International Law and Terrorism

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WE HAVE BEEN operating under the impression that the International Law of Armed Conflict (LOAC) is inimical to our effective prosecution of the war on terrorism.[1] But what has come to be called lawfare is a weapon that rightly belongs in the hands of those who abide by the LOAC. I submit that our problem lies not with the LOAC, but with our failure to make our own superior claim to legitimacy over terror warfare. We have also failed to exploit legitimacy's strategic advantages in order to sever terrorist organizations and their sponsor states from the public support on which their success depends. Instead of dealing with the hyper-legalization of warfare with an uncoordinated series of isolated tactical solutions of opportunity, we need to develop a comprehensive, proactive lawfighting doctrine of our own. As its overarching strategy, such a doctrine would—

- Publicly unmask terror warfare as inherently, irremediably in contravention of the letter and the spirit of the Geneva Conventions.
- Recognize that lawfare in the hands of those who abide by the LOAC can be a powerful weapon in the Global War on Terrorism.

Internationally, there are at least a dozen ways for politically sophisticated nations to expose the fraudulent notion that right is on the side of those who deliberately target innocent noncombatants while claiming protected civilian status for their murderers. One possibility that comes to mind is to press for a UN resolution declaring that—

- Terrorism is inherently, irremediably illegal as a way of war.
- Terrorism directed at particular nationalities, religious communities, or ethnic groups is outright genocide.

I do not expect such a resolution would pass in the current international political climate. Still, win or lose, by bringing its case before the UN, the United States would automatically gain exposure in the national and international media for it.

Another possibility is to spearhead a movement to put real teeth into the LOAC in the form of provisions explicitly outlining sanctions for grave breaches of the Geneva Conventions. Should we be successful, we must be prepared to see members of our own military tried for isolated violations such as those at Abu Ghraib. If we do a proper job of educating our troops to our moral and legal expectations, such incidents will be rare. But our enemies' entire way of war would be on trial before the court of public opinion because no way exists for terrorists to conduct war that does not contravene the LOAC.

The opinions and pronouncements of nongovernmental organizations (NGOs), terrorist sympathizers and apologists, and uninformed reporters with political agendas are not the law, and by our inaction we should not allow them to become new prerogative norms. Stopping this trend is especially important as we creep toward zero tolerance for civilian casualties. We must steer a middle course between utter disregard for the LOAC and uncritical acceptance of a hyper-legalistic approach that would place terrorists in the same legal and moral category as bona fide noncombatants. By defini-

tion, terror warfare cannot be waged except by means of deliberate attack on persons and places specially protected under Protocol I of the Geneva Conventions. It is impossible to conduct terror warfare without intentionally committing criminal breaches of the Geneva Conventions.

Two recent cases regarding Iraq show how enemies and nonsympathizers have attempted to turn the law against us. The first involves Giuliana Sgrena, an Italian journalist who was kidnapped by insurgents and then ransomed. Sgrena made a highly emotional claim in European and American media that U.S. troops at a Baghdad checkpoint had opened fire on the vehicle in which she was being transported to the airport following her release. She said U.S. troops fired on her without giving warning with the intention of killing her in retaliation for her political writing. The charges are unsubstantiated and, considering the hard-line leftist editorial philosophy of the newspaper she was working for, highly suspect. Nevertheless, protests sparked among the Italian public resulted in strong political pressure for Italian Prime Minister Silvio Berlusconi to withdraw Italian troops from Iraq. A Pentagon investigation has since found that Sgrena's vehicle had approached a well-known checkpoint outside Baghdad at a high rate of speed, ignoring all warnings to stop, and that troops manning the checkpoint had acted in accordance with the rules of engagement. It remains uncertain whether Italians will eventually reconcile these findings with those of their own magistrates' investigation.[2]

Also recently, an American deserter named Jeremy Hinzman applied for refugee status in Canada on the grounds that, had he returned to duty as a paratrooper, he would have been sent to Iraq where fighting for the coalition would have necessarily compelled him to commit atrocities, in contravention of the Geneva Conventions. The Canadian Immigration and Refugee Board rejected Hinzman's petition on the basis of findings that Hinzman had failed to establish "that if deployed to Iraq he would have engaged in, been associated with, or been complicit in military action condemned by the international community as contrary to basic rules of human conduct." Judge Brian Goodman ruled that although there have been serious violations, notably at the Abu Ghraib prison, Hinzman had not shown that the United States had, either "as a matter of deliberate policy or official indifference, required or allowed its combatants to engage in widespread actions in violation of humanitarian law."[3]

Despite Goodman's ruling, six other U.S. military service members have made similar applications. And, even if the Canadian Board stands fast in its correct judgment, such baseless hyper-legalistic claims will continue to take on a false legitimacy among an uncritical civilian public, the largely unschooled media, and barracks lawyers at home and abroad. Such false legitimacy facilitates Islamic terrorist activities worldwide by contributing to growing U.S. difficulties with military recruiting and retention.

Such incidents show how modern terror warfare has set Prussian strategist Carl von Clausewitz's most famous insight on its ear: War is the continuation of politics by other means, but terrorism is turning politics into a form of warfare; that is, politics as the continuation of war by other means. Terrorism is a subtly insidious, low-tech, but nonetheless disproportionately effective form of political warfare, or lawfare, as former Colonel Charles J. Dunlap called it in his landmark 2001 paper.[4] Briefly defined, lawfare is a method of warfare in which appeal to the LOAC is used as a means of realizing political objectives via the influence of public opinion on enemy policy.

Even before we had a name for lawfare, critics of the hyper-legalism that pervaded the air war in Kosovo saw it as an imposition of "the quaint norms of premodern war" that placed unreasonable constraints on all aspects of modern conventional warfare. Critics warned that the United States was particularly vulnerable to such impositions. And, in terrorist hands, the most commonly used tactic of lawfare has been to barrage the international news media with outrageous, often patently absurd, accusations of the illegality of coalition methods in prosecuting the GWOT that invoke unrealistic norms, in particular a wholly unreasonable, manifestly false, hyper-legalistic expectation of zero collateral damage. For a democratic nation like the United States, in which civilian control of the military is a constitutionally guaranteed right (as well as an onerous obligation of citizenship), such manipulation of national and international policy through public perception can prove catastrophic on a grand national scale. Doing so could undermine our military's will to fight and our citizenry's willingness to support it in the war against arguably the most immoral and dishonorable enemies we have ever faced.[5]

Since 9/11, the civilized nations of the world have wasted vital time on the defensive, casting about for uncoordinated tactical solutions of opportunity with which to counter apologists for terrorism while the number of innocent victims of its often perfidious tactics mounts daily. We have always had it in our power to denounce and

prosecute acts of terrorism as the grave breaches of the Geneva Conventions they are and to condemn terrorism itself as an inherently and irremediably immoral and illegal form of warfare. Nonetheless, we have stood by while apologists for terrorism convince our countrymen and allies that secondary considerations (sovereignty, religion, ethnicity, and political correctness) take precedence over the most fundamental human rights the Geneva Conventions are intended to protect.

I propose that we take a more aggressive approach and recognize lawfare as a powerful strategic weapon legitimately wielded only by those whose way of war is commensurate with the LOAC. We must seize the moral and legal offensive and use this weapon on terrorist organizations and sponsor states whose claims of moral superiority cannot withstand honest scrutiny. In short, I propose that we stop thinking of ourselves as helpless in the face of terrorist lawfare and, instead of responding to the hyper-legalization of warfare with a patchwork of reactive tactical solutions, develop a comprehensive proactive lawfighting doctrine consistent with the existing LOAC and the Just War Tradition to which our Nation subscribes.

I cannot say what a finished, working lawfighting doctrine would encompass, but it should contain a strategy for repositioning ourselves and our allies to fight terrorism from the offensive rather than from the untenable defensive position into which we have allowed ourselves to be maneuvered. Key to repositioning is seizing and occupying the high ground in the emerging moral and legal terrain, which in turn is key to the public outing of terror warfare for the unprecedented illegal and immoral assault on human rights it is. That indictment is more easily made than we seem to appreciate. Even a cursory reading of the relevant legal instruments readily reveals the utter incompatibility of terror warfare with the LOAC and accepted norms of decent human behavior on which the LOAC is based. Terror warfare is inherently contrary to the Geneva Conventions, to which apologists for terrorism have so falsely, hypocritically, and effectively appealed.[6]

Conventional vs. Terror Warfare

In the past year, we have seen the humiliation and physical abuse of Iraqi enemy prisoners of war (EPWs) by U.S. military police and contractors, the parading of body parts of fallen Israeli soldiers by members of the Palestinian terrorist organization Hamas, the murder and mutilation of U.S. and coalition military and civilian contract personnel by Iraqi rebels, the bombing of Spanish commuter trains by Islamic terrorists, and other grave breaches of the LOAC. It would appear that all parties to the current Middle Eastern conflict, legal combatants or otherwise, have committed egregious breaches of international treaty law and customary practice concerning the humane treatment of persons protected under the Geneva Conventions. While it is tempting to condemn all alike, I will not present a simple "tu atque" ("you, too") argument for a moral equivalency between conventional war and terror warfare. To the contrary, the Geneva Conventions, particularly Additional Protocol I, reveal a significant moral and corresponding legal difference besides an arguable one of degree between breaches that coalition troops commit and those terrorists commit.[7]

Our enemies have used lawfare to imply a moral equivalency between breaches of the rules of warfare committed in the course of conventional war and during terror warfare. Some breaches of the Geneva Conventions, however, arise as the result of the illicit execution of a legally permissible act. Others occur because the commission of war crimes is intrinsic to a particular way of war.

Detaining enemy combatants as EPWs, for instance, is permissible; mistreating them while in legal detention is not. The breaches that apparently took place at Abu Ghraib prison in Iraq are an example. As grave as such actions are, they can be remedied by timely, appropriate prosecution and punishment of those responsible for such crimes and by the subsequent enforcement of appropriate measures to prevent further abuses.

Terrorism, on the other hand, is defined and prohibited as an act or threat of violence directed at civilians with the object of spreading terror among them. Thus terrorist breaches are, by virtue of their defining tactics and overarching strategy, inherently illegal and cannot be otherwise. The irremediability of terror warfare lies in the fact that its tactics and overarching strategies rely on methods and means specifically prohibited under Part IV of Protocol I. Therefore, it is impossible to conduct terror warfare without intentionally committing criminal breaches of the Geneva Conventions.

Among the worst of these criminal breaches is perfidy. Article 37 of Protocol I to the Geneva Conventions defines perfidy as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." Such acts seek to take advantage of the opposing force's intent to respect Protocol I provi-

sions for the protection of innocents in time of war in order to gain some tactical advantage. Examples include engaging in combat while feigning noncombatant status, using noncombatants as shields, using ambulances to carry troops or ammunition, and siting command posts or weapons systems in or near specially protected places such as houses of worship, shrines, hospitals, or schools.

Not all war crimes fall under the heading of perfidy. Directly attacking noncombatants openly, while clearly a war crime, does not constitute perfidy. The Geneva Conventions place perfidious acts in a class of especially egregious war crimes because such acts cynically abuse those provisions that make it permissible to incur collateral casualties or damage so long as certain Just War criteria are fulfilled. The perfidious use of mosques, shrines, schools, ambulances, hospitals, and so on turns such protected places (and, inevitably, the protected persons, voluntarily or involuntarily, housed within their precincts) into legally permissible targets. In this way, a perfidious act of war performs an illegal end run around the foundational moral principle of the Geneva Conventions—the protection of innocent noncombatants.[8]

In terrorist hands, lawfare routinely places blame for casualties at the feet of coalition forces. Instructive to note is that the Geneva Conventions recognize that collateral damage to protected persons or places as a result of acts of perfidy is entirely the responsibility of the perpetrator, and not of his opponent who has struck what has become, by virtue of his perfidious act, a legitimate military target.

Resorting to perfidy is pernicious for another reason; it makes it emotionally easier for an otherwise scrupulous opponent to justify indiscriminately or disproportionately striking a perfidious enemy's own noncombatants and protected structures during future engagements. I believe the perfidious acts terrorists engage in are the genesis of much of our own abuses of prisoners suspected of committing acts of terrorism.

The Moral Case Against Terror Warfare

The argument that terror warfare is inherently and irremediably illegal, especially because of its use of perfidious means to deliberately target noncombatants, is also a deeply moral one that proceeds in a straight line of reasoning from Just War Theory to the LOAC. The LOAC is specifically intended to encode and enact the moral principles the Just War Tradition embodies. Under Just War criteria, it is not enough that war be undertaken for just cause; it must be justly fought as well. Consequently, to be legal under the first article of Protocol I and the LOAC, war must be fought in accordance with established custom, the principles of humanity, and the dictates of public conscience.

Protocol I makes it unequivocally clear that the guiding, overarching spirit of the LOAC is concern that innocents be spared from intentional infliction of at least the cruelest depredations of war, insofar as it is possible to do so. Contrary to terrorist apologetics, no statute exists in the International Law of War (a law that recognizes the Thomist principle of double effect) to the effect that no civilians might be harmed under any circumstances.[9]

Wording to the effect that the "provisions of this Protocol must be fully applied in all circumstances to all persons who are protected by these instruments" would appear to give precedence to concern for the welfare of noncombatants even over respect for "the sovereignty, territorial integrity or political independence of States [or of peoples aspiring to statehood] without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts." This order of precedence has legal significance; it effectively invalidates so-called root-causes arguments as exculpatory justifications for terrorism. This concept is extremely important to grasp because the root causes of Middle Eastern terrorism are at bottom religious in nature, and in our society minority religions are treated as sacred cows and are not to be criticized. But when religiously inspired warfare is deliberately directed against innocent noncombatants in contravention of the laws of civilized nations and most recognized religions, it is certainly possible to deny the legitimacy and the morality of such warfare. The fact that such abomination is wrapped in the cloak of religion only makes terrorism more egregious.[10]

If any doubt remains, Article 35, dealing with methods and means of warfare, declares outright that "in any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited." Furthermore, Protocol I, "which supplements the Geneva Conventions . . . for the protection of war victims, shall apply in all situations . . . including armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. . . ." Because peoples fighting against colonial domination, for example, might not be recognized nations in their own right, the quibbling argument that terrorist organizations

are exempt from the restraints placed on the behavior of parties to a conflict by Protocol I on the grounds of their statelessness would appear to be immaterial.[11]

To ensure the safety and welfare of protected persons, Protocol I requires, among other things, that all parties to armed conflicts "[d]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protections but are military objectives [and] take all feasible precautions in the choice of means and methods of attack with a view to avoiding and, in any event, minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects."[12]

Incumbent on all warring parties proceeding from obligations is the duty of "combatants to distinguish themselves from the civilian population while they are engaged in an attack" or, at the very least, to carry their arms openly "in order to promote the protection of the civilian population from the effects of hostilities."

Because acts of perfidy fly in the face of efforts to identify and safeguard protected persons under the provisions of Protocol I, they constitute "methods of warfare of a nature to cause superfluous injury or unnecessary suffering" to protected persons. Resorting to perfidy is therefore especially prohibited under Protocol I provisions dealing with methods and means of warfare.

Because specifically prohibited acts that target civilians directly (or indirectly through perfidy) constitute the very tactics that define terror warfare, any resort to this style of warfare is inherently in contravention of the LOAC in general and Protocol I of the Geneva Conventions in particular and, thus, is not only illegal but, by its most fundamental defining characteristics, irremediably so.

Parties to armed conflicts who are engaged in conventional warfare and experience such systemwide failures as apparently occurred in the Abu Ghraib prison can remediate their situation vis-à-vis the LOAC by prosecuting those responsible, however high up the chain of command, and instituting proper operating procedures. But there is nothing that terrorists can do to remediate their actions short of abandoning their preferred style of warfare.

Legal Responsibility for Acts of Terrorism

If the Geneva Conventions and Additional Protocol I are acknowledged as the pertinent provisions of the LOAC (and not the misconstructions, opinions, and pronouncements of terrorist propagandists, anti-American leftists, cultural relativists, barracks lawyers, and NGOs that, however well-intentioned, have placed an unrealistic and unreasonable expectation of zero collateral damage on conventional fighters), then terror warfare is always irremediably illegal.[13]

Article 85 of Protocol I states that such characteristic acts of terror warfare as "making the civilian population or individual civilians the object of attack [and] the perfidious use . . . of the distinctive emblem of the Red Cross [and so on] or of other protective signs . . . when committed willfully . . . shall be regarded as grave breaches." This statement is significant because Article 85 also states that "grave breaches of these instruments shall be regarded as war crimes." And, according to Article 86, the High Contracting Parties as well as all Parties to the conflict are required "to repress grave breaches, and to take all measures necessary to suppress all other breaches, of the Conventions or of [Additional Protocol I], which result from a failure to act when under a duty to do so." Arguments for terrorism, based on religion, politics, or frustration with the prevailing socioeconomic situation (the so-called root-causes arguments), which do not acknowledge the possibility of appeal to the Law of Nations, are not honest or exculpatory.

Articles 85 and 86 restate and reinforce Article 80, which states that the High Contracting Parties and the Parties to the conflict "shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol[;] shall give orders and instructions to ensure observance of the Conventions and this Protocol; [and] shall supervise their execution." The operative verb form in all three of these injunctions is "shall" (not "might"), signifying a positive legal duty to take timely, substantive action to prevent or curtail the grievous harm deliberately done to innocents by resorting to the tactics of terror warfare. According to Protocol I, this duty is incumbent on all High Contracting Parties and all Parties to a conflict, whether they are internationally recognized states or officially sponsored state actors.

Contrary to popular belief, terrorist organizations that recruit and operate across national borders with varying degrees of passive or active state cooperation are not exempt on the grounds of their lack of national status or official state responsibility. Neither are those states that covertly sponsor or tolerate such organizations exempt from the Article 86 responsibility for war crimes committed by terrorist organizations that act in effect as their subordinates "if [those sponsor states] knew, or had information which should have enabled them

to conclude in the circumstances at the time, that [these organizations were] committing or [were] going to commit such a breach, and if they did not take all feasible measures within their power to prevent or suppress the breach."[14]

Article 87 sets forth the duties that High Contracting Parties and all Parties to a conflict shall require of their military commanders with regard to war crimes and criminals. In so doing, it implicates those states and organizations as the ultimately responsible parties. But even if it did not, the international legal principle of Respondeat Superior would shift the duty to prevent or suppress the commission of terrorist war crimes up an obscured but existing chain of command to states that hide their responsibility for such crimes behind a facade of feigned helplessness, especially when they could have appealed to the UN at any time for aid.

The case of nonsignatories. Left unspecified, however, is whether Protocol I's provisions are universally binding on all warring parties or only those states and their "subordinates" who accede to the Geneva Conventions. The question also arises as to how to reconcile this situation with the preexisting Vienna Convention on Law of Treaties of 1969, the relevant provision of which states that no two states might make a treaty that binds a third without its consent. Although it might be argued that this provision was meant to protect a nation's citizenry from undue foreign influence, exempting nonsignatories from the Geneva Conventions would appear to place reasons of state above the welfare of innocent victims of war to whom the Geneva Conventions give precedence.[15]

The effect of this apparent conflict between the two Conventions is to leave an unintended loophole in international treaty law through which terrorist organizations and their sponsor states might slip by the simple means of nonaccession. Unless Protocol I might be read as taking precedence over the Vienna Conventions with regard to terror warfare, the protections afforded innocents under the Geneva Conventions might be effectively negated at the will of those whose political, religious, and socioeconomic purposes are served by a strategy of deliberate indiscriminate attack on noncombatants. No other reading makes moral sense.

Legal recourse against terrorists. In the Geneva Conventions, the civilized nations of the world have forged a powerful instrument for the protection of innocent victims of war, but an apparent disconnect between the potential power of the instrument itself and its application has rendered it virtually ineffective. This disconnect might be attributed in large part to two counterproductive factors. For instance, Article 90 provides at length for establishing international fact-finding commissions to "enquire into any facts alleged to be a grave breach as defined in Protocol I." But, although the composition and administration of these commissions are set out in detail, consequences to parties guilty of breaches and grave breaches are left unspecified, with the exception of possible financial liability covered in only one sentence of Article 91. And, although timeframes are specified to establish these commissions, no such limits are specified for the cessation of violations before steps (up to and including military intervention) are taken to keep the peace (while the commission proceeds with discovery and deliberation).[16]

Exacerbating this deficiency is the UN's unwillingness to approve the actions these instruments call for to prevent or suppress violations. Although Part 1 of Article 88 specifies that "the High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Convention or of this Protocol," and Article 89 calls for action "jointly or individually, in cooperation-operation with the UN" [which might, among other things, deploy peacekeeping troops], there has been a notable lack of will among High Contracting Parties, in general, and Security Council members under the current Secretary General, in particular, to condemn grave breaches of the Conventions in regard to inhumane and perfidious methods of terror warfare and to intervene on behalf of the victims of these illegal attacks. This reluctance to enforce the LOAC against terrorist organizations and their sponsor states might be caused, in large part, by a desire not to alienate UN constituents who are sympathetic to the terrorists' religious agenda and whose notions about the provisions of the Geneva Conventions might be fanciful, to say the least.

Just War and Lawfighting Doctrine

Whatever else a comprehensive American lawfighting doctrine might include, it should develop strategic plans for public education and what might be thought of as political and legal maneuver.

Education. By definition, terror warfare cannot be waged except by deliberately attacking persons and places specially protected under Protocol I of the Geneva Conventions. Thus, only widespread ignorance of the LOAC can account for the current efficacy of terrorist lawfare. The good news is that the near incontestability of the legal case against terrorism makes terrorist apologetics for their

activities fatally vulnerable to even a rudimentary knowledge of the LOAC. Therefore, any comprehensive U.S. lawfighting doctrine must contain a plan to inform our own and our allies' citizenry, military and civilian contract personnel, and media as to the actual content of the relevant international legal instruments, the Geneva Conventions, and Additional Protocols.

Ideally, basic concepts of Just War Theory and their expression in the LOAC should be introduced to American public school students at the high school, or even middle school, level. My purpose in proposing these additions to secondary school curricula is not to advocate the propagandizing of public school children. The plain fact is that, among forms of government, democracy is the most interactive and makes the greatest demands of its constituents. Our constitutional right (and responsibility) to exercise civilian control of the military requires an especially well-educated citizenry capable of making reasoned, rather than emotional, decisions concerning our defense policies. Developing such citizens was our founding fathers' primary vision for public education in our society. We expect public secondary schools and state universities to provide the relevant facts and foster the critical thinking citizens need in order to exercise civilian control of the single most powerful military in human history. Doing so is especially pressing in a post-1960s intellectual atmosphere of uncritical cultural relativism that has left us so susceptible to terrorist apologist rhetoric.[17]

More pressing, however, is the need to ramp-up ethical and legal instruction for contract personnel. Accusations that such personnel have committed some delict of the Geneva Conventions give the enemy ammunition to wage lawfare against us. Also, military ethics instruction should extend across all branches of the services, especially to military intelligence and police units, the focus of so much of the recent accusations against our troops. We must reevaluate the relative strategic value of information extracted from prisoners by questionable means versus what we lose by doing so. Using legitimate means of acquiring information denies terrorists and their apologists the moral advantage.

Instruction in military ethics and the LOAC must extend vertically from the Joint Chiefs down to the lowliest recruit. For lawfare purposes, perhaps the most important links in the chain of command are noncommissioned and junior officers who are teachers and models to enlisted soldiers and who constitute the majority of military personnel accused of breaches of the Geneva Conventions. In turn, they must know their superior officers' policies are such that any action they conduct will be in accordance with the provisions of the LOAC and the norms of decent human behavior. I am not arguing for an unrealistic, zero-tolerance policy that would only conduce to cover-ups of failures; we must deal with failures in a predictable, honest, transparent, and timely manner before our terrorist enemies turn the events into political improvised explosive devices.

No contractor should be allowed in the field who has not received the same ethics training as military personnel. Civilians, too, could damage our strategic interests by thoughtlessly committing acts in contravention of the Geneva Conventions. All contracted employees, especially personnel who work closely with prisoners or enemy civilians, should complete such training (provided by the military to ensure uniformity). Contracts should be contingent on completion of such training.

Last, we should not embed civilian media personnel with any military unit in the field without first teaching them, or having them demonstrate knowledge of, the Geneva Conventions. After *Newsweek* published unsubstantiated accusations that U.S. interrogators had shown disrespect toward the *Koran*, it is not unreasonable to ask journalists to responsibly convey information concerning the LOAC to their readers, listeners, and viewers, and their reports should include terrorist transgressions of the Geneva Conventions so people can form valid opinions about the prosecution of the GWOT. I am not calling for censorship or any other kind of interference with freedom of the press; I urge professional responsibility and competence.

We are not in this alone. We fight alongside forces from many other nations. The behavior of troops from any one of these nations has political consequences for all. It is therefore imperative that we communicate to our allies in the strongest terms our expectations that all coalition troops must fight in accordance with the LOAC.

Political and legal maneuvers. The Geneva Conventions are ineffective legal instruments for the protection of innocents from the depredations of terrorism because of vague wording in regard to the consequences of breaches of their conventions' provisions. Obviously, provisions that bind only signatories of the Conventions to the humane treatment of innocents without placing the same obligation on nonsignatory

parties contradict provisions stating that all parties to a conflict are obligated to conform to the letter of these instruments. This works contrary to the Just War spirit that motivates the entire body of the LOAC; it protects violators at the mortal expense of their victims because it could cynically but effectively be argued that constraints in the Geneva Conventions allow terrorist organizations to place themselves outside the reach of international law. A Law of the Sea so constrained would effectively legalize piracy.[18]

Existing conventions in international law must sometimes give way to new, peremptory norms or laws that are absolutely binding and not open to further debate. Among them might be the reasonable expectation that the civilized nations of the world condemn grave breaches of the LOAC's provisions and appropriately punish violators. The key to enforcing this requirement is to make it the universally accepted norm. We must not forget, however, that the peremptory norms with which we wish to compel compliance are those of the already established LOAC and *only* the established LOAC. I believe we can use the LOAC effectively against our terrorist enemies without incapacitating our own military. ***MR***

NOTES

1. The International Humanitarian Law is also known as the Law of War or the Law of Armed Conflict. See <www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:IHL_in_brief?OpenDocument>, accessed 23 September 2005.

2. United Press International, "U.S. Clears Self on Italian Agent's Death," *The Washington Times*, on-line at <www.13wham.com/news/national/story.aspx?content_id=CB8237AF-8387-4D6D-8AA1-DD994904C914>, accessed 14 September 2005; Ian Fisher, "Bush Phones Italy's Leader as Ire Lingers Over Killing," *The New York Times,* 4 May 2005, on-line at <www.nytimes.com/2005/05/ 05/international/europe/05italy.html>, accessed 14 September 2005.

3. Judge Brian Goodman, Opinion for the Canadian Immigration and Refugee Board, Division of Refugee Protection, 16 March 2005, on-line at <www.irb-cisr.gc.ca/rtf/reflex/fulltext/258c/rpd/TA401429S_e.rtf>, accessed 6 September 2005.

4. COL Charles J. Dunlap, Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts," 2001, on-line at <www.duke.edu/~pfeaver/dunlap.pdf>, accessed 6 September 2005.

5. Richard K. Betts, "Compromised Command" (review of Wesley K. Clark, *Waging Modern War: Bosnia, Kosovo and the Future of Combat* [New York: Public Affairs Press, 9 August 2002]) in *Foreign Affairs* (July/August 2001): 126; David B. Rivkin, Jr., and Lee A. Casey, "The Rocky Shoals of International Law," *The National Interest* (Winter 2000/01): 35.

6. The Law of Armed Conflict (LOAC) is a body of some 52 documents, treaties, conventions, declarations, and so on that includes the four Geneva Conventions of 1949. The outrages mentioned, and others, are addressed in Protocol I, Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977. For the sake of brevity, this document is henceforth referred to as "Protocol I." Unless otherwise mentioned, article numbers are those of Protocol I.

7. Tu atque is, literally, a countercharge leveled at an accuser that "you, too" have behaved in a similarly reprehensible manner. Protocol I delineates a clear hierarchy of gravity among various specified breaches to its provisions. Specifically, Part 2 of Protocol I lists murder, torture, and mutilation ahead of outrages on personal dignity as "acts which shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents." Article 85 of Protocol I lists those breaches that are so grave as to be considered war crimes. These are essentially the sort of deliberate attacks against protected persons and sites that constitute precisely the methods that are characteristic of terror warfare.

8. Just War criteria include good faith efforts to avoid or at least minimize damage to protected persons and places and to ensure that collateral damage be kept proportional to the expected tactical gain.

9. Innocents include those not actively engaged in combat, including but not limited to civilians, medical personnel, chaplains, and those rendered hors de combat (out of the fighting or disabled) by virtue of having been wounded or taken prisoner of war.

Thomas Aquinas is credited with introducing the principle of double effect in his discussion of the permissibility of self-defense in *Summa Theologica* (II-II, Qu. 64, Art. 7). See also "Doctrine of Double Effect," Stanford Encyclopedia of Philosophy, on-line at <http://plato.stanford.edu/entries/double-effect/>, accessed 14 April 2005.

10. The wording of Protocol I does not imply that no strike is permissible if there is any risk of collateral casualties as some antiwar and pro-terrorist activists maintain. To the contrary, while the Geneva Conventions state that the deliberate targeting of noncombatants (the defining strategy of terror warfare) is unjustifiable under any pretext, inadvertent and unintended (collateral) casualties are permissible under Article 57, although limited by certain Just War criteria. In this, the framers of the LOAC have followed St. Augustine in recognizing that the soldier in the field is not God and is neither omniscient nor omnipotent. He is, however, human and expected to act humanely, even in combat. That itself is a great deal to ask, especially when facing an enemy as inhumane as terrorists, but Jus in Bello (justice in war) criteria of the Just War tradition to which we subscribe absolutely requires it. See also "China-America The Great Game: Interview with LT Gen Liu Yazhou of the Air Force of the People's 'Liberation Army,'" *Heartland: Eurasian Review of Geopolitic,* Gruppo Editoriale L'Espresso/Cassan Press, Hong Kong: January 2005, on-line at <www.freerepublic.com/focus/f-news/1402564/posts>, accessed 7 September 2005.

11. Protocol I supplements the Geneva Conventions for the protection of war victims in all situations, including war against colonial domination. The argument that terrorist organizations are exempt from restraints on behavior by Protocol I on the grounds of their statelessness appears immaterial, especially in cases in the occupied territories of Israel, where the Palestinian Liberation Organization (PLO) has assumed the function of a proxy Palestinian state. Hezbollah is heavily funded by Iran and holds seats in parliament in Lebanon where it is based. In such cases, where terrorist organizations operate with the tacit approval, if not the covert support, of host nations, responsibility for adherence to the Geneva Conventions still devolves on the sponsor nations, many, but not all, of whom are signatories to these legal instruments.

12. Coalition forces fighting in Najaf have taken extraordinary pains to spare the Iman Ali mosque. In contrast, consider the desecration wrought by rebel Shi'ite cleric Mukhtadr al-Sadr's Mahdi Army, which turned the venerable Shi'a holy site into a command post for its irregular military activities and has buried caches of weapons in Moslem cemeteries.

13. The misconstructions, opinions, and pronouncements of terrorist propagandists and others are not recognized international law.

14. LTC Richard Erickson, "Legitimate Use of Military Force Against State-Sponsored International Terrorism" (Maxwell Air Force Base: Alabama Air University Press, 1989), 95. Erickson makes the point that "there is in international law the concept of state responsibility, that is, the duty that one state owes to another state and to the community of nations. Suppression of international terrorism is part of that duty. When states fail in their responsibility, either through inaction or through active sponsorship or support of terrorism, they commit a delict, or international wrong. The injured state is entitled to economic compensation and, in certain instances, to use military force to correct the wrong."

15. At issue is the relative position of state sovereignty vice protection of innocent persons in the context of the LOAC. Both are legal goods, but in any moral contest between the rights of the state and human rights, especially those to life and limb, we are compelled to argue strenuously from an ethical point of view that human rights must take precedence. Logically, too, we must argue from the premise that states are formed for the protection of peoples. A state that guards its sovereignty over the lives and welfare of its citizens is little more than a hollow legal construct, if that.

16. Although Protocol I leaves unspecified the consequences to parties eventually found guilty of grave breaches, measures up to and including Just War are suggested by, among other things, reference to the resources of the UN, which can call for and field international peacekeeping forces from its member nations.

17. An informal poll I took on my university campus a few years ago revealed that only a few students (mostly ROTC cadets and political science majors) had any inkling they had civilian control of the military or of what that meant for them.

18. The Law of the Sea essentially restates customary law, against which piracy has been a longstanding offense. Terror warfare, at least on the current international scale, is relatively new. It is worth noting, however, that the 1988 Rome Convention on Suspension of Unlawful Acts Against Maritime Navigation extends the principles of this Convention to fixed platforms on the continental shelf, effectively extending the area of jurisdiction of laws concerning piracy inland.

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