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HOW NOW SHALL WE FIGHT? THE RELEVANCE OF THE LAW OF ARMED CONFLICT TO THE UNITED STATES AND ITS COALITION MEMBERS IN LIGHT OF THE TERRORIST ATTACKS OF 11 SEPTEMBER 2001.

by

Tony F. De Alicante
LCDR, JAGC, USN

A PAPER SUBMITTED TO THE faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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The terrorist attacks of 11 September 2001 and the war in Afghanistan that followed have presented situations never before encountered by the United States in armed conflict and have changed some of the ways in which the U.S. conducts warfare. The Law of Armed Conflict (LOAC) has not kept up with those changes. As a result, the U.S. must examine whether the application of the LOAC is still relevant to how we fight wars and against whom we fighting in the twenty-first century, and make necessary adjustments so that operational commanders will have a framework to use in warfare that is current and relevant to helping them maintain superiority on the battlefield.

This paper points to some of what has changed on the battlefield with regard to U.S., coalition and enemy forces since the terrorist attacks of September 11, 2001. It discusses what issues those changes have created, and where the LOAC needs changes, suggests changes designed to make the LOAC more relevant to how the U.S. fights wars in order to provide operational commanders with an improved framework to use in armed conflicts. This paper also addresses the point that not as much has changed as one might think and that the LOAC will remain basically intact.

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[I]nternational law is not a static body of rules but rather a living creature, continually forged and shaped to serve the needs of an international community that itself is constantly changing. .[1] Horace B. Robertson, Jr

INTRODUCTION AND THESIS

The United States is a nation governed by the rule of law, applying both domestic and international laws to arrive at a balance that maintains a free and ordered society. As a whole, the international community is organized around a body of laws that apply, in varying degrees, to the entire international community in an attempt to maintained order worldwide. The terrorist attacks against the United States on September 11, 2001, however, have signaled that the idea of a Westphalian state with a peaceful coexistence is a thing of the past. The subsequent actions of the United States, coalition forces and enemy forces in Afghanistan have presenting situations never before encountered in an armed conflict. As a result, the U.S. must examine whether the application of the Law of Armed Conflict (LOAC) is still relevant to the wars we are fighting, and make necessary adjustments so that operational commanders will have a framework to use in warfare that is current and relevant to helping them maintain superiority on the battlefield.

BACKGROUND

The terrorist attacks against the United States on 11 September 2001 and the war that followed in Afghanistan have created new situations in armed conflict for our country. Never before have terrorists committed atrocities of such magnitude and then combined forces with a state military to fight the ensuing armed conflict in that foreign state. Although terrorists have suffered reprisals before, it has never been by a state with the resolve, resources, and international backing to respond with such massive force as has the U.S.

Although these terrorist attacks and the subsequent war have raised a multitude of new issues, many of the areas of the LOAC that may seem to be at issue have been dealt with

in the past, and the LOAC should emerge from this tragedy largely intact.[1] This paper will focus discussion at the operational level and address three issues regarding the relevance of the LOAC and its impact on how we are to fight this new war by: 1) analyzing what has changed on the battlefield since the terrorist attacks of September 11, 2001; 2) discussing what issues those changes have created; and 3) where the LOAC needs changes, suggesting changes designed to make the LOAC more relevant to how the U.S. fights wars in order to provide operational commanders with an improved framework to use in armed conflicts.

A BRIEF LOOK AT THE LAW OF ARMED CONFLICT

Although one objective of this paper is to suggest relevant changes to the LOAC, a thorough review of the LOAC is beyond the scope of this paper.[2] The LOAC is a dynamic body of law consisting of a compilation of international agreements (e.g. treaties, conventions, protocols, case law)[2] and customary international practice. International agreements generally require a nation's ratification before they are binding upon that nation.[3] Nations may limit their adherence to treaties by stating reservations in the ratification process, thus limiting the authority of that document upon that State. The body of written LOAC has not changed in the wake of the first war of the 21st century. LOAC established by customary practice is more in flux, however, and consists of common applications

> of military and naval forces in the field, at sea, and in the air during hostilities. When such a practice attains a degree of regularity and is accompanied by the general conviction among nations that behavior in conformity with that practice is obligatory, it can be said to have become a rule of customary law binding upon all nations."[4]

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[1] For example, maintaining a coalition, being attacked by terrorists both at home (World Trade Center, Oklahoma City) and abroad (Kenya and Tanzania, Khobar Towers), retaliation and reprisal, the right of self-defense, illegal combatants' participation in past armed conflicts, allowable targets in warfare, and the fact that U.S. forces obey the LOAC and are recognized and treated as lawful combatants are not new issues.

[2] The Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, Naval War College, Newport, R.I. (1999) notes that "[e]vidence of the law of armed conflict may also be found in military manuals, judicial decision, the writing of publicists, and the work of various international bodies" such as the Hague and Geneva Conventions and their respective updates, amendments and protocols.

The United Nations is the predominant international organization, and its 189 member nations, including the United States and Afghanistan,[3] are bound by its charter to assist member nations in any preventative or enforcement actions the UN takes.[5] UN Security Council (UNSC) Resolutions are binding on its members and several have been passed regarding terrorism and the conflict in Afghanistan. These Resolutions resolve to fight terrorism worldwide, they condemn the Taliban, al-Qaeda, and the September 11 terrorist attacks against the U.S., and call for the international community "to combat by all means threats to international peace and security caused by terrorists acts,"[6] and to "bring to justice the perpetrators, organizers and sponsors of these terrorists attacks."[4]

The LOAC clearly forbids an armed attack against any nation that is not made pursuant to a UNSC Resolution or in self-defense. International law and U.S. domestic law define the attacks that were made upon the United States as terrorist acts.[7] Article 51 of the UN Charter allows for individual or collective self-defense "if an armed attack occurs against a member of the United Nations until the Security Council has taken the measures **necessary** to maintain international peace and security."[8] The U.S. position presumes the UN Security Council has not yet taken all measures necessary to maintain international peace and security in Afghanistan. Therefore, the right of self-defense continues to justify military action.

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[3] Although Afghanistan has been a member of the United Nations since 1946, most of the international community has never recognized the Taliban as a legitimate government in Afghanistan. List of Member States of the United Nations. At best, only three other nations recognized the Taliban as a legitimate government.

[4] The Security Council has passed numerous other pertinent Resolutions condemning the September 11 terrorist attacks and calling on the international community to take action. They include UNSC Resolutions 1333 (December 19, 2000, condemning the Taliban's use of Afghanistan and harboring of UBL and his associates); 1373 (September 28, 2001, regarding suppression of financing and other support to terrorists); 1383 (December 6, 2001, establishing a Provisional Government in Afghanistan with Interim Authority); and 1386 (December 20, 2001, establishing a UN International Security Force for Afghanistan). The resolutions do not address all of the issues at hand, however. *See also* United Nations, International convention for the suppression of terrorist bombings, Fifty-second session, Agenda Item 152, Measures to eliminate international terrorism, report of the sixth committee, 25 November 1997; and 18 U.S.C. 2331 *et. seq.*, respectively for definitions of Terrorism.

Combatants are required to meet four criteria to qualify as lawful combatants: 1) be armed forces of a party to a conflict under responsible command, 2) wear a fixed distinctive sign recognizable at a distance, 3) carry weapons openly, and 4) obeys the law of war.[9] The primary rationale for these requirements is so the civilian population (non-combatants, or illegal combatants if they take up arms) can be distinguished from combatants, thus reducing the risk of killing innocent civilians.[5] The LOAC gives lawful combatants who fall into enemy hands status as prisoners of war (POWs). At the end of hostilities, POWs are repatriated. Unlawful combatants are not necessarily afforded the same status and protections as lawful combatants, although other written and/or customary international laws apply to govern their treatment.[6]

WHAT HAS CHANGED ON THE BATTLEFIELD SINCE SEPTEMBER 11, 2001?

Some things have definitely changed in this new war. Advances in technology have required special operations forces to be within eyes-on range of the enemy for laser targeting. CIA agents (usually non-combatants) are closer to the action and are reportedly operating Unmanned Aerial Vehicles (UAVs) equipped with missiles, and U.S. Special Forces have been photographed in Afghanistan sporting beards and civilian clothes while holding their weapons.[10] Some foreign forces are fighting without wearing distinctive insignia (al-Qaeda, Northern Alliance, tribal/war lord forces[7]), and some forces are swapping sides instead of

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[5] While targeting civilians is a war crime, civilian deaths as reasonable collateral damage in pursuit of a military target is not. If combatants were indistinguishable from non-combatants, the risk is great that the civilian population could get slaughtered in search of the combatants who conceal themselves in the civilian ranks.

[6] The San Remo Manual position is that "[i]nternational humanitarian law… applies to all armed conflicts from the moment that force is used…." The term "international humanitarian law is essentially synonymous with the LOAC. San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 73, International Institute on Humanitarian Law, Cambridge University Press (1995).

[7] The status of the Northern Alliance and tribal warlords would not be as troublesome if they wore a distinctive sign recognizable at a distance and obeyed the LOAC. The Geneva Convention of 1949 definition of lawful

being captured. While the U.S. obeys the LOAC[11] (with exceptions for provisions the U.S. believes do not reflect the current nature of the LOAC[8]), it is fighting a non-state terrorist organization that does not obey the LOAC, alongside the Taliban military, and the status of each as combatants is unclear. The U.S. is therefore at a disadvantage by operating within a box when the enemy is not similarly constrained. At issue are whether the respective parties to the conflict adhere to the LOAC, whether the respective parties qualify as lawful combatants, and the treatment to which each detainee (dependent on his status) is entitled. Peripheral issues of documenting war crimes and violations of the LOAC are inextricably tied into these issues as well.

After the status of detainees in an armed conflict is established, their treatment must be properly administered.[9] Operational commanders have to be careful not to confuse treatment with status, because conferring a wrong status on a detainee could grant him fewer or greater rights than he is entitled and could err on either side of justice. The best option is to always provide humanitarian treatment to detainees consistent with the Geneva Conventions, but reserve status determinations until some later (but not too distant) time

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combatants includes "organized resistance movements to a party to the conflict that are under responsible command…." GPW, art. 4; GWS, art. 13.

[8] For example, the United States position has been that Additional Protocol I to the Geneva Convention is contrary to customary international law, diminishes the distinctions between military and civilians, and is therefore not part of the LOAC. Protocol I allows a belligerent to attain combatant status by merely carrying his guns open during each military engagement and when visible to an adversary while deploying for attack, thus dropping the requirement for a fixed recognizable sign. The objection that the United States had to this convention was a section that ostensibly would recognize revolutionary forces as a legitimate military organization, thus giving lawful status to groups who are organized to overthrow legitimate governments. Operational Law Handbook (JA 422), 5-5, International and Operational Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia (2000). This may have direct consequences on groups such as the Taliban and Northern Alliance in Afghanistan.

[9] For the operational commander overseeing detention operations in Afghanistan and in Cuba, interim treatment standards must be established even before the status of the individuals is determined. This will inevitably be a balancing act of administering treatment that is humane and acceptable within current international standards (which requires humane treatment for terrorists, roughly consistent with the treatment of Prisoners of War under

when evidence is available to make a proper assessment, remembering that treatment does not confer status upon a detainee.[12]

The issue of the status of participants to an armed conflict and the required treatment if captured arises on both sides of this war. News reports and photographs indicate that there are Central Intelligence Agency (CIA) agents in the war zone in Afghanistan who are not only collecting intelligence, but may be acting as combatants. While the CIA is authorized under Executive Order 12333[10] to assist other U.S. Federal agencies, including the Department of Defense, if CIA agents are serving in a war zone as combatants, their current status is less than clear. Where there is no indication that the agent(s) in question carry weapons openly, wear a distinctive insignia, and are not armed forces under the responsible control of a military commander, they are probably not lawful combatants. The CIA might ordinarily involve itself in intelligence gathering, a non-combatant role, but not be carrying on a side-war with high-tech weapons. In this case, however, the CIA agents in the field appear to be packing more than just weapons for personal protection.[11]

ANALYSIS – NEW ISSUES ON THE BATTLEFIELD

With the realization that not all parties in the current armed conflict will obey the LOAC, operational commanders need to know which parties in an armed conflict follow it.

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the Geneva Conventions) without conferring status that would give the detainees more rights or an expectation of more rights (by them or by the international community) than they are due.

[10] EO 12333, United States Intelligence Activities (4 Dec 1981) authorizes the Central Intelligence Agency (CIA) to "Conduct special activities approved by the President." (para. 1.8(e)); "participate in law enforcement activities to investigate or prevent clandestine intelligence activities by foreign powers, or international terrorist or narcotics activities" (para. 2.6(b)); and Provide specialized equipment, technical knowledge, or assistance of expert personnel for use by any department or agency…." (para. 2.6(c)) *See also* Pillar, Paul R., Terrorism and U.S. Foreign Policy, 117-119, Brookings Institution Press (Washington D.C. 2001), for a discussion on the assistance that the CIA is authorized to provide other U.S. agencies in fighting terrorism.

[11] Even non-combatants are allowed to carry small arms for self-protection without taking them out of the non-combatant category. The Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, Naval War College, Newport, R.I. (1999), 487. In addition, the fact that CIA agents in the field are

This applies not only to the enemy, but to some unsavory partnerships that the U.S. may have to form as the lesser of two evils. The U.S. cannot force the enemy to follow the LOAC, but it can make better decisions for its own forces when it understands if adherence to the LOAC is part of the enemy's doctrine. In addition, operational commanders may be called upon at some point to provide evidence of war crimes and violations of the LOAC committed by the enemy. Knowing that the enemy does not follow the LOAC, U.S. forces should be particularly cognizant of documenting the activities of the enemy forces and prisoners taken in combat, as the statements of operational forces may be the best source of evidence to use to convict war criminals and prevent them from fighting another day.

When using coalition forces, U.S. commanders must insure that all personnel operating under them abide by the LOAC because they may be held responsible for war crimes committed by persons under their command.[12] There may be times, however, when the U.S. cannot guarantee that coalition forces fighting beside them adhere to the LOAC, but must use those forces because they are essential to the mission. Although U.S. forces abide by the LOAC, when operating with coalition forces whose adherence to the LOAC is questionable, this fact needs to be recognized from the outset. Unless there is an imperative reason to use those forces, they should not be allowed to fight with the coalition. When such forces do fight with the U.S. coalition, U.S. commanders should not be placed in a chain of command over those forces. Instead, those non-LOAC compliant forces should operate

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not distinguishable from civilians may only serve to determine their status, but does not mean that they are violating the LOAC.

[12] "Command Responsibility. CDRs are responsible for war crimes committed by their subordinates when any of three circumstances applies: (1) The CDR ordered the commission of the act; (2) The CDR knew of the act, either before or during its commission, and did nothing to prevent or stop it; or when (3) The CDR should have known 'through reports received by him or through other means, that troops or other persons subject to his control [were] about to commit or [had] committed a war crime and he [fail]ed to take the necessary and reasonable steps to insure compliance with the LOW or to punish violators thereof." Operational Law

under their own national chain of command so that U.S. commanders are not liable for any war crimes or violations of the LOAC committed by such forces. The Northern Alliance in Afghanistan is a good recent example of a force fighting jointly with U.S. that may not be following the LOAC and does not always follow U.S. guidance, but was important enough to the mission to not be excluded from the fight.

Operational Commanders also need to be careful that their own forces do not commit war crimes or violations of the LOAC, thereby making themselves and their forces subject to prosecution, open to scrutiny and ridicule by the international community, and sacrificing the protections under the LOAC enjoyed by lawful combatants. The reports that U.S. Special Forces in Afghanistan are operating in civilian clothes and wearing beards is contrary to the current U.S. position that requires a lawful combat to wear distinctive insignia identifiable from a distance. Special Forces' departure from the U.S. position would probably not affect their status as lawful combatants if they were captured, however, and is not a violation of the LOAC. Their appearance, however, discredits the U.S. position that enemy forces who do not wear distinctive insignia are unlawful combatants, and adds credence to the position that GP I, which drops the distinctive insignia requirement, is or should be the accepted customary practice. The result is probably the legitimization of GP I as the LOAC standard for determining who qualifies for status as a lawful combatant.

The advent of recent technology has increased the probability that combatants who either are not normally involved in the battlefield (e.g. CIA agents controlling a UAV with missiles on board) or are close to the enemy but not wearing a distinctive sign recognizable from a distance (e.g. special forces using laser targeting with eyes on the target for delivery

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Handbook (JA 422), 5-17, International and Operational Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia (2000).

of ordinance from U.S. aircraft) will be more openly involved in armed conflicts. Unanswered issues include what is the status of each of these individuals on the battlefield and who bears responsibility for their actions. Short of changes in the LOAC, and unless they are operating as a military auxiliary under a responsible chain of command, CIA agents who are combatants may not be lawful combatants as defined by the LOAC.[13] If captured, they may be tried as spies instead of being afforded status as lawful combatants. Finally, whatever their activities in the battlefield, the chain of command responsible for those agents is important when looking at accountability for war crimes that may have been committed by them. As discussed above, the commander of the individual who commits war crimes and LOAC violations may be held accountable for them.

A sub-issue raised by the presence of CIA agents on the battlefield is the legality of assassinations in armed conflict. The LOAC prohibits and current U.S. policy disallows assassinations. However, an enemy's military leadership (al-Qaeda) is a legitimate target in an armed conflict. President Bush has expressed intent to "hunt down" al-Qaeda leaders with indifference whether they are brought back dead or alive, clearly making them a target. Al-Qaeda leaders are already legitimate military targets in the war in Afghanistan, and killing them is not illegal assassination under the LOAC, even if there is a mission specifically organized by U.S. armed forces for that purpose. Absent changes in the LOAC, if a CIA agent is not a lawful combatant but kills the enemy leadership, is it lawful targeting or an assassination? The distinguishing element that makes this action an assassination vice lawful

[13] However, under Geneva Convention art. 4, civilians who augment the military, fall under the military chain of command and otherwise comply with the LOAC are not illegal combatants and are entitled to POW status if captured. This would include CIA agents with UAVs. It is questionable whether DoD and CIA would cooperate in such an arrangement, because military commanders may want to restrict the CIA's actions more than the CIA is willing and military commanders should be concerned about liability for war crimes committed by CIA agents over whom they may not have positive control.

targeting is the person pulling the trigger – a non-military government agent versus active duty military forces. The other variable is that if this action amounted to a war crime, who can be held criminally responsible? Even though the CIA is a U.S. agency, the operational military commander would not bear responsibility as long as the agent was not in the operational commander's chain of command. Most likely, responsibility would fall on the agent and his superior(s) who carried out, planned and authorized the targeting. Unless the military has positive control of their actions, U.S. military commanders may not want to make CIA agents auxiliary forces of the U.S. military, thereby legitimizing their actions and making what may be an illegal assassination, a legal and permissible targeting of the enemy's military leadership. The handling of this situation may be a ripe area to establish new rights and responsibilities of these representatives of a belligerent government, thereby establishing new international law by creating a customary practice.

Status of Forces – U.S. and Coalition

On the side of the coalition that is fighting with the United States, there are new issues regarding personnel employing firepower in the armed conflict. Specifically, there is a confirmed presence of CIA agents in Afghanistan, interrogating enemy detainees and wielding weapons including missile-carrying UAVs (unmanned aerial vehicles). In order to operate a UAV, CIA agents have to be within range to maintain positive control over the UAV, which more than likely places them in the war zone. In addition, there is a requirement with some of the newer technology to position U.S. forces close enough to the enemy to get eyes and a laser on a target so U.S. aircraft can accurately deliver ordinance to the target. Those forces place themselves at risk of capture by trodding close to the enemy.

If they proceed without wearing uniforms or a fixed distinctive sign recognizable at a distance, they subject themselves to charges as spies if captured.

The status of the Northern Alliance and tribal/regional warlords in Afghanistan and the legitimacy of any military action that they take in the war are also at issue. An overly simplistic view is that their struggle is internal and the LOAC does not apply to them. Geneva Convention Article 4, however, anticipates forces like the Northern Alliance and Afghan tribal militia and includes them within the definition of a party to the conflict. Assuming they are fighting in support of U.S. forces, however, UN Resolution 1368 (authorizing force against al-Qaeda and the Taliban) and the collective right of self-defense claimed by the U.S. brings them under the umbrella as lawful combatants. The legitimacy of their presence on the battlefield is therefore already covered by the LOAC and is a non-issue.

Status of Force – the Enemy

Operational commanders need to understand whether the enemy follows the LOAC in order to determine what doctrine enemy forces will employ against him. Although the U.S. cannot force an enemy, who may not care if it is playing by the rules, to abide by the LOAC, U.S. commanders need to know what part, if any, of the LOAC the enemy obeys.

Once enemy forces are detained and placed into custody, operational commanders overseeing the detaining operations have to make sure that they not only abide by the appropriate standards of treatment for the detainees, but that they also characterize the nature of their status properly. The President and SECDEF will establish the policy on determining the status of the detainees, but it has to be made with great care, because new international law may be established in the process by way of customary practice.

Such an analysis needs to first decide whether the Taliban are lawful combatants. In order to qualify as such they need to be measured against the four requirements of a lawful combatant. They appear to meet the first three requirements. Whether they follow the LOAC is unclear, however. In addition, while some have made an issue over whether the Taliban is a legitimate state, that issue is not determinative of its status as combatants.

> The 'armed forces' of a Party to an armed conflict include all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, **even if that Party is represented by a government or an authority not recognized by an adverse Party**.[13]

If they are unlawful combatants, they are not necessarily due the protections of the Geneva Convention for POWs. Regardless whether a party to an armed conflict are or are not lawful combatants, they are still subject to trial for any war crimes they commit. The problem with conferring POW status on an unlawful combatant (and terrorists in particular) is that once hostilities cease, unless the individual is tried for war crimes, the LOAC requires they have to be released and repatriated.

Problematic is the practice of the Taliban, when overrun, of changing sides and joining forces with the Northern Alliance. Regardless how customary that practice may be in that part of the world, it is non-sensical that this swapping of sides would legitimize those forces. A significant problem comes in ferreting out former Taliban members and assembling enough evidence to convict them of war crimes. A parallel problem is that of al-Qaeda falling under the Taliban forces. If the Taliban qualifies as legal combatants, it would make no sense that al-Qaeda members could be terrorists one moment and the next moment fall under the chain of command of a recognized legal combatant, and instantly qualify for POW status if captured. Of course, Taliban and al-Qaeda members continue to be subject to trial for war crimes, even if they are given POW status, but it unnecessarily confers an undeserving

legitimate status on a criminal organization. This practice would seriously increase the likelihood that persons who have committed war crimes (or have conspired to do so) will be released without punishment at the end of hostilities, free to commit further criminal acts. As noted above, the operational commander should take responsibility for documenting war crimes so that evidence to convict those persons is available at trial.

The enemy however, should not be denied, when they are due, protections that have been afforded legal combatants for five and a half decades. The U.S. has to be fair and consistent with how it treats and labels opposing forces, and strict in controlling the conduct of forces over which it has command in armed conflict, because customary international law is continually being established by the practices that we establish in warfare. Once those practices are established, the U.S. will be in a poor position in the eyes of the international community to treat any of our own forces, who may be guilty of the same errors and omissions, with a different standard than we treat the enemy.[14]

RECOMMENDATIONS FOR CHANGING THE LOAC

The Law of Armed Conflict has been inadequate to address important issues in warfare that have come out of the war in Afghanistan and the September 11, 2001 terrorist attacks. Based on the facts discussed above and the questions those facts raise, several changes should be made to the LOAC and the way we fight armed conflicts post "9/11."

Whereas belligerents in past wars have generally obeyed the LOAC, in wars against terrorism, a new standard has emerged. The U.S. now has to determine whether enemy forces can be expected to obey the LOAC in order to predict the doctrine that the enemy can

[14] With the international community backing of the U.S., a lot of the potential pitfalls of the issues raised above may be largely ignored on the winning side. The U.S. and supporting forces may well be able to avoid accountability so long as the U.S. is victorious, the cause is accepted as "just" in the international community, and the U.S. and its coalition are able, for the most part, to retain the moral high ground.

be expected to be use. In addition, U.S. commanders need to be cognizant which coalition forces obey the LOAC. Recognizing that the U.S. can influence but not force coalition members to obey the LOAC, the U.S. needs to either not utilize those coalition forces, or arrange a C2 structure that does not place U.S. commanders in the chain of command of forces that do not obey the LOAC, in order to avoid liability by U.S. commanders for war crimes committed by those coalition forces.

When faced with enemy forces as prisoners, however, operational commanders should focus on treatment rather than status, applying the conventions for POWs even when such treatment is not obligatory. As a policy matter, this practice complies with applicable standards for all belligerents without unnecessarily bestowing status on any of them. As a matter of expediency, the U.S. should use tribunals to determine status of detainees so that the status of the individuals can be recognized, with the caveat that the person's status is subject to change if additional evidence indicates that a change in status is warranted.

Not all U.S. military members in Afghanistan have been wearing distinctive insignia that outwardly identifies them as U.S. forces, thus compromising their status as lawful combatants. It seems by its practice, however, that the U.S. has recognized that GP I, which drops the distinctive insignia requirement for recognition as a lawful combatant, is the applicable LOAC standard. The U.S. should thus either ratify GP I (with exceptions where needed) or acknowledge it as the customary LOAC without ratifying the additional protocol.

With the use of new technology, not all combatants on the battlefield are members of the military. Yet there seems to be little distinction between the functions of some civilians and military members on the battlefield, such that armed civilians of a party to the conflict and military should fall under the definition of "armed forces," even without becoming an

auxiliary of the military. This would bring CIA agents and other civilians serving a combatant role, not under the military chain of command but still acting under U.S. authority, within the definition of a lawful combatant, and make it unnecessary for U.S. commanders to make CIA agents auxiliaries to U.S. military forces. With the application of GP I as the rule of law under the LOAC, the civilian population is not at any greater risk of getting confused with combatants that are CIA agents than with active duty forces not wearing identifiable insignia. By applying GP I and expanding the definition of "armed forces," CIA agents would qualify for POW status as lawful combatants if captured.

Assuming GP I is now the established standard, thus dropping the requirement for belligerents to wear distinctive insignia, the LOAC appears to be sufficient to define the Northern Alliance and tribal warlords as combatants. They already carry their weapons openly and Geneva Convention Article 4 categorizes them as a qualifying armed force. Whether they are lawful combatants will depend on their adherence to the LOAC.

The LOAC needs to expand the allowance of permissible targets in war in order to allow the targeting of terrorists as a legitimate practice in armed conflict, much the same way that the targeting of an enemy's military leadership is lawful targeting rather than an illegal assassination. In essence, this would legitimize the assassination of terrorists in a way that enjoys the support of the international community, and if publicized may have a deterrent effect on the recruiting of terrorists and the actions taken by them (though less so for terrorist extremists who have already committed to suicide attacks).

Legitimizing the targeting of terrorists could occur in a two-step process. First, the definition of an armed conflict under the LOAC would have to be expanded to include armed actions taken against terrorists and terrorism, by a State or State actor, under the right of

individual or collective self-defense, reprisal, or a standing UN Security Council Resolution, regardless whether a State is involved in supporting, protecting, harboring, assisting, defending or otherwise acting on behalf of terrorists in that State. The biggest problem with this first point is that it could ostensibly allow violations of a State's sovereign territory by belligerent forces in order to hunt down terrorists. This could be handled in one of two ways. The fact that there are terrorists within a State could be seen as carte blanche to invade the sovereign territory of that State. The better method (though lacking the element of surprise) would be to precede any incursion into a state's sovereign territory by a formal request of the harboring State to surrender the terrorists that are within its territory. Second, terrorists should be defined as lawful targets in armed conflict, just as the military leadership of enemy forces is defined as lawful targets in armed conflicts. This combination would obviate the need to address the propriety of assassinations as a U.S. policy matter, because the killing of terrorists in an armed conflict would never be an assassination. Rather, it would be a lawful targeting of enemy forces, albeit such conflicts in the future may be very small.

The least settled status issue in the current war is the status of terrorists. A new uniform terrorism code should be drafted and adopted that defines who qualifies as a terrorist, and applies criminal status on such individuals regardless of their chain of command or subsequent affiliations (e.g. side-swapping). The international community should bring terrorists and those who support them outside of the definition and protective status of combatants, such that when terrorists become engaged in armed conflict, they and their supporting organizations are treated as criminals and are not eligible for POW treatment under the LOAC. Such a body of law should be adopted as an international uniform code, complementing domestic terrorism statutes, with the uniform code intended to supplement

and serve as a minimum standard and gap-filler when domestic law is silent. It would have to be careful not to interfere with domestic law, making the international code a lowest threshold with individual States being able to make provisions more restrictive, but not less restrictive, so that States cannot legalize or legitimize terrorism.[15]

Finally, this war has created a greater need for U.S. forces to be diligent about evidence collection and documentation of events when dealing with terrorists. Safe keeping of evidence is vital so that terrorists and war criminals can be easily identified, detained, tried and convicted after capture, and can be assigned a proper status as soon as they are detained, with a desired end state of not having to fight the same persons twice.

CONCLUSION

Change in the international community has never been more apparent than it is today. At the dawning of a new age of terrorism, the United States must be cautious and deliberate in how it wields its instruments of national power in perhaps its most passionate of roles, defense of the U.S. homeland, recognizing that in changing times such as these, decisions and subsequent actions at the operational level of warfare may create new international law with far-reaching consequences. While the Law of Armed Conflict is relatively intact and to a large extent still relevant to today's world, decisions have to be made that will better define how the U.S. is to fight, define the status of those with whom we fight and fight against, and how the parties to an armed conflict are to be treated. In the battlefield, it is the operational commander who will put those policies into practice. While written changes in the LOAC may be easy to recognize and apply, where no laws exist that fully cover situations on the

[15] This idea is parallel to statutes such as the Uniform Probate Code in the U.S., which does not override state Codes, but acts as a gap-filler where the State code is silent. The State code can be more restrictive but not less restrictive than the Uniform Code. In the same way, Domestic laws would be able to be more restrictive than the international code, but not less restrictive, thereby being unable to legitimize terrorism in any manner.

battlefield, operational commanders have to remain especially careful of their actions, because their actions may be the customary laws of tomorrow.

NOTES

[1] Robertson, Horace B., Jr., "Contemporary International Law Relevant to Today's World?," Naval War College Review, 103, Summer 1992.

[2] *See* The Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, Naval War College, Newport, R.I. (1999), 298 (fn 15) for a succinct history of the Law of Armed Conflict.

[3] *See Id.* at 301-3, for a listing of eighteen of the principle international agreements reflecting the codification of the law of armed conflict.

[4] *Id.*

[5] "The Charter of the United Nations", Article 2(5), 26 June, 1945.

[6] United Nations Security Council Resolution 1368, 12 September 2001.

[7] Article 2(4) of the UN Charter requires members to refrain from use of force against territorial integrity or political independence of any state.

[8] UNSC Resolution 1368, 12 September 2001 (emphasis added).

[9] Operational Law Handbook (JA 422), 5-5, International and Operational Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia (2000).

[10] Reference photos and story in the latest Navy Times and Time Magazine dated February 4, 2002, p. 39.

[11] *See* "In Unconventional Conflict, U.S. Sticks To '"Laws of War,'" Newshouse.com (December 5, 2001)

[12] Customary international law requires that unlawful combatants be afforded humane treatment.

[13] The Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, Naval War College, Newport, R.I. (1999), 296 (n. 11) (emphasis added). This explanation appears to include such parties as the Taliban.

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