FILLING THE VOID: PROVIDING A FRAMEWORK FOR THE LEGAL REGULATION OF THE MILITARY COMPONENT OF THE WAR ON TERROR THROUGH APPLICATION OF BASIC PRINCIPLES OF THE LAW OF ARMED CONFLICT

Professor Geoffrey S. Corn[*]

In 1961, the Supreme Court of the United States held in *Mapp v. Ohio*[1] that the Fourteenth Amendment to the United States Constitution required imposition of the exclusionary rule for evidence improperly seized by State officials. In that case, the Court emphasized the significance of compliance with basic principles of legality when it noted "[N]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[2] Although this case had nothing to do with the legal regulation of military operations, the concept expressed by the Court is, in the opinion of this author, at the core of the issues addressed by the Panel on which I participated at the recent International Law Weekend. This Panel was called upon to address the sufficiency of international humanitarian law to deal with the treatment of individuals detained during the War on terror, and whether the application of international human rights norms was essential to regulate such activities.

Like the issue confronted by the Supreme Court in *Mapp*, the legal regulation of military operations related to the War on terror provides a

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* Assistant Professor of Law at South Texas College of Law. Prior to joining the faculty at South Texas, Mr. Corn served as the Special Assistant to the US Army Judge Advocate General for Law of War Matters, and Chief of the Law of War Branch, US Army Office of the Judge Advocate General International and Operational Law Division. Mr. Corn also served as a member of the U.S. Army Judge Advocate General's Corps from 1992–2004. Previously, he was a supervisory defense counsel for the Western United States; Chief of International Law for U.S. Army Europe; and a Professor of International and National Security Law at the U.S. Army Judge Advocate General's School. Mr. Corn has served as an expert consultant to the Military Commission Defense team, and has published numerous articles in the field of national security law. He is a graduate of Hartwick College and the U.S. Army Command and General Staff College, and earned his J.D., *highest honors* at George Washington University and his L.L.M., *distinguished graduate*, at the Judge Advocate General's School. He frequently lectures on law of war and national security law topics. This article is a revised reproduction of oral remarks presented at the International Law Weekend 2005, held at the House of the Association of the Bar of the City of New York, from October 20 to 22, 2005.

1. 367 U.S. 643, 659 (1961).

2. *Id.*

profound example of the corrosive effect of adopting of policies that are inconsistent with the fundamental charter of an organization—in this case the armed forces. Unlike the domestic realm, this charter does not take the form of a constitution. Nor, in the opinion of this author, does it take the exclusive form the treaties, although these certainly reflect aspects of this charter. Instead, the "charter for the existence" of a professional armed force consists of the fundamental principles of the law of armed conflict[3] (LOAC) developed over the centuries by warriors, diplomats, scholars, and humanitarian activists. These fundamental principles reflect a careful and delicate balance between the dictates of military necessity and the humanitarian goal of limiting the harmful effects of mortal combat, and provide the foundation for developing and maintaining the professionalism, discipline, and moral integrity of a military organization. Acknowledgment of these principles as non-derogable standards applicable to any military operation involving the application of force or the detention of opposition personnel is therefore essential to the legally legitimate execution of such operations.

While these principles are certainly reflected in numerous LOAC treaty provisions, in the opinion of this author, the failure to acknowledge their applicability even when the technical triggering requirements of the treaties in which they are codified have not been satisfied has manifested itself in the suggestion that certain aspects of the War on terror occur in a legally unregulated environment. This, I believe, has been reflected in much of the debate related to the applicability of the LOAC to individuals detained by United States armed forces as "enemy combatants" and has been a pervasive factor in the development of United States policy related to this issue. It was also a prominent aspect of the presentations by the various members of the ILW Panel.

This treaty "application analysis" approach has become the focal point of much of the debate and analysis related to the international legal regulation of the War on terror. Thus, proponents of expansive United States war execution powers assert the inapplicability of the Geneva Conventions to non-state actors captured during the trans-national war on terror. In response, proponents of humanitarian protections argue for a more protective interpretation of these treaties. In the alternative, many such proponents also assert that the inability of LOAC treaties to address every humanitarian issue related to the war on terror requires the United States to acknowledge the applicability of

3. The term law of armed conflict will be used throughout this essay to refer to international treaty and customary law developed to regulate the means and methods of warfare and provide humanitarian protections for the victims of war. Although often referred to as international humanitarian law, in the opinion of this author, this characterization diminishes the significance of the means and methods prong of this body of law.

international human rights norms to the conduct of military operations, a position that is contrary to the traditional United States position *vis-à-vis* the scope of human rights law.

Each of these positions was represented by fellow panelists at the ILW conference, all of whom were called upon to address the sufficiency of LOAC to address the international legal regulation of the war on terror, with specific emphasis on detention. In response to this question, I asserted that the LOAC was sufficient to provide the essential framework of regulation for the military component of this struggle, but with one critical qualification–only if the non-derogable nature of basic LOAC principles[4] is affirmatively acknowledged by United States policy makers. Such an acknowledgment is essential to ensure that the armed forces of the United States are never called upon to engage in operations involving the application of combat power in a legally unregulated environment; or, phrased differently, that they will never be called upon to engage in activities that are inconsistent with the basic charter of a professional and disciplined armed force reflected in these principles.

The United States must endorse such an interpretation of LOAC, and makes the fundamental principles of the LOAC the foundation for all policies, doctrine, and operational decisions related to execution of military operations by United States forces. Absent such an endorsement, these forces will continue to be required to engage in conduct that risks contravention of the most fundamental notions of humanity and professionalism. Such an outcome degrades not only international legitimacy, but also the discipline and effectiveness of our own force.

This dynamic has already been witnessed with regard to detention and interrogation directives indicating that humane treatment was merely a "policy" mandate, and not a legal obligation. Such an approach to the regulation of the armed forces presents a serious danger of debasing respect for the constraints on combatant conduct, and encouraging the instinct prevalent among so many military professionals throughout history: that military necessity is an unlimited source of authority for the execution of military operations. The potential consequence of such an approach to the regulation of hostilities poses significant dangers to the credibility of the overall United States effort to defeat

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4. A.P.V. ROGERS, LAW ON THE BATTLEFIELD 3 (2d ed. 2004) [hereinafter ROGERS]. Stating that:

> The great principles of customary law, from which all else stems, are military necessity, humanity, distinction, and proportionality. According to the UK Manual of Military Law, the principles of military necessity and humanity as well as those of chivalry have shaped the development of the law of war. Chivalry may, however, be classified as an element of the principle of humanity.

Id.

terrorist organizations, and is fundamentally inconsistent with the well-established limitation on the principle of military necessity.[5]

Unfortunately, the longstanding and well-established limited scope of the authority derived from the principle of military necessity has apparently been dismissed by policy makers adhering to a short-term cost/benefit analysis to determine appropriate conduct of the armed forces. In the opinion of this author, such an approach fails to consider a primary purpose of adhering to a framework of legal principles constraining the unlimited scope of the principle of necessity: protection of the moral integrity of the citizens called upon to serve our nation in uniform.

There are certain truisms in war that persist through time. First, war involves the deliberate infliction of suffering upon warriors, and the inevitable incidental infliction of suffering on the people and property of an opponent. Second, suffering is not inflicted for personal reasons, but because some national or organizational leadership entity directs such activity. Third, those who engage in mortal combat do not do so for profit or personal vendetta, but because they have been called upon to do so by the authority they serve. For the warriors who serve this nation, and many other nations, this results in an implied covenant between them and the nation under whose flag they fight, kill, destroy, and detain. The essence of this covenant is a willingness to inflict the suffering associated with warfare based on the belief that doing so will be consistent with the inherent values of the cause for which they serve. For most human beings, imbued with an inherent value for human life, preserving this covenant is essential to reconcile their innate sense of morality with the suffering their duty requires them to inflict.

Military professionals historically understood that preserving a sense of morality would be most severely stressed during armed conflict. As a result, they were at the forefront of developing non-negotiable rules to limit the brutality of warfare, and in so doing limit the corrosive moral consequence of conflict. Thus, another truism of war is that limitations imposed on the conduct of hostilities—limitations developed by warriors to limit the infliction of suffering to only that which is legitimately necessary— protect not just the adversary, but the moral and psychological integrity of the members of the

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5. U. S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 3 (July 1956). The prohibitory effect of the law of war is not minimized by "military necessity" which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.

Id.

force regulated by such constraints. The significance the LOAC plays in preventing deviation from a standard of morality was clearly understood by the Telford Taylor, the Chief United States prosecutor at Nuremburg. According to Taylor:

Another and, to my mind, even more important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the participants. War does not confer a license to kill for personal reasons-to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge.[6]

The great irony of the current debate related to the applicability of the LOAC to the military component of the war on terror is that it seems to reflect the lack of appreciation for this fundamental aspect of embracing expansive application of LOAC principles so effectively articulated by Taylor. It is equally ironic that proponents of expansive United States wartime power continually assert the "new paradigm" reflected in the war on terror. In the opinion of this author, this assertion is a subterfuge for those who seek to dispense with the constraints that result from good faith application of LOAC principles, and adopt an unlimited definition of military necessity–an idea that was flatly rejected following the Second World War. Instead of characterizing the war on terror as a new paradigm, it is more appropriate to consider why the framework of basic LOAC principles must be applied to any armed conflict, regardless of the nature of the enemy.

The possibility—if not probability—of engaging in armed conflict in a context not contemplated by the treaties regulating warfare was acknowledged in 1899 in the Preamble to the first multi-lateral treaty regulating the methods and means of warfare was adopted by the international community. Known as the Marten's Clause (in recognition of the author of this provision, the Russian diplomat Feodor Martens),[7] this provision required armed forces to comply with the "dictates of humanity" during all military operations, a mandate that has been replicated in subsequent law of war treaties.[8] The exact language of the original clause stated: "in cases not covered by the attached regulations, the belligerents remain under the protection and the rule of the principles of the law of nations' as derived from the usages established among civilized people, the laws of humanity and the dictates of the public conscience."[9]

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6. TELFORD TAYLOR, NUREMBERG AND VIETNAM, AN AMERICAN TRAGEDY 40–41 (1970).

7. This was the name of the Russian representative who drafted the language. *See* ROGERS, *supra* note 4, at 6 n.36.

8. *See id.* at 7 n.37.

9. Convention Respecting the Laws and Customs of War on Land, Oct. 18. 1907, 36 Stat. 2277;

Describing the purpose of this clause, A.P.V. Rogers highlights the drafters intent to ensure humanitarian protections applied during warfarewarfare for all those affected by a conflict, not only civilians:

The purpose of the clause was not only to confirm the continuance of customary law, but also to prevent arguments that because a particular activity had not been prohibited in a treaty it was lawful. Humanity is, therefore, a guiding principle which puts a brake on the undertakings which might otherwise be justified by the principle of military necessity.[10]

It therefore appears that both the profession of arms and the international community have understood, for over a century, that when armed forces of a state engage in operations involving "combat" activities, even when such conflict falls outside the scope of treaty regulation, restraint consistent with basic notions of humanity apply *ipso facto* to such operations. Any other conclusion would require the armed forces to "disregard of the charter of its own existence." Thus, the basic principles of the LOAC - including both the authority derived from the principle of military necessity and the constraint on that authority derived from the principle of humanity, must serve as the framework for such operations. This balance between the necessity to destroy an enemy force and the dictates of humanity is summarized by one text as follows:

Not all means or methods of attaining even a 'legitimate' object of weakening the enemy's military forces are permissible under the laws of armed conflict. In practice, a line must be drawn between action accepted as 'necessary' in the harsh exigencies of warfare and that which violates basic principles of moderation.[11]

This proposition is in no way novel for the United States armed forces. Indeed, it has formed the basis for the Department of Defense law of war policy for more than two decades. This policy, reflected in the Department of Defense Law of War Program,[12] mandates that the armed forces of the United States must treat any armed conflict as the trigger for application of the law of war.[13]

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see also Department of the Army Pamphlet 27-1, THE LAW OF LAND WARFARE at 5 (December 1956).

10. ROGERS, *supra* note 4, at 7.

11. HILLAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT, 226 (1992).

12. *See* U.S. DEP'T OF DEF., DIRECTIVE NO. 5100.77, DOD LAW OF WAR PROGRAM (1998), *available at* http://www.dtic.mil/whs/directives/corres/pdf2/d510077p.pdf (last visited Feb. 13, 2006).

13. *Id.* at ¶ 5.3.1 (stating that the Heads of the Department of Defense (DoD) Components shall "[e]nsure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations."); *see also* Major Timothy E. Bulman, *A Dangerous Guessing Game Disguised as an Enlightened Policy: United States Laws of war Obligations During Military Operations Other Than War*, 159 Mil. L. Rev. 152 (1999) (analyzing the potential that the U.S. law of war policy could be asserted as

This mandate has been the foundation for application of the LOAC principles during every phase of the war on terror, and reflects the basic proposition that armed conflict requires application of these basic principles, no matter how the conflict is characterized. In the opinion of this author, the time has come to alter the characterization of "policy" attached to this mandate to that of "legal obligation." This conclusion is justified by treating this mandate as a reflection of an underlying norm of customary international law; or, in the alternative, a reflection of a "principle of law recognized by civilized nations."[14] Such an endorsement would eliminate any uncertainty as to the application of basic principles of the LOAC, as a matter of legal obligation, during military operations associated with the war on terror.

With regard to application of these basic principles, the ILW Panel, like so many other experts who have been called upon to comment on United States policies, focused specifically on the treatment of detainees. This was certainly appropriate, as the issue of treatment of detained personnel who fail to meet the criteria for prisoner of war or protected civilian status truly serves as a metaphor for the broader application of this basic LOAC principle framework. There are few other situations where the tension between military necessity and the dictates of humanity is more profoundly stressed than when a member of an opposition force is captured and presumed to possess information of significant value to the capturing force. Indeed, it has been precisely this aspect of the current United States detention policy that has been cited by the Bush administration as the justification for considering, and in some cases endorsing, detention and interrogation standards that would not be permitted for prisoners of war. Classifying the humane treatment standard as a "policy" vice legal mandate has provided the purported legal flexibility to implement such policies.

Unfortunately, what this practice has failed to acknowledge is that the principle of humanity, and more specifically the obligation to ensure the humane treatment of all captured or detained personnel, is part of the basic non-derogable "charter" of the armed forces. It serves to limit the instinct to do all that is necessary to achieve a given military objective, no matter how

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evidence of a customary norm of international law). Other armed forces have implemented analogous policy statements. For example, the German policy to apply the principles of the law of war to any armed conflict, no matter how characterized, was cited by the ICTY in the Tadic jurisdictional appeal as evidence of a general principle of law extending application of the law of war principles derived from treaties governing international armed conflict to the realm of internal armed conflict. *See* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction, ¶ 118 (Oct. 2, 1995) (citing the German Military Manual of 1992), *reprinted in* 35 I.L.M. 32 (1996).

14. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1)(c), Oct. 24, 1945, 59 Stat. 1031. *See also* Geoffrey S. Corn, Taking the Bitter with the Sweet: *A "Full and Fair" Critique of the Use of Military Commissions to Prosecute Terrorism*, ___ STETSON L. REV. ___ (2006) (discussing customary nature of the basic LOAC principles) [forthcoming] (on file with author).

inconsistent with basic notions of humanity. In the realm of interrogation, that instinct will almost invariably lead to proposals to adopt more and more aggressive techniques against detainees perceived to be non-compliant. Removing humane treatment from the realm of legal obligation and downgrading it to policy is a dangerous invitation for commanders and policy makers to endorse a "whatever it takes" approach. As we have witnessed since 9/11, such an approach will ultimately require members of the armed forces to implement such techniques, which in turn will produce a conflict between their basic sense of morality and their duty to obey what are characterized as lawful orders (because of the exceptional nature of the subjects of interrogation). This, in turn, can (and throughout history often has) lead to a dangerous erosion of discipline within the force.

Treating humane treatment as a non-derogable obligation leads to a different result, and reflects the approach that is, as this author stated during the ILW presentation, essential for the maintenance of a disciplined and morally grounded military. Once both necessity and humanity are acknowledged as basic principles of the LOAC, applicable whenever and wherever the armed forces are called upon to engage in operations against a hostile force possessing military type capabilities (in short, "armed conflict"), the traditional process of balancing these two principles will animate policy and operational decisions. Although humane treatment is an ill-defined concept beyond providing the basic incidents of life and health,[15] a simple test will enable military commanders to assess whether a proposed tactic or technique intended to efficiently achieve the military objective will transgress the limitation of humane treatment. This test asks whether the proposed technique, if used against a "friendly" subordinate, would be considered improper. If so, it is almost certainly inconsistent with the principle of humane treatment.

It is important to note the paternalistic aspect of this test. Because most military personnel pride themselves on their ability and willingness to endure brutal treatment in the service of their nation, the traditional "do unto others" test will be ineffective. However, within the military culture, only mission accomplishment is paramount to caring for subordinates. As a result, most military leaders will possess a strong protective instinct over their subordinates. Thus, framing the question as "would I consider this tactic improper if employed against a soldier entrusted to my leadership" will create the proper frame of reference for assessing the permissibility of the tactic. This flexible and pragmatic approach has been the cornerstone of United States interrogation doctrine for decades, and as with the dictate of the Marten's Clause, there is no justifiable reason to question the continuing validity of this approach.

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15. *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts et al. eds., 2005).

The military aspect of the war on terror will no doubt continue to present complex challenges for our nation, and for the armed forces called upon to conduct operations in pursuit of national strategic objectives. But such complexity is not, as many critics of the LOAC posit, unprecedented in the history of warfare. Conducting military operations against highly organized non-state actors has been an aspect of the American way of war since the inception of the nation.[16] What is new is the suggestion that the conduct of such operations is, because of the nature of the enemy, legally unregulated. Such a suggestion fundamentally undermines the basic "charter" of a professional armed force, creates a dangerous risk of encouraging the darkest instincts of those called upon to "deliver" results, and corrodes the moral integrity of the men and women who serve this nation. Only a rejection of this proposition, and an endorsement of the obligation to comply with a framework of basic principles of the LOAC during all military operations will restore and preserve the appropriate balance between the dictates of necessity and the interests of humanity, and prevent the conduct of such operations from degenerating into what appears more like personal vendettas that the application of force for reasons of state. The armed forces have historically, and continue to understand this. It is time that those who create policies they must conform to also recognize this fact, a necessity articulated so effectively by eminent law of war historian Geoffrey Best:

> I do not fall into the most common, flattering and delusive of civilian assumptions, that civilian = good and military = bad. Far from it. So far as one can distinguish them from each other . . . civilians have often been ascendant in the political leadership under which . . . the military are seen to have done terrible things. Militarism . . . may be a nasty thing, but let the military man ponder on my conviction, that there can be no nastier a militarist than a civilian one.[17]

16. *See generally* MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER (2002).

17. GEOFFREY BEST, HUMANITY IN WARFARE 26–27 (1980).