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## The Evolution of the Laws of War in the War on Terror

### Keywords

War, Criminal Law, Military, War and Peace, Court of Justice of the European Union, Human Rights Law

## THE EVOLUTION OF THE LAWS OF WAR IN THE WAR ON TERROR

*Reviewed by Lara L. Griffith\**

MICHAEL LEWIS, ERIC JENSEN, GEOFFREY CORN, VICTOR HANSEN, RICHARD JACKSON AND JAMES SCHOETTLER, *THE WAR ON TERROR AND THE LAWS OF WAR* (OXFORD UNIVERSITY PRESS 2009).

### I. INTRODUCTION

*The War on Terror and the Laws of War* was written by a group of legal scholars and professors who are equally as comfortable with the laws of war as they are with the military field. Geoffrey Corn, author of the introduction as well as chapters on the application of the law to the war on terror, is currently an Associate Professor of Law at South Texas College of Law. Corn graduated from Hartwick College and the U.S. Army Command and General Staff College, earned his J.D. with highest honors at George Washington University, and served in the U.S. Army for twenty-one years, finishing his career as a Lieutenant Colonel in the Judge Advocate General's Corps.<sup>1</sup> Michael Lewis, author of perhaps the most analytic chapter in the book, *Battlefield Perspectives on the Laws of War*, graduated cum laude from Harvard Law School and continued on to have a 7-year career flying F-14 fighter airplanes with the United States Navy.<sup>2</sup> Lewis and his other co-authors Victor M. Hansen, Dick Jackson, Eric Jensen and James Schoettler, have extensive experience authoring literature on the laws of war.<sup>3</sup> Such sweeping military and academic experience is likely the reason for the authors' comprehensive and meticulous analysis of the laws of war.

This is a book geared towards practicing lawyers; namely, as it became evident through the progression of the book, to international lawyers and practitioners dealing with the laws of war. An incredibly specific niche to which the authors are directing their literature, the book's audience is expected to have a baseline understanding of both the American legal system as well the interaction between the military and the law during times of international conflict.

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1. Oxford University Press, *The War on Terror and the Laws of War: A Military Perspective*, <http://www.us.oup.com/us/catalog/general/subject/Law/PublicInternationalLaw/GeneralPublicInternationalLaw/?view=usa&ci=9780195389210> (last visited Mar. 1, 2010).

2. *Id.*

3. *Id.*

## II. THE LAWS OF WAR AND THEIR APPLICATION

The authors start blending the military and legal genres military and legal immediately from the beginning of the book. The Introduction cites NATO General James L. Jones's remark from 2003, stating that going to war was once a task focused on leading combat forces, but now, "you have to have a lawyer or a dozen. It's become very legalistic and very complex."<sup>4</sup> Thus, while the role of the lawyer is established right from the beginning, the Introduction warns lawyers to be weary of what they are dealing with. Professor Corn cautions his readership that they, as lawyers, know the law rather than the technological intricacies of modern warplanes. While he assumes his readers are knowledgeable, he notes that the laws of war and the arena wherein they evolve are extraordinarily convoluted and variable. The Forward of the book, then, sends a caution to lawyers: do not step into unfamiliar waters and assume to understand how to navigate through them. The authors of the book provide such a warning presumably to illustrate the necessity of their book as a guide through this arena.

Professor Corn follows the Introduction by authoring the first chapter entitled *What Law Applies to the War on Terror?* He quickly sets the legal framework of the entire book by distinguishing between a pre- and a post-9/11 legal and militaristic structure. He explains how the September 11<sup>th</sup> attacks both created and obliterated the categories of the laws of war. Up until that point, the only framework that existed was either inter-state or intra-state war.<sup>5</sup> Professor Corn explains that the paradigm shift began with the determination and categorization of the "unlawful enemy combatant" and its effect on the pre-9/11 legal configuration.<sup>6</sup> This term and its significance will be discussed later in this note. Professor Corn derives much of his framework from Common Articles 2 and 3 of the Geneva Convention.<sup>7</sup> It is clear, then, where his steep dichotomy comes from; Article 2 conflicts are international armed conflicts which arise between two or more of the High Contracting Parties, and Article 3 conflicts are conflicts *not* of an international character.<sup>8</sup> Chapter 1 is devoted to establishing the difference between these two types of conflicts, and emphasizing the enormous importance of what rhetoric can do within the Laws of Armed Conflict (LOAC).

Much of the chapter is derived from Professor Corn and co-author Eric Talbot Jensen's previous article: *Untying the Gordian Knott: A Proposal for Determining Applicability of the Laws of War to the War on Terror.*<sup>9</sup> That article focuses on the concept of "rules of engagement" and how those rules are broken into either status-based rules or conduct-based rules. While that article brings its readers to a narrow and esoteric view of the rules of engagement, the present book broadens and even

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4. GEOFFREY S. CORN, ET AL., *THE WAR ON TERROR AND THE LAWS OF WAR* vii (2009).

5. *Id.* at 3.

6. *Id.*

7. *Id.*

8. *Id.* at 5.

9. Geoffrey S. Corn and Eric Talbot Jensen, *Untying the Gordian Knott: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 5-6 (S. Tex. C. L. Working Paper K33), Jan 14, 2008, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1083849](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1083849).

simplifies the scope of the argument. This is particularly evident when Professor Corn concludes Chapter 1 by deriving his perspective from that of “the warrior.” The warrior’s understanding, Corn writes, is “based on the pragmatic and simple reality that authorization to engage an opponent based solely on a status determination means the line has been crossed.”<sup>10</sup> Essentially, Professor Corn anchors the idea of the very wartime framework he is promoting to the most militaristic of all men in history, the warrior. With the weightiness and simplicity of the warrior supporting the book’s basic legal paradigm, the book is able to move forward into more specified areas of the field.

Chapter Two focuses on the targeting of persons and property in war. It is written by Eric Jensen, a Lieutenant Colonel of the US Army JAG Corps. The chapter begins by laying out the history of the codification of the laws of war. The chapter provides a concise background of where the rules came from for targeting persons and property, explaining that regulations on specific weapons systems and tactics grew in the post-World War II era.<sup>11</sup> The authority for this chapter is found in the Protocol Additional to the Geneva Convention and Relating to the Protection of Victims of International Armed Conflicts (GPI).<sup>12</sup> Jensen uses the GPI to methodically lay out three categories of individuals on the battlefield: combatants, non-combatants, and civilians.<sup>13</sup> He explains, however, how the category of civilians can lose their immunity as civilians if they engage in conflict and turn themselves into pseudo combatants. The analytical break down of the players on the battlefield is a helpful academic tool for those unfamiliar with the layout of war.

One of the most revealing portions of the book in terms of military operations was the section in Chapter Two about the Air Force. The author explains how the Air Force must calculate collateral damage before they can go ahead with a targeted mission against combatants or civilian objects.<sup>14</sup> The chapter delves into soldiers’ discretion, and segues into how targeting of transnational terrorists is an entirely different playing field. Much of the rest of the book turns on the revelation found in this chapter concerning how transnational armed terrorists do not fit the definitions of any of the three categories of battlefield players listed above. Thus, the now infamous label synonymous with the War on Terror and with the then-reigning Bush Administration was born: “unlawful enemy combatants.” The authors made a noteworthy mention of an International Committee of the Red Cross (ICRC) study currently being conducted regarding whether civilians’ memberships in the armed wing of terrorist organizations will not only increase the State’s ability to respond to the threat, but will also reinforce fundamental principles of the LOAC that are designed to protect those very civilians from the

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10. CORN, *supra* note 4, at 34.

11. *Id.* at 43.

12. *Id.* at 45.

13. *Id.*

14. *Id.* at 47.

effects of the hostility.<sup>15</sup> Why the study is not included in the references is unclear and unfortunate, as the brief mention serves to pique the reader's interest.

Further, for all the discussion surrounding former President Bush's policy on the detention of combatants in the war on terror, Chapter Three, entitled *Detention of Combatants and the Global War on Terror*, is noticeably silent as to the controversy. It is a refreshing change to read this chapter as it is entirely void of judgment on the subject, and instead is wholly focused on the definitional status of these individuals. While concurrent articles such as Stephanie Cooper Blum's *The Why and the How of Preventive Detention in the War on Terror*<sup>16</sup> aptly focus on whether the Bush Administration's approach was unsound and unlawful, Jensen's chapter solely focuses on dissecting the definition of combatants for purposes of detention.

A useful and interesting section of Chapter Three, particularly to the lawyer or law student is the Executive Branch Response and the following section of Schoettler's Observations. It is a necessary part of the book where the author is able to scrutinize the lessons learned from the litigation which ensued following the president's detention of combatants in the war on terror. Schoettler emphasizes the recurring concern from the Supreme Court that the Executive branch did not exercise unchecked power when it came to indefinite detention of enemy combatants.<sup>17</sup> A testament to Schoettler's partisan authorship, however, is that his conclusion aligns itself only with keeping to the laws of armed conflict instead of playing to a particular political angle.

### III. TREATMENT AND TRIAL OF DETAINEES IN MILITARY COURTS

Chapters Four and Five focus on treatment and trial of detainees. This part of the book appeals to the sensationalists because it describes interrogation techniques and goes into detail about how such techniques violate virtually every human rights treaty of which the United States is a party, the 8<sup>th</sup> Amendment, and the uniform code of military justice.<sup>18</sup> After a frustratingly circular, albeit entirely accurate, analysis of how the amorphous standards became alarmingly susceptible to abuse, resulting in investigations of misconduct and ultimately re-regulation with the 2006 Department of Defense detainee program, the author leaves us with the standards the military began with: minimum humane treatment of Article 3 of the Geneva Convention.<sup>19</sup>

Chapter Five brings the reader back to the warrior ideal, but instead of using it for the legal and militaristic framework, this chapter describes how military courts trying war crimes makes sense because it is akin to warriors judging warriors. Again, the author goes through a somewhat circular history of how military courts have ebbed and flowed throughout different conflicts. The author points out and

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15. *Id.* at 59.

16. Stephanie Cooper Blum, *The Why and How of Preventive Detention in the War on Terror*, 26 T.M. COOLEY L. REV. 51, 56 (2009).

17. CORN, *supra* note 4, at 122.

18. *See id.* at 148.

19. *Id.*

argues the most notable events in the progression of military courts: First, President Bush's decision in November of 2006 to order a military commission for terrorist operatives was justified by stating that the fight against al Qaeda was sufficient to trigger LOAC application.<sup>20</sup> After its establishment, the Supreme Court eventually ruled that the structure violated domestic and international law.<sup>21</sup> More recently, changes have been made since President Obama's original plan to fully shut down the detention facility at Guantanamo Bay.<sup>22</sup> Since the book's publication, a task force, led by Attorney General Eric H. Holder Jr., has recommended that thirty-five detainees face prosecution or military commission.<sup>23</sup> While 110 detainees have been approved for transfer, the goal that President Obama set when he took office in 2009 is far from being realized on the date originally set for the facility's closure.<sup>24</sup> The administration has decided that approximately forty other detainees should be prosecuted for terrorism and related war crimes even though it is still unclear whether these detainees should face a civil trial or a military commission.<sup>25</sup>

Both of these chapters explain that while procedural limitations for detention and prosecution of transnational terrorists is somewhat clear, substantive jurisdiction for trials and interrogation is lacking in clarity. Such a lack of substantive clarity is evidenced by one of the most recent decisions by Mr. Holder, announcing that five detainees would face military commission and five others would be prosecuted in federal court.<sup>26</sup> The authors' conclusion at the end of Chapter Five is both fitting and timely, in that it looks to the future and demands "continuing observation and analysis," of these military courts and the decisions that allow for prisoners to be held under their jurisdiction.<sup>27</sup>

#### IV. COMMAND RESPONSIBILITY AND THE BATTLEFIELD PERSPECTIVE

The final two chapters of the book, the first of which is devoted entirely to the doctrine of command responsibility, and the second, a thorough analysis of the battlefield perspective of the laws of war, provide for strong final chapters. One commentator disparaged the book for not having a conclusion and proffered the suggestion that a lack of conclusion means the war on terror "is something that will keep the military busy for a while."<sup>28</sup> While a conclusion to the entire book may have been a helpful additive, each chapter's author provided insightful observations in their own mini-conclusions. Such disparate topics do not provide

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20. *Id.* at 164.

21. *Id.*

22. *Id.*

23. CBC News, *Prosecute 35 Guantanamo Detainees: Task Force*, CBC News, Jan 22, 2010, <http://www.cbc.ca/world/story/2010/01/22/us-guantanamo-bay-task-force.html>.

24. *Id.*

25. Charlie Savage, *Detainees Will Still Be Held, but Not Tried, Official Says*, N.Y. TIMES, Jan 22, 2010, at A14, available at <http://www.nytimes.com/2010/01/22/us/22gitmo.html?partner=rss&emc=rss>.

26. *Id.*

27. CORN, *supra* note 4, at 186.

28. Gentian Zyberi, *Book Review – The War on Terror and the Laws of War: A Military Perspective*, INT'L L. OBSERVER, Dec. 18, 2009, <http://internationallawobserver.eu/2009/12/18/book-review-the-war-on-terror-and-the-laws-of-war-a-military-perspective/>.

perfect fodder for an ultimate conclusion, and reviewer Gentian Zyberi may be correct in that a conclusion is preemptive because the war on terrorism is quite evidently not near a conclusion.

The doctrine of command responsibility is analyzed in Chapter Six as having a foundation in substantive criminal law principles. The author explains that command responsibility does *not* refer to instances of direct liability; rather, it is based on “the principle of derivative imputed liability.”<sup>29</sup> Explaining further, he states that the commander’s liability derives from his relationship with his soldiers and the link between his act and the crimes committed by his subordinates.<sup>30</sup> While this doctrine first seems esoteric and too particularized for this survey book, the author ties in its codification with principles used against members of the Taliban and other non-state actors. This chapter results in being one of the most edifying of the entire book, as the author describes how preoccupied commanders are to be held within the doctrine. Rightfully so, as they are more likely to prevent and suppress LOAC violations if they could be held liable in a criminal court for their subordinates’ violations. The true analysis, however, comes when the author compares commanders in the United States Army to leaders of terrorist organizations and how the latter find the doctrine entirely useless.<sup>31</sup>

#### V. CONCLUSION

As noted, while Chapter Seven, the final chapter, does not fully substitute for a conclusion, it gives a thoughtful final nod to the complexities between military operations and the laws of war. In summarizing what the reader should take from this narrative, the author returns to the warrior ideal to produce two overall principles. The first principle boils down to a simple epithet: warriors need rules.<sup>32</sup> Such a catch phrase is perhaps what the authors, collectively, would use if asked to summarize their book in three words. The second take-away is that the laws of war need to be clear and simple, and both given and received with confidence.<sup>33</sup> Although Chapter Seven delves into more specifics of aviation and technology, the chapter’s worth is found in its brief explanation of the authors’ intention in writing the book. The ability to see the laws of war through a militaristic eye is an invaluable perspective for lawyers and lawmakers alike. The authors of the book present an incredibly thorough study of exceedingly pertinent information. Such a task, in light of the ever-changing laws is daunting, but these authors have created this book as an important tool as the war on terror presses forward.

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29. CORN, *supra* note 4, at 191.

30. *Id.*

31. *Id.* at 205.

32. *Id.* at 211.

33. *Id.*