MISSING IN ACTION? UNITED STATES LEADERSHIP IN THE LAW OF WAR

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One of the most striking developments in international law over the last thirty years has been America's effective abdication of the leading role it had played in the advancement of law of war codification and application during the first 200 years of its history. While the United States has ratified several fairly non-controversial treaties in the last three decades, it has refused to join, and even worked to undermine the implementation of, other agreements that enjoyed broad international support. Furthermore, for probably the first time in its history, the United States sought to avoid the application of rules to itself that it had previously faithfully observed even in conflicts with adversaries who did not reciprocate.

To understand how exceptional American behavior has been in this recent period, one needs to appreciate its leading role in this field in earlier days. Dating back to the American Revolution, the United States was an early proponent of conducting hostilities in faithful adherence to the rule of law and civilized values, including early recognition of the right to surrender and commitment to humane treatment of captured enemies. Both Congress and George Washington agreed on the wisdom of this approach, which both encouraged enemy surrender, and earned public support for the American war effort, even while Americans were typically treated quite harshly by their British adversary.

Following its victory in the Revolution, the United States took a leading role in advancing further development of the law, including protections for prisoners of war in several bilateral treaties that clearly exceeded the customary requirements of the laws of war as understood in that age. The United States also rejected the practice of other nations who subjected spies to summary execution; in 1776 Congress made them statutorily liable

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to trial by court-martial using language that is still recognizable in the modern Uniform Code of Military Justice.

The United States made even more substantial contributions to the law of war during its 1846-48 conflict with Mexico. Adopting policies targeted at gaining popular Mexican acquiescence to the presence of his army in their country, General Winfield Scott insisted his men respect civilian property and the Catholic Church, pay fair value for all provisions received from local sources, and protect the local populace against predations from bandits. Because there was no legal basis for extending U.S. criminal law to Mexican territory, Scott promulgated rules regulating the conduct of both Americans and Mexicans in the form of a martial law order, which he then evenhandedly enforced, trying violators before military commissions which he had created expressly for this purpose. Departing from the European military practice of summarily executing guerillas and other unprivileged combatants, and going beyond the congressional mandate for spy trials, Scott also insisted on conducting trials for these individuals as well, employing a separate tribunal which he called "councils of war" (this role was subsumed by the military commission in subsequent conflicts).[1] Via a series of intervening historical steps, the U.S. conduct in Mexico eventually formed the basis of what has become codified in international law as the law of belligerent occupation.[2]

The American Civil War saw the drafting of the seminal effort in the overall development of the modern law of war, through the Instructions for the Government of the Armies of the United States in the Field. Better known as the "Lieber Code" after its primary author, Columbia University professor Francis Lieber, this work was the first serious attempt to capture the full scope of the customary law of war in a form suitable to guide the conduct of soldiers in the field. It responded to a need created by the lack of professional knowledge on the part of the thousands of inexperienced volunteer officers drawn from civilian pursuits and

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[1] *See, e.g.*, Haridimos V. Thravalos, *The Military Commission in the War on Terrorism*, 51 VILL. L. REV. 737, 744-46 (2006) (describing "councils of war" under General Scott).

[2] *See* David Glazier, *Ignorance Is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 121, 146, 139-73 (2005) ("While the underlying causes of Napolean's difficulties in Spain will be seen to be the *subject* of specific provisions in the modern law, specific measures taken by the Americans in Mexico will be seen to now generally be the actual *rule*.") (emphasis added).

placed in positions of responsibility in the rapidly expanded Union Army. It was a particularly significant reflection of the American commitment to the law of war given that the Union was not obligated to follow international rules in dealing with an internal rebellion, yet chose to do so nevertheless. The Lieber Code was subsequently adopted in large measure by a number of European armies, and is directly acknowledged as the basis for subsequent law of war codifications, including the Hague Regulations Respecting the Laws and Customs of War on Land which remain valid law to this day. The United States' controversial 1865 prosecution of Henry Wirz, commandant of the notorious Andersonville prisoner of war camp, was perhaps the first modern "war crimes" trial.

Over the remainder of the nineteenth century the United States continued to refine the law of war. Although the conduct of its wars with Native Americans was marred by a number of egregious incidents, the Army did come to recognize Indian adversaries as lawful belligerents and accord them immunity from civilian prosecution for acts conducted during hostilities. The Philippine Insurrection following the Spanish-American War saw further development of U.S. law of war principles, including efforts to hold American commanders responsible for unlawful acts committed by subordinates under the principle of command responsibility.

Continuing at the forefront of law of war adherence, the United States ratified almost all of the treaties on this subject that entered into force in the first half of the twentieth century, and played the leading role in establishing the first systematic effort at legal accountability for war crimes in the wake of World War II. Americans were instrumental in establishing and conducting the top-level International Military Tribunals at Nuremberg and Tokyo while U.S. national tribunals tried more than 3,000 additional Axis defendants around the world.

The United States was an active participant in the diplomatic conference that negotiated the 1949 Geneva Conventions, which it ratified after the conclusion of the Korean War. Despite popular portrayals to the contrary by anti-war activists, and a few well-publicized incidents like the My Lai massacre, the United States generally strove to comply with law of war mandates in Vietnam, carefully restricting aerial targeting of the North, for example. U.S. forces even accorded indigenous Viet Cong fighters prisoner-of-

war status although those fighters had no formal entitlement to it as internal adversaries of the South Vietnamese government.

As a result of concern about the effects of some U.S. actions during the war, including efforts at cloud-seeding and extensive use of defoliants, the Senate took the lead in directing the government to negotiate what became the 1976 U.N. Convention on the Prohibition of Environmental Modification Techniques. Indeed, the United States participated actively in developing the law of war through the end of the 1970s. In 1975 it ratified the 1925 Geneva Protocol banning the use of poison gases, and it took an active role in the negotiations that culminated in the adoption of two additional protocols to the Geneva Conventions in 1977, signing the agreements on the first day it was possible to do so.

Additional Protocol I ("AP I") expanded the Geneva Convention coverage of international armed conflict, adding some rules for the actual conduct of hostilities to the conventions' focus on protecting persons never or no longer involved in combat and explicitly codified some important provisions previously found only in customary rules. It is undoubtedly one of the most significant developments in the law of war in the sixty years since the Geneva Conventions were adopted. Additional Protocol II ("AP II") was less substantial, but did expand the scope of protections provided to participants in non-international armed conflicts, which previously had been addressed in only the single Common Article 3 found in all four of the 1949 treaties.

The 1980s, however, saw the United States change course and begin to abrogate its historic leadership role. Although the U.S. military and State Department participated in the additional protocol negotiations and initially supported ratification, the Reagan Administration adopted the critical arguments against AP I raised by some conservatives, including Douglas Feith,[3] who would later play a key role in justifying the 2003 invasion of Iraq as Undersecretary of Defense for Policy. In 1987 President Reagan submitted AP II to the Senate for advice and consent to its ratification, but his letter of transmittal declared that "Protocol I is

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[3] *See* George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 3–4 (1991) ("The decision by the Reagan administration to reject Protocol I was foreshadowed by a series of individual writings from 1984 to 1986 asserting that the Protocol served the interests of terrorists. . . . One polemicist Douglas J. Feith, then a Deputy Assistant Secretary of Defense, even described the negotiations as a 'sinister and sad tale' and a 'prostitution of the law.'").

fundamentally and irreconcilably flawed" and that it would not be ratified by the United States.[4] The letter identified two specific flaws with the treaty; its treatment of "wars of national liberation" as international armed conflicts and its grant of combatant status to some irregular forces which the letter equated to "terrorists."[5] The letter also says that "the Joint Chiefs of Staff have also concluded that a number of the provisions of the Protocol are militarily unacceptable"[6] despite the fact that the military had no issue at the time of signature. One of these concerns was separately identified as being that AP I is "too ambiguous and complicated to use as a practical guide for military operations."[7]

The President did promise that the United States would work with its allies to find ways to adopt "the positive provisions of Protocol I that could be of real humanitarian benefit"[8] including their potential application as customary international law. Despite an initial modest flurry of activity in this regard, including identification by some administration officials of parts of AP I that might constitute customary law, ultimately nothing definitive has ever come of these efforts. The authoritative law of war manual issued to the U.S. Army today, Field Manual 27-10,[9] dates from 1956, having been published the year after the United States ratified the 1949 Conventions. It thus provides U.S. forces in the field absolutely no guidance whatsoever as to which provisions of the Additional Protocols might be considered binding upon the United States (nor any information on rules contained in the

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[4] Letter of Ronald Reagan, President, United States, to United States Congress (Jan. 29, 1987), *reprinted in* 81 AM. J. INT'L L. 910, 911 (1987) [hereinafter Letter of Transmittal].

[5] *Id.* The concern about irregulars/terrorists was based on a flawed reading of Article 44. That article specifically refers back to the previous article for the definition of combatant, and Article 43 requires combatants to be under a command responsible to a state party, subject to an internal discipline system enforcing compliance with the law of war. Clearly these criteria rule out Article 44 providing protection for terrorists.

[6] *Id.*

[7] Aldrich, *supra* note 3, at 11 (quoting Letter of Submittal from Secretary of State George P. Shultz, S. TREATY DOC. NO. 2, 100th Congress, 1st sess., VII, IX).

[8] Letter of Transmittal, *supra* note 4, at 911.

[9] U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956). The manual also contains a single three-page change inserted in 1976, providing guidance on the Geneva Gas Protocol adopted the previous year. *See id.* appendix A-ii ("Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world . . . .").

various law of war treaties enacted subsequently, even where the United States is a treaty party). Meanwhile 168 other nations, including virtually all actual U.S. military allies[10] except NATO partner Turkey, have ratified AP I. The United Kingdom does not seem to have found the Protocol to be a significant problem while fighting alongside the United States in several recent conflicts. Its current military manual,[11] probably the most coherent and comprehensive document on the law of war currently available, has no apparent difficulty explaining AP I's rules. Meanwhile, the U.S. Senate has never even consented to the ratification of AP II; it is inexplicably still awaiting action twenty-two years after President Reagan's request for its approval.

On a more positive note, the United States is one of 186 countries which joined the 1993 Chemical Weapons Convention, committing itself to destroy all existing stocks. The United States is also party to the umbrella U.N. Convention on Certain Conventional Weapons ("CCW") adopted in 1980, as well as its more specific protocols placing restrictions on weapons producing non-detectable fragments ("Protocol I"), mines and booby-traps ("Protocol II"), incendiary weapons ("Protocol III"), blinding laser weapons ("Protocol IV"), and explosive remnants of war ("Protocol V").

This latter issue has received considerable global attention in the past two decades, with growing public awareness of the casualties certain weapons, particularly landmines and cluster munitions, have inflicted on innocent civilians years after previous armed conflicts have ended. Popular concern, mobilized in part by the personal efforts of individuals and non-governmental organizations, especially the International Campaign to Ban Landmines, headed by Jodie Williams, led to the adoption of the 1997 Ottawa Convention barring the use of anti-personnel mines and requiring the destruction of all existing stocks. The Convention now has 156 state parties. But while the United States no longer exports mines, and has contributed substantially to landmine clearance around the world, it has refused to join this

[10] Israel, which is often incorrectly cited as a U.S. ally in popular media, has also refused to ratify AP I. Although the United States is clearly Israel's leading supporter in the world community, the two nations are not party to a mutual defense agreement and thus are not "allies" in any legal sense.

[11] *See generally* UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004).

treaty, asserting that anti-personnel mines are essential for the defense of Korea, even though the United States has no minefields under its control there.[12]

Similar concerns have arisen over the issue of cluster munitions—bombs or artillery shells that dispense a large number of smaller explosive charges capable of killing or incapacitating personnel and lightly protected vehicles over a large area. A single cluster weapon can typically kill all exposed personnel over an area the size of several football fields. The problem with these weapons is their initial reliability; a single bomb might contain several hundred individual submunitions and in actual use between ten and thirty percent typically fail to detonate, leaving dozens of lethal remnants that can maim or kill years after a conflict has ended. Civilian casualties are still being inflicted by remnants of these weapons in Southeast Asia today, more than three decades after the U.S. withdrawal from Vietnam. The International Committee of the Red Cross ("ICRC") estimates that U.S. cluster bombs' remnants have caused over 10,000 civilian casualties just in Laos.[13] The submunitions dispensed by some bombs used by the United States in Afghanistan between 2001 and 2003 were similar in size and coloration to humanitarian relief packets dropped in the same timeframe, making their use even more problematic.

While a plausible argument can be made that cluster munitions use should be unlawful under longstanding customary law of war principles barring weapons that are indiscriminate in their effects, the international response has been focused on bringing them within explicit treaty coverage. Originally these efforts were coordinated under the aegis of the CCW process, but frustrated with U.S. opposition, 111 concerned nations adopted the approach taken to ban landmines and met outside this process, agreeing to an outright ban, known as the Oslo Convention on Cluster

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[12] U.S. Dep't of State, Fact Sheet: Frequently Asked Questions on the New United States Landmine Policy (Feb. 27, 2004), http://www.globalsecurity.org/military/library/news/2004/02/mil-040227-30050pf.htm (last visited Apr. 9, 2009).

[13] *See, e.g.*, Andrew Feickert, *Cluster Munitions: Background and Issues*, CONGRESS CONGRESSIONAL RESEARCH SERVICE, June 27, 2008, at 1, *available at* http://www.fas.org/sgp/crs/weapons/RS22907.pdf ("Cluster munitions were used extensively in Southeast Asia by the United States in the 1960s and 1970s, and the International Committee of the Red Cross (ICRC) estimates that in Laos alone, 9 to 27 million unexploded submunitions remained after the conflict resulting in over 10,000 civilian casualties to date.").

Munitions, in May 2008. The United States is now belatedly trying to achieve a less restrictive pact through the CCW process, but not surprisingly, few other nations are still interested in participating in efforts to regulate a weapon that they have already agreed to ban.

Prosecuting war crimes is another area in which the United States has largely surrendered its once leading role. Although the 1949 Geneva Conventions called upon states to exercise universal jurisdiction over grave breaches, the United States waited until 1996 to enact implementing legislation, the War Crimes Act of 1996, codified at 18 U.S.C. § 2441. Falling short of the treaties' mandates, however, the War Crimes Act limits U.S. jurisdiction to cases in which either perpetrator or victim is a U.S. national. A longstanding U.S. aspiration to have a standing court able to prosecute war criminals from around the world came to fruition with the 1998 Rome Statute of the International Criminal Court, which has now begun functioning in the Hague. After President Bill Clinton signed the treaty just before leaving office, his successor, President George W. Bush responded to conservative fears that U.S. personnel could somehow be subject to "political" prosecutions and declared that he was "unsigning" the treaty. The United States is thus not one of the current 108 state parties. This is particularly unfortunate because the Assembly of States Parties to the Rome Statute, from which the United States is thus excluded, is currently in the process of defining conduct that will constitute the crime of aggression. Having both taken the lead in prosecuting this offense after World War II, and now using military force more often than any other major power, this is an area in which the United States should be particularly interested in having a hand in developing governing law.

Despite the plethora of law of war treaties now in force, only the four Geneva Conventions have been universally ratified. It was thus entirely predictable, particularly given the failure of the United States and a handful of other conflict-prone nations to ratify AP I, that situations would continue to arise in which customary international law of war rules might still govern many aspects of armed conflicts. The ICRC therefore instituted a multi-year, multi-million dollar project to identify customary rules applicable to both international and non-international armed conflict. The resulting three-volume study was published in 2005. The U.S. government, represented by State Department Legal Advisor John Bellinger and Department of Defense General Counsel William Haynes, drafted

a critical response potentially characterized as "hair splitting," objecting in particular to the ICRC's methodology in ascertaining the state practice necessary to create customary international law.[14] While freely criticizing the ICRC's efforts, the U.S. reply made no effort to identify what specific laws of war rules constitute customary law.

This failure takes on particular significance given U.S. conduct of the so-called "war on terror" launched in response to the attacks of September 11, 2001. Although widespread support initially existed for U.S. authority to employ armed force in response to the attacks, including express endorsement by NATO and implicit U.N. Security Council sanction, the United States held that both the Taliban and al Qaeda fell outside the scope of Geneva Convention protections.[15] It was therefore logically necessary to ground U.S. conduct in customary law of war rules, but the reality is that while the United States paid periodic lip service to doing so, it essentially acted as if in a law-free zone.

Determinations of who could be detained, conditions of confinement at Guantánamo and other facilities in the United States and abroad, permissible interrogation methods, and even charges which could be preferred and trial procedure should all have been determined with explicit reference to the law of war. But the United States simply declared its captured adversaries to be "enemy combatants," a term coined in the Pentagon which does not conform with any specific classification recognized by the law of war. Essentially the United States just made up rules as it went along. Even while insisting it was committed to "humane" treatment, senior U.S. leaders sanctioned conduct ranging from sleep deprivation and stress positions to waterboarding. What is particularly perverse is that the idea for using many of these techniques came from the U.S. military's Survival, Evasions,

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[14] Letter from John B. Bellinger, III, Legal Advisor, U.S. Dep't of State & William J. Haynes, General Counsel, Dep't of Def., to Dr. Jakob Kellenberger, President, Int'l Comm. of the Red Cross (Nov. 3, 2006), *available at* http://www.defenselink.mil/home/pdf/Customary_International_Humanitiarian_Law.pdf.

[15] *See* Memorandum from President of the United States to Vice President of the United States, Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf ("[D]etermine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.").

Resistance, and Escape ("SERE") training provided to those service personnel considered at greatest risk of capture, special forces, and aviators. Yet the stated SERE mission is to prepare these combatants for dealing with the *unlawful* treatment accorded by America's recent unprincipled adversaries. These techniques were known to be ineffective at obtaining accurate information; the very reason they have been employed by U.S. enemies is to obtain *false* admissions of wrongdoing desired for propaganda purposes.

Even where U.S. conduct was most dependent on legal compliance—the trial of Guantánamo detainees by military commissions—it fell short. Even without what are widely considered to be significant procedural defects, most law of war experts agree that the very charges on which three Guantánamo detainees have been convicted, including conspiracy and providing material support to terrorism, do not even state legitimate violations of that corpus juris.

These departures from the law of war have had real consequences, undermining world public opinion in the U.S. conduct of the "war on terror," and making foreign nations reluctant to cooperate with the United States. They have also furthered the cause of America's adversaries, motivating support and even recruitment for both terrorist groups and the Iraqi resistance.

The reality is that law of war compliance is much more than a humanitarian ideal; it is also a practical tool facilitating the overall achievement of national political objectives, as American political-military leaders dating back to George Washington have long recognized. If the United States is to benefit from compliance with the law of war, it clearly is advantageous for it also to take a leading role in legal development, helping to shape the law to its overall advantage.

In hindsight, it seems likely that the roots of America's extra-legal conduct of the "war on terror" can be seen in the previous three decades' trend towards non-participation in agreements like AP I and the failure to actively define meaningful interpretations of customary law or provide updated law of war guidance to U.S. ground forces. It can only be hoped that this trend will be reversed in the future and the United States resumes its role as a leading force in both the development and implementation of the law of war.