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Rescuing the Law of War: A Way Forward in an Era of Global Terrorism

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Terrorists are gaining an astonishing legal edge over US and other armed forces deployed against them. The present trend promises to burden future generations, as well as our own, with an ad hoc, damaging legal framework sure to thwart counterterrorist operations and even furnish inducements for those tempted to join the terrorist ranks.

The long-term import of recent trends can't be overstated. The United States is surely—and not so slowly—bestowing legal status and privileges on members of terrorist organizations that have no precedent in the 3,500-year recorded history of warfare. Terrorists are acquiring legal recognition and support of a kind unavailable to members of US and other national armed forces, and for that matter unavailable to insurgents during civil conflict as well. (There are early intimations that the United States may end up unilaterally bestowing similar status and privileges on the members of opposing state forces as well as terrorist organizations.) The notion that opposing forces will ever make these unique legal privileges reciprocally available to the US armed forces simply doesn't warrant serious consideration.

This troublesome trend stems from uncertainty over how the law of war should be applied to meet terrorist threats. Though terrorism presents unfamiliar legal issues, these aren't quite as novel as they seem, and we could devise a more pragmatic approach. There is a way forward, but time is working against the establishment of an effective, national-security-focused wartime strategy for counterterrorist action. Steps need to be taken now to ensure

the survival of a realistic, useful legal framework that meets these emerging challenges.

This article briefly surveys the existing law-of-war framework before examining the problems facing commanders and policymakers alike when they try to apply these rules in military operations against terrorist organizations. It next identifies long-term hazards presented by current legal trends, and follows with a look at valuable though forgotten law-of-war lessons from US history that must be relearned in order to refocus the rules of war for the challenge of terrorism. The article closes by proposing a way forward.

The Basic Problem

A basic assumption underlying current debate on the legal status and treatment of terrorists has it that one of two paradigms controls. Either one or the other must be applied. Either the Geneva Conventions of 1949 apply in military operations against terrorists, or else the Geneva Conventions don't apply, in which case counterterrorist operations are a law-enforcement matter, and must follow rules similar if not identical to those that apply in peacetime policing and administration of criminal justice.¹ Neither paradigm fully captures the problem or offers a satisfactory solution. Nonetheless, they predominate in the current debate; this is due to misconceptions about the law of war.

The first paradigm assumes that all armed conflict is regulated by the Geneva Conventions.² If US armed forces deploy in combat, according to this line of reasoning, then their conduct is subject to the rules of the Geneva Conventions. However, these conventions (i.e. treaties) apply only to certain types of armed conflict. States have no obligation to apply them during military operations that don't fall within the categories of warfare covered by the Geneva Conventions. In fact (and as will also be shown) states are inviting serious trouble if they extend the application of those treaties to forms of warfare for which they were never meant.

The second paradigm—the one rapidly achieving dominance—holds that peacetime rules for law enforcement and criminal justice must be applied in dealing with terrorist organizations, those faced on the battlefield as well as those encountered away from war zones. This paradigm assumes that in any situation where the Geneva Conventions don't apply, the only alternative set of

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rules is that applied in peacetime; these rules being found in international human rights law and US constitutional law and criminal procedure. This influential line of thought provides the foundation for the unique legal status and combatant privileges quickly accruing to members of terrorist organizations.

From the early days of the response after 11 September, the executive branch has understood that counterterrorist operations don't easily fit within the framework provided by the Geneva Conventions and has incrementally developed strategies to address this problem. These steps offer the foundation for a third paradigm—a customary law-of-war paradigm rather than a Geneva Conventions/treaty-based paradigm—and a sensible way to proceed. Events, however, are moving too quickly for this gradualist approach to take hold and mature.

The absence of a sharply delineated customary law-of-war framework for military operations against terrorists leaves the impression (even if not the reality) of a legal vacuum. That perceived vacuum is filling rapidly with peacetime rules for law enforcement—rules entirely irrelevant to operational realities in war zones and an obstacle to responsible, reasonable efforts to ensure national security.

Treaties and Terrorism—A Legal Disconnect

A number of modern treaties regulate the conduct of hostilities, with the Geneva Conventions of 1949 providing a legal core that ensures protection for wounded combatants, sick and shipwrecked members of armed forces, medical personnel, prisoners of war, and civilians detained for security purposes in wartime, living in war zones, or under military occupation. The Conventions also establish the criteria that must be met in order to qualify as a lawful combatant taking up arms for the state.³

The Geneva Conventions, like most law-of-war treaties, were expressly adopted to regulate the conduct of *interstate* (or “international,” as it's also called) armed conflict. In other words, the protections and rules on lawful combatant status found in those treaties apply in warfare between sovereign nations. As set forth in the text of each, these treaties “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”⁴ All of the rules found in the Geneva Conventions and other law-of-war treaties apply during international armed conflict.

Aside from such interstate armed conflict, there is only one other form of warfare taken into account, in any manner, by modern law-of-war treaties. Civil war (or “noninternational armed conflict” as it's sometimes called) is regulated by a limited set of sub-rules found in the Geneva Conventions. Such conflicts, as the reader may infer, are those involving the state and

a segment of the population in rebellion, or involving private armed factions of citizens of the same nation, but not conflicts involving armed forces that wage war across national borders. Though states have shown some willingness to expand the number of rules that apply during noninternational armed conflicts, few treaties other than the Geneva Conventions have provisions that apply in such situations.⁵

That marks the boundaries of military conflict found and contemplated in law-of-war treaties. These treaties apply when the armed forces of sovereign nations engage in armed hostilities, and some sub-rules apply during civil conflicts. There is no treaty that covers (or even imagines) situations where privately organized armed forces cross international borders, stalk international sea lanes, or strike at international aviation for their own ideological or political purposes. Such conduct constitutes private international warfare, a deployment bereft of any legality under the laws of war. It simply doesn't fit.

Efforts have been made to pinpoint Geneva Convention and other treaty rules relevant to these private war scenarios, but they haven't been satisfactory because the international legal system has assimilated only interstate and internal armed conflict. It wisely isn't set up to tolerate private international warfare, and in fact rejected it long ago. Therefore, efforts to apply the Geneva Conventions in military operations against terrorist organizations are likely to generate confusion for policymakers and warfighters alike. It is important to clarify who is entitled to combatant status under existing law-of-war treaties.

Guerrillas, Saboteurs, and other False Cognates

This section of the article provides an overview of categories of combatants recognized by the rules of war. It should be kept in mind that most issues of combatant status that need to be resolved by commanders and judge advocates relate to these categories. The organizations that are characterized as terrorist due to their composition and behavior don't fall into any of these categories, and they constitute only a small component among opposing forces that might be encountered in the field.

However, terrorist organizations are also the focal point in a process of legal debate and revision that threatens to undermine a pragmatic approach to the law of war, and to create major long-term operational problems for the armed forces. For that reason, these small groups take on legal, operational, and policy significance far exceeding their numbers in the field relative to other classes of combatants.

The Geneva Conventions accord lawful combatant status only to specified groups. Anyone else taking up arms can be punished for engaging in

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hostilities. Lawful combatants include organized armed forces of sovereign states, members of other volunteer corps and organized resistance movements meeting strict criteria (e.g., carrying arms openly, following the laws and customs of war), and civilians spontaneously taking up arms on the approach of the enemy and also following the laws and customs of war.

It’s sometimes argued that organizations like al Qaeda don’t qualify for lawful combatant status because their members don’t meet such standards. They don’t wear uniforms, carry arms openly, or follow the laws and customs of war. But these factors only determine the lawfulness of military conduct in interstate warfare. In an unlikely scenario where terrorist organizations actually followed such rules (highly unlikely, as such practice would be antithetical to their doctrine and goals), they still would be acting outside the laws of war. Again, those rules make no allowance for privately waged international warfare, no matter how or why fought. In essence, being enrolled in an organized, uniformed military force is irrelevant if there’s no lawful authority for its existence or deployment.

Alternatively, it’s sometimes argued that terrorists are “unlawful combatants.” The concept of an unlawful combatant first emerged in the 19th century to encompass spies, saboteurs, and guerrilla fighters, whose mode of operations didn’t comport with established rules on military identification and overtly conducted military operations. This approach to dealing with terrorism also fails in the end. Spies, saboteurs, and guerrillas have a higher legal status than terrorists. The former may carry out operations that conflict with some of the rules of war, but they act during wartime and they’re accounted for by the Geneva Conventions.⁶ Terrorists, on the other hand, are waging private wars which aren’t accounted for by those treaties.

The last of our false cognates relates to insurgency. Though civil rebellion against one’s own government is punishable as a crime, and the participants don’t have the same legal status as combatants in an international conflict between states, there is also some legal basis for giving them quasi-legal status when they act in accordance with the laws and customs of war. However, these rules apply only during internal warfare and among citizens of that nation. They don’t apply in any manner to terrorist organizations waging international

warfare or, for that matter, to one that crosses borders to intervene in a foreign state's internal warfare.

It's understandable that efforts to address military aspects of terrorism focus on law-of-war treaties, and on a familiar taxonomy of international and noninternational armed conflict. It's been almost a hundred years since armed forces and international lawyers have dealt with opposing forces that didn't somehow fit within that framework. However, attempts to find an effective fit between law-of-war treaties and counterterrorist operations haven't worked well because such rules were never meant to apply in the situations now confronting states.

Unlawful Belligerency—A Workable Legal Framework

So far, no legal definition of terrorism has been presented here because those that exist aren't especially useful for the military practitioner, and terrorism per se isn't a useful focus for resolving the legal problems besetting counterterrorist military operations. A variety of treaties deal with terrorism in the law-enforcement context (e.g., aerial hijacking), but none address terrorism in a law-of-war framework. Though it's essential to factor in terrorist methods to devise military strategy and tactics that defeat the threat, in formulating useful rules of war for counterterrorism it actually adds nothing to do so.

Mass murder, suicide bombing, and captive beheadings are already crimes under the law of war. These crimes are wholly odious to all civilized values, but we add nothing to the clarity and utility of operational law by making such crimes the central focus. Our focus should remain on the actors themselves, rather than the shocking nature of their crimes, because that takes us back to one essential fact. Nonstate actors can never wage private international warfare, because such things are not permitted by international law.

As will be seen, this is the opening point for a pragmatic application of the law of war in operations against nonstate actors. From here, the following definition of terrorism is provided for use in law-of-war planning: Terrorists are unlawful belligerents, meaning nonstate actors whose actions, in time of peace, would qualify as armed, interstate hostilities if the same were attributed to a state; or whose conduct, in a time of legally recognizable armed hostilities, would otherwise be attributed to combatants but for the fact that they are intervening in international or internal armed conflict without legal status or authority to act as an armed force.

This concept marks the beginning of a way forward to work out the application of the law of war in counterterrorist operations. Without it, states are left with the alternative of applying the Geneva Conventions, or leaving all issues to be decided within the framework of peacetime rules for law en-

forcement. Neither of those alternatives can be adopted without risking dire consequences.

Legal Hazards

Since the Geneva Conventions don't apply to private warfare (again, they apply during interstate conflict and to a limited extent during civil conflicts only), any decision to apply them during warfare with unlawful belligerents would be a policy choice, not something required by the law itself. This would be a mistake. Such application would have the effect of re-legalizing private warfare. It took centuries for states to successfully abolish private, independently operating military forces that fought for their own ends, and their last legal vestiges vanished 150 years ago.⁷

It's not clear why it would be in the interests of a more just, peaceful world to facilitate their return now by bestowing on them the same status and protections that are granted combatants acting on behalf of, and answering to, sovereign states. We would move from a world where fewer than 200 actors (sovereign states) hold the authority to maintain military forces and deploy them for warfighting purposes, to one where there are potentially thousands of actors with real or imagined grievances (or criminal economic motives), possessed of an infinite range of objectives, who could attain lawful warfighting status by the simple expedient of crossing international boundary lines to kill or destroy by military means.

According to these private warriors the full protections of the Geneva Conventions would also have the perverse effect of encouraging insurgents in internal rebellions to take their warfare abroad, crossing into other states and international waters and airspace in order to attain the same newly exalted legal status accorded unlawful belligerents. This is a formula for chronic chaos and bloodshed in the 21st century. If current thinking prevails, however, our choice is limited to this profoundly troubling Geneva Convention option on one hand or, on the other, abandonment of the law of war altogether to resolve these issues in a peacetime context.

Recent debate and judicial decisionmaking is drawing us inexorably toward the latter option. Where historically civilian courts have had no role to play in deciding the status of enemies captured in war zones, or determining what rights they may be entitled to, or deciding when they would be released, they are taking on that role in the United States. Without exploring here the emerging case law on this issue, the reader is directed to an important recent decision by the US Supreme Court, *Rasul v. Bush*, which establishes that unlawful belligerents have a right to challenge their detention in the federal court system.⁸

This decision stems from the fact that military operations against terrorist organizations haven't been firmly placed within a law-of-war frame-

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work. Most US judges (like most of their counterparts around the world) are unfamiliar with the law of war, which has been applied infrequently in the course of American history. And, when it has been, decisions on the scope of application almost always have been made by the executive branch.

Because the application of the law of war in regard to terrorist organizations presents unfamiliar issues, the executive branch has taken a gradualist approach in adapting appropriate rules. That approach reflects an awareness of the complex legal challenges at hand, but events are moving too fast for a gradualist approach to work. In the absence of a firmly articulated, clearly delineated application of the law of war, the judicial branch is responding to requests that it resolve important legal questions related to the rights and status of captured unlawful belligerents. Judges are answering those questions with reference to the law that’s within their historical experience and responsibility, that being peacetime rules governing law enforcement, detention of criminal suspects, and due process. Those rules have no relevance to the operational facts of an international, unlawful belligerency, but such are the rules that are going to apply unless the laws of war are substituted in their place.

The present trend is beginning to arm captured members of opposing forces with a unique method of waging war even after capture. Access to lawyers and civilian courts to challenge their capture, complain about conditions of detention, or force second-guessing on executive branch decisions as to when or how administrative boards may consider matters affecting wartime captives could become highly disruptive. Such measures can force the allocation of resources and personnel to build and maintain administrative case files, distort battlefield prisoner handling procedures and tactical intelligence priorities in order to assemble evidence for newly invented legal procedures, and require the military services to pull or divert personnel from deployment to provide testimony and assist the government in litigation.

The existing rules of war provide only that an administrative hearing will be held to determine one’s status when it’s not certain if a detainee is actually a combatant. Those rules provide no right of access to civilian courts for full-scale judicial proceedings.⁹ Such judicial procedures are part of the sys-

tem where criminal law proceedings are concerned, and they are vital to the fair and proper administration of criminal justice. But they are not part of the system where the capture and detention of enemy personnel in wartime are concerned, and such is not required by the Geneva Conventions. Savvy wartime captives will make the most of these unique, newly emerging legal rights to disrupt military operations.¹⁰

With the law of war already eroding as a distinctive body of rules when applied to the battlefield capture, detention, and treatment of enemy prisoners, the next step might see courts assume judicial oversight of a kind associated with the review of activities of law-enforcement agencies. In cases involving criminal prosecution of unlawful belligerents, this could mean imposing peacetime rules on the collection of evidence. (For example, did intelligence officers act on “reasonable” information in recommending a raid that led to evidence used at trial, and, if not, should the evidence be suppressed on some theory of battlefield search and seizure?) In other instances, plaintiffs may turn to the courts to second-guess military application of targeting rules.

These scenarios may seem preposterous, but four years ago the notion that the judicial branch would assert a role in reviewing battlefield capture and detention would likewise have been impossible to imagine. There is already some hint that these procedures, so far required only in addressing unlawful belligerency, could ultimately be imposed on the US armed forces during interstate armed conflict.¹¹

The law of war can be rescued for realistic, effective application in wartime settings only if clear guidelines are quickly drawn that spell out its application in counterterrorist operations. The basis for doing so exists in a long history of forgotten, but vital, US practice.

Customary Law-of-War Precedents

To appreciate the value of some forgotten US experience, it’s important to understand that the law of war isn’t rooted in the Geneva Conventions. Rather, it’s the other way around. The Geneva Conventions are rooted in the law of war, but are only a part of it. No treaty gives a useful definition of situations that constitute armed conflict. If armed hostilities erupt, then states turn to the Geneva Conventions for guidance should the conflict involve warring states. If the conflict is internal to one state, then the subset of Geneva rules that apply during such warfare goes into effect. However, if warfare doesn’t fit that international-internal taxonomy, such doesn’t remove the conflict from the reach of the law of war. It only removes it from the reach of the Geneva Conventions.

The law of war is found partly in treaties, but also partly in customary rules. These customary rules reflect battlefield practice that over time has

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come to be accepted as obligatory on warring parties, whether or not ever written down in treaty form. (For example, the lives of prisoners captured on the battlefield must be spared; it’s illegal to issue an order that no prisoners will be taken.) The customary law of war long predates any treaties on the subject, and it applies even where other rules do not fit.

The customary law of war thus applies during counterterrorist military operations even when law-of-war treaties do not apply. The customary law of war is a dynamic, evolving component of international law and continues to fill the gap where treaties fail. Indeed, an international criminal tribunal recently recognized that the customary law of war is expanding to fill gaps in the law of internal armed conflict, since the Geneva Conventions, and other treaties, provide only limited guidance in such circumstances.¹²

Likewise, by way of practice, the Secretariat of the United Nations has determined (rightly or wrongly) that blanket application of the laws of war does not apply where nations deploy armed forces in “blue helmet” UN operations, rather than on their own behalf as warring states. The UN Secretary-General’s Bulletin on Observance by United Nations forces of international law is selective in its identification of rules of war that apply during such deployments.¹³ This is a striking example of the continued evolution of customary law, as rules are shaped to address military conflicts that may not fit within the Geneva Convention framework.¹⁴

The customary law of war offers a way forward. It can be applied in counterterrorist military operations. It is the third option, and in the long term it is more useful than the options of either applying the Geneva Conventions during unlawful belligerency, or trying to shoehorn counterterrorist military operations into a law-enforcement or criminal justice framework.

Just as military practitioners can draw useful, timely lessons from military history stretching back to antiquity, so too can policymakers and international lawyers gain valuable insight from legal issues faced and precedent developed in earlier generations. The legal challenges presented by terrorist warfare are unusual but not unique. American history offers parallels in the form of unlawful belligerency. These issues have arisen only sporadi-

cally and over a long period of time. Readers need to consider experience that may seem removed in time, but which nonetheless may be indispensable to resolving tough 21st-century problems.

The 9/11 Commission Report identified the customary law of war as an important source to consider in developing rules for military operations against terrorists.¹⁵ Customary law principles are not obvious in the same way as treaties or statutes. They can't be "looked up"; instead they must be derived from studying the historical practice of nations.

Given the unusual law-of-war issues generated by terrorism, precedents examined here are an indispensable source of insight—the building blocks that can be used by legal advisors and policymakers to determine how states have previously dealt with unlawful belligerency and to identify the legal foundation thus provided for the modern military response to terrorism. (Members of the legal profession won't hesitate to use even older judicial precedent that answers questions for them.)

These materials document US state practice in those unusual instances, spanning three centuries, where the government has had to deal with unlawful international belligerency of one form or another. It can be used to identify and firm up customary rules for military operations against unlawful belligerents in the 21st century. That experience supports two basic principles.

- The first principle: *Unlawful belligerents are never entitled to the status and protection accorded members of national armed forces.*

One of our government's first decisions about international law spelled out the fundamental distinction between rules of war applied to interstate belligerency and those applied during military action against unlawful belligerents—those being terrorists in our early 21st-century context. Even while embroiled in an uncertain war for independence, the Continental Congress took care to distinguish between the rules for maritime warfare that applied in full during interstate hostilities, and rules for the same that would apply only in modified form during military expeditions against pirates. Congress provided as follows when it adopted the Articles of Confederation (the nation's first Constitution) on 28 June 1777:

Art. 6 . . . nor shall any state grant commissions to any ships or vessels of war, nor letters of marque and reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such state be infested by pirates; in which case, vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.¹⁶

Not long after the nation achieved independence, the Attorney General of the United States further opined that in the course of one military campaign (in this case the Undeclared Naval War with France), different rules could be applied to different categories of military captives in wartime, depending on who they were and in whose service they fought:

Sir: I take the liberty of writing to you on an interesting subject, concerning which you will perhaps hear from the Secretary of State.

According to the account given in the Norfolk paper of the 15th, it seems probable that the ship *Nigre*, prize to the *Constitution*, will be found to be a pirate. If, after due inquiry (which you are requested to make, and for that purpose to go to Norfolk), it shall appear to be the case, the officers and crew, and all others on board having any agency in the ship, are to be prosecuted (witnesses excepted) in the circuit court of the United States for the district of Virginia, according to the laws of the United States, without respect to the nation to which each individual may belong, whether he be British, French, American, or [of] any other nation. . . .

On the other hand, if the ship is regularly commissioned and authorized by France as a public or private ship of war, all the officers and crew are to be detained as prisoners, at the expense of the United States—except such as are citizens of the United States, or some one of them, who may be tried for treason in adhering to, and aiding, the enemies of the United States.¹⁷

Another unusual challenge, this one involving unlawful belligerency launched from US soil, provides additional precedent from the mid-19th century. In the closing days of the Civil War, the Fenian movement for an independent Ireland gained considerable support in the United States, and in 1866 a private army crossed the US border to invade Canada in support of that cause. This private army was interdicted at the Battle of Limestone Ridge, and while most of the rank and file got away, some leaders were captured.

These leaders were tried and sentenced (some to be executed) in Canada's civilian courts. The US government conceded that these private belligerents had no claim to status or protection as lawful combatants, as laid out in a letter from Secretary of State Seward to the British government, in which he asked for mercy to be shown—but as a matter of grace, not because those held in Canada had any legal claim to wartime protections:

I frankly confess to the opinion that although statutes, executive proclamations, and judicial decisions have all concurred in treating the aggression of the so-called Fenian invaders into Canada as merely a municipal crime, the transaction nevertheless partook of a political character, and had relations and connections with the movement of that character which have widely manifested

themselves, not only in Canada and in Great Britain, but in the United States also. In dealing with all such movements it is always a practical question how far magisterial benignity can be wisely mingled with judicial severity. All experience shows that clemency to political offenders may at times be legitimately exercised with advantage for preserving peace and public order.¹⁸

Fifty years later, an American community in New Mexico was rocked by unlawful belligerency. On 19 March 1916, Francisco Villa, a leader in the ongoing Mexican Civil War, led a raiding party into the United States to attack Columbus, New Mexico, where nine citizens were killed and the town looted. Troopers from the nearby garrison of the Thirteenth US Cavalry raced to Columbus, and in the ensuing battle eight soldiers were killed in action, along with possibly 100 raiders.

Whatever law-of-war status Villa's forces may have held in Mexico while fighting in that nation's civil war, they could not lawfully cross the international border to carry out belligerent acts in the United States. Some of Villa's men were later captured by the US Army, but they were not accorded prisoner-of-war status. The aftermath to their capture furnishes 20th-century US precedent for the proposition that private international belligerents are never, under any circumstances, accorded the same status and privileges held by the armed forces of sovereign states.

The captured raiders were turned over to state authorities for trial in the courts of New Mexico, where some were sentenced to death and others to terms of imprisonment for their parts in the Columbus raid. A lawyer attempting to come to their aid appealed as follows to President Wilson:

They were . . . taken prisoners in Mexico by Pershing's expedition and were brought out of Mexico without extradition proceedings and turned over to the state authorities for punishment. They contend they are military prisoners, entitled to the protection of the United States. They have no friends, are in a strange country, and have no financial means to assert their innocence in higher court or to urge their contention that they are prisoners of war and should be so treated.¹⁹

That argument didn't persuade. When President Wilson did in fact write to Governor McDonald in New Mexico, he referred to active military operations in the field, the tense situation along the border, and concerns for the safety of US citizens in Mexico as grounds on which to "respectfully request that you consider the propriety of reprieving these men for a reasonable period of time in order that their present execution may not complicate the existing conditions in the manner stated above."²⁰ Had they been entitled to prisoner-of-war status, Wilson could have intervened and taken them into federal custody. In the absence of any basis on which to accord them such status, he had to frame his request on policy considerations alone.

- The second principle: *Unlawful belligerents captured by the United States are entitled to legal protection, but the executive branch has discretion on whether those protections come from the rules of war, or from the rules of law enforcement and criminal procedure.*

Fully compliant with 21st-century legal standards, American state practice has long established that unlawful belligerents will be accorded legal protection. Since the executive branch will decide whether the challenge is met by military or law-enforcement means, its decision weighs heavily in deciding whether their status and treatment falls under the laws of war, or the rules of law enforcement and criminal procedure.

In the early 1820s, the United States Navy carried out extensive military operations in the West Indies to subdue private maritime forces presenting a major security threat. There was some debate over what to do with them when they were captured, some suggesting that summary execution was appropriate. In 1822, members of the Congressional Committee on Naval Affairs cautioned against this:

The Committee are also of opinion that it would be inexpedient “to authorize the destruction of persons and vessels found at sea, or in uninhabited places, making war upon the commerce of the United States without any regular commission”; and that it would be inconsistent with public law or general usage to give any authority to destroy pirates and piratical vessels found at sea or in uninhabited places.

The Committee are of opinion that it would be dangerous, and productive of great evil, to vest in the commanders of our public vessels an authority to treat as pirates, and punish without trial, even such persons as above described. It is not necessary for the accomplishment of the object in view that such an authority should be given, and it is essentially due to the rights of all, and the principles of “public law and general usage,” that the consequences and punishment of piracy should follow only a legal adjudication of the fact.²¹

Unlawful belligerents were entitled to legal protection, but the government was free to choose the means of force used against them, as was asserted long after. The United States and Mexico were troubled by cross-border Indian raids in the post-Civil War period, and in 1878 the US Secretary of State sent a letter with the government’s view on legal guidelines appropriate for response to such threats to the US Minister in Mexico:

The first duty of a government is to protect life and property. This is a paramount obligation. For this governments are instituted, and governments neglecting or failing to perform it become worse than useless. This duty the Government of the United States has determined to perform to the extent of its power toward its citizens on the border. It is not solicitous, it never has been, about the methods or

ways in which that protection shall be accomplished, whether by formal treaty stipulation or by informal convention; whether by the action of judicial tribunals or that of military forces.

In 1882, President Chester Alan Arthur reaffirmed this view in his report to Congress on agreement with the Mexican authorities “for the crossing of the frontier by the armed forces of either country in pursuit of hostile Indians. . . . In my message of last year I called attention to the necessity of legislation for its suppression.” In 1890, the United States and Mexico ratified the first of three treaties that established procedures for cooperation between their military forces when engaged in such cross-border pursuit.²²

Unlawful belligerents were protected by law when captured, but the government was free to choose either military or law-enforcement methods to deal with them. If military methods were chosen, most likely because law-enforcement resources alone were insufficient to deal with the threat, then federal authorities could reasonably rely upon the laws and customs of war to guide their response. These rules could guide not only the methods of warfare employed by the armed forces, but also the post-capture treatment of unlawful belligerents. This principle is not expressly spelled out in US practice, but it is reasonable to infer as much.

The practical application of customary rules of war sometimes requires just such extrapolation. If we are going to build useful new practice, based on customary rules, in order to meet the threat of terrorist warfare and other forms of unlawful belligerency, then we need some organizing principles. We now have American state practice spanning 11 generations, continuing most recently with the Defense Department’s established administrative procedures to decide on the combatant status and release of unlawful belligerents held at the US Naval Base Guantanamo Bay.²³

This long record of practice clearly documents that satisfactory legal strategies have been adopted for other forms of unlawful belligerency, and they can be applied to address terrorist warfare as well. We already have the foundation on which to proceed.

A Way Forward

The judicial branch of government is the one least qualified to apply the laws of war and determine national security policy, but these issues are undeniably generating crucial legal questions, and the courts consider it their duty to move with rapidity when urgent issues come before them. Though an incremental approach to these issues by the executive and legislative branches reflects their appreciation of the complexities involved, this leaves a gap that the courts are quickly filling.

When applied against post-9/11 challenges, earlier American state practice arguably can be used to support either a pragmatic law-of-war approach or an utterly impractical law-enforcement approach. In the absence of a firm law-of-war framework, the courts are furnishing their own answers. There is simply no time to spare if the executive and legislative branches want to weigh in with alternative answers. The following two principles offer a way forward.

- *Terrorist warfare represents a form of unlawful belligerency that sovereign states can meet by adapting customary rules of war.*

Not all warfare is necessarily covered by the Geneva Conventions, and where it isn't, the customary law of war should apply. The 9/11 Commission observed that such rules can form the basis for an operational response to terrorism.²⁴ The executive branch needs to establish clear, firm guidelines for the application of the customary rules of war in operations against unlawful belligerents. Legal issues will arise that haven't been foreseen, but that's inherent to all military operations and they will have to be addressed as they arise. There is little time, however, to build a complete customary law-of-war framework ad hoc, and relying upon the judicial branch to sort out uncertainties in the rules of war is not an option.

- *The customary laws of war, when adapted for conflict with unlawful belligerents, must always incorporate rules of humanitarian restraint.*

Any set of customary rules of war adapted for this purpose will have to include rules for humanitarian protection of civilians and military captives. There simply is no getting around this. While certain rules found in the Geneva Conventions may not be appropriate or obligatory when dealing with terrorist organizations (e.g., the rule limiting the scope of questions that prisoners of war are obligated to answer²⁵) there are still lines that can't be crossed.

When an unlawful belligerent is captured on the battlefield, he might be questioned more searchingly than would be allowed of lawful combatants in interstate warfare who don't want to answer questions, but he is still protected against criminal abuse by the customary rules of war. The customary rules protect against crimes, such as but not limited to "violence to life and person, in particular murder of all kind, mutilation, cruel treatment and torture . . . taking of hostages . . . outrages upon personal dignity, in particular humiliating and degrading treatment . . . passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."²⁶

Outrage over atrocities committed by terrorists is an inherent civilized response, but military professionals know that the law of war is a tool

for discipline as well as protection. Commanders are responsible for maintaining professional cool in the ranks in the face of any provocation. There was once a legal notion, now archaic and never entirely accepted, that less-civilized opponents in effect waived the rules of war by their conduct, permitting the use of more brutal methods against them. That notion will never pass muster in the 21st century. There may be a temptation to think that a barbarous enemy deserves a like response, but this is an invitation to legal, moral, and political disaster. If the customary rules of war are going to be adapted for this challenge, the humanitarian component will be fixed at the core.

It is inevitable that some issues connected with unlawful belligerency will have to go before the courts.²⁷ However, judicial intervention in the law of war since 11 September 2001 already far exceeds anything ever before experienced, by any nation, in the history of warfare. It must be understood that this constitutes an experiment with no precedent anywhere.

Unlawful belligerency, whether as terrorist warfare or in some other form, may become a familiar and ugly facet of modern life. The executive branch is best equipped to devise rules for this emerging though not entirely unprecedented problem, with oversight provided by Congress. The judicial branch is least equipped to answer these questions, but has taken a rapid lead. A pragmatic response to terrorism will require the systematic presentation of a clearly articulated set of customary rules of war. These must be established without further delay.

NOTES

1. For purposes of brevity, references in this article to treaty-based rules of war are confined to the Geneva Conventions of 1949. These are Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War. However, the same line of argument presented in this article applies to other treaties regulating conduct of warfare as well, such as The Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907.

2. Armed conflict is a term found in the Geneva Conventions, and it covers a wide range of hostilities whether or not they've been initiated by way of a formal declaration of war. Hence "armed conflict" rather than "war" is preferred terminology in this article, and "warfare" is used in this article as less formal, descriptive terminology.

3. For a full description of criteria that must be met to qualify as a lawful combatant serving in the national armed forces, see Geneva Convention I, article 13; Geneva Convention II, article 13; and Geneva Convention III, article 4.

4. See article 2 of Geneva Conventions I-IV. Sovereign nations alone qualify as "High Contracting Parties." Organizations, whether public or private, are ineligible to become parties to the Geneva Conventions or other law-of-war treaties.

5. See article 3 of Geneva Conventions I-IV. This article, popularly known as "Common Article 3," is often described as a mini-Geneva Convention that applies basic humanitarian principles during noninternational armed conflict, though not the more detailed, specific provisions that apply during international hostilities. There are several legal instruments (not ratified by the United States, and therefore not binding in US planning or operations) that attempt to further develop the rules that apply during internal armed conflicts. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of

Victims of Non-International Armed Conflict (1977), and the Rome Statute of the International Criminal Court (1999).

6. See, e.g., Geneva Convention IV, articles 5, 68.

7. See Declaration Respecting Maritime War (sometimes known as the Declaration of Paris of 1856), which abolished privateering.

8. *Rasul v. Bush* 124 S.Ct. 2686 (2004).

9. Geneva Convention III, article 5, provides in part that “Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

10. Consider the Korean War’s example of captives, benefiting from treatment by US military medical personnel, who did everything they could to disrupt and undermine the work of those who tried to ensure their well-being. See Stanley Weintraub, *War in the Wards* (San Rafael, Calif.: Presidio Press, 1976).

11. “Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.” *Rasul v. Bush* 124 S.Ct. 2686 (2004) (concurring judgment).

12. “The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its respects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.” *Prosecutor v. Tadic* (Appeals Chamber-1995) 105 *I.L.R.* 519.

13. UN Secretary-General’s Bulletin, ST/SGB/1999/13, 6 August 1999.

14. The continuing moral and legal obligation of states to find ways to apply the law of war in unfamiliar settings is best summarized in a principle first established in the Hague Convention (II) With Respect to the Laws and Customs of War on Land of 1899, and slightly revised as follows in the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907. “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

15. “Recommendation: The United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.” The 9/11 Commission, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (Washington: GPO, 2004), p. 380.

16. Volume 1, *Elliot’s Debates on the Federal Constitution*, 80-81 (J. Elliot, ed., 1901).

17. Letter of 20 September 1798 from Charles Lee, Attorney General of the United States, to US District Attorney Thomas Nelson, Vol. 1, *Opinions of the Attorneys General of US* at 85 (1798). It turned out that the ship in question was actually an English privateer, and the US government paid an indemnity for unlawful capture.

18. *Papers Relating to Foreign Affairs: 1868*, 425 (Part 1, 1869), p. 426. Ultimately the British authorities commuted their sentences and sent them home.

19. Vol. 36, *The Papers of Woodrow Wilson*, p. 566 (1981).

20. *Ibid.*, pp. 653-54. Governor McDonald disagreed and sentences were carried out.

21. *Naval Affairs*, Volume 1, *American State Papers*, 788 (W. Lowrie and W. S. Franklin eds., 1826).

22. See J. B. Moore, 2 *Digest of International Law* 418-424 (1906) and 9 U.S.T.S. No. 233, 234, 237.

23. See, e.g., DOD Memorandum, 14 September 2004, “Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba.” “Enemy combatant” is the term employed by the United States to describe captured unlawful belligerents.

24. See note 15, above.

25. “Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.” Article 17, Geneva Convention III.

26. Common Article 3 (see note 5, above).

27. The question of determining the dividing line between application of the rules of war and peacetime rules for law enforcement when unlawful belligerents are detained away from the battlefield already has raised important constitutional questions that require judicial review. Consider, e.g., the ongoing Padilla case.