



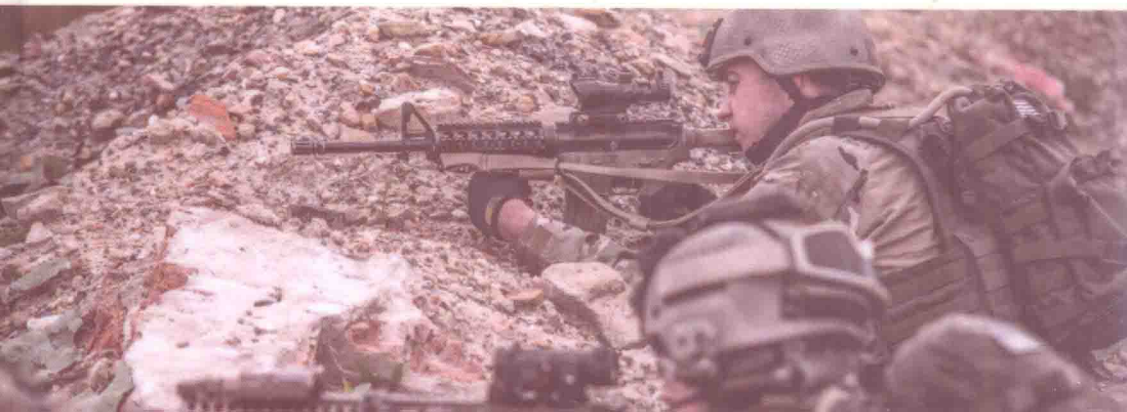
TERRORISM AND GLOBAL JUSTICE SERIES

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The War on Terror and the Laws of War

SECOND EDITION

A Military Perspective



The War on Terror and the Laws of War

A MILITARY PERSPECTIVE

Second Edition

Geoffrey S. Corn

James A. Schoettler, Jr.

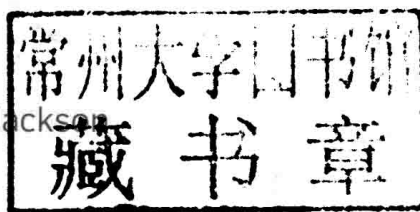
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Foreword by Major General Charles J. Dunlap, Jr.
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We would each also like to thank our research assistants. Without these devoted and exceptional students, this project could never have come to fruition as efficiently as it did.

Finally, we would like to thank the editors at Oxford University Press. The polish they put on our work will undoubtedly make the experience of reading these pages much more pleasant.

List of Treaties and Sources Frequently Cited in this Book

API Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 4.

APII Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 610.

AP Commentary INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987).

CCW Convention on Prohibitions or Restrictions on the Use of Certain Convention Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 163.

Declaration of St. Petersburg Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29, 1868 (Dec. 11), 18 MARTENS NOUVEAU RECUEIL (1e ser.) 474, translated and reprinted in 1 AM. J. INT'L L. SUPP. 95 (1907).

GCIV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516.

GCIV Commentary INT'L COMM. RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1958).

Geneva Protocol Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

GPW Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 UST 3316.

GWS Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114.

GPW Commentary INT'L COMM. RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (1960).

GWS Commentary INT'L COMM. RED CROSS, COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (1952).

GWS-Sea Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, 6 UST 3217.

Hague IV Hague Convention (IV) Respecting the Law and Customs of Law on Land with annex of regulations, October 18, 1907, 36 Stat. 2277, 1 Bevans 631.¹

Hague IX Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, October 18, 1907, 36 Stat. 2351, 1 Bevans 681.

¹ In this book, references to articles of Hague IV are references to the regulations annexed thereto.

Foreword to the Second Edition

CICERO FAMOUSLY OBSERVED that “In times of war, the law falls silent.” However true that may have been in ancient Rome, it is certainly not so today. The events of 9/11 kicked off a robust and ongoing debate about the law applicable to the transnational nonstate terrorist groups who pose such a serious threat not just to the physical security of the citizenry of the United States and other nations, but to the efficacy of the rule of law itself.

The dangerousness of these terrorists groups has in many instances necessitated the resort to armed forces organized, trained, and equipped for a different kind of opponent. Aligning the law to the array of new activities the military finds itself performing brings to mind the metaphor of “building the airplane while flying it.” Rather than being silent, the law in the time of today’s conflicts literally “shouts.” The question becomes: Is it shouting the right answers?

Unsurprisingly, the legal debates initiated by 9/11 have hardly diminished since the publication of the first edition of this book. Nations around the globe struggle to reconcile a legal architecture drafted largely with state-on-state conflicts in mind. Even when one considers such treaties as Additional Protocol II to the Geneva Conventions, which was aimed at non-international armed conflicts, we are still confronted with law that mainly contemplates belligerents different from the most dangerous transnational non-state terrorist groups who bedevil security forces today.

The harsh truth is that unlike traditional conflicts—international and non-international alike—there is no end of terrorism in sight. Indeed, the melancholy reality

is that there may not *ever* be an end. This produces a legal environment that if not completely unprecedented, is nevertheless fraught with a myriad of legal questions.

The fact is that despite the evolution of the law since 9/11, practitioners continue to be faced with complex legal issues many of which are—still—of first impression. Unfortunately, many practitioners lack the time to do the kind of in-depth research and thinking that these intricate issues require. Naturally, they frequently will look to the academy and other nongovernmental entities to build the intellectual infrastructure that they know they need to solve the legal dilemmas they face.

Therein, however, we find the critical issue: Do these “legal infrastructure builders” really have a sufficiently robust understanding of people, weaponry, and warfighting contexts to address the issues in such a way that they will have the legitimacy and logic that resonates with consumers of legal advice?

Too often the answer is no. In fact, as these issues have gained greater prominence, an increasing number of international law scholars have entered the fray. Some have educated themselves to the all-important context, but many of them are not as conversant as they need to be of the environment in which the legal issues play out. Put another way, some do not know what they do not know.

The second edition of this book is meant to carry on the critical mission of providing an unabashedly *military* perspective to the ongoing dialogue about the law. This is not to say, necessarily, that this unique perspective carries the imprimatur of infallibility simply because of the soldier-scholar status of this volume’s authors; rather, it is to suggest that the absence of consideration of the military perspective means that any legal analysis is, by definition, incomplete.

Decision-makers and, especially, the executors of decisions deserve better. Even if one were to consider and reject the approaches these authors suggest, the final product nevertheless would be better for the intellectual rigor that consideration of their views would mandate.

What is more is that polls show that the American public evinces more trust in the armed forces than any other institution in our society, so it is vitally important that the perspective this book uniquely provides be taken into account as legal policies and interpretations are produced. Only in this way can we ensure that in the years ahead we provide advice that holds firm to our values and principles, yet also solves the real-world needs of those we send in harm’s way as well as meeting the expectations of the American public writ large.

Charles J. Dunlap, Jr.

Foreword to the First Edition

HISTORIANS LIKE TO speak of revolutions in military affairs to describe the dramatic evolutions in warfare that technology and other developments produce at various points in warfare. While the remarkable rise in the prominence of law in war in recent years might not be quite as impressive as, say, the invention of gunpowder on armed conflict, the effect of law in twenty-first century conflicts is nevertheless quite extraordinary, a reality understood by the military profession. An iconic example of this recognition came from General James L. Jones, USMC, then the commander of NATO, and now in retirement heading the United States' National Security Council. In 2003, he remarked 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."¹

Why is this? As I have noted for many years, the reasons are manifold. The rise of globalized commerce with its insistence on legally binding arrangements—not to mention an ever-expanding number of international legal forums to resolve disputes—all serve to normalize law as a feature in international affairs to an unprecedented degree. Add to this the emergence of information technologies that enable the near instantaneous communication around the world of incidents that raise legal issues and it is readily apparent how law gets the attention it does these days. Indeed, that such developments infuse law

¹ Lyric Wallwork Winik, *A Marine's Toughest Mission* (Gen. James L. Jones), *PARADE MAG.*, Jan. 19, 2003 available at http://www.parade.com/articles/editions/2003/edition_01-19-2003/General_Jones.

into almost every aspect of modern war much as it has penetrated virtually every other aspect of contemporary life, is hardly surprising.

Clearly, evaluating the propriety of twenty-first century military operations requires a sophisticated understanding of the law of war, an understanding made all the more complicated by the rise of nonstate actors who operate transnationally and use terrorism as their principal weapon. Of course, there are a significant number of experts skilled in the history of the development and delineation of the meaning of the law of war. Moreover, a growing body of scholarship seeks to discuss the conceptual application of the law of war to terrorists in various situations.

However, in practice, the law of war—like other legal disciplines—much depends upon the ability to appreciate the factual context in which the law must operate. For the practitioner, understanding the “facts” of military operations can be quite daunting. The military “client” is engaged in a “business,” so to speak, that is fundamentally unlike most human endeavors. It involves extraordinarily intricate and unique technologies, as well as complex psychological interactions all designed, in the final analysis, to facilitate—when necessary and unavoidable—the melancholy task of killing other human beings.

The volume you are holding aims to bring to the discussion the perspective of lawyers who have served in what the Supreme Court in *Parker v. Levy*² calls the “specialized society separate from civilian society” that is the armed forces. By virtue of their military service in this “specialized society,” these attorneys bring a unique perspective to the law of war questions that bedevil decision-makers at every level attempting to deal with the threat of terrorism. This mindset is derived not only from the academic exploration of the law, but perhaps more importantly from years spent developing expertise in the context in which the law is intended to apply. This context, I submit, is an essential component in developing a genuine appreciation for the purpose and objectives of the law, which in turn is essential to critically analyzing the role of this law in the emerging realities of warfare. In short, the collective experience of these authors in the art of war—understanding the weapons, tactics, and, especially, the psychology of warriors on a nontraditional battlefield—enables the authors to provide an often overlooked perspective on these increasingly complex and important legal issues.

The linkage of a technical understanding of the law of war with the actual practice of war is vital. I can well recall a symposium of highly regarded civilian international lawyers convened in the aftermath of the Kosovo conflict. Almost to a person, these law-of-war experts were critical of what they understood to be the American practice of conducting air operations at altitudes no lower than 15,000 feet. They were convinced that what they thought was “high-altitude” bombing was the cause of what they took to be excessive civilian casualties.

² *Parker v. Levy*, 417 U.S. 733, 744 (1974).

What was striking is that for all their legal erudition, virtually none of these lawyers had a real understanding of the technology of modern warplanes. They simply did not comprehend that lower altitude strikes were typically less precise than those conducted at altitudes that optimized sophisticated targeting equipment. In addition, they did not appreciate that lower altitudes not only unnecessarily increased risk to the pilot, but also to those on the ground who could find themselves in the path of a 20-ton, fuel- and weapons-laden aircraft shot out of the air to tumble out of control into whatever happened to be in its way.

This is not to suggest that only those with military service should advise the military and the civilian authorities on law-of-war matters. On the contrary, the explosion of interest in this field has produced a rich landscape of critically important scholarship, debate, and commentary. However, it has and will remain critically important that those who wade into these murky waters remain cognizant of the reality that their conclusions will ultimately inform the development of law that must be applied by belligerents. Because of this, a keen understanding of how the law of war is implemented by warfighters in today's battles against terrorists and extremists, a heretofore under-represented viewpoint in the contemporary scholarly landscape, can only contribute to the advancement of the law. This book seeks to provide a military perspective on the difficult task of ensuring adherence to the law under circumstances hardly imaginable only a decade ago.

The practical impact of law on the war on terror is also well understood today. No observer of the post-9/11 era fails to recognize that the most serious setbacks for the American military involve not an adversary's battlefield successes, but rather alleged violations of the law by the United States' own forces. But this was no revelation for the profession of arms. For members of the American military profession who came of age in the era between Vietnam and September 11th, the significance of legal legitimacy at the strategic, operational, and tactical levels had become virtually axiomatic. These professionals understood what Professors Michael Reisman and Chris T. Antoniou rightly pointed out in their 1994 book *Law of War*—that popular modern democracies will not support military operations “no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.”³ Professor William G. Eckhardt articulated a similar view in terms intuitive to the military professional: the legality and morality of military operations are, in strategic terms, a “center of gravity” for the United States and other nations who embrace the rule of law.

The first line of defense of such a center of gravity is to ensure that one's own forces follow the law, and to be able to prove such observance. And the first “fighting position” in that line of defense is to ensure that a pragmatic understanding of when, why, and

³ W. MICHAEL REISMAN & CHRIS T. ANTONIOU, *THE LAWS OF WAR* xxiv (1994).

how the law applies to combat operations—an understanding informed by the realities of military operations—drives the evolution of the law.

The War on Terror and the Laws of War: A Military Perspective is especially timely and apt because it squarely addresses some of the thorniest issues of recent years. While it will be a prized refresher for many military practitioners, its greatest value may be as a source for those without a military background who may nevertheless wish to inform their analysis with a complete range of views. Because it does not shrink from tackling the toughest topics, some assertions in this book may generate strong dissents from the reader (including the reader in uniform). Yet as everyone steeped in the advocacy system appreciates, truth emerges from the reasoned analysis of conflicting views well presented and skillfully articulated. This book gives you just such a presentation of the military perspective.

Major General Charles J. Dunlap, Jr.

United States Air Force

April 2009

Washington, DC

Introduction

THIRTEEN YEARS AFTER the United States initiated a military response to the terrorist attacks of September 11th, 2001, the nation continues to prosecute what it considers an armed conflict against al-Qaeda. During this time, interpretations of legal authorities related to every aspect of this armed conflict have evolved substantially. Nonetheless, the core premise has remained constant: an armed conflict exists between the United States and al-Qaeda-associated forces.

This premise is itself highly controversial. To this day, a large number of states and many international legal experts contest the validity of characterizing a struggle against a terrorist organization (if that label is even legitimate), even when operating transnationally, as an armed conflict. There is little dispute that the struggle against the Taliban in Afghanistan qualifies as an armed conflict, and that therefore operations against terrorist belligerents *in that domain* fall within the scope of that recognized armed conflict. However, it is clear that the United States neither considers its armed conflict with al-Qaeda to be derivative of the distinct armed conflict against the Taliban, nor restricted to the geographic boundaries of Afghanistan.

Nonetheless, it is clear that the term “war on terror” is legally and operationally overbroad and misleading. President George W. Bush and his senior administration officials used that characterization in the aftermath of September 11th, but it is doubtful that even in the early days of this struggle the scope of this armed conflict was conceived so broadly. Instead, it is more likely that the terminology was initially used to signal a fundamental shift in the way in which the United States would respond to this