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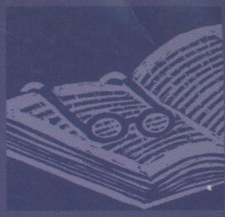

PRINCIPLES OF

Counter-Terrorism Law

JIMMY GURULÉ
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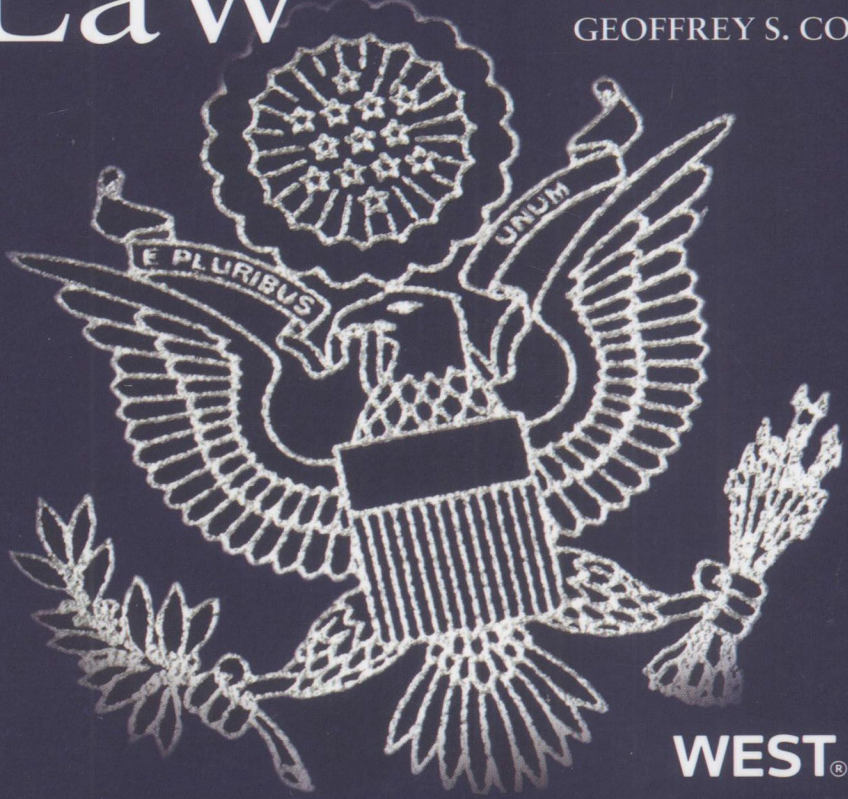

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PRINCIPLES OF COUNTER-TERRORISM LAW

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Preface

Master Sergeant Horvath: "Sir, what are your orders?"

Captain Miller: "We have crossed some strange boundary here; the world has taken a turn to the surreal."

Master Sergeant Horvath: "Clearly, but the question still stands."[1]

In the film *Saving Private Ryan*, this exchange takes place on a bridge in Normandy between Captain Miller (the character played by Tom Hanks who was charged with the mission of finding Private Ryan and bringing him out of hostilities), and Miller's senior non-commissioned officer Master Sergeant Horvath. Miller is trying to decide how to deal with something he never expected: Private Ryan, having been informed of the death of his three brothers, refuses to obey Miller's order to get to the rear and return home and demands to remain in combat to fight alongside his beleaguered and outnumbered comrades as they struggle to hold the critical bridge and protect the allied beachhead. Miller is confronted with the dilemma of how to respond to Ryan's determination *not* to save himself and spare his mother the anguish of possibly losing her fourth son in combat—a situation that no one in the chain of command that ordered the rescue—including General Marshall—had even contemplated.

The sentiment expressed by Captain Miller in the face of a wholly unexpected turn of events is in many ways a parable for the dilemma confronted by the United States following the terrorist attacks of September 11th, 2001. The nation, and in particular the political leadership of the nation, was confronted with the dilemma of how to respond to a threat that had manifested itself in a manner and magnitude that had not been effectively contemplated.[2] On that day, the world indeed did seem to have taken a turn for the surreal, but as Master Sergeant Horvath emphasized to Captain Miller, this in no way obviated the necessity for decisive action. How the United States would respond to the threat of future attacks from international terrorists, and more specifically how domestic and international law influenced that response, is the focus of this text.

1. Saving Private Ryan, (October 8, 1998), http://www.imdb.com/title/tt0120815/.

2. It is of course true that substantial criticism has been leveled at the government for failing to adequately anticipate and prepare for the type of terrorist attacks that occurred on September 11th. Indeed, substantial controversy surrounds the failure to do so. However, this in no way alters the reality that the nation was not prepared for the level of magnitude of these attacks, nor that these attacks came as a tremendous shock to the people and the leaders of the United States and many other countries around the world.

The terror attacks of September 11, 2001 were unquestionably the most effective, destructive, and terrifying in modern history. Although the threat of terrorism was nothing new, never before had a terrorist group inflicted such widespread and catastrophic damage on its selected victim. What made the attacks seem even more remarkable and the day even more surreal was the selected victim—the United States. To the shock and dismay of almost the entire world, the most powerful nation in the world had fallen into the crosshairs of a terrorist plot of unprecedented scope and ferocity.

On September 21, 2001, ten days after the most destructive terrorist attack in United States history, President Bush addressed a Joint Session of Congress. The President placed the American people on notice that the United States would employ every element of national power, including military power, to detect, disable, and defeat the threat of international terrorism:

> On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars, but for the past 136 years they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war, but not at the center of a great city on a peaceful morning. . . .
>
> Americans have known surprise attacks, but never before on thousands of civilians. All of this was brought upon us in a single day, and night fell on a different world, a world where freedom itself is under attack.
>
> Americans have many questions tonight. Americans are asking, "Who attacked our country?"
>
> The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda . . .
>
> There are thousands of these terrorists in more than 60 countries.
>
> *Our war on terror begins with al Qaeda, but it does not end there.*
>
> It will not end until every terrorist group of global reach has been found, stopped and defeated.[3]

No other event since the fall of the Berlin Wall and the end of the Cold War has shaped the national security policy of the United States

3. *See* Transcript of President Bush's address to a joint session of Congress on Thursday night, September 20, 2001 (emphasis added), *available at:* http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/.

more profoundly than the terror attacks of that tragic day. Almost immediately following these attacks, it became clear that the United States would leverage every instrument of national power to detect, disrupt, and when possible destroy international terrorists and the resources necessary for their operations. This represented a profound philosophical shift in national security policy. On September 10, 2001, the threat of terrorism, while undoubtedly understood as genuine and significant, was viewed almost exclusively through the lens of law enforcement. Criminal investigation and prosecution were the predominant tools in the arsenal of counter-terrorism. Even that term—counter-terrorism—reflected a mentality that terrorism was a reality that had to be managed. By September 12, 2001, that philosophy changed dramatically. Literally overnight terrorism, and in particular international or "transnational" terrorism, had manifested an order of magnitude that justified and necessitated a more proactive and aggressive response—a response intended to not merely counter terrorism, but defeat it. The most significant aspect of this reaction would be the invocation of wartime legal authority to achieve this critical national security objective.

But the attacks of September 11th also revealed two fundamental dilemmas that have and will likely continue to generate legal uncertainty and debate for years to come. First, where does terrorism fit within the continuum of international threats? Second, if certain terrorist threats necessitate the invocation of war powers, where is the line between the law enforcement and the wartime components of this struggle to be properly drawn? The two distinct responses to this threat that defined the pre and post September 11th U.S. policy in many ways reveal an unavoidable reality: transnational terrorism straddles a line between the threat posed by traditional organized criminal activity and that posed by armed, organized, and committed military forces. It is therefore unsurprising that both the law enforcement and military responses to terrorism are almost inevitably doomed to be both under-inclusive and over-broad.

National security involves leveraging every possible component of national power in order to achieve the security objective. The mnemonic DIMEC represents the components of national power that the government seeks to leverage in this process. Each of these letters represents an important source of that power: D for diplomacy; I for intelligence; M for military; E for economic, and C for criminal. Using each of these sources of national power in the effort to disrupt or defeat the terrorist threat is a complex and challenging process. One factor that adds to this complexity is that the use of these components of national power implicates both domestic and international law. The study of terrorism law is therefore the study of how these sources of law authorize or constrain the leveraging of these components of national power, and how policies for the purpose of achieving the

objective of protecting the nation from this threat have evolved within this legal framework.

The purpose of this book is to explore the relationship between law and national security policy as it relates to responding to the threat of transnational terrorism. This requires analyzing the U.S. response to this threat through three primary modalities: first, military response; second, criminal law enforcement response; and finally, economic response. Each of these response modalities offers certain advantages and disadvantages in this struggle. More importantly for purposes of this text, each of these modalities implicates a fundamentally different legal framework. How each of these legal frameworks has been understood and applied by the United States to date will be the primary emphasis in the chapters that follow.

Understanding the impact of the law related to the response to terrorism must begin with an understanding of the fundamental difference between a peacetime and wartime exercise of national power.[4] In many ways, these differences came to define both the post September 11th U.S. response to transnational terrorism and the criticisms that response triggered—criticisms that continue to this day.

These two broad legal frameworks involve distinct authorities and obligations. At the most fundamental level, the peacetime legal framework is based on an assumption that respect for the law is the norm, and violation the exception. This assumption drives the entire criminal law model, which is focused on deterring and when necessary punishing the wrongdoer. Deprivations of life and liberty pursuant to this model are therefore always based on individualized justifications. While criminal law has been used to deal with the threat of terrorism since that threat became a reality of the modern strategic environment, its effectiveness has always been stressed by two realities. First, criminal law is fundamentally responsive or reactionary. After the commission of a crime, the alleged offender is apprehended, charged with the relevant criminal offense or offenses, prosecuted, and punished. Second, the ability to prevent terrorism through criminal investigation and prosecution has always been limited to its deterrent effect. Deterrence, however, in relation to terrorism has proven to be of limited effectiveness. In fact, the entire concept of terrorism is often defined by a quite rational decision by terrorist operatives to engage in activities with full knowledge of the risk of criminal sanction or, in the case of suicide bombers, the intention to die for the terrorist cause. Of course, in the latter scenario the threat of criminal punishment has no deterrent value whatsoever. In short, the effectiveness of criminal law as a response to terrorism has been perceived as increasingly strained,

4. *See generally* Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict* (forthcoming in the Journal of International Legal Studies), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511954.

particularly by highly organized and well armed terrorist groups like al Qaeda.

The limited effectiveness of normal criminal sanction vis-à-vis terrorists has produced a trend in the United States to adjust criminal laws to be more preventive than responsive. The primary tool in the contemporary criminal law arsenal for dealing with terrorism, the federal offense of providing material support to terrorism, is the principal manifestation of this adjustment. But this has also generated significant questions as to the legitimacy of this law and whether it infringes on fundamental constitutional values including First Amendment freedom of association and Fifth Amendment due process protections. Irrespective of these questions, the increasing reliance on the material support statutes indicates the perceived limits of the traditional crimes for punishing the actual perpetrators of terrorist acts as an effective tool to deal with the terrorist threat.

This offense also reveals another fundamental tenet in the U.S. struggle against terrorism: the recognition that depriving terrorists of resources is essential for success. To that end, another front has gained increasing significance in this battle: the freezing and seizing of financial assets.[5] A robust body of U.S. law now enables the federal government to investigate, track, and freeze or seize assets connected with terrorist organizations. These laws, which will be discussed in detail, involve the coordinated leverage of intelligence, economic, diplomatic, and criminal components of national power. Perhaps the most complex and least understood front in this struggle, any genuine understanding of terrorism law necessitates understanding how the United States uses this power to deny terrorists the resources needed to execute their agenda.

Further, Congress has enacted several important statutes authorizing civil liability for personal injury or death caused by acts of international terrorism. Civil causes of action benefit the victims of terrorism by affording them the remedies of American tort law against the actual perpetrators of terrorist acts as well as their financial sponsors and facilitators. While the prospect of large civil monetary judgments may arguably have minimal or no deterrent value for the actual perpetrators of terrorist attacks, such causes of action may deter secondary actors such as corrupt charities and banks from providing and collecting funds or providing financial services to foreign terrorist organizations. However, as will be discussed in later chapters, plaintiffs face enormous legal obstacles to the enforcement of civil monetary judgments against the aiders and abettors of terrorist acts.

These components of national power were, however, all operative leading up to the terror attacks of September 11th. In spite of this,

5. *See* Jimmy Gurulé, Unfunding Terror: The Legal Response to the Financing of Global Terrorism (Edward Elgar 2008).

those attacks led to the almost immediate conclusion that the nation had not fully leveraged its power to protect itself from a terrorist threat of unprecedented proportions. In the weeks and months following September 11th, the United States adopted a radically new approach to dealing with this threat: Terrorism was classified as an "armed attack" triggering the inherent right of self-defense as defined by the Charter of the United Nations. The significance of this classification soon became clear as the United States launched Operation Enduring Freedom, a large-scale military assault on the Taliban forces in control of Afghanistan and the al Qaeda operatives that were using Afghanistan as their safe haven and base of operations.

It soon became apparent that the primary responsibility for dealing with this terrorist threat had shifted from law enforcement agencies to the Department of Defense, and that shift ushered in an entirely new paradigm for defending the nation against the threat of transnational terrorism. Although the military had been used previously in very limited engagements against terrorist base camps, and more commonly in a support role for law enforcement agencies, the United States had never characterized the struggle against terrorism as an armed conflict with all the rights associated with successfully waging war. But when President Bush, followed in close order by Congress, decided to treat this threat as an armed attack and to employ "all necessary force" to respond to this threat, the role of the military ceased to be supportive of law enforcement activities; primacy had clearly shifted to the military response, a response that became an armed conflict in its own right.

The significance of this characterization was profound: the United States had invoked an entirely new legal framework for dealing with the threat of transnational terrorism. By treating the response as an armed conflict, the United States signaled an invocation of the international law of armed conflict (LOAC) as a source of authority to target, detain, and punish the terrorist enemy. Because, however, this body of law had neither contemplated nor accounted for treating a transnational non-state entity as an enemy within an armed conflict framework, the characterization would spawn an avalanche of criticism based on the legal uncertainty associated with trying to fit the proverbial square peg of terrorism into the round LOAC hole. When the United States announced that it was establishing a long-term preventive detention facility in Guantánamo Bay Cuba, it became abundantly clear that the characterization of the struggle against terrorism was in fact directly related to an invocation of legal authority that would enable the United States to take a far more aggressive and preventive approach to the threat.

One of the primary objectives of this book is to expose the reader to the legal issues associated with this characterization, and why these issues produced such controversy. However, it is initially important to

understand the fundamental distinction in the authority available for the United States to respond to the threat of terrorism implicit in the characterization of this struggle as an armed conflict. Unlike the peacetime legal framework, the armed conflict/wartime framework is based on a different foundation which triggers a package of authorities related to achieving a fundamentally different effect. The law related to the regulation of armed conflict is premised on the assumption that an armed opposition group intends to cause violent harm to a State's military forces. This in turn produces a presumption of hostility that justifies resort to force-often times deadly force-as a measure of first resort. As a result, resort to force during armed conflict is not based on assessment of whether the object of that force represents an actual threat, but is instead based on a determination that an individual falls within the status of enemy belligerent. This presumptive authority to employ force against individuals determined to be part of armed opposition groups continues until the individual effectively disassociates himself from that group, normally through surrender (how this can be achieved by a terrorist operative remains an elusive question to this day).

Once opposition personnel are captured, their treatment reveals another critical distinction between the peacetime legal framework and the armed conflict legal framework. It is a fundamental tenet of criminal law that individuals are presumed innocent until proven guilty beyond a reasonable doubt, and accordingly are presumptively entitled to liberty unless and until their guilt has been established to that legal standard. Furthermore both due process and fundamental human rights law require that individuals alleged to have engaged in criminal misconduct be promptly charged and that the charges be adjudicated in a prompt timeframe before an impartial and independent judicial tribunal.

In contrast, individuals captured in the context of an armed conflict are treated according to a different presumption. Their association with armed opposition groups triggers a presumption of threat that justifies their preventive detention until hostilities have terminated, or in certain situations until the detaining power is satisfied that the individual no longer poses a threat of returning to hostilities. In certain types of armed conflict this presumptive authority to preventively detain is implemented through the concept of prisoner of war status. But as will be explained in later chapters, this status is reserved by international law to only certain individuals engaged in certain types of armed conflicts. The most fundamental requirement of entitlement to prisoner of war status is association with state authority. Accordingly, individuals detained pursuant to a determination that they are sufficiently associated with non-state hostile groups are conclusively excluded from prisoner of war status. The question that arose when U.S. forces began to capture alleged al Qaeda operatives was

whether these individuals could nonetheless be subjected to a LOAC preventive detention regime. For the United States, the answer to this question was never seriously in doubt. What became far more complex however, was whether these non-POW detainees (originally designated unlawful enemy combatants and subsequently re-designated unprivileged belligerents) were entitled to any substantive or procedural protections in relation to their detention, and if so the content of these protections.

In many ways this is a narrative that continues and will continue to be written. Contrary to the hopes of many of the supporters of candidate Obama, President Obama does not appear to be willing to abandon the wartime model for dealing with transnational terrorism. Instead, like his predecessor President Bush, he has continued to invoke all components of national power, including the military component, to deal with differing aspects of the struggle against transnational terrorism. It is therefore apparent that anybody who seeks to gain a genuine understanding of the law related to the struggle against terrorism, and in particular how the United States has and ostensibly will execute operations pursuant to that law, must gain an appreciation of the law that guides the invocation of the four core components of a national power related to this struggle: military, criminal, economic, as well as civil causes of action.

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Professor Jimmy Gurulé

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