



NEWPORT PAPERS

A Series of Point Papers
from the Naval War College and the
Navy Warfare Development Command
For Senior Leadership
In Response to Critical Issues

Strategy / CONOPS / Doctrine / Decision

United States Naval War College
Navy Warfare Development Command
Newport, Rhode Island

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Newport Papers

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**HOW NOW SHALL WE FIGHT?
THE RELEVANCE OF THE LAW OF ARMED CONFLICT TO THE UNITED STATES
AND ITS COALITION MEMBERS IN LIGHT OF THE TERRORIST ATTACKS OF 11
SEPTEMBER 2001.**

*[I] nternational law is not a static body of rules but rather a living creature, continually forged and shaped to serve the needs of an international community that itself is constantly changing.*¹ Horace B. Robertson, Jr.

Purpose: This paper addresses three issues regarding LOAC relevance and its impact on how we are to fight this new war. First, it analyzes what has changed on the battlefield since the terrorist attacks of September 11, 2001. Second, it discusses the issues such changes have created. And third, where appropriate it suggests changes to make the LOAC more relevant to U.S. war conduct in order to afford operational commanders an improved framework to use in armed conflicts.

Discussion: The United States is a nation governed by the rule of law, applying both domestic and international laws to arrive at a balance that maintains a free and ordered society. As a whole, the international community is organized around a body of laws that apply, in varying degrees, to the entire international community in an attempt to maintain order worldwide. However, the terrorist attacks against the United States on September 11, 2001, have signaled that the idea of a Westphalian state with a peaceful coexistence is a thing of the past. The subsequent actions of the United States, coalition partners, and enemy forces in Afghanistan present situations never before encountered in an armed conflict. As a result, the United States must examine whether application of the Law of Armed Conflict (LOAC) is still relevant to the wars we are fighting, and make necessary adjustments so that operational commanders will have a legal framework that is current and appropriate to helping them maintain superiority on the battlefield.

What Has Changed on the Battlefield Since 9-11?

Advances in technology require special operations forces to be within eyes-on range of the enemy for laser targeting. CIA agents (usually non-combatants) are also close to the action and reportedly operating Unmanned Aerial Vehicles (UAVs) equipped with missiles. U.S. Special Forces have been photographed in Afghanistan sporting beards and civilian clothes while holding their weapons.² Some foreign forces are fighting without wearing distinctive insignia (al-Qaeda, Northern Alliance, tribal/war lord forces¹), and some forces are swapping sides to avoid capture. While complying with the LOAC³

¹ The status of the Northern Alliance and tribal warlords would not be as troublesome if they wore a distinctive sign recognizable at a distance and obeyed the LOAC. The Geneva Convention of 1949 definition of lawful combatants includes "organized resistance movements to a party to the conflict that are under responsible command...." GPW, art. 4; GWS, art. 13.

(with exceptions for provisions the U.S. believes do not reflect the current nature of the LOAC²), the United States is fighting a non-state terrorist organization that does not observe the LOAC and is allied with the Taliban military, and the status of each as combatants is unclear. The U.S. is therefore at a disadvantage operating within a legal box where the enemy is not similarly constrained. At issue are whether the respective parties to the conflict adhere to the LOAC, whether the respective parties qualify as lawful combatants, and the treatment to which detainees (dependent on status) are entitled. Peripheral issues of documenting war crimes and LOAC violations are inextricably tied to these issues as well.

The issue of the status of participants to an armed conflict and the required treatment if captured arises on both sides of this war. News reports and photographs indicate that there are Central Intelligence Agency (CIA) agents in the war zone in Afghanistan who are not only collecting intelligence, but may be acting as combatants. While the CIA is authorized under Executive Order 12333³ to assist other U.S. Federal agencies, including the Department of Defense, if CIA agents are serving in a war zone as combatants, their current status is less than clear. Where there is no indication that the agent(s) in question carry weapons openly, wear a distinctive insignia, and are not armed forces under the responsible control of a military commander, they are probably not lawful combatants. The CIA might ordinarily involve itself in intelligence gathering, a non-combatant role, but not be carrying on a side-war with high-tech weapons. In this case, however, the CIA agents in the field appear to be packing more than just weapons for personal protection.⁴

New Issues on the Battlefield

With the realization that not all parties in the current armed conflict will obey the LOAC, operational commanders need to know which parties in an armed conflict follow it. This applies not only to the enemy, but to some "unsavory partners" the U.S. may have to engage as the lesser of two evils. The U.S. cannot force an enemy to follow the LOAC, but it can make better decisions for its own forces when it knows if an enemy observes the LOAC. In addition, operational commanders may be called upon at some point to provide evidence of war crimes and LOAC violations committed by an enemy. Knowing that the enemy does not follow the LOAC, U.S. forces should be particularly cognizant of

² For example, the United States position has been that Additional Protocol I to the Geneva Convention is contrary to customary international law, diminishes the distinctions between military and civilians, and is therefore not part of the LOAC. Protocol I allows a belligerent to attain combatant status by merely carrying his guns openly during each military engagement and when visible to an adversary while deploying for attack, thus dropping the requirement for a fixed recognizable sign. The objection that the United States had to this convention was a section that ostensibly would recognize revolutionary forces as legitimate military organizations, thus giving lawful status to groups who organized to overthrow legitimate governments. See *Operational Law Handbook (JA 422)*, 5-5, International and Operational Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia (2000). This may have direct consequences on groups such as the Taliban and Northern Alliance in Afghanistan.

³ EO 12333, United States Intelligence Activities (4 Dec 1981) authorizes the Central Intelligence Agency (CIA) to "Conduct special activities approved by the President." (para. 1.8(e)); "participate in law enforcement activities to investigate or prevent clandestine intelligence activities by foreign powers, or international terrorist or narcotics activities" (para. 2.6(b)); and Provide specialized equipment, technical knowledge, or assistance of expert personnel for use by any department or agency...." (para. 2.6(c)) See also Pillar, Paul R., *Terrorism and U.S. Foreign Policy*, 117-119, Brookings Institution Press (Washington D.C. 2001), for a discussion on the assistance that the CIA is authorized to provide other U.S. agencies in fighting terrorism.

⁴ Even non-combatants are allowed to carry small arms for self-protection without taking them out of the non-combatant category. *The Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, Naval War College, Newport, R.I. (1999), 487. In addition, the fact that CIA agents in the field are not distinguishable from civilians may only serve to determine their status, but does not mean that they are violating the LOAC.

documenting the activities of the enemy forces and prisoners taken in combat, as the statements of operational forces may be the best source of evidence to convict war criminals and prevent them from fighting another day.

With coalition forces, U.S. commanders must ensure that all personnel operating under them abide by the LOAC because they may be held responsible for war crimes committed by persons under their command.⁵ There may be times, however, when the U.S. cannot guarantee that coalition forces fighting beside them adhere to the LOAC, but must employ such forces because they are essential to the mission. Although U.S. forces abide by the LOAC, when operating with coalition forces whose adherence to the LOAC is questionable, this fact needs to be recognized from the outset. Unless there is an imperative reason to use those forces, they should not be allowed to fight with the coalition. When such forces do fight with the U.S. coalition, U.S. commanders should not be placed in a chain of command over those forces. Instead, non-LOAC compliant forces should operate under their national chains of command so that U.S. commanders are not liable for any war crimes or LOAC violations committed by such forces. The Afghani Northern Alliance is a recent example of a friendly force that may not be following the LOAC and does not always follow U.S. guidance, but was important enough to the mission to not be excluded from the fight.

Operational Commanders also must be careful that their own forces do not commit war crimes or LOAC violations, thereby making themselves and their forces subject to prosecution, open to scrutiny and ridicule by the international community, and sacrificing LOAC protections enjoyed by lawful combatants. If U.S. Special Forces in Afghanistan are operating in civilian clothes and wearing beards, this is contrary to the current U.S. position that requires distinctive insignia identifiable from a distance. Special Forces' departure from the U.S. position would probably not affect their status as lawful combatants if captured, however, and is not a violation of the LOAC. Nonetheless, their appearance discredits the U.S. position that enemy forces who do not wear distinctive insignia are unlawful combatants, and adds credence to the position that GP I, which drops the distinctive insignia requirement, is or should be the accepted customary practice. The result probably will be legitimization of GP I as the LOAC standard for determining who qualifies as a lawful combatant.

New technology has increased the probability that combatants who are not normally on the battlefield (e.g., CIA agents controlling armed UAVs) or are close to the enemy but not distinctively garbed (e.g., Special Forces using laser "eyes on the target" for U.S. aircraft ordnance delivery) will be more openly involved in armed conflicts. Unanswered issues include the status of such individuals and who bears responsibility for their actions. Short of changes in the LOAC, and unless operating as military auxiliaries under a responsible chain of command, CIA agents who are *de facto* combatants may not be

⁵ "Command Responsibility. CDRs are responsible for war crimes committed by their subordinates when any of three circumstances applies: (1) The CDR ordered the commission of the act; (2) The CDR knew of the act, either before or during its commission, and did nothing to prevent or stop it; or when (3) The CDR should have known 'through reports received by him or through other means, that troops or other persons subject to his control [were] about to commit or [had] committed a war crime and he [fail]ed to take the necessary and reasonable steps to insure compliance with the LOW or to punish violators thereof.'" Operational Law Handbook (JA 422), 5-17, International and Operational Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia (2000).

lawful combatants as defined by the LOAC.⁶ If captured, they may be tried as spies instead of being afforded status as lawful combatants. Finally, whatever the activities in the battlefield, the chain of command responsible for such agents is important when looking at accountability for war crimes. As discussed above, the commander of individuals who commit war crimes and LOAC violations may be held accountable for them.

A sub-issue raised by the presence of CIA agents on the battlefield is the legality of assassinations in armed conflict. The LOAC prohibits and current U.S. policy disallows assassinations. However, an enemy's military leadership (al-Qaeda) is a legitimate target in an armed conflict. President Bush has expressed intent to "hunt down" al-Qaeda leaders with indifference whether they are brought back dead or alive, clearly making them a target. Al-Qaeda leaders are already legitimate military targets in the war in Afghanistan, and killing them is not illegal assassination under the LOAC, even if there is a mission specifically organized by U.S. armed forces for that purpose. Absent changes in the LOAC, if a CIA agent is not a lawful combatant but kills the enemy leadership, is it lawful targeting or an assassination? The distinguishing element is the person pulling the trigger – a non-military government agent versus active duty military. The other variable is that if such action is a war crime, who can be held criminally responsible? Even though the CIA is a U.S. agency, a U.S. military commander would not bear responsibility as long as the agent was not in the commander's chain of command. Most likely, responsibility would fall on the agent and his superior(s) who authorized, planned, and carried out the targeting. Unless in positive control of agent actions, U.S. military commanders may not want to make CIA agents auxiliary forces of the U.S. military, thereby legitimizing their actions and making what may be an illegal assassination, a legal and permissible targeting of the enemy's military leadership.

Status of Forces – Friendly Coalition

On the side of the coalition fighting alongside the United States, there are new issues regarding personnel employing firepower in an armed conflict. The status of the Northern Alliance and tribal/regional warlords in Afghanistan and the legitimacy of any military action that they take in the war are also at issue. An overly simplistic view is that their struggle is internal and the LOAC does not apply to them. Geneva Convention Article 4, however, anticipates forces like the Northern Alliance and Afghan tribal militia, and includes them within the definition of a party to the conflict. Assuming they are fighting in support of U.S. forces, however, UN Resolution 1368 (authorizing force against al-Qaeda and the Taliban) and the collective right of self-defense claimed by the U.S. brings them under the umbrella as lawful combatants. The legitimacy of their presence on the battlefield is therefore already covered by the LOAC and is a non-issue.

Status of Forces – the Enemy

⁶ However, under Geneva Convention art. 4, civilians who augment the military, fall under the military chain of command and otherwise comply with the LOAC are not illegal combatants and are entitled to POW status if captured. This would include CIA agents with UAVs. It is questionable whether DoD and CIA would cooperate in such an arrangement, because military commanders may want to restrict the CIA's actions more than the CIA is willing and military commanders should be concerned about liability for war crimes committed by CIA agents over whom they may not have positive control.

In order to determine the doctrine enemy forces will employ against them, Operational commanders must know whether the enemy follows the LOAC. Although the U.S. cannot force an enemy, who may not care if it is playing by the rules, to abide by the LOAC, U.S. commanders need to know what part, if any, of the LOAC the enemy obeys.

Once enemy forces are detained and placed in custody, operational commanders overseeing the detaining operations must ensure that they not only abide by the appropriate standards of treatment for the detainees, but also characterize the nature of their status properly. The President and SECDEF will establish the policy to determine detainee status, but this must be done with great care because new international law may be established in the process by way of customary practice.

Analysis to determine detainee status must first decide whether Taliban are lawful combatants. In order to qualify as such they must be measured against the four requirements of a lawful combatant. They appear to meet the first three requirements. Whether they follow the LOAC is unclear, however. In addition, while some commentators have made an issue of whether the Taliban comprises a legitimate state, that issue is not determinative of its status as combatants.

The ‘armed forces’ of a Party to an armed conflict include all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, **even if that Party is represented by a government or an authority not recognized by an adverse Party.**⁴

If they are unlawful combatants, they are not necessarily due the protections of the Geneva Convention for POWs. Regardless whether parties to an armed conflict constitute lawful combatants, they are still subject to trial for any war crimes they commit. The problem with conferring POW status on an unlawful combatant (and terrorists in particular) is that once hostilities cease, unless the individual is tried for war crimes, the LOAC requires they have to be released and repatriated.

Problematic is the practice of the Taliban, when overrun, of changing sides and joining forces with the Northern Alliance. Regardless how customary that practice may be in that part of the world, it is illogical that swapping sides would legitimize those forces. A significant problem comes in ferreting out former Taliban members and assembling enough evidence to convict them of war crimes. A parallel problem is that of al-Qaeda falling under the Taliban forces. If the Taliban qualifies as legal combatants, it makes little sense that al-Qaeda members are terrorists one moment and the next fall under the chain of command of a recognized legal combatant, and instantly qualify for POW status if captured. Of course, Taliban and al-Qaeda members continue subject to trial for war crimes, even if they are given POW status, but it unnecessarily confers an undeserving legitimate status on a criminal organization. This practice would seriously increase the likelihood that persons who have committed war crimes (or have conspired to do so) will be released without punishment at the end of hostilities. As noted above, the operational commander should document enemy war crimes so that evidence to convict is available at trial.

Changing the LOAC

The Law of Armed Conflict does not address certain issues emanating from the war in Afghanistan and the September 11, 2001 terrorist attacks. Several changes should be made to the LOAC and the way we fight armed conflicts post “9/11.”

Whereas belligerents in past wars have generally obeyed the LOAC, in wars against terrorism, a new standard has emerged. The U.S. now must determine whether enemy forces can be expected to obey the LOAC in order to predict enemy doctrine employment. Also, U.S. commanders must know which friendly forces obey the LOAC. Recognizing that the U.S. can influence but not force coalition members compliance, the U.S. must either not utilize those coalition forces, or arrange a C2 structure that does not place U.S. commanders in the chain of command of forces that do not obey the LOAC, in order to avoid U.S. commander liability.

When faced with enemy forces as prisoners, however, operational commanders must focus on fair treatment rather than status, applying POW conventions even when such treatment is not obligatory. As a policy matter, this practice complies with applicable standards for all belligerents without unnecessarily bestowing status on them. As a matter of expediency, the U.S. should use tribunals to determine status of detainees so that individuals' status can be recognized, with the caveat that status is subject to change if additional evidence indicates such change is warranted.

Not all U.S. military members in Afghanistan have been wearing distinctive insignia that outwardly identifies them as U.S. forces, thus compromising their status as lawful combatants. It seems by practice, however, that the U.S. has recognized that GP I (which drops the distinctive insignia requirement for recognition as a lawful combatant) is now the applicable LOAC standard. The U.S. should thus either ratify GP I (with exceptions where needed) or acknowledge it as the customary LOAC without ratifying the additional protocol.

With the use of new technology, not all combatants are military personnel. Yet there seems to be little distinction between the functions of some civilians and military members on the battlefield, such that armed civilians of a party to the conflict should fall under the definition of “armed forces,” even without status as “military auxiliary.” This would bring CIA agents and other civilians serving a combatant role, not under the military chain of command, but still acting under U.S. authority, within the definition of a lawful combatant, and make it unnecessary for U.S. commanders to make CIA agents auxiliaries to U.S. military forces. With the application of GP I as the rule of law under the LOAC, the civilian population is not at any greater risk of getting confused with combatants that are CIA agents than with active duty forces not wearing identifiable insignia. By applying GP I and expanding the definition of “armed forces,” CIA agents would qualify for POW status as lawful combatants if captured.

Assuming GP I is now the established standard, thus dropping the requirement for belligerents to wear distinctive insignia, the LOAC appears sufficient to define the

Northern Alliance and tribal warlords as combatants. They already carry their weapons openly and Geneva Convention Article 4 categorizes them as a qualifying armed force. Whether they are lawful combatants will depend on their adherence to the LOAC.

The LOAC must expand the allowance of permissible targets in war in to allow targeting of terrorists as a legitimate practice in armed conflict, much the same way that the targeting of an enemy's military leadership is lawful targeting rather than an illegal assassination. In essence, this would legitimize the assassination of terrorists in a way that enjoys the support of the international community, and if publicized may have a deterrent effect on terrorist recruiting and other actions (though less so for terrorist extremists already committed to suicide attacks).

Legitimizing the targeting of terrorists could occur in a two-step process. First, the LOAC definition of an armed conflict would have to be expanded to include armed actions against terrorists and terrorism, by a State or State actor, under the right of individual or collective self-defense, reprisal, or a standing UN Security Council Resolution, regardless whether a State is involved in supporting, protecting, harboring, assisting, defending, or otherwise acting on behalf of terrorists in that State. The biggest problem with this first point is that it could ostensibly allow violations of a State's sovereign territory by belligerent forces in order to hunt down terrorists. This could be handled in one of two ways. The fact that there are terrorists within a State could be seen as *carte blanche* to invade the sovereign territory of that State. The better method (though lacking the element of surprise) would be to precede any incursion into a state's sovereign territory by a formal request to surrender the terrorists that are within its territory. Second, terrorists should be defined as lawful targets in armed conflict, just as the military leaders of enemy forces are defined as lawful targets. This combination would obviate the need to address the propriety of assassinations as a U.S. policy matter, because the killing of terrorists in an armed conflict would never be an assassination. Rather, it would be a lawful targeting of enemy forces.

The least settled issue in the current war is the status of terrorists. A new uniform terrorism code should be adopted that defines who qualifies as a terrorist, and applies criminal status on such individuals regardless of their chain of command or subsequent affiliations (e.g. side-swapping). The international community should place terrorists and their supporters outside the definition and protective status of combatants, such that when terrorists become engaged in armed conflict, they and their supporters are treated as criminals not eligible for POW treatment under the LOAC. Such a body of law should be adopted as an international uniform code, complementing domestic terrorism statutes, with the uniform code intended to supplement and serve as a minimum standard and gap-filler when domestic law is silent. It must not interfere with domestic law, making the international code a lowest threshold with individual States being able to make provisions more restrictive, but not less restrictive, so that States cannot legalize or legitimize terrorism.⁷

⁷ This idea is parallel to statutes such as the Uniform Probate Code, which does not override state Codes, but acts as a gap-filler where the State code is silent. The State code can be more restrictive but not less restrictive than the Uniform Code. In the same way, Domestic laws could be more restrictive than the international code, but not less restrictive, thereby not legitimizing terrorism in any manner.

Finally, this war has created a greater need for U.S. forces to be diligent about evidence collection and documentation of events when dealing with terrorists. Evidentiary safe-keeping is vital so that terrorists and war criminals can be easily identified, detained, tried, and convicted after capture, and can be assigned proper status as soon as they are detained, with a desired end state of not having to fight the same persons twice.

Conclusion: At the dawning of a new age of terrorism, the United States must be cautious and deliberate in how it wields instruments of national power in perhaps its most passionate role, U.S. homeland defense, recognizing that in changing times, decisions and subsequent actions at the operational level of warfare may create new international law with far-reaching consequences. While the Law of Armed Conflict is relatively intact and to a large extent still relevant, action is necessary to define how the U.S. is to fight, define the status of those we fight alongside & against, and how the parties to an armed conflict are to be treated. On the battlefield, it is the operational commander who will put those policies into practice. Where no laws exist that fully cover situations on the battlefield, the actions of operational commanders may become the customary laws of tomorrow.

NOTES

¹ Robertson, Horace B., Jr., "Contemporary International Law Relevant to Today's World?," *Naval War College Review*, Summer 1992, 103.

² Reference photos and story in *Navy Times* and *Time Magazine*, February 4, 2002, 39.

³ See "In Unconventional Conflict, U.S. Sticks To 'Laws of War,'" *Newshouse.com* (December 5, 2001).

⁴ The Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (Newport, RI: Naval War College, 1999), 296 (n. 11) (emphasis added). This explanation appears to include such parties as the Taliban.