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War and Detention

Today's state-oblivious battle against terrorism has tested the laws of war.

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War involves using military power to force an enemy into submission. It also almost always involves the capture and detention of enemy personnel. In common parlance, these captives are prisoners of war, or POWs. However, the status designation of captured enemies is often complex, and many situations exist where captives do not qualify for POW status. The consequence of this is potentially profound, and it's been a central challenge for the United States since military operations began after the 9/11 terrorist attacks.

U.S. military forces have captured and detained thousands in armed conflicts in Afghanistan, Iraq and other locations of this borderless war with al-Qaida. Force-on-force conflicts against an enemy state quickly transitioned into confrontations with irregular and hybrid forces, thus challenging the authority of the governments that

assumed power in Iraq and Afghanistan after our initial victories. Indeed, the bulk of U.S. combat operations have been prosecuted in support of these new governments, against the Taliban, al-Qaida and associated forces.

Under international law, the vast majority of captives were never entitled to POW status. Instead, they were regarded as "enemy belligerent detainees." Nonetheless, like POWs, they were held for the duration of the conflict to prevent them from returning to hostilities, and many remain detained. A handful of them have been prosecuted at Guantanamo Bay, Cuba, for war crimes, but detention to prevent their return to the conflict does not depend on a criminal conviction.

While preventive detention of enemy captives for the duration of hostilities is unremarkable, rarely in modern history has this authority been used in relation to a conflict that seems to have no end, like the U.S. armed conflict with al-Qaida. This has strained the perception of legitimacy, and led many to condemn what they view as indefinite detention without trial or conviction.

There's also the difficulty of determining who is the enemy. Unlike conventional enemies whose status is normally indicated by uniforms or identity cards, military (and at times judicial) authorities must piece together a jigsaw puzzle of conduct, statements and associations to determine who is, and who is not, a belligerent. The process is made even more complex with a deliberately dispersed terrorist organization.

Ultimately, U.S. detention operations are, like all other aspects of wartime military operations, governed by law and policy. While critics lambast the United States for what they consider overzealous assertions of legal detention authority, the truth is much more nuanced. Perhaps in no other area of our ongoing military campaign has there been a greater effort to develop a credible and effective legal framework to balance the needs of military necessity with the interests of human dignity. This process has been an evolution, largely because of a lack of a comprehensive international legal framework to address the need to detain "unprivileged" enemy belligerents, but also because of the need to correct mistakes made early in this war's detention saga.

What has developed over the past 14 years is an amalgam of rules and procedures drawn from international and domestic law, intended to minimize both the risk that an enemy will be allowed to return to the fight and the possibility of unjustifiably detaining individuals who pose no genuine risk of doing so.

WHAT LAW APPLIES? The law of armed conflict is the international law that regulates war. The regulatory framework for armed conflicts is divided into two categories: international armed conflict (IAC) and non-international armed conflict (NIAC), each with different applicable law. An IAC requires armed hostilities between at least two countries. Accordingly, the initial U.S. conflict in Afghanistan in 2001 and the conflict in Iraq in 2003 were both IACs. In contrast, NIACs are armed conflicts that don't involve a country fighting another country, but instead involve hostilities between a state and an organized non-state belligerent group or even between multiple non-state groups. The classic NIAC is civil war, where the government is fighting one or more insurgent groups.

Most of the detention-related challenges we've faced since 9/11 resulted from the inverse relationship between the frequency of NIACs and the extent of the law in place to regulate them.

Most of the law of armed conflict, including the 1949 Geneva Conventions, applies only during IACs. In contrast, there is a paucity of law applicable to NIACs. This creates a profound regulatory gap, because NIACs – the conflicts against non-state groups such as insurgents and other hybrid enemies – occur far more frequently than IACs. Indeed, some estimate that over the past 50 years, 90 percent of the armed conflicts have been NIACs. Thus, while there is a comprehensive body of law for the kinds of international conflicts that rarely occur, far less

law exists for the kinds of conflicts that do. It was into this regulatory gap that the United States fell following 9/11 – a gap that is particularly significant in the area of detention.

STATUS AND REVIEW In IACs, captured enemy soldiers are detained as POWs. Why? Based on their status as members of the enemy armed forces, they are presumptively a threat. They are detained to prevent them from continuing to fight. And it doesn't matter what the soldier was doing at the time of capture. Infantryman, special forces operative, clerk/typist – as long as they are members of the enemy armed forces, they are subject to detention.

The law of armed conflict considers and treats civilians very differently than members of the military, as it should. For example, while the captured Iraqi soldier is detained based on his status (as a soldier), the Iraqi civilian is not. The civilian may be detained (called internment for civilians), but only when the individual's conduct indicates that internment is necessary for imperative reasons of security.

When the rationale behind detention is understood, the conduct of that detention and how it ends makes sense. POWs, captured to prevent them from returning to hostilities, may be detained until hostilities end. And because it is their status that justifies detention, no type of hearing or review is required, only a determination of that status. Only when hostilities end, eliminating the risk the POW will return to the fight, is repatriation required.

In contrast, civilians may be interned only so long as they remain a threat. The law of armed conflict contains a review process by which, at least twice a year, the detaining military authority reconsiders whether the civilian still poses a security threat such that internment is warranted.

Unfortunately, the law of armed conflict provides far less clarity about the status of potential detainees in NIACs. This has required the United States to rely on customary international law principles that provide the foundation for all law of armed conflict treaties, to include the handful of treaty provisions developed specifically for NIAC. But it has also required extension of rules developed for IACs into the NIAC realm.

For example, the United States considers members of non-state belligerent groups – like al-Qaida operatives – subject to detention to prevent return to hostilities, as if they were POWs. However, because of the seemingly unlimited duration of the war, and the complexity of assessing their status as members of non-state belligerent groups, the United States has also extended the individualized cause and periodic review rules applicable to civilians in IACs to these detainees. Thus, whether detained in Afghanistan or Cuba, each detainee is provided an initial status review hearing and annual reviews to validate the continued military necessity for detention. Finally, as the result of Supreme Court decisions, all detainees at Guantanamo Bay may challenge the review decisions in federal civilian court.

DETAINEE TREATMENT Whether detained in an IAC or NIAC, the law of armed conflict requires that all detainees be treated humanely, which basically means that U.S. forces must protect them from harm and do no harm to them. While there was some confusion over applicability to al-Qaida detainees early in the war, this is no longer the case. Today, any person in U.S. custody is protected by this humane-treatment obligation.

For detainees who qualify as POWs, the law of armed conflict provides an additional protection known as "combatant's privilege" or "combatant immunity." During an armed conflict, members of the armed forces are lawfully permitted to use lethal force and take any number of actions that would be criminal outside the context of armed conflict. For example, there is simply no legal authority to intentionally kill someone in peacetime based only on status; such a killing is murder. But the law of armed conflict legally permits intentionally killing an enemy

belligerent operative during armed conflict based solely on such status. As a result, it grants immunity from criminal sanction for this exercise of "combatant's privilege." While the soldier granted this immunity is subject to detention as a POW, the detaining nation is barred from prosecuting him for his lawful wartime conduct.

No such privilege extends to non-state belligerents in NIACs, nor even to soldiers in an IAC whose conduct violates the law of armed conflict (for example, killing a POW or torturing a detainee). Accordingly, the United States determined from the outset of the war with al-Qaida that captured and "unprivileged" enemy belligerents were subject not only to detention but to civilian or military court trial for their violent actions.

If the U.S. military can already detain these captives, what is the point of prosecuting them? If he is convicted, he will be detained. If he is acquitted, he is still subject to preventive belligerent detention. This apparent anomaly is the source of a lot of confusion.

Trial and conviction do matter, even for someone who will remain in detention after acquittal. Most notably, if convicted, the detention will no longer be merely preventive, but punitive. This means that even if hostilities end, detention will continue for the duration of the sentence. It may also mean that the detainee will be subjected to capital punishment. Second, the conditions of detention may change substantially, as punitive detention is normally more onerous than preventive detention.

As noted by the Supreme Court in an early Guantanamo decision, detention of enemy belligerents during armed conflict is a "necessary incident of waging war." But that same decision also noted that if the nature of a armed conflict were to become significantly different from those that informed the development of the law of armed conflict, it may be necessary to reconsider the rules for detention.

In many ways, this seems to have predicted the evolution of U.S. detention practice since 9/11. The United States continues to preventively detain enemy belligerent operatives, and pursue prosecution of many it believes violated the law of armed conflict. But it has also implemented procedures in an effort to balance the necessity of detention with the risk of unjustified indefinite deprivation of liberty. While there are no easy answers to the detention challenge, almost all observers would agree that we are in a better place today than when this challenge first emerged.

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