The Law of War and the Academy*

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The law of war is a hot topic in public discourse and academic circles. Topics such as interrogation, treatment of unlawful combatants and targeting of insurgents in Iraq and elsewhere seemingly dominate the headlines. Furthermore, the proliferation of writing in scholarly journals on these subjects and many others compete with more traditional discussions of constitutional law or criminal law.

In the midst of the very public debates over the laws of war, America's application of those laws to the Global War on Terror, and its manifestations in Afghanistan and Iraq, there has been a little-noticed discussion between military legal experts and the academic community, as well as some public dialogue between politicians and military lawyers. These two dialogues should continue and expand in order to benefit the academic community and the public at large. In addition, the discussions benefit the military legal community as we develop the law (through customary international law, doctrine, treaty negotiation and drafting of legislation or administrative regulations) and discuss its development within the Executive Branch and with the Legislature.

What does a military lawyer bring to the table? How can he or she contribute to the discussion? I would like to mention at least three reasons that a military lawyer is uniquely suited to address these issues and, in turn, ways that discussion can benefit the academy and the public at large. First, the law of war has been developed by warriors, for warriors. Second, the military perspective provides some balance to the debate by explaining the importance of military objectives and military necessity, both of which need to be weighed in the balancing of interests that is reflected in the law of war. And finally, a discussion of the current practice of the law of war can dispel many of the myths about military conduct in war and connect the people of the country and its academic conscience to the Soldiers, Sailors, Marines and Airmen that represent them. One of my favorite aphorisms about the law is that "you can't practice law in a vacuum." Practitioners of the law must discuss these issues with those that influence the development of the law. The both are better for it.

I. The Law of War by Warriors, for Warriors

Imagine the following scenario: two factions, both with deep religious roots, are feuding across the wide river that divides their two camps. The political discussion is at a stalemate. There is a constitutional crisis in the legislature about the degree of power each faction will control; whether there should be a federal form of government with power decentralized in constituent states or a more centralized government controlled by the people's representatives in the capital. Although the politicians seemingly reached a compromise that allowed for the sharing of power, fanatics on both sides turn to armed force to impose their will on each other. The fanatics conduct symbolic kidnappings and murders to try to foment civil war. Both sides develop and arm powerful militias, and some even infiltrate the official armed forces of the nation. Houses are burned or bombed out, civilians become the target of attacks and terror reigns. Baghdad, Iraq, 2007? No, Bloody Kansas, 1856-1863. It was out of that maelstrom, which spawned John Brown, "General" James H. Lane and his Kansas Jayhawkers and Quantrill and his Raiders, including the James and the Younger brothers, that the modern law of war was born.[1] The internecine warfare in Kansas and Missouri then was as bloody and vicious as any sectarian warfare of today.

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[1] Kansas State Historical Society, *Willing to Die for Freedom*, http://www.kshs.org/exhibits/territorial/territorial4.htm (last visited Nov. 3, 2007).

General Halleck, an international law expert and commander of the Western Department at the time, later, as the Chief of Staff of the Army, decided that the lawlessness of the Western frontier could not and should not apply to the Civil War. Halleck commissioned Francis Lieber, a law professor at the University of South Carolina and Columbia University, to write the rules for land warfare. Lieber was also no stranger to war; he fought in the Napoleonic wars as a young man, and his sons were on opposite sides during the Civil War. The Lieber Code, also known by its official title, General Order 100, became the basis for the law of armed conflict, and much of it is preserved in the substance of the current law of war.[2] Lieber applied the concept of "unlawful combatants" to men like Quantrill and the James and Younger brothers calling them "brigands" and bandits and denying them the status of prisoners of war.[3] He contrasted partisans, who were treated as prisoners of war when captured,[4] like John Singleton Mosby, who acted as a detached corps of the Confederate Army in Northern Virginia. Lieber's code was much more comprehensive and preceded the International Committee of the Red Cross's (ICRC) work on treatment of wounded on the battlefield[5] by a year, demonstrating that "Bloody Kansas" and Francis Lieber spawned the modern law of war, not the Battle of Solferino and Henry Dunant.[6]

There is a long history of cross-fertilization between the military and academic communities. I already mentioned Halleck, who contributed a treatise on international law.[7] Lieber founded the International Law studies at Columbia University. More recently, Bill Baxter, Howard Levie, and Wally Solf left the military to become prominent experts in the law of war and professors at prestigious universities. Professor Bassiouni, the renowned scholar on International Criminal Law, including the use of international tribunals to enforce the law of war, learned much from his time as a soldier in the Egyptian Army and applied his knowledge to a career as an academic. And Telford Taylor, one of the architects of Nuremberg trials and a scholar on this area of the law, contributed to the development of the law since World War II. Taylor, in his seminal work on war crimes, explained why the law of war is so important to warriors:

> [T]hey are necessary to diminish the corrosive effect of mortal combat on the participants. War does not confer a license to kill for personal reasons – to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of the state; it does not countenance the infliction of suffering for its own sake or for revenge. Unless troops are trained and required to draw the distinction between military and non-military killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives. The consequence would be that many returning soldiers would be potential murderers. As Francis Lieber put the matter in his 1863 army regulations: 'Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.'[8]

There is much more room for development of the law of war, an area of the law that was designed by warriors, for warriors, to maintain their humanity in the midst of the inhumanity of war.

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[2] Adjutant Gen.'s Off., U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field, Gen. Ord. No. 100 (Apr. 24, 1863) [hereinafter Lieber Code].

[3] Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, *in* THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER 289 (1881), *available at* http://books.google.com/books?id=oKMFAAAAMAAJ&pg=PA277&dq=lieber+guerrilla+parties.

[4] *Id*. at 290.

[5] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]. The current GC I represents the fourth version of the Geneva Convention on the wounded and sick after those adopted in 1864.

[6] Lieber Code, *supra* note 2; HENRY DUNANT, A MEMORY OF SOLFERINO (ICRC English ed. 1986) (1862) (signed by President Lincoln in 1863, the Lieber Code was a product of the lessons learned from the bloody violence in Kansas from 1854 - 1858 that directly presaged the American Civil War. The Code dictated how U.S. Soldiers should conduct themselves in wartime. In contrast, the ICRC movement originated with *A Memory of Solferino*, written by Henry Dunant of Geneva, Switzerland between 1859 and 1862 following his experience during the aftermath of the 1859 Battle of Solferino between France and Austria).

[7] *See generally* H. W. HALLECK, INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR (San Francisco, H.H. Bancroft & Co. 1861).

[8] Telford Taylor, *War Crimes*, *in* WAR, MORALITY AND THE MILITARY PROFESSION 378 (Malham M. Wakin, ed. 1986).

II. Balanced Perspectives

Several examples of recent issues that would benefit from the discourse and the unique view that military practitioners bring to the table include: (1) an analysis of *Hamdan v. Rumsfeld*[9] and the Military Commissions Act[10] from a law of war[11] perspective; (2) a discussion of the efforts underway to use the law of war to protect civilians from the impact of cluster munitions; and (3) an analysis of Army interrogation policies from a law of armed conflict perspective.

The nation, the academy and the military would all benefit from a discussion about *Hamdan* from a law of war perspective. I have been to several seminars like this one over the last eight months, and each has looked at the case through a domestic lens, overlooking or negating the international law or law of war aspects of the case. The President had several choices when he chose to try the perpetrators of September 11th: to use a purely domestic criminal law paradigm under federal criminal law; to seek an international tribunal, along the lines of the International Criminal Tribunal for the former Yugoslavia (ICTY)[12] or the International Criminal Tribunal for Rwanda (ICTR);[13] to use the Uniform Code of Military Justice (UCMJ),[14] as we would for a captured enemy prisoner of war or one of our own soldiers who commits a war crime; or to create a military commission, along the lines of Nuremberg,[15] the Tokyo War Crimes Trials[16] or the *Ex parte Quirin*[17] case. It is well known that he chose the last option. All of the discussion that took place in the months following the *Hamdan* decision has focused on the domestic criminal law alternative and the UCMJ, rather than the international law standards for criminal tribunals and the standards laid out in Common Article 3 to the Geneva Conventions,[18] and illuminated by Article 75 of Additional Protocol I[19] and Articles 4-6 of Additional Protocol II.[20] If the military commission approach is legitimate, as the Supreme Court has indicated, it should be judged by the standard of the applicable law, the *lex speciales* of the law of war, not constitutional law or some domestic human rights standard.[21] The academy and the American public would benefit from a discussion that analyzes this issue from that perspective, and I dare say that the Military Commissions Act and Rules for Military Commissions will stand up to that scrutiny.

Another issue I have examined in the last year that would benefit from some dialogue and rational, objective discussion is the developing law on the use of cluster munitions on the battlefield. First, there have been some developments in treaty law in this area. The Explosive Remnants of War (ERW) Protocol V to the Convention on Conventional Weapons (CCW) went into effect in November 2006.[22] The ERW Protocol provides guidance to the manufacturing states so that they may

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[9] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

[10] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.) [hereinafter MCA].

[11] The law of war is also known as the law of armed conflict (LOAC) or international humanitarian law (IHL). The law of war (LOW), however, is a more succinct and descriptive term of the disciplined application of law to the very undisciplined profession of arms.

[12] *See generally* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), *amended by* S.C. Res. 1660, U.N. Doc. S/RES/1660 (Feb. 28, 2006). The ICTY was established by the Security Council in the face of serious violations of international law committed in the territory of the former Yugoslavia since 1991.

[13] *See generally* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), *amended by* S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004). Recognizing that serious violations of international law were committed in Rwanda in 1994, ,the Security Council created the ICTR.

[14] *See generally* Uniform Code of Military Justice, 10 U.S.C. § 802(a) (2006).

[15] *See generally* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The Nuremberg Trials were a series of trials from 1945 to 1949, most notable for the prosecution of prominent members of the leadership of Nazi Germany. The August 8, 1945 London Charter of the International Military Tribunal established the laws and procedures of the tribunal.

[16] *See generally* Charter of the International Military Tribunal for the Far East (1946), *reprinted in* U.S. DEP'T OF STATE, TRIAL OF JAPANESE WAR CRIMINALS 39-44 (Pub. No. 2613, Far Eastern Series No. 12, 1946). The International Military Tribunal for the Far East (IMTFE) was convened from May 3, 1946 to November 12, 1948 to try the leaders of Japan for war crimes committed during World War II.

[17] *See generally Ex Parte* Quirin, 317 U.S. 1 (1942).

[18] *See* GC I, *supra* note 5; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. "Common Article 3" refers to the fact that this article is common to all four of the Geneva Conventions.

[19] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

[20] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

[21] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794 (2006).

[22] *See* Protocol on Explosive Remnants of War, U.N. Doc. CCW/MSP/2003/2 (Nov. 27, 2003).

improve the reliability of all munitions, including cluster munitions, in an attempt to prevent them from becoming explosive remnants.[23] It also includes obligations both for the states using the weapons and for the states upon whose territory they are used such as the duty to record the locations of unexploded munitions, to protect civilians who are re-entering the area and to clean up the battlefield after the war is over.[24] The ERW Protocol hardly had the chance to work before the often shrill voices of non-governmental organizations (NGOs) began demanding that such weapons be banned.[25] At the same time, extensive studies about the application of the law of war to this problem, led by academics from Australia and assisted by most state parties to the CCW, fell on deaf ears.[26] Those studies concluded that the existing law of war on proportionality, distinction and protection of civilian objects, applied by both the attacker and defender, amply provide for humanitarian concerns.[27] Likewise, the military analysis concluded that reliable cluster munitions have extensive military utility.[28] These aspects of the law have been untouched in a public forum.

The third area where some public discussion, academic analysis and military expertise would be of value is in the analysis of current military interrogation standards. Unfortunately for the military, the new interrogation Field Manual,[29] which the Detainee Treatment Act proclaimed to be the law of the land was announced on the same day that the President transferred the fourteen "high-value detainees" to Guantanamo Bay, Cuba. As a result, there has been little or no discussion about the field manual, the Department of Defense detainee treatment policy, or any other significant changes in the law and regulations pertaining to detainees. The new field manual essentially maintains a Geneva Convention III,[30] Prisoner of War approach to military interrogation, and it frequently reinforces the Geneva Convention training standard, while also re-emphasizing the minimum treatment standards derived from Common Article 3 to the Geneva Conventions.[31] In sum, re-establishing the clear standards of the Geneva Conventions in military policy and doctrine is a credible topic that deserves critical, objective analysis.

III. Continuing Dialogue

How can we continue the discussion? Seminars, joint education and writing are all tried-and-true means of exchanging ideas. In addition to these approaches, public diplomacy and public-private discussions are a more novel and potentially fruitful means of discussion in the international law and law of war communities. Seminars such as this Symposium are an excellent opportunity to hear from military practitioners and academic experts in international law and the law of war. But they are more than lectures and seminar discussions; they are also an excellent opportunity to meet and exchange views informally. We will not always agree on the ends, ways or means of our legal strategies, but we can certainly understand each other better by exchanging views informally.

Joint education is a little-used method of discourse. To be sure, however, military experts have long been a part of academia. Gary Solis, Gary Sharp, Hays Parks and my colleague Jim Schoettler have taught as adjunct professors in the Washington, D.C. area for years; Gary Solis just returned to teach at Georgetown. Military experts have also come to establish a tradition of former professors from the Army Judge Advocate General's School (JAG School) in Charlottesville, Virginia, accepting teaching positions in law schools across the country. Dave Crane at Syracuse, Jeff Addicott at Saint Mary's, Mike Newton at Vanderbilt, Geoff Corn at Southwestern, Charlie Rose at Stetson and Victor Hansen at New

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[23] *Id*. at pmbl.

[24] *Id*. at arts. 3-5.

[25] *See* Memorandum, from Human Rights Watch, subject: States Parties' Responses to "International Humanitarian Law and ERW" Questionnaire, to CCW Delegates (Mar. 2006), *available at* http://hrw.org/backgrounder/arms/arms1105.pdf.

[26] *See* Convention on Conventional Weapons, *Group of Governmental Experts of the State Parties to the Convention on Prohibitions or Restrictions on the Certain Use of Conventional Weapons which May Be Deemed to Be Excessively Injurious Or to Have Indiscriminate Effects*, CCW/GGE/X/WG.1/WP.2 (Mar. 16, 2005).

[27] *See id*.

[28] *See* Convention on Conventional Weapons, *Group of Governmental Experts of the State Parties to the Convention on Prohibitions Or Restrictions on the Certain Use of Conventional Weapons Which May Be Deemed to be Excessively Injurious Or to Have Indiscriminate Effects*, CCW/GGE/X/WG.1/WP.1 (Feb. 21, 2005).

[29] U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006).

[30] *See* GC III, *supra* note 18.

[31] *See also Ex parte* Quirin, 317 U.S. 1 (1942).

England School of Law, all come to mind, and Sean Watts, a current professor at the JAG School just accepted a position at Creighton. Likewise, military academic institutions have included civilian experts on their faculty for many years. The most prestigious is the Stockton Chair at the Naval War College, which has included such visiting luminaries as Theodore Meron, Yoram Dinstein and Wolff von Heinegg. West Point, though an undergraduate institution, has had visiting professors of law for several years, including, most recently, Gary Solis. And, in an exciting development for the law of war, West Point is establishing a law of war center of excellence within its department of law that will probably include an endowed chair in the near future. Finally, the Army JAG School has established a reputation as a premier educational institution over the last twenty years, beginning with its recognition as an LL.M. degree-granting institution in 1986. The International and Operational Law Department of the Army JAG School has developed teaching materials in the law of war and national security law and has worked very closely with the University of Virginia School of Law. The International Law LL.M. program that the services support has provided students of the law of war to the academy. Lieutenant Colonel Eric Jensen, who will speak later during this program, recently graduated with an LL.M. from Yale in International Law.

Joint training, however, is much more than exchanging professors or students and conducting seminars. Geoff Corn and others have suggested that the JAG School open some of its courses to professors and students from outside the military. This is an excellent idea, worth pursuing with the Army JAG School, and capable of adding to the discourse and increased understanding of the military perspective on the law of war.

Professional writing is another way that the discourse can be expanded and ideas can be shared. Professional military journals, such as the *Military Law Review* or the *Naval War College Papers*, invite scholars to contribute to the law of war debate within military circles. The Lieber Society of the American Society of International Law has an annual writing competition on the laws of armed conflict. And, increasingly, military writers are being asked to contribute to law reviews throughout the country, particularly given the timely and fascinating topic we are discussing at this symposium. I regret not writing more, as a young Judge Advocate but I have certainly encouraged it among my subordinates and colleagues over the last ten or fifteen years as a leader and mentor of younger JAGs. There is no better way to share practical experience than with rigorous, scholarly articles.

Finally, public diplomacy has recently been added to the discourse. John Bellinger, the State Department Legal Advisor, has given public lectures in London and several other European capitals, as well as participated in national security law seminars at the Naval War College and in the Washington, D.C. area. The subject of his discussions has largely consisted of law of war topics and the U.S. position on the myriad of law of armed conflict issues that have arisen in recent conflicts. Bellinger continued in this vein in January 2007, as he agreed to participate in a series of *Opinio Juris* blogs; his participation extended from one week to two weeks, as the discussion gained fervor and examined many of these issues in great depth. The Office of the Army Judge Advocate General will continue the discourse in a public fashion, as we believe there is merit in explaining why we think we have the most disciplined and law-of-war-conscious military in the world. Discussions between private and governmental entities also serve the law and the nation. An excellent example is the recent series of discussions between Department of Defense lawyers and the ICRC on detention standards and customary international law, among other subjects. This dialogue has become more public with the publishing of the U.S. government's critique of the ICRC's Customary International Law Study.[32]

It is clear that we have a lot to learn from one another. I am sure Mark Bridges will give a great deal of credit to those from the academy, like Neal Katyal of Georgetown, who contributed to the defense of the Guantanamo detainees. Less known and unheralded are the contributions of military defense attorneys (like Bridges) who zealously represented the interests of their clients and laid the foundations for justice being done in the military commissions process. It is the nature of a professional soldier to be a "quiet professional," to do his job, to serve his country. It is also of value to the country to help the people of the country, and their brain trust in academic circles, to better understand where the law of war is going and where military legal professionals are going with it. It is important to continue and to further that dialogue.

[32] Letter from John Bellinger, State Dep't Legal Adviser & William Haynes, State Dep't Gen. Counsel, to Jakob Kellenberger, President, ICRC (Nov. 3, 2006), *available at* http://www.state.gov/s/l/rls/82630.htm.