

BOOK REVIEW

The War on Terror and the Laws of War: A Military Perspective

The War on Terror and the Laws of War: A Military Perspective,
Geoffrey S. Corn, James A. Schoettler, JR., Dru Brenner-Beck,
Victor M. Hansen, Richard B. "Dick" Jackson, Eric Talbot Jensen,
Michael W. Lewis, Oxford University Press, Terrorism and Global
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In this well-timed revision to the first edition published in 2009, the authors allow the reader to benefit from their unique yet balanced perspectives as they address some of the most pressing issues in the enduring campaign to defeat terrorism insofar as they concern the laws of war. The six authors, all of whom served in some capacity in the Armed Forces of the United States of America (USA), confess not to provide a critical analysis of the official characterisation of the 'War on Terror' as a genuine armed conflict under international humanitarian law. A reader expecting such an approach should invest their time and attention elsewhere. Whilst acknowledging that 'it is clear that the term "war on terror" is legally and operationally overbroad and misleading',¹ the authors choose to ground their contributions on the basis that the USA has operated, and continues to operate, as if it were in an armed conflict with al-Qaeda and its associated groups. According to the authors, this stance is justified by the argument that the three branches of government of the USA have repeatedly and consistently reached decisions to this effect. As a result, many readers might be inclined to approach the book with caution at first. This fundamental stance is however well-noted, emphasised, and indeed reasonable as the authors approach the controversial subjects from a factual, and most importantly, a military perspective.

In this second edition, the updated Foreword and Introduction provide a useful indication of the tone and direction the various chapters will take. In addition to the unique perspective noted above, perhaps two themes emerge which any reader should bear in mind as they proceed throughout the book. Firstly, noting the obvious proximity gap between purely academic legal scholars often writing in the abstract and the realities of the battlefield, Major General Charles J. Dunlap Jr. underscores the valuable point that a military contextual understanding can aid legal scholarship. In that sense, the six authors are well-qualified and unrivalled. Secondly, there is an acknowledgment of the unfortunate reality 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'.² Revelations over the past decade, expounded by the recent publication of the United States Senate Committee report on the conduct of the CIA post-9/11, make this assertion even more pertinent. Accordingly, the reader should not expect to see a whitewash of history, nor an undisputed defence of American post-9/11 policy.

For a relatively short book, the authors more than adequately address some of the major concerns of the 'War on Terror'. Although it is divided into seven chapters with each focussing on a specific operational

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¹ Geoffrey S Corn and others, *The War on Terror and the Laws of War: A Military Perspective* (2nd edn, Oxford University Press 2015) xxi.

² *ibid* xix.

issue, the 'chapters share a common thread: that legitimate, disciplined, and credible military operations cannot occur in the absence of an operational regulatory framework derived from the laws of war'.³ In the first two chapters, Geoffrey Corn considers the 'Legal Basis for the Use of Armed Force' and 'Triggering the Law of Armed Conflict?' respectively. In the third chapter, Eric Talbot Jensen looks at the 'Targeting of Persons and Property' and Richard Jackson follows in the fourth chapter by exploring the 'Interrogation and Treatment of Detainees in the Global War on Terror'. Furthermore, James Schoettler examines the 'Detention of Combatants and the War on Terror' in the fifth chapter and Dru Brenner-Beck considers the 'Trial and Punishment for Battlefield Misconduct' in the sixth. Michael Lewis closes with the seventh chapter on 'Battlefield Perspectives on the Laws of War'.

In Chapter 1, Corn provides a helpful overview of the legal framework regulating when States can resort to the use of force (*jus ad bellum*), drawing upon the UN Charter and several of the most significant international cases whilst outlining some historical examples. He then proceeds to discuss how the post-9/11 American interpretation altered and distorted this framework, arguing that although the framework governing the lawful resort to force may be generally unquestioned; its application to counter-terrorist operations is anything but undisputed. Most significantly, Corn discusses the right of self-defence that States can avail themselves of, which indeed the USA sought to after 9/11.

Having outlined the legal framework and the immediate post-9/11 legal position of the USA in Chapter 1, Corn proceeds in Chapter 2 to explore how the post-9/11 counter-terrorism response shifted from the traditional legal paradigm to an entirely controversial and troubling war paradigm. For example, Corn draws attention to *inter alia* Military Order No. 1 issued by President Bush on 3 November 2001 which indicated that the USA would invoke the law of armed conflict as authority for the detention and punishment of international terrorists. Corn then proceeds to discuss why these decisions were so controversial by outlining the traditional framework by which States may trigger the law of armed conflict.

In Chapter 3, Eric Talbot Jensen explores the legal principles relating to targeting that apply in combat generally, including its origins and how they form the foundation of regulations governing the conduct of hostilities. He helpfully outlines the framework governing the targeting of individuals and property whilst addressing the peculiarities of the 'War on Terror'. Unsurprisingly, the use of unmanned aerial vehicles (UAVs), otherwise known as drones, which have increased drastically under the administration of President Obama, features prominently in Jensen's discussion.

Richard Jackson then proceeds in Chapter 4 to examine the interrogation and treatment of detainees in the 'War on Terror'. He provides an overview of the historical developments of the law concerning the treatment of prisoners of war, whilst discussing some of the most troubling examples of detention demonstrated post-9/11. He suggests that the exposure of the prisoner abuse scandals and the resulting public backlash was necessary to set the USA back on the right track.

In Chapter 5, James Schoettler engages with the difficulty of the 'War on Terror' and the law applicable to the determination of a person's status under the law of armed conflict. He addresses the various positions maintained by the USA regarding al-Qaeda and Taliban fighters whilst also considering the various judicial and non-judicial responses to this new and uncharted legal characterisation of an 'unlawful enemy combatant' or 'unprivileged enemy belligerent'. Inevitably, Schoettler discusses Guantanamo Bay at length, now the symbolic heartland of detention in the 'War on Terror'.

In Chapter 6 Dru Brenner-Beck explores the role of the courts in prosecuting non-state actors captured in the course of the transnational campaign to defeat terrorism. Such a discussion is timely and necessary, given the sluggish pace with which Guantanamo detainees are being transferred to be tried or released upon their clearance. The author explores in detail some of the most fundamental and landmark cases heard in the USA in recent years, not least of all *Hamdan v Rumsfeld*.⁴

Finally, in Chapter 7, Michael Lewis seeks to emphasise that a genuine understanding of the role of the law of war in the conduct of transnational counter-terrorism campaigns is firmly grounded in the need to appreciate the unique context in which the law applies. This message is perhaps best reflective of the overall aim of the book. Going further, Lewis argues that the complexity of the law must be translated and applied in a practical setting. In that regard, the author insists that in order for law to have effective application on the ground, the complexities of international humanitarian law must be reduced into core principles and beliefs, to which combatants can be better expected to respect and observe, rather than to merely accept

³ *ibid* xxv.

⁴ *Hamdan v Rumsfeld*, 548 U.S. 557 (2006).

them. Lewis also stresses the need for combat forces to have adequate support, not just from a legal perspective but also from intelligence gatherers.

Despite its recent publication, the book suffers from its lack of analysis over the impact of the Islamic State in the Levant (ISIL), also known as the Islamic State or ISIS. One must presume that the drafting of the book pre-dated the full emergence of the terrorist organisation towards the end of summer 2014. This shortcoming is all the more pertinent as ISIS competes, and in many ways, now overshadows al-Qaeda for dominance in the region. Indeed, ISIS have demonstrated their capacity to greatly surpass al-Qaeda's organisational ability and potential to control territory. Nevertheless, the discussion contained within the seven chapters provides useful food for thought.

No concluding remarks are offered by the authors collectively, but as Gentian Zyberi observed regarding the first edition, 'Whether that was the authors implied response that the war on terrorism is something that will keep the military busy for a while will remain a puzzling question.'⁵ One must presume a similar motive for this second edition. As ISIS continue to surpass al-Qaeda in terms of regional dominance and global concern, it would appear that although the enemy may have a new face, the struggle will continue for many years to come.

Competing Interests

The author declares that they have no competing interests.

⁵ Gentian Zyberi, 'Book Review – The War on Terror and the Laws of War: A Military Perspective' (18 December 2009) <<http://www.internationallawobserver.eu/2009/12/18/book-review-the-war-on-terror-and-the-laws-of-war-a-military-perspective/>> accessed 22 May 2015.

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