

International Law and Terrorism

Some 'Qs & As' for Operators

By

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The events of 11 September 2001 present military lawyers—like the rest of the U.S. armed forces—with a variety of new challenges. Indeed, the war on terrorism raises complex legal issues (not the least of which is whether it is a “war” at all!). As difficult as it may be to determine what law applies to a particular question, the even more challenging task is to translate the legal analysis into something understandable to commanders and their troops.

The purpose of this essay is to try to facilitate that assignment. What follows is a series of predicable questions occasioned by recent events. Each is accompanied by a suggested response. These answers are not intended to be comprehensive dissertations on every aspect of the topic queried, but rather on designed to give the nonspecialist a cogent statement of the key points.

Realistically, the practitioner would be well served to consider the responses more as vectors for further study as opposed to final and definitive declarations. It is especially important to ensure that the proposed answers are “Shepardized,” so to speak, to ensure compliance with the most current authorities and national policy.

Nevertheless, it is hoped that the format and citations would provide legal professionals and their clients with a useful starting point in addressing the emerging challenges of America’s first “war” of the 21st century.

1. *What is terrorism?*

Legally, terrorism is defined in the U.S. Code as “premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents....”¹ The U.S. Department of Defense defines it somewhat more broadly, calling it: “The calculated use of unlawful violence or the threat of unlawful violence to inculcate fear; intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.”²

2. *Does the U.S. consider terrorism a crime or an “act of war”?*

Historically, the U.S. treats terrorism committed by persons not acting for a nation-state (*i.e.*, “non-state actors”) as crimes to be addressed by domestic law enforcement authorities.³ The U.S. is a party to a number of international treaties⁴ that speak to forms of terrorism, but most of these conventions couch the acts as crimes and task the parties to establish criminal jurisdiction over offenders.⁵ Terrorism committed by a nation-state (state-sponsored terrorism) is ordinarily considered a national security issue to be addressed by the armed forces.

3. *In terms of international law, what does “act of war” really mean?*

* *The views and opinions expressed are those of the author alone and do not necessarily reflect those of the Government of the United States or any of its components.*

In the modern era the phrase “act of war” is more a political term than a legal one.⁶ Historically, “act of war” usually referenced the rationale for nations to engage in international armed conflict. It could be a variety of things, to include unfriendly economic and commercial actions, or even simply insults to national pride. In today’s legal context, the U.N. Charter⁷ has supplanted the concept of “act of war.” In Article 2 (4) of the Charter member nations rejected the very notion of war by requiring members to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”

4. Does the UN Charter outlaw all uses of force?

No. The UN Charter provides two principal exceptions to the prohibition on the use of force in international affairs: 1.) The UN Security Council (not the General Assembly) can authorize member nations to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”⁸ and 2) Force can be used in self defense under Article 51 of the Charter. Specifically, Article 51 says that: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...”⁹

5. The Security Council passed a resolution condemning the 11 September attacks; does this provide legal authority to use force?

The Security Council adopted a resolution on 12 September 2001 that condemned the attacks, expressed determination to combat terrorist acts by “all means”, re-affirmed the inherent right of individual and collective self-defense, and expressed its readiness “to take all necessary steps” to respond to the terrorist attacks.¹⁰ However, it does not itself constitute an explicit authorization to use force except in self-defense.

6. What legal theory is the U.S. relying upon to justify the use of force against terrorists?

Self-defense. In its joint resolution authorizing the use of force, Congress noted that the attacks of 11 September “render it both necessary and appropriate that the United States exercise its rights to *self-defense* and to protect United States citizens both at home and abroad” in order “to deter and prevent acts of international terrorism against the United States.”¹¹

7. Does the Law of Armed Conflict (LOAC) apply to counter-terrorism operations?

Generally, LOAC only applies to international armed conflicts between nation-states and, under certain circumstances, organized resistance movements. LOAC usually does not govern the conduct of military or police personnel in law enforcement operations against non-state actors. Where there is state sponsorship, LOAC would govern such operations. Nevertheless, as a matter of policy, the U.S. armed forces must “comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.”¹²

8. You said LOAC only applies to international armed conflicts between states. Will our response be considered part of an “international armed conflict”?

It depends. By definition, the Geneva Conventions apply in cases of “armed conflict which may arise between two or more of the High Contracting Parties.”¹³ This means that the Conventions, which form a large part of LOAC, apply mainly when *nations* fight. It’s hard to say if a response

to a particular terrorist attack rises to the level of nations fighting. It may depend on the level of involvement, if any, of any harboring or protecting state. If the conflict does not rise to the level of "international armed conflict," then - as a matter of law - very little of the Geneva Conventions would apply. In that case, we could not – for example - demand that our soldiers be treated as POWs as a matter of legal right if captured during such operations.

9. *Is it legal to use U.S. military force in another state in self-defense against non-state terrorists?*

Yes. As a general rule employing military force is a last resort to be used only when law enforcement efforts cannot be effective.¹⁴ Ordinarily, dealing with terrorists is a matter for resolution by the law enforcement and judicial authorities of the respective states. However, in the final analysis most experts agree that all states "must be able to exercise their inherent right under international law to defend themselves against all actors – non-state and state alike."¹⁵

10. *Is it legal to use military force in self-defense against a state that harbors non-state actor terrorists?*

Yes, under certain circumstances. Where non-state actor terrorists merely use a state's territory as a "safe haven", and the 'host' state is unable to prevent the terrorists from operating there, a victim state is still clearly entitled to use force against the *non-state actors* themselves in self-defense - notwithstanding the violation of the sovereignty of the host nation such action requires.¹⁶ Where, however, the host nation does more than merely acquiesce to the terrorists presence but rather conspires with them, or aids or abets them, or becomes an accessory after the fact, the actions of the terrorists become imputed¹⁷ to the state itself.¹⁸ In such "state-sponsorship" situations the victim state may use such force as is necessary in self-defense *against the host nation itself* so as to ensure that the host nation no longer presents a threat of continued facilitation or support of terrorist operations.¹⁹

11. *Is it legal to use force against countries that help, but do not harbor, terrorists?*

Possibly. But remember, force may *not* be used to simply punish states that cooperate with terrorism.²⁰ However, self-defense may warrant the use of force *if* it is necessary to stop future attacks. A lot depends upon the nature and magnitude of the support. An extract of an article that appeared recently in the Wall Street Journal is instructive in this regard:

One of the most difficult legal issues is how to justify attacking states that may have helped the groups that carried out the attacks, but aren't home to the terrorists. "There may need to be a high level of culpability like aiding and abetting terrorists," says Michael Scharf, a former U.S. State department lawyer who now teaches at the New England School of Law in Boston.²¹

12. *What exactly is permitted under the concept of self-defense?*

The U.S.'s *Standing Rules of Engagement (SROE)*²² says that in self-defense situations, the "[f]orce used to counter a hostile act or demonstrated hostile intent must be reasonable in intensity, duration, and magnitude to the perceived or demonstrated threat based on all the facts known to the commander at the time."²³ Self-defense also includes the "authority to pursue and engage hostile forces that continue to commit hostile acts or exhibit hostile intent."²⁴ From an international law perspective, self-defense does not limit actions to just those necessary to

counter an immediate, tactical danger; rather, it is permissible to continue the use of force on a wider basis until the “aggressor is defeated and no longer constitutes a threat.”²⁵

13. Do we have to wait until we are under attack again before we act in self-defense?

No. The U.S. and other (but not all) countries believe that *anticipatory* self-defense is inherent in the basic right of self-defense. A Navy publication sums up the concept and its rationale very nicely:

International law recognizes that it would be contrary to the purposes of the United Nations Charter if a threatened nation were required to absorb an aggressor’s initial and potentially crippling first strike before taking those military measures necessary to thwart an imminent attack. Anticipatory self-defense involves the use of armed force where attack is imminent and no reasonable choice of peaceful means is available.²⁶

Anticipatory self-defense provides the basis for using force in self-defense pursuant to the SROE’s based on an adversary exhibiting “hostile intent.”²⁷

14. What about “retaliation,” is that considered self-defense?

No. Retaliation, as that word is used in the law, is not permitted under international or domestic codes. “Retaliation” is *lex taliones*, that is, the “infliction upon a wrongdoer of the same injury which he has caused another.”²⁸ Military (or, for that matter, even police) force cannot be legitimately used to inflict punishment or retribution for its own sake; force may only be used to the extent needed to restore peace and, where possible, bring criminals to justice.²⁹ If criminals – to include war criminals – warrant punishment, that is the responsibility for the appropriate courts and tribunals to determine; military forces cannot inflict summary punishment.³⁰ The Secretary of Defense recognized the important distinction between ‘retaliation/punishment’ and ‘self-defense’ in a 13 Sept 01 television interview. When asked about the possible use of force against terrorists in “retaliation,” he corrected the interviewer: “I don’t think of it as retaliation. I don’t think of it as punishment. I think of it as self-defense.”³¹ Likewise, in an interview on 20 October 2001 the Chairman of the Joint Chiefs of Staff stated explicitly: “The United States isn’t into retribution.”³²

15. What is a “reprisal”?

In legal terms, a “reprisal” is the legal use of an otherwise unlawful means in response to an illegal act by the enemy. For example, if an enemy uses an illegal weapon, the concept of “reprisal” would permit the use of weapons that would “otherwise be unlawful in order to compel the enemy to cease its prior violation.”³³ Reprisal can only occur in situations of international armed conflict; in other words, there is no such thing as a legitimate “reprisal” against a non-state actor criminal.³⁴ Protocol I to the Geneva Conventions forbids reprisal against civilians and civilian property.³⁵

However, the U.S. is *not* a party to Protocol I and does not consider its proscriptions against reprisals directed at all civilians to be part of customary international law. The U.S. *is* a party to the Geneva Convention on Civilians,³⁶ and follows its provisions regarding reprisals against civilians. The Geneva Convention prohibits reprisals against *protected* persons and their property.³⁷ In general, “protected persons” are those who find themselves “in the hands” of the opposing enemy.³⁸ For example, in a scenario where the U.S. – acting pursuant to ‘reprisal law’

- attacks civilian targets *in a foreign nation*, the reprisal would be lawful under the Geneva Convention, as the foreign civilians would not be considered “protected persons” because they are not “in the hands” of the U.S. .

16. Is it legal to have a ‘disproportionate response’ in a counter-terrorism operation?

In order to determine the legality of a ‘disproportionate response,’ it is vital to understand the precise context in which the phrase is used. For example, there is no violation of international law in using *overwhelming* force to achieve a legitimate military objective or, for that matter, a bona fide law enforcement purpose. There is no requirement for a ‘fair fight’ so to speak. That said, the concept of proportionality does come into play when considering *noncombatant* casualties. Basically, LOAC prohibits attacks where the incidental loss of civilian life or property “would be excessive in relation to the concrete and direct military advantage anticipated.”³⁹

17. Can terrorists be assassinated as part of a military operation?

No, but clearly understand that not all killing of individuals is “assassination” under international or domestic law. It is true that Executive Order 12333 does not permit any U.S. government employee – to include military personnel – to “engage in, or conspire to engage in, assassination.”⁴⁰ However, “assassination” ordinarily contemplates some measure of treachery or perfidy. For example, killing someone protected by a flag of truce is unlawful assassination. Absent treachery or perfidy, the prohibition against assassination does not prohibit the killing of individuals when necessary in self-defense, nor the killing in armed conflict of individual leaders who are directing or controlling armed forces.⁴¹

18. If U.S. military forces capture a terrorist, is he or she a POW?

Very unlikely. As mentioned before, the Geneva Convention that provides protections for prisoners of war is limited to situations of “armed conflict which may arise between two or more of the High Contracting Parties.”⁴² Moreover, even assuming that circumstance exists, the captive usually must be a member of the armed forces of a Party to the Convention.⁴³ (If such a person has committed unlawful terroristic acts, he or she will be treated as a POW but tried for crimes, including war crimes, where appropriate.) In any event, *a non-state actor will almost never qualify for POW status*. Although it is possible, for example, for members of “organized resistance movements” to be entitled to POW designation if captured, they achieve that status only when such movements are: 1.) commanded by a person responsible for his subordinates; 2.) wear a fixed distinctive sign recognizable at a distance; 3.) carry arms openly; and 4.) conduct their operations in accordance with the laws and customs of war.⁴⁴ In an international armed conflict, persons whose status is unknown are entitled to be treated as POWs until the issue is resolved.

19. If a terrorist captures a U.S. military member, is he or she a POW?

It depends. If captured by a *state* actor (e.g., a member of the armed forces of a hostile country) during armed conflict, the military member is entitled to POW status (unless, for example, the individual was not wearing a military uniform such as when acting as a spy or a saboteur in hostile territory). If captured by a *non-state* actor (e.g., a criminal) the U.S. military member is technically not a “POW” but simply a crime victim – essentially a hostage.⁴⁵ Unlike a POW who can legally be held by the enemy power until the end of hostilities, a crime victim should be immediately released, as it was not lawful for the non-state actor to hold them in the

first place. It is expected that DoD would “call for their immediate repatriation and expect them to be afforded the full protections accorded to lawful combatants until so repatriated.”⁴⁶

20. Does the Code of Conduct apply in situations involving terrorist captors?

Yes, but there are special considerations. DoD Directive 1300.21, *Code of Conduct Training and Education*, Enclosure 3 (8 Jan. 2001) contains explicit guidance on how the Code of Conduct applies during captivity by terrorists.

21. What is the scope of the President’s authority to counter terrorism?

As Commander-in-Chief, the president has extensive power to take action in the interest of national defense in emergency situations.⁴⁷ However, this power is not unlimited. For example, during the Korean War, President Truman ordered a government takeover of the steel industry in anticipation of a labor strike that he feared would impede national security. The Supreme Court set aside the order and held that the President’s emergency powers are limited to those set forth in the constitution or provided by statute.⁴⁸ Congress has, in fact, enacted a wide variety of laws designed to empower the President in situations of war or national emergency.⁴⁹

22. Must Congress declare war before action can be taken against terrorists?

No. As Commander-in Chief⁵⁰ the President has Constitutional authority to act in the nation’s defense even in the absence of a formal declaration of war.⁵¹ In 1973 Congress passed the War Powers Resolution,⁵² which requires certain reporting in situations where troops are involved in hostilities or are deployed overseas equipped for combat. The report triggers a sixty-day clock (extendable by the President for an additional thirty days) at the end of which Congress must approve the continued operation in some way (e.g., declaration of war or other action). Although Presidents have generally complied with the Resolution, none has conceded its constitutionality.⁵³

23. What are a commander’s obligations under LOAC?

Commanders must ensure that forces are properly trained in LOAC, observe it in practice, and report LOAC violations in a timely manner.⁵⁴ If commander orders, knew, *or should have known about a war crime*, personal criminal liability may attach. The affirmative responsibilities of a command are highlighted by the case of General Tomoyuki Yamashita. Yamashita, a Japanese general who commanded forces in the Philippines, was tried as a war criminal following World War II - even though he did not personally commit any atrocity. In upholding Yamashita’s conviction and sentence, the Supreme Court concluded that:

The law of war imposes on any...commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war and...he may be charged with personal responsibility for his failure to take such measures when violations result.⁵⁵

Yamashita was executed near Manila on 23 February 1946.

24. How can military members be sure that the orders they are given in counter-terrorism operations comply with the law?

Military members have an obligation to obey only *lawful* orders; the defense of blind obedience to 'superior' orders was rejected at Nuremberg⁵⁶ and does not exist today. However, under U.S. military law, members of the armed forces may *infer* that all orders are lawful *unless* they are "patently" illegal.⁵⁷ This should rarely be an issue because for U.S. forces trained legal advisors generally review all operations' plans to ensure their lawfulness. Specifically, DoD policy requires that "all operation plans...concept plans, rules of engagement, execute orders, deployment orders, policies, and directives are reviewed by the command legal advisor to ensure compliance with domestic and international law."⁵⁸ Further, Protocol I of the Geneva Conventions requires legal advisors to be available at all levels of command,⁵⁹ and this is also incorporated into DoD policy.⁶⁰

Notes

¹ 22 U.S.C. § 2656 (d)(1).

² Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms*, 12 April 2001, at 428 available at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf (last accessed 16 Sept 01).

³ For a comprehensive listing of U.S. law related to terrorism, see FindLaw, *Special Coverage: America Attacked*, available at <http://news.findlaw.com/legalnews/us/terrorism/laws.html> (last accessed 17 Sept 01).

⁴ See U.S. Dep't of State, *International Terrorism Conventions* (August 17, 1998), available at http://www.state.gov/www/global/terrorism/980817_terror_conv.html (last accessed 16 Sept 01).

⁵ The U.S. has criminalized acts as required by the respective treaties. See e.g.,

⁶ The phrase “act of war” does appear in the U.S. Code, but not in the context of a rationale to engage in armed conflict. Specifically, Title 18 defines “act of war” as:

- (4) the term “act of war” means any act occurring in the course of –
 - (a) declared war;
 - (b) armed conflict, whether or not war has been declared, between two or more nations; or
 - (c) armed conflict between military forces of any origin.

18 U.S.C. §2231

⁷ U.N. Charter (1945) available at <http://www.un.org/aboutun/charter/index.html> (last accessed 16 Sept 01).

⁸ U.N. Charter art. 42.

⁹ U.N. Charter art 51.

¹⁰ U.N. Security Council Res. 1368 (2001) available at <http://www.un.org/Docs/scres/2001/res1368e.pdf> (last accessed 16 Sept 01).

¹¹ S.J. Res. 23, 107th Cong. (2001) [emphasis added.]

¹² U.S. Dep't of Defense Dir. 5100.77, *DoD Law of War Program*, para. 5.3.2 (9 Dec. 1998)

¹³ See Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 [Geneva III], art 2.

¹⁴ See Richard J. Erickson, *Legitimate Use of Military Force Against State-Sponsored Terrorism* (1989) at 212.

¹⁵ Walter Gary Sharp, Sr., *The Use of Armed Force Against Terrorism: American Hegemony or Impotence?*, 1 Chi. J. Int'l L. 37, 39 (Spring 2000).

¹⁶ Some experts conclude that “[m]erely providing safe haven for international terrorists after they have committed their acts does not constitute an “armed attack” required by the terms of the [UN] Charter [for self-defense].” John F. Murphy, *The Control of International Terrorism*, in National Security Law 465 (John Norton Moore, Fredrick S. Tipton, and Robert F. Turner, eds., 1990).

¹⁷ Erickson, note 14, *supra*, explains how responsibility is imputed to the state:

As an abstract entity, the state becomes liable under international law through the acts or omissions of its officials and agents. These acts or omissions are imputed to the state. The acts of the head of government are always imputable to the state, as are the acts of ministers within the scope of their ministries. The same is true of all other officials and agents, irrespective of governmental level. This includes military and police authorities. Additionally, acts or omissions are imputed to the state even if beyond the scope of the legal power of the official and even if opposite to that directed so long as they are not repudiated by governmental authority and the wrongdoer is not appropriately disciplined or punished.

Id. at 99.

¹⁸ By way of illustration, the U.S.'s Manual for Courts-Martial provides an explanation of "aiding and abetting" under the law of principals, as well as "accessory after the fact":

If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must: (i) Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and (ii) Share in the criminal purpose of design. One who, without knowledge of the criminal venture or plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime...In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime *if* such a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

Manual for Courts-Martial, United States, pt. IV, para. 1b(2)(b)

The assistance given to a principal by an accessory after the fact is not limited to assistance designed to effect the escape or concealment of the principal, but also includes acts performed to conceal the commission of the offense by the principal (for example, by concealing evidence of the offense).

Manual for Courts-Martial, United States, pt. IV, para. 2c(1)

¹⁹ The concept of applying the criminal law concepts of the law of principles and the law of conspiracy has precedent from, among other sources, the Nuremberg trials. For example, the Charter of the International Military Tribunal provided that:

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Charter of International Military Tribunal, art. 6 (August 8, 1945) *available at* <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergIndictments.html#Charter> (last accessed 17 Sept. 2001)

²⁰ See also notes 28, 29, 30, and 31 and accompanying text.

²¹ Matthew Kaminski and Paul Hofheinz, *U.S. Retaliation May Qualify As "Crime Against Humanity"*, *Wall Street Journal*, Sept 18, 2001, as reprinted in Department of Defense, *Current News Early Bird*, Sept 18, 2001, story No. 9 *available at* <http://ebird.dtic.mil/Sep2001/e20010918crime.htm> (last accessed 18 Sep 2001).

²² Chairman, Joint Chiefs of Staff Instr. 3121.01A, *Standing Rules of Engagement for US Forces*, Enclosure A, (15 January 2000) [SROE].

²³ *Id.* at para. 5f.

²⁴ *Id.* at para. 8b.

²⁵ L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester University Press: 1993), at 9. The full passage is as follows:

While the charter restricts the right to resort to measures of a warlike character to those required by self-defense, its provisions only relate to the *jus ad bellum*. Once a conflict has begun, the limitations of Article 51 become irrelevant. This means there is no obligation upon a party resorting to war in self-defense to limit his activities to those essential to his self-defense. Thus, if an aggressor has invaded his territory and been expelled, it does not mean that the victim of the aggression has to cease his operations once his own territory has been liberated. He may continue to take advantage of the *jus*

in bello, including the principle of proportionality, until he is satisfied that the aggressor is defeated and no longer constitutes a threat.

Id.

²⁶ Dep't of Navy, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, para.4.3.2.1 (1997).

²⁷ SROE, note 22, *supra*, at para. 5 (h). The definition is as follows:

Hostile Intent. The threat of imminent use of force against the United States, US forces, and in certain circumstances, US nationals, their property, US commercial assets, and/or other designated non-US forces, foreign nationals and their property. Also, the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.

Id.

²⁸ Blacks Law Dictionary 1058 (4th ed., 1968).

²⁹ Erickson, note 14, *supra*, at 211 ("If [force is used] in self-defense, then the action must be protective, not punitive.").

³⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* [Protocol I], art. 85.4e. Although the U.S. is not a Party to Protocol I, it considers this portion to be a binding part of customary international law.

³¹ *Larry King Live* (CNN television broadcast, Sept. 13, 2001). The full transcript of that portion of the interview is as follows:

KING: And how -- just a couple more moments -- how do we define retaliation? Do we retaliate through legal means? Do we retaliate through an armed force? What is the definition in your head of retaliation?

RUMSFELD: Larry, I don't think of it as retaliation. I don't think of it as punishment. I think of it as self-defense.

The United States of America has every right to defend itself, and that is what it is about. It is consciously saying that countries and entities and people who actively oppose the United States and damage our interests by acts of violence, acts of war, are our enemies, and they are people and organizations and entities and states that we have every right to defend ourselves against.

³² General Richard B. Meyers, *Text: Meyers' Briefs Special Forces Operation*, [Washingtonpost.com](http://www.washingtonpost.com) (October 20, 2001) available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/myers_102001.html (last accessed 20 October 2001).

³³ U.S. Dep't of Air Force, Air Force Pamphlet 110-31, *International Law – The Conduct of Armed Conflict and Air Operations*, para. 10-7 (19 November 1976).

³⁴ See generally, Geoffrey Best, *War & Law since 1945* (1994), at 311-318.

³⁵ Protocol I, note 30, *supra*, at art. 51.1 and art. 52.1.

³⁶ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, August 12, 1949 [Geneva IV].

³⁷ *Id.* at art. 33.

³⁸ *Id.* at art. 4.

³⁹ Protocol I, note 30, *supra*, at art. 51.5(b).

⁴⁰ Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1980) *reprinted in* 50 U.S.C. § 401 nt., para. 2.11.

⁴¹ See generally, Hon. Caspar W, Weinberger, *When Can We Target the Leaders?* Strategic Review, Spring 2001, at 21.

⁴² Geneva III, note 13, *supra*, at art 2.

⁴³ *Id.* at 4(1).

⁴⁴ *Id.* at art. 4(2).

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- ⁴⁵ See generally, H. Wayne Elliott, *Hostages or Prisoners of War: War Crimes at Dinner*, 149 Mil. L. Rev. 241 (1995).
- ⁴⁶ E-Mail from Col Thomas Tudor, Chief, International and Operations Law Division, U.S. Air Force, to Col Charles J. Dunlap, Jr. (information copy), Staff Judge Advocate, Air Education and Training Command (9 Oct. 2001) (on file with the author) (citing DoD).
- ⁴⁷ See Donald L. Robinson, *Presidential Emergency Powers*, in The Oxford Companion to the Supreme Court of the United States (Kermit L. Hall, ed., 1992), at 665.
- ⁴⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
- ⁴⁹ See generally, Dep't of Air Force, Digest of War and Emergency Legislation Affecting the Department of Defense (2000). See also note 3, *supra*.
- ⁵⁰ U.S. Const. Art. II, § 2, cl. 1. For a discussion of the scope of the President's commander-in-chief authority see <http://supreme.lp.findlaw.com/constitution/article02/07.html> (last visited 17 Sept 01).
- ⁵¹ See Thomas O. Sargentich, *War Powers*, in The Oxford Companion to the Supreme Court of the United States note 47, *supra*, at 911.
- ⁵² War Powers Resolution of 1973, Public Law No. 93-148, 87 Stat. 555 (1973).
- ⁵³ See Sargentich, note 51, *supra*.
- ⁵⁴ See generally, DoDD 5100.77, note 12, *supra*.
- ⁵⁵ See *In Re Yamashita*, 327 U.S. 1, 14 (1946). For a comprehensive analysis of this case, see W. Hays Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1 (1973).
- ⁵⁶ The *Charter of the International Tribunal*, note 19 *supra*, states in Article 8 that: "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires."
- ⁵⁷ Manual for Courts-Martial, United States, pt. IV, para. 14c(2)(a)(i). But see Mark J. Osiel, Obeying Orders (1999) (arguing for a new norm that would require deliberative judgment in lieu of a presumption of lawfulness).
- ⁵⁸ CJCSI 5810.01A, *Implementation of the DoD Law of War Program*, para. 6(c)(5) (27 August 1999)
- ⁵⁹ Protocol I, note 30, *supra*, at art. 82.
- ⁶⁰ CJCSI 5810.01A, note 58, *supra*, para. 5(b).