LAW, ETHICS, AND THE WAR ON TERROR
Law, Ethics, and the War on Terror
Dedicated to the memory of
Randy Forsberg (1943–2007),
scholar, activist, mentor, friend
Law, Ethics, and the War on Terror

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Preface

Most people intuitively feel that violating the Geneva Conventions or engaging in torture is wrong, yet they may not have a full grasp of the underlying legal details or an understanding of the ethical debates. The Global War on Terror has given these matters a certain urgency. The United States responded to the brutal attacks of 11 September 2001 by declaring itself at war. Its subsequent behavior, the capture and imprisonment of hundreds of accused ‘enemy combatants’, widespread evidence of torture and abuse of the detainees, and, finally, the invasion of Iraq have alarmed people at home and abroad.

Lawyers, philosophers, and ethicists have pursued these issues in their professional journals and to a certain degree in the public sphere. There are, however, few books that provide a basic overview for the non-specialist of the key ethical and legal issues in the war on terror. That is what the present book aspires to do. My own training is in history, literature, and political science rather than in philosophy or law. I have, however, been teaching in the area of international law and ethics since the mid-1990s, when I was on the faculty at the University of Michigan. In 1992 I had announced to my students that I would be exploring a new area of teaching, since I had become ‘doubly obsolete’ in my old ones. As a Sovietologist who studied and taught about the US–Soviet nuclear arms race, I had witnessed ‘my’ country and ‘my’ problem both disappear, thanks largely to the reforms of Mikhail
Gorbachev. He in turn had been inspired by a transnational network of disarmament activists, among whom Dr Randall Forsberg, the founder of the Nuclear Freeze movement, stood out for her energy, insight, and commitment. I dedicate this book to her memory.

Much of my teaching at Cornell, since I joined the faculty in 1996, has focused on ethical issues in international affairs. I had the privilege to co-teach a graduate seminar on that subject with Henry Shue, one of the most thoughtful scholars of international ethics. In the couple of years following the 9/11 attacks, I worked with my colleague, Professor David Wippman of Cornell Law School, to organize a conference and produce an edited book on the implications of the war on terror for the laws of war. I have learned a tremendous amount from David and the other participants in the project. I draw on some of the material from our book in this study, while accepting sole responsibility for any errors in my interpretation of the law.

Many of the ideas explored in these chapters first emerged as lectures, at Michigan and Cornell and at several institutions in Italy. In addition to thanking my US students, I would like to acknowledge students and colleagues at the Alta Scuola di Economia e Relazioni Internazionali (ASERI), Università Cattolica del Sacro Cuore, Milan; at the Dipartimento di Politica, Istituzioni, Storia, Università di Bologna, where I was a Visiting Fulbright Lecturer in 2006; at the Università Suor Orsola Benincasa in Naples; and at the International School on Disarmament and Research on Conflicts at Andalo (Trento). Thanks are due also to the organizers and participants of seminars where I presented early versions of some of these arguments: Brown University’s Watson Institute; the Fondazione Mediterraneo in Naples; the Centro Einaudi in Turin; the Istituto per gli Studi di Politica Internazionale, Milan; Gamla Torget, Uppsala University, Sweden; the Tomsk State
University, Russia; and the Faculty of Law, Mohamed V University, Rabat, Morocco.

At Polity, I owe thanks to Louise Knight for proposing that I write this book; to her assistant, Emma Hutchinson; to the anonymous reviewers for their thoughtful comments; and to Manuela Tecusan, copy-editor and classicist, for, among other things, convincing me to replace *jus* with *ius*.

I am grateful to my wife, Joan Filler, and to my Cornell colleagues, Peter Katzenstein, Jonathan Kirshner, and Sidney Tarrow, for their helpful comments on the manuscript, and to a former colleague, Jeremy Rabkin, for discussions about some of the issues I cover here. The Peace Studies Program at Cornell has been a consistent source of support. I especially thank my longtime friend and colleague Judith Reppy and our irreplaceable staff, Elaine Scott and Sandra Kisner. I thank my mother for everything she did in raising me to stimulate my interest in ethical issues.

I wrote most of this book while visiting the home of my in-laws, Maurice and Myril Filler, stealing away time from the computer to enjoy lively discussions about the sorry state of our world. Their continued intellectual engagement, sense of optimism, and support for my work are a great source of inspiration.
Introduction

The mass murder of thousands of innocent civilians by al Qaeda terrorists plumbed the depths of criminality and immorality. The various responses to those attacks, particularly by the United States, provoked widespread accusations that the anti-terrorist cure may be worse than the terrorist disease. This book explores the key legal and ethical controversies that arose in the wake of the brutal acts of 11 September 2001 and of the launching of the Global War on Terror – a metaphorical and real war of indefinite duration and unlimited reach.

The Cold War ended with the fall of the Berlin Wall on 9 November 1989 – the first 9/11. The demise of communism in the face of peaceful mass protests, led by reform socialists and dissidents, capped a particularly productive decade of efforts to promote human rights worldwide. These efforts created the impression that a global civil society had emerged, to challenge the dominance of states and to establish new norms to guide their behavior, especially in the realm of human rights and limitations on warfare. The aftermath of the second 9/11, however, witnessed a reassertion of state prerogatives and a strengthening of executive authority in many countries. The US administration of George W. Bush alarmed many people, at home and abroad, by the policies it pursued in its war on terror – particularly its treatment of detainees at Guantánamo Bay and Abu Ghraib prisons, its defiance of the Geneva Conventions, its use of torture against terrorist suspects, and its invasion of Iraq. By the autumn of 2006, citizens polled in
the United Kingdom, the closest US ally, viewed George Bush as a greater threat to world peace than either the North Korean leader, Kim Jong-Il, or the Iranian president, Mahmoud Ahmadinejad. Only Osama bin Laden came in ahead of Bush, at 87 percent to the US president’s 75 percent. Other US allies and neighbors reported similar results.¹

Whether or not the United States under George Bush constituted the greatest danger to international security, it certainly generated the most controversy. Yet the main issues that arose in the wake of the 9/11 attacks will long outlast the Bush administration. The purpose of this book is to provide the relevant historical and political background and the basic legal and ethical frameworks for some of the major controversies related to the war on terror. My goal is not to produce a law textbook or a philosophical treatise, but rather a general introduction, accessible to non-specialists. My overall theme is the tension between the efforts of two sets of actors. On one side are the proponents of enhancing human rights and increasing restrictions on warfare. These include nongovernmental organizations, some governments, and individuals – often characterized collectively as ‘norm entrepreneurs’. On the other side are other governments, most notably the United States, pursuing the Global War on Terror, often at the expense of basic rights. I do not spend much time examining whether this terminology makes sense, whether one can wage a genuine war against a thing, such as terror, or the tactics of terrorism. Others have done so to good effect.²

My main argument is that the war on terror is bringing about a return to state prerogatives in establishing the norms that govern international behavior. This is, in fact, the predominant explanation for international law – that customary law comes primarily from state practice and treaty law reflects state interests. Yet, with the end of the Cold War, we seemed to experience something different: a greater influence on the part
of civil-society groups and nongovernmental organizations. That short period could well be ending now. Chapter 1 sets out the basic outlines of the argument about norms versus practice in the evolution of ethics and law. I use the chapter not to engage in a theoretical debate with legal scholars or political scientists, although some of their work informs my analysis. Instead, I present the argument as a framework for evaluating the subsequent evidence from the controversies that have surfaced in the war on terror.

Chapter 2 addresses the first one of these: it is a controversy over the very definition of terrorism. The chapter examines whether government and military officials can be considered victims of terrorism, or whether the victims must be only innocent civilians. It explores the question of ‘state terrorism’ and the role of terror in warfare, particularly in aerial bombardment. It explains how the United Nations has sought to pursue conventions to cope with the threat of terrorism, all the while recognizing the unfortunate reality that often one state’s terrorist is another’s freedom fighter. It presents a possible compromise, which leads to a focus on terrorists who are non-state actors but which does not relieve states from their responsibilities when they commit war crimes and atrocities.

Chapter 3 tackles the main questions regarding the treatment of terrorist suspects: Do the Geneva Conventions apply? Who qualifies to be a prisoner of war and who decides on it? What are ‘enemy combatants’ and what are their rights, if any? The chapter discusses how the Bush administration and how the US Supreme Court have answered these questions. It then reviews the debate on torture, not only in its legal and ethical dimensions, but also by asking where the political initiative came from to subject detainees to harsh interrogations. Finally, the chapter considers the legality and practicality of targeted killings of suspected terrorists as a preventive measure.
Can someone suspected of planning a bomb attack be a legitimate target under the laws of war?

Chapter 4 is devoted to another preventive measure, equally controversial but more consequential: war. The chapter reviews the legal status of the wars in Afghanistan and Iraq, as well as their political motivations. It considers whether, despite the widespread global opposition to the Iraq War, states are coming to accept the idea of preventive measures against terrorism. Is a norm in favor of preventive war emerging?

Chapter 5 addresses a different category of wars – the ones fought for ostensibly humanitarian purposes. Both humanitarian interventions and wars for ‘regime change’ pose problems for aid organizations which strive to maintain neutrality and impartiality in the expectation that they will be accorded immunity from the violence. The situation during the early twenty-first century rendered those expectations increasingly unrealistic. The fate of aid workers is complicated by their interaction with the private security corporations upon which governments depend to carry out their humanitarian wars. The modern-day guns for hire rarely fit the technical legal definition of a mercenary, and thus fall into a kind of legal limbo. They seem unaccountable for the many crimes in which they have been implicated. This chapter, along with the preceding ones, reinforces the point that it is worth understanding the evolution of two types of norms: those that harm civilians and diminish human rights as well as those that protect civilians and expand their rights. A major factor influencing the evolution of the first kind of norms is the war on terror.

Readers will notice that most of the attention in this book is directed to the policies of the United States. It is not the only country engaged in a self-described war on terror. In a previous book I wrote about another one: Russia. Others are writing systematically about a range of countries facing the ‘international state of emergency’ that 9/11 provoked. In this book I
occasionally mention examples from other states’ experiences with terrorism. The United States, however, is the world’s preeminent military power, with an annual war budget that exceeds the total military spending of the rest of the world. The United States is also the principal target of the other main protagonist in the war on terror: the al Qaeda network of Islamist terrorists. This is not a book about al Qaeda, or even about terrorists per se. Except for the discussion of the debates over definitions in Chapter 2 and the status of enemy combatants and detainees in Chapter 3, I do not have a lot to say about terrorists. This is mainly a book about the evolution of norms and laws governing warfare and the protection of civilians during a war on terror. And here is the final justification for focusing on the United States: Most theories that accord state practice first place in shaping the evolution of norms would anticipate that the most powerful state in the system would be the most influential. I qualify this generalization at certain points in the book and in the concluding chapter, arguing that other states and nongovernmental organizations can still play an important role. This argument provides a small bit of hope in an otherwise bleak prognosis.
What we commonly call ‘the laws of war’ has two other names, used by professionals in the field: ‘international humanitarian law’ and ‘the law of armed conflict’. Which name you use says a lot about how you think about the sources and purpose of law in the international system. Members of humanitarian organizations and many international lawyers prefer the name ‘international humanitarian law’. They date the modern emergence of this body of law to the efforts of Swiss businessman Henry Dunant, founder of the International Committee of the Red Cross (ICRC). Dunant convened the first meeting of the ICRC in 1863. He was inspired by the horrors he witnessed at the Battle of Solferino in northern Italy four years earlier. The committee was initially formed to aid wounded soldiers; it then expanded its scope to include sailors, and later, prisoners of war. As war became increasingly destructive to civilians, the ICRC embraced a broader mandate to extend protections to noncombatants as far as possible. The organization is considered the custodian of the Geneva Conventions and its role is explicitly recognized in the treaties.

The description ‘law of armed conflict’ is the preferred choice of military professionals whose historical reference point is the Lieber Code, issued in that same year of 1863. US President Abraham Lincoln commissioned a document formally titled Instructions for the Government of Armies of the United States in the Field, General Orders Number 100. It was intended to codify the existing military practice so that soldiers
of the Union Army would abide by it. Its author, Francis (Frantz) Lieber, was a German-American jurist and professor at Columbia University who had fought in the Prussian Army against Napoleon. He supported the Union during the Civil War, even though he had lived for many years in South Carolina and his son died in 1862 fighting on the Confederate side.

The two ways of understanding the laws of war share much in common, starting with the basic distinction between *ius ad bellum* – the conditions under which resorting to war is considered legitimate – and *ius in bello* – the types of military strategies and weapons allowed and the treatment of prisoners of war and civilian noncombatants. This fundamental distinction originated with the Catholic Just War tradition centuries ago, but it reflects principles broadly shared across the world’s religions. Perhaps more significantly, the ethical tradition of just war became the basis for modern legal restrictions on warfare to which all states are bound.

The United Nations Charter, for example, embodies the principles of *ius ad bellum* in its prohibition on the use of force except for reasons of self-defense or when it is authorized by the Security Council for the preservation of international peace and security. Here the principle of right authority comes into play. To justify the use of military force for self-defense, the proper authority is the state itself. This customary norm of international law is reinforced by the United Nations Charter’s reference (in Article 51) to ‘the inherent right of individual or collective self-defense’ that all UN member states enjoy. In situations that affect international peace and security but may not pose direct threats to member states which would justify individual military action in self-defense, the UN Security Council is considered the right authority to sanction the use of force, under Chapter VII of the Charter. The criterion of reasonable hope also falls within the scope of the *ius ad bellum*. It
refers to the requirement that there be some realistic expectation that the goals of the military operation contemplated will be achieved. It would be difficult to justify harm done to innocent civilians, not to mention the deaths of a country’s own soldiers (or even those of the other side), for a hopeless cause. Both right authority and reasonable hope figure prominently in legal and political discussions on such topical issues as ‘humanitarian intervention’ and preventive war.¹

*Ius in bello* principles are reflected in the various Hague and Geneva Conventions which constitute the laws of war and in treaties restricting the use of particular weapons or military practices. Within *ius in bello*, two principles loom large in importance: *distinction* (or *discrimination*) and *proportionality*, which, in turn, is linked to the doctrine of *double effect*. The principle of distinction requires that armed forces distinguish between military and civilian targets, attacking the former and seeking to avoid harming the latter. Double effect is an ethical concept, usually attributed to Thomas Aquinas, with applications to fields ranging from medicine to warfare. It focuses on the actor’s intentions in carrying out an act which can have both good and evil consequences (thus, a double effect). In war, killing civilians is considered evil, whereas destroying military facilities or killing soldiers is good. Many attacks produce both effects. Some harm to civilians is expected to occur in all armed conflicts, so killing civilians per se is not illegal or immoral according to just war theory. In order to satisfy the ethical criteria and to adhere to the laws of war, armed forces are not allowed to target civilians directly or to use the deaths of civilians as a means to an end, even if that end – victory – is good. But forswearing the deliberate intention of killing civilians is not enough to excuse or justify their deaths in a military engagement. There must be a reasonable judgment that the good effect – the military benefit – outweighs the evil effect of harm to civilians. That is where the principle of proportional-
ity comes in. Here is a standard, concise definition: ‘The loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.’2 That this definition comes from a US Army field manual reinforces the point: Over the centuries, the ethical concepts made their way from just war theory into the body of modern international law, and from there into the rules of engagement which are supposed to govern military practice.

Despite common features, the divergent names for the laws of war imply different points of emphasis. One might hypothesize, for example, that the humanitarian approach reflected in international humanitarian law would privilege civilian welfare over optimal military performance, whereas the military professionals’ understanding of the law of armed conflict would favor the exigencies of successful combat and ‘military necessity’ over the protection of civilians. Like any dichotomy, this one is not fully accurate, but it does seem to reflect the basic tensions underlying the role of law and ethics in international politics, especially as they have surfaced in connection with the war on terror.

In 1939 Edward Hallett Carr, the British historian and analyst of international affairs, described a ‘fundamental divergence’ in the understanding of international law ‘between those who regard law primarily as a branch of ethics, and those who regard it primarily as a vehicle of power’.3 More than six decades later, the Global War on Terror exposed this divergence as still the fundamental source of disagreement on the purpose of the laws of war. Consider the debate which has emerged over the question, as one observer put it, ‘Who owns the rules of war?’4 Proponents of expanding the scope of humanitarian protections endorse the likeminded efforts of nongovernmental and international organizations and states, particularly in Europe, which have favored limitations
on certain weapons and strategies and have sought to hold governments accountable for abuses perpetrated against detainees suspected of conducting or planning terrorist acts. Advocates of this approach invoke pragmatic arguments for pursuing alleged war criminals and scofflaws—deterrence of future abuses, for example—but a sense of moral outrage seems an equally strong motivating force. In the war on terror, that outrage is directed not only against those who undertake terrorist acts but also against those who torture terrorist suspects or wreak havoc on innocent civilians, in an attempt to defeat insurgents.

The opposite position reflects greater concern about the military capabilities of states that are directly engaged in fighting terrorists worldwide and guerrilla insurgencies in places such as Afghanistan and Iraq. The rights of terrorist suspects and of civilians in conflict zones are secondary. Proponents of this position argue that the states that actually practice warfare should set the rules and should not be constrained by other states and organizations that have no direct involvement in military matters. Following Robert Kagan’s celebrated generalization that ‘Americans are from Mars and Europeans are from Venus’, they argue that the pacifically oriented states of the European Union, for example, should not determine the rules that define US military conduct. It is the United States, after all, that bears the lion’s share of the burden of defending the world from terrorism. Some suggest that European countries are cynically employing ‘lawfare’ to limit US power to their benefit. They find it incredible, for example, that the chair of the International Criminal Court’s working group tasked with defining the crime of aggression should be the United Nations representative from Liechtenstein, a tiny country that disbanded its eighty-strong army in 1868 and remained neutral in both world wars. In response, defenders of the court might question why the nationality of the working group’s chair