

"International Law implications of the US Departure from Afghanistan"

Prof. Geoffrey S. Corn

Prof. Eric Talbot Jensen

Outline

1. When is “war” really over
2. Recognition/State
Responsibility
3. Detention

Our Longest War



Almost 25% of the current US population was born during the war

	2001	2021
Annual GDP	\$2.46 Billion	Over \$21 Billion
Literacy Rate	Approximately 30%	Almost 50%
Female Literacy	13%	38%
Infant Mortality (by 5)	25%	6%
Life Expectancy	56.07	65.63



Estimated amount of direct Afghanistan and Iraq war costs that the United States has debt-financed as of 2020: \$2 trillion.

Estimated interest costs by 2050: Up to \$6.5 trillion.

THE HUMAN COST (as of April 2021):

- American service members killed in Afghanistan through April: 2,448.
- U.S. contractors: 3,846.
- Afghan national military and police: 66,000.
- Other allied service members, including from other NATO member states: 1,144.
- Afghan civilians: 47,245.
- Taliban and other opposition fighters: 51,191.
- Aid workers: 444.
- Journalists: 72.



Is the Longest War Really Over

“We will maintain the fight against terrorism in Afghanistan and other countries. We just don’t need to fight a ground war to do it. We have what’s called over-the-horizon capabilities, which means we can strike terrorists and targets without American boots on the ground — or very few, if needed.

We’ve shown that capacity just in the last week. We struck ISIS-K remotely, days after they murdered 13 of our servicemembers and dozens of innocent Afghans.

And to ISIS-K: We are not done with you yet.”

Pres. Biden, August 31, 2021

Afghanistan and future NIAC



Has the emergence of transnational organized armed groups reversed the domestic incentives to treat NIACs as domestic issues?

Armed Conflict Incentives

- Historically, States have avoided, for political reasons, admitting they were involved in an armed conflict.
 - Mexico with the drug cartels
 - Turkey with the PKK
- 9/11 created a new paradigm because of the transnational nature of the threat.



Transnational NIAC

- A post 9/11 theory of international legal authority to engage in conduct of hostilities
- Originally subject to substantial criticism
 - Textual reading of CA3
 - Formalist reading of CA3
 - False 'geography of war' narrative
- Fundamental inversion of NIAC pragmatics
- Inherent incentive for invoking war powers to respond to non-state threats

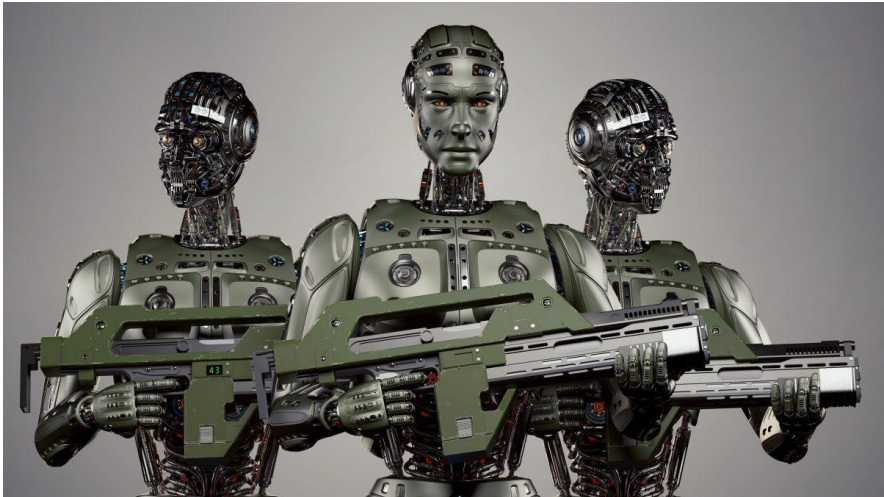
Armed Conflict Incentives

- Emerging Technology
- Transnational Reach





Emerging Tech and Command Responsibility



Emerging and Advanced Technology

- RPVs, Cyber, Autonomy
- Contributes to a perception of limited political risk for conducting hostilities
 - Bolsters Executive assertions of inherent Article II authority
- Key aspect of AG war powers opinions for:
 - Libya
 - Syria missile strikes
- A new layer of complication to assessing applicability and compliance with the War Powers Resolution

Recognition/State Responsibility

- States (nations) the foundational unit of international law since 1648 Treaty of Westphalia.
- States responsible for:
 - 1) Controlling violence within its political boundaries.
 - 2) Any violence that comes from within its borders with external effects.
- Art. 1 – “Every internationally wrongful act of a State entails the international responsibility of that State.”
- Art. 2 – “There is an internationally wrongful act of a State when conduct consisting of an action or omission:
 - (a) is attributable to the State under international law; and
 - (b) constitutes a breach of an international obligation of the State.

Recognition/State Responsibility

- US, EU, UK do not “recognize” the government of the Taliban



What does this mean for state responsibility?

Who is responsible to protect foreign citizens?

Who is responsible for human rights abuses?

How does the US/EU/UK enforce Treaty obligations?

Recognition/State Responsibility

Countermeasures - Otherwise illegal act taken by a victim State* **against the violating State**, not amounting to a use of force, designed to bring a violating State back into legal compliance

- 1) must be in response to a previous int'l wrong
- 2) Injured State must have called on the violating State to make reparation
- 3) Countermeasure must be proportional to the initial injury
- 4) purpose must be to induce compliance
- 5) must be reversible

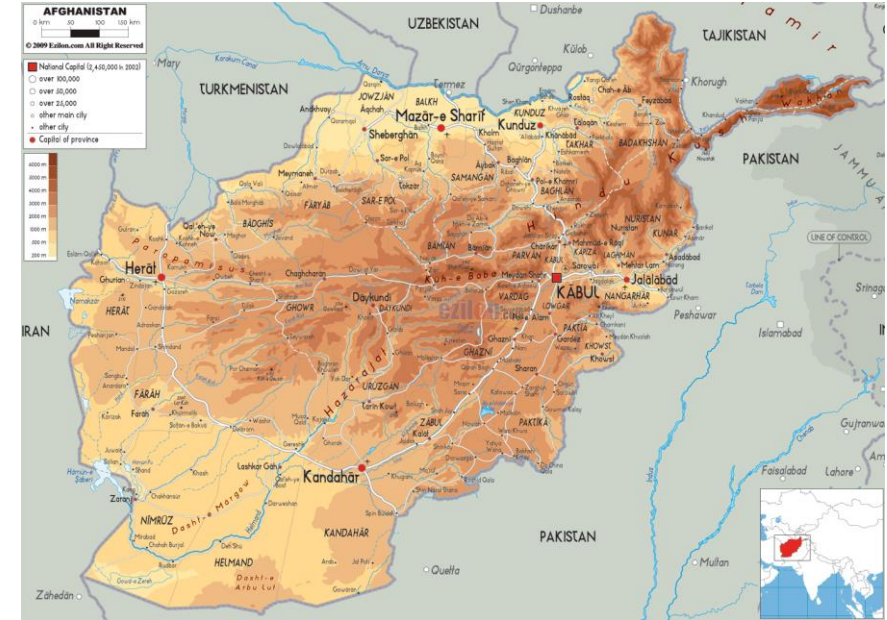
* No collective countermeasures



AUMF

- Detention – “The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who “engaged in an armed conflict against the United States.” If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of “necessary and appropriate force,” and therefore are authorized by the AUMF.”
- “If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of “necessary and appropriate force,” and therefore are authorized by the AUMF.”

Hamdi v. Rumsfeld



AUMF

- Pres. Obama and “associated forces”
- If the predicate is gone, does the expansion remain?
- What impact would repeal of the AUMF have?
- *But see* then Judge Kavanaugh in Al-Bihani (en banc) - the president “possesses independent authority under Article II of the Constitution to act against al Qaeda and the Taliban—and to detain members of those groups—even without congressional authorization,”

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) **IN GENERAL.**—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

GITMO



GITMO

- Around 780 individuals have been detained at Gitmo.
- Earliest arrival of someone still there is 2002 (a lot of them). Latest arrival is 2008.
- That population is now down to about 39 after the transfer of the Moroccan in August.
- Of those 39, a little less than 2/3 spent some time under CIA control in various sites other than GITMO.



GITMO

- 2 have been convicted and are being held post conviction.
 - a. al-Buhlul – serving a life sentence
 - b. Khan – pled guilty in 2012, has been cooperating, sentencing postponed to determine credit for 1,200 days in custody of CIA.
- Around 10 have been reviewed and recommended for release if the proper security conditions can be met.
- 7 have been charged in military commissions and are currently in that process. These include KSM and the 9/11 attackers as well as al-Nashiri who allegedly masterminded the USS Cole bombing in Yemen in 2000.
- 3 more have had charges signed by the military commissions convening authority but have not been arraigned yet on those charges.
- Around 17 are subject to law of war detention.
- 2 have been approved for release



GITMO

- Law of War Detention – “until the end of hostilities”
 - Fuente Polisario in Western Morocco (25 years)
 - “We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.
 - “The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by “universal agreement and practice,” are “important incident[s] of war.””
 - “If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”
Hamdi v. Rumsfeld



Russia and Ukraine – Legal Issues

- Jus ad bellum?
- Threat of Force
- Treatment of PWs
- Fighters and Combatants
- Levee en Masse
- Dardanelles and Treaty Law
- Neutrality
- Lawful Weapons
- Defender's Obligations



Questions/Comments