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Keynote Address

William H. Taft

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THE GENEVA CONVENTIONS AND THE RULES OF WAR IN THE POST-9/11 AND IRAQ WORLD

KEYNOTE ADDRESS

WILLIAM H. TAFT^{*}

To begin with, I would like to thank American University's Washington College of Law and the *International Law Review* for putting on this conference. The subject—The Geneva Convention and the Rules of War in the post-9/11 World and in Iraq—could not be more timely and potentially useful. We are at a point now where we have enough experience in the war the terrorists are fighting against us to know how it is being fought by them and needs to be defended against by us. Specifically, we now have a fair idea of how this conflict varies from both traditional wars and normal law enforcement operations—the two familiar structures through which uses of force against civil societies have been customarily dealt with. We need to take the knowledge our experience has given us to establish a new system whose rules are well understood and take account of both the need to protect our citizens and assure that we accurately identify, effectively deter, and appropriately punish those who pose threats to our society or have committed criminal acts. This conference can make an important contribution to this effort.

During the course of the day, I have no doubt the various panels will be exploring the issues implicit in the assignment I have described in detail. In this short keynote address, I will try just to make a few general points that I hope will assist in that work.

^{*} Of Counsel, Fried, Frank, Harris, Shriver & Jacobson; formerly, Legal Advisor, Department of State, Deputy Secretary and General Counsel, Department of Defense.

At the outset, let me declare my own preference for using the law of war rather than traditional criminal law as at least the starting point for any new system of rules for dealing with the terrorist challenge we currently confront. In saying this, I do not exclude that a better day may come when nations may be able to protect their citizens effectively through traditional law enforcement methods, but at the moment it does not seem to me that such an approach will succeed or properly takes account of the nature and extent of the threat.

Al Qaeda is not simply a criminal enterprise that uses violence to achieve particular, limited material objectives. Its objectives, insofar as they can be determined from its actions and the statements of its leaders, are essentially political and amount to nothing less than the overthrow of recognized governments and the destruction of as much of civil society as it can manage in certain states, including the United States. Moreover, it pursues its political objectives in ways that are the ways of war, not the ways of crime. Al Qaeda, of course, is not a state, but nor is it simply the Red Brigades or even the IRA and the Basque movement with their specific goals to change the policy of a single national state. Al Qaeda's program addresses itself directly to the conduct of national governments around the world. Its methods, moreover, are the methods of war, and the scale and international character of its activity are similarly familiar to us only in war.

Finally, on our side it is clear that the deployment of our own armed forces and the conduct of military operations are essential to deal with al Qaeda and its affiliate terrorist groups. In short, as was clearly recognized by our allies and the unanimous vote of the United Nations Security Council immediately after the attacks on September 11, 2001, we are engaged in an armed conflict. While it is undoubtedly true that this armed conflict with al Qaeda has its unconventional aspects, the law of armed conflict modified to adapt to those unconventional aspects appears to me to be the best place to start.

I mentioned just now what I believe should be the purposes of the set of rules we apply in dealing with al Qaeda—the effective protection of our citizens and the need to assure that we accurately identify, effectively deter, and appropriately punish the terrorists who

are fighting us. With regard to each of these purposes, the law of armed conflict provides several distinct advantages over traditional law enforcement approaches.

First, the law of armed conflict authorizes the detention and interrogation of persons who may have critically important information about terrorists' plans and capabilities. While detained persons are not, of course, required to provide information and certainly may not be coerced into doing so, experience suggests that many of them will do so voluntarily or, perhaps as often, inadvertently, and this can save many lives. Because under the law of war it is not necessary to provide detained persons with lawyers, advise them of their rights to remain silent or charge them with any crime—they may not, after all, have committed one—they are more likely to provide vital intelligence information than would be the case in a law enforcement setting. The law of war, which traditionally has immunized lawful combatants for acts that in other contexts would be criminal, recognizes that a belligerent's interest in gaining intelligence may outweigh his interest in prosecuting individual members of the opposing force for criminal acts—apart, of course, from war crimes, which present a special case. The same balance of interests would seem to apply in the conflict with terrorists.

A second area where the traditional law of war seems to correspond well with the balance of interests in the conflict with al Qaeda concerns the right to detain persons who, if they are released, will re-engage in the fight. Again, the law of war recognizes that it is not necessary to charge a detained person with a crime to keep him off the battlefield while hostilities continue. Preventing his further participation in the conflict will, presumably, hasten its end and could significantly reduce the risk of additional casualties to our population. Such preventive detention obviously has no place in our concept of criminal law enforcement, but it has long been accepted in the law of war and, again, seems sensibly to apply to the conflict with al Qaeda.

A third advantage of applying the law of war to the conflict with al Qaeda is that it embodies an established set of rules for the conduct of our own troops. It immunizes them for various acts involving the use of force that in a law enforcement context would not be

permitted, at the same time as it prohibits acts that unnecessarily endanger non-combatants; it assures detained combatants of humane treatment; it provides a basis for charging terrorists for war crimes and holding them accountable for how they treat our servicemen who fall into their hands. Our troops, moreover, are trained to comply with the law of war in conducting operations. Inasmuch as the terrorists can only be defeated by our armed forces, discarding familiar rules of conduct and improvising new ones as we go along creates a situation full of temptations to cut corners and adopt practices that seem desirable at the moment but are not well thought through and are bad precedents for other situations that we fail to anticipate.

On the whole, then, it seems to me that, for these and other reasons, the law of armed conflict provides the best foundation for a system governing the war the terrorists have declared and are pursuing against us. However, in applying it to this new type of war with non-state actors operating in a loose, erratically disciplined structure, we need to recognize that this war varies in important respects from the state-against-state wars for which the law of war was designed, and we should be prepared to make appropriate modifications to accommodate the differences. Two points, in particular, stand out in this regard, both of them having to do with detention of enemy combatants.

First, we need to exercise great care in taking persons into custody in the first place to assure that they are indeed enemy combatants. In the traditional state-against-state war this is generally not difficult. The enemy wears his country's uniform, has a rank and serial number he is obliged and typically pleased to specify, and is assigned to a regular military unit. Most often he is captured in the course of actual combat, leaving no doubt as to his status. In the war the terrorists are fighting, the situation is much less clear. Persons are handed over to our forces by third parties whose reports about the circumstances of capture are not always reliable; they do not wear uniforms or other identifying insignia; and they are often arrested on the basis of information that they are plotting terrorist events while they sit in their apartments far from the battlefield rather than in a national Ministry of Defense. In short, in all these circumstances it is a lot more difficult to be sure that persons we suspect are terrorists actually are enemy combatants who may be detained. It appears now,

in fact, that not many, but at least a few, of the persons detained in Guantanamo for more than two years were not properly classified as combatants and should never have been sent there at all. Errors occur in war, of course, and often with tragic consequences, but it is hard not to think that providing an individualized determination of each individual's status at the time of capture rather than waiting until the Supreme Court required this years later would have avoided some mistakes and, perhaps incidentally, would have increased public support both at home and abroad for detaining enemy combatants while the war with al Qaeda continues.

Second, there is the issue of how long an individual detainee may be held while the conflict with al Qaeda continues. In view of the fact that the conflict may extend indefinitely, there has been concern that persons who have not been charged with any crime may nonetheless be effectively imprisoned for life because a war in which they were perhaps only briefly involved when they were young has not ended. People expressing this concern in this way—and there are many of them—evidently do not accept that the law of war, permitting detention of combatants while hostilities continue, is the applicable body of law for the conflict with al Qaeda. Nonetheless, even assuming as I do that it is, the situation, in my judgment, calls for another adjustment to the practice of holding captured enemy combatants until the end of hostilities under the traditional law of war to reflect the special circumstances of the war with al Qaeda.

The traditional rule assumed that the belligerent state had the ability both to initiate the war and require its citizens to participate in it and, subsequently, to end hostilities by ordering its forces to surrender. Military discipline would enforce each decision in its turn. In this situation, the consequences of repatriating captured combatants, whether during hostilities or after, were clear: persons repatriated while hostilities continued would rejoin their country's forces, and those repatriated later would have no war to fight in and thus present no danger. The key consideration here, of course, is simply whether the released detainee will rejoin the fight. Rather than seeking the answer to this question in the formal position of a belligerent state, however, in the war with the terrorists it would seem that a periodic individual assessment of a detainee's intentions is appropriate. This is the approach reflected in the annual review board process recently established for Guantanamo detainees.

There remains the important question of what rules should govern the treatment of enemy combatants captured in this new type of war. It seems clear that, strictly speaking, the Geneva Conventions do not apply to a conflict with al Qaeda, a non-state and a non-party to the Conventions. While it is less clear, it is likely that in most cases even if the Conventions did apply, the terrorist combatants in this conflict do not qualify for treatment as prisoners of war because of their failure to comply with the laws of war.

None of this is to say, however, that the Conventions' general requirement that detained persons not be subjected to cruel, inhumane or humiliating treatment is not a sound guideline. If we are to use the law of war as the point of departure for the system to be used in this new type of war, there ought in any event to be some particular justification—or at least some practical benefit—for departing from this guideline. It is significant that, seeing no such justification or benefit when they were considering this issue initially in January of 2002, neither the military nor the civilian leadership of the Department of Defense proposed to deviate from the requirements of the Geneva Conventions in their treatment of the detainees in Guantanamo. The original rules of engagement issued to the forces fighting in Afghanistan had rather directed that the Geneva Conventions be complied with in the treatment of persons taken into custody, regardless of whether they were, strictly speaking, entitled to this. In this respect they followed the American practice in Vietnam, where the Viet Cong were treated in accordance with the Conventions even though it was understood that this was not required.

It has been a continuing source of amazement and, I may add, considerable disappointment to me that, notwithstanding the stated intention of the Pentagon's leadership to comply with the requirements of the Conventions without qualification, lawyers at the Department of Justice thought it was important to decide at that time that the Conventions did not apply to al Qaeda as a matter of law and to qualify the commitment to apply them as a matter of policy to situations where this was "appropriate" and "consistent with military necessity." This unsought conclusion unhinged those responsible for the treatment of the detainees in Guantanamo from the legal guidelines for interrogation of detainees reflected in the Conventions and embodied in the Army Field Manual for decades. Set adrift in

uncharted waters and under pressure from their leaders to develop information on the plans and practices of al Qaeda, it was predictable that those managing the interrogation would eventually go too far, and news reports now indicate that from time to time this happened.

I do not exclude that some important information—perhaps very important, life-saving information—may have resulted from the application of methods of interrogation that are prohibited by the Conventions and the Manual. I would note, however, that in adopting any new system authorizing such methods, some justification beyond declaring that unlawful combatants have no rights or that the laws of war prohibiting the use of such methods do not apply to our conflict with al Qaeda would be highly desirable. This would seem to be a job for Congress, but perhaps this conference can make a start.

Before ending, I should mention one more area where there is some work to be done. The International Committee of the Red Cross (“ICRC”) and several human rights advocacy groups have on a number of occasions publicly raised concerns about other alleged deviations from the customary law of war as it relates to the treatment of detainees in our conflict with al Qaeda. Specifically, the ICRC has alleged that the United States is holding persons whose identities have not been declared to the ICRC, that it is operating undisclosed detention facilities and arranging unlawful transfers of detainees to third countries. There is no basis in the law of war, criminal law or human rights law for such practices. Nor is it tenable after the Supreme Court’s rulings last summer to assert that detainees have no legal rights of any kind, that they may not contest with the assistance of competent counsel of their own choosing the legal basis of their detention, that the government has complete discretion to determine the conditions of their detention, or that whether they are treated humanely or not is a question only of policy. How our government treats people should never, at bottom, be a matter merely of policy, but a matter of law.

This conference will have served a most useful purpose if it begins to identify what that law should be. I wish you good luck in your important work.