LAW, JUST WAR, AND THE INTERNATIONAL FIGHT AGAINST TERRORISM: IS IT WAR?

1. INTRODUCTION

September 11 was not the first time the United States was victimized by terrorist attacks. In 1983, a truck bombing at the Beirut Airport in Lebanon killed 241 American Marines. In 1988, a bomb planted by Libyan intelligence officers detonated aboard Pan Am flight 103 as it passed over Lockerbie, Scotland, killing all 259 persons aboard. Truck bombings at the United States Embassies in Kenya and Tanzania in 1998 killed 225 people and injured thousands more. And in October 2000, suicide bombers maneuvered a small boat alongside the warship USS Cole in the port of Aden, Yemen, and triggered an explosion that killed seventeen US sailors. Nor was September 11 the first major attack by foreign terrorists on American soil. In February 1993, a massive explosion in the parking garage of the World Trade Center in New York City killed six persons and wounded more than 1,000.

Yet the magnitude of the events of September 11 fundamentally changed the United States Government’s approach towards international terrorism. After September 11, the Bush Administration rejected the previous American approach to counterterrorism, which had primarily employed the combined tools of diplomatic cooperation, economic sanctions, and internationally coordinated law enforcement measures. Instead, the President declared in the aftermath of September 11 that the United States was engaged in a war on terrorism. Subsequent statements and actions have made clear that President Bush’s declaration that the United States would wage war against terrorism was not simply a spontaneous utterance, but is rather a formulation of national policy. Indeed, only a few days after press reports in July 2005 announced that administration officials would cease describing the conflict as a “global war on terror,” the President publicly overruled his top advisors, saying, “Make no mistake about it, we are at war.”

The characterization of the United States’s response to terrorism as “war” – or, in the parlance of international lawyers, “armed conflict” – has enormous implications for measures the United States may, as a legal
matter, permissibly take in the course of the conflict. And yet whether the response to terrorism may properly be treated as “war” is far from clear. In this chapter, I argue that although the fight against terrorism does not qualify as war as a matter of positive international law, there are justifiable functional reasons for extrapolating from positive law and treating the conflict – or at least part of it – as war. But this is not the end of the inquiry. For even in war, substantive legal restraints apply. Moreover, just war theory demands reciprocity in wartime, such that the belligerents face each other with equivalent belligerent rights. Accordingly, assessing whether the exercise of wartime legal powers by the United States in the struggle against terrorism is justifiable requires us to consider not only the *prima facie* functional basis for treating the conflict as war. We must also evaluate whether the United States has accepted the duties that apply in wartime and the related principle of reciprocity.

Because the conflict against terrorism does not satisfy the formal international law definition of war, the exercise of wartime legal authorities by the United States since September 11 is justifiable only on the basis of a functional extrapolation from positive law. By itself, this move is defensible. The United States, however, has been unwilling to accept important corresponding legal restraints that should flow from such a functional extrapolation. Nor has it been willing to confer upon its adversaries the rights to which they should be entitled as a matter of reciprocity under such an approach. This assertion of wartime rights without acceptance of corresponding wartime responsibilities undercuts the justification for the United States’s effort to move beyond positive law in selecting a legal framework for the struggle against terrorism. In other words, the means by which the United States has conducted its campaign against terrorism undermines the justification for treating the conflict as “war.”

2. IS IT REALLY WAR?

2.1 War as Metaphor

The United States’s response to terrorism is not the first time American leaders have invoked the concept of “war” in the face of challenges to the well-being of the country. The metaphor of war has been employed in the past to inspire comprehensive collective responses to major national crises. And so President Nixon launched a national “war” against crime. President Reagan initiated a “war on drugs.” And some years before that, of course, President Johnson declared “unconditional war on poverty in America.”