

Contemporary Armed Conflict and the Non-State Actor

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ABSTRACT

Recent challenges in international security posed by two terrorist organizations, Al Qaeda and the Islamic State of Iraq and Syria (ISIS), have highlighted an urgent domestic and foreign policy challenge, namely, how to address the threat posed by violent non-state actors while adhering to the rule of law values that form the core of democratic governance. Despite the vital importance of this topic, the legal framework for conducting operations of this magnitude against non-state actors has never been clearly identified. The Law of Armed Conflict (LOAC) is organized around the assumption that parties to an armed conflict are “combatants,” meaning that they are members of a state military acting in the name of that state. Norms of conduct are unclear with regard to non-state actors, and there are few consistent legal principles to provide guidance. In 2002, the Bush Administration declared members of Al-Qaeda and other violent non-state actors “unlawful combatants,” and as such declared them not subject to the Geneva Conventions. Legal scholars tend to agree, and many have written that LOAC must adapt to fit the new asymmetric nature of armed conflict. Law, however, is generally thought of as a constraint, rather than an instrument for achieving other goals. This article will address the status of unlawful combatants under existing International Humanitarian Law and Just War Theory and ask what the right legal framework is for addressing the threat posed by non-state actors in current asymmetric conflict. It will argue that violent non-state actors are more properly thought of as international criminals than as combatants of any sort. It will also examine the meaning of rule of law reasoning in the context of war. Results-oriented legal analysis treats law as failing to provide reasons to individual actors, and privileges form over substance. I argue that this approach must be rejected if war is to be constrained by law.