Legal Lessons Learned from Operation Enduring Freedom

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“They don’t get it,” the president said. “How many times do you have to tell them it’s going to be a different type of war? And they don’t believe it. They’re looking for the conventional approach. That’s not what they’re going to see here.”

1. Introduction

In October 2002 the Director of Legal Services in the New Zealand Defence Forces concluded an article on the law of armed conflict by saying: “Lawyers suffer from the same disability as strategists – they are always planning for the last war, not the next one.” Presumably he intended his remarks, with regard to Enduring Freedom strategists, facetiously. The generals fought the war they planned for, which was neither a confrontiation at the Fulda Gap nor another Battle of Medinah Ridge. However his remarks are salient if applied to military lawyers who, in their planning, must attempt to reconcile a growing gap between contemporary military tactics and a body of battlefield law which is largely unchanged in the past half century and which was designed for entirely different circumstances. If, as has been said, the Great War was fought with twentieth century weapons and nineteenth century values, I suggest that Enduring Freedom may reflect a similar disjunction between military practice and legal theory. That is my thesis and I will attempt to justify it by comparing what has already been published (or spoken of) regarding tactical lessons learned.

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from Enduring Freedom with a provocative article, *Bellum Americanum: The U.S. View of Twenty-First Century War and its Possible Implications for the Law of Armed Conflict,* written 5 years ago by a serving officer, then Lt. Col. Michael N. Schmitt, a USAF judge advocate. Risking charges of chauvinism, I selected his article for several reasons: Enduring Freedom was the first new war of the twenty-first century; although waged by coalition forces, some of whom had legal advisors in the field, the application of *jus in bello* was largely governed by US interpretations of law of war doctrines; and, in the near future, robust peacekeeping tactics and concurrent legal rules will be shaped by the Afghan experience and the "stressors" it presented for the law of armed conflict.

Schmitt uses the term "stressors" to identify characteristics which he thought might affect the law's development. He identified 10. My paper will focus on 8 which have particular relevance to the law of war in Afghanistan. I will not discuss his first stressor, novel behaviour e.g. computer hacking, which may constitute the justification for armed attack, because it relates more directly to *jus ad bellum*, and is outside the scope of my paper. Nor will I comment on his views regarding the potentially changed environment for treaty regimes, since the most interesting developments have been at what the Canadian forces describe as the "operational and tactical level." At that level, the stressors Schmitt identified are: the role of non-State actors; the increasingly vague line between international and national conflicts; the application, in 21st century war, of traditional humanitarian principles of discrimination, proportionality, military necessity, and humanity; and finally, the implications of both enhanced dissemination of tactical information and what Schmitt saw as "the ability to direct lethal force ... increasingly pushed down the chain of command." I will consider each in turn, not to offer a cure, but to suggest where the traditional laws of armed conflict have proved wanting, and why military lawyers may be tempted to plan for wars which took place a generation ago.

2. The Role of Non-State Actors and the Line between International and National Conflicts

It is useful to recall that the *Martens Clause*, adopted by the delegates at the 1899 Hague Conference, was intended to regulate the behaviour of the High Contracting Parties, and that their inhabitants and belligerents were to be protected by the Conven-

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3 (Summer 1998) 19 Michigan Journal of International Law, 1005-1051 (hereinafter *Bellum Americanum*).
4 Ibid. p. 1053.
6 *Bellum Americanum*, note 3 supra at 1087.