

Unleashing the Dogs of War: Using Military Working Dogs to Apprehend Enemy Combatants

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In the El Anbar province of central Iraq, an infantry company conducts a mission rehearsal in preparation for a cordon and search operation to capture an enemy insurgent leader.² The operation will be conducted in a densely populated neighborhood within the city limits of Ar Ramadi. The company commander planning the operation is concerned about what actions can be taken if the insurgent leader attempts to escape capture. The Rules of Engagement (ROE) authorize the use of force, including deadly force, to be used against the targeted insurgent leader. However, if the insurgent leader successfully avoids capture, or is shot dead while trying to escape, the commander may lose an invaluable opportunity to gather battlefield intelligence against the insurgency.³ The company commander is also concerned about the risks of controlling lethal fires in a populated urban area. To mitigate the risks of collateral damage and civilian casualties, the company commander submits a request to employ a non-lethal weapon for use during the capture mission.

Back at the brigade command post, the company commander's request to use a non-lethal weapon during the cordon and search operation is forwarded from the battalion commander to the brigade commander. The brigade commander has never received a request to deploy a non-lethal weapon in an offensive operation and contemplates the ramifications of granting his subordinate commander's request. The brigade commander recognizes that the requested "non-lethal weapon" has never been used against the enemy during offensive combat operations. After studying the request for several minutes, the brigade commander turns to his Command Judge Advocate (CJA) and asks, "Judge, can we use a dog to apprehend enemy combatants during a cordon and search operation?"

I. Introduction

Every weapon used on the battlefield is required to undergo a Department of Defense (DOD) legal review;⁴ but what is a judge advocate (JA) supposed to do when a commander wants to use a military working dog (MWD) like a weapon? This article attempts to answer that question by examining whether using MWDs to apprehend enemy combatants complies with the law of war (LOW).⁵ Employing a MWD like a non-lethal weapon to capture targeted enemy combatants is not an entirely fictional idea like the one depicted in the opening scenario.⁶ The legality of using MWDs during offensive combat operations recently appeared as an issue on the U.S. Army War College's 2006 Key Strategic Issues List (KSIL), suggesting

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² See generally U.S. DEP'T OF ARMY, FIELD MANUAL 3-06.20, CORDON AND SEARCH: MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR CORDON AND SEARCH OPERATIONS (Apr. 2006).

³ See, e.g., Lieutenant General David H. Petraeus, *Learning Counterinsurgency: Observations from Soldiering in Iraq*, MIL. REV., Jan.-Feb. 2006, at 6 (stressing the importance of developing actionable intelligence at the tactical level as instrumental to successfully fighting a counterinsurgency campaign).

⁴ U.S. DEP'T OF DEFENSE, DIR. 5000.1, THE DEFENSE ACQUISITION SYSTEM para. E1.1.15 (12 May 2003) [hereinafter DOD DIR. 5000.1].

Legal Compliance. The acquisition and procurement of DoD weapons and weapon systems shall be consistent with all applicable domestic law and treaties and international agreements (for arms control agreements, see DoD Directive 2060.1, reference (1)), customary international law, and the law of armed conflict (also known as the laws and customs of war). An attorney authorized to conduct such legal reviews in the Department shall conduct the legal review of the intended acquisition of weapons or weapons systems.

Id.

⁵ The DOD directive outlining the DOD Law of War Program defines the Law of War as:

That part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict ("LOAC"). The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party and applicable customary international law.

U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 3.1 (9 May 2006) [hereinafter DOD DIR. 2311.01E].

⁶ See, e.g., R. Norman Moody, *Canines Crucial Part of War Effort*, FLA. TODAY, Apr. 26, 2005, available at <http://www.floridatoday.com> (ID: brv13254527) (last visited Oct. 24, 2006) (describing how an Air Force staff sergeant and his MWD tracked and captured enemy combatants during combat operations in Iraq) (copy on file with author).

a growing interest in expanding the use of MWDs on the battlefield.⁷ Ongoing combat operations in Iraq and Afghanistan demonstrate the importance commanders place on using captured individuals to provide actionable intelligence for conducting follow-on operations.⁸ However, several high-profile courts-martial concerning the use of MWDs should raise concerns about how MWDs are being employed during combat operations.⁹ Of course, commanders also will have to consider a variety of non-legal factors including cultural considerations, public perceptions, and campaign objectives when determining whether using MWDs in offensive combat operations is prudent in a given situation. Nonetheless, the fundamental question with which JAs must contend is whether using a MWD team to apprehend an enemy combatant would violate the LOW.

This article introduces the LOW principles that form the underlying foundation for determining the legality of a particular means or method of warfare and examines the legality of using MWDs in offensive combat operations. The analytical framework used in DOD weapon reviews can be adapted to examine whether MWDs could be used in offensive combat operations.¹⁰ Judge advocates are required to conduct DOD weapons reviews to ensure any weapon used by U.S. Armed Forces complies with the LOW and applicable DOD Directives.¹¹ There is no specified format for conducting a DOD weapons review, but there are common LOW principles that are usually found in them.¹² Accordingly, the first half of this article examines a MWD's capabilities, limitations, and historical use in combat.¹³ The second half of this article examines how a MWD might be employed in light of applicable LOW principles reflected in customary international law¹⁴ and binding U.S. treaty law.¹⁵ If the LOW is not violated, then military commanders should be able to employ MWDs as non-lethal weapons systems during offensive combat operations to apprehend enemy combatants.¹⁶

⁷ See U.S. ARMY WAR COLLEGE KEY STRATEGIC ISSUES LIST 59 (Dr. Antulio J. Echevarria, II, ed., July 2006), available at <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=722>.

⁸ See *supra* note 3; see also Office of the White House Press Secretary, *President Discusses Creation of Military Commissions to Try Suspected Terrorists* (6 Sept. 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> [hereinafter *Military Commissions*]. In a 2006 press briefing on the creation of Military Commissions, President George W. Bush outlined the importance of gaining intelligence from captured enemy combatants to thwart future terrorist plots:

In this new war, the most important source of information on where the terrorists are hiding and what they are planning is the terrorists, themselves. Captured terrorists have unique knowledge about how terrorist networks operate. They have knowledge of where their operatives are deployed, and knowledge about what plots are underway. This intelligence -- this is intelligence that cannot be found any other place. And our security depends on getting this kind of information. To win the war on terror, we must be able to detain, question, and, when appropriate, prosecute terrorists captured here in America, and on the battlefields around the world.

Military Commissions, supra.

⁹ See Josh White, *Army Dog Handler Gets Six Months in Prison*, WASH. POST, at A15 (Mar. 23, 2006), available at <http://washingtonpost.com/wp-dyn/content/article/2006/03/22> (describing the court-martial sentence of an Army dog handler for maltreatment of detainees, among other charges, and allowing his MWD to be used as a means of intimidating and harassing detainees during interrogations); see also Josh White & Scott Higham, *Use of Dogs to Scare Prisoners Was Authorized*, WASH. POST, June 11, 2004, at A1 (reporting that senior ranking intelligence officers authorized military dog handlers to use MWDs to intimidate and harass detainees at Abu Ghraib prison during interrogation operations) (copy on file with author).

¹⁰ See generally U.S. DEP'T OF ARMY, REG. 27-53, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW (1 Jan. 1979) [hereinafter AR 27-53]; U.S. DEP'T OF AIR FORCE, INSTR. 51-402, WEAPONS REVIEW para. 1.2.2 (13 May 1994) [hereinafter AFI 51-402]; U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 3300.1A, LAW OF ARMED CONFLICT (LAW OF WAR) PROGRAM TO ENSURE COMPLIANCE BY THE NAVAL ESTABLISHMENT (2 May 1980); U.S. MARINE CORPS, ORDER 3430.7, MARINE CORPS PROGRAM FOR THE USE AND ACQUISITION OF NON-LETHAL WEAPONS (31 July 1997) [hereinafter MCO 3430.7].

¹¹ See *supra* note 5 (noting that *DOD Dir. 2311.01E* requires legal reviews on all matters relating to "the development, acquisition, and procurement of weapons and weapon systems. . .").

¹² See, e.g., Major Donna Marie Verchio, *Just Say No! The StrUS Project: Well-Intentioned, But Unnecessary and Superfluous*, 51 A.F. L. REV. 183, 219 (2001) (describing how most DOD weapon reviews rely on a three-step analysis for determining the legality of a particular weapon including: (1) the weapon's mission and military advantage; (2) the weapon's "nature;" and (3) the "weapon's applicability (or non-applicability) to specific international law (law of war or arms control) rules or prohibitions"); see also Memorandum, Special Assistant for Law of War Matters, Office of the Judge Advocate General, U.S. Army, to Office of the Project Manager Mines, Countermine and Demolitions, Picatinny Arsenal, N.J., subject: Cartridge, 120MM, XM1028 Cartridge, Milestone C and Low Rate, Legal Review (15 Sept. 2004) [hereinafter XM1028 Cartridge Weapons Review] (on file with author).

¹³ See Verchio, *supra* note 12, at 219.

¹⁴ See CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 4.a. (25 Mar. 2002) (noting that U.S. forces will comply with the LOW during all armed conflicts, and "unless otherwise directed by competent authorities, will comply with the *principles* and spirit of the law of war during all other operations") (emphasis added).

¹⁵ The U.S. Marine Corps requires that a non-lethal weapon comply with all provisions of international law. See MCO 3430.7, *supra* note 10, para. 4. Likewise, the Air Force requires a discussion on the relevant aspects of international treaty law. See AFI 51-402, *supra* note 10, para. 1.2.2.

¹⁶ See generally Lieutenant Colonel James C. Duncan, *A Primer on the Employment of Nonlethal Weapons*, 45 NAV. L. REV. 1, 26-27 (1998) (noting that non-lethal weapons should undergo the same legal review requirements as lethal weapons systems).

II. Military Working Dogs: Capabilities, Limitations, and Historical Use

A. Capabilities and Limitations

The technical capabilities and limitations section of a weapons review usually discusses how a particular weapon functions to accomplish its purpose.¹⁷ Examining how a MWD uses non-lethal force to apprehend an individual will provide valuable information about how that same dog might be employed as a non-lethal weapon to capture enemy combatants. As a logical starting point for this inquiry, JAs should first consider whether a MWD can even be compared to a weapon for purposes of conducting a legal review. The DOD defines non-lethal weapons as “weapons that are explicitly designed, and primarily employed so as to incapacitate personnel or materiel, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment.”¹⁸ In contrast, the Army defines weapons as “all conventional arms, munitions, materiel, instruments, mechanisms, or devices which have an intended effect of injuring, destroying, or disabling enemy personnel, materiel, or property.”¹⁹ By comparison, both the U.S. Army and U.S. Air Force MWD training manuals state that allowing a dog to bite during an apprehension is a non-lethal use of force.²⁰ The question posed in the opening scenario indicates that the MWD will be used to incapacitate enemy personnel while minimizing the potential for the occurrence of a fatal shooting incident during the mission. The MWD would therefore seem to fit the latter definition describing a non-lethal weapon; for purposes of this review, a MWD is likened to using a non-lethal weapon system to apprehend an enemy combatant.²¹

1. Capabilities

Military working dog teams have special capabilities that have been employed effectively in law enforcement and combat operations.²² The Air Force MWD manual describes the law enforcement capabilities of a MWD trained for patrol work as follows: “MWDs seek, detect, bite and hold, and guard suspects on command during law enforcement patrol activities. They deter attack and defend their handlers during threatening situations. They can assist in crowd control and confrontation management, as well as search for suspects indoors and outdoors.”²³ The Army’s MWD regulation notes the following about employing MWDs in combat patrol operations: “The patrol dog’s superior detection ability is especially useful at night or during periods of limited visibility. Patrol dogs can detect a fleeing person that a human could not detect and, if necessary, pursue, attack, and hold the fleeing person.”²⁴ The Army’s field manual on military police law and order operations states that MWDs are “highly useful in cordon and search operations” and “on the battlefield just as in a peacetime

¹⁷ See, e.g., W. Hays Parks, *Memorandum of Law: Review of Weapons in the Advanced Combat Rifle Program*, ARMY LAW., July 1990, at 18 [hereinafter Parks, *ACR Program Weapon Review*]; W. Hays Parks, *Joint Service Combat Shotgun Program*, ARMY LAW., Oct. 1997, at 16 [hereinafter Parks, *Joint Combat Shotgun Weapon Review*].

¹⁸ See U.S. DEP’T OF DEFENSE, DIR. 3000.3, POLICY FOR NON-LETHAL WEAPONS para. 3.1 (9 July 1996) [hereinafter DOD DIR. 3000.3] (defining non-lethal weapons as “weapons that are explicitly designed, and primarily employed so as to incapacitate personnel or materiel, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment”).

¹⁹ AR 27-53, *supra* note 10, para. 3.a. *But see* U.S. DEP’T OF DEFENSE, INSTR. 5525.10, USING MILITARY WORKING DOG TEAMS (MWDTS) TO SUPPORT LAW ENFORCEMENT AGENCIES IN COUNTERDRUG MISSIONS para. 4.2.1 (17 Sept. 1990) (stating the DOD view that MWDs are equipment and may be loaned out, with the MWD handler, to assist law enforcement officials); U.S. DEP’T OF AIR FORCE, JOINT INSTR. 23-224, DOD MILITARY WORKING DOG (MWD) PROGRAM para. 8 (1 Dec. 1990) [hereinafter AFJI 23-224] (noting that MWDs are designated as government property, branded for identification, and accounted for by an inventory manager). The DOD has designated the Air Force as the primary manager of the DOD MWD program. AFJI 23-224, *supra*, para. 2. As such, the Department of the Air Force is responsible for establishing DOD policies relating to the procurement, recruitment, training, and logistical management of MWD teams. *Id.*

²⁰ See, e.g., U.S. DEP’T OF ARMY, REG. 190-12, MILITARY WORKING DOGS para. 4-2.b (30 Sept. 1993) [hereinafter AR 190-12] (stating that, “[r]elease of a patrol dog to apprehend a suspect is a greater measure of force than use of an MP club, but less than deadly force because a patrol dog is trained to terminate an attack on voice command of its handler”); *see also* U.S. DEP’T OF AIR FORCE, INSTR. 31-202, MILITARY WORKING DOG PROGRAM para. 3.2 (1 Aug. 1999) [hereinafter AFI 31-202] (instructing that, “[r]elease of an MWD to bite or allowing it to bite while on leash, although considered use of force, is not considered use of deadly force”).

²¹ See DOD DIR. 3000.3, *supra* note 18, para. 3.1 (defining non-lethal weapons as “weapons that are explicitly designed, and primarily employed so as to incapacitate personnel or materiel, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment”).

²² See, e.g., Corporal Christi Prickett, *Military Working Dogs Essential Tool in Iraq Mission*, May 3, 2005, available at <http://www.usmc.mil/marinelink/mcn2000.nsf/0/91943E720D2572C585256FF6001A74E6?opendocument> (noting that the 2d Military Police Battalion, II Marine Expeditionary Force (FWD), has employed MWD teams to support entry control points, maneuver and mobility support operations, cordon and search missions, and main supply route security operations); *see also* Air Force News Service, *Air Force K-9 Dogs in Iraq*, Sept. 10, 2003, available at <http://usmilitary.about.com/cs/airforce/a/afk9dogs.htm> (describing the conduct of air-base defense and force protection operations with MWDs in support of Operation Iraqi Freedom).

²³ AFI 31-202, *supra* note 20, para. 8.1. *But see* U.S. DEP’T OF ARMY, FIELD MANUAL 19-10, MILITARY POLICE LAW AND ORDER OPERATIONS 114 (30 Sept. 1987) [hereinafter FM 19-10] (discouraging the use of patrol dog teams for direct confrontation with demonstrators).

²⁴ AR 190-12, *supra* note 20, para. 4-4.b.

environment, MWD teams are useful wherever the dogs' highly developed senses of smell and hearing can be used to detect the presence and location of otherwise invisible intruders or enemy."²⁵ The Marine Corps' warfighting publication on providing military police support to a Marine air-ground task force operation advises that MWDs are trained to "attack on command, cease attack on command, search buildings and open areas for criminal offenders, perform reliably off the leash, and work safely and effectively around people."²⁶ Thus, MWD teams have proven themselves to be quite skillful at locating and apprehending individuals with non-lethal force during law enforcement operations and combat support missions.

2. Limitations

The MWD does have operational limitations that may restrict how and where a dog may be employed on the battlefield. One of the most important limitations is the understanding that a MWD is usually trained to respond only to the commands of the dog's designated handler.²⁷ If the MWD's handler is seriously injured or killed during a combat mission, the dog cannot be transferred immediately over to another individual and be expected to carry out its mission.²⁸ Military working dog handlers maintain control over their dogs by using hand signals, voice commands, and physical restraint of the dogs.²⁹ Thus, a handler needs to maintain close physical proximity to the dog. If the MWD and its handler become separated, then the ability to control the dog becomes diminished, and the possibility of the MWD biting someone other than the intended target becomes more likely.³⁰ The Air Force MWD manual specifically warns a handler not to release his dog if the suspect being pursued is not in sight.³¹ Likewise, MWD handlers are cautioned against releasing their dogs into angry crowds during riot control situations where the dogs could become agitated and possibly bite people.³² Finally, extreme caution must be used if the MWD is released where children may be present.³³

B. Historical Use

Studying how a particular weapon has been employed historically in combat can yield valuable information for the legal review.³⁴ Specifically, JAs may gain some insight into the military necessity for implementing a particular means or method of warfare. Likewise, a state's practice of using a particular weapon on the battlefield could indicate whether a particular

²⁵ FM 19-10, *supra* note 23, at 116.

²⁶ U.S. MARINE CORPS, MARINE CORPS WARFIGHTING PUB. 3-34.1, MILITARY POLICE SUPPORT OF THE MARINE AIR GROUND TASK FORCE E-1 (13 Oct. 2000) [hereinafter MCWP 3-34.1].

²⁷ See, e.g., AR 190-12, *supra* note 20, para. 4.1.b ("Each MWD will have only one assigned handler so that the dog will maintain an aggressive attitude toward all other persons. A handler may be assigned to more than one dog; however, a dog will never be assigned to more than one handler."); see also U.S. DEP'T OF ARMY, PAM. 190-12, MILITARY WORKING DOG PROGRAM para. 1-19c (30 Sept. 1993) [hereinafter DA PAM. 190-12] ("The dog depends directly on the handler and, in keeping with the principle of one dog-one handler, the dog should never have to depend on anyone other than the assigned handler.").

²⁸ See, e.g., MCWP 3-34.1, *supra* note 26, at E-2. The publication explains in relevant part,

Team members must know what to do if a handler is seriously wounded or killed. A dog that has worked closely with a team and has developed a tolerance for one or more of the team members will usually allow one of the members to return it to the kennel. If the MWD will not allow anyone near its handler, other handlers must be called in to assist.

Id.

²⁹ See AFI 31-202, *supra* note 20, para. 3.1-3.3 (discussing the importance of maintaining control over the MWD at all times); DA PAM. 190-12, *supra* note 27, para. 2-6.b.2 (instructing that prior to releasing a dog inside building or enclosed area, a handler should provide a warning that the dog may attack without warning and cautioning handlers to maintain voice control over the MWDs throughout the search).

³⁰ See DA PAM. 190-12, *supra* note 27, para. 2-2.b (warning that, "[h]andlers must avoid releasing the dog to attack until the danger to innocent persons can be eliminated or minimized"); see also MCWP 3-34.1, *supra* note 26, at E-4 (noting that a MWD should not be used to search an area until there is relative certainty that the area is clear of innocent people).

³¹ AFI 31-202, *supra* note 20, para. 3.2.3.

³² *Id.*; see also FM 19-10, *supra* note 23, at 114; DA PAM. 190-12, *supra* note 27, para. 2-17.a.(2)-(3) (observing that the "high levels of confusion and excitement" can make it difficult to control the dogs and warning that the MWD should never be released into a crowd of demonstrators).

³³ See AFI 31-202, *supra* note 20, para. 3.2.3 ("Handlers will not release MWDs in areas where children are present, except as a last resort short of deadly force."). Some researchers have noted that when dogs attack children the severity of the wounds are more likely to be greater than those sustained by an adult and it is likely that the children unknowingly provoked the dog to attack. See, e.g., NAT'L CANINE RES. FOUND., FATAL DOG ATTACK STUDIES (2004), <http://ncrf2004.tripod.com/id8.html> (noting that adults are physically more capable of fending off a dog attack than are children).

³⁴ See, e.g., Parks, *Joint Combat Shotgun Weapon Review*, *supra* note 17, at 16-17 (noting that history constitutes state practice and providing a historical overview of the shotgun's use in combat).

means or method of warfare has developed into a rule of customary international law.³⁵ The widespread use of dogs on the battlefield to perform certain combat functions suggests that using MWDs in combat has become a universally-accepted state practice.³⁶ Judge advocates should consider whether the acceptance of using MWDs on the battlefield in general might also extend to employing MWDs during offensive combat operations.

The employment of MWDs in combat is well-recorded throughout American military history and can be traced as far back as the French and Indian wars.³⁷ In spite of Benjamin Franklin's advocacy for the use of dogs in combat, the U.S. military did not adopt a program to train MWDs for battlefield use until the outbreak of World War II (WWII).³⁸ By the time the United States entered WWII, Germany, France, Japan, Russia, and Great Britain all had adopted military training programs to employ dogs on the battlefield.³⁹ Since the end of WWII, the U.S. military has expanded widely the use of dogs on the battlefield.⁴⁰ A survey of the MWD doctrine and training manuals indicates that MWDs are employed in a variety of combat support operations including: area defense and perimeter security missions; early detection sensors during combat patrols; force protection and apprehension capabilities during EPW operations; and, detection, by use of a superior sense of smell of bombs and other types of explosive materials.⁴¹

Arguably, one of the most important functions MWD teams perform in combat is helping U.S. forces detect, find, and capture enemy combatants.⁴² With the exception of an abandoned training program during WWII, MWDs have not been trained to conduct offensive combat operations against enemy combatants.⁴³ However, the U.S. military has trained and employed other animals to conduct offensive combat operations against enemy combatants during Operation Iraqi Freedom.

³⁵ See Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding of and Respect for the Rule of Law in Armed Conflict* 179-81, INT'L REV. OF THE RED CROSS, vol. 87, no. 857, Mar. 2005 (noting that State practice is derived from a State's physical acts and verbal acts, including the use of certain weapons and how a force conducts itself on the battlefield); see also Parks, *Joint Combat Shotgun Weapon Review*, *supra* note 17, at 17 (noting the substantial employment of shotgun weapons by several nations during combat operations and the corresponding lack of restrictions on their employment due to LOW concerns).

³⁶ See, e.g., Staff Sergeant Monica R. Garreau, *MP K-9s Enhance Force Protection Efforts*, ARMY NEWS SERV. (27 June 2004), available at http://www4.army.mil/ocpa/read.php?story_id_key=6094; James Pettit & Captain Ronald J. Hughes, *Engineer Mine Detection Dogs*, 18 ENGINEER 34 (July–Sept. 2004); Specialist Cheryl Ransford, *Canine Units Issued New Protective Gear*, FREEDOM WATCH 8 (27 Feb. 2005) (copy on file with author); Corporal Paul Robbins Jr., *Taking a Bite Out of Ramadi*, MARINE CORPS NEWS (28 Sept. 2006), available at <http://www.usmc.mil/marinelink/mcn2000.nsf/homepage?readform> (story ID#: 20061029624); *Air Force K-9 Dogs in Iraq*, AIR FORCE NEWS SERV. (10 Sept. 2003), available at <http://usmilitary.about.com/cs/airforce/a/afk9dogs.htm>.

³⁷ See, e.g., MICHAEL G. LEMISH, *WAR DOGS: A HISTORY OF LOYALTY AND HEROISM* 6 (1999) (attributing early consideration to the use of dogs in combat to Benjamin Franklin). Around 1755, Colonel Benjamin Franklin wrote to Major Frank Read to encourage the use of dogs to defend the town of Reading, Pennsylvania, against an impending attack by natives and foreign insurgent forces:

Dogs should be used against the Indians. They should be large, strong, and fierce; and every dog led in a slip string, to prevent their tiring themselves by running out and in, and discovering the party by barking at squirrels, etc. Only when the party comes near thick woods and suspicious places they should turn out a dog or two to search them. In case of meeting a party of the enemy, the dogs are all then to be turned loose and set on. They will be fresher and finer for having been previously confined and will confound the enemy a good deal and be very serviceable. This was the Spanish method of guarding their marches.

Id. (citing to Fairfax Downey, *Dogs for Defense* 2 (1955)); see also Willard Sterne Randall, *Colonel Benjamin Franklin*, MIL. HIST. Q.: Q. J. OF MIL. HIST. 6 (Winter 2001) (copy on file with author).

³⁸ On 13 March 1942, the U.S. Army's Quartermaster General created the Canine (K-9) Corps. See OFFICE OF THE QUARTERMASTER GENERAL, U.S. ARMY, *FACT SHEET ON WAR DOGS* 4 (15 July 1948) (copy on file with author).

³⁹ See, e.g., Thomas F. Newton, *World War II Combat: Axis and Allies*, <http://community-2.webtv.net/Hahn-50thAP-K9/K9History21/> (last visited Oct. 23, 2006) (providing a compilation of primary and secondary historical sources relating to the use of dogs in combat during WWII).

⁴⁰ See, e.g., Maryann Mott, *Dogs of War: Inside the U.S. Military's Canine Corps*, NAT'L GEOGRAPHIC NEWS (Apr. 9, 2003), http://news.nationalgeographic.com/news/2003/04/0409_030409_militarydogs.html (writing about the training of explosive detection and patrol dogs at Lackland Air Force Base, San Antonio, Texas).

⁴¹ See, e.g., AFI 31-202, *supra* note 20, para. 8.4 ("MWDs are employed to provide enhanced patrol and detection capability to perimeter and point defense, as a sensor system, and drug and explosives detection."); DA PAM. 190-12, *supra* note 27, para. 2-26 (stating that in past combat operations, MWDs have provided early warning of imminent attacks, helped clear protected areas of hostile persons, explosives, and weapons after attacks); MCWP 3-34.1, *supra* note 26, at E-2 (instructing that a MWD's capabilities are used to enhance the security posture of a tactical patrol through the detection and location of enemy soldiers).

⁴² See, e.g., Prickett, *supra* note 22; *Air Force K-9 Dogs in Iraq*, *supra* note 22.

⁴³ During WWII, the Army developed a program to train dogs to carry explosives strapped to their backs into enemy fortified bunkers. Though suicidal for the dogs, it was believed at the time that this method of warfare could potentially save thousands of American G.I.s lives during the Pacific campaign to end the war. LEMISH, *supra* note 37, at 89 (citing to a letter from Colonel William A. Borden, Office of the Chief of Staff, to Major General S.G. Henry, Director, New Developments Division, War Department Special Staff (8 Nov. 1943) (letter available in the National Archives at NARA RG407) (copy on file with author). Ironically, this same tactic may have been used against U.S. forces serving in Iraq. See *Dog Bomb Used Against U.S. Forces*, WASH. TIMES, Aug. 14, 2006, at 11 (reporting that an Iraqi insurgent group claimed responsibility for attacking U.S. forces near Baghdad by "setting off explosives attached to a dog").

Specifically, the U.S. Navy used sea lions in the Persian Gulf and dolphins in the Iraqi port of Umm Qasr to perform enemy swimmer interdiction missions.⁴⁴ The U.S. Navy developed a training program that taught these sea mammals to help Navy combat swimmers detect and apprehend enemy personnel using non-lethal force.⁴⁵ Like their sea mammal counterparts, MWDs might also be trained to assist U.S. forces in performing the mission of locating and apprehending enemy combatants on land.

For over sixty years, the U.S. military has relied on the invaluable service rendered by MWDs during numerous combat operations. While MWDs only have been employed in combat support roles, there is a growing body of evidence that suggests MWDs also could be used in direct combat action missions.⁴⁶ As demonstrated by the U.S. Navy's use of dolphins and sea lions to perform enemy swimmer interdiction missions, animals can be trained and relied upon to provide non-lethal force capabilities.⁴⁷ Likewise, MWDs could be trained to use non-lethal force to apprehend enemy combatants during offensive combat operations.

III. Legal Obligations and LOW Considerations

Most JAs are familiar with the admonition that the means of injuring one's enemy are not unlimited.⁴⁸ This LOW requirement arises from customary international law, as expressed in Article 22, Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annexed Regulations (HR), which states, "The right of belligerents to adopt means of injuring the enemy is not unlimited."⁴⁹ The Army's field manual on the laws of land warfare further clarifies this requirement: "The means [of warfare] employed are definitely restricted by international declarations, and conventions and by the laws and usages of war."⁵⁰ Even if MWDs are not considered weapons for purposes of conducting a DOD weapons review, JAs should still be prepared to render legal advice concerning LOW compliance before a MWD is employed as a non-lethal weapon.⁵¹

⁴⁴ See Lieutenant Junior Grade Josh Frey, *Anti-Swimmer Dolphins Defending Persian Gulf Ports*, FLAGSHIP (Aug. 13, 2003), at http://www.flagshipnews.com/archives_2003/aug212003_11.shtml. The U.S. Navy's sea lion swimmer interdiction program, known officially as the Shallow Water Intruder Detection System program, has been described as follows:

The sea lions are trained to detect swimmers or divers approaching military ships or piers. The animals carry a clamp in their mouths. They approach the swimmer quietly from behind and attach the clamp, which is connected to a rope, to the swimmer's leg. With the person restrained, sailors aboard ships can pull the swimmer out of the water.

Id.; see also Scott Simon, *Marine Mammals on Active Duty: Navy Uses Dolphins, Sea Lions to Patrol Waters in Persian Gulf*, NAT'L PUB. RADIO (Mar. 29, 2003), at <http://www.npr.org/templates/story/story.php?storyId=1211780> (describing the U.S. Navy's use of sea lions and dolphins to perform enemy swimmer interdiction missions in Bahrain and the Iraqi port of Umm Qasr). The United States may not be the only nation that has trained sea mammals to perform enemy swimmer interdiction missions. See, e.g., *Iran Buys Kamikaze Dolphins*, BBC WORLD NEWS (Mar. 8, 2000), available at http://news.bbc.co.uk/2/hi/world/middle_east/670551.stm (describing how dolphins that were sold to Iran had been trained by the former Soviet Union's military to attack enemy frogmen).

⁴⁵ See U.S. Dep't of Navy, U.S. Navy Marine Mammal Program, <http://www.spawar.navy.mil/sandiego/technology/mammals> (last visited Oct. 23, 2006) (describing the U.S. Navy programs to employ marine mammals in a variety of combat roles including: mine hunting, force protection, object recovery, fleet support, and enemy swimmer interdiction). Sea mammals reportedly have superior sensory capabilities that make them well-suited for the enemy-swimmer interdiction missions. *Id.*; see also Donna Leinwand, *Sea Lions Called to Duty in Persian Gulf*, USA TODAY, Feb. 17, 2003, at A7, available at http://www.usatoday.com/news/world/iraq/2003-02-16-sealions-usat_x.htm.

⁴⁶ See, e.g., R. Norman Moody, *Florida-Based Military Dogs Do Heroic Work In War Zone*, FLA. TODAY, May 9, 2005, available at <http://www.floridatoday.com/apps/pbcs.dll/article?AID=/20050426/NEWS01/504260331/1006> (last visited Mar. 28, 2006) (describing how a MWD apprehended two men in southern Iraq who were attempting to avoid capture). According to an Israeli Defense Force (IDF) website, the IDF has employed MWDs against enemy combatants during counter-terrorism missions in the Occupied Territories and Lebanon. See The Israeli Special Forces Database, Unit Oket'z Attack Palga, at <http://www.isayeret.com/units/land/special/7142/attack.htm> (last visited Mar. 18, 2004) (on file with author) (providing an overview of Unit 7142's history and operational capabilities).

⁴⁷ See, e.g., Frey, *supra* note 44.

⁴⁸ See U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 33.a (18 July 1956) [hereinafter FM 27-10].

⁴⁹ See Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annexed Regulations art. 22, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter HR IV], reprinted in INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 152 (2006). The Army's field manual on the laws of land warfare notes that HR IV is "declaratory of the customary law of war," and is therefore applicable to all States. FM 27-10, *supra* note 48, para. 6; see also FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 41 (2001) (noting that the underlying principle of HR art. 22 was reaffirmed in Resolution XXVIII of the Twentieth International Conference of the Red Cross and Red Crescent (Vienna, 1965) and subsequently, in 1968, in Resolution 2444 (XXIII) of the United Nations General Assembly).

⁵⁰ See FM 27-10, *supra* note 48, para. 33.b.

⁵¹ See DOD DIR. 2311.01E, *supra* note 5, para. 5.3.1 (prescribing to the head of the DOD components that "qualified legal advisers are immediately available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations. . ."); see also

Judge advocates must provide commanders with legal advice regarding the legality of employing a particular means of warfare based on applicable LOW principles and binding international treaty obligations.⁵² The first LOW principle requires that commanders refrain from employing weapons that are calculated to cause superfluous or unnecessary injury.⁵³ The second principle requires that commanders refrain from using a weapon that would cause suffering beyond what is required by military necessity.⁵⁴ The third LOW principle reflects the belief that commanders shall only employ weapons or weapon systems at valid military objectives.⁵⁵ If a means of warfare does not cause unnecessary suffering, and is only calculated for use against enemy combatants, then JAs should consider whether there are any treaty-based prohibitions or restrictions on using a particular weapon or tactic.⁵⁶

A. Unnecessary Suffering

The first LOW principle for consideration prohibits the employment of weapons that are calculated to cause unnecessary suffering.⁵⁷ This prohibition is recognized as a reflection of customary international law,⁵⁸ however, there is no universally agreed upon test for determining whether a particular weapon causes unnecessary suffering.⁵⁹ The LOW acknowledges that some amount of suffering is an acceptable consequence resulting from lawful combatants engaging in legitimate forms of warfare.⁶⁰ A weapons review should view a weapon's characteristics in light of its ability to inflict injury in excess of the military advantage expected to be gained from the weapon's use.⁶¹ A JA would therefore determine whether employing a

U.S. DEP'T OF ARMY, FIELD MANUAL 90-40, MULTISERVICE PROCEDURES FOR THE TACTICAL EMPLOYMENT OF NONLETHAL WEAPONS V-1 (6 Oct. 1998) [hereinafter FM 90-40]. The Army field manual states, in relevant part:

Nonlethal methods and capabilities may include the use of common materials and existing systems that were not designed as non-lethal weapons, but they can achieve the desired result of minimizing fatalities, permanent injury to personnel and undesired damage to property and the environment.

FM 90-40, *supra*, at V-1.

⁵² *Id.*

⁵³ HR IV, *supra* note 49, art. 23(e) (forbidding the "employment of arms, projectiles, or material *calculated* to cause unnecessary suffering") (emphasis added); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 35(2), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (prohibiting the employment of weapons, projectiles and material and *methods* of warfare of a nature to cause superfluous injury or unnecessary suffering) (emphasis added). Additional Protocol I, Article 35(2), essentially restates HR IV, art. 23(e), but adds the requirement forbidding the use of certain "methods" of warfare while simultaneously dropping the element of intent reflected in the term "calculated."

⁵⁴ See, e.g., Parks, *ACR Program Weapon Review*, *supra* note 17, at 19 (explaining that the LOW requires that commanders refrain from using weapons that are calculated to induce suffering "beyond that required by military necessity").

⁵⁵ See Major Geoffrey Corn, Int'l and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., Aug. 1998, at 36 (explaining that the LOW principle of distinction is not articulated in either the HR or the Geneva Conventions (GC), but rather AP I, art. 48); see also AP I, *supra* note 53, art. 48. Additional Protocol I states,

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Id.

⁵⁶ See MCO 3430.7 *supra* note 10, para. 4a; see also AFI 51-402, *supra* note 10, para. 1.2.2.

⁵⁷ See HR IV, *supra* note 49 (citing art. 23c and the prohibition on employing arms calculated to cause unnecessary suffering); see also MCO 3430.7, *supra* note 10, para. 4.a (stating that nonlethal weapons must also "prevent the infliction of unnecessary suffering").

⁵⁸ See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULE 70, at 237 (2005) (noting agreement amongst nation States that any weapon whose employment causes suffering that serves no military purpose violates this rule of customary international law); see also Parks, *Joint Combat Shotgun Weapon Review*, *supra* note 17, at 18 (arguing that while the term "superfluous injury" is often substituted for "unnecessary suffering," the former is a more authentic translation of the French text—"propre a causer des maux superflus," which is used in art. 23(e), HR IV).

⁵⁹ HENCKAERTS & DOSWALD-BECK, *supra* note 58, at 240 (noting the difference in views "on how it can actually be determined that a weapon causes superfluous injury or unnecessary suffering").

⁶⁰ See Parks, *Joint Combat Shotgun Weapon Review*, *supra* note 17, at 19 (noting that the LOW prohibition against causing unnecessary suffering is an acknowledgement that the LOW "recognizes as legitimate necessary suffering in combat").

⁶¹ See Major Geoffrey Corn, Int'l & Operational Law Note, *Principle 4: Preventing Unnecessary Suffering*, ARMY LAW., Nov. 1998, at 50-52 (explaining that the principle of unnecessary suffering must be balanced against the principle of military necessity); see also Memorandum, Office of the Staff Judge Advocate, United States Air Force, to the Judge Advocate, Army Material Command, subject: Requested Legal Review of the M26 Advanced Taser, at 5 (8 Jan. 2002) [hereinafter M26 Advanced Taser Weapons Review] (stating that a weapon may cause unnecessary suffering if the injury or death to combatants is disproportionate to the military advantage to be gained from using the weapon) (copy on file with author). The memorandum states that the M26 Advanced Taser Weapon review was coordinated with the Staff Judge Advocate to the Commandant of the Marine Corps and the Offices of the Judge Advocates General of the Army and Navy. *Id.*

MWD like a non-lethal weapon to apprehend an enemy combatant might result in an injury or suffering that would be disproportionate to the military advantage expected to be gained by the dog's use.⁶²

A MWD can perform an apprehension by the less forceful method of finding and barking at an individual's location or by finding and biting an individual until the MWD handler commands the dog to release the individual.⁶³ If a MWD is employed using the "bite and hold" method of apprehension, then the dog should bite only once to establish a firm grip on the individual the dog is apprehending.⁶⁴ If the detainee attempts to break the MWD's bite-grip, then the dog likely would attempt to reestablish its hold by biting the detainee again.⁶⁵ This second scenario increases the likelihood that a MWD might inflict multiple bite wounds on the detainee. While the infliction of multiple bite wounds may cause some concern about the infliction of unnecessary suffering to effect an apprehension, there are other legitimate weapon systems that also cause multiple wounding effects when employed against valid military objectives (e.g., the combat shotgun, fragmentation grenade, and claymore mine).⁶⁶ Thus, it appears that if a MWD were employed like a non-lethal weapon against a valid military object, then a MWD is not likely to cause suffering beyond what is militarily necessary to apprehend an enemy combatant.

B. Military Necessity

The second LOW principle requires commanders to refrain from employing methods, tactics, and means of warfare that are deemed to be unnecessary.⁶⁷ As discussed in the previous section, military commanders must inflict only that measure of suffering required by military necessity to achieve a valid military objective.⁶⁸ Justification for using a weapon requires a valid military purpose or necessity for employing the weapon.⁶⁹ Military commanders should be cautioned that the military necessity principle does not excuse taking actions or employing a means of warfare that would otherwise violate the LOW.⁷⁰ Additionally, a JA should also take into account the stated or proposed necessity for using a weapon and compare it with other comparable weapons already in use on the battlefield.⁷¹

⁶² See also HENCKAERTS & DOSWALD-BECK, *supra* note 58, at 240 (noting that many States follow the rule that determining whether a means of warfare causes unnecessary suffering or superfluous injury requires "that a balance be struck between military necessity, on the one hand, and the expected injury or suffering inflicted on a person, on the other hand, and that excessive injury or suffering, i.e., that which is out of proportion to the military advantage sought, therefore violates the rule").

⁶³ See *United States Department of Justice (DOJ) and International Association of Chiefs of Police (IACP) Recommendations on Police Service Dogs*, <http://www.policecanines.com/documents/doj.htm> (last visited Apr. 25, 2006) [hereinafter Justice Department Memo] (providing a recommendation to the City of Cincinnati, OH, and Prince George's County, MD, that each police agency should adopt a "find and bark" policy over "bite and hold"). *But see* Charlie Mesloh, Excerpts from *An Overview of Canine Apprehension Methodologies and Their Relationship to Bite Ratio* (Apr. 17, 2003), available at <http://www.k9fleck.org/biteratios.htm> (last visited Oct. 23, 2006) (arguing that canines that are trained to "find and bark" are less likely to look to their dog handlers for control while executing an apprehension).

⁶⁴ See also Jack L. Stump, MD, FAAEM, FACEP, *Animal Bites*, eMEDICINE, <http://www.emedicine.com/emerg/topic60.htm> (last visited Oct. 23, 2006) (noting that the bite of a dog can yield between 150-450 pounds of pressure per square inch, depending on the dog and its training).

⁶⁵ See, e.g., Douglas U. Rosenthal, *When K-9s Cause Chaos—An Examination of Police Dog Policies and Their Liabilities*, 11 N.Y.L. SCH. J. HUM. RTS. 279, 280 (1993-1994) (providing a survey of several U.S. court cases examining whether using a dog to apprehend an individual constitutes an excessive use of force).

⁶⁶ See Parks, *Joint Combat Shotgun Weapon Review*, *supra* note 17, at 21 (noting that various lawful fragmentation munitions, including the shotgun and fragmentation grenade, are used throughout the world's armies).

⁶⁷ See, e.g., Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 216 (1998) (noting that Article 14 of the Lieber Code authorized Union Army commanders during the U.S. Civil War to use, "those measures which are indispensable for securing the end of the war, and which are lawful according to the modern law and usages of war.").

⁶⁸ See JEAN PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* 32 (1975) (observing that, "[T]he old rule of war 'do as much harm to your enemy as you can' has been replaced by the new law: do not inflict more harm on your enemy than the purpose of the war demands."); see also FM 27-10, *supra* note 48, para. 2(a) (noting that one of the fundamental purposes of the Law of War is to protect "both combatants and noncombatants from unnecessary suffering").

⁶⁹ See AP I, *supra* note 53, art. 52(2) (defining a military objective as, "[T]hose objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.").

⁷⁰ See FM 27-10, *supra* note 48, para. 3(a) (providing that, "[m]ilitary necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity."). Thus, military necessity does not provide justification for conducting warfare that is considered illegal by universally recognized standards of customary international law or binding treaty law.

⁷¹ See, e.g., Parks, *Joint Combat Shotgun Weapon Review*, *supra* note 17, at 19 (stating that the balancing test necessary to determine a weapon's legality requires that the weapon's effects must be compared to other comparable weapons already in use on the battlefield and the military necessity for the weapon under consideration).

The requirement to conduct combat operations in urbanized areas significantly increases the likelihood of lethal encounters with non-combatants.⁷² During cordon and search operations, like those regularly being conducted in Afghanistan and Iraq, close quarters combat is being conducted in populated areas.⁷³ When these operations are conducted in populated areas, it is not unusual for U.S. forces to witness several individuals running away from the designated military objective.⁷⁴ Due to errors in human judgment or unfortunate circumstances, it is possible for a fleeing civilian to be mistaken for a suspected enemy combatant.⁷⁵ Providing military commanders with a non-lethal force option to capture or detain an enemy combatant will likely mitigate the risk of an accidental or mistaken shooting of a non-combatant. Using a MWD team to apprehend an enemy combatant gives commanders a viable, non-lethal option for apprehension and validates a legitimate military necessity for their employment.⁷⁶

Using a MWD team is arguably more efficient and effective than other comparable weapons that could be employed to apprehend an enemy combatant.⁷⁷ Commanders currently have the capability of employing less-than-lethal munitions and weapons systems to effect an apprehension.⁷⁸ A conventional weapon, like a combat shotgun, can be employed using non-lethal munitions. However, even the use of non-lethal munitions may result in the infliction of permanent injury or death.⁷⁹ Another alternative to using lethal force is the employment of a non-lethal weapons system like the M26 Advanced Taser.⁸⁰ The M26 taser is a non-lethal weapon system capable of delivering 50,000 volts of electricity onto a person's body in order to temporarily incapacitate the targeted individual.⁸¹ The M26 taser operates by shooting two needle-tipped prongs twenty-one feet through the air to reach the intended target.⁸² The M26 taser is capable of being fired only once; so, if the shooter misses the intended target, there is no mechanism to immediately rearm the taser so that it may be fired again.⁸³ There is also the potential for a taser to trigger cardiac arrest and death.⁸⁴ In contrast, a MWD has no such limitations. The MWD will go farther than the twenty-one foot restriction of the M26 taser and does not pose the same lethality concerns as employing non-lethal munitions from less than twenty feet.⁸⁵ Another advantage the MWD team has is that once a MWD is released to

⁷² See FM 90-40, *supra* note 51, at I-2; see also COUNCIL ON FOREIGN RELATIONS, NONLETHAL WEAPONS AND CAPABILITIES 2 (2004) [hereinafter NONLETHAL WEAPONS AND CAPABILITIES REPORT] (stating that nonlethal weapons are particularly appropriate for stability and support operations like those in Iraq and describing how a U.S. Soldier shot and killed the chairman of the U.S. appointed municipal council in Sadr City as a debacle).

⁷³ See, e.g., *Lessons Learned: Infantry Squad Tactics in Military Operations in Urban Terrain During Operation Phantom Fury in Fallujah, Iraq* (Feb. 12, 2005), available at <http://www.blackwaterusa.com/btw2005/articles/041805aar.html> (last visited Oct. 23, 2006) (reprinting a collection of first person interviews of several Marine infantrymen who participated in close quarters battle during Operation Phantom Fury in Fallujah Iraq). The article was produced as part of the U.S. Marine Corps Lessons Learned (MCLL) program.

⁷⁴ The slang term "squirters" has entered into the military's lexicon to describe individuals who attempt to run away from a military objective as it is being sealed off by security elements during cordon and search operations. (The individuals are attempting to "squirt" off of the objective as the security cordon encircles around it.) See, e.g., Max Boot, *Reconstructing Iraq: With the Marines in the South and 101st in the North*, WKLY. STANDARD (15 Sept. 2003), available at http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=3078&R=ED861C8 (last visited Oct. 23, 2006) (describing how "Force Recon Marines, riding in two Humvees, were supposed to conduct the raid. Three light armored vehicles went along to "sanitize" the perimeter and deal with any "squirters").

⁷⁵ See, e.g., NONLETHAL WEAPONS AND CAPABILITIES REPORT, *supra* note 72, at 10 (observing that during combat operations in Iraq, insurgents would purposely immerse themselves into the civilian population knowing that U.S. military commanders were reluctant to respond with overwhelming lethal force due to the risks of killing innocent non-combatants).

⁷⁶ See, e.g., AR 190-12, *supra* note 20, para. 4-4.b (declaring that patrol dogs can detect a fleeing person that a human could not detect and, if necessary, pursue, attack, and hold the fleeing person); see also U.S. DEP'T OF ARMY, REG. 190-14, CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITY DUTIES para. 3.1.b.(5) (12 Mar. 1993) (listing MWDs as a measure of non-lethal use to be employed prior to the use of deadly force); MCO 3430.7, *supra* note 10, para. 4.c (noting that non-lethal weapons provide commanders an alternative for taking military action where "the use of deadly force is not the preferred option").

⁷⁷ See, e.g., NONLETHAL WEAPONS AND CAPABILITIES REPORT, *supra* note 72, at 2 (stating that nonlethal weapons are particularly appropriate for use in stability and support operations like those being conducted in Iraq). The report goes on to argue that a military force "using nonlethal weapons and capabilities has the potential of achieving combat and support goals more effectively than would a force employing only lethal means." *Id.*

⁷⁸ See, e.g., FM 90-40, *supra* note 51, at V-2, tbl. V-1 (noting that the combat shotgun can employ non-lethal munitions such as the twelve-gauge bean bag round and twelve-gauge rubber bullet round).

⁷⁹ *Id.* (warning that less-than-lethal munitions should not be employed at ranges less than twenty feet due to their potential for producing a fatality).

⁸⁰ See M26 Advanced Taser Weapons Review, *supra* note 61, at 2 (describing the capabilities of the M26 Advanced Taser).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* However, the M26 Advanced Taser can be configured like a stun gun which would likely permit multiple uses if the user is able to press the electrical probes against the targeted individual's body. *Id.* at 3.

⁸⁴ See, e.g., Amnesty International, *Excessive and Lethal Force? Amnesty International's Concerns About Deaths and Ill-treatment Involving Police Use of Tasers* (Nov. 30, 2004), available at <http://web.amnesty.org/library/index/engamr511392004> (last visited Oct. 23, 2006) (providing an overview and discussion of several instances where taser use resulted in the death of an individual being apprehended).

⁸⁵ See *supra* note 79.

conduct an apprehension, the MWD handler can immediately halt and redirect the dog if necessary. Neither the M26 taser or the employment of non-lethal munitions offers the advantage of calling off the use of force once it has been put in motion.

The effect of employing a MWD team to apprehend and detain enemy combatants will not be excessive in relation to the anticipated military advantage that will be gained by the team's utilization. As noted above, using a MWD is arguably more efficient and effective at capturing and detaining an enemy combatant than any other available means. The MWD is trained so that its effects are neither per se superfluous nor unnecessary when used to apprehend an enemy combatant. Indeed, a MWD's injurious effects are relatively minor compared to those of other available non-lethal weapons like the M26 taser or the use of non-lethal munitions.

C. Distinction

The third LOW principle requires military commanders to refrain from launching attacks that cannot be directed towards a military objective.⁸⁶ In a study of customary international humanitarian law, the International Committee of the Red Cross (ICRC) asserts that "the use of weapons which are by nature indiscriminate is prohibited."⁸⁷ The ICRC further suggest that the measure for determining whether a weapon is indiscriminate is based on two criteria.⁸⁸ The first criterion requires that a weapon be capable of being targeted at a military objective.⁸⁹ The second criterion requires that a weapon's effects must be capable of limitation as required by international law.⁹⁰ Judge advocates should also consider whether a MWD is capable of being targeted at enemy combatants and whether the MWD can be controlled or limited so as not to be indiscriminate in its effects.⁹¹

A MWD satisfies the first ICRC indiscriminate weapon criterion because a MWD is capable of being directed to apprehend only an enemy combatant that has been designated by a dog handler. The MWD undergoes special training to reinforce the proper response from the dog so that it will only apprehend an individual after being instructed to do so on command.⁹² A MWD relies on the dog handler's visual and verbal commands to properly identify and designate an individual targeted for apprehension.⁹³ Since the MWD would be released only by a trained handler, operating under appropriate release guidelines, at a legitimate military objective, it is unlikely that a MWD would be used indiscriminately to attack non-combatants.

⁸⁶ See, e.g., Corn, *supra* note 55, at 35 (noting that the application of destructive military force is limited to the greatest extent possible to only those people, places, or things categorized as legitimate targets as the result of the existence of a state of hostilities).

⁸⁷ See HENCKAERTS & DOSWALD-BECK, *supra* note 58, at 3 (claiming that state practice establishes the LOW principle of distinction as applicable in both international and non-international conflicts). Doctor Jakob Kellenberger, President, International Committee of the Red Cross, states, in his foreword to the Henckaerts and Doswald-Beck study, the ICRC's belief that the work presented by the authors is an "accurate assessment of the current state of customary international humanitarian law." *Id.* at xi; see also AP I, *supra* note 53, art. 51(4) (prohibiting the use of weapons that are "of a nature to strike military objectives and civilians or civilian objects without distinction"); Michael J. Matheson, Remarks at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U.J. INT'L L. & POL'Y 419, 420 (1987), reprinted in INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 385 (2006) (expressing the view that Article 51's prohibition against attacking or threatening violence against civilian populations or individuals reflects international customary law). Mr. Matheson clarifies that the United States does not support those portions of Additional Protocol I, within Articles 51 and elsewhere, that prohibit the use of reprisals because an outright ban on the use of reprisals does not reflect customary international law. *Id.* At the time of his remarks, Mr. Matheson served as the Deputy Legal Advisor, U.S. Department of State. *Id.*

⁸⁸ See HENCKAERTS & DOSWALD-BECK, *supra* note 58, at 247.

⁸⁹ *Id.* (stating that the first criterion is articulated in AP I art. 51(4)(b), prohibiting the use of weapons that cannot be directed at a specific military objective).

⁹⁰ *Id.* (stating that the second criterion is articulated in AP I art. 51(4)(c), prohibiting the employment of weapons "the effects of which cannot be limited as required by the Protocol").

⁹¹ See M26 Advanced Taser Weapons Review, *supra* note 61, at 6 (suggesting that determining whether a weapon is capable of being controlled so as to be directed against a lawful target must be addressed in any weapons review). But see AFI 51-402, *supra* note 10, para. 1.2.2 (requiring only that a weapon review include, as a "minimum," a discussion on the relevant aspects of international law).

⁹² See AFI 31-202, *supra* note 20, para. 8.1 (noting that MWDs, "seek, detect, bite and hold, and guard suspects on command during law enforcement patrol activities"); see also DA PAM. 190-12, *supra* note 27, para. 1-10 (stating, "[p]atrol dogs also are trained to apprehend suspects at or near a crime scene, stop those who may attempt to escape, and to protect their handlers from harm").

⁹³ See DA PAM. 190-12, *supra* note 27, para. 3-12.b (providing a description of how a dog handler employs a MWD to apprehend an individual).

Under the second ICRC indiscriminate weapon criterion, the effects of the MWD can be sufficiently controlled or limited so as not to violate international law. Current Army and Air Force doctrine cautions dog handlers that due care must be given when a MWD is released to apprehend an individual.⁹⁴ The U.S. Air Force adds a further safeguard by directing dog handlers not to unleash a MWD until the handler has verified that the MWD correctly recognizes the target to be pursued and apprehended.⁹⁵ Similarly, the U.S. Marine Corps cautions dog handlers to exercise caution when using a MWD to search an area where innocent persons may be present.⁹⁶ While there are employment considerations that may influence how an MWD is employed in a given situation, there is no evidence to suggest that a MWD would be as likely or more likely to bite noncombatants under appropriate release criteria.⁹⁷ The military commander who chooses to employ MWD teams to apprehend and detain enemy combatants can establish employment guidelines or restrictions to minimize the risks to civilians during combat operations.⁹⁸ Once unleashed, a MWD does not become an independent force that can no longer be controlled by the dog's handler.⁹⁹ On the contrary, the duration and intensity of an apprehension applied by a MWD to an enemy combatant can be regulated by a dog handler so as to not be indiscriminate.

D. International Treaty Obligations

In the final part of the legal analysis, JAs should survey the body of binding international treaty law to determine whether the United States is a party to any treaty that would prohibit the use of MWDs as means of non-lethal force to detain suspected enemy combatants.¹⁰⁰ Determining the impact of treaty law on a particular means of warfare arises from the understanding that binding international treaty obligations “must be observed by both military and civilian personnel with the same strict regard for both the letter and spirit of the law which is required with respect to the Constitution and statutes enacted in pursuance thereof.”¹⁰¹ A survey of applicable treaty law reveals that the United States is not a party to any treaty that prohibits the use of animals or MWDs as a means of warfare.¹⁰² Likewise, there are no prohibitions imposed on the United States by international treaty law that restrict using MWDs as a non-lethal weapon to apprehend enemy combatants.¹⁰³ Therefore, there should be no objection based on any binding treaty obligations to the employment of MWDs during offensive combat operations.

IV. Conclusion

During combat operations in Iraq and Afghanistan, enemy combatants will purposely immerse themselves into the civilian population knowing of U.S. military commanders' reluctance to respond with overwhelming lethal force when innocent non-combatants may be killed. As a result, commanders will seek ways to neutralize the enemy's advantage while minimizing the potential for alienating a local populace. Employing a MWD to apprehend an enemy combatant may provide commanders with a non-lethal alternative to the use of lethal force in difficult situations where the risk to non-combatants is high. Judge advocates have a duty to conduct a thorough legal analysis before a MWD is employed to apprehend an enemy combatant. Conducting a legal analysis based on relevant LOW principles and international treaty law will enable the

⁹⁴ *Id.* para. 202.b (warning MWD handlers to consider the presence of “innocent” people who may inadvertently become the subject of an attack); *see also* AFI 31-202, *supra* note 20, para. 3.2.1 (warning that a MWD should only be released after it has identified the same target as the handler).

⁹⁵ *See* AFI 31-202, *supra* note 20, para. 3.2.1.

⁹⁶ *See* MCWP 3-34.1, *supra* note 26, at E-4 (suggesting that a MWD should not be used to search an area until there is relative certainty that the area is clear of innocent people).

⁹⁷ *See, e.g.,* Charles Mesloh, *An Examination of Police Canine Use of Force in the State of Florida*, at 59 (2003), available at http://www.uspcak9.com/training/florida_study.pdf (comparing canine employment methods and demonstrating that working dogs are capable of being trained to look to their handler for guidance on what to do after they are unleashed). A MWD could be similarly trained to regulate the duration and intensity of a “bite and hold” as directed by the dog handler.

⁹⁸ *See, e.g.,* DA PAM. 190-12, *supra* note 27, para. 2-6.b.2 (instructing that prior to releasing a dog inside building or enclosed area, handlers should provide a warning that the dog may attack without warning and cautioning handlers to maintain voice control over the MWD throughout the search).

⁹⁹ *See id.* para. 3-12 (listing the critical training requirements for ensuring a MWD only employs controlled aggression).

¹⁰⁰ *See, e.g.,* M26 Advanced Taser Weapons Review, *supra* note 61, at 4-5 (describing the lack of prohibition on tasers imposed by customary international law and discussing whether the weapon falls within the scope of several U.S. treaty obligations).

¹⁰¹ FM 27-10, *supra* note 48, para. 7.b (explaining that under the U.S. Constitution, article VI, clause 2, treaties to which the United States is a party, “constitute part of the supreme Law of the Land”).

¹⁰² The Department of State maintains a list of all treaties to which the United States is a party. *See, e.g.,* *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2006*, available at <http://www.state.gov/s/l/treaty/treaties/> (last visited Oct. 18, 2006).

¹⁰³ *Id.*

commander to make an informed decision about the limitations of using a MWD during offensive combat operations. After conducting a thorough analysis of the relevant LOW principles and binding treaty law, the JA should be able to recommend using a MWD as a lawful means of non-lethal force to apprehend an enemy combatant.