

Tactical Level PSYOP and MILDEC Information Operations: How to Smartly and Lawfully Prime the Battlefield

Major Joshua E. Kastenberg*

“All warfare is based on deception. Hence, when able to attack we must seem unable; when using our forces, we must seem inactive; when we are near, we must make the enemy believe we are far away; when far away, we must make him believe that we are near. Hold out baits to entice the enemy. Feign disorder and crush him.”

—Sun Tzu

Overview

Information operations (IO) have been viewed as a force enabler for the strategic level of warfare, but U.S. forces engaged in every level of warfare use some form of it. For instance, in World War II, allied forces dropped leaflets from aircraft to encourage surrender, used sound deception to simulate armored movements, and even convinced the German high command that the D-Day Normandy invasion was a ruse while General Patton’s Third Army would land at Calais.¹ Offensive tactical level IO in the modern era of irregular warfare might target an insurgent group operating from a city, or even an element as small as a specific military unit no larger than a battalion.² Defensive tactical IO might be employed to protect an airfield or dissuade a population segment from supporting a hostile group. Today, both the U.S. Army and U.S. Air Force possess IO forces and delivery systems, and importantly, these forces and systems are interoperable.³ Among the many objectives of IO is the ultimate goal of information superiority. This is defined as “the capability to collect, process, and disseminate an uninterrupted flow of information while exploiting or denying an adversary’s ability to do the same.”⁴ It is just as important to conduct IO at the tactical level with the objective of achieving information superiority as it is at the strategic level of conflict. The concept and terminology of IO has evolved from a number of terms, some of which are still in use. Notable in this category is the term and concept of “information warfare.” The terms, however, are not interchangeable; by virtue of its descriptive name, information warfare is a subset of IO.⁵

The Department of Defense (DOD) defines information warfare as “information operations conducted during time of crisis or conflict to achieve or promote specific objectives over a specific adversary or adversaries.”⁶ Information operations

* Judge Advocate, U.S. Air Force. Presently assigned as the Chief of Operations Law, Operations Law Division, Office of the Judge Advocate General (OTJAG), Headquarters U.S. Air Force, The Pentagon, Washington, D.C. LL.M. in International & Comparative Law, 2003, Georgetown University; J.D., 1996, Marquette University; MA in History, 1992, Purdue University; BA in History, 1990, University of California, Los Angeles. Major Kastenberg thanks Colonel Larry Youngner, USAF, Mr. Richard Jackson, U.S. Army, Office of the Judge Advocate General, and Technical Sergeant Mark Caldwell for their assistance and insight in finishing this article.

¹ See, e.g., CORNELIUS RYAN, *THE LONGEST DAY* 38-101 (1959); WILLIAM GERARD, *SECRET SOLDIERS, THE STORY OF WORLD WAR II’S HEROIC ARMY OF DECEPTION* 1-60 (2002).

² See, e.g., INT’L & OPERATIONAL LAW DEP’T, *THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL*, JA 422, *OPERATIONAL LAW HANDBOOK* 392 (2005); U.S. DEP’T OF ARMY, *FIELD MANUAL* 90-2, *BATTLEFIELD DECEPTION* ch. 1 (3 Oct. 1988):

Perhaps the most striking application of military deception is to be found in the selection of the invasion site and cover plan for the D-Day invasion at Normandy. It is well established that Hitler and almost all of his senior military advisors believed that the most likely place for the Allied invasion of Europe would be in the Pas de Calais region. Moreover, the Allies were aware of this belief through ULTRA intercept. Intercept confirmed that Hitler believed that the Allies would invade at Pas de Calais.

Id.

³ See, e.g., Ryan Henry & C. Edward Peartree, *Military Theory and Information Warfare*, *PARAMETERS* 121-35 (Autumn 1988) (superbly discussing IO in warfare).

⁴ JOINT CHIEFS OF STAFF, *JOINT PUB. 3-13, INFORMATION OPERATIONS II-1* (13 Feb. 2006) [hereinafter *JOINT PUB. 3-13*].

⁵ See, e.g., U.S. DEP’T OF DEFENSE, *INFORMATION OPERATIONS ROADMAP* 10-11 (20 Oct. 2003). The study leading to the Operations Roadmap found a need to establish a common lexicon and a proficient force for IO.

⁶ See, e.g., JOINT CHIEFS OF STAFF, *JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 29 (12 Apr. 2001) [hereinafter *JOINT PUB. 1-02*]. The full definition reads:

The integrated employment of the core capabilities of electronic warfare, computer network operations, psychological operations, military deception, and operations security, in concert with specified supporting and related capabilities, to influence, disrupt, corrupt or usurp adversarial human and automated decision making while protecting our own. Also called IO. See also computer network operations; electronic warfare; military deception; operations security; psychological operations.

Id.

is composed of five severable pillars: electronic warfare (EW), computer network operations (CNO), PSYOP, MILDEC, and operations security (OPSEC). Although these pillars are severable, they are frequently interdependent with each other as well as with conventional military operations.

The subject matter and scope of this article is limited to providing a framework for legal oversight to the planning and execution of tactical level PSYOP and MILDEC operations. As a result, it does not cover in detail issues such as neutrality, operations conducted within the United States which impact the Constitution, or combatant command authorities and their attendant supporting and supported relations. Rather, it seeks to provide a roadmap for a JA or legal representative assigned to an IO cell in support of tactical military operations. As such, this primer is complimentary to Joint Publication (JP) 1-04, *Legal Support to Military Operations*, which envisions service JAs working in concert in joint operations.⁷

Section one provides a brief overview of joint and service doctrine descriptions. Doctrine and definitions are important in any realm as both provide a common lexicon for joint and coalition operations. Moreover, definitions and doctrine contextualize the application of law to operations. Section two covers the basic law and unclassified regulatory schemes under which MILDEC and PSYOP operations might be carried out. Section three applies law of armed conflict considerations to these operations and provides hypothetical examples.⁸ Just as it is the goal of doctrine to establish a common lexicon between service branches, it is the goal of this primer that in our age of joint information operations, JAs will also share a common regulatory and doctrinal language. After all, Field Manual (FM) 27-100 states:

During deployment and entry, OPLAW tasks related to the conduct of operations become more critical. OPLAW JAs must maintain situational awareness to provide effective advice about targeting, ROE, and legal aspects of current operations (including information operations). . . . Deploying legal specialists help the OPLAW JA maintain situational awareness during the operation by attending briefings, monitoring email traffic, tracking the battle, and providing other required assistance. . . . Finally, even during fast-paced operations, OPLAW JAs must continue to perform OPLAW military decision-making process functions in support of the staff's operational planning.⁹

While some of the regulations and doctrine inherent to PSYOP and MILDEC are classified, and therefore not referenced in this primer, the goal of providing basic guidance is obtainable. Finally, it is important for contextual purposes to note up front that it is extremely difficult to analogize the intended objectives of PSYOP and MILDEC to the direct impact capabilities of precision-guided munitions. The two IO pillars are planned and executed with an “effects-based” approach. That is, the measure of success is the overall effects, rather than whether or not a specific target was struck.

Doctrine and Definitions: Joint Doctrine

While departmental and service regulations, directives and instructions as referenced below detail the legal and regulatory regime in all IO operations, joint and service doctrine detail generically how an IO campaign may be waged. On 13 February 2006, Joint Publication 3-13, *Information Operations*, was published by the Joint Staff after service review. As is the case with any joint doctrine, it provides guidance and a common lexicon to the services in fulfilling the “organize, train, [and] equip” inherent in service responsibilities.¹⁰ Importantly, the doctrine states up front that “IO may involve complex legal and policy issues requiring careful review.”¹¹ However, doctrine is not law and it does not have the force of law or regulation. Rather, military doctrine has a prominent role in determining how military operations are planned and conducted. Doctrine is a statement of how we organize and employ our forces to fight. The principles contained within doctrine are *authoritative but not directive*; that is, doctrine is designed to be flexible enough for the commander to conduct operations and missions as a situation changes and to organize forces to best meet the adversary's forces.

⁷ See JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS (1 Mar. 2007) [hereinafter JOINT PUB. 1-04].

⁸ See, e.g., U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM 3.1 (9 May 2006) [hereinafter DOD DIR. 2311.01E]. The terms law of war and law of armed conflict (LOAC) are used interchangeably, and there has been no mandate by DOD to use one or the other. At present the U.S. Air Force uses LOAC. See, e.g., U.S. DEP'T OF AIR FORCE, POLICY DIR. 51-4, COMPLIANCE WITH THE LAW OF ARMED CONFLICT (26 Apr. 1993).

⁹ U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 3-3 (1 Mar. 2000) (to be revised as FM 1-04.0); see Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, ARMY LAW., Sept. 2006, at 3 (providing a further descriptive overview); see also Robert G. Hanseman, *The Legalities and Realities of Information Warfare*, 42 A.F. L. REV. 173, 174 (1997) (providing a solid argument as to why JAs need to understand the principles of information warfare).

¹⁰ JOINT PUB. 3-13, *supra* note 4, at I-5.

¹¹ *Id.* at I-6.

Generally, PSYOP and MILDEC are concerned with influencing others, while other types of information dissemination (e.g., public affairs) are concerned with conveying truthful information.¹² One fundamental difference between the two is that PSYOP is primarily a U.S. Special Operations Command (USSOCOM) responsibility. That is, the commander of USSOCOM assigns PSYOP forces to a geographic combatant command, but maintains administrative (and operational) control over those forces.¹³ As is often the case, effective PSYOP and MILDEC often intermingle factual and deceptive statements.¹⁴ Psychological operations are defined as “operations to convey selected truthful information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and . . . behavior”¹⁵ Military deception is described as being “those actions executed to deliberately mislead adversary decision makers as to friendly military capabilities, intentions, and operations, thereby causing the adversary to take specific actions (or inactions) that will contribute to the accomplishment of the friendly forces’ mission.”¹⁶

Joint Publication 3-13 notes that the JA is a critical member of any IO planning cell.¹⁷ The doctrine further details the type of legal considerations encountered in any IO campaign. The law of armed conflict (LOAC) is at the forefront of tactical level IO. However, there are other issues such as using non-military assets and personnel to conduct IO operations. For instance, U.S. law prevents the use of military PSYOP on U.S. citizens.¹⁸ Additionally, host nation laws might limit the nature of PSYOP and MILDEC operations.

Joint Publication 3-53, *Psychological Operations*, is the specific doctrine for joint PSYOP operations.¹⁹ It reaffirms the importance of such operations at the tactical level of conflict. Moreover, it stresses that the authority to conduct tactical level PSYOP rests with the tactical area commander. Even at the tactical level, PSYOP may be employed to strengthen relations between U.S. and allied forces, influence local populations, and counter enemy propaganda. Much of PSYOP is passive, but at the tactical level can be a critical tool to prevent open armed conflict as well as to protect non-combatant populations.²⁰ This joint doctrine provides an additional difference between PSYOP and MILDEC. While PSYOP is generally targeted toward a defined population (e.g., an insurgent group), MILDEC is targeted toward specific individuals.²¹

Joint Publication 3-13.4, *Military Deception*, is the specific doctrine for joint MILDEC operations.²² As in the case of JP 3-53, it affirms the importance of MILDEC operations at all levels of conflict. At the tactical level, MILDEC focuses on the ability to affect the adversary tactical commander’s ability to make timely and accurate decisions. For instance, a coalition media barrage of information stating that an insurgent religious leader is going to give a speech at a specific time and place, when in fact the individual leader had not planned to do so, may cause that individual to temporarily avoid an urban area, flee the area altogether, or actually give the speech. Likewise, the Mossad posting of false obituaries of Palestinians allegedly involved in the “Munich Massacre” caused these individuals to disappear into an inert status for years.²³ Perhaps one of the best examples of military deception occurred in the Palestine theatre of World War I—the British and Australian attack on Beersheba in 1917 was successful after a British officer “lost” a letter describing his regiment’s movement toward the coast. This act caused the Turkish Army to move away from Beersheba and toward the coast where they expected an attack.²⁴

¹² *Id.* at II-1–II-2.

¹³ *See, e.g.*, 10 U.S.C. § 167(j)(6) (2000) (unified combatant command for special operations forces provided sole responsibility for PSYOP); *see also* JOINT CHIEFS OF STAFF, JOINT PUB. 3-05.1, JOINT SPECIAL OPERATIONS TASK FORCE I-1 (26 Apr. 2007) [hereinafter JOINT PUB. 3-05.1].

¹⁴ *See, e.g.*, U.S. DEP’T OF AIR FORCE, DOCTRINE DOC. 2-5, INFORMATION OPERATIONS (11 Jan. 2005) [hereinafter AFDD 2-5]; U.S. DEP’T OF ARMY, FIELD MANUAL 3-13, INFORMATION OPERATIONS: DOCTRINE, TACTICS, TECHNIQUES, AND PROCEDURES (28 Nov. 2003) [hereinafter FM 3-13].

¹⁵ JOINT PUB. 3-13, *supra* note 4, at II-1.

¹⁶ *Id.* at II-2.

¹⁷ *Id.* at IV-5.

¹⁸ Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981) (United States Intelligence Activities, *amended by* Exec. Order 13,284 (2003) and Exec. Order 13,355 (2004)); *see also* U.S. DEP’T OF DEFENSE, DIR. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (Dec 1982); U.S. DEP’T OF ARMY, REG. 381-10, INTELLIGENCE OPERATIONS 5 (3 May 2007).

¹⁹ JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS (5 Sept. 2003) [hereinafter JOINT PUB. 3-53].

²⁰ *Id.* at I-4-5.

²¹ *Id.* at I-10; JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.4, MILITARY DECEPTION II-3 (13 July 2006) [hereinafter JOINT PUB. 3-13.4] (concurring with the PSYOP doctrinal distinction between the two).

²² JOINT PUB. 3-13.4, *supra* note 21.

²³ *See, e.g.*, SIMON REEVE, ONE DAY IN SEPTEMBER: THE FULL STORY OF THE 1972 MUNICH OLYMPICS MASSACRE AND THE ISRAELI REVENGE OPERATION “WRATH OF GOD” (2006).

²⁴ B.H. LIDDELL HART, THE REAL WAR: 1914-1918, at 309 (1930).

Military deception is a descriptive term for a number of different operations. In addition to offensive and defensive MILDEC, there are tactical level counter-MILDEC operations.²⁵ This type of operation can be roughly described as an attempt to counter an adversary's deception campaign with one of our forces. The use of MILDEC has a rich legacy in military history. An example of a World War II era counter-deception operation was the British placement of "dummy tanks" in North Africa.²⁶ Through a deception campaign, the German command appeared to mass armor in one sector, while actually massing it in another. British intelligence, having broken the German code, discovered the deception and countered through the placement of inflatable "dummy tanks" to make the Germans believe the British had fallen for their ruse. When the German attack occurred, the British were able to fully blunt the German armor's advance, ending the German offensive.²⁷

The sixteenth century political-military theorist Niccolo Machiavelli provided an outstanding description of MILDEC operations when he wrote, "a general ought to divide the enemy's strength by making him suspicious of his confidants, or by obliging him to employ his forces in different places and detachment at once."²⁸ In the current era of irregular warfare, coalition propaganda thanking an enemy subordinate for his help through a subdued delivery process might have the effect of creating distrust in an insurgency's leadership structure. Another contemporary operation might be feeding allied deception into an adversary's deception operation where it is known that the adversary is testing a U.S. force's response. The posting of fictitious news releases is one example.²⁹

Doctrine and Definitions: Service Doctrine

The basic Army doctrinal definitions of "information operations" and "information warfare" may be found in Training and Doctrine Command Pamphlet 525-69, *Concept for Information Operations*. The doctrine states that IO "includes interacting with the global information environment and, as required, exploiting or degrading an adversary's information and decision systems."³⁰

Field Manual 3-0, *Operations* is the starting point for the Army's definition of MILDEC and PSYOP. It defines MILDEC as "measures designed to mislead adversaries and enemies by manipulation, distortion, or falsification."³¹ The aim of MILDEC is "to influence the enemy's situational understanding and lead him to act in a manner that favors friendly forces."³² Psychological operations are defined as "operations that influence the behavior and actions of foreign audiences by conveying selected information and indicators to them"³³ The aim of PSYOP is to "create behaviors that support U.S. national interests and the mission of the force."³⁴ Field Manual 3-05.30, *Psychological Operations*, provides guidance.³⁵ It stresses the importance of legal oversight in all PSYOP. It also reinforces command and control authorities over PSYOP, as well as the prohibition against intentional use on U.S. citizens.³⁶

Air Force Doctrine Document 2-5, *Information Operations*, is the starting point for the Air Force's definition of MILDEC and PSYOPS.³⁷ It characterizes the goal of MILDEC as "mislead[ing] or manag[ing] the perception of adversaries, causing them to act in accordance with friendly objectives."³⁸ The goal of PSYOP is to "induce, influence, or reinforce the

²⁵ The *DOD Dictionary* defines counter-deception as, "efforts to negate, neutralize, diminish the effects of, or gain advantage from a foreign deception operation. Counter-deception does not include the intelligence function or identifying foreign deception operations." See JOINT PUB. 1-02, *supra* note 6, at GL-3.

²⁶ See, e.g., BARRIE PITT, THE YEAR OF ALAMEIN, 1942: THE CRUCIBLE OF WAR, VOL. II 269-81 (1990).

²⁷ *Id.*

²⁸ NICCOLO MACHIAVELLI, THE ART OF WAR 173 (Da Capo 1965) (1521).

²⁹ See, e.g., U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 11-18 (June 2001) [hereinafter FM 3-0]; see also AFDD 2-5, *supra* note 14, at 11.

³⁰ U.S. DEP'T OF ARMY, TRADOC PAM. 525-69, CONCEPT FOR INFORMATION OPERATIONS para. 1-5a (1 Aug. 1995).

³¹ FM 3-0, *supra* note 29, at 11-18.

³² *Id.*

³³ *Id.* at 11-19.

³⁴ *Id.*

³⁵ U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.30, PSYCHOLOGICAL OPERATIONS (15 Apr. 2005).

³⁶ *Id.* at ch. 4 (Command and Control), para. 1-26 (legal aspects of PSYOP).

³⁷ AFDD 2-5, *supra* note 14.

³⁸ *Id.* at 10.

perceptions, attitudes, reasoning, and behavior of foreign leaders, groups, and organizations in a manner favorable to friendly national and military objectives.”³⁹

As in the case of JP 3-13, there are two fundamental similarities between FM 3-0 and AFDD 2-5. Both services acknowledge that PSYOP and MILDEC operations enhance the other IO pillars, as well as kinetic operations. Likewise, both doctrines recognize that legal oversight into PSYOP and MILDEC is critical at all levels of conflict. Finally, generically speaking, IO effects have the propensity to cross over multiple combatant commands, so it is critical for the JA to have a full understanding of the “effects-based” end-state inherent in IO planning. Effects-based planning essentially means “the full integration and interoperability of military forces and other national assets to create a cascading series of effects that achieve strategic goals instead of resorting to traditional force-on-force combat emphasizing physical destruction.”⁴⁰

A final doctrinal note directly implicating the legal regime of IO: in the information warfare realm, effects-based planning must consider the likelihood of unintended results. Lieutenant General Robert Elder, U.S. Air Force, recently stated, “[a]lthough we tend to focus on the desired effects of influence operations, we clearly need to consider the undesired effects of our actions as well. Virtually every action contributes to some effect, and, of course, not all effects are desirable.”⁴¹ It is for this reason, among others, that careful legal overview should be conducted. If PSYOP or MILDEC is not conducted according to the legal and regulatory regimen, one possible result is that the operation will backfire on an operational or even strategic level.

Law and Regulation

Information operations, like any military operation, are constrained by LOAC. That is, U.S. military operations will conform to the principles contained in that body of law. In 1995, the U.S. Navy instructed its forces, “in formulating and executing [Information Warfare] plans and policies, feasible options may raise difficult legal and ethical questions. When executing any [Information Warfare] mission, U.S. forces must conform to all domestic and international laws, treaties, the Law of Armed Conflict, and all applicable rules of engagement.”⁴² Although somewhat dated, the basic premise of this statement remains wholly accurate.

One of the two starting points for advising any tactical level PSYOP or MILDEC operation is Department of Defense Directive 2311.01E, *DoD Law of War Program*, which states that “[a]ll Department of Defense personnel will] comply with the law of war during all armed conflicts, however such conflicts are characterized”⁴³ However, this directive only provides overarching rules to the critical arena of the law of war. It does not provide specific direction as to responsibilities and authorities to conduct operations.

The standing rules of engagement (SROE) provide the second starting point.⁴⁴ As parts of the SROE are classified, this discussion is necessarily brief. However, because all service members and commanders retain the inherent right of self defense, PSYOP and MILDEC operations used in this manner will likely pass any ROE test. The SROE delegates to combatant commanders and their delegated subordinate commanders authority to conduct tactical MILDEC. If, among other issues, the tactical plans have strategic implication, misrepresent the intentions of U.S. government foreign policy, or require major military resources to execute, the combatant commanders must first consult with the Chairman of the Joint Chiefs of Staff.⁴⁵

³⁹ *Id.*

⁴⁰ See, e.g., U.S. JOINT FORCES COMMAND, CONCEPTS DIVISION, WHITE PAPER ON EFFECTS-BASED OPERATIONS (Oct. 2001); see also Michael W. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 A.J.I.L. 481 (2003) (providing a generic analysis of effects-based aerial warfare during the 1991 Gulf War).

⁴¹ Lieutenant General Robert Elder, *Effects-Based Operations, A Command Philosophy*, AIR & SPACE POWER J. 14 (1 Mar. 2007).

⁴² U.S. DEP'T OF NAVY, POLICY PLANNING AND GUIDANCE FOR NAVAL INFORMATION WARFARE/CMD AND CONTROL WARFARE 3 (16 Feb. 1995).

⁴³ DOD DIR. 2311.01E, *supra* note 8, at 9.

⁴⁴ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES (13 June 2005) [hereinafter CJCSI 3121.01B].

⁴⁵ See generally CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3211.01A, JOINT MILITARY DECEPTION (15 June 1994) [hereinafter CJCSI 3211.01A]. This is a classified document and not addressed here. However, the title is not classified. Judge advocates deployed to an IO cell or operation should become familiar with this instruction.

A third set of critical instructions remains classified, but can be described as follows:

DOD Instruction (DODI) S-3321.1 establishes policy, provides procedures, and assigns responsibilities for overt PSYOP conducted by the DOD in peacetime and in military operations other than war. This directive states that PSYOP, as an effective and essential instrument of national policy, is an inherent responsibility of all military commanders. Theater CINCs [Commanders in-Chief] must conduct PSYOP, and Services must support these operations and PSYOP undertaken by any other U.S. agencies.⁴⁶

Information operations responsibilities are further established in DOD Directive O-3600.1, *Information Operations*.⁴⁷ Although the directive is classified as “For Official Use Only” (and therefore not specifically cited herein), there are basic unclassified authorities important to understand. Because IO in one theater of conflict may effect operations in another, the commander of U.S. Strategic Command (CDRUSSTRATCOM) has a specific responsibility to coordinate all IO across combatant command area of responsibility (AOR) boundaries.⁴⁸ Likewise, as addressed earlier, the CDRUSSOCOM provides PSYOP forces to support the combatant commands. This does not in any way diminish a local commander’s responsibility to ensure that LOAC and other legal regimes are adhered to in his or her AOR. A JA deployed in an IO cell or advising a PSYOP or MILDEC operation must understand the approval authorities for such operations. Generally, an IO cell coordinates objectives and tasks with their counterparts at higher and lower command echelons and identifies IO targets, which are then nominated at separate targeting meetings.⁴⁹ Again, as a result of the effects-based nature of IO, cross-coordination is a prominent feature of IO. Understanding the internal and external legal and regulatory structures of combatant commands is important for JAs, as it is often the JA that a joint task force (JTF) commander turns to in determining who must receive notice of a planned operation.

Psychological operations approval authority can be no lower than a JTF commander, but it must be noted that there are two levels of approval for two types of PSYOP packaging: “Objectives, Themes, and Messages” (OT&M) and “products.” The OT&M must be approved by the President, his or her designated combatant commander, joint force commander, or designated ambassador.⁵⁰ The OT&M generally are characterized as overriding ideas designed to sway a segment of a population. Products, such as posters and news advertisements, may be approved by the joint force commander.⁵¹ The significant restriction on PSYOP contained in the SROE is that National Command Authority approval is required before using e-mail or webpages for PSYOP.⁵²

During wartime, a combatant commander is responsible for the direction and conduct of PSYOP in the combatant commander’s (AOR) and is accountable to the President and Secretary of Defense through the Chairman of the Joint Chiefs of Staff.⁵³ Chairman of the Joint Chiefs Instruction (CJCSI) 3211.01A states that joint commanders are authorized to employ tactical MILDEC to support OPSEC during the preparation and execution phases of normal operations, and when the commander’s forces are engaged with an adversary or subject to imminent attack.⁵⁴

Finally, service branch regulations envision tactical level information operations. Although service regulations do not govern joint operations, they provide further insight into authorities regulating IO. For instance, Air Force Policy Directive (AFPD) 10-7 states that “IO will integrate into . . . tactical planning and execution.”⁵⁵ Air Force Instruction (AFI) 10-704, *Military Deception Program*, notes that the authority to execute tactical military deception rests with the combatant

⁴⁶ U.S. DEPT OF AIR FORCE, INSTR. 10-702, PSYCHOLOGICAL OPERATIONS (PSYOP) (19 July 1994).

⁴⁷ U.S. DEP’T OF DEFENSE, DIR. O-3600.1, INFORMATION OPERATIONS (14 Aug. 2006) (classified as “For Official Use Only”).

⁴⁸ JOINT PUB. 1-04, *supra* note 7, at I-10.

⁴⁹ Lieutenant Colonel Pamela Stahl & Captain Toby Harryman, *The Judge Advocate’s Role in Information Operations*, ARMY LAW., Mar. 2004, at 30, 33. It is the author’s contention that Stahl’s and Harriman’s article is well-grounded, and the present article is complementary to it.

⁵⁰ See, e.g., JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, JOINT DOCTRINE FOR PSYCHOLOGICAL OPERATIONS II-1 to II-5 (10 July 1996); JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, JOINT DOCTRINE FOR SPECIAL OPERATIONS II-11 (17 Dec. 2003).

⁵¹ FM 3-13, *supra* note 14.

⁵² See CJCSI 3121.01B, *supra* note 44.

⁵³ JOINT PUB. 3-53, *supra* note 19; Peter J. Smyczek, *Regulating the Battlefield of the Future: The Legal Limitations on the Conduct of Psychological Operations under Public International Law*, 57 A.F. L. REV. 209, 221 (2005).

⁵⁴ CJCSI 3211.01A, *supra* note 45.

⁵⁵ U.S. DEP’T OF AIR FORCE, POLICY DIR. 10-7, INFORMATION OPERATIONS para 2.6 (6 Sept. 2006).

commander in whose theatre the operation resides.⁵⁶ However, the combatant commander may delegate the authority to conduct tactical level deception operations to a JTF commander.⁵⁷ Likewise, at a bare minimum, approval to execute a specific PSYOP or MILDEC operation rests with a JTF commander.⁵⁸ Additionally, a commander may not use MILDEC operations to intentionally deceive Congress or the American public.⁵⁹ Army regulations specific to PSYOP and MILDEC are non-existent. Instead, the Army specifically follows the DOD and CJCS instructions in training, planning, and executing IO in general. Finally, OPNAVINST 3434.1 governs Navy PSYOP programs⁶⁰ and OPNAVINST S3433.1 governs Navy MILDEC operations.⁶¹ The language contained in the Navy instructions are roughly equivalent to their sister-service counterparts.

Law of War Principles

Principles and prohibitions in the law of war apply to PSYOP and MILDEC operations as much as they do to the kinetic battlefield itself.

Perfidy

The prohibition against perfidy is applicable to both PSYOP and MILDEC, as it is to any military operation.⁶² Deception is an ancient and acceptable means of warfare. Ruses and stratagems are perfectly lawful, except for perfidy. For instance, Article 24 of the 1899 Hague Convention states, “[r]uses of war and the employment of methods necessary for obtaining information about the enemy and the country, are considered allowable.”⁶³ This prohibition has been codified into the law of war, but its basis rests in the concept of chivalry. That is, certain rules of war are inviolable. Faking a surrender, or misusing a medical facility are two examples of perfidious conduct.⁶⁴

Article 37 of Protocol I to the Geneva Conventions (Protocol I) prohibits the killing, wounding, or capturing of belligerents by perfidy.⁶⁵ One example would be the misuse of agreed symbols that invoke a protection provided by the law of armed conflict. Similarly, the use of protected persons for offensive military operations may rise to the level of perfidy. If, for instance, a MILDEC operation uses an allied imam and his mosque to convey messages to an anti-allied insurgency, the imam and mosque no longer enjoy protection under the law of war. Likewise, the imam and his mosque cannot be used to lure a wanted insurgent leader by acting as an intermediary, and then setting the insurgent leader up for an ambush.⁶⁶ The example of targeting an imam, or having an allied imam assist in conducting PSYOP or MILDEC is not far-fetched as it has been rightly pointed out a few such religious leaders have served as the leaders of insurgent or terrorist movements.⁶⁷ One can easily imagine a situation where an IO cell wants to “fight fire with fire.” Other examples of perfidy include the feigning of incapacitation by wounds or sickness, as well as the feigning of protected status such as a hospital.⁶⁸

⁵⁶ U.S. DEP’T OF AIR FORCE, INSTR. 10-704, MILITARY DECEPTION PROGRAM para. 1.1 (25 Mar. 1994).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See, e.g., JOINT PUB. 3-13.4, *supra* note 21, at II-8 (stating that MILDEC operations must not intentionally target or mislead the U.S. public, Congress, or the news media).

⁶⁰ U.S. DEP’T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 3434.1, PSYCHOLOGICAL OPERATIONS (22 Dec. 1997).

⁶¹ U.S. DEP’T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. S3433.1, MILITARY DECEPTION (4 Aug. 1995).

⁶² U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, at A13 (18 July 1956) [hereinafter FM 27-10].

⁶³ Convention (II) with Respect to the Laws and Customs of War on Land art. 24, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429; see also Samuel V. Jones, *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, 16 DUKE J. INTL. & COMP. L. 249, 250-54 (2006) (describing an unlawful ruse arising to perfidy).

⁶⁴ See, e.g., COLONEL WILLIAM WINTHROP, MILITARY LAW & PRECEDENTS 786-88 (1895) (abusing a flag of truce is a violation of the law of war); see also Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. TOL. L. REV. 111, 112 (2001).

⁶⁵ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 37, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

⁶⁶ JOINT PUB. 3-13.4, *supra* note 21, at I-8.

⁶⁷ Jerald M. Post, *Psychological Operations and Counterterrorism*, JOINT FORCE Q. 107 (Apr. 2005).

⁶⁸ WINTHROP, *supra* note 64, at 784-88.

Although it may at first seem that MILDEC operations are, at times at odds with the law of war, there is a fundamental reason why this is not the case. The essence of MILDEC operations rests with the so-called “Magruder Principle”: briefly stated, it is generally easier to induce a deception target to maintain a pre-existing belief than to deceive the deception target for the purpose of changing that belief.⁶⁹ Moreover, in order to be perfidy, the act must be the proximate cause of the killing, injury, or capture of the enemy.⁷⁰

For example, it is perfectly acceptable to convince an opposing force that U.S. forces will commence a maneuver at a certain time, only to have it executed at another. It is not lawful, under the law of armed conflict, to convince an opposing leader and his group that U.S. forces intend on turning over all insurgents and their families who do not immediately surrender to a third party likely to commit acts of torture and murder upon capture. This act, if carried out, would violate the *non-refoulement* prohibition.⁷¹ That is, the United States is prohibited from rendering a person to a third party known to violate prohibitions on torture. Furthermore, just as torture is illegal in U.S. domestic law, so too is the threat of torture.⁷²

Necessity

Necessity has long been accepted as a legal principle in U.S. military operations.⁷³ However, the principle of necessity does not permit unlimited use of force simply to gain an objective, and there are limits to the use of non-lethal coercion. It is defined as “permitting the application of only that degree of regulated force not otherwise prohibited by the laws of war, required for the partial or complete submission of the enemy with the least expenditure of life and physical resources.”⁷⁴ In short, the issue of necessity is, as the name implies, whether an operation or act is necessary to further a legitimate military aim.

If, for example, an inactive insurgent cell resides in a densely populated urban enclave, this principle might prohibit PSYOP and MILDEC operations designed to push the cell members into open armed confrontation with coalition units. On the other hand, an operation designed to sway the local population’s support from the cell leadership which in turn causes factions to fire upon each other, would not necessarily violate the principle, because the effects-based intent underlying the operation was only to divorce the inactive cell from possible non-combatant support.

Psychological operations and MILDEC operations may be viewed as a matter of military necessity so that conventional operations adhere to the other law of war constraints. Indeed, one can argue that such operations, particularly when designed to separate non-combatants from combatants, or even to dissuade non-combatant support to combatants give strength to the principle of distinction. However, as is the case of any justification of military operations under LOAC, even a liberal approach to the principle of military necessity is not without limits. Psychological operations and MILDEC operations designed to keep an inherently non-combatant population in a state of confusion to the point where livelihoods are disrupted and residents flee may very well cross into an unlawful operation if there is no discernable threat prior to the operation’s commencement. Likewise, such operations must be timed so that if the effects of the operation rise to the level just noted, then they are of definite duration. On the other hand, operations designed to produce loyalty or trust in U.S. forces will almost, under any condition, be acceptable under the necessity principle.

Defensive operations designed to reduce the risk of attack, such as placing a phony minefield or broadcasting the sound of barking German Shepherds, will under almost every condition be categorized as necessary and lawful. On the other hand, an operation designed to clear a village of its inhabitants which results in the displacement of protected civilians must have some justification under this principle.

⁶⁹ JOINT PUB. 3-13.4, *supra* note 21, at A-1.

⁷⁰ See W. Hays Parks, *Special Forces Wear of Non-Special Uniforms*, 4 CHI. J. INT’L L. 521-24 (2003) (providing perhaps the best discussion of special operations forces and the rules against perfidy); see also MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 204 (1982).

⁷¹ Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 19 U.S.T. 6223, 606 U.N.T.S. 267 (providing that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”); see also FM 27-10, *supra* note 62, at A-70.

⁷² 28 U.S.C. § 1350 (2000); Leila N. Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE WEST. RES. J. INT’L L. 309 (2006).

⁷³ See, e.g., Headquarters, Dep’t of Army. Gen. Orders No. 100, Instructions for the Government of Armies of the United States in the Field (1863).

⁷⁴ FM 27-10, *supra* note 62.

Proportionality

It is possible that a tactical MILDEC or PSYOP operation will produce (or cause to be produced) “suffering” or “injury.” This can make it difficult to apply the traditional balancing test inherent in the concept of proportionality to PSYOP and MILDEC. There are different definitions of the term proportionality, but its basic premise is that a military operation, whether it involves the placement of a single kinetic explosive or consists of an hours-long artillery barrage should be proportional to the objective of the operation (assuming the objective is otherwise compatible with LOAC).⁷⁵

To the extent that these operations are not aimed at directly producing injury or suffering, they will more likely be constrained by policy or operational considerations than by legal ones in time of armed conflict. As an example, a MILDEC operation which is designed to evacuate an urban area of its non-combatant population may result in a stampede, or rioting. Ostensibly Article 51 of Protocol I protects civilian populations against this type of result (if the result were intended).⁷⁶ On the other hand, if the effects-based intent was to separate a terrorist cell from a non-combatant population (to protect that non-combatant population), the proportionality principle is met, even if an unforeseen and unintended consequence was the injurious stampede.

Determining proportionality constraints for a PSYOP or MILDEC operation may be difficult compared to a kinetic weapons approach because it is inherently difficult to define the extent of a result. However, it is appropriate to pursue a liberal approach to offensive PSYOP and MILDEC operations precisely because the specific intent and direct effects of these operations do not envision or involve killing or wounding civilians, or damaging property. Likewise, a defensive operation will almost always satisfy a test for proportionality because these operations, by their nature, are designed to protect lives and critical assets.

Distinction

The principle of distinction embodies the concept that the effects of war must be limited to combatants and military objectives as much as is feasible. Civilians and civilian objects should be spared and may not be targeted.⁷⁷ However, this principle becomes muddled in many aspects of irregular warfare when insurgent leaders use civilian populations for direct support. In such instances, PSYOP and MILDEC operations may “target” civilian populations with the purpose of undermining a regime or discrediting a belief-set. These same operations may be used to clear non-combatants from a geographic area. For instance, dropping leaflets or publishing media articles telling civilians how to avoid hostile fire achieve valid military purposes by potentially undermining their will to support a regime that may indiscriminately subject them to military fire. In targeting these individuals with PSYOP messages, the law of war is upheld because civilians are protected to a greater extent than they would have otherwise been. On the other hand, a MILDEC operation designed to clog an urban area with non-combatants so as to hamper an opposing enemy’s freedom of maneuver might well fail this principle if the civilian population will be subjected to kinetic firefights when they otherwise might have been safe.

Threats that a civilian population will suffer if insurgent leaders are not promptly surrendered may cross the line into illegality. Civilians may not be held as hostages, as such threats, even when not carried out, convey the impression of intent to create a hostage situation.⁷⁸ Also, it is a general legal principle that civilians not engaged in hostilities may be free to leave an area if security considerations permit. In short, civilians may not be used as shields.⁷⁹ Convincing civilians to take up arms or arrest and kill an insurgent leader may be legal, but fraught with other problems. For one, civilians give up their distinction as non-combatants when they take part in combat operations. Additionally, untrained civilians who take up arms are not likely to adhere to the law of armed conflict.

Although not forming a binding international law norm, a recent Israeli Supreme Court decision, *The Public Committee against Torture in Israel v. The Government of Israel*,⁸⁰ provides an excellent analysis of the non-combatant versus

⁷⁵ See, e.g., OSCAR SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 153 (1991).

⁷⁶ Protocol I, *supra* note 65, art. 51.

⁷⁷ *Id.* arts. 48-49; see also Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the War on Terror*, 27 FLETCHER F. WORLD AFF. 51, 67 (Summer 2003).

⁷⁸ See, e.g., FM 27-10, *supra* note 62, at A70.

⁷⁹ *Id.*

⁸⁰ HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [2005], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

combatant distinction. In that case, the particular issue was targeted killings. The Israeli court held that an insurgent/terrorist, while not necessarily a combatant at the time of the government's targeting of him, did not become a non-combatant simply as a result of the passage of time.⁸¹ In other words, former combatants in irregular warfare who have not surrendered (or abdicated from their membership in an insurgency) remain lawful targets since they are not technically non-combatants.

Non-Combatants and Retained Personnel

A question arose in the recent past as to whether a chaplain could be a member of an IO planning cell. The purpose of the chaplain's placement was not to provide ministerial support to the other cell members, but rather to serve as an expert on the local culture and faith structures. The answer to this question was that a chaplain who served in this capacity lost all Geneva protections attendant with his chaplain status and could not, under LOAC, wear any chaplain insignia.⁸² In one respect, a chaplain who participates in the IO planning cell while wearing a distinctive emblem of protection is engaged in a perfidious act.

Another issue involves the use of departmental civilians and contractor personnel in a tactical level PSYOP or MILDEC operation. Although not technically in a "kill-chain," these operations are often used to prepare the kinetic battlefield. There is no prohibition against using civilians in preparing and planning such operations; however, where the execution of these operations is closely placed to the actual combat, it will be difficult to distinguish between combatants and non-combatants. Civilians who take part in IO campaigns lose their protected status as non-combatants.⁸³ This includes behavioral sciences personnel who assist in planning and executing PSYOP and MILDEC operations.

One area of caution is the oversight of civilians in planning and executing MILDEC operations. Commanders are ultimately responsible for ensuring adherence to the law of war. The dicta set forth in *In re Yamashita*⁸⁴ remains as strong today as it did in 1946.⁸⁵ Judge advocate guidance in an IO cell or over IO operations generically must educate uniformed personnel that they may ultimately be responsible for the unlawful acts of civilians if those acts could have been prevented, or if the unlawful acts were required to have been reported.

Tactical PSYOP and MILDEC in the Detainee Arena

It has been recently observed that JAs providing legal support to interrogation operations must understand the interrogation process and how that mission is executed.⁸⁶ The interrogation process in some instances utilizes MILDEC and PSYOP. Indeed, all interrogation uses some psychological processes, and there are eighteen methods of interrogation which do not cross into torture or other illegal means.⁸⁷

The treatment of captured persons is regulated by international law, domestic law, and policy. As alluded to earlier, Common Article 3 of the 1949 Geneva Conventions prohibits both violence to life and person, torture, and "outrages upon

⁸¹ *Id.*

⁸² See, e.g., FM 27-10, *supra* note 62, at A-18; see also U.S. DEP'T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY 6 (25 Mar. 2004); U.S. DEPT OF AIR FORCE, INSTR. 52-104, CHAPLAIN SERVICE READINESS (14 May 2003).

⁸³ Protocol I, *supra* note 65, art. 51(3) ("Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.").

⁸⁴ *In re Yamashita*, 327 U.S. 1, 16 (1946) (stating that international law "imposed upon [Gen. Yamashita] . . . as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate under the circumstances to protect prisoners of war and the civilian population [from war crimes committed by forces under his command]).

⁸⁵ Michael L. Smidt, Yamashita, Medina, and Beyond: *Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 165-72 (2000); see also William Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, B.Y.U. L. REV. 366, 390 (2006) (arguing that current law such as the Military Extraterritorial Jurisdiction Act permits the prosecution of a limited class of civilians in courts-martial).

⁸⁶ Lieutenant Colonel Paul Kantwill, *Improving the Fighting Position, A Practitioner's Guide to Operational Support to the Interrogation Process*, ARMY LAW., July 2005, at 15.

⁸⁷ *Id.*

personal dignity, in particular humiliating and degrading treatment.”⁸⁸ The language of the article is fairly clear, as is the prohibition against torture previously-cited international law sources and covered by Articles 92 and 134 of the Uniform Code of Military Justice.⁸⁹ In theory, Article 93 might also criminalize the abuse of detainees by U.S. forces serving in detention operations.⁹⁰ Geneva Convention III, Article 8 also prohibits medical or scientific experimentation, as well as forcing detained prisoners to become objects of public curiosity.⁹¹ Article 9 requires a detaining authority to maintain respect for detained “persons and their honor.”⁹²

As already noted, just as torture is prohibited, so too is the threat of torture. The same holds true with the threat of public degradation. The threat of publicly displaying detainees, or of disseminating information (such as homosexual activity) which would likely place the detainee in a dangerous position on return to his or her home, would be prohibited. There are a number of activities such as these which would violate LOAC and other laws if conducted.

However, the use of PSYOP or MILDEC is not per se prohibited in the detention environment. There may be valid uses for these operations, including maintaining discipline in the camp and creating an environment favorable for intelligence collection. For instance, distributing uncommon foods, such as ice cream, after certain events may be a simple part of a more complex operation. The same guidelines and prohibitions against abuse of detainees and non-combatants apply to PSYOP and MILDEC operations within detention operations.

The regulatory starting point for detainee operations is DODD 2310.01E, *Department of Defense Detainee Program*.⁹³ The directive mandates that Common Article 3 will be followed in all detainee cases.⁹⁴ It further requires all departmental employees to report suspected violations.⁹⁵ Combatant commanders are responsible for ensuring detainees are treated according to the requirements of international and domestic law, and departmental policy.⁹⁶

Conclusion

The goal of this primer is to establish a common legal lexicon for the two IO pillars of PSYOP and MILDEC beyond that available in doctrine, and then apply legal and regulatory constraints to the planning and execution of these pillars at the tactical level. Without the context of doctrine and past lessons, improper application of the law and regulatory scheme to such operations will handicap their effectiveness. Yet, a primer can provide only so much of the necessary context for applying the laws and regulations to tactical operations. This article is simply a start, but hopefully a helpful one. In particular, it must be stressed that the liberal application of the laws of armed conflict constraining tactical IO should be the norm. The intent behind most of these operations is not to kill, but rather to win by avoiding killing. Secondarily—but equally important—many IO also implicate the principles of distinction, necessity, and proportionality inherent in military operations. In the present era of irregular warfare, IO and in particular, tactical level operations, will be increasingly used. It is critical for JAs to be literate in the law and doctrine governing these operations.

⁸⁸ Common Article 3, present in the four Geneva Conventions which are: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31; (2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 85; (3) Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; and (4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁸⁹ UCMJ arts. 92, 134 (2005). Article 92 (Failure to Obey Order or Regulation), includes dereliction of duty; Article 134 is a general disorders article.

⁹⁰ UCMJ art. 93. Article 93 (Cruelty and Maltreatment), requires that a victim be subject to the orders of the accused. Military case law might consider a detained person subject to the orders of the accused, where the accused served in a detention facility. *See, e.g.,* United States v. Sojfer, 44 M.J. 603 (N-M. Ct. Crim App. 1996).

⁹¹ GC III, *supra* note 88, art. 8.

⁹² *Id.* art. 9.

⁹³ U.S. DEP'T OF DEFENSE, DIR. 2310.01E, DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept. 2006).

⁹⁴ *Id.* at 4.2.

⁹⁵ *Id.* at 4.10.

⁹⁶ *Id.* at 5.9.