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Foreword

On behalf of The Judge Advocate General's Legal Center and School, United States Army and our friends at the Judge Advocate General's School, United States Air Force and the Naval Justice School, we are pleased to present this special joint service edition of *The Army Lawyer*. It is fitting that this issue focuses on international and operational law topics, as Judge Advocates from all services serve with distinction in operational theaters around the world. The Global War on Terror has continued to highlight the fact that on today's battlefield, no service fights alone. The United States military is, and must be, a joint team bringing our strengths together to defend our great Nation. The wide range of topics, experiences, and viewpoints expressed in this issue exemplifies the extraordinary value of inter-service coordination. We extend our sincere thanks and appreciation to our colleagues on the staffs of our sister service legal publications, the Air Force Law Review, and the Naval Law Review.

-The Editors

Time to Stand Up and Be Counted: The Need for the United Nations to Control International Terrorism

Major Karin G. Tackaberry[*]

Terrorism is a global menace. It calls for a united, global response. To defeat it, all nations must take counsel together, and act in unison. That is why we have the United Nations.[1]

I. Introduction

Since September 11, the United States and many other nations have been engaged in the Global War on Terrorism.[2] The U.S. military has approximately 200,000 Soldiers, Sailors, Airmen, and Marines serving in Iraq and Afghanistan.[3] Each service's Judge Advocate General's Corps supports the Global War on Terrorism by providing "professional legal support at all echelons of command throughout the range of military operations"[4] and within other government agencies such as the Department of State.[5] In the Army, this legal support includes advice and services in international law, one of the core legal disciplines.[6] Although international law advice generally focuses on conduct in a full spectrum of missions and ensuring adherence to international treaty law and customary international law,[7] judge advocates may gain a greater understanding of daily activities in deployed areas by understanding the historical evolution of justifying war and the existing anti-terrorism treaties.[8]

Since the beginning of civilization, great philosophers and scholars have struggled with the morality of war. In particular, these philosophers formulated guidelines in an effort to ensure a just cause for going to war. Despite these guidelines, the world faced The Great War—thought to be the "war to end all wars."[9] Close to twenty years later, World War II proved that perception to be wrong.[10] At the end of World War II, many nations joined together to prevent another global armed conflict. In 1945, fifty-one countries formed the United Nations (UN) as an organization for cooperation between

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[1] Press Release, Secretary General, True Faith is Respectful, Compassionate, Devoid of Hatred, Says Secretary-General at Temple Emanu-El in New York, U.N. Doc. SG/SM/7962/Rev. 1 (Sept. 18, 2001), *available at* http://www.un.org/News/Press/docs/2001/sgsm7962R1.doc.htm.

[2] THE WHITE HOUSE, PROGRESS REPORT ON THE GLOBAL WAR ON TERRORISM 1 (Sept. 2003), *available at* http://www.whitehouse.gov/homeland/progress/progress_report_0903.pdf.

[3] Rick Maze, *CBO: Iraq Surge Could Actually Total 50,000*, ARMY TIMES, Feb. 2, 2007, *available at* http://www.armytimes.com/news/2007/TNScbosurge070201; Mike Mount, *U.S. Sending More Troops to Thwart Taliban Offensive*, CNN, Feb. 14, 2007, http://www.cnn.com/2007/World/asiapcf/02/14/Afghanistan.troops/index.html.

[4] U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 1-1 (1 Mar. 2000) [hereinafter FM 27-100].

[5] Interview with Lieutenant Colonel Michael Lacey, Director, Center for Law and Military Operations, TJAGLCS, in Charlottesville, Virginia (Feb. 27, 2007) [hereinafter Lieutenant Colonel Lacey Interview].

[6] FM 27-100, *supra* note 4, at 1-4.

[7] *See id.* at 1-7.

[8] Lieutenant Colonel Lacey Interview, *supra* note 5.

[9] *The Great War: 80 Years On*, BBC NEWS, Nov. 2, 1998, *available at* http://news.bbc.co.uk/2/hi/special_report/1998/10/98/world_war_i/197437.stm; *The War to End All Wars*, BBC NEWS, Nov. 10, 1998, *available at* http://news.bbc.co.uk/2/hi/special_report/1998/10/98/world_war_i/198172.stm.

[10] *See generally* Statistics of World War II, The History Place, *available at* http://www.historyplace.com/worldwar2/timeline/statistics.htm (last visited Sept. 25, 2007) (discussing how World War II involved twenty-five nations and resulted in over fifty-two million military and civilian deaths).

States, naturally focusing on the most recent war.[11] The UN Charter limited the justifications for war[12] and sought to prevent future wars between States, thereby achieving global peace.[13]

Since its creation, membership in the UN has expanded[14] and armed conflicts between nations have decreased. Formal declarations of war have become almost nonexistent since the end of World War II, and most States seek to bring their use of military force within the UN Charter framework.[15] The syllogism that the UN has created world peace is appealing, but the reality of the twenty-first century is that this is merely a *post hoc ergo propter hoc* fallacy.[16]

Today, nebulous organizations that operate internationally have filled the void created by the absence of warfare between States. "[T]he combination of religious ideology and interests that use religious factors in violence are becoming an increasingly potent force in Africa, Asia, the Middle East, and even the Americas."[17] Terrorism is a word frequently used to characterize these acts of violence that increasingly fall within the category of armed conflict. Despite the escalating level of violence, the few anti-terrorism treaties are based in criminal law, not laws of armed conflict. To effectively punish and limit violent terrorism, the UN must abandon the treaties prohibiting the crimes of terrorism and craft a new body of law premised on the law of armed conflict.

Creation of a viable solution for terrorism requires an understanding of the rationale and justification of armed attacks, to include violent terrorist attacks. In Part II, this article discusses three distinct just war systems and conflicts among these systems. The first system, based on Islam but best known as *jihad*, formed with little or no influence from the non-Islamic world. This article discusses *jihad* without Western bias and relies heavily on Muslim scholars as the basis of research. The second system, traditional *jus ad bellum*, commonly known as the law of resorting to war,[18] is a Western framework that some States (including the United States) argue includes a customary international law concept based on the *Caroline* incident of 1837.[19] The third system, the framework of the UN Charter, provides limited justification for armed conflict among its members. An understanding of these systems reveals the shortcomings of the existing counterterrorism treaty law and the necessity for classification of violent terrorism as warfare.

Because existing treaties for the prevention of terrorism rely on a criminal framework, Part III of this article examines the crime of terrorism and existing counterterrorism treaties. This examination begins with UN actions to fight terrorism and continues with the quagmire of inaction surrounding the drafting of a UN Comprehensive Anti-Terrorism Treaty. Next, this article further illuminates the existing polarity throughout the world by discussing several regional counterterrorism conventions. Lastly, Part IV of this article proposes essential elements for defining and controlling the war crime of international terrorism by non-State actors.

II. Authority for War

> *Historical and anthropological evidence suggests that every human culture has generated some analogue of just war tradition: a consensus of beliefs, attitudes, and behavior that defines the terms of justification for resorting to violence and the limits, if any, to be set on the use of violence by members of that culture.*[20]

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[11] History of the United Nations, http://www.un.org/aboutun/unhistory (last visited Sept. 25, 2007) [hereinafter History of the United Nations].

[12] U.N. Charter art. 2, para. 4, *available at* http://www.un.org/aboutun/unhistory (last visited Sept. 25, 2007).

[13] Peter Howard, *United Nations*, *in* MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA, http://encarta.msn.com/encyclopedia_761564986/United_Nations.html (last visited Sept. 25, 2007).

[14] Growth in UN Membership, http://www.un.org/Overview/growth.htm (last visited Sept. 25, 2007).

[15] Flashback: Invasion of Kuwait, BBC NEWS, Aug. 1, 2000, *available at* http://news.bbc.co.uk/1/hi/world/middle_east/ 856009.stm [hereinafter Flashback: Invasion of Kuwait].

[16] Post Hoc, http://www.fallacyfiles.org/posthocf.html (last visited Oct. 4, 2007) (providing the translation "after this, therefore because of this").

[17] Pauletta Otis, *Religious Warfare on the Global Battlefield*, *in* THE JUST WAR AND JIHAD 169, 170 (R. Joseph Hoffman ed., 2006).

[18] MICHAEL WALZER, JUST AND UNJUST WARS 21 (4th ed. 2006).

[19] MICHAEL BYERS, WAR LAW 53-54 (2005).

[20] James Turner Johnson, *Historical Roots and Sources of the Just War Tradition in Western Culture*, *in* JUST WAR AND JIHAD 3, 3 (John Kelsay & James Turner Johnson eds., 1991).

A. Jihad

Jihad[21] most commonly translates to the English meaning "to strive/make effort in the way of ALLAH"[22] or "an exertion of one's power in Allah's path."[23] In Western societies, though, many people mistakenly believe *jihad* means "holy war."[24] Although some Muslims seek to avoid the connection of *jihad* and warfare,[25] not all Muslims shun that apparent connection.[26] The most accurate explanation of *jihad* is a "continuum . . . [ranging] from totally nonviolent to violent actions."[27] Regardless of its form, *jihad* is an integral facet of the Islamic religion and law and has existed since the life of Muhammad. Passages in the *Qur'an*[28] from Muhammad's time in Medina extol the need to follow Muhammad in spreading Islam through battle.[29] English translations of several verses from the *Qur'an* concerning *jihad* are contained in Appendix A.

Since the basis of Islam is the *Qur'an* and the *Sunnah* (i.e., the Prophet Muhammad's actions implementing the *Qur'an*),[30] a study of *jihad* requires a brief historical view of Muhammad's actions with respect to warfare.[31] Approximately two years after Muhammad's migration from Mecca to Medina,[32] he revealed the first *Qur'anic* verse concerning war.[33] Revelation of this verse marks the beginning of Muhammad's military leadership and the most famous *jihad* contained within the *Sunnah*—the battle of Badr.[34] Based on the actions of the Muslims at the battle of Badr, many Muslims believe "death [is] a trifle on the way to martyrdom"[35] that can be achieved by "persecuting others for their faith [and] obey[ing] the [*Qur'anic*] Injunction to carry out *jihad*."[36]

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[21] JUST WAR IN COMPARATIVE PERSPECTIVE 80 (Paul Robinson ed., 2003) ("In the Qur'an, it is always joined with the phrase *fi sabil allah*, which means 'in the path of God.'"); *see also* Abdullah Saeed, *Jihad and Violence: Changing Understandings of Jihad Among Muslims, in* TERRORISM AND JUSTICE: MORAL ARGUMENT IN A THREATENED WORLD 72, 73 (C.A.J. Coady & Michael P. O'Keefe eds., 2002).

[22] AAMER LIAQUAT HUSSAIN, ISLAM AND TERRORISM: AN HISTORICAL AND THEOLOGICAL ENQUIRY 16 (2002) (capitalization in the original text).

[23] Johnson, *supra* note 20, at 9.

[24] Karima Bennoune, *As-Salumu Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT'L L. 605, 615 (Winter 1994); *see also* Daniel Pipes, *What Is Jihad*, Dec. 31, 2002, http://www.danielpipes.org/pf.php?id=990.

[25] M. AMIR ALI, THE INSTITUTE OF ISLAMIC INFORMATION & EDUCATION, BROCHURE NO. 18 JIHAD EXPLAINED, *available at* http://www.iiie.net/node/33 (stating that the translation of *jihad* as "holy war" is the product of "influences of centuries-old Western propaganda," and the literal translation of holy war from English to Arabic is completely different than the word *jihad*).

[26] AYATULLAH MORTEZA MUTAHHARI, JIHAD: THE HOLY WAR OF ISLAM AND ITS LEGITIMACY IN THE QURAN (Mohammad Salman Tawhidi trans., 1985), *available at* http://www.al-islam.org/short/jihad (asserting that "religion must have a law of war, a law of *jihad*"); *see also* BERNARD LEWIS, THE CRISIS OF ISLAM 31 (2003) (stating that war against infidels and apostates is *jihad*).

[27] Saeed, *supra* note 21, at 74.

[28] The Noble Qur'an, http://www.usc.edu/dept/MSA/quran (last visited Sept. 25, 2007) [hereinafter The Noble Qur'an] (explaining that *Qur'an*, which means word of God, is a written account of the verses from God to Mohammad who became known as a prophet for the Arab people. Muslims strongly believe that the Qur'an is "letter for letter fixed by no one but Allah."). *See generally* Richard Martin, *The Religious Foundations of War, Peace, and Statecraft in Islam, in* JUST WAR AND JIHAD 91, 101-02 (John Kelsay & James Turner Johnson eds., 1991) (explaining the significance of the *Qur'an* and *Sunnah*).

[29] Johnson, *supra* note 20, at 9.

[30] MD. MONIRUZZAMAN, THE ISLAMIC THEORY OF JIHAD AND THE INTERNATIONAL SYSTEM 141 (1989) (defining Sunnah as "[t]he sayings, acts or approvals of the Prophet Muhammad; Traditions of Muhammad, the second ultimate source for Islamic law after the Qur'an"); *see also* The Noble Qur'an, *supra* note 28 ("Sunnah was inspired by Allah but the wording and actions are the Prophet's."). *See generally* Martin, *supra* note 28, at 101-02 (explaining the significance of the *Qur'an* and *Sunnah*).

[31] *See* Daniel Pipes, *Why Don't Scholars Admit That Holy War Means War?*, TIMES HIGHER EDUC. SUPPLEMENT (Oct. 3, 2003), *available at* http://www.thes.blogspot.com ("Jihad was no abstract obligation through the centuries but a key aspect of Muslim life. According to one calculation, Muhammad himself engaged in 78 battles, of which just one (the Battle of the Ditch) was defensive.").

[32] MONIRUZZAMAN, *supra* note 30, at 17 (explaining that Muhammad met some people from Yathrib, later known as Medina, in 620 C.E. when they traveled to Mecca for the annual pilgrimage. The people of Yathrib showed support for Muhammad and his preaching. After this initial meeting, four successive meetings with people from Yathrib prompted them to invite Muhammad to Yathrib to flee the persecution in Mecca.).

[33] MUTAHHARI, *supra* note 26.

[34] The Battle of Badr, Muhammad.net, http://www.muhammad.net/bio/badr.htm (last visited Sept. 25, 2007); *see also* M.J. AKBAR, THE SHADE OF THE SWORDS 32-34 (2002) (describing the Battle of Badr as a David versus Goliath type of battle with the Muslims as David and the Arab Quraysh tribe being Goliath).

[35] AKBAR, *supra* note 34, at 36.

Jihad in its military form also can be considered either offensive or defensive. Offensive *jihad* involves the affirmative use of force to remove anything or anyone that impedes the spreading of Islam.[37] Conversely, defensive *jihad* exists for "the purpose of preserving the Islamic Message, the Islamic State and the Muslims."[38] The question then arises as to what constitutes a war by non-Muslims that would prompt defensive *jihad*—armed attack, threatening speech, offensive words, or one nation's perceived non-compliance with international law? Presently, the answer to every one of these possibilities may be "yes." One must consider that the Islamic belief of *jihad* also means that any "wars waged against Muslims by infidels are by definition unjust."[39]

Under the rubric of *jihad* as foreign policy, actions must comply with *adl*, which translates to "fairness, rule of law and justice in relation with others."[40] In many instances, much of the world perceives a double standard to exist because strong nations disobey international laws that are against their national interest while weak nations are held to those same laws regardless of national interest.[41] "Islamic *jihad* is a violent and radical response to that [perceived] double standard, unfairness, and injustice."[42]

The doctrine of *jihad* is based in verses of the *Qur'an*; however, study of *jihad* must consider "how far the doctrine was molded by pressure of immediate circumstance."[43] This study can divide the *jihad* verses into three stages: stage one has an apologetic tone and "insistence on the necessity of war,"[44] stage two is "mostly concerned with the sanctification of plunder,"[45] and stage three contains the "ban on idolatry in Arabia."[46] These stages "prove with transcendent clarity (if indeed any proof was needed) that *jihad* was never contemplated as a permanent dispensation . . . and was never anything but an ad hoc dispensation."[47] As such, the need for *jihad* may be renounced and "the lineaments of a peaceful *Islam* be conjured up and given shape by people who know better and see further."[48] Essentially, renouncement of *jihad* would declare an end to the need for acts of *jihad*, the acts would be banned, and peaceful Islam would exist.

B. *Jus Ad Bellum*

Although the "Western Just War Theory" does not appear to be as specifically tied to religion as *jihad*, Western just war theory was "shaped by religious and nonreligious forms within [the] culture."[49] Sources of influence include Saint Augustine, the twelfth century monk Gratian, Saint Thomas Aquinas, Francisco de Vitoria, and Grotius.[50]

Through the ages, with the contributions of these individuals and many others, Western Just War Theory evolved into a cohesive "doctrine of just war tradition . . . [functioning] as a broad cultural consensus within western European culture on

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[36] Johnson, *supra* note 20, at 10.

[37] Muhammad the Messenger of God, Prophet's Military Policy, http://home.swipnet.se/islam/A_Personality/The_Apostle/12military.htm (last visited Oct. 4, 2007) (follow "*Prophet's Military Policy*" hyperlink).

[38] MONIRUZZAMAN, *supra* note 30, at 104.

[39] Johnson, *supra* note 20, at 9.

[40] MONIRUZZAMAN, *supra* note 30, at 104.

[41] *Id*.

[42] *Id*. at 105.

[43] SUHAS MAJUMDAR, JIHAD: THE ISLAMIC DOCTRINE OF PERMANENT WAR 89 (1994).

[44] *Id*. at 90.

[45] *Id*. at 91.

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] Johnson, *supra* note 20, at 3.

[50] *See generally id*. at 3-26 (providing a historical account of the Western Just War Tradition).

the justification and limitation of war"[51] with a set of core principles: "just cause, legitimate authority, last resort, proportionality between offence and response, reasonable chance of success and right intention."[52] The first principle, just cause, seems to have been limited to defense of the innocent and self-defense.[53] Legitimate authority concerns States' sovereignty, and the sovereign's authority to declare war.[54] Next, for a war to be just, diplomacy and negotiations must be unavailable, leaving war as the only option.[55] The principles of proportionality and reasonable chance of success closely relate to the conduct of war and are closely tied to an assessment of the anticipated action during war.[56] The last principle, right intention, may be closely tied to just cause, but focuses more on the end sought by the war rather than on the reason to initiate the war.[57] Peace as the end result of war may be the only just intention acceptable under just war theory.[58]

Jus ad bellum also considers self-defense as a just cause for war. Although the term "self-defense"[59] may sound relatively straightforward, the world has seen self-defense utilized as justification for a vast spectrum of actions. The current discussion of self-defense will focus on events pre-1945 (i.e., before the UN Charter). Part II.C. of this text discusses self-defense since the creation of the UN.

In the arena of international law, the concept of anticipatory self-defense arguably has risen to the level of customary international law resulting from a dispute over the steamboat *Caroline*.[60] In 1837, after the *Caroline* aided rebels against the British in Canada, the British conducted a raid across the Niagara River into the state of New York, killed at least two of the *Caroline*'s crewmembers, "set the boat on fire and sent it over Niagara Falls."[61] It was not until five years after the incident that new Secretary of State Daniel Webster sent the now-famous letter to Lord Ashburton wherein he declared that a government must "show a necessity of self-defense, instant, overwhelming, leaving no choice of means, no moment of deliberation."[62] Webster also articulated that nothing unreasonable or excessive could be done in self-defense.[63] Governments accepted Webster's necessity and proportionality requirements, and self-defense, distinct from a justification for war, was authorized if these requirements were met and the "act defended against was not an act of war."[64] Thus, the customary international law recognition of anticipatory self-defense was born.[65] The twentieth century, though, marked an era of written international law in addition to customary international law.[66]

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[51] *Id.* at 16.

[52] Robert Skidelsky, *Essay: The Just War Tradition*, 105 PROSPECT (Dec. 2004), *available at* http://skidelskyr.com/index.php?id=2,11,0,0,1,0.

[53] *Id.*

[54] Alexander Moseley, *Just War Theory*, *in* THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY, http://www.iep.utm.edu/j/justwar.htm (last visited Oct. 4, 2007).

[55] Skidelsky, *supra* note 52.

[56] *Id.*

[57] *Id.*

[58] Bertrand Lemennicier, Classical Just War Theory: A Critical View, Address before Libertarian International Spring Convention (Mar. 22-23, 2003), *available at* http://lemennicier.bwm-mediasoft.com/article.php?ID=86&limba=en.

[59] David M. Ackerman, *CRS Report for Congress—International Law and the Preemptive Use of Force Against Iraq* 1-2 (Apr. 11, 2003), *available at* http://www.dean.usma.edu/departments/law/lawandterr/Preemptive%20Use%20of%20Force%20in%20Iraq.pdf (citing CHARLES CHENEY HYDE, 3 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1686 (1945) ("An act of self-defense is that form of self-protection which is directed against an aggressor or contemplated aggressor. No act can be so described which is not occasioned by attack or fear of attack.").

[60] BYERS, *supra* note 19, at 53-54.

[61] *Id.* at 53.

[62] *Id.* at 54; *see also* FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWERS OF CONGRESS IN HISTORY AND LAW 49 (1989) (citing letter from Daniel Webster to Henry Fox (Apr. 24, 1841), *in* 6 THE WORKS OF DANIEL WEBSTER 250, 261 (1851) (stating that Daniel Webster, "hoping to put the British on the defensive in negotiations over the Maine boundary, argued that the British attack was wholly unjustified.")).

[63] BYERS, *supra* note 19, at 54.

[64] *Id.*

[65] Michael Lacey, *Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction*, 10 IND. INT'L & COMP. L. REV. 293, 296 (2000).

[66] *See generally* ASIL Guide to Electronic Resources for International Law, http://www.asil.org/resource/treaty1.htm (last visited Sept. 25, 2007) (stating that the history of treaties stretches for thousands of years but that they have been increasing codified since the beginning of the 20th century).

C. Authority for War Within the UN Charter

The structure of world peace cannot be the work of one man, or one party, or one nation. . . . It must be a peace which rests on the cooperative effort of the whole world. . . . Peace can endure only so long as humanity really insists upon it, and is willing to work for and sacrifice for it.[67]

In 1945, delegates from fifty countries worked in San Francisco to complete the UN Charter, culminating on 24 October 1945 with a UN comprised of fifty-one member countries.[68] The purpose of the UN, similar to the League of Nations before it, was to foster international cooperation and to promote international peace and security.[69] Whether considered an extension of *jus ad bellum* or a separate and distinct body of law,[70] the UN Charter and customary international law set extreme limits on UN Member States' ability to go to war.[71] "Governments that use force have almost always sought to justify their actions in legal terms, however tenuously."[72] That justification is almost invariably couched in terms of self-defense.

Under the UN Charter, Articles 2(4) and 51 are the two primary sources of both the limitations on, and justifications for, war by member nations. The use of force by one member State against another member State is prohibited under Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[73] Article 51, however, recognizes a nation's inherent right of self-defense: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[74] However, the meaning of Article 51's terms and the definition of the right of self-defense are at the center of ever-increasing debates.[75]

Two of the significant debates concerning self-defense primarily focus on: (1) the perceived right of anticipatory self-defense and its limits, and (2) the ability to use force in self-defense outside a nation's own territory. The case for anticipatory self-defense originates from the *Caroline* incident previously discussed.[76] Due to the modern reality of weapons of mass destruction and the unpredictability of non-State actors, some nations, including the United States and Israel, have asserted a right to preemptive self-defense that expands the concept of anticipatory self defense.[77] The second debate focuses on attacks occurring outside the territorial integrity of the attacking nation.

Two examples that illustrate the debate in both of these areas are the 1981 Israeli bombing of the nuclear reactor at Osirak, Iraq,[78] and the 1998 U.S. bombings of al Qaeda training camps in Afghanistan and a chemical weapons production

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[67] Franklin Delano Roosevelt, President of the United States, Address to the United States Congress (Mar. 1, 1945), *available at* http://teachingamericanhistory.org/library/index.asp?documentprint=658 (providing a transcript of the speech made by President Roosevelt to the U.S. Congress as a report of progress made when the United States, United Kingdom, Soviet Union, and China held the Yalta Conference and agreed upon the need for a new international organization of nations).

[68] *Id*.; Howard, *supra* note 13.

[69] U.N. Charter art. 1; History of the United Nations, *supra* note 11; League of Nations Photo Archive Introduction, http://www.indiana.edu/~league/intro.htm (last visited Sept. 25, 2007).

[70] *See* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 691-92 (Dec. 2004).

[71] BYERS, *supra* note 19, at 2.

[72] *Id*. at 3.

[73] U.N. Charter art. 2, para. 4.

[74] *Id*. art. 51.

[75] Ackerman, *supra* note 59, at 3.

[76] *See supra* Part II.B.

[77] BYERS, *supra* note 19, at 8. *See generally* John Norton Moore, *The Need for an International Convention*, *in* LEGAL RESPONSES TO INTERNATIONAL TERRORISM 437, 441 (M. Cherif Bassiouni ed., 1988).

[78] *See generally* BYERS, *supra* note 19, at 72 (On 7 June 1981, the Israeli Air Force flew 600 miles into Iraqi territory to the outskirts of Baghdad and bombed a nuclear reactor under construction. The attack severely damaged Iraq's nuclear program; the Israeli pilots were national heroes.).

facility in Sudan.[79] In both instances, the attacking nations asserted the right of self-defense within the meaning of Article 51 as justification for these attacks.[80] Also, in both instances, many nations and international law commentators disagreed with the actions of the attacking State and condemned these acts as being outside the meaning of self-defense and therefore, improper uses of force under the UN Charter.[81] Despite these condemnations, the UN has little ability to punish nations for actions that are outside the accepted use of force,[82] particularly when one of the States holds a permanent seat on the UN Security Council with the concomitant "veto."[83]

In keeping with the UN's purposes, the international body also pursues international peace and security from threats other than war between nations.[84] Terrorism is one such threat. In the aftermath of September 11, the United States and United Kingdom complied with the provisions of the UN Charter and "notified the Security Council that they were conducting operations against the Taliban and al Qaeda pursuant to their right of individual and collective self-defense."[85] The "international reaction to the affair was almost universally one of outrage over the terrorist acts and support for the United States,"[86] and the UN Security Council made "no effort . . . to condemn the forceful response once launched."[87] In this instance, nations followed the law of armed conflict to respond to violent terrorist acts, and the international community supported such a response, but the response departed from the existing international laws to counterterrorism.

III. The Crime of Terrorism

A. What is the Crime of Terrorism?

At first glance terrorism seems to be a word without ambiguity. One literal definition of terrorism is "the unlawful use or threatened use of force or violence by a person or an organized group against people or property with the intention of intimidating or coercing societies or governments, often for ideological or political reasons."[88] However, international organizations, nations, and individuals utilize definitions of terrorism that may conform with or vary greatly from this

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[79] *See generally* Todd R. Phinney, Airpower versus Terrorism: Three Case Studies 26-33 (June 2003) (unpublished thesis, The School of Advanced Air and Space Studies), *available at* http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA425884&Location=U2&doc=GetTRDoc.pdf (In August 1998, after several years of violent acts, al Qaeda conducted terrorist bombings of the U.S. embassies in Kenya and Tanzania. Within one week of the embassy bombings, evidence showed al Qaeda perpetrated these acts and planned future attacks. Based on this evidence, the United States bombed a chemical plant in Sudan and an al Qaeda training camp in Afghanistan.).

[80] BYERS, *supra* note 19, at 72; David Johnston & Todd S. Purdum, *Missed Chances in a Long Hunt for bin Laden*, N.Y. TIMES, Mar. 25, 2004, at A1; *see also* Lacey, *supra* note 65, at 294-96 (discussing the United States' explanation of the lawfulness of the missile strikes in Afghanistan and Sudan); Ackerman, *supra* note 59, at 5-6 (describing Israel's claim of self defense).

[81] Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, WASH. Q., Spring 2003, at 89; *see also* Lacey, *supra* note 65, at 299.

[82] *See* U.N. Charter arts. 33-50 (providing the Security Council with the authority to determine the pacific settlement of disputes or to take action with respect to threats to the peace, breaches of the peace, and acts of aggression).

[83] *Id*. art. 27(3) (requiring "the concurring vote of the permanent members" for any substantive decisions by the UN Security Council, effectively giving a veto to the five permanent members: the United States, Russia, China, United Kingdom, and France); *see, e.g*., Afghanistan/Pakistan—UNGOMAP—Background, http://www.un.org/Depts/dpko/dpko/co_mission/ungomap/background.html (last visited Sept. 25, 2007) (explaining that the Security Council debate concerning the Soviet forces' entrance into Afghanistan in December 1979 was deadlocked due to the Soviet Union's veto power, and to circumvent this situation, the matter was referred to the General Assembly under the "A Uniting for Peace" procedure).

[84] *See* Basic Facts About the UN, http://www.un.org/aboutun/basicfacts/peacesec.htm (last visited Sept. 25, 2007).

[85] Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, *in* INTERNATIONAL LAW AND THE WAR ON TERROR 7, 25 (Fred L. Borch & Paul S. Wilson eds., 2003).

[86] *Id*. at 15.

[87] *Id*. at 16.

[88] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), *available at* http://www.bartleby.com/61/26/T0122600.html (last visited Sept. 25, 2007).

definition resulting in "well over one hundred different definitions of terrorism in the scholarly literature."[89] Definitions of terrorism focus on many different areas: the act itself, the reason, the actor, or the status of the victim.[90]

One common point of contention concerning the definition of "terrorist" is whether it should "distinguish between the criminal terrorist and the violent but heroic freedom fighter."[91] In several former colonies, the weaker minority or indigenous people utilized acts of violence to challenge the authority of the ruling nation.[92] Does this constitute terrorism? Understandably, a nation that won its freedom after employing these tactics probably would not classify its actions as terrorism,[93] but, to the contrary, others may consider this an act of terrorism.[94]

Conversely, some consider "actions done on behalf of the state in pursuit of legitimate state aims"[95] to constitute terrorism. These actions could be tactics utilized by the regime in power to quell an internal resistance of its people or the tactics of one nation against the leadership or people of another. Many countries that won independence through the efforts of freedom fighters consider that "'state terrorism' [is] actually the most harmful and deadly form of terrorism."[96] Several periods of Soviet Union history are known for terrorism by the government,[97] and many opponents of the United States consider its current foreign policy to exemplify State terrorism.[98]

Regardless of which definition of terrorism one might use, most would agree that terrorist acts are a "deliberate and cold-blooded exaltation of violence over all forms of political activity. The modern terrorist does not employ violence as a

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[89] C.A.J. (Tony) Coady, *Terrorism, Just War and Supreme Emergency*, *in* TERRORISM AND JUSTICE: MORAL ARGUMENT IN A THREATENED WORLD 8, 8 (C.A.J. (Tony) Coady & Michael P. O'Keefe eds., 2002) (citing WALTER LAQUEUR, THE AGE OF TERRORISM 143 (1987)); *see also* BEN SAUL, *Reasons for Defining and Criminalizing Terrorism*, *in* DEFINING TERRORISM IN INTERNATIONAL LAW 10, 57 (2006) (citing A. SCHMID & A. JONGMAN, POLITICAL TERRORISM 119-52 (1983) (stating over 109 academic or official definitions of terrorism existed as early as 1983)).

[90] Coady, *supra* note 89, at 8-10.

[91] Harry H. Almond, Jr., *Terrorism—Legal Control Under the Law of War*, *in* TERRORISM AND POLITICAL VIOLENCE 355, 361-62 (Henry H. Han ed., 1993); Ninian Stephen, *Toward a Definition of Terrorism*, *in* TERRORISM AND JUSTICE: MORAL ARGUMENT IN A THREATENED WORLD 1, 2 (C.A.J. (Tony) Coady & Michael P. O'Keefe eds., 2002); Jörg Friedrichs, *Defining the International Public Enemy: The Political Struggle Behind the Legal Debate on International Terrorism*, 19 LEIDEN J. OF INT'L L. 69, 71 (2006).

[92] *See generally* Algerian War of Independence 1954-1962, http://www.onwar.com/aced/data/alpha/algeria1954.htm (last visited Sept. 25, 2007) (providing details of the war by Algeria against French colonial rule); World War II Europe The Resistance Movement Other Countries, http://intellit.muskingum.edu/wwii_folder/wwiieurope_folder/wwiieurresother.html (last visited Sept. 25, 2007) (providing a bibliography of sources detailing the resistance fighting in Austria, Belgium, Czechoslovakia, and Denmark).

[93] *See* Friedrichs, *supra* note 91, at 72. In 1972 when the United States submitted a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, many countries which were the "offspring of national liberation movements, suspected that the US draft was intended to outlaw their brethren fighting against colonialism and oppression." *Id.*

[94] Trusteeship Council, http://www.un.org/Depts/dpi/decolonization/council.htm (last visited Sept. 25, 2007). Chapter XII of the UN Charter authorized the establishment of the Trusteeship Council to oversee the transformation from colonial rule to independence for eleven specified territories. In 1994, however, the Trusteeship Council suspended action since the last of the eleven territories gained self-governance, and the Trusteeship Council will only resume meetings when the occasion may require. Based on the suspension of the Trusteeship Council, it must be concluded that the UN does not recognize the existence of any territories still requiring freedom fighters.

[95] Igor Primoratz, *State Terrorism*, *in* TERRORISM AND JUSTICE: MORAL ARGUMENT IN A THREATENED WORLD 31, 31 (C.A.J. (Tony) Coady & Michael P. O'Keefe eds., 2002).

[96] Friedrichs, *supra* note 91, at 72.

[97] Primoratz, *supra* note 95, at 31; Ihor Kamenetsky, *Terrorism as an Instrument of the State in Case of the U.S.S.R., from Lenin to Gorbachev*, *in* TERRORISM AND POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL 145, 145-66 (Henry H. Han ed., 1993).

[98] *See* BYERS, *supra* note 19, at 76-77; MONIRUZZAMAN, *supra* note 30, at 104; Simon Chesterman, *Introduction: The United Nations and the Law of War: Power and Sensibility in International Law*, 28 FORDHAM INT'L L.J. 531, 532 (Feb. 2005); Friedrichs, *supra* note 91, at 70 ("It is precisely the absence of a legal definition of terrorism that makes it possible for the hegemonic power (read 'United States') and its followers to determine international public enemy on a case-by-case basis. A legal definition would serve as a limitation to this discretional power."); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 797 (Summer 2004).

necessary evil but as a desirable form of action."[99] Despite the lack of a single comprehensive definition of terrorism,[100] international counterterrorism treaties have existed for over forty years.[101]

B. Status of International Treaties on Terrorism

1. United Nations—Criminal Law Treaties

Action in the absence of an agreed-upon definition exposes the United Nations to the charge of double standards, thus undermining the very legitimacy and universality that are among its most precious assets.[102]

Since 1963, the UN has created thirteen conventions or protocols relating to terrorism.[103] A list of the thirteen UN counterterrorism agreements and a summary of the provisions of each is located at Appendix B. The body of law created by these thirteen counterterrorism treaties is an ineffective patchwork of instruments.[104] Three conventions focus on "inherently dangerous substances"[105] rather than the actual commission of a violent act. Many of the other documents are a reactionary attempt to prevent a specific form of violence,[106] and several also establish jurisdiction over the offenses within that instrument. Frequently this jurisdiction follows the "principle of *aut dedere aut judicare*, which states that a country that does not extradite an alleged offender shall assume jurisdiction to judge that person according to its own laws."[107] Extradition, however, has "worked poorly in practice."[108] Of course, to prosecute an individual according to domestic laws, a nation must have domestic laws against such an act of terrorism. In many instances, the counterterrorism treaties require the establishment of domestic legislation to "provide elements [not contained in the treaties that are] necessary for implementation."[109]

The many languages of the Member Nations and the variety of legal systems create several approaches for interpreting and implementing these international counterterrorism documents.[110] To assist in the process, the Commonwealth Secretariat[111] provides model domestic laws for any nation that considers ratifying the UN counterterrorism conventions and

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[99] Paul Jones, *The Seven Deadly Sins of Terrorism*, *in* TERRORISM AND POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL 189, 191 (Henry H. Han ed., 1993); *see also id.* at 193 ("To terrorists, violence is not a political weapon, to be used *in extremis*: It is a substitute for the entire political process.").

[100] *See* Stephen, *supra* note 91, at 1-2.

[101] U.N. OFC. ON DRUGS AND CRIME, LEGISLATIVE GUIDE TO THE UNIVERSAL ANTI-TERRORISM CONVENTIONS AND PROTOCOLS para. 11, U.N. Sales No. E.04.V.7 (2004) [hereinafter LEGISLATIVE GUIDE].

[102] Jane Boulden & Thomas G. Weiss, *Whither Terrorism and the United Nations?*, *in* TERRORISM AND THE UN 1, 4 (Jane Boulden & Thomas G. Weiss eds., 2004).

[103] LEGISLATIVE GUIDE, *supra* note 101, para. 4.

[104] Edward Marks, *Diplomacy and Terrorism: Conflicting Systems*, *in* TERRORISM AND POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROLS 41, 55 (Henry H. Han ed., 1993); *see also* John Murphy, *International Law and the War on Terrorism*, *in* INTERNATIONAL LAW AND THE WAR ON TERROR 391, 397 (Fred L. Borch & Paul S. Wilson eds., 2003) ("This so called 'piecemeal' approach has resolved the problem of defining terrorism by avoiding it.").

[105] LEGISLATIVE GUIDE, *supra* note 101, para. 31.

[106] *See generally* Monica Serrano, *The Political Economy of Terrorism*, *in* TERRORISM AND THE UN 198, 198 (Jan Boulden & Thomas G. Weiss eds., 2004) (stating that the existing conventions identify forms of terrorist acts and no definition of terrorism).

[107] LEGISLATIVE GUIDE, *supra* note 101, para. 57. *See generally* Harry H. Almond, Jr., *The Legal Regulation of International Terrorism*, *in* TERRORISM AND POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROLS 199, 199-211 (Henry H. Han ed., 1993); Murphy, *supra* note 104, at 399.

[108] Captain Morris L. Sinor, *Confronting Nomadic Terrorism*, 52 NAVAL L. REV. 98, 104 (1964).

[109] LEGISLATIVE GUIDE, *supra* note 101, para. 8.

[110] *Id.* para. 12.

[111] *Assistance Provided by the Commonwealth Secretariat in the Field of Counter-Terrorism*, http://www.un.org/Docs/sc/committees/13731373/terrorism_summary.doc (last visited Feb. 26, 2007) (The Commonwealth Secretariat created an "Implementation Kit [that] consists of a Model Law and Commentary on each of the Counter-Terrorism Instruments."). *See generally* Commonwealth Secretariat, http://www.thecommonwealth.org/subhomepage/151087/ (last visited Sept. 25, 2007) (The Commonwealth is an organization of nations who had been under colonial rule of the British Commonwealth, and the

protocols.[112] These model laws further highlight the lack of consistency among nations by allowing countries to choose among several legislative options provided to combat terrorism.[113] Practically speaking, the reliance on a diverse body of domestic counterterrorism criminal legislation and the nature of the body of law created by these thirteen UN treaties create an approach to combating terrorism that is not only ineffective and lacking uniformity, but that also permits States to superficially comply with their UN obligations with relating to counterterrorism.[114]

2. United Nations—Global Counterterrorism Strategy

In 2005, in addition to working on counterterrorism treaties, the UN General Assembly also adopted a Global Counterterrorism Strategy.[115] "This is the first time that all Member States have agreed to a common strategic approach to fight terrorism . . . sending a clear message that terrorism is unacceptable in all its forms and manifestation."[116]

Included in the Global Counterterrorism Strategy are requirements for each nation to implement and fully cooperate with all General Assembly and Security Council resolutions striving to oppose terrorism.[117] The Strategy further requires States to address the conditions conducive to the spread of terrorism, to undertake measures to prevent and combat terrorism, and to "ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism."[118] The Strategy also encourages members to contribute to measures strengthening the role of the UN in combating terrorism.[119] Despite the unanimous agreement of the UN Member States in adopting the Global Counterterrorism Strategy, the actions of the Member States speak louder than words. The UN fails to escape the quagmire involved in drafting the fourteenth threat to counter terrorism—a Comprehensive Treaty on Terrorism.

3. United Nations—Comprehensive Treaty on Terrorism

"The United Nations itself has been anything but enthusiastic about taking on a larger role in countering terrorism."[120] In 1997, the General Assembly passed Resolution 51/210 creating an Ad Hoc Committee on Terrorism to negotiate the draft Comprehensive Convention on International Terrorism and the draft Convention for the Suppression of Acts of Nuclear Terrorism.[121] In 2005, after nine sessions, the committee adopted the draft Convention for the Suppression of Acts of Nuclear Terrorism.[122] Work, however, remains stagnated on the Comprehensive Convention on International Terrorism.

In 1998, India submitted a draft Convention on the Suppression of Terrorism, but this draft was considered controversial in many areas.[123] Since the submission of this draft, the committee has disagreed on the scope of the proposed treaty.[124] In

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Commonwealth Secretariat, formed in 1965, is the main intergovernmental agency for the Commonwealth.); Organisation of Commonwealth United Nations Associations (OCUNA), http://www.thecommonwealth.org/Internal/151814/151973/organisation_of_commonwealth_united_nations_associ/ (last visited Sept. 25, 2007) ("OCUNA was established in the 1980s because there is so much in common between the United Nations and the Commonwealth and to lobby for those links to be further strengthened.").

[112] LEGISLATIVE GUIDE, *supra* note 101, para. 12.

[113] *See* Commonwealth Secretariat, *Model Legislative Provisions on Measures to Combat Terrorism* (Sept. 2002), http://www.unodc.org/pdf/crime/terrorism/commonwealth_model_english.pdf (providing the Model Legislation with options within many sections).

[114] *Contra* Michael Newton, *International Criminal Law Aspects of the War Against Terrorism*, *in* INTERNATIONAL LAW AND THE WAR ON TERROR 323, 345 (Fred L. Borch & Paul S. Wilson eds., 2003).

[115] UN Action to Counter Terrorism, http://www.un.org/terrorism/strategy-counter-terrorism.html (last visited Sept. 25, 2007).

[116] International Instruments to Counter Terrorism, Counter-Terrorism Strategy, http://www.un.org/terrorism/instruments.html (last visited Sept. 25, 2007).

[117] UN Global Counter-Terrorism Strategy, G.A. Res. 60/288, ¶ 2, U.N. Doc. A/Res/60/288/Annex (Sept. 8, 2005).

[118] *Id*.

[119] *Id*.

[120] Edward C. Luck, *The U.S., Counterterrorism, and the Prospects for a Multilateral Alternative*, *in* TERRORISM AND THE UN 74, 80 (Jan Boulden & Thomas G. Weiss eds., 2004).

[121] G.A. Res. 51/210 (III), ¶ 9, U.N. Doc. A/51/210 (Jan. 16, 1997).

[122] *See supra* Part III.B.1.; *see infra* Annex B.

2000, in response to a recommendation for "a high-level conference on terrorism . . . [some delegations] said such a conference would just be an exercise in rhetoric and [would] distract States from conducting practical work."[125] The events of September 11 seemed to quell open resistance to drafting this treaty.[126] However, in three successive progress reports, the Ad Hoc Committee reported that negotiations were near completion.[127] The apparent lack of progress on this comprehensive treaty leads one to surmise that despite a professed commitment to combating terrorism, a comprehensive definition of the criminal offense of terrorism is impossible.[128] Insight into the divide that exists over the definition of terrorism can be gained through examination of several regional counterterrorism instruments as well as the just war theory for each region.[129]

4. League of Arab States—The Arab Convention for the Suppression of Terrorism

The League of Arab States adopted the Arab Convention for the Suppression of Terrorism [hereinafter 1998 Arab Convention] on 22 April 1998.[130] This convention entered into force just over a year later on 7 May 1999.[131] However, rather than helping to resolve the terrorism debate, this convention highlights the conflict that exists today concerning a definition of terrorism.

The preamble of this document asserts that as Arab nations committed to the tenets of Islamic *Sharia*, the League rejects "all forms of violence and terrorism and [advocates] the protection of human rights . . . based as they are on cooperation among peoples in the promotion of peace."[132] The preamble provides that the Contracting States are committed to the UN Charter and all other international instruments to which the nations are parties.[133] Yet the definition of terrorism contained in Article 1[134] and the broad exceptions to this definition contained in Article 2(a)[135] contradict the assertions in the preamble.

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[123] Center for Nonproliferation Studies, *Draft Comprehensive Convention on International Terrorism* 9 (Aug. 11, 2006), *available at* http://www.nti.org/e_research/official_docs/inventory/pdfs/intlterr.pdf [hereinafter Center for Nonproliferation Studies].

[124] *Id*. at 1.

[125] *Id*. at 7.

[126] Friedrichs, *supra* note 91, at 71.

[127] Center for Nonproliferation Studies, *supra* note 123, at 1-3 ("were almost complete" in 2004, "near consensus" in 2005, and "near completion" in 2006).

[128] *See* Friedrichs, *supra* note 91, at 75 (describing the "uncompromising stance of both sides," in reference to the Organization of Islamic Conference and the Western countries, during the negotiations of this Treaty).

[129] *See id.* (stating that during the negotiations for the United Nations Comprehensive Treaty on Terrorism:

> the 56 members of the Organization of the Islamic Conference (OIC) demanded the exemption of national liberation movements from the reach of the convention (citation omitted) . . . . The countries of the OIC were calling for a binding legal definition of international terrorism along these lines, which was rejected by the majority of Western countries.").

Id.

[130] The Secretary-General, *Report of the Secretary-General on Measures to Eliminate International Terrorism*, ¶ 178.N., *delivered to the General Assembly*, Doc. A/60/228 (Jan. 16, 2006), *available at* www.un.org/law/cod/sixth/60/status_update_jan_2006.pdf [hereinafter *Measures to Eliminate Terrorism*].

[131] *Id*. Twenty-one nations and the Palestinian Authority are signatories to this convention, and sixteen nations and the Palestinian Authority have ratified it.

[132] The Arab Convention for the Suppression of Terrorism, pmbl., Apr. 22, 1998, U.N. DEP'T OF POL. AFF., INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM 152, UN Sales No. 01.V.3 (2001), *available at* www.al-bab.com/arab/docs/league/terrorism98.htm [hereinafter The Arab Convention for the Suppression of Terrorism] (unofficial translation from Arabic by the United Nations English translation service).

[133] *Id*. at 152-53.

[134] *Id*. art. 1, para. 2, at 153.

> Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources.

Id.

[135] *Id*. art. 2, at 154.

> All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-

Article 2(a) clearly provides an exception to commit acts in situations of self-determination against non-Arab States that would otherwise fall within Article 1's definition of terrorism, but prohibits these same acts against the territory of any Arab State.[136] When considering Article 2(a) in light of the authority for *jihad* within Islam,[137] the offenses labeled as exceptions to the definition of terrorism are the same acts authorized under *jihad*. Essentially, acts of *jihad* within the Islamic religion[138] are not criminal acts of terrorism as defined by the Arab Convention for the Suppression of Terrorism.

Article 6 of the 1998 Arab Convention also limits the authority to grant requests for extradition.[139] Among other exceptions, when extradition is requested for a criminal offense, extradition can be refused when a Contracting State has domestic laws that categorize the act in question as a political offense.[140] Therefore, if a State considers an act not to be a crime because it is a political offense authorized as *jihad*, that State's law supersedes the authority of this regional convention. It seems the purpose of the 1998 Arab Convention was to have a pro forma terrorism convention rather than to actually suppress terrorism.

5. Organization of Islamic Conference—Convention of the Organization of Islamic Conference on Combating International Terrorism

The Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999 Islamic Convention) closely follows the 1998 Arab Convention. The 1999 Islamic Convention was drafted in July 1999[141] and went into force on 7 November 2002.[142] Again, this Convention prohibits Contracting States from making reservations,[143] but the content of the Convention provides little need for reservation.

The preamble to the 1999 Islamic Convention appears to go further than the 1998 Arab Convention in condemning terrorism.[144] At first glance, this language seems to condemn acts committed for the purpose of destabilizing states, but, similar to the 1998 Arab Convention,[145] Articles 1 and 2 of the 1999 Islamic Convention severely limit the definition of

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> determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State.

Id.

[136] Ben Saul, *Terrorism in International and Regional Treaty Law*, *in* DEFINING TERRORISM IN INTERNATIONAL LAW 129, 155 (2006); *see also* Murphy, *supra* note 104, at 418 ("To be blunt, this provision seeks to justify the commission of terrorist acts against Israel and reflects an attitude that prevented the Ad Hoc Committee on Terrorism from adopting measures against terrorism during the early 1970s.").

[137] *See supra* Part II.A.

[138] *See supra* notes 37-41 and accompanying text.

[139] The Arab Convention for the Suppression of Terrorism, *supra* note 132, art. 6, at 160.

[140] *Id*.

[141] It is interesting to note that the 1999 Islamic Convention was drafted only two months after the 1998 Arab Convention went into force. *See supra* note 131 and accompanying text.

[142] *Measures to Eliminate Terrorism*, *supra* note 130, ¶ 178.O.

[143] Convention of the Organization of the Islamic Conference on Combating International Terrorism, art. 41, July 1, 1999, U.N. DEP'T OF POL. AFF., INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM, at 208, UN Sales No. 01.V.3 (2001), *available at* www.oic-oci.org/English/convenion/terrorism_convention.htm [hereinafter Convention of the Organization of the Islamic Conference on Combating International Terrorism].

[144] *Id*. pmbl., at 188:

> *Believing that* terrorism constitutes a gross violation of human rights, in particular the right to freedom and security, as well as an obstacle to the free functioning of institutions and socio-economic development, as it aims at destabilizing States;
>
> *Convinced that* terrorism cannot be justified in any way, and that it should therefore be unambiguously condemned in all its forms and manifestations, and all its actions, means and practices, whatever its origin, causes or purposes, including direct or indirect actions of States.

Id.

[145] *See supra* Part III.B.4.

terrorism by including vast political exceptions to that definition.[146] Echoing the 1998 Arab Convention, these exceptions mirror the Islamic authority of war through *jihad* and do not criminalize acts that would otherwise fall within the Convention's definition of terrorism.[147]

6. Council of Europe—Convention on the Prevention of Terrorism

While the Arab States and Islamic Conference agreed on their definition of terrorist offenses (including exceptions for *jihad*), the Council of Europe and European Union failed to reach a uniform definition of terrorism. In 1977, the Council of Europe drafted the European Convention on the Suppression of Terrorism, which went into effect on 4 August 1978.[148] This Convention served as a basis for the 2005 Convention on the Prevention of Terrorism (2005 European Convention), but the later convention did not follow the definition of a terrorist offense utilized in Article 1 of the 1977 instrument.[149]

On 16 May 2005, the Council of Europe adopted the 2005 European Convention[150] which will be entered into force on 1 June 2007.[151] In this document, the definition of a terrorist offense is limited to those offenses "within the scope and as defined in one of the [ten] treaties listed in the Appendix."[152] The ten treaties referenced in this definition are ten of the thirteen current UN treaties dealing with terrorism.[153] It appears, then, that the European Convention restricts the definition of terrorist offenses to those within the UN's existing, and ineffective, treaty framework. The Explanatory Report for the 2005 European Convention, however, provides that the scope of the definition could include "conduct that has the potential to lead to terrorist offenses,"[154] but this report also includes the disclaimer that it is not an "authoritative interpretation of the Convention, although it may serve to facilitate the application of the provisions contained therein."[155] Thus, the lack of a cohesive or comprehensive definition of terrorism within the existing UN terrorism treaties is now a shortcoming manifested in the 2005 Council of Europe Convention on the Prevention of Terrorism.

The Committee of Experts on Terrorism that proposed and drafted the 2005 European Convention considered the definition of "terrorist act" set forth in the European Union's Council Common Position of 27 December 2001.[156] That

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[146] *See* Convention of the Organization of the Islamic Conference on Combating International Terrorism, *supra* note 143, arts. 1-2, at 189-91.

[147] *See supra* note 138 and accompanying text.

[148] *Measures to Eliminate Terrorism*, *supra* note 130, ¶ 178.P.

[149] Saul, *supra* note 136, at 149.

[150] *Measures to Eliminate Terrorism*, *supra* note 130, ¶ 178.Z.

[151] Fight Against Terrorism, http://www.coe.int/t/e/legal_affairs/legal_co-operation/Fight_against_terrorism (last visited Sept. 25, 2007).

[152] Council of Europe Convention on the Prevention of Terrorism, art. 1 and app., May 16, 2005, C.E.T.S. 196. The list of treaties for the scope of the definition of a terrorist offense:

> A. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on Dec. 16, 1970;
> B. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on Sept. 23, 1971;
> C. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on Dec. 14, 1973;
> D. International Convention Against the Taking of Hostages, adopted in New York on Dec. 17, 1979;
> E. Convention on the Physical Protection of Nuclear Material, adopted in Vienna on Mar. 3, 1980;
> F. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on Feb. 24, 1988;
> G. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on Mar. 10, 1988;
> H. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on Mar. 10, 1988;
> I. International Convention for the Suppression of Terrorist Bombings, adopted in New York on Dec. 15, 1997;
> J. International Convention for the Suppression of the Financing of Terrorism, adopted in New York on Dec. 9, 1999.

Id.

[153] *See supra* Part III.B.1. and *infra* Appendix B.

[154] Council of Europe, *Explanatory Report to the Convention on the Prevention of Terrorism*, para. 49, C.E.T.S. 196 (May 16, 2005) [hereinafter *Explanatory Report*].

[155] *Id*. para. II.

definition focused on three aims of terrorist acts and eleven actions that would achieve those aims.[157] Nonetheless, the Committee of Experts on Terrorism did not use that definition because it was crafted for the Common Position and not for the prevention of terrorism or for a comprehensive treaty on terrorism.[158] The international community's need to clarify the meaning of terrorism is highlighted by the fact that the Council of Europe and European Union, two organizations with many of the same members, formulated two divergent definitions of what constitutes a terrorist offense and both definitions differ from the 1977 Convention definition.[159]

IV. Proposal for the War Crime of Non-State International Terrorism

> *There is absolutely no doubt that we must take vigorous action against terrorism and craft a long-term strategy in order to defeat this scourge . . . [without] creat[ing] divisions between people of different religions and cultures, nor polariz[ing] the world into mutually hostile camps.*[160]

Because the UN is "uniquely placed to foster international and regional cooperation [in the fight against terrorism],"[161] it should assume the burden of creating an international standard to control and punish terrorist acts and not rely on domestic criminal legislation to fulfill this requirement. However, as illustrated by the current status of international counterterrorism treaties and the recently created regional terrorism treaties, a great divide currently exists in the action against terrorism.[162] Some governments call for the classification of acts as terrorist crimes while others consider these same acts lawful.[163] As

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[156] *Id*. para. 48.

[157] Council Common Position (EU) No.931/2001 of Dec. 27, 2001, art 1, para. 3, O.J. (L 344) 93, 93-94.

> 3. For the purposes of this Common Position, "terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organization, as defined as an offence under national law, where committed with the aim of:
>
> (i) seriously intimidating a population, or
>
> (ii) unduly compelling a Government or an international organization to perform or abstain from performing any act, or
>
> (iii) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization:
>
> (a) attacks upon a person's life which may cause death;
>
> (b) attacks upon the physical integrity of a person;
>
> (c) kidnapping or hostage taking;
>
> (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
>
> (e) seizure of aircraft, ships or other means of public or goods transport;
>
> (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
>
> (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
>
> (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
>
> (i) threatening to commit any of the acts listed under (a) to (h);
>
> (j) directing a terrorist group;
>
> (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.
>
> For the purposes of this paragraph, "terrorist group" shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. "Structured group" means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

Id.

[158] *Explanatory Report*, *supra* note 154, para. 48.

[159] *See* Saul, *supra* note 136, at 155.

[160] Press Release, Secretary General, Secretary-General Commends African Efforts Against Terrorism, Urges Ratification, Implementation of Existing Conventions, U.N. Doc. SG/SM/799 (Oct. 22, 2001).

[161] Thierry Tardy, *The Inherent Difficulties of Interinstitutional Cooperation in Fighting Terrorism*, *in* TERRORISM AND THE UN 120, 122 (Jan Boulden & Thomas G. Weiss eds., 2004) (quoting the executive director of the U.N. Office for Drug Control and Crime Prevention).

[162] *See supra* Part III.B.

previously discussed, one of the tenets of Islam is *jihad*, and as such, followers of the Islamic religion cannot and will not allow *jihad* to be considered a criminal act.[164] Consequently, the negotiations for a comprehensive definition for the crime of terrorism may be unattainable. Successful resolution to control international violence depends upon "avoiding the notion of inherently *good* and *bad* governments."[165]

The UN must create a legal regime based on the law of armed conflict[166] and completely separate from domestic criminal laws to control international acts of violence and aggression conducted by non-State actors.[167] Just as the UN Charter serves as the rule of law and places limitations on warfare between nations, the UN must come together and limit international terrorism.[168]

When the framers of the UN sought to limit warfare in a world where individual nations went to war based on justifications each nation thought proper, the Charter they drafted did not consider one just war theory good or another bad; it determined that war between nations was only justified in self-defense, or as authorized by the UN Security Council to restore international peace and security.[169] Article 2 of the UN Charter prohibits the "threat or use of force against the territorial integrity or political independence of any state"[170] without regard to motive. This rule applies equally to all nations.

Unlike the UN Charter's self-defense exception for armed conflict between States,[171] a total ban on international terrorist acts should be implemented. Prohibitions on terrorist offenses must apply equally to the citizens of all Member Nations notwithstanding any motives or justifications for such acts. After eliminating motive, all forms and manifestations of terrorism are reduced to their elemental form of threatened or actual armed force and aggression. In this light, terrorism can be seen in its truest form—as unlawful warfare.[172] The existing international law of armed conflict, though, applies to States involved in international armed conflict,[173] and a portion of the law of armed conflict applies during non-international armed conflict.[174] Consequently, in today's world unlawful warfare, in the form of international terrorism, is everywhere operating outside the law.[175] Although premised on the law of armed conflict, this new body of law should supplement the existing Geneva Conventions and Additional Protocols because "international terrorism presents a threat with which traditional theories for the use of military force are inadequate to deal, and were unanticipated when the [UN] Charter was drafted."[176]

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[163] *See supra* notes 91-98 and accompanying text.

[164] *See supra* Part II.A.

[165] Stephen, *supra* note 91, at 4 (emphasis in original).

[166] *See* Christopher Greenwood, *Terrorism: The Proper Law and the Proper Forum*, *in* INTERNATIONAL LAW AND THE WAR ON TERROR 353, 354-60 (Fred L. Borch & Paul S. Wilson eds., 2003).

[167] *Contra* Newton, *supra* note 114, at 327, 351. Despite advocating the use of domestic criminal laws to prosecute terrorists, the author desires domestic prosecution for "terrorists who survive military action against them," so he is advocating action against terrorists that should be governed by the law of armed conflict.

[168] The purpose of the United Nations as written in Article 1 of the United Nations Charter should be the justification for the elimination of international acts of violence by non-State actors. U.N. Charter, art. 1.

[169] *See supra* Part II.C.

[170] U.N. Charter art. 2, para. 4.

[171] *Id.* art. 51.

[172] *See* Almond, *supra* note 107, at 207.

[173] *See* Common Article 2, present in the four Geneva Conventions [hereinafter 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 [hereinafter First Geneva Convention]; (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 [hereinafter Second Geneva Convention]; (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 Third Geneva Convention]; 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 [hereinafter Fourth Geneva Convention].

[174] Brooks, *supra* note 70, at 704 nn.99-101.

[175] *Id.* at 761.

A. Proposed Guidelines for the Definition of Non-State International Terrorism

Terrorism strikes at the very heart of everything the United Nations stands for. It presents a global threat to democracy, the rule of law, human rights and stability. Globalization brings home to us the importance of a truly concerted international effort to combat terrorism.[177]

For international efforts to succeed, terrorism must be defined so as to provide clear guidelines for distinguishing terrorist conduct that violates international law from other unacceptable conduct that may not violate international law or conduct that violates the existing law of armed conflict. The following proposal attempts to remove the "cultural, professional, or political biases that can strongly affect the definition [of terrorism]"[178] by requiring three essential elements: a non-State actor, an international act of violence, and a sufficient level of participation.

1. Non-State Actors

When devising a definition for international terrorism, the identity of the actor must be considered. The existing law of armed conflict applies to "Members"[179] of the UN and "High Contracting Parties"[180] to the Geneva Conventions during "armed conflict . . . between two or more of the High Contracting Parties . . . [or] partial or total occupation of the territory of a High Contracting Party."[181] In a world with vastly different circumstances than at the time of the Geneva Conventions' creation, individuals and groups commit violent acts independent of any UN Member or High Contracting Party.[182] To fill the void in the existing law of armed conflict, a new proposed convention on international terrorism should focus only on non-State actors.

One point of discussion in this area centers on actions by members of regular armed forces or other individuals who perform official duties for a nation.[183] A simple resolution based on "scope of employment"[184] exists. The existing law of armed conflict applies when an individual commits an international act of threatening behavior, intimidation, aggression or violence that was performed within the scope of employment of a nation. Additionally, if a member of the armed forces or another State official, during a period of armed conflict or other military operations, commits an act contrary to the law of armed conflict, measures for enforcement and punishment of that act already exist.[185] Lastly, when not in a situation of armed conflict and not acting within the scope of employment, a member of the armed forces or other State official could fall within the purview of this proposed definition of terrorism if that person committed an international act of terrorism.[186] After determining that an actor is not in the scope of a State's employment, the focus shifts to the nature of the act in question.

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[176] Jackson Nyamuya Maogoto, *Walking an International Law Tightrope: Use of Military Force to Counter Terrorism—Willing the Ends*, 31 BROOKLYN J. INT'L L. 405, 461 (2006) (noting that the United Nations Charter focuses on warfare between States, and the Geneva Conventions and Additional Protocols maintain that focus even though they were ratified in 1949 and 1977 respectively).

[177] LEGISLATIVE GUIDE, *supra* note 101, para. 5 (quoting Kofi Annan, *Preface* to U.N. OFFICE ON DRUGS AND CRIME, INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM, U.N. Sales No. E.01.V.3 (2001)).

[178] DONALD J. HANLE, TERRORISM: THE NEWEST FACE OF WARFARE 104 (1989).

[179] U.N. Charter art. 2.

[180] Geneva Conventions, *supra* note 173, art. 2, para. 1.

[181] *Id.* art. 2, para. 2.

[182] BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW 1-3 (2006) (providing a discussion of several individuals and groups who have committed acts of violence).

[183] *See generally* John R. Bolton, Former U.S. Ambassador to the United Nations and Former Under Secretary for Arms Control and International Security, Remarks to the Federalist Society (Nov. 14, 2002) (detailing several reasons the United States opposes the International Criminal Court), *available at* http://www.state.gov/t/us/rm/15158.htm.

[184] "Scope of employment" is "the reasonable and foreseeable activities that an employee engages in while carrying out the employer's business." BLACK'S LAW DICTIONARY 564 (8th ed. 2004).

[185] *See, e.g.*, First Geneva Convention, *supra* note 173, art. 49; Second Geneva Convention, *supra* note 173, art. 50; Third Geneva Convention, *supra* note 173, art. 129; Fourth Geneva Convention, *supra* note 173, art. 146 (requiring signatory States to criminalize "grave breaches" of their respective Geneva Convention); First Geneva Convention, *supra* note 173, art. 50; Second Geneva Convention, *supra* note 173, art. 51; Third Geneva Convention, *supra* note 173, art. 130; Fourth Geneva Convention, *supra* note 173, art. 147 (defining which acts constitute grave breaches of their respective Geneva Convention); War Crimes Act of 1996, 18 U.S.C. § 2441 (2000) (criminalizing, *inter alia*, grave breaches of the Geneva Conventions as war crimes).

2. International Act of Violence

Whether committed by an individual, group, or State, violence waged by residents of one nation toward the people, property or government of another nation logically rises to the level of an international event.[187] Within this proposal, to be contrary to international law, an act of violence or aggression must be international in nature. As recent history has shown, a group or an individual intent on causing harm may find a way to do so that was previously unimaginable.[188] For this reason, a definition or set of guidelines on terrorism should not revolve around a set of specific prohibited acts. Rather, a general prohibition against threatening behavior, intimidation, aggression and violence of an international nature that is committed by a non-State actor is necessary to include terrorist acts not yet contemplated.

Since this proposal seeks to supplement existing law, the definition of international terrorism should not apply to hostile acts committed by lawful combatants.[189] This proposition may face resistance from proponents of freedom fighters who (the argument goes) must resort to violence for their cause. In many instances, violence by freedom fighters in a war of national liberation[190] falls within domestic law or the existing law of armed conflict, so the definition of international terrorism would not apply to those actions. The actions of freedom fighters, though, are also the most common example of acts that should fall within the proposed definition of international terrorism.

"Freedom fighters" are ordinarily seen as individuals or groups resisting oppressive regimes, colonial domination, or alien occupation.[191] Generally, resistance of an oppressive regime would be an internal conflict and not within the realm of international violence. For example, Colombia is engaged in a four decades-long war involving the Revolutionary Armed Forces of Colombia (FARC),[192] an organized force structured like a military, with the majority of its actions targeting the Colombian military.[193] The UN considers the situation in Colombia to be an internal armed conflict.[194] As such, under the law of armed conflict, Common Article 3 and Additional Protocol II protections apply during armed conflict between the FARC, a dissident armed force, and the armed forces of Colombia, a UN Member.[195]

The FARC, however, also engages in violent acts that do not target the Columbian government or military: assassinations, kidnappings, extortion, and murder of civilians.[196] Generally, these actions do not fall within the proposed

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[186] *See infra* Part IV.A.2.

[187] *See Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism*, U.N. Doc. A/C.6/L.850, art. 1 (Sept. 25, 1972), *available at 1972 United States Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism*, *in* LEGAL RESPONSES TO INTERNATIONAL TERRORISM 445, 445 (M. Cherif Bassiouni ed., 1988) (relying on the international nature of the act as the major criteria for an offense qualifying as terrorism as provided in Article 1 of this draft convention).

[188] Press Release, General Assembly, Opening its Fifty-sixth Session, General Assembly Condemns Heinous Acts of Terrorism Perpetrated in Host City and Washington, U.N. Doc. GA/9903 (Sept. 12, 2001).

[189] *See generally* Yoram Dinstein, *Unlawful Combatancy*, INTERNATIONAL LAW AND THE WAR ON TERROR 151, 151-74 (Fred L. Borch & Paul S. Wilson eds., 2003) (discussing unlawful and lawful combatancy and the distinctions between them).

[190] Mark Freeman, *International Law and Internal Armed Conflicts: Clarifying the Interplay Between Human Rights and Humanitarian Protections*, J. HUMANITARIAN ASSISTANCE, *available at* http://www.jha.ac/articles/a059.htm (last visited Sept. 25, 2007) (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, para. 4, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] ("people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination")).

[191] *See* Rama Mani, *The Root Causes of Terrorism and Conflict Prevention*, *in* TERRORISM AND THE UN 219, 221 (Jan Boulden & Thomas G. Weiss eds., 2004) (providing a discussion on "self-determination terrorism"); *see also id*. (providing discussion of the humanitarian law during war of national determination).

[192] Revolutionary Armed Forces of Columbia Fuerzas Armadas Revolutionarios de Columbia—FARC, http://www.fas.org/irp/world/para/farc.htm (last visited Sept. 25, 2007) [hereinafter FARC] (providing information on the FARC, its activities, and the conflict in Columbia).

[193] *Id*.

[194] U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Report of the United Nations High Commission for Human Rights on the Situation of Human Rights in Columbia*, ¶ 3, U.N. Doc. E/CN.4/2006/9 (May 16, 2006).

[195] If the freedom fighters reach a level of fighting that can be fairly characterized as "internal" or "non-international" armed conflict (i.e., civil war), then Common Article 3 of Geneva Conventions provides minimal *international* protections; *see also* Protocol II Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International and Non-international Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. Nevertheless, the government of the nation involved in a civil war retains domestic criminal jurisdiction over all residents therein, including freedom fighters.

definition of international terrorism because they are violence or aggression committed by one of Colombia's citizens toward persons or property within that same nation. Colombia's domestic law would apply to these acts.[197] However, violent acts by the FARC against individuals who are not citizens of Colombia do fall squarely within the proposed definition of international terrorism.[198] These acts no longer fall under the guise of righteous resistance from oppression, but appear as threats or breaches of peace, contrary to the UN's purpose of maintaining international stability and security.[199]

Most arguments supporting freedom fighters in a war of liberation concern acts of violence against colonial rule, State aggression, and alien occupation. The UN considers colonial rule to be non-existent since the last of eleven territories under trusteeship had completed its transition to self-governance in 1994,[200] therefore this article will not address freedom fighters seeking liberation from colonial rule.

On the other hand, State aggression and alien occupation involve one State's incursion of another State; both exist today. In 1974, the UN General Assembly issued a resolution defining State aggression: "The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."[201] As this definition of State aggression requires armed force, State aggression clearly falls within the purview of the existing law of armed conflict.[202] Within international armed conflicts, protection of freedom fighters as lawful combatants seems to require these fighters to instantly and spontaneously target armed forces,[203] and other possible protections may hinge upon consideration of the aggressor as an occupier or not.[204] As illustrated above, in an international setting, the existing law of war is extremely limited in its application to so-called freedom fighters. Many actions of freedom fighters, however, occur outside periods of armed conflict and/or target people and property other than those of armed forces directly engaged in hostilities.[205]

3. Level of Participation

An individual's level of participation in an act of international terrorism is the third essential element for defining terrorism. The point at which a person's contribution rises to the level of international terrorism may be difficult to determine. This determination should consider an act in terms of possible outcomes; when a peaceful or lawful outcome of an act is not realistically possible, then that act would rise to the level of direct participation in terrorism. To illustrate, consider a clerk who unknowingly provides false identification documents to an individual, who in turn commits an act of

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[196] *See* Tom Regan, *Columbia's FARC Rebels Still Undermine Peace Effort*, CHRISTIAN SCI. MONITOR, July 25, 2006, *available at* http://www.csmonitor.com/2006/0725/dailyUpdate.html?s=mesdu (reporting the July 2006 FARC killing of "more than a dozen rural woodcutters in a rural region of Colombia"). *See also Q&A: Columbia's Civil Conflict*, BBC NEWS, May 24, 2005, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/Americas/1738963.stm (describing the violence by the FARC rebel group).

[197] *See supra* note 195.

[198] *See* FARC, *supra* note 192 (discussing the 2003 FARC kidnapping of three American contractors and frequent kidnapping of foreign nationals for ransom).

[199] U.N. Charter art. 1, para. 1.

[200] Trusteeship Council, http://www.un.org/Depts/dpi/decolonization/council.htm (last visited Feb. 4, 2007); *see also* Friedrichs, *supra* note 91, at 90 ("The times of colonialism and the Cold War are over.").

[201] G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc A/9631 (1974).

[202] Geneva Conventions, *supra* note 173, at art. 2; *see also* Protocol II, *supra* note 195.

[203] Third Geneva Convention, *supra* note 173, art. 4, para. (A)(6) (addressing individuals who are not affiliated with a "Party to the conflict." This provision, however, only allows "inhabitants of a non-occupied territory, who . . . spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they . . . respect the laws and customs of war.").

[204] *See* Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025, 1025-72 (Summer 2004) (arguing that in situations when a resident of an occupied territory commits a hostile act against the armed forces of a State aggressor who is an alien occupier, a strong case may exist for consideration of this unlawful enemy combatant as a protected person under the Fourth Geneva Convention if that individual is within an occupied territory or the home territory of a belligerent country and satisfies the nationality requirements outlined in Article 4 of the Fourth Geneva Convention; the Fourth Geneva Convention may not protect a similar individual fighting a State aggressor before occupation; and citizens of neutral countries who entered Iraq during the occupation would not be protected under the Fourth Geneva Convention. Illustration of this point is made by comparing the occupation of Iraq with the armed conflict in Afghanistan that did not rise to the level of occupation). *But see* Sinor, *supra* note 108, at 107 (stating that even if individuals participating in conflicts are granted POW status, that "status is not effective to address the threat.").

[205] *See supra* note 92 and accompanying text.

international violence.[206] One realistic possibility for using this false documentation is to escape an oppressive government. Although providing false identification is unlawful, a peaceful outcome realistically exists, and one would be hard-pressed to find that the clerk's actions constituted international terrorism. On the other hand, consider a black marketer who internationally trafficks in weapons. Even though the weapons dealer does not commit overt acts of violence or aggression and may have no knowledge of the intended use of these weapons, a realistic outcome that is peaceful or lawful arguably does not exist.[207]

B. Proposals for Enforcing the Prohibition Against International Terrorism

1. Prosecution of International Terrorism as a War Crime

Consideration of international terrorism as a *war crime* and not simply a domestic crime has many political and legal benefits. As a war crime, prosecution of alleged offenses of international terrorism could be conducted in an international forum based on the principle of universal jurisdiction,[208] and not in a domestic forum based solely on the domestic criminal statutes implemented by an individual nation.[209] Universal jurisdiction for international terrorism also ensures that "any state apprehending any actor for an agreed offense could . . . deliver the actor to [the appropriate] jurisdiction."[210] Additionally, coupled with the removal of political motives or exceptions in the definition of international terrorism, an international forum would "be largely immune to political interference."[211] Establishing the forum for adjudication of cases of alleged war crimes of international terrorism at an international tribunal would also ensure uniformity in the process.

By establishing a tribunal for all cases of alleged war crimes of international terrorism by non-State actors, individuals would be afforded the same due process no matter the nationality of the accused or the nationality of the victims. This due process should include the assistance of counsel, periodic review hearings, and the right to appeal any adverse decision.[212] One forum for adjudication ensures the length of the adjudication process for each individual would be relatively similar. A single forum for adjudication would also create a body of law to serve as precedents for subsequent trials. Most importantly, for the international community to successfully come together to fight international terrorism, the actions cannot merely be considered criminal, but must be considered conduct that is contrary to the purposes of the UN.

Since this proposal to limit international violence must remain separate from domestic criminal law, currently the International Criminal Court (as implemented by the 1998 Rome Statute) cannot support prosecution of these offenses because "the fourth major hurdle to International Criminal Court jurisdiction is the principle of complementarity."[213] Under this proposal for international terrorism, the prohibition against international violence by non-State actors would not be punishable as a domestic crime, so States cannot have jurisdiction over these offenses. However, if an amendment to the Rome Statute allowed prosecution of these offenses with sole jurisdiction at the International Criminal Court, then this forum would be appropriate for these cases. In essence, the procedure for the International Criminal Court to have jurisdiction over a war crime under the existing law of war would be distinct from the procedure for a case under the proposed convention.[214]

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[206] *See, e.g.*, Brooks, *supra* note 70, at 757.

[207] *But see* 18 U.S.C. § 2339A (2000) (specifying that the criminal offense of providing material support to terrorists requires knowledge and intent that the material support is for any one of several specified criminal acts).

[208] *See generally* Lieutenant Commander James Paul Benoit, *The Evolution of Universal Jurisdiction Over War Crimes*, 53 NAVAL L. REV. 259 (2006) (discussing the history and authority for the international community or a State to prosecute war crimes).

[209] BYERS, *supra* note 19, at 141.

[210] Sinor, *supra* note 108, at 110.

[211] *Id*. at 144. *But see* Benoit, *supra* note 208, at 294 (citing Bureau of Political-Military Affairs, U.S. Department of State, *Fact Sheet, The International Criminal Court*, Aug. 2, 2002, *available at* http://www.state.gov/t/pm/rls/fs/2002/23426.htm (discussing the United States' concerns that the ICC Prosecutor will conduct politicized investigations)).

[212] Brooks, *supra* note 70, at 758.

[213] Benoit, *supra* note 208, at 292 (explaining that domestic courts essentially have a "right of first refusal" over cases falling within the jurisdiction of the International Criminal Court).

[214] Article III § 2 of the U.S. Constitution, 28 U.S.C. § 1251, and various other special statutes confer jurisdiction of cases to the Supreme Court of the United States.

Amendment to the Rome Statute to allow for jurisdiction over these cases would prevent the creation of an additional international forum with the duplication of many positions and less efficiency in the process.[215]

2. Potential for Sanctions Against State Sponsors of Terrorism

Whether considering a proposed new protocol on international terrorism by non-State actors or the current law of armed conflict, there must be recourse against those nations who aid individuals in committing international terrorism. Many scholars believe "tacit and covert state support to [non-State terrorist groups] can be significant."[216] The UN must establish a system of sanctions to prevent this State support and to ensure compliance with counterterrorism instruments and the law of armed conflict as a whole. These sanctions would be most effective when levied in the form of fines or economic penalties.[217] With respect to countering terrorism, the imposition of sanctions against a State should occur in cases of State support of non-State actors, refusal to turn over accused war criminals, and other instances of a State impeding the apprehension and trial of accused international terrorists.

V. Conclusion

> *It is not enough to yearn for peace. . . . Machinery for the just settlement of international differences must be found. Without such machinery, the entire world will have to remain an armed camp. The world will be doomed to deadly conflict, devoid of hope for real peace.*[218]

Prior to the creation of the UN, nations waged war based on two major schools of thought concerning its justification: *jihad* and *jus ad bellum*. The *Islamic* populace, its scholars, and its leaders followed the word of Allah and the practices of Muhammad, which are the foundations for *jihad* and Islam.[219] At the same time, much of the Western world relied upon *jus ad bellum*, heavily based upon Christian scholars and philosophers, to justify a nation's going to war.[220] World War II, with its widespread death and destruction, served as a catalyst for the creation of the UN. The world faced danger from a war of nations and alliances of nations. In the pursuit of peace and security in the world and "to save succeeding generations from the scourge of war,"[221] nations voluntarily departed from the justifications previously relied upon to go to war. Instead, Member Nations adopted a prohibition on aggression and warfare among members of the UN for any reason other than self-defense, or as authorized by the UN Security Council to restore international peace and security. Generally, nations have complied with the obligations of the UN Charter and the Geneva Conventions. Consequently, few wars between nations have occurred since the UN formed.[222] Individuals and groups committing violent acts domestically and internationally, however, have filled the void of war between nations.[223] The same purposes that motivated the UN to adopt the law of armed conflict also support the need for banning international violence committed by non-State actors.

At first glance, the UN's purpose of "self-determination of peoples"[224] seems to support the notion of freedom fighters and groups rising to power within their nations. Historically, these freedom fighters fought against governments that practiced totalitarianism, imperialism, and colonialism. Today, however, acts of violence are now international and

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[215] *See* Benoit, *supra* note 208, at 304-05 nn.324-33 and accompanying text (discussing the United States' objection to the International Criminal Court for lack of efficiency).

[216] Mani, *supra* note 191, at 223.

[217] Murphy, *supra* note 104, at 425-29.

[218] Harry S. Truman, President of the United States, Address Before a Joint Session of the Congress (Apr. 16, 1945), *available at* http://www.trumanlibrary.org/ww2/stofunio.htm (providing a transcript of the speech made by President Truman to the U.S. Congress one day after the burial of former President Franklin Delano Roosevelt).

[219] *See supra* notes 28-36 and accompanying text.

[220] *See* Johnson, *supra* note 20, 3-26.

[221] U.N. Charter pmbl.

[222] *See* Flashback: Invasion of Kuwait, *supra* note 15.

[223] *See supra* notes 171-76 and accompanying text.

[224] *Id.* art. 1, para. 2.

frequently target civilians. The acts of violence waged today are chosen for their destructiveness and are increasingly lethal. This international violence is a "threat to peace and stability of all legitimate states—that is, all those states which live under the rule of law."[225]

The international community continues to assert its commitment to suppressing terrorism, however, its actions do not conform to its rhetoric. The inability of the UN to reach a consensus on the definition of terrorism since the 1960s has caused an ineffective framework of criminal law-based treaties that rely on domestic laws for the adjudication of actions that are considered terrorist offenses.[226] The lack of uniformity created by this framework has allowed nations to enact regional treaties on terrorism and domestic criminal laws that vary widely in their application, and most egregiously, it has allowed individuals to commit international acts of violence that are outside the law.[227] "Traditional criminal law formulae have not worked to control the threat [of terrorism]."[228] The world has seen changes in warfare, and the nature of acts of terrorism now exceed the capabilities of the domestic criminal law systems to properly address the offenses.

"The lack of an international enforcement mechanism [for terrorism] reflects the unwillingness of states to commit to a regime that might disrupt the world order. But, where the adversary is already undermining world order, effective response is critical."[229] Unlike the nations who came together from 1942–1945, today's UN Member States hold tightly to steadfast positions concerning the definition of terrorism and are unwilling to follow the guidance of President Roosevelt to sacrifice for peace.[230] All, however, must make sacrifices. Sacrifices by Western nations, namely the United States, would include abdicating responsibility to an international forum for adjudication of international terrorism cases and agreeing that it is unreasonable to expect Islamic nations to proclaim that a fundamental part of their religion, *jihad,* is a crime.

To solve this dilemma, just as the UN Charter restricts a nation's ability to go to war, so too must the UN restrict an individual's ability to commit international acts of violence. The existing law of armed conflict, however, is inadequate to address the growing violence and aggression waged by non-State actors. A new convention on international terrorism must supplement the existing law of armed conflict. To create a world, in the spirit of the "fundamental values of peace, nonaggression, sovereignty, and nonintervention that are embedded in the Charter,"[231] the UN must adapt to the changing world. Through cooperation of the UN, international terrorism must be banned "without discrimination of race, religion, color, language, region, and state"[232] and without exception for motive.

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[225] Jones, *supra* note 99, at 195.

[226] *See supra* notes 104-13 and accompanying text.

[227] *See generally* Luck, *supra* note 120, at 80-81 (stating that no penalties for non-compliance exist).

[228] *Id.* at 104.

[229] Sinor, *supra* note 108, at 114.

[230] *See supra* note 67 and accompanying text.

[231] S. Neil MacFarlane, *Charter Values and the Response to Terrorism*, *in* TERRORISM AND THE UN 27, 27 (Jan Boulden & Thomas G. Weiss eds., 2004).

[232] Kulwant Kaur, *US War on Terrorism in Afghanistan—A Human Rights Perspective*, *in* TERRORISM AND HUMAN RIGHTS 27, 33 (Mahendra Gaur ed., 2003).

Appendix A

The following verses from the Qur'an are taken from *The Islamic Theory of Jihad and the International System*.[233] In that work, Md. Moniruzzaman relied upon The *Al-Qur'an*, The Holy Qur'an; English Translation of the meanings and Commentary, Madinah: King Fahd Holy Qur'an Printing Complex. The *Qur'an*, in Arabic, is believed to be the literal word of Allah and any translation from Arabic is an interpretation and cannot be equated to the Arabic Qur'an.[234]

To those against whom war is made, permission is given (to fight) because they are wronged- and verily, Allah is Most Powerful for their aid.
(Surah *Al Hajj* : 39)

Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors.
(Surah *Al Baqarah* : 190)

Fighting is prescribed upon you, and ye dislike it. But it is possible that ye dislike a thing which is good for you, and that ye love a thing which is bad for you. But Allah knoweth, and ye know not.
(Surah *Al Baqarah* : 216)

Then fight in the cause of Allah and know that Allah heareth and knoweth all things.
(Surah *Al Baqarah* : 244)

And fight them on until there is no more tumult or oppression, and there prevails justice and faith in Allah altogether and everywhere; but if they cease, verily Allah doth see all that they do.
(Surah *Al Anfal* : 39)

Those who believe and adopt exile, and fight for the faith, in the cause of Allah, as well as those who give (them) asylum and aid- these are (all) in very truth the Believers: for them is the forgiveness of sins and a provision most generous.
(Surah *Al Anfal* : 74)

And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated (and oppressed)?- men, women, and children, whose cry is: "Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from Thee one who will protect; and raise for us from Thee one who will help."
(Surah *Al Nisa* : 75)

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[233] MONIRUZZAMAN, *supra* note 30, at 19-21.

[234] The Noble Qur'an, *supra* note 28.

Appendix B

United Nations Counterterrorism Treaties[235]

Convention on Offenses and Certain Other Acts Committed on Board Aircraft (1963)

- Applies to acts affecting in-flight safety;
- Authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, where necessary to protect the safety of the aircraft; and
- Requires Contracting States to take custody of offenders and to return control of the aircraft to the lawful commander.

Convention for the Suppression of Unlawful Seizure of Aircraft (1970)

- Makes it an offence for any person on board an aircraft in flight to "unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft" or to attempt to do so;
- Requires parties to the convention to make hijackings punishable by "severe penalties"
- Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; and
- Requires parties to assist each other in connection with criminal proceedings brought under the Convention.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) (aka Montreal Convention)

- Makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts;
- Requires parties to the Convention to make offences punishable by "severe penalties"; and
- Requires parties that have custody of offenders to either extradite the offenders or submit the case for prosecution.

Convention on the Prevention and Punishment of Offenses against Internationally Protected Persons, Including Diplomatic Agents (1973)

- Defines an "internationally protected person" as a Head of State, Minister for Foreign Affairs, or representative or official of a State or international organization who is entitled to special protection in a foreign State, and his/her family; and
- Requires parties to criminalize and make punishable "by appropriate penalties which take into account their grave nature" the intentional murder, kidnapping, or other attack upon the person or liberty of an internationally protected person; a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an act; and an act "constituting participation as an accomplice."

International Convention against the Taking of Hostages (1979)

- Provides that "any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention."

Convention on the Physical Protection of Nuclear Material (1980)

- Criminalizes the unlawful possession, use, transfer or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial property damage.

Amendments to the Convention on the Physical Protection of Nuclear Material

- Makes it legally binding for State parties to protect nuclear facilities and materials in peaceful domestic use, storage as well as transport; and
- Provides for expanded cooperation between and among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences or sabotage, and prevent and combat related offences.

[235] UN Action to Counter Terrorism, *supra* note 115 (listing the thirteen major conventions and protocols dealing with terrorism as well as offering full versions of these documents).

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988)

- Extends the provisions of the Montreal Convention to encompass terrorist acts at airports serving international civil aviation.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)

- Establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established for international aviation; and
- Makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships.

Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005)

- Criminalizes the use of a ship as a device to further an act of terrorism;
- Criminalizes the transporting on board a ship various materials knowing that they are intended to be used to cause, or to threaten to cause, death, serious injury, or property damage to further an act of terrorism;
- Criminalizes the transporting on board a ship of persons who have committed an act of terrorism; and
- Introduces procedures for governing the boarding of a ship believed to have committed an offense under the Convention.

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988)

- Establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against for international aviation.

Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005)

- Adapts the changes to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation to the context of fixed platforms located on the continental shelf.

Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)

- Designed to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am Flight 103 bombing);
- Obligates parties in their respective territories to ensure effective control over "unmarked" plastic explosives;
- Provides that each party must, inter alia, take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; prevent the movement of unmarked plastic explosives into or out of its territory; exercise strict and effective control over possession and transfer of unmarked explosives made or imported prior to the entry into force of the Convention; ensure that all stocks of unmarked explosives not held by the military or police are destroyed, consumed, marked, or rendered permanently ineffective within three years; take necessary measures to ensure that unmarked plastic explosives held by the military or police are destroyed, consumed, marked or rendered permanently ineffective within fifteen years; and, ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date of entry into force of the Convention for that State.

International Convention for the Suppression of Terrorist Bombings (1997)

- Creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.

International Convention for the Suppression of the Financing of Terrorism (1999)

- Requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable social or cultural goals or which also engage in illicit activities such as drug trafficking or gun running;
- Commits States to hold those who finance terrorism criminally, civilly, or administratively liable for such acts; and
- Provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. Bank secrecy is no longer adequate justification for refusing to cooperate.

International Convention for the Suppression of Acts of Nuclear Terrorism (2005)*

- Covers a broad range of acts and possible targets, including nuclear power plants and nuclear reactors;
- Covers threats and attempts to commit such crimes or to participate in them, as an accomplice;
- Stipulates that offenders shall be either extradited or prosecuted;
- Encourages States to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings; and
- Deals with both crisis situations (assisting States to solve the situation) and post crisis situations (rendering nuclear material safe through the International Atomic Energy Agency (IAEA)).

*Note: This Convention is not yet in force. It was adopted in April 2005, opened for signature on 14 September 2005 and will enter into force when it has been ratified by twenty-two Member States.

The Influence of International Law on the Military Commissions Act 2006: The Glass Half Full or Half Empty?

Colonel Larry D. Youngner, USAF, Squadron Leader Patrick Keane, RAAF, and Squadron Leader Andrew McKendrick, RAF[*]

Overview

The Military Commissions Act (MCA)[1] was signed into law on 17 October 2006.[2] Prior to the MCA, military commissions to try terrorists and unlawful combatants had been established by executive order.[3] In *Hamdan v. Rumsfeld*[4] the Supreme Court identified defects in the executive order and its concomitant military commissions process. The MCA is intended to overcome those defects and to establish a lawful and sustainable military commissions system. The extent to which the MCA achieves this objective will no doubt be determined in future litigation.

The MCA is domestic law enacted to achieve national ends. It is often the case that legislators have little enthusiasm for citing international law as having influenced the shaping of domestic legislation. It does not play well with some parts of the electorate who complain that such influence smacks of the subordination of United States' sovereignty to foreign interests and influence. To the contrary, entering treaties is an exercise of sovereignty provided for by the Constitution. The President is empowered to ratify a treaty, provided two-thirds of the Senate affirms the Executive's action.[5] Once entered into force, such treaties enjoy a lofty status under the Constitution's Supremacy Clause. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land*."[6] Thus, the United States' obligation to be mutually bound by international treaties of its own making reflects a conscious exercise of its sovereignty.

The influence of international law on the MCA is profound and wide-ranging. Critics of the MCA argue that aspects of the proposed trial system do not comport with international law. This article does not attempt to adjudicate that debate. Rather, it attempts to identify how international law has shaped and influenced the MCA, from its inception to the specific language of its provisions.

International Law in *Hamdan v. Rumsfeld*

The influence of international law, in particular the law of armed conflict, is overt and explicit in the majority opinion of the United States Supreme Court delivered by Justice Stevens in *Hamdan v. Rumsfeld*. The Court found that the law of armed conflict had been incorporated by Congress into Article 21 of the Uniform Code of Military Justice (UCMJ)[7] and that this legislation brought the Geneva Conventions within the scope of law that was to be applied in U.S. courts.

The majority[8] held that military commissions convened under Military Commission Order (MCO) No. 1[9] did not comply with the conditions found in Common Article 3 of the Geneva Conventions.[10] Of particular concern to the Court was that

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[1] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. § 948a) [hereinafter MCA].

[2] President Bush Signs Military Commissions Act of 2006, Oct. 17, 2006, *available at* http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html.

[3] Dep't of Defense, Military Commission Order No. 1 (21 Mar. 2002), 32 C.F.R. §§ 9.1–9.12 (2007) [hereinafter DOD MCO No. 1].

[4] Hamdan v. Rumsfeld, 548 U.S. __ 2006, U.S. LEXIS 5185 (2006).

[5] U.S. CONST. art. II, § 2, cl. 2.

[6] *Id.* art. VI, § 2 (emphasis added).

[7] 10 U.S.C. § 821 (2000).

[8] Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer.

[9] *Supra* note 3.

military commissions did not constitute "a regularly constituted court affording all the judicial guarantees . . . which are recognized as indispensable by civilized peoples."[11] The failure to attain this standard was explained as the military commissions not reflecting courts-martial practice without adequate reason. It is this judgment that resulted in Congress's enacting the MCA.

The majority relied considerably upon the Geneva Conventions in reaching their decision. Justice Stevens made the following observations regarding the Geneva Conventions:

> The procedures adopted to try Hamdan also violate the Geneva Conventions.[12]
>
> . . . .
>
> [W]e need not decide the merits of [the Government's] argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories, Article 3 often referred to as Common Article 3.[13]
>
> . . . .
>
> Common Article 3 then, is applicable here and, as indicated above, requires that Hamdan be tried by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[14]

The *Hamdan* decision asserts the authority of treaty law, one of the bases of international law,[15] over certain forms of U.S. executive branch action. This result should be unsurprising given the status granted treaty law under the U.S. Constitution.[16] That said, not all treaties or executive agreements automatically become supreme law of the United States per Article VI, Section 2 of the Constitution. Rather, this depends upon whether the treaty is self-executing or non-self executing.

Self-executing treaties take effect as domestic law of the land without the requirement for domestic implementing legislation.[17] Once a self-executing treaty enters into force, the treaty is as legally binding on the United States as an act of Congress that has become a law. The Supreme Court defines self-executing agreements as treaties wherein "no domestic legislation is required to give them the force of law in the United States."[18] To paraphrase Professor Anthony Aust, determining whether a treaty is self-executing is not an exact science and requires a case by case analysis, and often a case by

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[10] *See* Common Article 3, present in the four Geneva Conventions [hereinafter 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. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; (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. 3217, 75 U.N.T.S. [hereinafter GC II]; (3) Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; (4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. The provision is known as Common Article 3 because it is the third article in each of the 1949 Conventions.

[11] *See* Common Article 3, *supra* note 10.

[12] Hamdan v. Rumsfeld, 548 U.S. __ 2006, U.S. LEXIS 5185, ***118 (2006).

[13] *Id.* at ***123.

[14] *Id.* at ***129.

[15] *See* Statute of the International Court of Justice art. 38, para. 1, June 26, 1945, 59 Stat. 1031, T.S. 993 The ICJ Statute lists sources of international law applied by the ICJ as:

> [I]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; [and] . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Id.

[16] *Supra* note 6.

[17] *See* Stephen I. Vladeck, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 YALE L.J. 2007 (2004); Howard S. Schiffman, Breard *and Beyond, Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT'L & COMP. L. 27 (2000).

[18] Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984).

case decision, for American courts.[19] Key factors in the analysis are: intent of the treaty parties, whether treaty terms expressly require implementing legislation, the level and type of obligations imposed, and whether a private cause of action is implied or permitted without a requirement for domestic implementing legislation.[20]

United States constitutional law scholars note that "[a]mong the major treaties presently considered entirely or partially non-self-executing are nearly all of the most significant covenants in international humanitarian law, including the International Covenant on Civil and Political Rights and the Geneva Conventions [of 1949]."[21] As one scholar notes, "[t]he body of international law conferring rights on U.S. detainees is almost entirely embodied within these treaties . . . , and most of their key provisions, as of this writing, have been held unenforceable . . . precisely because they are non-self-executing."[22] Of note, recent dicta from the John Walker Lindh and General Manuel Noriega opinions suggest that aspects of the Geneva Conventions may in fact be self-executing as they relate to habeas petitions.[23] This matter has not been decided by the Supreme Court.[24] Accordingly, international law and United States treaty practice will continue to influence domestic legislation regarding how U.S. forces deal with combatants, lawful and unlawful, encountered on the battlefield.

Hamdan v. Rumsfeld is a clear example of international law, in this case the law of armed conflict, being enforced by a national tribunal of the United States. The application of the law of armed conflict is indirect, insofar as the Supreme Court construed it to be incorporated by reference to an Act of Congress, namely the UCMJ.

The Influence of International Law on Legislators

On 28 September 2006, the U.S. Senate debated the MCA.[25] The bill passed the Senate by a vote of sixty-five to thirty-four; the House of Representatives had passed the bill earlier.[26]

The drafting of the MCA included a significant level of discourse on international law and the effect of the MCA on U.S. obligations. During the Senate debate there were specific references to international law, in particular the law of armed conflict: "[t]he bill provides legal clarity for our treaty obligations under the Geneva Conventions."[27]

Part of the discussion focused upon the need to balance treaty obligations with the authority of the President to conduct the "war on terror." Some obligations in the Geneva Conventions are clear and unambiguous, while others are more susceptible to interpretation. One purpose of the MCA is to resolve some of those tensions: "[t]his bill acknowledges the President's authority under the Constitution to interpret the meaning and application of the Geneva Conventions, and to promulgate administrative regulations for violations of our broader treaty obligations which are not grave breaches of the Geneva Conventions."[28]

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[19] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 159 (2000).

[20] *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999); *see generally id.* at 157-61.

[21] Vladeck, *supra* note 17, at 2014.

[22] *Id.*

[23] *See* United States v. Lindh, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002); United States v. Noriega, 808 F. Supp. 791, 797-99 (S.D. Fla. 1992). Both cases provide dicta to advance the notion that certain articles of the 1949 Geneva Conventions are self-executing and therefore "supreme law of the Land." This argument is further advanced in the Vladeck article, *supra* note 17.

[24] Boumediene v. Bush, 127 S. Ct. 1478, 1479 (2007), U.S. LEXIS 3783, ***1 (2007):

> Despite the obvious importance of the issues raised . . . traditional rules governing our decision of constitutional questions . . . and our practice of requiring the exhaustion of administrative remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus . . . make it appropriate to deny these petitions . . . .

Id.

[25] 152 Cong. Rec. S10,243 (2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2006_record&page=S10223&position=all (Senate debate on the Military Commissions Bill).

[26] *Id.*

[27] *Id.* (statement of Sen. Frist).

[28] *Id.* S10,246 (statement of Sen. Warner).

The decision in *Hamdan v. Rumsfeld* was clearly at the center of the debate. It caused legislators to assess the status and meaning of the Geneva Conventions and their application to the non-traditional armed conflict in which the United States was engaged: "When the Geneva Conventions were applied to the war on terror, we had a problem. We had to renew the Military Commission Tribunal in line with Common Article 3. Common Article 3 is a mini-human-rights [treaty] that is common to all four Convention articles."[29]

The willingness with which international law was cited reflects the legal reality imposed on the executive and legislature by the Supreme Court in *Hamdan v. Rumsfeld*.

Jurisdiction under the MCA

The military commissions established under the MCA differ in many significant respects from those originally envisioned under MCO No. 1. There are differences in both personal jurisdiction (persons who are subject to the jurisdiction of the military commissions) and subject matter jurisdiction (nature of offenses which may be tried by military commissions).

These changes cannot all be traced to the implementation of U.S. obligations under the Geneva Conventions. They go further, providing additional evidence of the influence of international law on the drafters.

Personal Jurisdiction

Under the executive orders[30] that applied prior to the MCA, the jurisdiction of military commissions over individuals was to be applied through the exercise of executive discretion.[31] It was to be applied to individuals identified by the President, where there was reason to believe they were members of the al Qaeda organization or otherwise engaged in or "associated with" acts of international terrorism affecting the United States.[32]

This provision cast a wide net. It did not prescribe any particular form of review to determine if an individual was engaged in or associated with international terrorism. The term "terrorism" itself remains fraught with ambiguity under international law and is not defined in customary law or treaty. The personal jurisdiction of the military commissions under the executive orders did not draw from or rely upon international law.

Personal jurisdiction has significantly changed under the MCA.[33] The jurisdiction of military commissions now relates to alien "unlawful enemy combatants."[34] The definition of this term in the MCA has two subsets.

The first subset of the definition includes persons who have engaged in hostilities, or purposefully and materially supported hostilities, and who are not "lawful combatants."[35] The term "lawful combatant" is defined in terms similar, though not identical, to those of Article 4 of the Third Geneva Convention (GC III)[36] which defines prisoners of war entitled to the status and protection of that convention. The inclusion of persons who have "purposely and materially supported hostilities" appears to be a wider definition of "unlawful combatant" than that suggested by international law,[37] though the term may be further interpreted through litigation.

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[29] *Id.* S10,392 (statement of Sen. Graham).

[30] *See supra* note 3; Military Order of November 13, 2001, 3 C.F.R. tbl. 3 (2002) [hereinafter Military Order].

[31] Military Order, *supra* note 30, § 2(a).

[32] The term "associated with" is not used in Military Order, *supra* note 30, § 2(a). The term is used here to paraphrase the wide range of accessorial liability covered by § 2(a).

[33] *See* MCA, *supra* note 1, § 948c.

[34] *Id.* § 948a.

[35] *See supra* note 22.

[36] GC III, *supra* note 10.

[37] Civilians traditionally are not regarded as combatants unless they take a "direct part in hostilities." *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; *see also* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S.ARMY, JA 422, OPERATIONAL LAW HANDBOOK 17 (2006) (defining "unprivileged belligerent").

The second subset of the definition includes persons determined to be unlawful combatants by a Combatant Status Review Tribunal (CSRT).[38] The procedures for the CSRT are similar in nature and purpose to prisoner of war status tribunals required by GC III[39] and provided for in regulations.[40] They involve a review of the individual circumstances of a detainee by a tribunal of fact.

The extent to which personal jurisdiction under the MCA complies with international law remains a matter for debate.[41] It is undeniable, however, that international law has exerted an influence on the personal jurisdiction of military commissions. Following *Hamdan v. Rumsfeld*, the jurisdiction of the commissions has changed from vaguely defined "terrorists" as nominated by the President, to unlawful combatants, determined either by a procedure similar to a GC III Article 5 tribunal or in accordance with a legal definition that clearly draws upon international law.

Subject Matter Jurisdiction

The subject matter jurisdiction of the MCA, set out in Subchapter VII, states that the Act "codifies offenses that have traditionally been triable by military commissions."[42] The purpose of this provision is clear. There are prohibitions under the U.S. Constitution and international law on the retrospective application of new criminal offenses created by statute.[43] This assertion in the MCA may be the subject of debate as a global proposition,[44] but it is clear that many of the MCA offenses possess a substantial lineage under international law.

The Geneva Conventions criminalize grave breaches thereof.[45] Many of the offenses set out in the MCA reflect the Geneva Conventions' grave breach provisions. These are traditional and undoubted war crimes offenses, which may be properly tried by a duly constituted domestic tribunal. Examples of such offenses include murder of protected persons,[46] attacking protected property,[47] torture,[48] and cruel or inhuman treatment.[49] The offense of murder of protected persons is particularly apposite to the trial of alleged terrorists given the common modus operandi of terrorist organizations, carrying out mass casualty attacks upon civilians.

Other offenses in the MCA do not strictly refer to the grave breaches provisions of the Geneva Conventions, but are cognizable under customary international law or other international treaties. The offense of using treachery or perfidy[50] is an offense under customary international law and prohibited by Protocol I.[51] The offense of improperly using a distinctive emblem[52] is an offense under customary international law and constitutes a grave breach of Protocol I.[53]

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[38] News Release, U.S. Dep't of Defense, Combatant Status Review Tribunal Order Issued (July 7, 2004), *available at* http://www.defenselink.mil/release/2004/nr20040707-0992.html.

[39] *See* GC III, *supra* note 10, art. 5.

[40] U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Oct. 1997), *available at* http://www.usapa.army.mil/pdffiles/r190_8.pdf.

[41] *See, e.g.*, Human Rights First, Human Rights First Analyzes DOD's Combatant Status Review Tribunals, http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm (last visited Oct. 1, 2007).

[42] *See* MCA, *supra* note 1, § 950p.

[43] U.S. CONST. art. III, § 9, cl. 3; Common Article 3, *supra* note 10; Protocol I, *supra* note 37, art. 75(4)(c).

[44] John Cerone, *The Military Commissions Act of 2006: Examining the Relationship Between the International Law of Armed Conflict and US Law*, 10 A.S.I.L. INSIGHT, Nov. 13, 2006, *available at* http://www.asil.org/insights/2006/11/insights061114.html.

[45] GCs I–IV, *supra* note 10.

[46] MCA, *supra* note 1, § 950v(b)(1).

[47] *Id.* § 950v(b)(4).

[48] *Id.* § 950v(b)(11).

[49] *Id.* § 950v(b)(12).

[50] *Id.* § 950v(b)(17).

[51] Protocol I, *supra* note 37, art. 37.

[52] MCA, *supra* note 1, § 950v(b)(19).

[53] Protocol I, *supra* note 37, art. 85(3)(f).

Some of the offenses in the MCA are not established war crimes but rather are domestic crimes, elements of which are shaped by international law. The offense of murder in violation of the law of armed conflict[54] is intended to cover, inter alia, the use of lethal force by unlawful combatants against U.S. or allied forces. The use of lethal force by an unlawful combatant (also referred to as an unprivileged belligerent) against a lawful combatant constitutes the domestic offense of murder. The defense of privileged belligerency open to the lawful combatant is not available to the unlawful combatant. It is not correct to describe the offense as a war crime.[55] However, it is a domestic crime, the elements of which are determined in accordance with international law.

The MCA also contains offenses that are clearly domestic law offenses. The offense of rape[56] under the MCA does not contain limitations requiring a connection to armed conflict or a particular act of terrorism. There is no geographic limitation as to where the rape must take place before jurisdiction accrues, nor are there limitations relating to the location, nationality or any other characteristic of the victim. The offense of rape has been dealt with in the statutes of international tribunals[57] but never as a crime of universal jurisdiction without a connection to armed conflict or mass perpetration as a crime against humanity. The inclusion of the offense of rape in the MCA extends jurisdiction to circumstances where, in a transnational armed conflict against terrorists conducted partly in the territory of failed states, there may be no other tribunal willing or able to deal with the offense. But the inclusion of this offense clearly illustrates the domestic criminal law side of the jurisdiction of military commissions.

One of the more contentious applications of the MCA's subject matter jurisdiction is its retroactive application of conspiracy liability. The use of conspiracy liability is particularly relevant in the trial of alleged terrorists, particularly in the absence of evidence of participation in a specific attack. Many rank and file members of terrorist organizations may have received some form of training and possess a willingness to carry out attacks, but have not been involved with planning or carrying out a particular attack. Similarly, individuals may be members of, or associated with, an organization regarded by the United States as unlawful combatants such as the Taliban. However, although the individual was a member of, or associated with, that organization, there may be no evidence that the individual fired a shot or engaged in any other form of hostile act against U.S. or allied personnel.

The existence of the crime of conspiracy under the law of armed conflict was regarded skeptically by the Supreme Court in *Hamdan v. Rumsfeld*.[58] The use of conspiracy charges against relatively low-ranking members of al Qaeda and the Taliban may be one of the more hotly-contested aspects of the impending MCA litigation. It will be instructive to observe the extent to which international law is relied upon by litigants and jurists.

Conclusion

It is tempting to posit the thesis that, but for international law, the MCA would not exist. However tempting, two facts prevent this conclusion from being drawn with certainty. First, the majority in *Hamdan v. Rumsfeld* provided various reasons for striking down the military commissions process provided for in MCO No. 1. Not all relate to international law. Secondly, it could be argued that United States obligations under the Geneva Conventions are not strictly a matter of international law, but rather are a matter of domestic law given the status of the conventions under the U.S. Constitution.

Yet it is possible to conclude that international law has exerted a profound influence over the MCA. International law has been subject to unprecedented discourse by legislators in the passage of the MCA. The personal jurisdiction of the military commissions has changed from terrorists as designated by the executive, to unlawful combatants in accordance with criteria and processes thematically derived from international law. The subject matter jurisdiction of the Act includes both war crimes and domestic crimes, but draws heavily upon international law.

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[54] MCA, *supra* note 1, § 950v(b)(15).

[55] *See* Norman A. Goheer, *The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent Is Not a War Crime* (Berkley Electr. Press, Working Paper No. 1871, 2006), *available at* http://law.bepress.com/expresso/eps/1871/ (last visited Oct. 11, 2007).

[56] MCA, *supra* note 1, § 950v(b)(21).

[57] Statute of the International Tribunal (Former Yugoslavia) art. 5(g), May 25, 1993, 32 I.L.M. 1192; Statute of the International Tribunal (Rwanda) arts. 3(g), 4(e), Nov. 8, 1994, 33 I.L.M. 1602; Rome Statute of the International Criminal Court arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002.

[58] Hamdan v. Rumsfeld, 548 U.S. __ 2006, U.S. LEXIS 5185, ***81 (2006).

As with all instances of international law concepts reduced to working domestic statutes, the devil is in the details. Whether the MCA passes muster in terms of compliance with international law is a matter for academic debate and litigation. To some extent, that question may now be determined by the discretion and integrity of appointed judicial officers. But, beyond a doubt, the MCA is strongly influenced by international law.

Special Operations Commando Raids and Enemy *Hors de Combat*

Commander Gregory Raymond Bart[*]

Executive Summary

United States Special Operations Forces (SOF) conduct commando raids resulting in defeated enemy soldiers who are either wounded or neutralized as effective fighting forces. Some scholars indicate that the law of war provides only two alternative statuses for them: *prisoners of war* or *capitulated forces*. If true, this conclusion could dramatically impact operations planning. The defeated soldiers' prisoner of war (POW) status would impose on SOF teams significant duties that would impede the accomplishment of commando missions. These duties include absolute obligations to protect, evacuate, and provide medical care, food, and clothing to the defeated soldiers. Alternatively, their capitulated-force status would impose on SOF teams duties that vary with the nature of the capitulation agreement. These duties might range from simply honoring a temporary ceasefire to providing complete POW protections.

Neither the POW nor capitulated force statuses accurately reflect the relationship between SOF teams and the enemy soldiers they defeat during commando raids. Prisoner of war status begins with physical custody, but SOF teams lack effective control over the defeated enemy. Often, SOF teams release enemy soldiers from any temporary custody. The release occurs on the field and not through an authorized repatriation or parole program. These two statuses do not account for this reality. They can lead to confusion and therefore do not clearly describe the duties owed by SOF teams to defeated enemy soldiers.

However, the law of war provides a third possible status for these soldiers: *hors de combat*. This status recognizes that they have laid down their arms and are no longer capable of defending themselves, and that SOF teams lack effective control over them. It imposes clear duties that fall between those owed to POWs and those owed to capitulated forces in terms of their logistical impact on SOF teams. These duties do not include a general duty to evacuate, but include humanitarian obligations to provide medical care to the wounded as feasible.

During commando raids, SOF teams should treat defeated enemy forces as *hors de combat* and not as POWs or capitulated forces. This status provides clear and flexible humanitarian duties that are within the teams' operational capabilities. Special operations forces teams can thereby complete their commando missions without lingering legal uncertainties about the applicable standard of treatment for defeated enemy soldiers.

Introduction

By doctrine and training, U.S. Special Operations Forces (SOF) conduct direct-action missions, commonly called "commando raids."[1] They are short-duration strikes or small-scale offensive operations in hostile, denied, or politically sensitive territory to seize, destroy, capture, recover, or damage designated targets.[2] Inevitably, these engagements produce defeated enemy personnel who are wounded or neutralized as effective fighting forces. But unlike conventional units, SOF teams have few or no resources to hold prisoners or to evacuate them. So what are the teams' responsibilities to these defeated enemy soldiers?

Special operations forces teams encountered this scenario in 2003 during Operation Iraqi Freedom (OIF). Planners at the United States Central Command (CENTCOM) anticipated that Iraqi forces might launch Scud missiles from western Iraq at civilian population centers in Israel, as they had done in 1991 during Operation Desert Storm.[3] From a humanitarian

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[1] JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, JOINT DOCTRINE FOR SPECIAL OPERATIONS (17 Dec. 2003) [hereinafter JOINT PUB. 3-05].

[2] *Id.*

[3] WILLIAM ROSENAU, SPECIAL OPERATIONS FORCES AND ELUSIVE ENEMY GROUND TARGETS: LESSONS FROM VIETNAM AND THE PERSIAN GULF WAR (2001).

perspective, there was great concern for injuries to Israeli civilians. From a strategic perspective, planners worried that Scud missile attacks might provoke an Israeli armed response, which could dramatically broaden the conflict's scope.[4]

Hence, in early 2003, CENTCOM deployed SOF teams to Iraq to conduct commando raids and destroy Scud launch sites.[5] The missions required that SOF teams be heavily armed yet highly mobile. The Scud missiles were scattered throughout the western Iraqi desert at guarded, remote sites.[6] The CENTCOM planners anticipated that the SOF teams would be unable to take custody of defeated Iraqis while still accomplishing their missions. The teams would not have the manpower or logistical resources for prisoners. As a practical matter, planners assumed that the teams would simply leave enemy soldiers—wounded or otherwise defeated—and quickly proceed to the next Scud site.

Some scholars opine that the law of war provides only two possible statuses for such defeated enemy soldiers: POW, or capitulated forces who have agreed not to fight.[7] Victorious forces owe prisoners of war absolute duties of care, which carry significant logistical burdens. However, they owe capitulated forces only those duties that are expressed in the agreement not to fight.[8] Accordingly, the status of defeated enemy soldiers can dramatically affect SOF operations planning.

This article considers SOF teams' relationship with a defeated enemy in the above scenario and argues that a third category exists: *hors de combat*.[9] It discusses the teams' responsibilities in the field, not the duties of higher-level strategic military or civilian decision makers. The first section reviews the statuses of POWs and capitulated forces under the law of war. It asserts that POW status begins with the capture and control of defeated soldiers. It also considers the termination of both statuses and the logistical burdens that each status imposes on SOF teams. The second section asserts that neither status accurately reflects the relationship between SOF teams and defeated enemy soldiers during commando raids. This article borrows the concept of effective control from war crimes jurisprudence and suggests that during raids, SOF teams lack the necessary effective control over defeated soldiers to trigger POW status. It further asserts that POWs and capitulated force statuses leave released enemy soldiers in a confusing situation with unclear humanitarian protections. The final section shows how the law of war provides a third status for defeated enemy soldiers: *hors de combat*. This status imposes clear duties of care that field units can meet in light of their mission capabilities.

The article concludes that given the circumstances of commando raids, SOF teams should treat defeated enemy forces as *hors de combat* and not as prisoners of war or capitulated forces. This third status provides for the humane care of defeated forces while recognizing the reality that SOF teams do not have lasting control over them.

I. Prisoners of War, Capitulated Forces, and Duties of Care

It is important to review the nature of the statuses of POWs and capitulated forces before considering the relationship between SOF teams and defeated enemy soldiers during commando raids.

A. Prisoners of War

Traditionally, defeated enemy soldiers were at the mercy of victorious forces. They could be killed, held for ransom, enslaved, or simply left in the field. The major documents of the law of war fundamentally altered this tradition by prohibiting victorious forces from refusing quarter—leaving no survivors among the defeated enemy.[10] For captured enemy soldiers, the law of war also created POW status, which imposes on the victor absolute duties of care.

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[4] Carla Anne Robbins & Karby Leggett, *How the U.S. Plans to Keep Israel on the Iraq War's Sidelines*, WALL ST. J., Mar. 3, 2003, *available at* www.globalsecurity.org/org/news/2003/030303-israel-sideline01.htm.

[5] BOB WOODWARD, PLAN OF ATTACK 379–82 (2004).

[6] T. Ripley, *Iraq's Western Desert Special Forces Playground*, JANE'S DEFENCE WKLY., Apr. 3, 2003, *available at* http://www.janes.com/defence/news/jdw/jdw030403_1_n.shtml.

[7] M. Scott Holcomb, *Perspective: View from the Legal Frontlines*, 4 CHI. J. INT'L L. 561, 565–66 (2003).

[8] These categories can overlap. A capitulation agreement might provide that defeated soldiers will be taken into custody as POWs.

[9] This status assumes that the commando raids occur during an international armed conflict and that the defeated enemy soldiers are lawful combatants who are entitled, if captured, to POW status under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. *See infra* notes 11–18 and accompanying text.

[10] L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 196 (2d ed. 2000).

1. Definition and Commencement of POW Status

States disagree about the precise moment that POW status begins for defeated soldiers.[11] Nevertheless, the law of war's primary documents consistently define POW in terms of lasting physical custody. One early formulation of the law of war was U.S. Army General Orders Number 100 of 1863, commonly known as the Lieber Code.[12] The Lieber Code governed Union troops' conduct during the American Civil War. Article 49 of the Lieber Code stated: "A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation."[13] Hence, enemy soldiers did not become prisoners of war simply by reluctance or inability to fight, or by surrender and capitulation. Rather, their status began upon "fall[ing] into the hands of the captor"—conditions of physical custody.[14]

The Hague Convention of 1899 (Hague II) and the Hague Convention of 1907 (Hague IV) adopted a definition of POW in line with the Lieber Code. In both conventions, Article 4 states: "Prisoners of war are in the power of the hostile Government, not of the individuals or corps who capture them."[15] Again, the word "capture"—meaning physical custody—describes the condition that triggers POW status.

The 1929 and 1949 Geneva Conventions Relative to the Treatment of Prisoners of War also required capture for the commencement of POW status. Jean Pictet, the official commentator on the 1949 Convention (GC III), wrote:

> The general principle for application of the 1929 Convention to persons referred to in Articles 1, 2 and 3 of the 1907 Hague Regulations is stated in Article 1, paragraphs 1 and 2, of that Convention. The Convention applies to such persons "who are captured by the enemy. . . ."[16]

Of note, the 1949 Convention does not use the term "captured." Instead, it describes prisoners of war as soldiers that have "fallen into the power of the enemy."[17] But Jean Pictet indicates that this condition still requires capture:

> Under the present provision, the Convention applies to persons who "fall into the power" of the enemy. This term is also used in the opening sentence of Article 4 above, replacing the expression "captured" which was used in the 1929 Convention (Article 1). It indicates clearly that the treatment laid down by the Convention is applicable not only to military personnel taken prisoner in the course of fighting, but also to those who fall into the hands of the adversary following surrender or mass capitulation.[18]

Geneva Convention III broadened the description of prisoners of war from "captured" to include defeated soldiers who submitted to custody without a fight. Under GC III, victorious forces must still capture defeated soldiers to render them prisoners of war.

The 1977 Protocol I to the 1949 Geneva Conventions is consistent with this concept.[19] Article 44 states that any combatant "who falls into the power of an adverse Party shall be a prisoner of war."[20] The drafters of Protocol I agreed that

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[11] JEAN PICTET, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 480–81 (1987).

[12] GREEN, *supra* note 10.

[13] D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICTS 3–23 (1988).

[14] To *capture* means "to take captive." *Captive* is an adjective defined in purely physical terms: "taken and held as or as if a prisoner of war"; "kept within bounds: confined"; and "being such involuntarily because of a situation that makes free choice or departure difficult." MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.m-w.com/cgi-bin/dictionary/capture (second definition) and http://www.m-w.com/dictionary/captive (last visited May 10, 2007).

[15] Convention (II) with Respect to the Laws and Customs of War on Land art. 4, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 [hereinafter 1899 Hague Convention or Hague II]; Convention (IV) Respecting the Laws and Customs of War on Land art. 4, October 18, 1907, 36 Stat. 2277, U.S.T.S. 539 [hereinafter 1907 Hague Convention or Hague IV].

[16] 3 JEAN PICTET, COMMENTARY ON THE GENEVA CONVENTIONS OF AUGUST 12, 1949, at 3, 73 (1952).

[17] Geneva Convention Relative to the Treatment of Prisoners of War art. 44, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S 135 [hereinafter GC III].

[18] PICTET, *supra*, note 16, at 76.

[19] The United States is not a party to Protocol I but generally supports the protocol's prohibition against taking no quarter and the principle that POW status should apply to all persons entitled to combatant status. *See* Martin P. Dupuis, John Q. Heywood, & Michele Y.F. Sarko, *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 415, 425 (1987).

[20] Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 41, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

GC III gives undisputed POW status only to captured enemy soldiers. The drafters worried that GC III provides unclear or no protections for defeated soldiers who are not in the victorious forces' custody. Hence, they included in Protocol I separate protections for such soldiers as *hors de combat*.[21]

The U.S. policy on this issue is expressed in Department of Defense (DOD) regulations, which state that POW status for defeated enemy soldiers begins upon their capture. The DOD POW Program requires enemy personnel captured or detained by U.S. armed forces to be physically handed over to U.S. Army military police for processing as prisoners of war.[22] The armed services secretaries also promulgated a joint regulation for the administrative processing of enemy prisoners of war.[23] Significantly, it applies to persons "captured, detained, interned, or otherwise held in U.S. armed forces custody."[24]

Thus, the law of war and U.S. policy indicate that POW status starts when victorious forces take custody of defeated enemy forces.

2. Duties Owed by a Captor's Forces to POWs

Once POW status begins, the law of war mandates that the captor's forces owe the prisoners several duties of care.[25] For SOF teams, these obligations impose significant operational burdens that can inhibit their ability to complete commando raids. However, the captor's forces are prohibited from making special agreements with prisoners to reduce these rights and protections.[26] The rights granted to prisoners of war are absolute.[27] They extend between states and cannot be renounced by either the defeated enemy's individual soldiers or the captor's tactical commanders.

Some scholars opine that the law of war fails to state clearly what a tactical commander must do to satisfy these obligations. They suggest that this ambiguity gives field commanders flexibility in meeting them.[28] However, Article 13 of GC III does not support this conclusion with any language that would indicate that its obligations are required only "as practicable" or "as feasible."[29]

Rather, GC III mandates that captors must treat prisoners of war humanely at all times. This obligation requires absolute physical protection from all violence and even from harsh environmental conditions.[30] Geneva Convention III, Article 13 recognizes that prisoners of war are no longer combatants and includes prohibitions against murder, mutilation, torture, corporal punishment, sensory deprivation, collective punishment, humiliation, and medical experimentation.[31] Captors may not use force or coercion to interrogate prisoners, who are obligated only to reveal their name, rank, service number, and date of birth. Furthermore, captors are required to protect prisoners of war against reprisals from their own forces or those of the adverse power.[32] In short, the captor's forces must keep prisoners of war in *protective* custody, not just to prevent their escape for operational reasons.

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[21] PICTET, *supra* note 11, at 481–84.

[22] U.S. DEP'T OF DEFENSE, DIR. 2310.1, DOD PROGRAM FOR ENEMY PRISONERS OF WAR (EPOW) AND OTHER DETAINEES paras. 3.3, 3.4 (Aug. 18, 1994).

[23] U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Oct. 1997) [hereinafter AR 190-8]. This regulation is promulgated in the Navy, Air Force, and Marine Corps as OPNAVINST 3461.1, AFJI 31-304, and MCO 3461.1, respectively.

[24] *Id*. para. 1-5(a)(1).

[25] Geoffrey S. Corn & Michael L. Smidt, *"To Be or Not to Be, That is the Question": Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1.

[26] *Id*. at 204.

[27] GREEN, *supra*, note 10, at 203.

[28] Corn & Smidt, *supra* note 25, at 8.

[29] GC III, *supra* note 17, at arts. 12–16; PICTET, *supra* note 16, at 140.

[30] GREEN, *supra* note 10, at 204–06. Geneva Convention III, Article 13, states: "Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention." GC III, *supra* note 17, art. 13.

[31] Corn & Smidt, *supra* note 25, at 9; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE paras. 84–92 (July 1956) [hereinafter FM 27-10].

[32] FM 27-10, *supra* note 31, para. 89.

Significantly, the law of war also requires the captor's forces to evacuate prisoners of war.[33] Specifically, GC III, Article 19 states that the captor's forces must remove prisoners from the battlefield or harsh environmental conditions to camps that are located far from the zone of combat operations.[34] Unlike Article 13, Article 19 contains the phrase "as soon as possible" and therefore apparently allows the victorious field commander some operational flexibility. But these words are trumped by Article 13's obligations. Until evacuation occurs, Article 13 absolutely requires field commanders to maintain prisoners in safe and humane conditions and to provide wounded prisoners with medical attention.[35] They must also protect prisoners against enemy reprisals. These tasks might require more of the captor's forces than those needed to evacuate the prisoners or to keep them from escaping.

Further, the victorious field commander's forces must accomplish the evacuation under humane conditions that are equivalent to those used to transport the captor's own forces. During the journey, his forces must provide prisoners with food, potable water, medical attention, and even appropriate clothing.[36] At the camp itself, the captor's forces have numerous additional obligations.[37] But at that point, U.S. Army military police are supposed to acquire custody and responsibility for the prisoners of war.[38] (Their obligations are beyond the scope of this article, which focuses on SOF teams' duties.)

Clearly, absent an *hors de combat* category, SOF teams have substantial logistical burdens related to the initial handling in the field of enemy soldiers defeated during a commando raid, if those soldiers qualify for POW status.

3. Termination of POW Status

The law of armed conflict requires a captor's forces to treat captured enemy soldiers in the proper manner described above until the termination of their POW status. Geneva Convention III provides that POW status ends with repatriation.[39] This can occur during continued hostilities or upon cessation of active hostilities between countries. When U.S. armed forces are the captors, the Assistant Secretary of Defense for International Security Affairs (ASD (ISA)) must approve all transfers of prisoners of war to any entity outside DOD for any purpose, including repatriation.[40] Moreover, the cessation of hostilities is a policy-level decision. In other words, U.S. field units, such as SOF teams, lack authority to terminate enemy soldiers' POW status.

Of note, GC III allows the captor's forces to release POWs on parole, that is, an agreement not to resume hostilities. But parole does not terminate POW status. It merely releases prisoners due to poor confinement conditions or logistical capabilities to care for them.[41] Moreover, U.S. military field units lack independent authority to approve the parole and release of enemy POWs.[42]

B. Capitulated Forces

In contrast to POWs, the status of capitulated forces and the duties owed to them depend on agreed terms. A capitulation is an agreement entered into between two field commanders "for the surrender of a body of troops, a fortress, or other defended locality."[43] It might cover the specific force or territory to be surrendered, the disposition of enemy forces, a

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[33] GREEN, *supra* note 10, at 206.

[34] *Id*.; GC III, *supra* note 17, arts. 19-20; FM 27-10, *supra* note 31, paras. 95–96.

[35] GREEN, *supra* note 10, at 206; GC III, *supra* note 17, arts. 13, 15.

[36] GC III, *supra* note 17, art. 20.

[37] FM 27-10, *supra* note 31, paras. 97–100; AR 190-8, *supra* note 23.

[38] *See* Corn & Smidt, *supra* note 25, at 7–8.

[39] GREEN, *supra* note 10, at 212–13. *Repatriation* means the return of a prisoner to his home country. GC III, *supra* note 17, arts. 109–17.

[40] Corn & Smidt, *supra* note 25, at 7–8.

[41] GC III, *supra* note 17, art. 21; GREEN, *supra* note 10, at 207.

[42] DOD DIR. 2310.1, *supra* note 22; AR 190-8, *supra* note 23, para. 2-2d.

[43] FM 27-10, *supra* note 31, para. 470.

ceasefire for withdrawal or provisioning, disarmament, the treatment of surrendered installations, or even orders to be completed. Parties must scrupulously adhere to the terms of a capitulation agreement.[44]

Its provisions determine the status of capitulated forces and the duties owed to them.[45] If troops are surrendered under the agreement, then they become prisoners of war and are entitled to receive all due protections and duties of care. On the other hand, if the capitulation covers only the surrender of a locality or a fortress, then it might provide only for a ceasefire while certain conditions continue to exist. Such conditions might include time limits, the withdrawal of troops, or keeping troops within specified geographic limits.[46]

In a mere ceasefire, defeated enemy forces remain active combatants, not prisoners of war, and the victorious forces owe them only the duties that are defined in the ceasefire agreement. The victorious forces are not prohibited from targeting the enemy, except according to the agreement, which might cover only a limited time and location. Also, the victorious forces might not have any obligation to evacuate enemy soldiers nor to provide medical care, food and clothing, or even shelter from the environment.

Capitulated forces therefore receive care according to the capitulation agreement, which might confer upon them the rights of statuses ranging from POW to active enemy combatant.[47]

II. Defeated Enemy Soldiers: Neither Prisoners of War nor Capitulated Forces

Unfortunately, the statuses of POWs and capitulated forces do not realistically reflect the relationship between a SOF team and defeated enemy soldiers during a commando raid. The SOF team's mission might be exclusively to destroy an enemy facility, rather than to take custody of enemy soldiers. Neither category—POWs nor capitulated forces—accounts for the team's lack of effective custody or control over the defeated enemy. Further, SOF teams often release any temporarily detained enemy soldiers. Neither category clearly explains the status of the released enemies nor the duties owed to them.

A. SOF Teams Lack Effective Control over Defeated Enemy Soldiers

It is helpful to borrow the standard of *effective control* from war crimes jurisprudence to understand whether a SOF team has custody over defeated enemy soldiers during a commando raid for purposes of POW status. Effective control is an element of command responsibility theory. An analogy can be drawn between assessing the effective control of a SOF team over defeated enemy soldiers and assessing the effective control of a military superior over a subordinate who commits war crimes.

1. Effective Control in War Crimes Jurisprudence

For over fifty years, U.S. courts and international tribunals have applied command responsibility theory to hold commanders responsible for crimes by subordinate soldiers.[48] Regardless of the forum, the essential questions for command responsibility are the same: "When a crime is committed by a subordinate, under what circumstances is the superior liable?" and "Who is a superior?"[49] A superior-subordinate relationship exists when there is "effective command and control," either de jure or de facto.[50]

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[44] *Id*.; Hague IV, *supra* note 15, art. 35 (regulations).

[45] FM 27-10, *supra* note 31, para. 475.

[46] *Id*. para. 474.

[47] United States field commanders generally have authority to enter into capitulation agreements (but not to repatriate POWS or grant them parole). United States field commanders entered into such agreements with numerous Iraqi field commanders during Operation Iraqi Freedom. Iraqi units remained at designated sites under ceasefire terms while the main U.S. offensive forces bypassed them en route to Baghdad. In this manner, the spearhead of the U.S. forces attempted to avoid many of the logistical burdens associated with handling POWs during the advance to Baghdad. Days later, other U.S. forces took custody of the capitulated Iraqi forces and provided them with POW protections and duties of care. *Id.* para. 472; Holcomb, *supra* note 7, at 567.

[48] Michal Stryszak, C*ommand Responsibility: How Much Should a Commander be Expected to Know?*, 11 U.S.A.F. ACAD. J. LEG. STUD. 27 (2000/2001); Andrew D. Mitchell, *Failure to Halt, Prevent, or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381 (Sept. 2000).

[49] The theory has a common formulation in both domestic and international tribunals. It requires three elements: (1) a superior-subordinate relationship, (2) knowledge, actual or constructive, by the superior of the crimes committed by the subordinate, and (3) failure by the superior to halt, prevent, or punish the

The most recent and comprehensive consideration of the theory occurred in the *Celebici Judgment* by the International Criminal Tribunal for the Former Yugoslavia (ICTY).[51] In the *Celebici Judgment*, the ICTY considered whether three officers (Zejnil Delalic, Zcravko Mucic, and Hazim Delic) had effective control over Bosnian Muslim and Croat guards who committed numerous atrocities against Bosnian Serb prisoners in 1992 at the Celebici camp.[52] Delalic was the commander of military forces in Konjic, Bosnia, where the camp was located. Mucic was the alleged commander of the camp, and Delic was his deputy. The Trial Chamber first considered whether each had de jure authority over the guards. It examined legislation, laws, written policies, and written orders for definitions of their authority and of any hierarchy that included the defendants and the guards. Then it analyzed whether a de facto relationship existed between the defendants and the perpetrators. The Trial Chamber considered a variety of factors: the distribution of tasks; the capacity to issue orders; any exercise of disciplinary measures by the defendants; and lastly the defendants' powers of influence. Significantly, it distinguished between influence and effective control, indicating that influence alone does not establish a superior-subordinate relationship. An individual is criminally liable under command responsibility theory only to the extent that he fails to exert proper influence on others over whom effective control already exists.[53]

The Trial Chamber ruled that Mucic had de jure effective control over the guards. Numerous documents established that he had such authority as a camp commander within the Bosnian Army. Accordingly, the Chamber found him guilty of atrocities committed by the guards at the camp. In contrast, it ruled that Delalic did not have effective control over the guards. It distinguished between influence and effective control and focused on Delalic's functions and activities as the regional coordinator for forces in the Konjic area and as the appointed commander of Tactical Group I. The Chamber held that as a coordinator, Delalic's duties consisted of "mediation and conciliation" and that he had "his functions prescribed."[54] The Chamber noted that the position of coordinator was not recognized in the Bosnian Army and that it did not place Delalic in a military chain of command.[55] Rather, he acted as a mediator between military and civilian groups in the Bosnian government and facilitated the distribution of supplies, but he exercised no independent judgment.[56] Accordingly, the Trial Chamber held that Delalic's job as a coordinator did not make him a superior of the prison guards. Concerning his post as the commander of Tactical Group I, the Chamber opined that the unit was a temporary combat unit that did not include non-combat institutions such as prisons.[57] Further, it rejected any inference of a superior-subordinate relationship from an order that Delalic transmitted from higher authority to the Celebici camp commander to appoint a commission to interrogate prisoners. The Chamber emphasized that the tactical group existed only to carry out specific combat missions and was merely a conduit in transmitting the order.[58] The Chamber concluded that Delalic was not a regional commander, and he directed other units in the area only on an ad hoc, occasional, tactical basis. Accordingly, it held that Delalic did not have effective control over the camp and was not criminally liable for atrocities committed there.

The Trial Chamber also found that Delic lacked both de jure and de facto effective control over the guards even though he was the camp's deputy commander. The Chamber again distinguished influence from effective control. Several witnesses testified that Delic appeared to be the guards' "boss" because he sometimes gave orders and apparently had a strong, intimidating, and coercive influence on them.[59] Nevertheless, the Trial Chamber held that Delic's influence was merely the result of his forceful personality, which intimidated the guards. The Chamber emphasized that he received daily direction from Camp Commander Mucic, he could not exercise discipline, and he could not act alone without the commander's

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subordinate. Further, command responsibility theory creates liability for two types of conduct—positive acts and omissions—when there exists a legal obligation to act. *See* Mitchell, *supra* note 48, at 383.

[50] Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment (Nov. 16, 1998) (*aff'd*, Case No. IT-96-21-A, Judgment (Feb. 20, 2001)); Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002.

[51] *See* Statute of the International Tribunal (Former Yugoslavia), May 25, 1993, 32 I.L.M. 1192.

[52] Mitchell, *supra* note 48, at 390; Ann B. Ching, Comment, *Evolution of the Command Responsibility Doctrine in Light of the* Celebici *Decision of the International Criminal Tribunal for the Former Yugoslavia*, 25 N.C. J. INT'L L. & COM. REG. 167, 192–202 (Fall 1999).

[53] Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 A.J.I.L. 573, 576 (July 1999).

[54] *Id*. at 238.

[55] Ching, *supra* note 52, at 196.

[56] *Id*.

[57] Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment, ¶ 245 (Nov. 16, 1998).

[58] *Id*.

[59] *Id*. ¶¶ 285–89.

authority. Accordingly, the Chamber ruled that influence alone did not establish that Delic had de facto effective control over the Celebici camp and found him not guilty under command responsibility theory.[60]

2. SOF Teams Lack Effective Control over Defeated Enemy Soldiers

The *Celebici* cases provide a framework to analyze whether SOF teams have de jure or de facto effective control over defeated enemy soldiers during commando raids. By drawing an analogy to these cases, one can demonstrate that the defeated soldiers have not "fallen under the power" of the teams in a manner that triggers POW status.

Special operations forces teams lack de jure effective control over defeated enemy soldiers because the law of war does not generally require victorious forces to capture defeated enemy forces.[61] Certainly, it prohibits victorious forces from refusing quarter—killing all defeated enemy soldiers, even the wounded.[62] The 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (GC I) requires that forces collect the wounded and treat the wounded and sick soldiers who fall into their hands as POWs.[63] Accordingly, SOF teams must cease attacks against defeated and defenseless enemy soldiers. But that obligation is prohibitive, not affirmative. It does not logically follow that SOF teams must treat all defeated enemy soldiers as prisoners of war.[64]

Moreover, it is important to distinguish a common understanding of the prohibition against refusing quarter that states that armed forces cannot decide to "take no prisoners."[65] The prohibition focuses on ensuring that there are survivors from the defeated enemy and not on requiring that victorious forces actually take prisoners. Jean Pictet explains: "The term 'quarter' . . . here means that the conquered enemy's life is spared."[66] For this reason, references to "no prisoners" were deleted from the final draft of Protocol I's quarter provisions.[67] Clearly, SOF teams are not obligated to take custody of defeated enemy soldiers during commando raids; thus, the teams lack de jure effective control over them.

Prisoner of war status therefore depends on whether SOF teams have de facto effective control. Under the *Celebici* cases, one may consider the following factors to determine whether SOF teams' functions include the material ability to prevent defeated enemy forces from committing hostile acts: the distribution of tasks, the capacity to issue orders, any previous exercise of disciplinary measures by the teams, and powers of influence.

The distribution of tasks for SOF teams does not indicate the existence of de facto effective control. During commando raids, SOF teams typically do not take physical custody of defeated enemy soldiers, or do so only for short periods until the teams depart the site.[68] This follows from the unusual circumstances of such missions. Teams typically are small in number, usually twelve or fewer soldiers. To facilitate their mobility, they carry few supplies; by weight, most of their supplies consist of ammunition. Typically, their mission deep in enemy territory is to destroy enemy facilities such as Scud launchers. The conditions might require them to attack at night and to hide during the day.[69] Upon completing their mission, teams are usually exfiltrated from enemy territory by helicopters, which have limited room for passengers. Moreover, SOF teams' missions might include immediate follow-on raids against other sites. Accordingly, unless tasked to retrieve specific high-profile enemy combatants, SOF teams often release any defeated enemy combatants that are held during a raid.[70] Hence, the

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[60] *Id.*

[61] SCHINDLER & TOMAN, *supra* note 13, at 3–23; Hague IV, *supra* note 15, art. 23.

[62] GREEN, *supra* note 10, at 196; Hague IV, *supra* note 15, art. 23.

[63] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field arts. 14–15, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I].

[64] *See* PICTET, *supra* note 16, at 151–55. A duty to provide supplies or to evacuate might arise if defeated enemy soldiers are left in a situation where they would have virtually no chance of survival because of the environment. A decision not to help them would be equivalent to a refusal to give quarter. But, as discussed in Part III, that duty is owed to all *hors de combat*. *See* PICTET, *supra* note 11, at 490.

[65] PICTET, *supra* note 11, at 475.

[66] *Id.*

[67] Protocol I, Article 40, states: "It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis." Protocol I, *supra* note 20, art. 40.

[68] Gary L. Walsh, *Role of the Judge Advocate in Special Operations*, ARMY LAW., Aug. 1989, at 4.

[69] ROSENAU, *supra* note 3, at 34–40.

[70] *Id.*

teams exercise only ad hoc, limited tactical control over defeated enemy soldiers. This task is more analogous to the limited, occasional, non-effective control exercised by Delalic and Delic in the *Celebici* cases rather than the extensive, prolonged effective control that Mucic exercised.

Special operations forces teams also lack lasting authority to issue orders, to exercise discipline, or to exert lasting influence on the defeated enemy. Commando teams have contact with enemy forces only for short periods. They do not function as occupiers of the targeted enemy facilities. In Iraq, they quickly move from one site to the next. They might have custody over some defeated enemies for short periods, but only to complete the destruction of the facility. They do not remain as guards of enemy territory or defeated soldiers. After the SOF teams leave, the enemy soldiers are no longer in custody or directly prevented from resuming hostile activities. Hence, the team's ability to issue orders and impose discipline on the defeated enemy is one of influence alone through force of personality and threats (as with Delalic) and not one of effective control (as with Mucic).

After leaving, SOF teams' primary lasting influence on defeated enemies is through threats of renewed hostilities, such as air strikes. One might argue that such influence amounts to the defeated enemy being "in the power" of the team so as to trigger POW status. But Jean Pictet indicates that such influence does not necessarily invoke POW status, which requires the defeated enemy to have "fallen into the power" of the team through capture.[71] Accordingly, SOF teams do not have effective control over defeated enemy soldiers during commando raids, and POW status does not accurately or realistically define the relationship between the teams and the defeated enemy.

B. Confusion over POW Status and Released Enemy Soldiers

Moreover, applying POW status leads to confusion over the defeated enemies' status and the standard for their treatment. Assuming that the defeated soldiers qualify as POWs, what is their status if SOF teams release them? Special operations forces teams lack the authority to terminate POW status or to grant parole. Those decisions rest with the ASD (ISA). The released enemy soldiers therefore would fall into the confusing situation of being POWs at-large, without authorized release. In effect, they would be the equivalent of escaped prisoners—who may also be defined as at-large without authority. The law of armed conflict sanctions the use of force to stop escaped prisoners.[72] The released soldiers therefore would run the risk of being targeted as suspected escapees. Moreover, they would likely not clearly understand what actions constitute "escape" versus "parole" and what they must do to maintain their POW status. After all, the released prisoners have no duty to honor ambiguous de facto paroles that do not exist under law or regulation. Applying POW status to released enemy soldiers during commando raids leaves them in an untenable situation.

Of note, Protocol I's drafters attempted to address this problem. Article 41 states: "When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation . . . they shall be released and all feasible precautions shall be taken to ensure their safety."[73] But this provision also leads to confusion. As Jean Pictet notes, it is unclear what level of authority can approve release and what the ramifications of an unauthorized release are.[74]

Also, it is unclear whether victorious forces can properly invoke Article 41 to release prisoners for purely operational or logistical purposes. In his report on Protocol I, the *Rapporteur* indicated that practical concerns would dictate the article's use:

> The requirement that all "feasible precautions" be taken to ensure the safety of released prisoners was intended to emphasize that the detaining Power, even in those extraordinary circumstances, was expected to take all measures that were practicable in light of the combat situation. In the case of a long distance patrol, it need not render itself ineffective by handing the bulk of its supplies over to the released prisoners, but it should do all that it reasonably can do in view of all the circumstances to ensure their safety.[75]

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[71] PICTET, *supra* note 11, at 484.

[72] *Id*. at 488.

[73] Protocol I, *supra* note 20, art. 41.

[74] PICTET, *supra* note 11, at 490.

[75] *Id*. at 489 (quoting 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 384 (Geneva 1974-77)).

In contrast, Jean Pictet states in his commentary to Article 41 that a captor's forces should not release prisoners for purely operational or logistical reasons. He cautions:

> The release should be a humanitarian gesture, not an easy means of getting rid of prisoners considered to be an encumbrance. In fact, in some situations where the prisoner would have virtually no chance of survival, this would be equivalent to a refusal to quarter.[76]

Further, Article 41's release provisions would not necessarily apply to U.S. SOF teams. The United States has not publicly indicated support for Article 41 as a statement of customary international law.[77] Accordingly, the application of POW status to defeated soldiers during commando raids leads to confusing results that ignore the realities of field operations.

C. The Humanitarian Obligations Owed to Capitulated Forces

Capitulated-force status also does not clarify what humanitarian obligations SOF teams owe to defeated enemies during commando raids. If the terms of a capitulation agreement include the capture of enemy soldiers, then POW status applies. But, as stated, that status leaves the defeated forces in an untenable situation if SOF teams release them, as the teams are likely to do. If the capitulation agreement does not include the capture of enemy soldiers, then the defeated enemies are still active combatants to whom no duties are owed except for those provided in the agreement's terms. Clearly, a third category or status must apply to the defeated enemy soldiers in this scenario in order to provide them with clear humanitarian protections.

III. Defeated Enemy Soldiers During Commando Raids Are *Hors de Combat*

The law of war recognizes for defeated enemy soldiers a third category that is distinct from POW or capitulated forces. These enemies are *hors de combat*—soldiers who, having laid down their arms or having no further means of defense, have surrendered at the discretion of the victorious forces.[78] This status includes defenseless wounded soldiers. Special operations forces teams owe *hors de combat* duties of care that are independent of and overlap those owed to prisoners of war and capitulated forces.

A. Existence of *Hors de Combat* Status

The law of armed conflict reveals the existence of *hors de combat* as a distinct category in the structure of major treaties. All contain articles for *hors de combat* separate from those for prisoners of war. In Hague IV's regulations, Section II, Chapter I, Article 23 outlaws killing or wounding "an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion."[79] In contrast, Hague IV's regulations concerning prisoners of war are located in Section I, Chapter II, Articles 4 through 20.[80] In the 1949 Geneva Conventions, GC I provides protections on the battlefield for all wounded and sick who are *hors de combat*.[81] But an entirely separate treaty, GC III, provides protections for prisoners of war, including the wounded and sick.[82]

Moreover, the 1977 Protocol I's drafters were keenly aware of the distinction between *hors de combat* and prisoners of war. They perceived a gap in the protections between these statuses. Jean Pictet explains:

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[76] PICTET, *supra* note 11, at 490.

[77] Dupuis et al., *supra* note 19.

[78] PICTET, *supra* note 11, at 480.

[79] Hague IV, *supra* note 15, art. 23(d).

[80] *Id*. arts. 4-20.

[81] GC I, *supra* note 63 *passim*.

[82] *Id.* art. 14; GC III, *supra* note 17.

> The essential problem concerned how to create a concrete link between the moment when an enemy soldier is no longer a combatant because he is *hors de combat*, and the moment when he becomes a prisoner of war because he has "fallen into the power" of his adversary.[83]

The drafters therefore included in Protocol I an article that prohibits attacks against defeated soldiers who are *hors de combat*, regardless of their status as wounded, captives, or prisoners of war.[84] It broadly applies to all combatants who express an intent to surrender, who remain under the power of an adverse party, or who cannot defend themselves.

B. Applying *Hors de Combat* Status to Defeated Soldiers During Commando Raids

Hors de combat status accurately describes defeated enemy soldiers during commando raids. The soldiers are no longer willing or able to defend themselves, regardless of whether they are wounded or captives. Further, the status is unaffected by the unusual battlefield circumstances of commando raids. As already described, the defeated soldiers are not in the effective control or custody of SOF teams, and are often released from any temporary custody. But *hors de combat* status does not depend on custody or control, or approval by higher military or civilian authorities. The defeated soldiers are *hors de combat* as long as they choose not to fight.

Accordingly, *hors de combat* status provides clear guidance on the duties that SOF teams owe to defeated enemy forces, regardless of custody or release. Notably, these obligations blend the duties owed to prisoners of war and those owed to capitulated forces. The prohibition against refusing quarter applies to all *hors de combat*. Special operations forces teams must therefore cease all attacks against defeated soldiers as if they were prisoners of war. This is a broader protection than a mere ceasefire resulting from a limited capitulation agreement. But if the defeated soldiers resume hostilities, then they are no longer *hors de combat* and they become lawful targets again. Also, GC I, Article 15 requires that SOF teams treat wounded *hors de combat* humanely. This includes general obligations for SOF teams to search for and collect the wounded and to provide them medical care and protection.[85] The release of defeated soldiers does not affect these duties.

Nonetheless, these duties are more flexible than GC III's absolute obligations for the treatment of prisoners of war.[86] Geneva Convention I, Article 15 requires both sides in a battle to take "all possible measures," while GC III lacks such flexible language. For *hors de combat*, SOF teams can therefore choose the form and scope of relief for injured enemies based on operational considerations. For example, teams can meet GC I's obligation by leaving the injured *hors de combat* with medical supplies or by coordinating air drops of supplies to them. In short, *hors de combat* status acknowledges the practical limitations of operations such as commando raids.

Most importantly, SOF teams do not necessarily have to abandon commando missions to take *hors de combat* into protective custody or to evacuate them. For uninjured defeated enemies, there is no general duty under the law of armed conflict for the teams to take custody of them. For wounded defeated enemies, GC I requires evacuation only if possible within the limits of battlefield operations.[87] But again, SOF teams cannot leave *hors de combat* in environmental conditions with virtually no chance for survival.[88]

Hors de combat status therefore provides understandable and realistic standards of treatment for defeated enemy soldiers during commando raids. It strikes a balance between the rigid humanitarian goals of POW status and the practical considerations that promote use of capitulated forces status.

IV. Conclusion

During commando raids, SOF teams should treat defeated enemy forces as *hors de combat* and not as prisoners of war or capitulated forces. This status recognizes the reality of the battlefield circumstances during such raids. It removes confusion

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[83] PICTET, *supra* note 11, at 481.

[84] Protocol I, *supra* note 20, art. 40; PICTET, *supra* note 11, at 481–84.

[85] GC I, *supra* note 63, art. 15.

[86] *See* PICTET, *supra* note 16, at 151.

[87] *See id*.

[88] PICTET, *supra* note 11, at 490.

about the status of defeated soldiers who are released and the appropriate standard for their treatment. Furthermore, the teams can still meet the operational burdens that this status imposes, without sacrificing mission accomplishment.

By applying *hors de combat* status to defeated enemy soldiers, SOF teams can thereby accomplish commando raids without lingering questions as to whether they acted consistently with the law of war. Clearly, there are many inherent operational uncertainties in daring commando raids. Legal ambiguities over the status of defeated enemy soldiers should not be among them.

Developing the Rule of Law in Afghanistan:
The Need for a New Strategic Paradigm

Lieutenant Commander Vasilios Tasikas[*]

I. Introduction

Today, the greatest challenges that we face emerge more from within states than between them – from states that are either unable or unwilling to apply the rule of law within their borders.[1]

During a three-month deployment to Afghanistan, I was assigned to the Office of the Staff Judge Advocate (SJA) at Combined Forces Command in Kabul (CFC-A). There, I had an opportunity to work with the Chief of International Law[2] on a whole host of operational law issues traditional encountered by judge advocates in a war zone, namely the law of armed conflict and detention operations. However, my assignment provided me an opportunity not only to practice international law, but an opportunity to put my legal skills to use in "rule of law" operations directed at helping a fledgling democratic government. Moreover, after interviewing numerous judge advocates, I quickly concluded that many of the military attorneys assigned to Kabul were not practicing law in the traditional sense of the word, such as advising commands or prosecuting courts-martial cases, but were devoting the majority of their time to rule of law missions.[3]

This boots-on-the ground reality for judge advocates comes from the recognition that the conflict in Afghanistan is going to take more than killing or detaining the enemy to achieve victory. In truth, the U.S. military leadership in Afghanistan, then commanded by Lieutenant General Karl Eikenberry, directed United States judge advocates, in cooperation with civilian leadership, coalition forces, and host country officials, to devise and implement programs to assist in transforming a nascent democratic country to govern and be bound by the rule of law.

This article relates some of the undertakings from the rule of law operations that U.S. forces took to the Afghanistan theatre as it existed in the summer of 2006. While this article draws on my own experience and the experiences of other judge advocates in country in an effort to illuminate the many issues military lawyers confront today in post-conflict operations, this article has a greater purpose than just elucidating personal experiences. Rather, the piece signals the broader implications for judge advocates in future military operations and proposes a method to ensure a ready response for future military rule of law missions.

This article is premised on a political context that foresees the U.S. military as having a greater role in nation-building operations within post-conflict environments. However, the U.S. military has spent the last two decades trying to ignore or curtail the reality of lengthy and costly post-conflict operations. This neglect stems from a long-standing, but inaccurate, perception of the proper role of the military as an instrument of national power. This notion yields a strong bias to fund and operate mighty armies and navies to fight and win major wars against major foes. The truth is that the United States has always engaged in protracted military endeavors short of full-scale wars. The reality is that these types of operations will likely become more prevalent, not less, in the future.

Given this assumption, military interventions short of full-scale war will be a given fact for decades to come. Some have argued that this new reality will require increasing collaboration between the military and civilian development agencies,[4] while others call for a bifurcation of the military into two separate governmental agencies (one purely for war-fighting; the

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[1] Secretary Condoleezza Rice, Remarks at the American Bar Association's Rule of Law Symposium, Capital Hilton, Wash. D.C., Nov. 9, 2005. http://www.state.gov/secretary/rm/2005/56708.htm.

[2] The Chief of International Law at Combined Forces Command-Afghanistan at the time was LTC Paul Kantwill, Judge Advocate, U.S. Army.

[3] My mission mandate included conducting interviews with various judge advocates on "lessons learned" and first-person insights on combat operations and on reconstruction and development in Afghanistan. I participated in interviews with over forty judge advocates detailed to Combined Forces Command – Afghanistan (CFC-A), The Combined Security Transition Command-Afghanistan (CSTC-A), Combined Joint Task Force-76, and other subordinate task forces, as well as meetings with lawyers from the Afghanistan Government and International Security Assistance Force (ISAF). From these interviews I was able to extract core issues confronting judge advocates in Afghanistan. What follows is a synthesis of information garnered from those interviews and my own observations and conclusions regarding rule of law operations.

[4] *See* Andrew S. Natsios, *The Nine Principles of Reconstruction and Development*, 35 PARAMETERS 4 (Autumn 2005).

other for post-conflict and disaster response operations).[5] Either way, judge advocates will have to gain additional proficiency in conducting rule of law missions in post-conflict operations.

This increasing synthesis between kinetic operations and nation-building will require that judge advocates gain a broad understanding of how reconstruction and development operate in a post-conflict theatre in order to effectively conduct rule of law operations. If the U.S. military is going to be tasked with post-conflict missions, which by inference includes rule of law line of operations, the critical questions then posed are what organizational force structure should be created and what skills sets should be developed? To support that effort, the judge advocate community must question how best to strengthen its capability and what competencies are required to conduct rule of law in a post-conflict environment.

While judge advocates will continue to focus on the law of armed conflict and military justice, they will also have to gain new and comprehensive skills to confront the likely threat scenarios of the future. This article suggests that the lessons drawn from the development and reconstruction mission in Afghanistan signal that the judge advocate community must augment its training for young military attorneys and tailor its organizational force structure to facilitate and strengthen rule of law efforts in post-conflict operations now and into the future.

II. The Traditional American Military Ethos

American military strategy has traditionally endorsed the notion that the primary role of the armed forces in society is to achieve the political objectives of the State through war. In essence, the military's ethos affirms that "the ultimate objective of all military operations is the destruction of the enemy's armed forces."[6] There remains a lingering notional legacy that the U.S. military should be limited to operations exclusively dealing with fighting and winning the nation's wars.[7] Juxtaposed to this strategic belief, military strategists have never earnestly incorporated non-kinetic missions, such as peacekeeping, post-stability operations, or nation-building, into mainstream military doctrine.[8] Quite simply the idea of these "peace" missions has been antithetical to the military philosophy, doctrine, and culture.[9]

The foundation of American military thinking stems back to Carl von Clausewitz, probably the most celebrated military strategist.[10] Carl von Clausewitz defined war as "an act of force to compel our enemy to do our will."[11] "In war," Clausewitz wrote, "the destruction of the enemy is admittedly the purpose of all engagements."[12] From this, one infers that "force" is the means and "the compulsory submission of the enemy to our will it is the ultimate object."[13]

Traditional American military doctrine views war as an engagement between sovereign States with professional armies, modern navies, and sophisticated weapons. "War was clean, independent of politics, and fought with big battalions."[14] This ideal notion was carried on throughout U.S. military thinking.

General Douglas MacArthur, one of the most renowned American generals, regarded the purpose of war in this pure absolute form. According to MacArthur, the goal of war was to "[destroy] the enemy's military power and [bring] the conflict to a decisive close in the minimum of time and with a minimum of loss."[15] MacArthur also believed the overriding principle of war was to crush the enemy. Anything less he viewed as "appeasement."[16]

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[5] *See* THOMAS P.M. BARNETT, THE BLUEPRINT FOR ACTION: A FUTURE WORTH CREATING (2005) [hereinafter BARNETT 2005].

[6] U.S. DEP'T OF ARMY, FIELD SERVICE REGULATION 77 (1923).

[7] *See* THOMAS P.M. BARNETT, THE PENTAGON'S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY 107 (2004) [hereinafter BARNETT 2004].

[8] *See* Lecture by James Jay Carafono, *Post-Conflict Operations from Europe to Iraq*, delivered July 13, 2004; published by the Heritage Lectures, July 13, 2007, *available at* http://www.heritage.org/Research/NationalSecurity/hl844.cfm.

[9] *See* BARNETT 2004, *supra* note 7, at 79-88.

[10] Homepage, Carl von Clausewitz (1780-1831) (Aug. 8, 2007), http://www.clausewitz.com/CWZHOME/CWZBASE.htm.

[11] CARL VON CLAUSEWITZ, ON WAR 606 (1976).

[12] *Id.* at 76.

[13] *Id.* at 2.

[14] John Fishel, *Little Wars, Small Wars, LIC, OOTW, the Gap, and Things that Go Bump in the Night*, 4(3) LOW INTENSITY CONFLICT & LAW ENFORCEMENT 377 (1995).

[15] Allen Gottman, ed., *Testimony of General Douglass MacArthur and of Secretary of Defense George Marshall*, *in* KOREA AND THE THEORY OF LIMITED WAR 20 (1967) [hereinafter Testimony].

[16] *Id.* at 26.

Extrapolated from these notions of war, U.S. military doctrine emerged embracing an idea that the primary focus of the military was to fight major wars where vital national interests are at stake.[17] In addition, U.S. military doctrine embraced the idea that there are two distinct and autonomous instruments of national power, one "military" and the other "political."[18] Motivated by this ideal conception of war, U.S. military leaders promoted a complete and rigid separation of military affairs and political influence during wartime. Evidence of this fact is General MacArthur's testimony before the Senate Armed Services and Foreign Relations Committees, where he stated:

> The general definition which for many decades has been accepted was that war was the ultimate process of politics; that when all other political means failed, you then go to force; and when you do that, the balance of control, the balance of concept, the main interest involved, the minute you reach the killing stage, is the control of the military.[19]

MacArthur added, "There should be no artifice under the nave of politics, which should handicap your own men, decrease their chances for winning, and increase their losses"[20]

Despite U.S. military history to the contrary, U.S. military thinking has reflected the conceptions espoused by MacArthur. From the Revolutionary War to the Iraq War, traditional military doctrine called for the military only to fight and win wars.[21]

This entrenched doctrine was further solidified after the ill-fated adventurism in Vietnam, which was later compounded by the Beirut tragedy of 1983. The lingering impact from Vietnam was that the United States should avoid limited wars and nation-building ventures.[22] The aftermath of the 241 Marines that lost their lives by a suicide bomber in Beirut engendered a belief that the U.S. should eschew peacekeeping operations with ambiguous and ill-defined objectives.[23]

Modern U.S. strategists offered narrow conditions for military use overseas. Former Secretary of Defense Caspar Weinberger, a year after the Lebanon bombings, offered a restrictive criterion on the appropriate use of military intervention. In essence, Weinberger expressed readiness to fight whenever vital national interests are at stake and the objective is to win.[24] In addition, Weinberger argued that military action should be initiated as a last resort and with "reasonable assurance" of public and Congressional support.[25]

Colin Powell, former Chairman of the Joint Chiefs, carried this cautious interventionist doctrine forward during and after the Gulf War. In that, he argued that the United States should only intervene with overwhelming force and with an enunciated exit strategy.[26] The U.S. military events in Somalia and Haiti further stigmatized nation-building missions for many policymakers and citizenry alike as an inappropriate use of military assets.[27]

This sentiment is also found in academia. Major General Charles Dunlap, an esteemed author and judge advocate, argued that the "armed forces [should] focus exclusively on indisputably military duties" and "not diffuse [its] energies away from our fundamental responsibilities for war-fighting."[28] Other well-regarded academics have also noted the tendency of

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[17] Fishel, *supra* note 14, at 375-77.

[18] *See* THOMAS K. ADAMS, MILITARY DOCTRINE AND THE ORGANIZATION CULTURE OF THE UNITED STATES ARMY 661 (1990).

[19] Testimony, *supra* note 15, at 26.

[20] *Id.*

[21] *See* Roy K. Flint, *The Truman-MacArthur Conflict: Dilemmas of Civil-Military Relations in the Nuclear Age*, *in* THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1789, at 261 (1991).

[22] *See* George C. Herring, *America and Vietnam: The Unending War*, FOREIGN AFF. 104 (1991).

[23] *See* Alvin H. Bernstein, *The Truth About Peacekeeping*, WKLY. STANDARD 24 (Sept. 22, 1997).

[24] Casper W. Weinberger, The Uses of Military Power, Speech at the National Press Club, Washington, D.C. (Nov., 28, 1984), *available at* http://www.afa.org/magazine/jan2004/military_power.pdf.

[25] *Id.*

[26] Michael Barone, *War Is Too Important to Be Left to the Generals*, WKLY. STANDARD 31 (June 10, 2002).

[27] Nina M. Serafino, Foreign Affairs, Defense, and Trade Division, *Peacekeeping and Related Stability Operations: Issues of U.S. Military Involvement*, Congressional Research Service Report for Congress 4 (July 13, 2006), *available at* http://www.history.navy.mil/library/online/peacekeep_stab%20ops.htm.

[28] Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, 22 PARAMETERS 2 (Winter 1992-93). Currently, Major General and Deputy Judge Advocate of the United States Air Force.

post-conflict and nation-building operations to challenge the values of the warrior ethos and possibly undercut combat effectiveness during wartime. [29]

The Supreme Court has also recognized this line of thinking in their seminal case, *Parker v. Levy*, where the Court stated that "[t]he differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars . . . .'"[30] Even George W. Bush, when a presidential candidate, reaffirmed this idea in the 2000 campaign when he declared: "I don't think our troops ought to be used for what's called nation-building. I think our troops ought to be used to fight and win war."[31]

III. The Reality of Modern Military Intervention

The sentiments expressed in the previous section, however, are not in accord with the realities of military intervention throughout U.S. military history. From its inception, the U.S. military has been involved in small wars, insurgency operations, constabulary missions, and nation-building endeavors. The U.S. military has raided the Barbary Coast;[32] pacified the Western Frontier;[33] fought rebels in the Philippines;[34] conducted constabulary missions in Cuba, Panama, and Nicaragua;[35] occupied Haiti and the Dominican Republic;[36] conducted peacekeeping operations in China;[37] and rebuilt Germany and Japan.[38]

Despite the fact that military leaders and policy makers have promoted the mythos that the armed forces only exist to fight and win major wars of vital national interest, American history has been dominated by the military engaged in operations short of full-scale Clausewitzean war. These countless military skirmishes comprised no frontlines and encompassed no decisive battles. There was no to strategy to annihilate the enemy; instead these events were better characterized on how military tactical force was always subordinate to broader political and diplomatic considerations. Nevertheless, this military reality has never caught up with the American military ethos. As one commentary reveals: "Despite the existence of significant experience and doctrine within the Marine Corps, an even greater amount of experience in the Army, and important foreign sources of relevant doctrine, there is little interest in and less acceptance of the role of the American military in small wars."[39]

Thus, while avoiding the notion, military planners could not ignore the certainty that the U.S. military would intervene in operations other than war.[40] This is no truer than in post-Cold War era. Despite the past-decade long rhetoric that the United

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[29] *See, e.g.*, MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER 418 (1960); SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 61 (1985).

[30] Parker v. Levy, 417 U.S. 733, 743 (1974) (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)).

[31] Presidential Debate between Vice President Al Gore and Governor George W. Bush (Oct. 11, 2000) (transcript available at Commission on Presidential Debates, http://www.debates.org/pages/trans2000b.html).

[32] RICHARD ZACKS, THE PIRATE COAST: THOMAS JEFFERSON, THE FIRST MARINES, AND THE SECRET MISSION OF 1805 (2005); FRANKLIN T. LAMBERT, THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC (2005); JOSEPH WHEELEN, JEFFERSON'S WAR: AMERICA'S FIRST WAR ON TERROR 1801-1805 (2003).

[33] TONY R. MULLIS, PEACEKEEPING ON THE PLAIN: ARMY OPERATIONS IN BLEEDING KANSAS (2004); DURWOOD BALL, ARMY REGULARS ON THE WESTERN FRONTIER, 1848-1861 (2001).

[34] BRIAN MCALLISTER LINN, THE U.S. ARMY AND COUNTERINSURGENCY IN THE PHILIPPINE WAR 1899-1902 (2000).

[35] LESTER D. LANGELY, THE UNITED STATES AND THE CARIBBEAN IN THE TWENTIETH CENTURY (4th ed. 1989); LESTER D. LANGLEY, THE BANANA WARS: AN INNER HISTORY OF AMERICAN EMPIRE 1900-1934 (1983); IVAN MUSICANT, THE BANANA WARS: A HISTORY OF THE UNITED STATES MILITARY INTERVENTION IN LATIN AMERICA FROM THE SPANISH-AMERICAN WAR TO THE INTERVENTION OF PANAMA (1990).

[36] HANS SCHMIDT, THE UNITED STATES OCCUPATION OF HAITI: 1915-1934 (1995). BRUCE J. CALDER, IMPACT OF INTERVENTION: THE DOMINICAN REPUBLIC DURING THE U.S. OCCUPATION OF 1916-1924 (2006).

[37] JOHN KING FAIRBANKS, THE UNITED STATES AND CHINA (4th ed. 1979).

[38] JAMES DOBBINS, ET. AL., AMERICA'S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ (2003).

[39] John Fishel, *supra* note 14, at 379.

[40] Until recently the Department of Defense described these operations as Military Operations Other Than War (MOOTW). As defined in the now discontinued *Joint Chiefs of Staff, Joint Publication 3-07, Joint Doctrine for Military Operations Other Than War (2001)*, MOOTW encompasses:

> A broad range of military operations and support a variety of purposes, including: supporting national objectives, deterring war, returning to a state of peace, promoting peace, keeping day-to-day tensions between nations below the threshold of armed conflict, maintaining U.S. influence in foreign lands, and supporting U.S. civil authorities consistent with applicable law.

JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR II-1 (2001).

States will not commit troops unless vital national interest are at stake and only with overwhelming force,[41] the United States has shown a greater willingness over the last fifteen years to intervene in multifaceted military operations that were anything but total war. Since the early 1990's, the United States has been involved in seven post-conflict stability operations—roughly one nation-building mission every two years.

The United States deployed military troops to Panama (1989), Somalia (1993), Haiti (1994), Bosnia (1996), and Kosovo (1999) with a strategy short of the traditional military "fight and win" objective. Currently, the United States sees its armed forces conducting a full array of post-conflict operations in Afghanistan and Iraq.

The reason for these interventions in a post-9/11 world has become clear. Failed or weak states matter.[42] They matter not only for humanitarian concerns, but also for national security reasons.[43] The 2002 National Security Strategy (NSS) focuses on the potential menace caused by failed states. "America is not threatened less by conquering states then we are by failing ones."[44] In his introductory letter to the NSS, President Bush underscores this reality: "The events of September 11, 2001, taught us that weak states, like Afghanistan, can pose as great a danger to our national interests as strong states."[45]

The 2006 National Security Strategy carries over this notion that the prevailing threat to the United States for the last decade and half comes from nonstate actors located inside failed states.[46] This emphasis on failed states educes the hard reality that the United States military will intervene in stability and reconstruction operations for years to come. These missions will require a rule of law component.[47]

Based on this new reality of military intervention and post-conflict operations, the military establishment is reformulating its doctrine - encompassing what is now known as "stability operations" on equal footing with major combat operations. The Pentagon is slowly coming around to the notion that high-tech weapons and massive firepower are not always beneficial or constructive in modern day military undertakings.[48] Acknowledging today's strategic realities, the military establishment is incorporating "soft" tactics in missions where the goal is not to annihilate the enemy's armed forces but to achieve a political end-state.[49] Thus, after years of trying to limit U.S. involvement in the "lesser included" operations, policy makers and military strategists are launching a momentous endeavor to improve the capability of the military to conduct stability operations. As articulated below, one of the principal lines of operations in stability operations includes rule of law.

IV. The Emergence of the Doctrine of Stability Operations

Since the attacks on America on September 11, 2001, the U.S. military has now come to fully appreciate the importance of stability operations. With America's modern Leviathan force and war-fighting capability, modern U.S. wars have proven to be quick and nearly painless.[50] However, following a cessation of major military operations, the post-conflict environment has proven to be more problematic.[51]

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[41] *See* Condoleezza Rice, *Campaign 2000: Promoting the National Interest*, FOREIGN AFF. (Jan./Feb. 2000), *available at* http://www.foreignaffairs.org/20000101faessay5/condoleezza-rice/campaign-2000-promoting-the-national-interest.html.

[42] *See* 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 361-67 (2004).

[43] *See* John J. Hamre & Gordon R. Sullivan, *Toward Postconflict Reconstruction*, 25:4 WASH. Q., 85, 85 (Autumn 2002); Douglas H. Dearth, *Failed States: An International Conundrum*, 5-2 DEFENSE INTELLIGENCE J. 119, 122-23 (1996).

[44] THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, Sept. 2002, at 1 [hereinafter NATIONAL SECURITY STRATEGY 2002], *available at* http://www.whitehouse.gov/nsc/nss/html.

[45] THE NATIONAL SECURITY STRATEGY 2002, Cover Letter, *supra* note 44.

[46] NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, Mar. 2006, at 15, *available at* http://www.whitehouse.gov/nsc/nss/2006/sectionIV.html.

[47] *Id.* at 16.

[48] *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-27 (Dec. 2006) [hereinafter FM 3-24]. ("Sometimes doing nothing is the best reaction;" "Some of the best weapons for counterinsurgents do not shoot."); Milan Vego, *The Network-Centric Warfare Illusion*, ARMED FORCES J., Jan. 2007, at 17 ("Technology is considered not an aid to war fighters but the very heart of warfare. Everything else is subordinated to the 'system.'").

[49] FM 3-24, *supra* note 48, at foreword. "Soldiers and Marines are expected to be nation builders as well as warriors. They must be prepared to help reestablish institutions and local security forces and assist in rebuilding infrastructure and basic services. They must be able to facilitate establishing local governance and the rule of law." *Id. See generally also* JOSPEH S. NYE, SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS (1994).

[50] *See* Jeffrey Record, *Why the Strong Lose*, PARAMETERS 16, 25-27 (Winter 2005-06).

[51] *Id.*

While this fact is obvious in Iraq, it is also true in Afghanistan. In the region, there has been a resurgence of the Taliban. Insurgency attacks were up 400% from 2005 to 2006.[52] In fact, 2006 has proven to be the bloodiest year since the beginning of U.S. military intervention in 2001.[53] Provincial warlords continue to be the *de facto* rulers outside of Kabul. Opium production is at an all-time high. Crime is on the rise. The lack of essential public services, such as water and electricity, continue to be a major setback. Most ominous, Al Qaeda has regrouped.[54]

The recent post-conflict experiences in Afghanistan (and Iraq) have impelled policy makers within the U.S. government to improve both the planning and execution of stability operations.[55] The Bush Administration, which came into power opposed to the notion of using U.S. military forces to engage in nation-building, has shifted direction by acknowledging that the United States "must also improve the responsiveness of our government to help nations emerging from tyranny and war . . . and that means our government must be able to move quickly to provide needed assistance."[56] In turn, President Bush issued National Security Presidential Directive (NSPD) 44 for the purpose of improving "coordination, planning, and implementation for reconstruction and stabilization assistance for foreign states and regions at risk of, in, or in transition from conflict or civil strife."[57] The Department of State created the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) in order "to enhance our nation's institutional capacity to respond to crises involving failing, failed, and post-conflict states and complex emergencies."[58]

This impetus has also drawn the Department of Defense into an arena that before September 11 it wished to minimize, if not ignore completely. In November 2005, the Deputy Secretary of Defense issued Directive 3000.05, entitled "Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operation."[59] The directive is an unprecedented initiative to declare stability operations as a "core U.S. military mission that the [military] shall be prepared to conduct and support."[60] Moreover, the publication directs stability operations "shall be given priority comparable to combat operations and be explicitly addressed and integrated across all Department of Defense (DOD) activities."[61]

The doctrine of stability operations is a new peculiarity in military literature typically described in a fashion that at first blush appears to be miscellaneous to the traditional function of the military. The term, in and of itself, connotes military operations which are "not war" and missions seemingly best left to civilian agencies to execute.

The 2006 Joint Publication 3-0, *Doctrine for Joint Operations*, defines stability operations in this fashion by stating that stability operations "seek to maintain or reestablish a safe and secure environment and provide essential governmental services, emergency infrastructure reconstruction, or humanitarian relief."[62] Directive 3000.05 echoes the Joint Publicaton 3-0 by delineating the focus of Stability Operations.

> Stability Operations are conducted to help establish order that advances U.S. interest and values. The immediate goal often is to provide the local populace with security, restore essential services, and meet

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[52] Walter Pincus, *U.S. Sees New Al-Qaeda Threat*, WASH. POST, Feb. 28, 2007, at A4.

[53] *Id.*

[54] *Id.*

[55] Phil Kearley, *Stability Operations Concepts and Capabilities Emerging from JFCOM/Joint Experimentation*, U.S. Joint Forces Command, Joint Experimentation Directorate (J-9), at 2 (Nov. 2004). However, the recognition that the U.S. military was not prepared for post-conflict operations goes back to lessons learned from the 1989 U.S. invasion of Panama. *See* RICHARD H. SHULTZ, JR. IN THE AFTERMATH OF WAR: U.S. SUPPORT FOR RECONSTRUCTION AND NATION-BUILDING IN PANAMA FOLLOWING JUST CAUSE (1993).

[56] President George W. Bush, Speech at the International Republican Institute Dinner**,** Renaissance Hotel, Washington D.C. (May 18, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/05/20050518-2.html.

[57] NATIONAL SECURITY PRESIDENTIAL DIRECTIVE/NSPD-44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTING AND STABILIZATION, 1 (Dec. 7, 2005).

[58] *See* Department of State, Office of the Coordinator for Reconstruction and Stabilization website, *available at* http://www.state.gov/s/crs/ (last visited Feb. 2, 2007).

[59] U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS (28 Nov. 2005) [hereinafter DOD DIR. 3000.05].

[60] *Id.* at 2.

[61] *Id.*; s*ee also* REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON INSTITUTIONALIZING STABILITY OPERATIONS WITHIN DOD (Sept. 2005) (urging the Pentagon to accelerate its capabilities to conduct post-conflict stability operations).

[62] JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS V-I (Sept. 2006) [hereinafter JOINT PUB. 3-0].

humanitarian needs. The long-term goal is to help develop indigenous capacity for securing essential services, a viable market economy, rule of law, democratic institutions, and a robust civil society.[63]

The objectives of stability operations are, thus, aimed at deterring continued armed conflict, resolving disputes, providing essential services, and supporting civil authorities. To this end, DOD Directive 3000.05 includes three general tasks involved in stability operations, which include: rebuilding indigenous institutions (e.g. security forces, correctional facilities, and judicial systems); reviving and rebuilding the private sector; and developing representative government institutions.[64]

The characteristics of stability operations are seemingly the antithesis to traditional war fighting ethos. Operational commanders must apply operating principles that differ from traditional principles of war.[65] Andrew Natsios, the former head of U.S. Agency for International Development (USAID), delineates nine principles to be applied in post-conflict stability operations, which include: ownership, capacity building, sustainability, selectivity, assessment, results, partnership, flexibility, and accountability.[66] However, these principles, although easy to define, are often difficult to implement during stability operations. At its basic essence, it means that military strategists must cease viewing the military within the context of conflict and violence and start viewing the military in the context of peace and security. Or as one analyst succinctly put it, strategists must view "war within the context of everything else."[67] A focus on winning wars is only a partial paradigm.

During stability operations, the military must adjust from its "fight to win" doctrine and use of overwhelming force and, instead, employ restrictive, and sometimes complex, rules of engagement. Success must be measured politically and not militarily. Furthermore, the military must work in close coordination with international organizations, non-governmental organizations, other U.S. governmental actors, and host-nation civil authorities; and commanders must accomplish their objective by cooperating and persuading rather than commanding and directing. Lastly, while conducting stability operations, individual tactical decisions can have dramatic and immediate strategic implications. Therefore, senior commanders and junior personnel alike must be strongly familiar not only with the operational factors of time, space, and force, but also with a nation's history, economy, and culture.

These features place unique demands on an operational commander during stability operations. Joint Publication 3-0 notes that while many stability operations will involve other civilian agencies, the "U.S. military forces should be prepared to lead the activities necessary to accomplish these tasks when indigenous civil, [U.S. Government], multinational or international capacity does not exist or is incapable of assuming responsibility."[68] Moreover, the publication adds that "[t]he military's predominant presence and its ability to command and control forces and logistics under extreme conditions may give it the de facto lead in stability operations normally governed by other agencies that lack such capacities."[69] These assertions recognize the reality that military forces in some, if not all, post-conflict stability operations, will be the only governmental entity able of accomplishing the mission.

V. Rule of Law – The Fifth Pillar of Stability Operations

The Office of the Coordinator for Reconstruction and Stabilization has identified five pillars that are germane in stability operations.[70] These essential tasks include: security; governance and participation; humanitarian assistance and social well-being; economic stabilization and infrastructure; and justice and reconciliation.[71]

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[63] DOD DIR. 3000.05, *supra* note 59, at 2.

[64] *Id.*

[65] U.S. DEP'T OF ARMY, ARMY FIELD MANUAL 100-5, OPERATIONS, at 2-4 to 2-6 (June 1993). The nine principles of war as outlined in FM 100-5 are: objective, offensive, mass, economy of force, maneuver, unity of command, security, surprise, and simplicity. *Id.*

[66] Natsios, *supra* note 4, at 4-20.

[67] BARNETT 2004, *supra* note 7, at 7.

[68] JOINT PUB. 3-0, *supra note* 62, at V-24.

[69] *Id.*

[70] *See* Department of State, *Post-Conflict Reconstruction Essential Tasks*, Apr. 2005, *available at* www.state.gov/documents/organization/53464.pdf; *see also* ROBERT C. ORR, ed., WINNING THE PEACE: AN AMERICAN STRATEGY FOR POST-CONFLICT RECONSTRUCTION (2004) (identifying only four pillars of post-conflict reconstruction: security, governance and participation, social and economic well-being, and justice and reconciliation).

[71] *Id.*

The justice and reconciliation or rule of law pillar involves building and maintaining a legal system that is characterized by "well-functioning, respected courts, fair and adequate legal codes, well-trained police, and respect for civil and political rights."[72] These elements are in an effort to bring about a larger and broader end-state that is: establishing a government bound by the law, guaranteeing equality before the law, providing law and order, ensuring an efficient and predicable judicial system, and promoting human rights.[73] However, the goal of rule of law is not ultimately realized except through norm-creation and cultural conversion.[74] "Without a widely shared cultural commitment to the idea of the rule of law, courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper."[75]

VI. Rule of Law Operations in Afghanistan – The Role of Judge Advocates

The consequences of the Pentagon embracing stability operations on the Judge Advocate General (JAG) community cannot be completely realized at this point. However, one thing has become apparent as a constant in this discussion—that is the idea that rule of law has emerged as a crucial and indispensable element to success in post-conflict environments. And JAs are at the "front lines" of the rule of law campaign in post-conflict Afghanistan.

The challenges to rule of law in post-war Afghanistan are formidable. In the past thirty years, the country has endured a decade long occupation and authoritarian rule by the Soviets, years of internal fighting and civil unrest, followed by despotism and oppression by the Taliban.[76] This long and tragic history has left Afghanistan one of the poorest countries in the world.[77] In turn, this has produced a country with a weak central government and an economy largely dependent on foreign aid.[78]

After nearly three decades of war, chaos, and repression, much of the physical infrastructure has been destroyed and social services have been seriously disrupted.[79] Compounding the problem, Afghanistan suffers from low educational levels, scarcity in safe drinking water, poor health conditions, inadequate medical care, and shortages of safe housing and electricity.[80] Less than fifteen percent of the land is arable;[81] and there is a heavy reliance on poppy cultivation and opium trade accounting of almost sixty percent of Afghanistan's GDP and supplying over eighty percent of the world's heroin consumption.[82] To boot, the countryside is plagued with land mines and unexploded ordnance and less than twenty percent of the roads are paved.[83]

As would be self-evident under these conditions, the Afghanistan rule of law apparatus also suffers from serious systemic deficiencies. Warlords continue to operate with impunity.[84] Corruption is rampant.[85] Salaries for judges and prosecutors are extremely low.[86] The judges and prosecutors that are employed tend to lack formal legal education.[87] There

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[72] JANE STROMSETH, ET AL., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 69 (2006).

[73] *See* Thomas Carothers, *The Problem of Knowledge*, *in* PROMOTING THE RULE OF LAW ABROAD 15-28 (Thomas Carothers ed. 2006).

[74] *See* John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT'L L. 811, 860 (1997). *See also* STROMSETH, *supra* note 72, at 75.

[75] STROMSETH, *supra* note 72, at 76.

[76] MICHAEL SCHEUER, IMPERIAL HUBRIS 30-37 (2004).

[77] U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK (2007) [hereinafter CIA FACT BOOK].

[78] *Id.*

[79] Dennis A. Rondinelli, *International Goals and Strategies for Afghanistan's Development: Reconstruction and Beyond*, *in* BEYOND RECONSTRUCTION IN AFGHANISTAN: LESSON FROM DEVELOPMENT EXPERIENCE 14 (John D. Montgomery & Dennis A. Rondinelli eds., 2004).

[80] CIA FACT BOOK, *supra* note 77; Larry P. Goodson, *The Lessons of Nation-Building in Afghanistan*, *in* NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ 154-55 (Francis Fukuyama ed. 2005); Rondinelli, *supra* note 79, at 13-14.

[81] Rondinelli, *supra* note 79, at 13-14.

[82] Goodson, *supra* note 83, *in* NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ 155; *see also* CIA FACT BOOK, *supra* note 80. For a comprehensive analysis of Afghanistan's opium economy see *The Opium Economy in Afghanistan: An International Problem*, United Nations, Office of Drug and Crime (2003).

[83] Rondinelli, *supra* note 82, at 13-14.

[84] Barnett R. Rubin, *Saving Afghanistan*, FOREIGN AFF. (Jan./Feb. 2007), *available at* http://www.foreignaffairs.org/20070101faessay86105/barnett-r-rubin/saving-afghanistan.html.

[85] *Id.*; *see also* Paul Watson, *In Afghanistan, Money Tips the Scales of Justice*, L. A. TIMES, Dec. 18, 2006, at A1.

[86] Interview with COL Richard E. Fay, Rule of Law Officer, Combined Forces Command in Kabul, Afghanistan (Sept. 6, 2006) (noting that an Afghan civil judge makes about half the salary of a private in the Afghan National Army) [hereinafter Fay Interview].

are only a handful of licensed lawyers in Afghanistan for a population of thirty-one million.[88] Most police are illiterate.[89] The physical infrastructure, especially prisons, in the hinterlands is in disrepair and substandard.[90]

The Afghan legal system also presents unique challenges. In Afghanistan, legal sources emanate from three separate legal traditions: Sharia law stemming from the Qur'an and Sunna; Secular law modeled after the French Napoleonic system, and Phushtunwali deriving from a centuries old honor-based tribal law.[91] While all three have co-existed for hundreds of years, they have never been fully reconciled.

The mandate for rule of law operations in Afghanistan occurred shortly after the U.S. invasion in October 2001. On 5 December 2001, the international community concluded a Security Council agreement endorsing The Agreement on Provisional Arrangement in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement).[92] Among other things, the parties stipulated that achieving the rule of law was a fundamental and central goal among reconstruction efforts in Afghanistan.[93] The Bonn Agreement set a desired end state in Afghanistan with a "domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions."[94]

The Bonn Agreement was the foundational document that outlined the international community's effort to rebuild Afghanistan based on a "lead nation" model. In essence this approach put different country teams in the lead for developing the various post-conflict pillars. Germane to the rule of law field, Italy was charged with reforming the Afghan judicial system.[95] Germany was charged with developing the Afghan National Police.[96] The United States was given the mandate to reform the Afghan National Army, including military law reform.[97]

At the theatre command level, the central objective of the rule of law mission in Afghanistan is to build self-confidence in an embryonic government emerging from a quarter of a century of war, anarchy, and tyranny.[98] Put another way, U.S. teams sought to bolster the ability of the new government to govern by the rule of law and inculcate Afghan society with the belief in the rule of law.[99]

Along with these conditions, Combined Forces Command's operational lines made rule of law a high priority.[100] The CFC-A's guidance was threefold. First, it directed military personnel to seek out realistic, affordable, and practical justice sector improvements.[101] Second, capacity building would require a holistic approach by linking key elements of rule of law, including courts, prisons, police, and lawyers.[102] Lastly, it recognized a commitment to indoctrinate both Afghan government officials and the population with the firm belief in the rule of law.[103]

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[87] *Id.*

[88] *See* Amnesty International, *Afghanistan: Re-establishing the Rule of Law* 31-33 (Aug. 14, 2003), *available at* http://www.web.amnesty.org/library/index/engasa110212003.

[89] Fay Interview, *supra* note 86.

[90] *Id.*

[91] *See* Frank E. Vogel, *An Introduction to Law of the Islamic World*, 31 INT'L. J. LEGAL INFO. 355 (2003); *see also* Special Report, *Honor Among Them: Thieves, Murderers, Rapists; and How the Pushtuns' Ancient Trial Code Is Fighting for Survival Against Radical Islam*, ECONOMIST, Dec. 19, 2006, at 36.

[92] Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001) [hereinafter Bonn Agreement].

[93] *See* Charles H. Norchi, *The Rule of Law as a Goal in Afghanistan*, *in* BEYOND RECONSTRUCTION IN AFGHANISTAN: LESSONS FROM DEVELOPMENT EXPERIENCE 118 (John D. Montgomery & Dennis A. Rondinelli eds., 2004).

[94] Bonn Agreement, *supra* note 92, art. II.2.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] Interview with COL Manuel Supervielle, Staff Judge Advocate, Combined Forces Command, in Kabul, Afghanistan (July 19, 2006) [hereinafter Supervielle Interview].

[99] *Id.*

[100] Fay Interview, *supra* note 86.

[101] *Id.*

[102] *Id.*

[103] *Id.*

Combined Security Transition Command-Afghanistan (CTSC-A),[104] a subordinate command to both CFC-A and the U.S. Embassy in Afghanistan, also had operations that promoted the rule of law. The CSTC-A's mission statement states that it "in partnership with the Government of the Islamic Republic of Afghanistan and the international community, is to plan, program and implement . . . reforms of the Afghan National Security Forces in order to develop a stable Afghanistan, strengthen the rule of law, and deter and defeat terrorism within its borders."[105]

The CSTC-A's Strategic Reform Division (SRD) was charged with reforming the Afghan National Army (ANA), while the Police Reform Division (PRD) was responsible for reforming the Afghan National Police (ANP) force.[106] Within each division there were U.S. legal mentors to advise and train the ANA and ANP legal personnel. For example, the SRD legal team role was to assist the Head of the Legal Department for the General Staff of the Afghan National Army, in essence the Judge Advocate General of the ANP. Their legal mentor counterparts at PRD had a similar task advising the Legal Advisor to the Minister of Interior and Chief of Legal Affairs for the ANP.

Recognizing that legal judicial reform was a precondition for a secure, democratic, and economically viable Afghanistan, rule of law practitioners took on a whole host of initiatives to maximize legal reform in a fledgling government. Judge advocates' involvement in rule of law took on one of several roles, including as advisers to commanders and their staff on legal reform initiatives, as instructors to Afghan National Army attorneys on military justice, as mentors to judges and governmental officials, as drafters of Afghan laws and presidential decrees, and as facilitators at provincial rule of law conferences.

During the summer of 2006, one of the feature accomplishments by the CFC-A rule of law team was to draft a U.S. strategic plan for the implementation of the rule of law program. Surprisingly, five years after the U.S. invasion of Afghanistan there was no overarching design on how the United States would support rule of law efforts in country. On behalf of the Office of the Director for Rule of Law at the U.S. Embassy in Kabul, judge advocates crafted a five-year plan on rule of law initiatives. The master document listed a vision, key participants, opportunities and threats, and key detailed initiatives required to succeed in Afghanistan. More importantly, it described the desired end state and the resources necessary to reform the Afghan justice system.[107]

Rule of law practitioners were active in drafting necessary laws and regulations believed to be vital to the government's effectiveness, creating a secure setting, and fostering economic viability. For example, the SRD team was instrumental in developing ANA's Military Criminal Procedure Code and military punitive articles.[108] The PRD counterparts worked on drafting and implementing internal police disciplinary policy and regulations. The international and operational law team at CFC-A drafted decrees, laws, and regulations regarding border control and criminal procedure.

Rule of law practitioners were the first to recognize that creating a functional legal system requires more than the enactment of necessary laws, but requires a well-functioning judicial system and an ethical law enforcement apparatus to ensure uniform and fair application of those laws. To this end judge advocates were instrumental in mentoring various Afghan officials that ranged from high ranking ministerial officials to court-martial defense attorneys on the full gambit of legal issues including military justice, international law of armed conflict, human rights law, environmental law, ethics, fiscal law, and personnel law. However, efforts also included management issues such as organizational staffing, case management, anti-corruption reform, investigatory actions, and police tactics. [109]

On a regular basis, judge advocates met with governors and provisional justice sector officials to assess their concerns and priorities in rule of law reform. Military teams routinely coordinated their efforts and information with U.S. Embassy officials and Provincial Reconstruction Teams to identify targets of opportunity. In an effort to extend the central government's authority, judge advocates in close coordination with Department of State, Department of Justice, USAID, and non-governmental agencies, facilitated in launching provincial justice programs, such as in Wardak Province located twenty miles southwest of the capital city. The success in the Wardak model has led to U.S. Embassy sponsored initiatives in four other provinces with the hope of expanding the process to other provinces.[110]

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[104] CSTC-A, *Fact Sheet* (Apr. 12, 2006), *available at* http://oneteam.centcom.mil/fact_sheets/CSTC-A%20Fact%20Sheet%20-%2012%20April%2006.pdf.

[105] CSTC-A, *Mission Statement, available a*t http://oneteam.centcom.mil/default.aspx (last visited Sept. 25, 2007).

[106] CSTC-A, *Fact Sheet*, *supra* note 104.

[107] Fay Interview, *supra* note 89.

[108] Interview with Lieutenant Commander Scott E. Johnson, Legal Mentor, Strategic Reform Division, CSTC-A, in Kabul, Afghanistan (Aug. 11, 2006). *See also* Major Sean M. Watts & Captain Christopher E. Martin, *Nation-Building in Afghanistan: Lessons Identified in Military Justice Reform*, ARMY LAW., May 2006, at 1.

[109] *Id.*

[110] Fay Interview, *supra* note 86.

Judge advocates were also active members of Provincial Justice Conferences. In an effort to construct a coordinated and holistic approach to rule of law, judge advocates under the auspices of the U.S. Embassy and working with other coalition and international partners, would meet once a month with local governmental officials including judges, police, prosecutors, prison wardens, and public defenders. The aim was to assess the current state of the legal system and provide a comprehensive and integrated way forward.[111]

This assessment included tangible issues like the condition of the physical infrastructure and needed equipment. It included collecting demographics and criminal data in the province, such as the population size, number of police, number of arrests, ongoing criminal cases, and prison population breakdown. But these assessments also included subjective assessments such as the condition of defendants while in confinement, access to defense clients at various states of the criminal process, and public perception of the secular legal system. Once a full and comprehensive assessment was done with input from all players, rule of law practitioners would move forward on an integrated strategic plan and coordinate efforts with the local government.

Lastly, judge advocates facilitated and supported efforts to rehabilitate the infrastructure and apparatus of the Afghan justice system utilizing Commander's Emergency Response Program (CERP) funds.[112] These rule of law endeavors included constructing modern courthouses and prisons, providing vehicles for a justice motor-pool, funding defense counsel services, and launching public awareness campaigns. In addition, they secured funding to equip facilities with office equipment, furniture, vehicles, and supplies essential for a functioning justice system.

VIII. The Missing Link – The Seventh Core Competency and Rule of Law Joint Command

Added to the cavalcade of internal challenges confronting Afghanistan, there is one major factor that greatly impedes rule of law progress in Afghanistan. The simple fact is that there are few rule of law operators in Afghanistan, a country the size of Texas; and the ones who were there tended to have no training in judicial reform or foreign development experience. Thus, rule of law endeavors were proving much more problematic to implement not only because of the conditions in Afghanistan, but also because of the dearth of rule of law operators and paucity of rule of law training.

This problem is compounded by the fact that there is limited information to judge advocates preparing to deploy to Afghanistan. As one judge advocate put it, "Anecdotally, we understand that the judicial system in Afghanistan needs great work at the provincial and local levels. Without accompanying data, however, it is difficult to determine where best to begin our efforts."[113]

Although the United States often referred to the rule of law as one of its highest priorities for Afghanistan post-conflict goals, the necessary manpower fell well short of effectively reaching the desired end state. The joint manning document (JMD) only called for one O-4 (Army major) "rule of law" judge advocate officer (Army major) in the CFC-A SJA's office. The CSTC-A was slated only for one O-5 (Navy commander), one O-4 (Navy lieutenant commander) judge advocate, and one contract civilian. On the Strategic Reform Division, the JMD only called for one civilian contractor to work with the entire Ministry of Interior and the ANP.

While the JMD required only a few judge advocates's to conduct the rule of law mission, the reality on the ground revealed something quite different. In CFC-A, the SJA's office enlarged the rule of law team by repositioning an O-6 judge advocate (Army colonel) at the helm and adding one other O-6 (Navy captain). In addition, the CFC-A Civil-Affairs directorate staffed an O-5 judge advocate (Army lieutenant colonel), whose focus was on rule of law.

At the CSTC-A command, restructuring was also required to handle the demand of the rule of law goal. The SRD team was augmented by an O-3 judge advocate from the Defense Institute of International Legal Studies. And the SJA at CSTA-A also devoted much of his time to assisting the one civilian contractor at SRD toward reforming legal issues affecting the Afghan police force.

One striking fact about the breadth and weight of rule of law missions among U.S. judge advocates in Kabul arose during interviews. Out of the eighteen judge advocates assigned to CFC-A and CSTC-A during the summer of 2006, fifteen of them

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[111] *Id*.

[112] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109–163, § 1202(a), 119 Stat. 3136, 3455-56. For a general overview and brief history and purpose of CERP, *see* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK 273-74 (2006); *see also* LTC Mark Martins, *No Small Change of Soldering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 1.

[113] Memorandum, LTC Paul S. Wilson, Staff Judge Advocate, 82nd Airborne Division, to Director, Center for Law and Military Operations, subject: Afghanistan Rule of Law Initiatives (30 Nov. 2006) (on file with CLAMO).

were conducting rule of law operations in one form or another at least fifty percent of the time. That is, over eighty percent of judge advocates stationed at Kabul were fully engaged in rule of law. Thus, although military attorneys may have deployed expecting to practice operational law[114] or one of the six core legal competencies of JAG community,[115] once on the ground they were performing tasks to bring about the legal reform in a foreign country. The logical conclusion from this factor is that the legal teams in Afghanistan were not staffed for one of the emerging core competencies, namely rule of law reform.

Moreover, judge advocates were not trained for rule of law operations. As articulated by current military doctrine, the mission of the judge advocate is "to provide professional *legal support* at all echelons of command throughout the range of military operations."[116] As such, military attorneys are trained to provide legal advice and services to assist military operations; but not to act as planners or operators performing military operations. However, the experience in Afghanistan is proving that this model is outdated and causing a capability gap. The need to recognize rule of law as a core competency is driven by on-the-ground imperatives.

During my three-month deployment, I interviewed numerous judge advocates from each service, coalition military attorneys from Canada and United Kingdom, and held discussions with Afghan government lawyers. While those I met provided some practical or tactical lessons learned, most were eager to discuss systematic transformation measures that would impact on the strategic rule of law mission in country. In other words, the major theme running through all my discussions was the complexity of rule of law operations and the great necessity of understanding the broader context of development, reconstruction, and reform in post-conflict societies.

If there was one generally agreed-upon lesson from rule of law operators in Afghanistan, it is this: judge advocates will have to gain additional competencies and expertise in rule of law operations in order to effectively execute the broader U.S. post-conflict mission. Put another way, the real lesson drawn from operations in Afghanistan signal that the judge advocates should develop new skill sets in rule of law and possibly restructure itself to strengthen future U.S. engagements in post-conflict stabilization and nation-building efforts. The current model of on-the-job training was insufficient and learning on the fly at times was counterproductive to the intricacies and complexities of rule of law missions in post-conflict Afghanistan.

These suggested measures ranged from requiring judge advocates to acquire cross-cultural training and language skills to recognizing rule of law as a core competency within the JAG community. The common thread is that extensive training and schooling must be designed and implemented to prepare the next generation of judge advocates participating in international development and reconstruction. Judge advocates must be schooled in a multidisciplinary program that has more emphasis on reconstruction policy and international aid than with the practice of military law. Simply put, to effectuate nation-building strategies expected by politicians and demanded by theater commanders will require expertise in broader issues of political reform, development, and reconstruction.

The challenges associated with identifying the scope and applicability of rule of law in relation to post-conflict operations are facets at every level of command – from the provincial reconstruction team to the strategic headquarters. There is no doubt that assiduous judge advocates have made a tremendous contribution to the rule of law operations in Afghanistan. There is, however, a need for greater scrutiny directed to strategy, policies, doctrine and training in order to maximize efforts.

Truth be told, most judge advocates were not adequately prepared for such missions conceptually or organizationally, and often had difficulty assigning the abstract concept of "rule of law" an operational meaning inside a non-western state with alien norms and institutions.[117] The only genuine solution is that military attorneys must develop a real foundation in nation-building programs and genuine expertise in rule of law.

Given the role of the State Department as the lead agency in post-conflict operations and the non-kinetic nature of rule of law, some may argue that rule of law operations are entirely within the remit of civilian governmental agencies. This position is misguided. This view fails to consider that the military may at times be the only governmental entity that can conduct post-conflict operations.[118] As one source candidly described most post-conflict operations:

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[114] Operational Law is that" body of domestic, foreign, and international law that directly affects the conduct of operations." U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 3-2 (1 Mar. 2000).

[115] Judge advocates' competencies: military justice, international law, administrative law, civil law, claims, and legal assistance. *Id.* at 3-1 through 3-16.

[116] *Id.* at 1-1 (emphasis added).

[117] *See* Glenn Kessler & Thomas E. Ricks, *The Realists' Repudiation of Policies for a War, Region*, WASH. POST, Dec. 7, 2006, at A1. "Indeed, among the lessons brought home by U.S. trainers over the past three years are that many were unprepared for the task and that the mission is extremely difficult. It requires knowledge not only of U.S. combat operations but also of foreign weaponry and, most of all, of Iraqi culture." *Id.*

[118] *See* FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994 – 2006 (2006).

> [T]he military on the ground represents the only capability to manage the impact of a leadership vacuum and head off a rapid spiral into lawlessness and human tragedy. However experienced or talented civilians may be, the military will have the main responsibility for establishing and maintaining public order, security, and emergency services in an immediate post-combat setting.[119]

Others may assert that this is a purely civil affairs unit responsibility. However, the reality on the ground is that it is a JAG operation. While civil affairs units can assists in logistics and reconstruction, it will be lawyers who draft laws, lawyers who train fellow lawyers, and lawyers who mentor governmental officials. There will be a need for military attorneys, along with law enforcement officials, to adequately train police on issues of basic criminal law, search and seizure, and human rights. Judge advocates will be used to train foreign military personnel on the law of armed conflict and detention operations.

While judge advocates will inevitably rely on their legal education and experience, rule of law operations will require broader skill sets. Incorporating rule of law as a subset of any existing core competency (such as operational or international law) is an incongruous mixture of professional disciplines. Rule of law is not about practicing law, but more akin to managing a political campaign or leading a community activists group; only in today's reality judge advocates are compelled to do so in countries that they know little about and in a language they do not understand.

If the JAG community envisions conducting rule of law operations and supporting other development projects now and in the future, policy makers must be prepared to train the next generation of military attorneys in international development encompassing a multidisciplinary paradigm model that combines economic conceptions, cultural and linguistic understandings, and comparative political and legal systems. This proposal is the result of several underlying principles.

First, a cursory understanding of religious, cultural, or legal aspects of a society is not sufficient to conduct successful rule of law operations.[120] Laws do not exist in isolation, but are shaped by political, cultural, and economic characteristics of the society to which they apply.[121] Lesson learned from those on the ground and from Afghan commentary is that lack of cultural awareness by westerners was a major impediment to mission attainment. Rule of law operators must become intimately knowledgeable of the societal nuisances of a country and local conditions to implement sustainable and legitimate rule of law programs.[122]

Second, western rule of law operations tend to focus on western speaking elites and technocrats without fully integrating a country's other legitimate power players or all-together ignoring grass-root political elements. This flawed approach is analogous to public health aid workers who concentrate their efforts on urban centers, hospitals, and doctors, overlooking rural populations, indigenous health systems, and nurses.[123] This top-down approach is particularly apparent in Afghanistan. Operators must, at minimum, recognize the non-state, but legitimate, power brokers of a region and how they effect the role of the state institution.

Third, rule of law operators must fully understand the basic political framework of post-conflict operations (e.g. the Bonn Agreement in Afghanistan) and understand the U.S. team leader's strategic objectives and the theatre commander's intent. In addition, rule of law operators must be able to readily identify partners and forge cooperative alliances with the interagency and international rule of law players.

Fourth, rule of law operations require fluent speakers in the indigenous language or very capable and legally trained interpreters.[124] While the Pentagon has launched programs to bolster foreign language proficiency of military personnel,

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> It should be noted that as it relates to capacity to conduct Rule of Law operations, no agency appears to have such an organic capability. At best, such capacity can be cobbled together from skill sets from among the various agencies. In environments where active combat operations are on-going, the military may be the only agency that can provide the force protection necessary to maintain freedom of movement on the ground.

Id. at 126.

[119] *See* REPORT OF AN INDEPENDENT TASK FORCE SPONSORED BY THE COUNCIL ON FOREIGN RELATIONS, IN THE WAKE OF WAR: IMPROVING U.S. POST-CONFLICT CAPABILITIES 13 (2005).

[120] *See* Manuel E. F. Supervielle, *The Geneva Conventions and the Rules of War in the Post-9/11 and Iraq World: Islam, the Law of War, and the U.S. Soldier*, 21 AM. U. INT'L L. REV. 192, 200 (2005).

[121] Frank Upham, *Mythmaking in the Rule-of-Orthodoxy*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 75 (Thomas Carothers 2006).

[122] Even with contextual insight and knowledge directly influencing legal reform is extremely difficult. *See* John. V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT'L L. & COM. REG. 71, 81 (1998).

[123] Stephen Galub, *A House Without a Foundation*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 106 (Thomas Carothers ed. 2006).

[124] Tom Bowman, *Pentagon to Bolster Language Skills*, BOSTON GLOBE, Jan. 2, 2006. "The U.S.-led missions in Iraq and Afghanistan have exposed the inability of most military personnel to converse in Arabic or the primary languages of Afghanistan, Dari Persian, and Pashtu. Such a dearth in knowledge

there is no endeavor to incorporate such programs in the rule of law arena. Concepts in law are highly complex and nuanced and are not often directly translatable. In addition, not everyone has the same concept of what a specific legal term means or ought to mean. Even the basic term "law" does not translate effectively in some Islamic languages.[125]

Fifth, rule of law is not a technical problem, but a social and political process.[126] Rule of law operations have more in common with an election than they do with the practice of law, in that they attempt to convince officials and citizenry alike on the benefits of a particular legal system. A generic template approach is an approach for failure. Successful rule of law methods and implemented programs in one country may not, and likely will not, travel. Although conceptual notions will undoubtedly link these situations, rule of law practitioners must fully understand the context to which they enter to effectively tailor and personalize each operation to the specific culture of a country in order to be perceived as legitimate and functional.

What do these underlying principles mean in terms of force structure? Despite the recognition that rule of law is an important subset of post-conflict operations, the U.S. military does not have the right structural capability to conduct rule of law operations. The mandate is scattered, roles tend to overlap, and authority is unclear. The result is an ad hoc response to rule of law operations during post-conflict missions. As one expert stated:

> Each time we have sent out new people to face old problems, and seen them make old mistakes. Each time we have dissipated accumulated expertise after an operation has been concluded, failing to study the lessons and integrate the results in our doctrine, training and future planning, or retain and make use of the experienced personnel in ways that ensure the availability for the next mission when it arrives.[127]

An ad hoc response to a "core U.S. military mission" is no longer good enough. A proposed solution, would be for the military to stand up a joint command with its own budgetary authority and personnel resources that is ready to respond to rule of law missions. This "Rule of Law Joint Command" would be comprised of a robust staff, commanded by a general or flag officer, with a mandate to manage resources and planning regarding military rule of law operations. It would maintain its own major operational budgetary authority that would allow rapid financial dispersal to host country entities for development and reconstruction projects. The Joint Command would be able to develop permanent contacts with the interagency, coordinate and plan with international partners, and fashion relationships with nongovernmental agencies. In addition, it would be able to coordinate deployment efforts of rule of law experts and interpreters and provide reach back capability for rule of law operators out in the field.

The Rule of Law Joint Command would develop best practices, procedures, and techniques tailored to specific regions and legal systems in the world; and would maintain a database of rule of law reports and studies that would aid policy makers and military planners. Personnel would garner regional and linguistic expertise aligned with the current Combatant Command structure. The Joint Command would develop training and planning capabilities on permanent bases. Moreover, it would coordinate deployment of trained and competent military attorneys in rule of law overseas assignments.

The Joint Command would also manage and facilitate continuity and unity of effort.[128] Legal transformation and institutional judicial reform take a considerable amount of time and effort. In order for U.S. personnel to be catalysts for change, it will require development of profound relationships and rapport with influential host-country individuals. This, in turn, requires that continuity of effort be established for the duration of operations. However, this was not the case in Afghanistan. Continuity and coherence in implementing rule of law initiatives have been undercut by the rapid turnover among judge advocates.

In a Muslim country where personal relationships and trust are prized for deal making, the relatively rapid turnover of judge advocates disrupted their influence and impeded their ability to steer groups toward consensus.[129] While the effectiveness of rule of law operations will obviously depend on the skills and abilities of individual practitioners, it will also greatly depend on the ability of those practitioners to regularly meet with host-nation officials and attend consecutive grass-roots meetings with a harmonized position, unified effort, and consistent approach. An institutional body dedicated to the

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comes at a particularly sensitive time, when the Americans must work closely with the local populations, training soldiers and police, and helping create government institutions." *Id.*

[125] Vogel, *supra* note 91, at 356-57.

[126] Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar./Apr. 1998, at 95. Upham, *supra* note 121, at 75.

[127] *Next Steps in Iraq and Beyond: Before the S. Comm. on Foreign Relations*, 107 Cong. (2003) [hereinafter Dobbins Statement] (statement of James Dobbins, Director of RAND International Security and Defense Policy Center).

[128] Interview with Captain Christopher E. Martin, Defense Institute of International Legal Studies, in Kabul, Afghanistan (July 18, 2006).

[129] Supervielle Interview, *supra* note 98.

rule of law mission would greatly off-set any of these shortcomings by accounting for the predictable long-term duration of post-conflict missions.

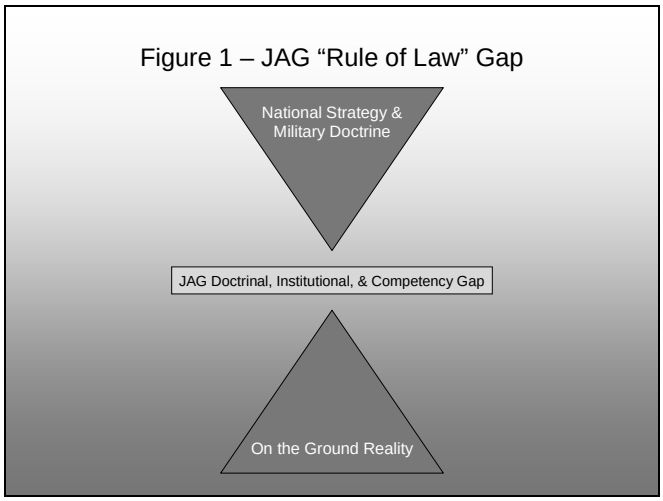
IX. Conclusion

One of the central national lessons gained from the U.S. experience in Afghanistan is that failed states directly affect U.S. security.[130] Following the withdrawal of the Soviet Union, Afghanistan had become a sanctuary for global terrorists. While America chose to ignore these states in the 1990's, September 11 taught us to do so was plainly myopic and simply fatuous.

Our current primary enemy is global terrorists. What policy and military strategists must come to realize is that the central gravity of terrorism is extremism. At its basic essence, extremism is a state of mind; and a state of mind cannot be beaten by military raids. Extremism may only be defeated by helping establish security, political, economic, and social structures to allow a society to alleviate the causes of extremisms – namely poverty, social isolation, illiteracy, and hopelessness. While combating terrorism will require military force along with law enforcement, extremism will only be eliminated through the time consuming process of development, reconstruction, and reform.

Forcefully removing degenerate regimes and killing or capturing terrorists is now recognized as a necessary, but incomplete strategy. Kinetic operations can only provide time and space. It can not be the solution in and of itself. Military war fighting may only provide the environmental conditions for political by-in. In other words, force is necessary, but never sufficient; and a political process is needed for total victory. This means that all groups must be able to draw away from terror or armed resistance and choose legal mechanisms to solve their disputes. Ultimately, this can only be done using soft tactics, such as rule of law programs, and not by using heavy handed weaponry.

In the past, the military has "treated each new [nation-building] mission as if it were the first, and more importantly, as if it were the last."[131] The implications of the last fifteen years regarding stability operations, however, is that institutionalized capacity and competency is now required.[132] A continued absence of a functional institutional construct "reflects an outdated and wishful attitude that stabilization and reconstruction operations are extraordinary rather than routine."[133] An institutional rule of law framework is now required due to U.S. defined national security interests and the Pentagon's new doctrinal paradigm regarding post-conflict operations. More importantly, it is also required because judge advocates are in-fact conducting rule of law operations in theatre. However, as Figure 1 illustrates, what currently exists is a doctrinal, institutional, and competency gap within the JAG community regarding rule of law operations.



[130] John J. Hamre & Gordon R. Sullivan, *Toward Postconflict Reconstruction*, 25 (4) WASH. Q. 85–96 (Autumn 2002).

[131] Dobbins Statement, *supra* note 127.

[132] *Id.*

[133] REPORT OF AN INDEPENDENT TASK FORCE, CO-CHAIRS SAMUEL R. BERGER AND BRENT SCOWCROFT, SPONSORED BY THE COUNCIL ON FOREIGN RELATIONS, IN THE WAKE OF WAR: IMPROVING U.S. POST-CONFLICT CAPABILITIES (2005).

Although judge advocates are conducting rule of law operations in Afghanistan (and Iraq), it will not be the last time. As much as the JAG community would like to focus on the core legal competencies, rule of law operations cannot be disregarded or minimized. As the experience in Afghanistan has clearly confirmed, military lawyers are acting operators crafting and implementing rule of law initiatives. The ad hoc and haphazard practice, however, is not enough for such an important strategic component in post-conflict operations. Rather, Afghanistan underscores the critical importance of a new strategic paradigm.

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

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"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

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[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.

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[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]

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[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

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[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]

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[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/COMMAND 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

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[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 programs[60] 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]

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[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 Conflic*t, 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-refoulment* 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.

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[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 muddied 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

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[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

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[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 are 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.

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[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.

The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—
A Look at the Task Force 134 Process and the Future of Detainee Prosecutions

Major W. James Annexstad[1]

"True peace is not merely the absence of tension: it is the presence of justice."

—Martin Luther King, Jr.

I never understood how a single event could permanently scar a person's memory, until 11 September 2001. Now, like most Americans, I will never forget the events that took place that day. In addition to scarring my memory, those events triggered the next generation of world conflict, the Global War on Terror. This latest conflict has placed many new demands on today's military. In addition to being able to fight and win the war on terror, we, as uniformed servicemembers, are now leading a global hunt to bring terrorists to justice.[2] It is this hunt that has increased the role judge advocates (JAs) are playing and, for the first time in history, the contribution of JAs may determine whether this operation is deemed a success.

When you hear the word "justice" in connection with war, you may assume justice means legally killing terrorists under authorized rules of engagement. But what about the terrorists we capture? How do we bring these individuals to justice? Is it enough to detain them? Or is more required? This article examines how we have answered these questions in Iraq. Specifically, it explores the Central Criminal Court of Iraq (CCCI) and the law as it applies to the prosecution of insurgents. Furthermore, it addresses the limitations of the CCCI and provides a general overview of Task Force 134 (TF 134), the joint task force charged with bringing these individuals to justice.

Before deciding how to bring these terrorists to justice, one must first address their legal status. Under international law, is the insurgent a lawful or unlawful combatant? The answer is crucial, because if designated as lawful, a combatant would be immune from prosecution for participation in the armed conflict and may be entitled to the protections given to a prisoner of war under the Fourth Geneva Convention of 1949.[3] Conversely, if designated unlawful, a combatant would receive no such immunity and would be subject to the criminal laws of his captor.[4] The criteria to identify a lawful combatant are taken from Article 9 of the 1874 Brussels Declaration and were later incorporated into the language of Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War.[5] These criteria are now considered customary international law.[6] The basic requirements of Article 4 are that each army has at its head a leader responsible for the actions of his subordinates, and that members wear a distinctive badge recognizable at a distance, carry arms openly, and conform to the laws of war.[7] An unlawful combatant is merely a civilian who takes a direct role in the hostilities without the benefit of combatant immunity. Thus, an unlawful combatant who participates in normal acts of combat, for example, participating in an ambush of government forces, may be prosecuted for possession of illegal weapons, murder, or even mere membership in the insurgent group. The status of the insurgents in Iraq has been the subject of much debate over the last four years. However, the answer seems clear. There have been no reports of insurgents wearing uniforms, bearing arms in the open, or displaying an emblem or symbol that distinguishes them from the public. There also seems to be no organization to the insurgency to suggest they are commanded by an individual responsible for the acts of his subordinates. Although there has been no formal decision by the U.S. government as to the status of the insurgents, one may conclude, by applying the requirements above, that the Iraqi insurgents are unlawful combatants and are thus subject to prosecution. This means they could be prosecuted either by the Iraqi government, the United States, or both.

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[2] President George W. Bush, Address at the Commonwealth and Churchill Clubs, San Jose, California (Apr. 30, 2002).

[3] L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 109-11 (1993).

[4] *Id.*

[5] Nathan A. Canestaro, *"Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq*, 43 COLUM. J. TRANSNAT'L L. 73, 99-102 (2004).

[6] *Id.*

[7] GREEN, *supra* note 3, at 103.

With numerous options available, it must be determined how best to prosecute insurgents. Since 11 September, the United States has answered this question in different ways for different groups of detainees. It has traditionally been the practice of the United States government to use domestic criminal law to bring terrorists to justice. We continued this practice after 11 September to prosecute individuals like the "American Taliban" John Walker Lindh and the "Shoe Bomber" Richard Reid.[8] Subsequently, on 17 October 2006, President George Bush signed the Military Commissions Act of 2006 which will be used to prosecute approximately seventy-five of the 440 detainees held at Guantanamo Bay Naval Base for law of war violations.[9] Finally, there is one method that has surprisingly received almost no publicity since it has been used to bring the vast majority of the terrorists and insurgents detained in Iraq to justice. This system, known as the CCCI, allows the Iraqi government to prosecute individuals with the assistance of the coalition forces. The JAs assigned to this mission work in the TF 134 legal office under the command of Multi-National Force – Iraq (MNF–I).

The Central Criminal Court of Iraq

On 8 October 2003, the CCCI was created by the Administrator of the Coalition Provisional Authority (CPA), L. Paul Bremer, to help promote "the development of a judicial system in Iraq that warrants the trust, respect, and continued confidence of the Iraqi people."[10] Noting the continued need for military support to help maintain public order, this court has now become the primary vehicle to prosecute terrorists and insurgents for crimes committed in Iraq while ensuring that they receive "fundamental standards of due process."[11] The specifics of this criminal court were spelled out in Amended Coalition Provisional Order Number 13, dated 22 April 2004.[12] The CCCI uses an inquisitory judicial system, as opposed to the accusatory judicial system we are familiar with in the United States. Like other criminal courts in Iraq, the CCCI consists of two chambers, an investigative court and a trial court.[13]

In the inquisitory judicial system, the investigative judge (IJ) plays the key role: taking testimony, reviewing evidence, and referring cases to trial. Although attorneys may start proceedings, they play minimal roles in the investigation. This is drastically different from the accusatory system in which most of these functions would be handled by the prosecutor.[14] Furthermore, the IJ is relatively free to conduct the inquiry as he or she wishes. There are few technical rules of evidence and juries are not part of the system.[15] The inquisitory system of justice focuses on searching for "material truth."[16]

Inquisitory proceedings resemble accusatory system pre-trial conferences.[17] They are conducted in an informal manner and are not transcribed.[18] Also, on appeal, all issues in the case, both law and fact, are open for review, and new evidence can be submitted on all points.[19] In the accusatory system, appeals to an appellate court are mostly on issues of law and do not involve issues of fact which have been determined during the trial process.

Besides the obvious procedural differences, the inquisitory system differs from the accusatory system in several other ways. The judge conducting the investigation is more likely to act upon his biases than is a judge in an accusatory proceeding. Also, the inquisitorial approach is less sensitive to claims concerning material truth.[20] In Iraq, the IJ is appointed

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[8] Susan Candiotti, *Walker Lindh Sentenced to 20 Years*, CNN.COM, Oct. 4, 2002, http://archives.cnn.com/2002/LAW/10/04/lindh.statement/; *Richard Reid Pleads Guilty Faces Minimum Sentence of 60 Years*, CNN.COM, Jan. 22, 2003, http://archives.cnn.com/2002/LAW/10/04/reid.guilty.plea/.

[9] Jim Garamone, *Bush Says Military Commissions Act Will Bring Justice*, AM. FORCES INFO. SERVICES, Oct. 17 2006, *available at* http://www.globalsecurity.org/security/library/news/2006/10/sec-061017-afps01.htm; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. § 948a).

[10] COALITION PROVISIONAL AUTHORITY AMENDED ORDER NUMBER 13 (REVISED) (AMENDED), THE CENTRAL CRIMINAL COURT OF IRAQ (22 Apr. 2004) [hereinafter CPA ORDER NO. 13].

[11] *Id.*

[12] *Id.*

[13] *Id.* § 1.

[14] Dictionary by LaborLawTalk, http://dictionary.laborlawtalk.com/inquisitorial_system (last visited May 22, 2007).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

by the administrator and must be an Iraqi national with high moral character who has had no affiliation with the Ba'ath Party.[21] The IJ conducts an investigative hearing (IH), a fact-finding process that determines if there is enough evidence to refer the matter forward for trial. If there is not enough evidence to refer the case to trial, the judge can either dismiss the charges or hold the case open for further investigation. It is important to note that a dismissal of charges following this hearing would prevent the same or similar charges from being brought against the same defendant in the future.

Under CPA Amended Order Number 13, the CCCI's jurisdiction was expanded to create nationwide discretionary investigative and trial jurisdiction over any crimes committed in Iraq. Section 18 of this order specifies that the CCCI should focus its resources on terrorism.[22] Coalition Provisional Authority Memorandum Number 3 implements CPA Order Number 7, establishes a framework for applying criminal law in Iraq, and recognizes that the continued support of multinational forces plays a critical role in the administration of justice.[23] This framework is made up of a combination of the established Iraqi judicial system and is governed by the Iraqi Criminal Proceeding Law of 1971, which applies the Iraqi Penal Code of 1969 and the Iraqi Weapons Code of 1992.[24] The CPA modified aspects of this established Iraqi law in 2004 to ensure that fundamental standards of human rights were maintained and that the ongoing process of security detainee management also complied with the Fourth Geneva Convention.[25] One of the major changes made by the CPA was the accused's right to be represented by an attorney of his choice in all proceedings before the CCCI.[26]

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[21] CPA ORDER NO. 13, *supra* note 10, § 5.

> (1) Prior to the assumption of the functions of government on 1 July 2004, the judges of the CCCI shall be appointed by the Administrator and shall:
> (a) be an Iraqi national,
> (b) be of high moral character and reputation,
> (c) have a background of either opposition to the Ba'ath Party, nonmembership of the Ba'ath Party or membership that does not fall within the leadership tiers described in CPA/ORD/16 May 2003/01 and entailed no Involvement in Ba'ath Party activity,
> (d) have no criminal record unless the record is a political or false charge made by the Ba'ath Party regime,
> (e) have had no involvement in criminal activities,
> (f) have demonstrated a high level of legal competence; and
> (g) be prepared to sign an oath or solemn declaration of office.

Id.

[22] *Id.* § 18.

> (1) The CCCI shall have nationwide discretionary investigative and trial jurisdiction over any and all criminal violations, regardless of where those offenses occurred. Its jurisdiction shall extend to all matters that could be heard by any local felony, or misdemeanor court.
> (2) In exercising its discretionary jurisdiction, the CCCI should concentrate its resources on cases related to:
> (a) terrorism,
> (b) organized crime,
> (c) governmental corruption,
> (d) acts intended to destabilize democratic institutions or processes,
> (e) violence based on race, nationality, ethnicity or religion; and
> (f) instances in which a criminal defendant may not able to obtain a fair trial in a local court.
> (3) Any criminal defendant may request the CCCI to review his or her case if the defendant asserts that his case will not be fairly heard by a local criminal court.
> (4) Any felony, misdemeanor or investigative court in Iraq may refer a case to the court.
> (5) If the investigation of a case has been completed by a local investigative court, the CCCI may, if it chooses, conduct the trial of the case without conducting a further investigation. However, the court may order a new investigation, or supplement the prior investigation, if it believes it necessary in the interests of justice to do so.
> (6) The decision of the CCCI to take jurisdiction of a case will end any local courts jurisdiction over such case, and all local courts shall be required to immediately furnish all files to the CCCI and fully cooperate with the court as outlined in section 9 above.

Id.

[23] Coalition Provisional Authority Memorandum No. 3 (Revised), Criminal Procedures, § 1 (24 June 2004) [hereinafter CPA Memorandum No. 3].

[24] *Id.* § 2.

[25] *Id.* § 1; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75 (3) & (4), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. The exact terms of Article 75 are:

> 3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
>
> 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

If the case is referred to trial by the IJ, a panel of three Iraqi judges examines the evidence, consisting mainly of the IJ's report along with his or her recommendation. The panel then hears the accused if he desires to make a statement. Finally, the panel hears arguments from both the Iraqi defense counsel and Iraqi prosecutor. After a decision is reached, the court either recommends the detainee's release if the evidence was insufficient, or convicts the detainee and sentences him. Upon conviction, the detainee is transferred to Iraqi custody to serve the sentence in an Iraqi confinement facility. All appeals arising from CCCI felony proceedings are heard by the Court of Cassation in accordance with applicable Iraqi law as modified by CPA orders.[27]

Task Force 134

Before exploring the CCCI process in more detail, it is necessary to introduce the military organization charged with bringing the insurgents to justice. Ensuring individuals detained in Iraq receive proper due process is the mission of TF 134. The TF 134 legal office contains JAs and paralegals from across the branches of service. The office is divided into four sections: a headquarters element, a magistrate's cell, the combined review and release board (CRRB) review section, and the CCCI liaison office. The headquarters element, in addition to being the primary legal advisor to the commanding general, also supervises the day-to-day operations of the other cells. The magistrate's cell is charged with reviewing detention decisions for legal sufficiency when the detainee is inprocessed. The CRRB review section presents cases to a review board made up of Iraqi government officials and coalition forces officers. Finally, the CCCI liaison office reviews and presents cases to CCCI judges at an IH. The CCCI liaison office is staffed with numerous JAs, called liaison officers, who facilitate the prosecution of coalition forces cases. As the focus of this article is the court system, this article explores the CCCI liaison office.

The Process

Coalition forces play a vital role in prosecuting insurgents at the CCCI. In a real sense, the strength of a criminal case begins and ends with them. Coalition forces must collect evidence at the scene and provide the witnesses to testify. The easiest way to explore the CCCI is to follow the process from start to finish. Naturally, it begins with the apprehension and detention of an individual. Coalition forces have been granted the authority to apprehend and detain any person suspected of committing a criminal act against either multinational forces or against the Iraqi people.[28] These individuals are then classified as "criminal detainees."[29] Coalition forces also have the authority to detain individuals for "imperative reasons of

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> (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
>
> (b) No one shall be convicted of an offence except on the basis of individual penal responsibility;
>
> (c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
>
> (d) Anyone charged with an offence is presumed innocent until proved guilty according to law;
>
> (e) Anyone charged with an offence shall have the right to be tried in his presence;
>
> (f) No one shall be compelled to testify against himself or to confess guilt;
>
> (g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
>
> (i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
>
> (j) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

Id.

[26] CPA ORDER NO. 13, *supra* note 10, § 22.

[27] *Id.* § 21.

[28] CPA Memorandum No. 3, *supra* note 22, § 5.

[29] *Id.* § 5.

security" in accordance with the mandate set out in United Nations Security Council Resolution 1546.[30] These individuals are classified as "security internees."[31] This is an important distinction because different rights are granted to the different classifications. It is also worth noting that an individual may be classified as both a security internee and criminal detainee. In the event that this happens the individual detainee will be afforded the status granting the most due process rights.

Criminal detainees are first inprocessed by the detaining unit in the field and will be held at that unit's local internment facility until they can be transferred to a brigade internment facility (BIF) or division internment facility (DIF). They will stay in these slightly larger facilities until they can be transferred to one of the three theatre internment facilities (TIF). In other words, a criminal detainee starts at smaller facilities located in Iraq and are later transferred to the TIFs. There are two TIFs where nearly all of the 14,000 detainees are being held: Camp Bucca and Camp Cropper.[32] Coalition Provisional Authority Memorandum Number 3 states that criminal detainees shall be handed over to Iraqi authorities as soon as reasonably practicable.[33] However, an exception to this memorandum allows coalition forces to retain individuals at the request of the appropriate Iraqi authorities based on either security or capacity considerations.[34] Currently, coalition forces retain the vast majority of the individuals detained under this exception. Once the individual is inprocessed at the TIF, he is advised of his right to remain silent and is told why he is being held. If the individual is suspected of committing a felony offense, he has the right to consult with an attorney within seventy-two hours of being in-processed at the TIF.[35] Coalition Provisional Authority Memorandum Number 3 also states a "criminal detainee shall be brought before a judicial officer as rapidly as possible and in no instance later than ninety days."[36]

Security internees can, and usually are, inprocessed like the criminal detainees. For all practical purposes, it is not until after they are inprocessed, and a review of the evidence is conducted, that they are actually designated as either a criminal detainee or security internee. Security internees who have been held longer than seventy-two hours are entitled to a review of the decision to intern them.[37] The review must be completed no later than seven days from the date of their internment.[38] Each security internee who is interned after 30 June 2004 can only be held for eighteen months before either being released or transferred to the Iraqi government.[39] If necessary, however, coalition forces can hold a person longer than eighteen months.[40]

In addition to the rights discussed above, both criminal detainees and security internees have the right to have the operation, conditions and standards of the internment facility conform to Section IV of the Fourth Geneva Convention. They also have the right to have the Ombudsman from the Iraqi Prisons and Detainee Department and official delegates from the International Committee of the Red Cross inspect the health, sanitation, and living conditions at the facility and to privately interview all detainees.[41]

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[30] *Id.* § 6 (citing U.N. SCOR, 4987th mtg., at 15, U.N. Doc S/RES/154 (2004), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/NO4/381/16/PDF/N0438116.pdf?OpenElement (last visited Apr. 21, 2007)).

[31] *Id.* § 6.

[32] Michael Moss, *Iraq's Legal System Staggers Beneath the Weight of War*, N.Y. TIMES, Dec. 17, 2006, at A1.

[33] CPA Memorandum No. 3, *supra* note 22, § 5.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* § 6.

[39] *Id.*

[40] *Id.* The process for holding a security for longer than eighteen months is:

> (6) Where it is considered that, for continuing imperative reasons of security, a security internee placed in internment after 30 June 2004 who is over the age of eighteen should be retained in internment for longer than eighteen months, an application shall be made to the Joint Detention Committee (JDC) for approval to continue internment for an additional period. In dealing with the application the members of the JDC will present recommendations to the co-chairs who must jointly agree that the internment may continue and shall specify the additional period of internment. While the application is being processed the security internee may continue to be held in internment but in any case the application must be finalized not later than two months from the expiration of the initial eighteen month internment period.

Id.

[41] *Id.* §§ 5-6.

The detaining unit commander, in conjunction with JAs working at the BIFs and DIFs, performs the initial due process review. This group, known as the detention review authority, makes the initial determination either to hold the individual as a security threat or criminal suspect, or to release him. If it is necessary to continue holding the individual, he is transferred to Camp Cropper to be in-processed into one of the three TIFs. The magistrate's cell at Camp Cropper performs a second due process review of the individual's case to again determine if sufficient evidence exists to hold the individual for security or criminal reasons. If no sufficient evidence exists, the magistrate's cell can recommend the person be released. There is no set legal standard for making this determination, so the decisions made by the JAs assigned to the magistrate's cell are largely subjective. Based upon their decision, the individual will either be immediately released, forwarded to the CCCI liaison office for prosecution, or forwarded to the CRRB review section for continued internment for security reasons.

Once the case file has been received by the CCCI liaison office, the JA liaison officers again analyze the evidence to ascertain if sufficient evidence exists to indicate that a crime has been committed. Typically, the types of evidence gathered at the scene include pictures, witness statements, diagrams, explosive test results, evidence inventories and, in some cases, confessions. The review must make sure three critical items of evidence are available to present at court. These items include two witnesses who can testify in court, photographs from the events that led to the detention, and a diagram depicting where the events took place.[42] A deficiency in any of the three areas will leave the office unable to make the case for an IH. Because the evidentiary evaluation of a case is arguably the most important step in the CCCI process, it is appropriate to discuss the evidentiary necessities in more detail.

Witnesses & Testimony

Two witnesses who can testify regarding the facts and circumstances of the event are an absolute necessity. Normally, these witnesses are members of coalition forces that either detained the suspect or were involved in the investigation that led to his detention. Local Iraqis are also eligible witnesses. Because of personal safety concerns and travel issues, however, they rarely—if ever—testify in court. Ideally, witnesses have first-hand knowledge of the events. However, because Iraqi law has no evidentiary rules that apply at the IH or at trial, first-hand knowledge is not necessary. Of course, less weight will be given to the testimony of a witness without first-hand knowledge of the events. It is also important to note that sworn statements are not sufficient to comply with the two witness requirement. Coalition forces must have the witnesses testify either live at the IH or via video telephone conference (VTC), or the court will not hear the case.[43] The availability of witnesses to appear before the investigative court via VTC is important for two reasons. First, because the events being evaluated may be months old, and in some cases years old, it is not uncommon for witnesses who were serving in Iraq at the time the individual was detained to have returned to their home station. If they were not able to appear via VTC they would have to be flown to Iraq to testify live. Second, it allows witnesses who are serving outside Baghdad, the sole location for CCCI operations, to spend less time out of the unit. An added benefit to the VTC rule is that witnesses avoid the danger of traveling across Iraq to testify.

Photographs

Photographs that sufficiently document all the events surrounding the detention are also necessary. Common examples include photographs of the detainee with the evidence at the scene, close-up photographs of the evidence, and crime scene photographs that depict shell casings, footprints, and tire tracks. The photographs are critical not only to tie the detainee to the crime scene but also to serve as an inventory of what was found at the scene. This photographic inventory is important because the actual physical evidence is almost never available for use at the IH, nor is it required for a referral to trial.

Diagram or Sketch

A diagram of the location can either be handwritten or computer-generated. This diagram must depict where key pieces of evidence were found. Additionally, it should provide an estimate of the distances from key landmarks to evidence. It is also important to reference the area of the operation by showing the neighborhood, village, or city nearest to the operation. A

[42] Specialist Brian James Anderson, *Detainee Release Process*, VICTORY TIMES, June 10, 2006, at 4.

[43] CPA ORDER NO. 13, *supra* note 10, § 10 (stating that "the CCCI may receive testimony from witnesses who are not present in Iraq by Video Telephone Conference or similar communications technology.").

diagram is an important piece of evidence for the IH and can be produced by the witness during the hearing. Sometimes it is best to present this evidence by allowing the witness to draw the diagram while explaining the events to the Iraqi judge.

While these three categories of evidence are necessary to state a prima facie case against a detainee, coalition forces attorneys have also been working with Iraqi judges to educate them on additional pieces of evidence that could help them in their fact-finding mission. This evidence includes weapons or explosive residue tests performed in the field by coalition forces operators and fingerprint evidence taken from the crime scene. The Iraqi court system does not require expert testimony to present this information, as long as the coalition forces witnesses can testify about the results and that they personally administered the test. Currently, Iraqi judges appear receptive to this type of testimony.

The evaluation of a case for criminal prosecution in Iraq would not be complete without discussing two additional subjects: confessions and multiple detainee cases.

Confessions

It is not uncommon for a JA to open a file in Iraq and find a written confession made by the detainee subsequent to detention. While a confession appears on its face to strengthen the case for potential prosecution, it does not. Under Iraqi criminal law this confession is worthless. The interim Iraqi constitution, termed the Law of Administration for the State of Iraq for the Transitional Period, specifically states that "[t]orture in all its forms, physical or mental, shall be prohibited under all circumstances, as shall be cruel, inhuman, or degrading treatment. No confession made under compulsion, torture, or threat thereof shall be relied upon or admitted into evidence for any reason in any proceeding, whether criminal or otherwise."[44] In practice, unless the confession is made either to an Iraqi judge or Iraqi judicial officer it will be given no weight as proof of the commission of a crime. Since the majority of interrogations are conducted in the field or at the unit's internment facility, it is unlikely that any such confession will be admitted. Finally, it is worth mentioning that coalition forces have recently attempted to have an Iraqi judicial investigator work with the magistrate's cell at Camp Cropper to re-interview the detainees while inprocessing to obtain any potential confession. Only time will tell how this attempt will be accepted by the Iraqi court system.

Multiple Detainee Cases

Cases that involve multiple detainees also present difficulty for JAs. Unless all detainees are located, it is unlikely to have a suitable case to present to the investigative court for two reasons. First, as a matter of judicial economy, judges do not want to hear partial cases when it is possible to perform one investigation and make a factual finding as to all the detainees. Second, it is an issue of proof. That is, the detainees present at the hearing would most likely blame all the criminal acts on the missing detainees, leaving the court no choice but to dismiss the charges against those present.

Assuming that the JA evaluating the case finds all of the necessary evidence, the case can proceed to an IH. If not, the JA is left with three options. The JA can contact the detaining unit to see if the additional evidence exists, refer the file to the CRRB for a security evaluation, or recommend the individual for immediate release.

Upon referral, coalition forces attorneys docket hearings with the court and ensure witness availability by coordinating with the witness's unit and command. Coalition forces attorneys are responsible for preparing and presenting cases at the investigative court. Basic case preparation includes ensuring all necessary evidence is ready for entry at hearing. It also includes making sure the witnesses understand the proceedings and can answer the questions they will be asked by the judge. At the hearing, coalition forces attorneys ensure that sufficient evidence is entered for the case to be referred from hearing to trial. They are also allowed to ask questions of both the prosecution and defense witnesses, but any request to ask questions must be with the permission of the judge. All evidence and testimony is recorded at the IH for entry into the record at trial.

If the IH judge refers the case to trial, coalition forces attorneys diligently monitor its progress. Although coalition forces attorneys do not participate in the trials, they do track the cases in order to relay verdicts and sentencing results back to the respective units. As mentioned earlier, the IH is where the majority of the case is developed. Trials are very brief: most

[44] Coalition Provisional Authority, Law of Administration for the State of Iraq for the Transitional Period art. 15, Mar. 8, 2004, *available at* http://www.cdi.org/news/law/Iraq-Constitution.htm.

last around fifteen minutes and the deliberations are less than half that time.[45] Some take less than a minute. As part of the process, units are able utilize sentencing data for deterrence purposes within their various areas of operation.

The Combined Review and Release Board (CRRB)

The legal basis for this process is grounded in United Nations Security Council Resolutions 1546 and 1637, authorizing coalition forces to detain individuals for imperative reasons of security.[46] If the reviewing JA determines that there is no evidence that the detainee has committed a crime, the case will be forwarded to the CRRB to see if the detainee should be held as a security threat. When that determination has been made, detainees become security internees under the Fourth Geneva Convention which mandates they receive an Article 78 administrative review of detention.[47] This administrative review is conducted by the CRRB, which partners with the Iraqi government to determine which detainees should be interned as a threat to the Iraqi government or to coalition forces. The CRRB is an independent and unbiased board consisting of nine members: six representatives from the Iraqi government, two representatives each from the Ministries of Justice, Interior, and Human Rights, and three senior multinational forces officers. The CRRB meets weekly to review detainee files and determines "which detainees pose a threat and which detainees can be set free."[48] The CRRB will review detainee files within the first 90-120 days after they have been interned in a TIF. In accordance with requirements of the Fourth Geneva Convention, their files are reviewed every 120-180 days following the initial board.[49] Judge advocates assigned to the CRRB review the cases and present the facts to the board. One important evidentiary difference between the CCCI and CRRB is that unlike the CCCI, the CRRB is authorized to use classified information when making its decision to continue internment. Because the volume of cases presented to the CRRB can reach around a thousand a week, deliberations take only a matter of minutes. The majority vote of the board is controlling. If the board determines that the internee is a security threat the individual will be held. On the other hand, if the board finds no threat exists the individual will be recommended for immediate release. However, prior to release, the capturing units and MNF-I intelligence officer are given the opportunity to object to the release.[50] Should the unit object, the commanding general of TF 134 will make the final decision to release or retain the individual.

Limitations

The CCCI is not without its limitations. As discussed below, some of the limitations concern the system itself, such as throughput and the detainee's access to defense counsel. Some limitations exist because we are asking our Soldiers, Sailors, Airmen, and Marines to operate as investigators without any training, and because we are placing the intelligence and investigative communities in positions where their respective missions conflict. The good news is that as the Iraqi government continues to grow and take over more control of the court system, most—if not all—of these limitations will disappear.

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[45] Moss, *supra* note 31, at A1.

[46] CPA Memorandum No. 3, *supra* note 22, § 1.

[47] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Specifically this article provides:

> If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
>
> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.
>
> Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

Id.

[48] Anderson, *supra* note 41, at 1.

[49] *Id.*

[50] *Id.*

Throughput

The main limitation facing this system is its ability to handle the workload. Currently, the CCCI has one main courthouse located in Baghdad with approximately three to five Iraqi IJs assigned to hear coalition forces cases. With two-thirds of the detainees interned outside the Baghdad area, the detainees have to be physically moved to Baghdad for an IH. This shuffling of detainees takes time and increases the danger to the coalition forces moving them. Moreover, the witnesses who will testify at the IH also have to come to Baghdad to testify. This leaves their units short of people and also places them in danger while they travel to Baghdad. The inability to move cases through the IH phase creates numerous collateral issues. First, when cases take longer to get to the IH, individuals wait longer to get their day in court. Additionally, every extra day an individual waits for a hearing the number of detainees continues to grow and the CCCI falls further behind. Finally, this puts pressure on the coalition forces that are operating the detention facilities and trying to turn the detention role over to the Iraqi people. The solution to this problem requires stability in Iraq. As the government continues to grow and more judges are trained and added to the staff, additional courts can be added throughout Iraq. This will place courts, judges, and Iraqi attorneys closer to the TIFs, increasing the number of hearings and reducing travel.

Access to a Defense Attorney

For a legal system to be perceived as fair it cannot hamper a person's right to defend himself. The detainees' limited access to evidence and to consult with an Iraqi defense lawyer early in the process has generated criticism.[51] The crux of the problem stems from the fact that if an Iraqi defense attorney wants to meet with a detainee, he is forced to travel to one of the three TIFs mentioned above. Two of the three facilities are located a great distance from Baghdad even though the CCCI sits in Baghdad and most of the Iraqi defense attorneys are also in Baghdad. Thus, it is next to impossible to allow detainees easy access to defense attorneys. Even when the detainees are located in Baghdad arranging meetings is still difficult, primarily because of security concerns. However, this makes a bad impression on Iraqi defense lawyers who believe that the Americans will not allow them access to do their job. It should be noted, though, that every detainee is provided with representation at the IH. This limitation must be addressed, but a short term fix does not appear to be on the horizon. The addition of CCCI courts closer to the other detention facilities would benefit detainees as would the development of Iraqi defense lawyers closer to these areas. This is yet another growing pain that TF 134 manages as it continues to assist the Iraqi government in building the rule of law.

Soldiers and Marines as Investigators

The evidence used to build criminal cases against insurgents comes largely from Soldiers and Marines who are not trained as criminal investigators. They are performing miraculously under the circumstances. Coalition forces in the field receive very little training, if any, about what evidence is necessary to prosecute individuals they detain. Iraq is still a war zone, where these servicemembers' first concerns are accomplishing their primary mission and their own safety. The JAs routinely visit units in the field to discuss emerging trends in the CCCI. This not only makes them aware that people are working to bring these individuals to justice but also helps them understand what is needed to keep these individuals off the street. There is no quick fix to this dilemma; JAs must continue to communicate the evidentiary needs with the average Soldier and Marine in the field to keep them abreast of what is needed to build a criminal case.

Intelligence Versus Investigation

Finally, the JAs evaluating cases routinely encounter the reality that the evidence on a particular individual is classified because it was derived through intelligence sources as opposed to investigative sources. As most of the information derived from the intelligence community is classified, it cannot be presented to the judge during the IH. Without any additional evidence, JAs are left with no other option than to send the file to the CRRB for review. The intelligence community is not concerned with building a criminal case, but is more concerned with finding terrorists and getting bad guys off the street. Without a change in procedure, this problem will continue to hamper the building of criminal cases against these individuals. To date, this problem can only be addressed by engaging with the intelligence community to declassify the evidence needed to present a case to the CCCI. This is relatively simple. The question is whether it can be completed quickly enough to meet the due process timing requirements set in place by the CPA.

[51] Moss, *supra* note 31, at A1.

Even with the limitations discussed above, the CCCI process is a success story in the Global War on Terror. The JAs and paralegals assigned to Task Force 134 are not only bringing these terrorists and insurgents to justice, but they are helping to establish the rule of law in Iraq. It is the latter that will be crucial to our long-term success in the region and to Iraq's success as a nation. Although recent newspaper articles continue to suggest the CCCI is "staggering under the weight of war," when looked at more closely the evidence does not support this conclusion.[52] Over the past three years coalition forces have detained roughly 61,000 individuals and currently have about 14,000 in detention facilities throughout Iraq.[53] Of that 61,000, roughly 3000 have been charged and tried in Iraqi courts with approximately half of those trials resulting in a conviction.[54] This means roughly 1500 terrorists were brought to justice and nearly 43,000 individuals have been released. These statistics clearly show the system works and while it may not be perfect, it is up and running during a time of war. As this system continues to grow and more courts are opened in areas outside Baghdad, most of the limitations discussed above will fade away, as will the coalition forces' participation in this process. The end result will be the establishment of the rule of law in Iraq, ensuring justice for the Iraqi people. Once there is justice, peace will follow.[55]

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[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Quote DB, http://www.quotedb.com/quotes/3642 (last visited Oct. 4 2007).

Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage

Commander Albert S. Janin, JAGC, USN[*]

I. Introduction

The belligerents waging intense armed attacks against government armed forces in Afghanistan and Iraq are not agents of a Geneva Convention "high contracting Party," or any nation-state, or any armed force within the meaning of the law of war. They are non-uniformed "civilians," as are the militants conducting transnational suicide attacks around the world. This reality has profound operational and legal implications.

A dizzying array of legally charged terms are applied to persons found on or near a battlefield: armed forces, militias, spies, mercenaries, guerrillas, terrorists, revolutionaries, combatants, lawful combatants, unlawful combatants, non-combatants, belligerents, unprivileged civilian belligerents, civilians, protected persons, civilians accompanying the force, contractors, etc. One commentator enumerates those in legal peril on the battlefield—unlawful combatants, saboteurs, guerrillas, spies, mercenaries, and pirates—and states that "[n]one of this sheds much light on the law in relation to terrorism."[1] He then adds "unlawful belligerent" to the stew in an effort to classify terrorists, and suggests a way to fill a dangerous void in conventional law.[2] Unfortunately, the proposal never acquired the force of law. The threat (e.g., al Qaeda jihadist) or grocer-by-day/sniper-by-night problem must be addressed within the two-classification system of civilian or combatant until the law changes.[3]

"Though non-state combatants are inevitably part of the equation during internal armed conflict, they have almost no place legally in the structure of interstate conflict."[4] This article assumes an international armed conflict in order to discuss Additional Protocol I and enable the comparison to customary international law. Conflict-characterization and identification of the controlling body of law is complex and often debatable. The Geneva Conventions and Additional Protocol I are not universally applicable.[5]

Infantrymen do not care that the person hiding amongst the civilian population plotting to kill them is labeled an unlawful belligerent, unlawful combatant, terrorist, or a lawful guerrilla fighter. Their worries are (or at least should be) mission accomplishment, legal compliance, and survival with honor. Unfortunately, insurgencies are treacherous,[6] while

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[1] Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 CASE W. RES. J. INT'L L. 227, 228-29 (2002).

[2] *Id.* at 230 (using a different phrase than the more familiar "unlawful combatant" to highlight that such persons lack legal justification for their attacks under international law, and routinely target non-combatants).

[3] *See* HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2005] paras. 11, 28 [hereinafter *PCATI v. Israel*], *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (last visited Oct. 11, 2007 (denying an Israeli government request to create a hybrid classification to address the "complex reality" of "unlawful combatants," and stating "[i]t is difficult for us to see how a third category can be recognized in the framework of the Hague and Geneva Conventions").

[4] Hoffman, *supra* note 1, at 227.

[5] *See* Lieutenant Colonel (LTC) Paul E. Kantwill & MAJ Sean Watts, *Hostile Protected Persons or "Extra-Conventional Persons:" How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L.J. 681, 722 (2005) (discussing the "bifurcated analysis" taught by the U.S. Army JAG School to determine status at the outset of military operations); *see also* Lieutenant Commander Kenneth B. Brown, JAG Corps, U.S. Navy, *Counter-Guerrilla Operations: Does the Law of War Proscribe Success?*, 44 NAV. L. REV. 123, 144 (1997) (discussing the "threshold requirement" of analyzing whether the conflict is "international or internal" in the context of counter-guerrilla operations and commenting that the criteria "raises almost as many questions as it solves").

[6] *See* Brown, *supra* note 5, at 144 ("[G]uerrilla wars . . . are one of the nastiest forms of violence, where both the 'guerrilleros' and those who try to subdue them easily slip into an escalation of uncontrolled brutality.'"); *but see* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 529 (Yves Sandoz et. al eds., 1987) [hereinafter AP I COMMENTARIES] ("[T]he guerrilla fighter who relies on his civilian attire and lack of distinction to take advantage of his adversary in preparing and launching an attack" will lose combatant and prisoner of war status.).

positive international law can rationally be interpreted to place armed forces[7] engaged in counterterrorism and counterinsurgency operations in an untenable position, subject to an all-too-lethal double standard.

This article uses a hybrid term of civilian-belligerent in order to be consistent and functionally precise. The purpose is not to add yet another term to this body of law but merely to be descriptive. This article will also use the terms guerrillas, insurgents, and terrorists to describe people who physically carry out organized armed attacks, yet are de jure "civilians" according to Additional Protocol I.[8]

The law of war's "Basic Rule"[9] requires force to be directed at combatants and away from civilians. Unfortunately, contemporary operational realities make implementation of this Basic Rule extremely challenging because many combatants appear to be civilians and base their operations amongst non-combatants.

The lethal problem of civilian-belligerents is now the customary trend in warfare rather than the exception to the rule. Article 51(3) of Additional Protocol I contemplates this phenomenon to a limited extent, and permits the use of force against civilians "for such time as they take a direct part in hostilities."[10] The United States is not a party to Additional Protocol I, but regards the Basic Rule as a codification of the principle of distinction[11] and invokes the inherent right of self-defense to justify the use of force against civilian-belligerents. Israel is also a non-party and applies a policy similar to the United States.[12] On the other hand, the United Kingdom did ratify Additional Protocol I and is bound by Article 51(3).[13] All three countries have extensive, recent experience with civilian-belligerents. Each of these approaches will be discussed in this article.

This article will discuss the Additional Protocol I and self-defense differences that pertain to the counterinsurgency or counterterrorism operations. Specifically, it will explore the extent to which "direct part in hostilities" and "imminent attack" are related for targeting purposes. An appreciation of the context in which these legal standards will be applied and how the military controls the use of force is essential. Part II discusses insurgencies and counterinsurgencies. Part III covers the criteria that govern force-employment against civilians. Part IV discusses the inherent right of self-defense. Part V pertains to rules of engagement, distinguishes between status and conduct, and provides examples from the conflict in Iraq. Part VI explores targeted killing, the practical point of divergence for Additional Protocol I and self-defense law. Like civilian-belligerents and non-combatants, conventional law and customary law blend together. The article concludes that the legal issue falls within the scope of substantially similar legal standards; as a result pragmatic, not legal, considerations more powerfully restrain indiscriminate force.

II. Operational Realities in Counterinsurgency Warfare

Insurgencies are long, bloody, brutal, and frustrating. Likewise, every facet of counterinsurgency warfare is complex and uncertain. Rebels in the American Revolution took thirteen years to defeat the British armed forces and adopt the

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[7] *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflict art. 43, *adopted* June 10, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] ("all organized armed forces, groups, or units which are under a command responsible . . . for the conduct of its subordinates . . . subject to internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."); *see also* Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

[8] *See* Additional Protocol I, *supra* note 7, art. 50 ("A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1),(2),(3), and (6) of the Third Convention and in Article 43 of this Protocol.").

[9] *Id.* art. 48.

> Basic Rule: 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 civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Id.

[10] *Id.* art. 51(3).

[11] Memorandum from W. Hays Parks for the Office of The Judge Advocate General, U.S. Army, Law of War Status of Civilians Accompanying Military Forces in the Field (6 May 1999) [hereinafter Civilian Status Memo]. This legal memo pertains to permissible positions for U.S. contractors that would not constitute taking part in hostilities and would maintain prisoner of war status as civilians accompanying the force. This memo is silent with respect to whether certain mission critical civilian contractor positions (e.g., forward deployed weapon system technicians) would be considered lawful targets). *Id.*

[12] *See* State Parties/Signatories to Additional Protocol I, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=p (last visited Sept. 18, 2007) (listing countries that have ratified or acceded to Additional Protocol I).

[13] *Id.*

Constitution. American armed forces took seventeen years to pacify the Philippines. British armed forces took twelve years to subdue Malaysian communist guerrillas. Vietnamese insurgents took twenty-five years to defeat Western powers in their country. When not engaged in wars of national survival, Israel has been involved in counterinsurgency warfare since its birth in 1948. After generations of anti-colonial struggle, many African nations continue to endure horrific guerrilla warfare.

Democratically elected leaders can expect difficulty persuading their electorates to maintain resolve during counterinsurgencies. Armed forces can expect difficulty fulfilling their obligation to discriminate amongst targets. Commanders can expect difficulty formulating successful strategies while protecting their forces from unnecessary hazards. "In insurgencies, it is not only difficult to distinguish combatant from noncombatant; it is also difficult to determine whether the situation permits harm to noncombatants."[14] The current conflicts in the Afghanistan and Iraq illustrate the operational realities in brutal detail.

A. Insurgents

"Terror, the guerrilla leader's most potent weapon, is used by him not only to demoralize the enemy and extort support of his own people, but also to exact unswerving loyalty from the individual guerrilla."[15] The British-led security mission in the southern four provinces in Iraq encountered such tactics while conducting "patrols, arrests, anti-terrorist operations," and infrastructure protection.[16] From 1 May 2003 until 30 June 2004, approximately 1050 "violent attacks" occurred in the British sector.[17] A British General Officer described the conditions his forces faced:

> Iraq is the most volatile and violent place in which I have served. The population as a whole possessed a lot of weaponry, with at least two weapons in most households. In addition, the tribes, criminal gangs, and terrorist groups were very well armed with heavy machine guns, rocket propelled grenades, bomb-making kits and a wide variety of other weapons. The Rule of Law, which normally operates in a civil society, simply did not exist when [the British Army] arrived in Iraq. The police were ineffective, they were not respected, they were corrupt, and they were easily intimidated by the tribes . . . The area was rife with tribal feuds and organized crime. Extortion, kidnapping, carjacking, looting, oil smuggling were the key criminal pursuits. When the criminals were conducting these activities they went heavily armed and they were always ready to shoot at us if we came across them . . . I suspect we had 2 or 3 shooting incidents involving armed criminals every night. Tribal feuds were often extremely violent and dangerous . . . where heavy machine guns were regularly fired at each other . . . Terrorists, who included the former regime extremists, targeted us quite actively. Their attacks ranged from drive-by shootings to bombings . . . .[18]

United States armed forces in Iraq experienced even more volatile and bloody confrontations. In Fallujah,

> [t]he [M]arines engaged in a series of ferocious close-quarters battles with scores of insurgents thoroughly mixed in with the civilian population. Reports from embedded news correspondents suggest that the [M]arines did not intentionally target [non-combatant] civilians during the offensive . . . . [U]nlike the insurgents, [Marines] went to considerable lengths to protect noncombatants.[19]

Even during the six weeks it took to defeat Saddam Hussein's Iraqi national forces,[20] the U.S. military primarily confronted "irregular fedayeen fighters, not uniformed soldiers."[21] Since then, "the landscape has become increasingly confused"

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[14] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 7-7 (15 Dec. 2006) [hereinafter FM 3-24].

[15] Brown, *supra* note 5, at 131 (quoting BERT LEVY, GUERRILLA WARFARE 16 (1942)).

[16] The Queen on the application of Mazin Jumaa Gatteh Al Skeini and others v. Sec'y. of State for Defence, [2004] EWHC 2911 admin, para. 43 (U.K.) [hereinafter *Al Skeini Opinion*]. The families of six Iraqis killed by British armed forces in Iraq brought suit in England alleging violations of the European Convention of Human Rights.

[17] *Id.*

[18] *Id.* para. 40 (quoting British Brigadier W. H. Moore, Commander, 19th Mechanized Brigade, Basra City, Iraq).

[19] Colin H. Kahl, *How We Fight*, 85 FOREIGN AFFAIRS 94 (Nov.-Dec. 2006) (Marines did not use indirect fire and disapproved the majority of preplanned targets due to concern for civilian casualties.).

[20] *See U.S. Launches Cruise Missiles at Saddam*, CNN, Mar. 20, 2003, *available at* http://www.cnn.com/2003/WORLD/meast/03/19/sprj.irq.main/ (U.S. hostilities commenced on 20 March 2003); *see also* President Bush Announces Combat Operations in Iraq Have Ended, http://www.state.gov/p/nea/rls/rm/20203.htm (State Department Bulletin publishing end of major combat operations on 1 May 2003).

because of "the thorough intermingling of insurgents and civilians . . . , the increasing frequency of attacks on U.S. troops by individuals in civilian garb or civilian vehicles, and the insurgents' intentional use of civilians and civilian objects as shields."[22] It is readily apparent that guerrilla forces seeking to bleed the United States and United Kingdom into withdrawal are systematically violating the law of war:

> Insurgents and militias [in Iraq] have placed [non-combatant] civilians at risk by positioning their forces and arms caches in mosques and hospitals; using homes as shelters; firing mortars and rockets from yards, farms, and fields; and using ambulances, taxis, and other civilian vehicles to transport fighters and weapons. They have launched indiscriminate attacks that were certain to kill large numbers of non-combatants. And as the conflict evolved, Sunni insurgents and Shiite militias have increasingly targeted [non-combatant] civilians, triggering a spiral of sectarian violence.[23]

There were approximately 50,000 Iraqi civilian deaths during the first forty months of fighting.[24] As of 1 May 2003 (the declared end of major combat operations) approximately 2558 Iraqi civilians have been killed in the crossfire. From that point until about mid-summer 2006, U.S. armed forces have killed approximately one Iraqi civilian per day in escalation of force incidents at check points and during convoy operations.[25] That is approximately 1200 civilians. Two unanswered questions are raised. Who killed the other 35,000 civilians, and how many of those civilians were unlawful combatants? Even if twice as many non-combatant civilians were killed by indiscriminate fire as were killed during major combat operations (victims of collateral damage), there are approximately 30,000 intended non-combatant victims of homicide. It can reasonably be inferred that the overwhelming majority of those killings were carried out in accordance with guerrilla doctrine.

The Iraq war is not an aberration, but an historically normative example of the brutality of insurgency warfare. Even the ghastly numbers of civilian deaths in Iraq pale in comparison to the civilian suffering in the Philippine insurrection (seventeen times as many per month) and in South Vietnam during the Viet Cong insurgency (nine times as many per month).[26] No one understands the terrible carnage wrought by insurgency warfare better than the Israelis:

> For more than three years now, the State of Israel is under a constant, continual, and murderous wave of terrorist attacks . . . without any discrimination between combatants and civilians or between men, women, and children . . . . [M]ore than 900 Israelis have been killed and thousands of other Israelis have been wounded. . . . In addition[,] thousands of Palestinians have been killed and wounded. For sake of comparison we note that the number of Israeli casualties in proportion to the population of the State of Israel is a number of times greater than the percentage of casualties in the U.S. in the events of September 11 in proportion to the U.S. population.[27]

Organized, well-armed civilian-belligerents present an extraordinary challenge to law of war-compliant armed forces. In 2006, the Multi-National Corps - Iraq commander believed "that the insurgency over time has repopulated itself" in part due to "escalation of force" incidents that result in the unintentional killing or wounding of non-combatant Iraqi civilians.[28] Counterinsurgency tactics, not just the law of war, counsel restraint.

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[21] Kahl, *supra* note 19, at 95.

[22] *Id.*

[23] *Id.* at 88 (quoting U.S. military sources).

[24] *Id.* at 86 (quoting non-profit organization Iraq Body Count and Iraqi Health Ministry).

[25] *Id.* at 87 (quoting U.S. military sources).

[26] *Id.* at 89 (quoting U.S. military sources).

[27] HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2005] para. 17 (quoting the Israeli State Attorney General summary of Second *Intifada* carnage from September 2000 to January 2004).

[28] Nancy Montgomery, *U.S. Seeks to Reduce Civilian Deaths at Iraqi Checkpoints*, MIDEAST STARS & STRIPES, Mar. 18, 2006, *available at* http://stripes.com/article.asp?section=104&article=34944&archive=true (quoting Lieutenant General Chiarelli, U.S. Army, Commander, Multi-National Corps – Iraq). Lieutenant General Chiarelli's spokesman agreed with the estimate that 1000 Iraqis were killed or injured in escalation of force incidents since 2003. This article does not make a distinction between proper engagement of civilian-belligerents and non-combatant civilians. What is clear is that the incidents instill Iraqi hatred for the United States.

B. Counterinsurgents

Armed forces must be "subject to the strictest of discipline when in the field and must receive special training to prepare them for the rigors of this style of warfare" in order to lawfully and effectively combat guerrillas.[29] American gunners in Iraq must make life-or-death, split-second decisions under extreme stress and constant bomb threat.[30] "Suicide attacks by pedestrians and civilian vehicles laden with explosives have continually threatened U.S. forces at checkpoints and temporary roadblocks or driving along supply routes."[31] Despite these many provocations, there are tactical as well as legal reasons why coalition armed forces must resist the temptation of reprisal. "With few exceptions, history clearly shows that those who rely on brutality and indiscriminate firepower to quash a guerrilla movement will likely only fuel the fire they are attempting to extinguish."[32]

The keys to successful counterinsurgency are "gaining popular support and establishing legitimacy for the government," while at the same time "practicing proportionality and discrimination" required by operational, legal, and moral "necessity."[33] On the other hand, the guerrilla force center of gravity is the brutally enforced silence they enforce upon the unwilling non-combatant shields. The U.S. counterinsurgency manual sums up the challenge:

> The most salient difference between war fighting and policing is the moral permissibility of noncombatant and bystander casualties. In war fighting, noncombatant casualties are permitted as long as combatants observe the restrictions of proportionality and discrimination. In policing, bystanders may not be harmed intentionally under any circumstances. Failure to observe this rule undermines the peace - often tenuous in these circumstances - that military action has achieved. In maintaining the peace, police are permitted to use only the least force possible to achieve the immediate goal.[34]

Sound legal arguments, under the penumbra of military necessity, can be used to justify aggressive force employment in areas densely populated by non-combatants. However, legality does not equal effectiveness. The correct tool for counterinsurgency is the surgeon's scalpel, not the sledgehammer. Insurgents must be excised, not smashed, in order to minimize collateral damage, foster vital civilian cooperation, and prevent regeneration.[35] The law may constrain tactically aggressive courses of action, but less so than the operational environment itself.

III. Targeting Civilian-Belligerents

The law of war's "Basic Rule" ties privileges and immunities to status. "[T]he principle of the protection of the civilian population is inseparable from the principle of the distinction which should be made between military and civilian persons. In view of the latter principle, it is essential to have a clear definition of each of these categories."[36]

There are two essential privileges, each with a concomitant restriction. Combatant immunity is granted to fighters who obey the law of war, including the requirement to wear a uniform or "fixed insignia recognizable at a distance to help draw

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[29] Brown, *supra* note 5, at 168.

[30] Montgomery, *supra* note 28.

[31] Kahl, *supra* note 19, at 93.

[32] Brown, *supra* note 5, at 123.

[33] FM 3-24, *supra* note 14, at 7-6.

[34] *Id.*

[35] *See id.*

> In conventional operations, proportionality is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and military advantage gained. But in [counterinsurgency] operations, advantage is best calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained. If certain key insurgent leaders are essential to the insurgents' ability to conduct operations, then military leaders need to consider their relative importance when determining how best to pursue them. In [counterinsurgency] environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape. If the target is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement.

Id.

[36] AP I COMMENTARIES, *supra* note 6, at 610.

fire away from non-combatant civilians."[37] Fighters granted combatant immunity will not be subject to criminal prosecution for assault, murder, destruction of property, and other acts of violence. Everyone else is granted immunity from being intentionally attacked, provided they do not fight.[38] Additional Protocol I defines anyone who is not eligible for prisoner-of-war status as a civilian,[39] applying a broad, negative definition.[40] The Geneva Conventions and Additional Protocols bifurcate the world into combatants and civilians. This leaves a legal void in which civilian-belligerents can operate:

> From the principle of distinction there has arisen an overly simplistic division of individuals into two categories: military personnel, who may be attacked at any time, wherever located, and *civilians, who may not be intentionally attacked so long as they do not take an active part in military operations*. The latter incorrectly are sometimes referred to noncombatants. Combatant and noncombatant are imprecise, undefined terms.[41]

Article 51 does contemplate the phenomenon of civilian-belligerents without creating a third classification. It is entitled "Protection of the civilian population" and sub-section (2) reiterates the "Basic Rule" of distinction.[42] The United States recognizes this specific assertion as customary international law.[43] Indeed, Article 51 "explicitly confirms the customary rule that *innocent civilians* must be kept outside the hostilities as far as possible and enjoy general protection against danger arising from hostilities."[44] Sub-section (3) temporarily suspends such protection, but fails to adequately address the persistent threat from civilian-belligerent groups.

A. Additional Protocol I "Direct Part in Hostilities" Window for Engagement

Article 51(3) addresses the limitations of civilian immunity from targeting. "Civilians shall enjoy the protection afforded by this section, *unless and for such time as they take a direct part in hostilities*."[45] This "covers not only the time that the civilian makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon. . . ."[46] The engagement window extends to the pre-staging attack phase. However, civilians who work in war-related industries or otherwise sustain combatant ability to wage war are not taking "direct part in hostilities," and do not lose immunity from being targeted.[47] The breadth of interpretation is the essential issue. But, the engagement window is not open for very long.

Article 51(3) grants civilian-belligerents "light-switch" immunity from targeting. It is turned off briefly and only "for such time as they take a direct part in hostilities."[48] The commentary to the Additional Protocol describes "direct

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[37] *See* GPW, *supra* note 7, art. 4 (Privileged combatants are armed forces and attached militias who satisfy four criteria that pertain to discipline and distinction.).

[38] Additional Protocol I, *supra* note 7, art. 51(3); *see* AP I COMMENTARIES, *supra* note 6, at 618 ("In general, the immunity afforded civilians is subject to a very stringent condition: that they do not participate directly in hostilities, i.e. that they do not become combatants, on pain of losing their protection.").

[39] *Id.* art. 50 ("A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1),(2),(3), and (6) of the Third Convention and in Article 43 of this Protocol.").

[40] *See* AP I COMMENTARIES, *supra* note 6, at 610.

> In the course of history many definitions of the civilian population have been formulated . . . all of these definitions are lacking in precision . . .[t]hus the Protocol adopted the only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces.

Id.

[41] Civilian Status Memo, *supra* note 11 (quoting Additional Protocol I, art. 51(3)) (emphasis added).

[42] Additional Protocol I, *supra* note 7, art. 51(2) ("The civilian population as such, as well as individual civilians, shall not be the object of attack.").

[43] Memorandum from Office of the Secretary of Defense for Mr. John H. McNeill, Assistant General Counsel (International), 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986).

[44] AP I COMMENTARIES, *supra* note 6, at 615 (emphasis added) (The ICRC commentators describe Art. 51 as "one of the most important articles in the Protocol.").

[45] Additional Protocol I, *supra* note 7, art. 51(3) (emphasis added).

[46] AP I COMMENTARIES, *supra* note 6, at 618.

[47] *Id.* at 619 ("There should be a clear distinction between the direct participation in hostilities and participation in the war effort . . . [w]ithout such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless.").

[48] Additional Protocol I, *supra* note 7, art. 51(3).

participation" in two different and not necessarily consistent ways: acts "likely to cause" and acts "intended to cause actual harm to the personnel and equipment of the armed forces."[49] After a civilian-belligerent completes the act intended or likely to cause actual harm, he can turn the immunity switch back on under the "for such time as" construct. "It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection . . . against the effects of hostilities, and he may no longer be attacked."[50]

The commentary further states that "there is *nothing to prevent* the authorities, capturing him in the act or arresting him at a later stage, from taking repressive or punitive security measures with regard to him . . . ."[51] However, no foundation was provided for the assumption that "authorities" would be operating in a permissive environment. Counterinsurgencies are often fought in non-permissive environments where an arrest attempt would place lawful armed forces combatants *in extremis*. Moreover, counterinsurgency campaigns take place in states where non-combatant civilians carry arms (including automatic assault rifles) for personal protection.[52] Carrying arms openly does not offer much help for distinguishing civilian-belligerents from non-combatant civilians. This makes the lawful combatant obligation of wearing a "fixed distinctive sign recognizable at a distance"[53] the most effective means to protect non-combatant civilians from being harmed.[54]

B. The American Geographic, Functional, and Temporal "Direct Part" Determination

The United States did not ratify Additional Protocol I, taking particular exception to the legitimization of guerrilla warfare because the "the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants."[55] President Reagan did not send it to the Senate for advice and consent, in large part due to this very reason:

> Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war . . . [a]nother provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations.[56]

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[49] *Id.* at 618 (both subjective and objective language are addressed).

[50] AP I COMMENTARIES, *supra* note 6, at 618. *But see infra* note 130 (stating that direct participation is not limited to physical attack but membership in an "armed faction involved in attacks").

[51] *Id.* (emphasis added).

[52] *See Al Skeini Opinion*, *supra* note 16, para. 40.

[53] GPW, *supra* note 7, art. 4 (stating the second of four criteria that "organized resistance groups" are required to fulfill in order to be granted combatant immunity and prisoner of war status).

[54] *But see* Additional Protocol I, *supra* note 7, art. 44(3) (describing the controversial "guerrilla compromise" that lowers the criteria for combatant status by granting license to discard fixed distinctive insignia recognizable at a distance in special circumstances, despite the concomitant elevated risk to non-combatant civilians).

> In order to promote the protection of civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

Id.

[55] Policy Letter from the U.S. Secretary of State to the President of the United States, Advice and Consent of the Senate to Ratification, Protocol II Additional to the Geneva Conventions (Dec. 13, 1986).

> Equally troubling is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to "national liberation" movements in general, but in particular to the inhumane tactics of many of them. Article 44(3), in a single subordinate clause, sweeps away years of law by "recognizing" that an armed irregular "cannot" always distinguish himself from non-combatants; it would grant combatant status to such an irregular anyway. As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States' announced policy of combating terrorism.

Id.

[56] Policy Letter from the President of the United States to the U.S. Senate, Advice and Consent of the Senate to Ratification, Protocol II Additional to the Geneva Conventions (Jan. 29, 1987).

The United States interprets "direct part" more broadly than the Additional Protocol I signatories, and does so through the prism of self-defense. "A civilian entering the theater of operation in support or operation of sensitive, high value equipment, such as a weapon system may be at risk of intentional attack because of the importance of his or her duties."[57] The U.S. Department of Defense Law of War Working Group evaluated the role of American civilians accompanying the force and opined that they "may compromise their immunity from intentional attack" if there is: "(1) geographic proximity of service provided to units in contact with the enemy, (2) proximity of relationship between services provided and harm resulting to enemy, and (3) temporal relation of support to enemy contact or harm resulting to enemy."[58]

In transitioning from a defensive to an offensive perspective, no "bright line" exists to demarcate when a civilian becomes a lawful target.[59] The determination is fact sensitive and framed by the concept of self-defense.[60]

IV. The Inherent Right of Self-Defense

> A national decision to employ military force in self-defense against a legitimate terrorist or related threat would not be unlike the employment of force in response to a threat by conventional forces; *only the nature of the threat has changed, rather than the international legal right of self-defense.* The terrorist organizations envisaged as appropriate to necessitate or warrant armed response by U.S. military forces are well-financed, highly-organized paramilitary structures engaged in the illegal use of force.[61]

United Nations Charter Article 51 appears simple at first glance: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . . ."[62] However, the meaning of "armed attack," the impact of Security Council inaction, the problem of non-state actors, and the extent to which the United Nations Charter displaces pre-existing customary international law remain the subject of robust legal debate.[63] "[M]any States, including the U.S., argue that an expansive interpretation of the Charter is more appropriate, contending that the customary-law right of self-defense (including anticipatory self-defense) is an inherent right of a sovereign State that was not 'negotiated' away under the Charter."[64]

Self-defense is recognized as a right of customary international law by the International Court of Justice.[65] Article 51 of the United Nations Charter describes the right of self-defense as "inherent."[66] This "suggests that the right, which existed as a matter of customary international law before the Charter was adopted, was incorporated into the Charter and continues to exist independently of the Charter."[67]

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[57] Civilian Status Memo, *supra* note 11 (discussing potential loss of civilian immunity and prisoner of war status for civilians accompanying the force).

[58] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, INT'L & OPERATIONAL LAW VOL. II, I-10 (Sept. 2006) (Civilian Protections in Armed Conflict).

[59] *See* Civilian Status Memo, *supra* note 11 (discussing potential loss of civilian immunity and prisoner of war status for civilians accompanying the force).

[60] *See* W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, 4, 6.

> Another unresolved issue concerns which civilians may be regarded as combatants, and therefore subject to lawful attack. While there is general agreement among law of war experts that civilians who participate in hostilities may be regarded as combatants, there is no agreement as to the degree of participation necessary to make an individual civilian a combatant.

Id.

[61] *Id.* at 7 (emphasis added).

[62] U.N. Charter art. 51.

[63] *See* Mark B. Baker, *Terrorism and the Inherent Right of Self-defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25 (1987-1988); *see also* Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT'L L. & FOREIGN AFF. 331, 339 (2005) ("The Security Council may intervene by taking 'measures' which would effectively truncate the exercise of self-defense . . . [but] mere words or rhetoric are insufficient to divest a state of the right to self-help.").

[64] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, INT'L & OPERATIONAL LAW VOL. I, C-6 (July 2006) [hereinafter INT'L & OPERATIONAL LAW VOL. I] (Legal basis for the use of force).

[65] Printer, *supra* note 63, at 341 (citing Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14 (June 27)).

[66] U.N. Charter art. 51.

[67] *Id.* at 338 (customary self defense law will always be available because there is no triggering mechanism such as a state of international armed conflict).

All uses of force in international armed conflict are subject to the law of war requirements of necessity and proportionality. Self-defense is no exception.[68] The arguments that justify the use of force make themselves when warships, embassies, and urban centers are attacked by organized suicidal civilian-belligerents who are poised for a re-attack. Justification gets more difficult the more preemptive the use of force. "The key, of course, is determining at what point the requirement of necessity is triggered."[69] In other words "if the action of the United Nations is delayed or inadequate and the probability of the armed attack becomes manifestly imminent, instant, and overwhelming," a nation is lawfully entitled to take unilateral action and use preemptive force against the threat.[70]

It is particularly noteworthy that the sole United Nations Article 51 resolution was triggered by an armed attack perpetrated by a non-state actor.[71] Up until this point, it was far from clear that national self-defense could be invoked against civilian-belligerents.[72] However, force must be used to counter a future threat. Referring to the 1998 U.S. counterterrorist missile strikes, one author stated:

> International law did not recognize revenge or punishment as justification for military attack, but the customary law of self-defense did sanction such strikes if they were designed to disrupt or preempt an enemy's ability to carry out future attacks. This principle helped shape the Pentagon's target list: They would emphasize bin Laden's ongoing operations, the threat posed to the United States in the future, and his ability to give orders.[73]

In order to credibly claim color of law, it is wise to confine "the use of force to only those situations involving the most serious and dangerous form of threat to international peace."[74] Just as restraint during counterinsurgency warfare pays dividends with the local population, restraint during global counter-terrorist operations will pay dividends with nation-state actors. "If an aggressive use of force does not rise to the level of an armed attack, a state may pursue traditional criminal sanctions, but may not rightfully respond with military action."[75]

The law governing the use of force in national self-defense is a macrocosm of the choices to be made at the tactical level of warfare. The rights of nations are delegated to their agents on the battlefield, the combatants, usually by the promulgation of rules of engagement (ROE). "[A]nticipatory self-defense serves as a foundational element in the CJCS [Chairman of the Joint Chiefs of Staff] Standing ROE, as embodied in the concept of 'hostile intent,' which makes it clear to commanders that they do not have to absorb the first hit before their right and obligation to exercise self-defense arises."[76]

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[68] *See* Baker, *supra* note 63, at 33.

[69] *Id.* at 44 (discussing anticipatory responses).

[70] *Id.* at 45 (mirroring Caroline Doctrine language established after the 1837 British attack against an American vessel suspected of aiding Canadian insurgents. This incident is internationally recognized to stand for the proposition that use of force in anticipatory self-defense is lawful when the circumstances leading to the use of force are "instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation"); *see* INT'L & OPERATIONAL LAW VOL. I, *supra* note 64, at C-9.

[71] *See* Jonathan Ulrich, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA J. INT'L L. 1029, 1047 (2005) (quoting U.N. Security Council Resolution 1368).

> On September 12, 2001, the UN Security Council passed a resolution which, "recognizing the inherent right of individual or collective self-defense in accordance with the Charter," condemned the attacks and expressed the Security Council's "readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism. . . .

Id. (quoting UN SCOR, 56th Sess., 4370th mtg,, U.N. Doc. S/RES/1368 (2001), *available at* http://www.un.org/Docs/scres/2001/sc2001.htm) (last visited 15 Oct. 2007).

[72] *See* Printer, *supra* note 63, at 334.

> [T]he use of force paradigm as established by the U.N. Charter and extant customary international law, applies to military conflicts between state and non-state actors. In particular, the Charter's use of force provisions should apply to terrorist groups as a matter of customary law because groups that can carry out armed attacks that threaten global peace and security should be bound by the very provisions that seek to constrain such behavior.

Id.

[73] STEVE COLL, GHOST WARS 409 (2004) (discussing U.S. strike planning in 1998 that culminated in cruise missile attacks in Afghanistan and Sudan).

[74] Baker, *supra* note 63, at 33 (discussing U.N. Charter Article 51 interpretation).

[75] Printer, *supra* note 63, at 339.

[76] INT'L & OPERATIONAL LAW VOL. I, *supra* note 64, at C-9.

V. Rules of Engagement

Rules of Engagement control the use of force. They are designed to coordinate political, military, and legal purposes and "are one of the most effective tools for implementing strategic decisions made at higher levels."[77] Properly drafted ROE ensure law of war compliance, but they are a command control device, as opposed to a legal one.

The inherent right of self-defense is the backbone of U.S. Standing ROE (SROE). The Joint Chiefs of Staff repeatedly refer to this customary law in the "fundamental policies and procedures governing the actions taken by U.S. commanders and their forces during all military operations and contingencies."[78] The concept of self-defense is a central, unifying theme throughout the U.S. SROE, whether forces are conducting operations overseas or supporting domestic law enforcement. "Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent."[79]

High-level authorities can also declare a force "hostile" and authorize an offensive use of force. The on-scene tactical action officer or rifleman must follow the ROE and acquire positive identification or "reasonable certainty that the proposed target is legitimate."[80] Positive identification reiterates the law of war obligation to discriminate between combatants and non-combatants. This works well when the enemy complies with the law of war by wearing fixed insignia recognizable at a distance. It is rarely possible when fighting civilian-belligerents. Counterinsurgency force employment decisions are almost always based on conduct, even when mission-specific ROE declare the enemy insurgent, terrorist, or guerrilla group hostile.

A. Status-Based Engagement

It is lawful to attack enemy combatants at any time during international armed conflict. The restraint on force is limited only when there would be excessive collateral damage, when enemy combatants are attempting to surrender, or when enemy combatants are out of the fight due to injury.[81] Attacking combatants even when they are not in a position to mount an attack is lawful under any law of war regime: customary international law; the Hague Conventions; and the Geneva Conventions, to include the Additional Protocols. This concept is codified in the U.S. SROE: "Once a force is declared hostile by appropriate authorities, U.S. forces need not observe a hostile act or demonstration of hostile intent before engaging . . . ."[82]

This concept goes from well-established, when the target is a "combatant,"[83] to highly controversial, when the attack is initiated against a civilian-belligerent.[84] The U.S. SROE contemplate this contingency. A "declared hostile force" is "[a]ny *civilian*, paramilitary, or military force, or *terrorist(s)* that has been declared hostile by appropriate U.S. authorities."[85] If the ROE designate a civilian force hostile, the on-scene American servicemember will not have to perform the "direct part in hostilities" analysis. Positive identification as a member of the civilian-belligerent group becomes the issue. Additional Protocol I and the self-defense views converge at this point only because civilian-belligerents rarely distinguish themselves; thus, their status is not revealed until the point of attack.

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[77] Captain J. Ashely Roach, *Rules of Engagement*, NAVAL WAR COLLEGE REV. 47 (Jan.-Feb. 1983).

[78] JOINT CHIEFS STAFF INSTR. 3121.01B, THE STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES 1 (13 June 2005) [hereinafter JCSI 3121.01B] (including actions in support of domestic civil authority and routine force protection duties within American territory).

[79] *Id.* at 2-3, A-2 (citing self-defense right in rules of engagement section pertaining to overseas military operations, during civil support and law enforcement actions within the United States; and reiterated in policy section of ROE enclosure).

[80] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 117 (2006) [hereinafter JA 422] (reprinting the Operation Iraqi Freedom Combined Forces Land Component Commander ROE card promulgated 311334Z Jan 2003). *See also* CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN & IRAQ, 11 SEP 2001-1 MAY 2003, at 96-99 (2004) [hereinafter OEF-OIF LESSONS LEARNED] (PID is an implicit requirement of ROE and a restatement of the Basic Rule).

[81] *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art.12 Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 ("wounded or sick, shall be respected and protected in all circumstances").

[82] JCSI 3121.01B, *supra* note 78, at A-2.

[83] *See* GPW, *supra* note 7, art. 4.

[84] *See* HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2005] paras. 4-5 (petitioners unsuccessfully claimed the right of national self defense was inapplicable against civilian-belligerent groups, and in the alternative "that the targeted killings policy violate[d] the rules of international law even if the laws applicable to armed conflict between Israel and the Palestinians are the laws of war.").

[85] JCSI 3121.01B, *supra* note 78, at A-2 (emphasis added). It is noteworthy that this concept can be found in the unclassified portion of the ROE.

During major combat operations in Iraq in 2003, U.S. forces were issued the following ROE:

> On order, enemy military and paramilitary forces are declared hostile and may be attacked subject to the following instructions . . . [p]ositive identification (PID) is required prior to engagement. PID is reasonable certainty that the proposed target is a legitimate military target. If not PID, contact your next higher command for decision . . . ."[86]

Civilians were not to be targeted except in self-defense.[87] Eventually, the U.S. military issued more restrictive ROE that authorized the use of force in response to hostile acts or demonstrations of hostile intent.[88] Policy and tactics shifted to conduct-based engagement. Removing the declared hostile force language from the mission-specific ROE did not change the civilian-belligerent PID challenges, but did help foster a mindset change aligned to the counterinsurgency environment and the desired political end-state.[89] However, "PID in the self-defense context does not require that the actual identity of the threat need be known—e.g. whether the threat is part of a certain enemy force—but rather that the general source of the threat be known."[90]

B. Conduct-Based Engagement

The right of self-defense justifies the use of necessary and proportional force to counter an attack ("hostile act") or a threat of an attack ("demonstration of hostile intent"). A hostile act is "[a]n attack or other use of force" and hostile intent is "[t]he threat of imminent use of force" that is determined "based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous."[91] The attacker's classification as a combatant or civilian is not relevant because his conduct justifies the use of force.

When overseas and not engaging in offensive operations against a declared hostile enemy, U.S. armed forces are directed to assume a posture of de-escalation, to provide warning, and to allow a threat the opportunity to withdraw "when time and circumstances permit."[92] However, the U.S. SROE also recognize that "[s]elf-defense includes the authority to pursue and engage."[93]

1. American Force-Employment in Iraq

The U.S. military, now allied with the Iraqi armed forces, is embroiled in a counterinsurgency confronting an enemy force made up entirely of civilian-belligerents. This reality compounds the risk of confusion and collateral damage inherent in war, yet:

> [United States] compliance with noncombatant immunity in Iraq has been higher than critics often assert, and adherence has increased over time as the U.S. military has tried to correct its procedures in reaction to instances of noncompliance. Observed through the narrow lens of the laws of war, the U.S. military has gone to commendable lengths to comply with the principles of distinction and proportionality in Iraq.[94]

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[86] JA 422, *supra* note 80, at 117.

[87] *Id.*

[88] *Id.*

[89] *See* Kahl, *supra* note 19, at 97 (showing that changes in tactics, training, procedures and ROE "have had a positive effect" restraining the use of force that was permissible earlier in the war); *see also* OEF-OIF LESSONS LEARNED, *supra* note 78, at 98 (showing that most judge advocates agree that "PID requirement did apply to self-defense; for example, a civilian firing a weapon at U.S. forces is committing a hostile act, and seeing the civilian do so constitutes PID of the source of the threat").

[90] OEF-OIF LESSONS LEARNED, *supra* note 80, at 99.

[91] JCSI 3121.01B, *supra* note 78, at A-4.

[92] *Id.* (satisfying necessity and proportionality).

[93] *Id.* (illustrating that U.S. forces do not have to wait to absorb the first volley; apparent retreat can mean repositioning for the next attack).

[94] Kahl, *supra* note 19, at 98.

There have been criminal deviations from this overall trend. Misconduct and law of war violations "may be especially likely in a prolonged counterinsurgency campaign, due to the inherent stress of combat, the intense fog of war, the frustration of fighting an unseen enemy, the growing estrangement of the civilian population, and purposeful attempts by guerrillas to drive wedges between the counterinsurgent forces and the civilians these are supposed to protect."[95] United States Marines accused of murdering non-combatant civilians in Haditha is one prominent example.[96]

> As the war [in Iraq] transitioned into a counterinsurgency mission and U.S. forces confronted adversaries who were largely indistinguishable from the [non-combatant] civilian population, the criterion [for the employment of force] was status based: U.S. troops must now positively identify a "hostile act" (such as the firing of an automatic weapon in their direction) or a "hostile intent" (such as the brandishing of a rocket-propelled grenade or the planting of an improvised explosive device) before they may fire their weapons.[97]

The current ROE in Iraq "explicitly require U.S. troops to respond to a hostile act or intent with 'graduated' force. Under many circumstances, U.S. forces may engage in deadly violence only after warning their targets and trying non-lethal measures against them to no avail."[98] The mission specific ROE became less aggressive and shifted for tactical reasons back towards the SROE. Counterinsurgency warfare often must constrain force below the proportionality standard under the law of war. "Rather than decide-detect-deliver-assess [targeting process], the [counterinsurgency] process may become detect-decide-deliver-assess. This is because the targets are individuals or groups of people rather than a fixed-enemy order of battle. It is impossible to decide who/what to target without first knowing who/what the targets are."[99]

The practical and legal constraints of PID make status-based engagements very rare in a counterinsurgency environment. United States armed forces are in a reactive posture. "The Marines say insurgents know the rules, and now rarely carry weapons in the open."[100] Instead, "they pose as civilians and keep their weapons concealed in cars or buildings until just before they need them. Later, when they are done shooting, they put them swiftly out of sight and mingle with civilians."[101] The British armed forces face the same challenges. Although bound by Article 51(3) during international armed conflict, "after the end of major combat operations, British ROE shifted from war fighting to those permitted under the law of self-defense, known as card Alpha."[102] The practical realities make the potential differences between the two legal regimes inconsequential.

2. British Force-Employment in Iraq

The British armed forces "Guidance for Opening Fire for Service Personnel" issued during the occupation phase of Operation Iraqi Freedom is similar to, but not as aggressive as, the U.S. SROE. For example, British troops are authorized to "open fire against a person if he/she is committing or about to commit an act likely to endanger life and there is no other way to prevent the danger."[103]

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[95] *Id.*

[96] *See U.S. Marines Face Iraq Murder Trial*, BBC, Dec. 22, 2006, *available at* http://news.bbc.co.uk/2/low/middle_east/619847.stm (noting that order to "shoot first and ask questions later" is reprinted on the criminal charge sheet).

[97] Kahl, *supra* note 19, at 93.

[98] *Id.* at 94.

[99] FM 3-24, *supra* note 14, at 28.

[100] C. J. Chivers, *Perfect Killing Method, But Clear Targets Are Few*, N.Y. TIMES, Nov. 22, 2006, at 1.

[101] *Id.*

[102] Interview with Lieutenant Colonel Alex Taylor, AGC (British Army Legal Service), Director, Coalition Operations, CLAMO, TJAGLCS, U.S. Army, in Charlottesville, Virginia (Feb. 21, 2007) [hereinafter Lieutenant Colonel Taylor Interview] (Lieutenant Colonel Taylor served as the Staff Judge Advocate HQMND, East in Basra, Iraq in 2005) (notes on file with author).

[103] *Al Skeini Opinion*, *supra* note 16, para. 45 (describing the U.S. "hostile intent" towards personnel only). Card Alpha states:

> 1. This guidance does not affect your inherent right of self-defense. However, in all situations you are to use no more force than absolutely necessary. FIREARMS MUST ONLY BE USED AS A LAST RESORT. 2. When guarding property, you must not use lethal force other than for the **protection of human life.** PROTECTION OF HUMAN LIFE. 3. You may only open fire against a person if he/she is committing or about to commit an act **likely to endanger life and there is no other way to prevent the danger**. CHALLENGING. 4. A challenge MUST be given before opening fire unless: a. To do this would be to increase the risk of death or grave injury to you or any other persons other than the attacker(s) **OR** b. You or others in the immediate vicinity are under armed attack. 5. You are to challenge by shouting: **"NAVY, ARMY, AIR FORCE, STOP OR I FIRE."** Or

In 2004, the families of six Iraqis killed by British armed forces in Iraq filed suit in England, alleging wrongful deprivation of life under European Convention of Human Rights (ECHR).[104] British troops killed Mr. Al Skeini and four other Iraqis in separate unrelated pre-custodial confrontations.[105] The ECHR states that "[n]o one shall be deprived of his life save in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law."[106] However, the Convention does not prohibit killing in "defence of any person from unlawful violence, in order to effect a lawful arrest . . . [or] for the purposes of quelling a riot or insurrection."[107]

Although the British court did not make any findings of fact, the record contains detailed after-action accounts that underscore the operational realities associated with counterinsurgency operations. The *Al Skeini* case provides an excellent insight into the realities faced by coalition armed forces in Iraq and descriptions of conduct-based engagements. The first case pertains to hostile intent.

> Case 1 . . . the patrol saw and heard heavy gunfire from a number of different points . . . . The intensity of the firing appeared to increase as the patrol approached the area on foot and in darkness. The patrol thought a firefight between rival groups was in progress. When the patrol encountered two Iraqi men in the street, Sergeant Ashcroft opened fire *because the two men were armed and Sergeant Ashcroft considered them to represent an immediate threat* to his life and the lives of the other members of the patrol.[108]

The British sergeant assessed that two men carrying weapons during the course of a firefight were an imminent threat to his patrol. He had no way of knowing what faction the men represented or if they were unaffiliated, well-armed, non-combatant civilians out for a late night walk. The sergeant's force employment decision was based on only two facts: there was a firefight and the targets were armed. The British Army determined the decision to be reasonable and within the rules of engagement. The second case is another example of hostile intent, only with more compelling circumstantial support.

> Case 2 . . . The patrol had received information that a group of men armed with long barreled weapons, grenades, and rocket propelled grenades has been seen entering the house . . . After the patrol failed to gain entry by knocking, the door was broken down . . . as [one of the British soldiers] entered the second room he heard automatic gunfire from within the house . . . two men armed with long barreled weapons rushed down the stairs towards him. There was not time to give a verbal warning. [The British soldier] believed that his life was in immediate danger. He fired one shot at the leading man (the deceased) and hit him in the stomach. He then trained his weapon on the second man who dropped his gun . . . .[109]

This British soldier decided to fire based on prior knowledge, non-responsiveness, weapons discharge from unseen person(s) in the house, and the presence of an armed man running toward him. Once again, the British Army determined that the use of force was reasonable and within the rules of engagement. Note that the soldier fired a single shot, and, in a remarkable display of restraint, held fire when the second target demonstrated his willingness to surrender. The third case involved a victim of collateral damage.

> Case 3 . . . [The deceased] was shot during a firefight . . . [w]hen the area was illuminated with parachute flares, at least 3 men with long barreled weapons were seen in open ground, two of whom were firing directly at the British soldiers. One of the gunmen was shot dead during this exchange of fire with the patrol . . . . The deceased plaintiff (a woman) was found in a nearby building with a gunshot wound to the head, an apparent collateral damage victim.[110]

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words to that effect. **OPENING FIRE**. 6. If you have to open fire you are to: a. fire only aimed shots AND b. Fire no more rounds than are necessary, AND c. Take all reasonable precautions not to injure anyone other than your target.

Id. (emphasis in original).

[104] *See id.* para. 6. Only one of the six plaintiffs was taken into custody. *Id.* This article focuses on the five pre-custodial shootings.

[105] *Id.*

[106] *Id.* para. 318.

[107] *Id.*

[108] *Id.* para. 58 (emphasis added).

[109] *Id.* para. 62.

[110] *Id.* para. 66.

The soldiers employed force in response to perceived hostile acts. The British Army determined that the patrol's actions were within the rules of engagement. There was no evidence showing whether the victim was shot by the civilian-belligerents or the British soldiers. Collateral damage is never helpful in counterinsurgency warfare, but it is inevitable. In this case, the soldiers were under fire and successfully engaged one of their attackers. This was not an example of indiscriminate fire. The fourth case pertains to hostile intent perceived from non-compliance and erratic behavior at a traffic control point.

> Case 4 . . . [the British soldier] became suspicious of a minibus, with curtains over its windows, that was being driven towards the patrol at slow speed with its headlights dipped. When the vehicle was signaled to stop, it appeared to evade the soldiers . . . so [the British soldier] pointed his weapon at the driver and ordered him to stop . . . . The vehicle then stopped . . . . The driver reacted in an aggressive manner and appeared to be shouting over his shoulder to people in the curtained-off area in the back of the vehicle. When [the British soldier] tried to look into the back of the vehicle, the driver pushed him away by punching him in the chest . . . shouted into the back of the vehicle and made a grab for [the British soldier's] weapon. [The British soldier] had to use force to pull himself away. The driver then accelerated away, swerving in the direction of various other members of the patrol . . . [the British soldier] fired at the vehicle's tyres and it came to a halt about 100 metres from the patrol. The driver turned again and shouted into the rear of the vehicle. He then appeared to be reaching for a weapon. [The British soldier] believed that his team was about to be fired on by the driver and others in the vehicle. He therefore fired about 5 aimed shots. As the vehicle sped off . . . fired another 2 shots . . . . After a short interval, the vehicle reappeared and screeched to a halt . . . the driver . . . [had] three bullet wounds in his back and hip area. . . . [111]

In this incident, a British soldier again demonstrated tremendous discipline. He suffered a physical attack and relied on multiple indicators of hostile intent prior to directing aimed fire at the decedent. The last two rounds fired could be challenged as excessive. But, it always will be difficult to assess whether the target is fleeing or repositioning. Room for error is slim, especially when there is a threat of vehicle-borne improvised explosive devices. The British Army determined this force employment decision to be reasonable and within the ROE. The fifth case involves an unambiguous hostile act.

> Case 5 . . . The patrol heard a gunshot in the immediate vicinity . . . [the British soldier] illuminated a man (the deceased) standing about 20 metres away. The man was holding an AK rifle and gesticulating with both arms raised. He was also shouting at persons in the courtyard . . . [the British soldier] continued to illuminate the man and shouted warnings at him. The man turned . . . brought down his rifle and fired one round at [the British soldier, who] fired a single shot at the man . . . .[112]

This is a textbook example of proportional use of force in response to a hostile act. The British Army determined this force employment decision was reasonable and within the ROE.

American and British frontline experience supports the assumption that armed forces are reactive and employ force based on conduct. However, this is not always the case. On occasion, human or signals intelligence will enable the employment of anticipatory force. This is particularly true in the case of insurgent or terrorist leadership because they are the subject of intense intelligence collection efforts.

VI. Targeted Killing: the Extreme Test of Direct Participation and Self-Defense

"Any targeted killing, regardless of whether it is treated as an assassination, must fall within the [the United Nations Charter] Article 51 exception to the Article 2(4) prohibition against the use of force."[113] Given the widely differing interpretations on a nation's right to self-defense, factual support to justify the scope of application is the key to the perception of legitimacy.

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[111] *Id.* para. 70.

[112] *Id.* para. 79.

[113] Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 DUKE L.J. 677, 690 (2005).

A. "Assassination" in War and Peace

> Acting consistent with the Charter of the United Nations, a decision by the President to employ clandestine, low visibility or overt military force would not constitute assassination if U.S. military forces were employed against the combatant forces of another nation, a guerrilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States.[114]

Assassination is illegal under international law.[115] But, it is undefined. "It is virtually impossible to discuss the legal issues surrounding assassination without an acceptable working definition."[116] There have been attempts to define what assassination is not, just like the problematic negative definition for "civilian." However, those efforts do not enjoy the force of law but are merely legal commentaries.

> Modern definitions often distinguish between peacetime and wartime assassination. Although both are illegal, the criteria for determining each type of assassination are slightly different. Peacetime assassination requires the murder of a specifically targeted person for a political purpose. Wartime assassination, on the other hand, requires the murder of a targeted individual and the use of treacherous means.[117]

If the wartime-perfidy/peacetime-political purposes test is a reasonable reflection of law, status-based engagements of enemy belligerents during international armed conflict and conduct-based engagements of anyone, at any time, would not constitute assassination.

Customary international armed conflict has undergone a transformation. Non-state, transnational organizations with significant personnel, training, and equipment continue to threaten nation states, indeed super powers, to the point that national self-defense can reasonably be invoked.[118] Unlike the "war on drugs" slogan that politicians invoked to rally support for international criminal law enforcement initiatives, the slogan "Global War on Terror" does describe a de facto armed conflict of an international character. Whether or not such a "war" constitutes international armed conflict within the meaning of Common Article 2 is a matter of legal debate.[119] But, no rational person can deny that organized non-state actors are carrying out systematic paramilitary attacks across international boundaries that have necessitated nation-states to respond to the ongoing threat with armed forces. "[A]n entity that elects to use force on the international plane should be treated as an international actor and should be bound by accepted international norms."[120]

The most cutting-edge aspect of the Global War on Terror is the application of force against non-state actors as opposed to treating the problem exclusively as a matter of international criminal law. "A civilian who undertakes military activities assumes a risk of attack, and efforts by military forces to capture or kill that individual would not constitute assassination."[121] This justification "has only begun to gain [broader international] acceptance, in light of the tragic events of September 11, 2001."[122] However, American preemptive use of force against nation-state and non-state actors substantially predates this watershed event.[123]

It is patently obvious that the two main belligerents in the Global War on Terror are the United States and al Qaeda. "[I]t is not clear whether terrorists like those in the al Qaeda network are more accurately characterized as enemy combatants or

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[114] Parks, *supra* note 60, at 8.

[115] It is also illegal under American law per Executive Order 12,333. This article focuses on the international dimensions of the use of force.

[116] Wachtel, *supra* note 113, at 680.

[117] *Id.* Treachery is a term of art in the law of war. The author further clarifies by referring to the "ruse-perfidy distinction." *Id.*

[118] *See* Ulrich, *supra* note 71, at 1047 (stating that U.N. Security Council Resolution 1368 invoked Article 51 in response to al Qaeda's 9/11 attacks).

[119] *See* A. P. V. ROGERS, LAW ON THE BATTLEFIELD 46 (2004) ("Even if one could establish that this was a situation to which the law of war applied . . . some leading academics are scornful of the very idea that a 'war on terrorism' is a war in the legal sense.").

[120] Printer, *supra* note 63, at 345.

[121] Parks, *supra* note 60, at 7 (discussing assassination in wartime in a counterinsurgency environment).

[122] Wachtel, *supra* note 113, at 693.

[123] *See* Parks, *supra* note 60, at 7 (discussing a list of examples of United States' use of force to protect its citizens from threats originating in foreign countries, from the Barbary pirates in 1804 to the 1986 air strikes in Libya).

criminal suspects. The nature of the threat that they pose—to both military forces and civilian populations—blurs the combatant/criminal distinction."[124] Nevertheless, responsive use of force should be prompt.

> If a state waits too long before invoking its right to self-defense, its use of force might be considered a reprisal. . . . There is a fine line between a legal use of force of self-defense to counter an ongoing threat and an illegal retaliation for a prior act of aggression. . . . The right to use force is therefore always forward-looking . . . because the only permissible justification for using force is 'protective, not punitive.'[125]

Targeted killing of combatants is not unlawful during international armed conflict. With respect to civilian-belligerents, there is a correlation between the intensity of objection to anticipatory self-defense claims and the location of the strike, to wit: whether the target was engaged inside or outside a recognized theater of armed conflict.

B. Examples of Targeted Killing

1. Targeted Killing within a Theater of Armed Conflict

On 8 June 2006, "U.S. armed forces discovered the location of Abu Musab al-Zarqawi, the leader of al Qaeda in Iraq, and killed him and his companions with two 500 pound bombs."[126] It appears that U.S. military commanders assessed that attempting to capture Zarqawi (and potentially gain extraordinary intelligence) presented too many risks. This is a relatively rare example of a civilian-belligerent status-based engagement. Yet, this killing did not yield an outcry from the international community. Perhaps this is a sign of acquiescence to state practice.

The United Nations Secretary-General implied approval by stating "of course, we cannot predict that this will mean an end of the violence, but it is a relief that such a heinous and dangerous man, who has caused so much harm to Iraqis, is no longer around to continue his work."[127] A lawyer with the militant Egyptian Islamists stated: "Zarqawi was a symbol . . . and was the *head of an army* . . . if Zarqawi has fallen, there are others to take his place and *responsibility*."[128] On the same day, the Washington Post reported that an explosion ripped through a busy outdoor market in Baghdad just a few hours after Zarqawi's death, and commented that the bombing emphasized "the *threat of continued* violence."[129] This report aptly captures al Qaeda's constant menace.

Technically a "civilian," Zarqawi was also a "general," who commanded a belligerent group in a recognized zone of armed conflict. Even though he was resting in a house at the time of his death, Zarqawi's record of carnage, ongoing virulent threats, and paramilitary assets make a self-defense claim credible. An influential U.S. military law commentator described the U.S. view in a presciently tailored scenario seventeen years before this strike:

> In the employment of military forces, the phrase "capture or kill" carries the same meaning or connotation in peacetime as it does in wartime. There is no obligation to attempt capture rather than attack of an enemy. In some cases, it may be preferable to utilize ground forces in order to capture (e.g.) a known terrorist. However, where the risk to U.S. forces is deemed too great, if the President has determined that the individual(s) in question pose such a threat to U.S. citizens or the national security interests of the United States as to require the use of military force, it would be legally permissible to employ (e.g.) an air strike against that individual or group rather than attempt his, her, or their capture, and would not violate the prohibition on assassination.[130]

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[124] Ulrich, *supra* note 71, at 1055.

[125] Wachtel, *supra* note 113, at 690.

[126] Ellen Knickermeyer & Jonathan Finer, *Insurgent Leader al-Zarqawi: Killed in Iraq*, WASH. POST, June 8, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/08/ARZ2006060800114.html (al-Zarqawi was responsible for "hundreds of bombings, kidnappings, and beheadings in Iraq.").

[127] *World Reacts to al-Zarqawi Death*, CNN, June 8, 2006, *available at* http://www.cnn.com/2006/WORLD/meast/06/08/zarqawi.reax/ (emphasis added). *CNN* posted select quotes from various reactions from around the world.

[128] *Id.* (quoting Montasser al-Zayyar) (emphasis added). If Zarqawi is not a lawful target, no one is.

[129] Knickermeyer, *supra* note 126 (emphasis added).

[130] Parks, *supra* note 60, at 7 n.6.

The Zarqawi strike is an even rarer example of when anticipatory self-defense overlaps with the Article 51(3) "direct part" test—when the target is not physically preparing to engage in an attack. "'[D]irect' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[131] Command of a belligerent group should qualify under any reasonable Additional Protocol I interpretation. An influential British military law commentator holds the view that "[b]ecoming a member of a guerrilla group or armed faction involved in attacks against enemy armed forces" constitutes "taking a direct part in hostilities . . . so long as participation in the activities of the group continued."[132] The Additional Protocol I community would vary in their interpretation of this point, but apparently not in the case of Zarqawi.

Outside a recognized theater of combat operations, there is a strong presumption that law enforcement is the only proper response. Credible claims that lethal force was necessary in self-defense will require much greater justification.

2. Targeted Killing Outside a Theater of Armed Conflict

> [President] Bush's authorization of selective lethal force does not seem to have any geographic or temporal limitations. . . . [It is not clear] when this new war will end, or to what degree it justifies the use of military force in parts of the world which are not internationally recognized theaters of armed conflict.[133]

Claims of preemptive self-defense outside a recognized theater of combat operations present a slippery slope that could indeed lead to abuse of national power. The concern that the war on terrorism could be used as a pretext for unwarranted use of force is rational. Self-defense law requires a strike-by-strike analysis to ensure that force is used to prevent an imminent attack.

> [A]n attacked state may rightfully respond militarily if it reasonably believes that force is the only option available to defeat the enemy and to eliminate or reduce the threat of future attacks. However, in the absence of a continuing threat, the principle of necessity would not justify the use of force.[134]

al Qaeda's threat is persistent. In November 2002, the United States obtained Yemen's permission to fly a Predator drone into its airspace and kill Qaed Salim Sinan al-Harethi, an al Qaeda leader. "As the first known [post-9/11] use of force against al Qaeda outside Afghanistan, the Predator missile attack was viewed as a move 'away from law enforcement-based tactics of arrest and detentions' that the Bush administration had previously employed against terrorist suspects beyond the Afghan theater of operations."[135] Unlike strikes in Afghanistan and Iraq, "[s]ources both domestically and abroad criticized the strike, aimed at one of Osama bin Laden's top lieutenants, as an extrajudicial killing or assassination in violation of international law."[136] Specifically, "[t]he line of reasoning put forth by Amnesty International and the UN Special Rapporteur places the war against terrorism in a strictly law enforcement framework: terrorists are suspects, to be arrested and tried for their crimes."[137]

In *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, Norman G. Printer, Jr., puts forth cogent reasons why terrorists should not enjoy targeting immunity and argues that "according protected status to terrorists would only create an incentive for noncompliance with the laws and customs of war. If a terrorist could claim a privileged status, he would, in effect, be rewarded for disobeying the rules."[138]

Mr. Printer counters the claim that the al-Harethi strike was an unlawful extra-judicial killing by asserting that the man and his organization (al Qaeda) were a continuing threat to the United States of America, and at the time of his death he was

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[131] AP I COMMENTARIES, *supra* note 6, at 619.

[132] ROGERS, *supra* note 119, at 11. Note "against enemy armed forces" language; it would be an unjust anomaly if an Additional Protocol I nation could strike a civilian-belligerent who kills their soldiers but not their civilians. *Id.*

[133] Ulrich, *supra* note 71, at 1044.

[134] Printer, *supra* note 63, at 342 ("For instance, in the case of a single terrorist attack without the expectation of another attack").

[135] Ulrich, *supra* note 71, at 1042.

[136] Printer, *supra* note 63, at 332.

[137] Ulrich, *supra* note 71, at 1057 (discussing the Yemen missile strike).

[138] Printer, *supra* note 63, at 375.

taking direct part in hostilities within the meaning of customary law of war.[139] He goes on to analyze the five dead associates believed to be low level al Qaeda members. However, at the time of the strike it was not possible to positively identify them. Nevertheless "it was reasonable to conclude that the individuals traveling with al-Harethi were not lawful belligerents because as his associates or bodyguards, they enabled al-Harethi to plan and perform terrorist operations in violation of the laws of war."[140] Even if critics of the al-Harethi strike argue that such an assumption is still indiscriminate, the military necessity of neutralizing a high ranking al Qaeda terrorist outweighs the collateral damage of five dead associates. "In short, a high value military objective may justify the taking of one or more innocent lives."[141]

The President of the United States authorized lethal force against al Qaeda leadership before 9/11. In response to the al Qaeda suicide bombing attacks on U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania on 7 and 20 August 1998, President Clinton ordered seventy-five Tomahawk missile strikes against jihadist training camps in Zawhar Kili, Afghanistan and thirteen Tomahawk missile strikes against a chemical factory in Khartoum, Sudan associated with Bin Laden and the al Qaeda network.[142] In less than two weeks, al Qaeda and the United States exchanged armed attacks in four separate sovereign nations. At the time of the strike, bin Laden was under indictment for "conspiracy to attack defense utilities of the United States."[143] Even though arrest was impracticable, the legality and advisability of military strikes was a hot topic of debate in the Clinton Administration.

The classified legal memoranda in which President Clinton authorized covert action against bin Laden were ambiguous, reflecting differences of opinion at the senior advisor-level as well as concern both about failure and collateral damage.[144] Senior American advisors debated how best to approach bin Laden and al Qaeda after the bloody attacks on the U.S. embassies in Africa. Secretary of Defense Cohen "argued that the debate over war versus law enforcement was a 'false choice,' [and that] all instruments of American power were required at once."[145] President Clinton planned for both.

Presidential authority given to the Central Intelligence Agency (CIA) to covertly seek bin Laden's capture "zigzagged on the issue of lethal force."[146] Although force in self-defense while attempting to capture bin Laden was permitted, the conditions of certainty required for offensive strike authorization were considered impracticable by counterterrorist operatives.[147] President Clinton put several submarines on alert in the Arabian Sea and made clear that he was prepared to kill bin Laden under the right circumstances. The CIA was trying to fix the locations of bin Laden and al-Zawahiri[148] with the intent to pass the coordinates to the submarines.[149] "[There] was no question [that] the cruise missiles were trying to capture [bin Laden]. They were not law enforcement techniques."[150]

In 1998, when the President authorized missile strikes against bin Laden and al Qaeda-related facilities inside Afghanistan and Sudan, they were not theaters of armed conflict for the U.S. military. "World reaction" ranged "from praise to condemnation."[151] However, the use of force was in response to attacks of a magnitude and kind (embassies and a warship) that were textbook acts of war, usually reserved for nation-state actors. India's external ministry stated that "the

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[139] Mr. Printer does not discuss Additional Protocol 1 because the United States is not a party. *See* State Parties/Signatories to Additional Protocol I, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=p (last visited Sept. 18, 2007).

[140] Printer, *supra* note 63, at 372.

[141] *Id.* at 380 (discussing the law of war obligation of proportionality). Note that a strike in the open desert does not raise counterinsurgency tactical concerns. *Id.*

[142] COLL, *supra* note 73, at 411.

[143] *Id.*

[144] *Id.* at 425.

[145] *Id.* at 427.

[146] *Id.* at 428.

[147] *Id.* at 429 ("unless you find him walking alone, unarmed, with a sign that says 'I am Osama' on him . . . we weren't going to attempt an operation").

[148] al Qaeda second in command. *See* http://www.cnn.com/CNN/Programs/people/shows/zawahiri/profile.html (last visited Sept. 21, 2007).

[149] The status of the CIA operatives under the law of war is an interesting question that could be fairly posed. Using Geneva Conventions Identification Card-carrying members of the U.S. military on direct action missions eliminates this issue.

[150] COLL, *supra* note 73, at 429.

[151] *World Reaction: From Praise to Condemnation*, BBC, Aug. 21, 1998, *available at* http://news.bbc.co.uk/2/low/1555885.stm.. Condemnation came from Sudan, Russia, Libya, Iraq, Iran and the Palestinian authority; praise came from Britain, Israel, Germany, Australia, and Japan; with "muted" responses from China and India. *Id.*

international community should develop a global mechanism to deal with the menace of trans-border terrorism."[152] Until that day happens, the case against al Qaeda under customary international law has been solid since 1998, and the ensuing nine years has done nothing but improve the justification for the use of lethal force. However, there always remains the potential to overreach and stretch the bounds of credulity.

"[T]he indeterminate geographic and temporal bounds of the war on terror demand that some distinction be drawn between the engagement of terrorists within and without a zone of armed conflict. . . . [A] higher standard must govern where it is not clear that the laws of war should."[153] Once again, the issue here is a question of degree, not kind. Moreover, counterterrorism operations will unfortunately be intergenerational. Maintaining credibility must be a priority for democratic nations. "Although a logical outgrowth of earlier targeting policies, Bush's targeting of terrorists does present new legal challenges, insofar as it derives its legitimacy from the war on terror and what might be viewed as an indefinitely protracted Article 51 self-defensive action."[154]

The strategic counterterrorist environment is like the tactical counterinsurgency environment in that they both must employ force in a way that maximizes cooperation. Articulating that the use of force was preventative and that apprehension was impracticable are the keys to persuading other state-actors that a military strike was legitimate (a narrower standard than international law). The Long-Term Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism put forth a standard for targeted killing:

> [A]ny authorization of targeted killing outside a zone of active combat must be "justified as necessary to prevent a greater, reasonably imminent harm or in defense against a reasonable imminent threat to the life of one or more persons." Necessity requires that there be no reasonable alternative, like arrest or capture - that targeting killing is the last resort. "Reasonably imminent" means that there must be "a real risk that any delay in the hope of developing an alternative would result in a significantly increased risk of the lethal attack."[155]
>
> This proposition is substantially similar to the standard propounded by the Israeli Supreme Court.

C. Israeli Practice and Legal Position

"In its war against terrorism, the State of Israel employs . . . what it calls the 'policy of targeted frustration' of terrorism . . . [targeting] terrorist organizations involved in planning, launching, or execution of terrorist attacks against Israel."[156] This policy is aggressive, as much for its frequency of execution as it is for the interpretation of anticipatory self-defense. Under the Israeli "active defense" or "accumulation of events" view, "a state may invoke Article 51 to protect its interests if there is sufficient reason to believe that a pattern of aggression exists."[157]

The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment (PCATI) sued the Israeli government, claiming that their targeted killing policy violated both international and Israeli law. The plaintiffs alleged that by the end of 2005, Israeli security forces had intentionally killed approximately 300 "members of terrorist organizations," had attempted to kill another thirty suspected terrorists, and had caused approximately 150 non-combatant civilian deaths with hundreds more wounded.[158]

The complaint asserted that "the legal system applicable to the armed conflict between Israel and the terrorist organizations is not the laws of war, [but] rather the legal system dealing with law enforcement in occupied territory."[159]

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[152] *Id.*

[153] Ulrich, *supra* note 71, at 1059 (proposing a standard for authorization for targeted killing outside of armed conflict).

[154] *Id.* at 1043.

[155] *Id.* at 1057-58 (quoting Philip B. Heymann & Juliette N. Kayyem, Long-Term Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism, *available at* http:/www.mipt.org/pdf/Long-Term-Legal-Strategy.pdf) (last visited 15 Oct. 2007).

[156] HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2005] para. 2.

[157] Wachtel, *supra* note 113, at 693.

[158] HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2005] para. 2. Israel was contending with the second *Intifada*. *Id.*

[159] *Id.* para. 4.

Hence, "suspects are not to be killed without due process, or without arrest or trial."[160] The plaintiffs asserted in the alternative that targeted killing violates the laws of war because there is no intermediate classification of "unlawful combatant" between "civilian" and "combatant," and that the former was immune from being targeted.[161]

PCATI did acknowledge the Additional Protocol I, Article 51(3) "direct part" window and urged a narrow interpretation that would make a civilian who took part in hostilities immune from attack "from the time that the civilian returns to his house, and even if he intends to participate again later in hostilities . . . although he can be arrested and tried for his participation in the combat."[162] The Israeli Supreme Court rejected this position, stating that "[i]t is no longer controversial that a state is permitted to respond with military force to a terrorist attack."[163]

The Israeli Supreme Court also rejected the government of Israel's argument that since terrorists "do not differentiate themselves from the civilian population, and since they do not obey the laws of war . . . that a third category of persons—the category of unlawful combatants—should be recognized."[164] The court took "no stance regarding the question whether it is desirable to recognize this third category" because the issue was "not one of desirable law, rather one of existing law," and that the court determined there was insufficient grounds for a third category to be "recognized in the framework of the *Hague* and *Geneva Conventions*."[165]

The Israeli Supreme Court approached the case pursuant to "the customary international law dealing with the status of civilians who constitute unlawful combatants."[166] It determined that Additional Protocol I, Article 51 codifies customary international law.[167] It is universally agreed that civilians forfeit their immunity from targeting if they take direct part in hostilities.[168] However, interpretation of taking "direct part" in hostilities varies widely. The scope of the "direct part" test application was the crux of the case. The decision parsed Article 51(3), addressing "direct part in hostilities" and the "for such time as" temporal element.

The Israeli Supreme Court did not have uniform international persuasive sources to address the meaning of "direct part in hostilities." The court first identified the two extreme edges, selling food to unlawful combatants and carrying arms en route to an ambush. It then delved into the purpose of the provision and the impact of a narrow interpretation. "The rationale behind the prohibition against targeting a civilian who does not take direct part in hostilities, despite his possible (previous or future) involvement in fighting, is linked to the *need to avoid killing innocent civilians*."[169] The court concluded that the "direct character of the part taken should not be narrowed merely to the person committing the physical attack. Those who have sent him, as well, take a 'direct part.' The same goes for the person who decided upon the act, and the person who planned it."[170] The decision cited the Additional Protocol I Commentaries in support, noting the ICRC editors' observation that "[i]t is possible to take part in hostilities without using weapons at all."[171]

The Israeli Supreme Court noted the potential for a "revolving door" and refused to interpret the "for such time" element of Article 51(3) in a way that would grant civilian-belligerents light switch immunity.[172] Four considerations relevant to deciding a lawful course of action in "gray" cases were put forth: "well based information is needed" before categorizing a

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[160] *Id.*

[161] *Id.* para. 5.

[162] *Id.* para. 6.

[163] *Id.* para. 10.

[164] *Id.* para. 11.

[165] *Id.* para. 28 (emphasis in original).

[166] *Id.* Israel, like the United States, did not sign Additional Protocol I.

[167] *Id.* para. 30 (citing the International Criminal Tribunal for the Former Yugoslavia decision in Struger and military manuals of many states, including the United States).

[168] *See id.* para. 31 (quoting the Red Cross "Model Manual on the Law of Armed Conflict for Armed Forces").

[169] *See id.* (quoting Professor Cassesse, a respected international law scholar, who ironically testified on behalf of the plaintiffs in this case) (emphasis in original).

[170] *Id.* para. 37.

[171] *See id.* para. 31 (citing the Inter-American Commission on Human Rights, the Commentary to the Additional Protocols, and international academic texts).

[172] *See id.* para. 40.

civilian as a combatant;[173] "a civilian taking direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed";[174] a "thorough investigation regarding the precision of the identification of the target and the circumstances of the attack . . . is to be performed (retroactively)";[175] and the attack must be in accordance with the principle of proportionality if there is a risk of collateral harm to non-combatants.[176] Targeted killing that comports with these criteria was deemed lawful.

The Israeli Supreme Court opinion builds a framework for the legitimate use of force that requires positive identification and necessity, while being sensitive to the potential for abuse of sovereign power. However, the record does not lay a foundation that each case of targeted killing met these criteria, perhaps because it was not a "case" as envisioned by U.S. law. In order to maintain legitimacy, governments must meet their burden of factual production. The issue hinges more on the facts than the law.

VII. Conclusion

Article 51(3) and self-defense law often merge into a marriage of practicability, brought together by civilian-belligerent tactics that channel the different legal constructs onto common ground. Insurgents and terrorists effectively utilize their noncombatant camouflage to attack their uniformed enemies and undermine civilian security.[177]

The two legal regimes are substantially similar when applied to conduct-based engagements. Article 51(3) permits the targeting of civilian-belligerents for "such time as they take direct part in hostilities."[178] Self-defense law permits the use of force to counter hostile acts or the threat of imminent attack.[179] Counterinsurgent armed forces are usually in a reactive posture and must wait for the civilian-belligerents to reveal themselves by their conduct. Under both standards, armed forces can return fire and use lethal force against civilians who threaten imminent attack.

The *Al Skeini* case provides a detailed record of British use of defensive force triggered by hostile acts or demonstrated hostile intent deemed threatening to human life.[180] In the most aggressive incidents, soldiers shot non-uniformed persons because they were non-compliant at a traffic control point or were armed in the vicinity of a firefight.[181] Deadly force in these confrontations was deemed to be within the ROE. The British troops were serving in "volatile and violent" Iraq.[182] This geographic and temporal construct grants substantial discretion.

Persistent, transnational attacks by civilian-belligerent groups kill and maim thousands of noncombatant civilians every year. Responsive, status-based engagements are comparatively few and far between.[183] As with many controversial subjects, passionate debate rages over statistically marginal possibilities, but appropriately so. Making the controversial legal choice to authorize a status-based engagement is as rare as positive identification.

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[173] *See id.* para. 40 (this concept is akin to the concept of positive identification).

[174] *See id.* The court further noted that "if a terrorist taking direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed." *Id.* The court referred to the principle of proportionality. *Id.*

[175] *See id.* This is consistent with United States practice in Iraq and Afghanistan. Moreover, this is a requirement for the United Kingdom pursuant the European Human Rights Convention. *Id.*

[176] *See id.*

[177] *See, e.g.*, Eric T. Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209, 248 (2005) ("If soldiers cannot distinguish who the enemy is, and if that enemy attacks from civilian crowds, it is impossible to expect soldiers to not respond in self-defense, thereby putting innocent noncombatants at risk.").

[178] Additional Protocol I, *supra* note 7, at 51(3).

[179] *See* JCSI 3121.01B, *supra* note 78, at A-4; *see also Al Skeini Opinion*, *supra* note 15, para 45 (reprinting British ROE card).

[180] *Al Skeini Opinion*, *supra* note 16, para. 45. The British ROE used self-defense language not Article 51(3). *Id.* The British did not see themselves in international armed conflict at this point of the hostilities. Lieutenant Colonel Taylor Interview, *supra* note 103. Hence, Additional Protocol I was no longer triggered. It would be ironic if permissible uses of force could be more robust under customary self-defense than when engaged in "war."

[181] *See id*. at 58, 71.

[182] *See id.* para. 40.

[183] *But see* HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2005] para. 2. These numbers are despite the allegation that Israel successfully targets approximately 100 civilian-belligerents per year. *Id.*

Status-based engagements represent a possible point of divergence for Article 51(3) and the inherent right of self-defense. But, it is unclear how far apart the two approaches could get. The ICRC Protocol I commentators offer a view into the breadth of the term "hostilities," stating that it "covers not only the time that the civilian makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon."[184] One commentator posits that civilian immunity from targeting is lost pursuant to Article 51(3) as long as there is membership in "a guerrilla group or armed faction involved in attacks against enemy armed forces."[185] This describes status and reveals that hostile designation is merely a conduct predetermination. It could also provide an Additional Protocol I justification for targeting al Qaeda leaders.

When targeting terrorist leadership, hostile status is almost certainly accompanied by a conduct-based justification. Indeed, the distinction between conduct and status becomes blurred. When managing rank-and-file civilian-belligerents, the issue reverts back to conduct even if they are declared hostile, as part of a larger group, because they do not distinguish themselves and do not merit their own intelligence dossier. Moreover, given the paramilitary capabilities of many transnational terrorist groups, "[t]he focus should be on the nature of the violence, not on the legal status of the aggressor."[186]

Turning the Additional Protocol I civilian-belligerent loophole into a noose often requires national leaders to preemptively use force, risking condemnation and counterproductive pressure. Rules of engagement are a blend of legal, policy and military considerations. The allocation needs to be balanced carefully. Targeted killing is least controversial when the target's geographic, functional, and temporal relevance can be articulated.

> [S]elf-defense would be appropriate to [justify] the attack of terrorist leaders where their actions pose a continuing threat to U.S. citizens or the national security of the United States. As with an attack on a guerrilla infrastructure, the level to which attacks could be carried out against individuals within a terrorist infrastructure would be a policy rather than a legal decision."[187]

If the policy decision is executed outside a recognized theater of armed conflict,[188] the burden of justification[189] should be heightened. The ability to effectuate arrest is presumed.[190] The 1998 Clinton administration capture-or-kill debate over bin Laden reflects this sensitivity. The Israeli Supreme Court recently established the requirement within their jurisdiction to exhaust "less harmful means"[191] before targeting killing would be lawful in their country.[192] Even though there is a contemporary American school of thought, backed by state practice,[193] that "there is no duty to capture or to take an unlawful combatant into possession any more than there is a duty to capture a lawful combatant, provided he or she has not attempted to surrender,"[194] the United States should be prepared to address this issue.

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[184] AP I COMMENTARIES, *supra* note 6, at 618.

[185] ROGERS, *supra* note 119, at 11.

[186] Printer, *supra* note 63, at 349.

[187] Parks, *supra* note 60, at 7 n.8.

[188] Civilian-belligerent groups are usually based in war-torn countries.

[189] That is, the burden of justification in the "court" of world opinion. Compare differing reactions to the death of Harethi in Yemen and Zarqawi in Iraq. National actors rarely risk legal accountability.

[190] *See* Ulrich, *supra* note 71, at 1056 ("The dual nature of the terrorist enemy as combatant and criminal, and the different aims of the fight against it - making arrests, preventing future attacks, and destroying network infrastructure—demand, and have received, a flexible response from U.S. law enforcement, intelligence, and military officials.").

[191] *See* HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2005] para. 40.

[192] It is virtually impossible to make an arrest with a Predator drone.

[193] *See* Knickermeyer, *supra* note 126.

[194] Printer, *supra* note 63, at 370; *see also* Parks, *supra* note 60, at 7:

> [D]ifficulty lies in the determination where the line should be drawn between guerrillas/combatants and the civilian population in order to provide maximum protection from intentional attack to innocent civilians. The law provides no precise answer to this problem . . . [i]f a member of a guerrilla organization falls above the line established by competent authority for combatants, a military operation to capture or kill an individual designated as a combatant would not be an assassination.

Id.

The potential for controversy stems more from a lack of factual justification than it does from a question of law. Hostile intent[195] or indicia of taking direct part in hostilities are substantially similar. It is not a stretch to assert that "planners and those who sent the suicide bombers to their death"[196] can be targeted under both legal regimes. As transnational terrorists continue to ply their deadly trade, state practice will continue to inform these legal standards. Many counterterrorist engagements take place outside the context of international armed conflict and Additional Protocol I. It is ironic that self-defense custom can be more robust than rights bestowed to belligerents during war.[197]

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[195] Propaganda broadcasts like those from al Qaeda, Hamas, Hezbollah, and Jemah Islamiyah on Al Jazeera television serve as a useful record of hostile intent.

[196] *See* HCJ 769/02 The Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2005] para. 40 (Both the Israeli Supreme Court and the ICRC view 51(3) as a principle of customary international law.).

[197] Unlike conventional law of war that must be triggered by a de jure international armed conflict, customary self-defense law will always be applicable. *See* Additional Protocol I, *supra* note 7, art.1 ("This protocol, which supplements the Geneva Conventions . . . shall apply in the situations referred to in Article 2 common to those Conventions.").

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	56th Judge Advocate Officer Graduate Course	13 Aug 07 – 22 May 08
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C20 (Ph 2)	174th JAOBC/BOLC III	9-Nov 07 – 6-Feb 08
5-27-C20 (Ph 2)	175th JAOBC/BOLC III	22 Feb – 7 May 08
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F1	199th Senior Officers Legal Orientation Course	22 – 26 Oct 07
5F-F1	200th Senior Officers Legal Orientation Course	28 Jan – 1 Feb 08
5F-F1	201st Senior Officers Legal Orientation Course	24 – 28 Mar 08
5F-F1	202d Senior Officers Legal Orientation Course	9 – 13 Jun 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08
5F-F3	14th RC General Officer Legal Orientation Course	13 – 15 Feb 08
5F-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08

5F-F55	2008 JAOAC (Phase II)	7 – 18 Jan 08
5F-JAG	2007 JAG Annual CLE Conference	1 – 5 Oct 07
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	2d BNCOC Common Core	4 – 25 Jan 08
600-BNCOC	3d BNCOC Common Core	10 – 28 Mar 08
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	1st Paralegal Specialist BNCOC	2 Nov – 7 Dec 07
512-27D30 (Ph 2)	2d Paralegal Specialist BNCOC	29 Jan – 29 Feb 08
512-27D30 (Ph 2)	3d Paralegal Specialist BNCOC	2 Apr – 2 May 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08
512-27D40 (Ph 2)	1st Paralegal Specialist ANCOC	2 Nov – 7 Dec 07
512-27D40 (Ph 2)	2d Paralegal Specialist ANCOC	29 Jan – 29 Feb 08
512-27D40 (Ph 2)	3d Paralegal Specialist ANCOC	2 Apr – 2 May 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08
WARRANT OFFICER COURSES		
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	16 – 20 Jun 08
7A270A3	2008 Senior Warrant Officer Symposium	4 – 8 Feb 08
ENLISTED COURSES		
512-27D/20/30	19th Law for Paralegal Course	24 – 28 Mar 08
512-27DC5	25th Court Reporter Course	28 Jan – 28 Mar 08
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC6	8th Court Reporting Symposium	29 Oct – 2 Nov 07
512-27DC7	3d Redictation Course	7 – 18 Jan 08
512-27DC7	4th Redictation Course	31 Mar – 11 Apr 08
512-27D-CLNCO	10th BCT NCOIC Course	16 – 20 Jun 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08
5F-F58	2008 BCT Symposium	4 – 8 Feb 08

ADMINISTRATIVE AND CIVIL LAW		
5F-F21	6th Advanced Law of Federal Employment Course	17 – 19 Oct 07
5F-F22	61st Law of Federal Employment Course	15 – 19 Oct 07
5F-F23	61st Legal Assistance Course	29 Oct – 2 Nov 07
5F-F23	62d Legal Assistance Course	5 – 9 May 08
5F-F202	6th Ethics Counselors Course	14 – 18 Apr 08
5F-F23E	2007 USAREUR Legal Assistance CLE	5 – 8 Nov 07
5F-F24	32d Administrative Law for Installations Course	17 – 21 Mar 08
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F26E	2007 USAREUR Claims Course	15 – 19 Oct 07
5F-F28	2007 Income Tax Law Course	10 – 14 Dec 07
5F-F28E	7th USAREUR Income Tax CLE	3 – 7 Dec 07
5F-28H	8th Hawaii Income Tax CLE	14 – 18 Jan 08
5F-F28P	8th PACOM Income Tax CLE	7 – 11 Jan 08
5F-F29	26th Federal Litigation Course	6 – 10 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	159th Contract Attorneys Course	3 – 11 Mar 08
5F-F10	160th Contract Attorneys Course	23 Jul – 1 Aug 08
5F-F101	8th Procurement Fraud Course	26 – 30 May 08
5F-F103	8th Advanced Contract Law Course	7 – 11 Apr 08
5F-F11	2007 Government Contract Law Symposium	4 – 7 Dec 07
5F-F12	77th Fiscal Law Course	22 – 26 Oct 07
5F-F12	78th Fiscal Law Course	28 Apr – 2 May 08
5F-F13	4th Operational Contracting	12 – 14 Mar 08
5F-F14	26th Comptrollers Accreditation Fiscal Law Course	15 – 18 Jan 08
5F-F15E	2008 USAREUR Contract Law CLE	12 – 15 Feb 08
8F-DL12	2d Distance Learning Fiscal Law Course	4 – 8 Feb 08

CRIMINAL LAW		
5F-F31	13th Military Justice Managers Course	15 – 19 Oct 07
5F-F33	51st Military Judge Course	21 Apr – 9 May 08
5F-F34	29th Criminal Law Advocacy Course	4 – 15 Feb 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08
5F-F35	31st Criminal Law New Developments Course	5 – 8 Nov 07
5F-F35E	2008 USAREUR Criminal Law CLE	15 – 18 Jan 08
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08
5F-F42	89th Law of War Course	11 – 15 Feb 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08
5F-F45	7th Domestic Operational Law Course	29 Oct – 2 Nov 07
5F-F47	49th Operational Law Course	25 Feb – 7 Mar 08
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47E	2008 USAREUR Operational Law CLE	28 Apr – 2 May 08

3. Naval Justice School and FY 2008 Course Schedule

Please contact: Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, Rhode Island 02841 at (401) 841-3807, extension 131, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	15 Oct – 14 Dec 07 22 Jan – 21 Mar 08 2 Jun – 1 Aug 08 4 Aug – 3 Oct 08
BOLT	BOLT (020) BOLT (020) BOLT (030) BOLT (030)	24 – 28 Mar 08 (USMC) 24 – 28 Mar 08 (USN 4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	10 – 14 Mar 08 22 – 26 Sep 08
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	12 – 23 May 08 28 Jul – 8 Aug 08

786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	24 – 28 Mar 08 (San Diego) 14 – 18 Apr (Norfolk)
850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operationals Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (010) Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	22 – 26 Oct 07 (Newport) 10 – 14 Mar 08 (Newport) 5 – 9 May 08 (Newport) 9 – 13 Jun 08 (Newport) 21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22– 26 Sep 08 (Newport)
4048	Estate Planning (010)	21 – 25 Jul 08
961M	Effective Courtroom Communications (010) Effective Courtroom Communications (020)	29 Oct – 2 Nov 07 (Norfolk) 28 Jan – 1 Feb 08 (Bremerton)
748A	Law of Naval Operations (010) Law of Naval Operations (020)	3 – 7 Mar 08 15 – 19 Sep 08
7485	Litigating National Security (010)	29 Apr – 1 May 08 (Andrews AFB)
748K	USMC Trial Advocacy Training (010) USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	22 – 26 Oct 07 (Camp Lejeune) 12 – 16 May 08 (Okinawa) 19 – 23 May 08 (Pearl Harbor) 15 – 19 Sep 08 (San Diego)
2205	Defense Trial Enhancement (010)	12 – 16 May 08
3938	Computer Crimes (010)	19 – 23 May 08 (Newport)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020)	TBD TBD
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (010) Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	5 – 9 Nov 07 (Pensacola) 14 – 18 Jan 08 (Pensacola) 14 Jan – 18 Feb 08 (Bahrain) 3 – 7 Mar 08 (Pensacola) 14 – 18 Apr 08 (Pensacola) 28 Apr – 2 May 08 (Naples, Italy) 9 – 13 Jun 08 (Pensacola) 16 – 20 Jun 08 (Quantico) 23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	4 – 5 Feb 08 (Yokosuka) 1 – 2 May 08 (Naples)
7878	Legal Assistance Paralegal Course (010)	31 Mar – 5 Apr 08

03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	1 Oct – 14 Dec 07 22 Jan – 4 Apr 08 9 Jun – 22 Aug 08
846L	Senior Legalman Leadership Course (010) Senior Legalman Leadership Course (010)	18 – 22 Aug 08
049N	Reserve Legalman Course (Phase I) (010)	21 Apr – 2 May 08
056L	Reserve Legalman Course (Phase II) (010)	5 – 16 May 08
846M	Reserve Legalman Course (Phase III) (010)	19 – 30 May 08
5764	LN/Legal Specialist Mid-Career Course (010) LN/Legal Specialist Mid-Career Course (020)	15 – 26 Oct 07 5 – 16 May 08
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	21 Apr – 2 May 08 16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
4046	SJA Legalman (010) SJA Legalman (020)	25 Feb – 7 Mar 08 (San Diego) 12 – 23 May 08 (Norfolk)
Pending	Prosecution Trial Enhancement (010)	4 – 8 Feb 08
7487	Family Law/Consumer Law (010)	31 Mar – 4 Apr 08
627S	Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	6 – 8 Nov 08 (San Diego) 7 – 9 Jan 08 (Jacksonville) 14 – 16 Jan 08 (Bahrain) 4 – 6 Feb 08 (Yokosuka 11 – 13 Feb 08 (Okinawa 20 – 22 Feb 08 (Norfolk) 18 – 20 Mar 08 (San Diego) 31 Mar – 2 Apr 08 (Norfolk) 14 – 16 Apr 08 (Bremerton) 22 – 24 Apr 08 (San Diego) 28 – 30 Apr 08 (Naples) 19 – 21 May 08 (Norfolk) 8 – 10 Jul 08 (San Diego) 4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070)	15 Oct – 2 Nov 07 26 Nov – 14 Dec 07 28 Jan – 15 Feb 08 10 – 28 Mar 08 28 Apr – 16 May 08 2 – 20 Jun 08 7 – 25 Jul 08

	Legal Officer Course (080)	8 – 26 Sep 08
0379	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	22 Oct – 2 Nov 07 26 Nov – 7 Dec 07 4 – 15 Feb 08 10 – 21 Mar 08 21 Apr – 2 May 08 7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	5 – 9 Nov 07 7 – 11 Jan 08 (Jacksonville) 25 – 29 Feb 08 7 – 11 Apr 08 23 – 27 Jun 08 4 – 8 Aug 08 (Millington) 25 – 29 Aug 08
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalman (020)	16 – 27 Jun 08

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	1 – 19 Oct 07 26 Nov – 14 Dec 07 7 – 25 Jan 08 25 Feb – 14 Mar 08 5 – 23 May 08 9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08

947J	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	15 – 26 Oct 07 26 Nov – 7 Dec 07 7 Jan – 18 Jan 08 31 Mar – 11 Apr 08 5 – 16 May 08 9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08
3759	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	29 Oct – 2 Nov 07 (San Diego) 4 – 8 Feb 08 (Yokosuka) 11 – 15 Feb 08 (Okinawa) 31 Mar – 4 Apr 08 (San Diego) 14 – 18 Apr 08 (Bremerton) 28 Apr – 2 May 08 (San Diego) 2 – 6 Jun 08 (San Diego) 25 – 29 Aug 08 (Pendleton)
2205	CA Legal Assistance Course (010)	TBD
4046	Military Justice Course for Staff Judge Advocate/ Convening Authority/Shipboard Legalmen (010)	25 Feb – 7 Mar 08

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

Please contact: Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, Alabama 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445, for information about attending the listed courses.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Judge Advocate Staff Officer Course, Class 08-A	9 Oct – 13 Dec 2007
Paralegal Apprentice Course, Class 08-01	10 Oct – 30 Nov 2007
Area Defense Counsel Orientation Course, Class 08-A	15 – 19 Oct 2007
Defense Paralegal Orientation Course, Class 08-A	15 – 19 Oct 2007
Paralegal Craftsman Course, Class 08-01	24 Oct – 7 Dec 2007
Advanced Environmental Law Course, Class 08-A (Off-Site Wash DC Location)	29 – 30 Oct 2007
Reserve Forces Judge Advocate Course, Class 08-A	3 – 4 Nov 2007
Deployed Fiscal Law & Contingency Contracting Course, Class 08-A	27 – 30 Nov 2007
Computer Legal Issues Course, Class 08-A	3 – 4 Dec 2007
Legal Aspects of Information Operations Law Course, Class 08-A	5 – 7 Dec 2007
Federal Employee Labor Law Course, Class 08-A	10 – 14 Dec 2007
Paralegal Apprentice Course, Class 08-02	3 Jan – 22 Feb 2008
Trial & Defense Advocacy Course, Class 08-A	7 – 18 Jan 2008
Air National Guard Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 2008
Air Force Reserve Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 2008
Military Justice Administration Course, Class 08-A	28 Jan – 1 Feb 2008
Legal & Administrative Investigations Course, Class 08-A	4 – 8 Feb 2008
Total Air Force Operations Law Course, Class 08-A	8 – 10 Feb 2008
Homeland Defense/Homeland Security Course, Class 08-A	11 – 14 Feb 2008
Judge Advocate Staff Officer Course, Class 08-B	19 Feb – 18 Apr 2008
Paralegal Apprentice Course, Class 08-03	25 Feb – 11 Apr 2008
Paralegal Craftsman Course, Class 08-02	3 Mar – 11 Apr 2008
Interservice Military Judges' Seminar, Class 08-A	1 – 4 Apr 2008
Senior Defense Counsel Course, Class 08-A	14 – 18 Apr 2008
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 2008
Environmental Law Course, Class 08-A	21 – 25 Apr 2008
Area Defense Counsel Orientation Course, Class 08-B	21 – 25 Apr 2008

Defense Paralegal Orientation Course, Class 08-B	21 – 25 Apr 2008
Advanced Trial Advocacy Course, Class 08-A	29 Apr – 2 May 2008
Reserve Forces Judge Advocate Course, Class 08-A	3 – 4 May 2008
Advanced Labor & Employment Law Course, Class 08-A	5 – 9 May 2008
Operations Law Course, Class 08-A	12 – 22 May 2008
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 2008
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 2008
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 2008
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 2008
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 2008
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 2008
Law Office Management Course, Class 08-A	16 – 27 Jun 2008
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 2008
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 2008
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 2008
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 2008

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2007 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2008

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2007***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2008. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2008 JAOAC will be held in January 2008 and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2007). If the student receives notice of the need to re-do any examination or exercise after 1 October 2007, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2007 will not be cleared to attend the 2008 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions regarding attendance at Phase II (Residence Phase) or completion of Phase I writing exercises, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil.

For system or help desk issues regarding JAOAC or any on-line or correspondence course material, please contact the Distance Learning Department at jagc.training@hqda.army.mil or commercial telephone (434) 971-3153.

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually

Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state).
**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2007-2008).

Date	Unit/Location	ATTRS Course Number	Topic	POC
13-14 Oct 07	Kansas National Guard Washburn Univ. School of Law Topeka, KS		Trial Defense Service, Ethics and Emergency Response Issues	MAJ Matt Oleen (785) 274-1337/1027 Matt.oleen@us.army.mil

The consolidated list of the on-sites for Fiscal Year 2008 will be published in the next issue of The Army Lawyer.

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, Vol. 1, JA-501-1-95.

AD A301095 Government Contract Law Desk book, Vol. 2, JA-501-2-95.

AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated

to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow the steps above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the March 2007, issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNet. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. AKO accounts are mandatory. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3369, commercial: (434) 971-3369, or e-mail at Dottie.Evans@hqda.army.mil.

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