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INTERNATIONAL AND OPERATIONAL LAW EDITION

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Foreword

Lieutenant Colonel Jeff A. Bovarnick
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Charlottesville, Virginia

Welcome to the third International and Operational Law edition of *The Army Lawyer*!¹

The proposition that all judge advocates (JA) and paralegals need a solid foundation in International and Operational Law is an understatement. As of this writing, there are over 600 legal personnel deployed to combat zones² and countless others stationed around the world, including Haiti.³ There is no indication that the number of deployed JAs will decrease any time soon. Although the U.S. mission in Iraq will expire at the end of 2011,⁴ the number of JAs deploying to Afghanistan is increasing. As the armed conflict against transnational terrorists continues with no end in sight, conventional forces may find themselves venturing beyond the borders of Afghanistan. The recent devastating earthquake in Haiti demonstrated that members of the Judge Advocate General's Corps (JAG Corps) must be ready on a moment's notice to successfully advise commanders on the full spectrum of legal issues in the international and operational law disciplines.

The law of armed conflict has been under intense scrutiny since 11 September 2001 and this is particularly true when it comes to discussing the law applicable to the conflicts in Iraq and Afghanistan and the status, treatment, and rights of terrorists. In addition to debates and arguments in all three branches of our Government, not surprisingly, the terrorism debate has led to an exponential increase in legal scholarship, to include new and updated textbooks,⁵ articles published in legal journals,⁶ and numerous non-fiction books that help keep lawyers abreast of changes to the legal landscape.⁷

* For the 2009–2010 academic year, the International and Operational Law Department was composed of nine resident JAs: Lieutenant Colonel (LTC) Jeff A. Bovarnick (Chair); Commander (CDR) Trevor A. Rush (U.S. Navy) (Vice-Chair through March 2010); Captain (CAPT) Brian J. Bill (U.S. Navy); Lieutenant Colonel (LtCol) J. Porter Harlow (U.S. Marines Corps); LTC Christopher R. Brown (Army National Guard of the United States), Major (Maj) J. Jeremy Marsh (U.S. Air Force) (Vice-Chair as of April 2010); Major (MAJ) Shane R. Reeves; MAJ Robert E. Barnsby; and MAJ Gregory S. Musselman. Our Administrative Assistant is Ms. Terri Thorne. Commander Rush deployed to Afghanistan in April 2010.

¹ This is the second annual edition of *The Army Lawyer* dedicated to International and Operational Law, and the third overall. Last year, my predecessor, COL Michael Lacey, began the trend followed by our other three academic departments of publishing timely and relevant articles in a symposium issue. In the May 2009 edition, five of the six articles were drafted by faculty members; one article was co-authored by a professor and a brigade judge advocate. For the current edition, six of the eleven articles were drafted by International and Operational Law Department faculty members, and five submissions were provided by outside contributing authors, including Mr. Dick Jackson (Special Assistant for Law of War Matters, International and Operational Law Division, Office of The Judge Advocate General), LTC Chris Jenks (Chief, International Law Branch, Office of The Judge Advocate General), MAJ Richard Taylor (Student, 58th Graduate Course), Captain (CPT) Ron Alcalá (Editor, *The Army Lawyer*), and Ensign (Ens.) Scott Glabe (U.S. Navy Reserve and J.D. candidate, Yale Law School).

² See TJAG/DJAG Deployed JA Overview (June 15, 2010). Of the 646 total JAG Corps officers and enlisted personnel that are deployed, the vast majority are in Iraq (369) and Afghanistan (204). The 646 total includes 436 active duty, 124 National Guard, and 86 Reserve component servicemembers. Of the total, there are 302 officers, 333 enlisted, and 11 warrant officers.

³ On 12 January 2010, a 7.0 magnitude earthquake devastated Haiti, and within days, members of the 82d Airborne Division and XVIII Airborne Corps deployed to Haiti. See Donna Mills, *82nd Airborne Soldiers Begin Haiti Deployment*, U.S. DEP'T OF DEF. NEWS (Jan. 14, 2010), available at <http://www.defense.gov/news/newsarticle.aspx?id=57522>. In January 2010, the XVIII Airborne Corps Office of the Staff Judge Advocate (OSJA) sent a legal team to Haiti and later transitioned the legal mission to a team from the U.S. Army South OSJA. Interview with Lieutenant Colonel Charles Poché, Director, Center for Law and Military Operations (CLAMO), in Charlottesville, Va. (Apr. 14, 2010).

⁴ See Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq art. 30(1), Nov. 17, 2008 [hereinafter Security Agreement]; Commander Trevor A. Rush, *Don't Call It a SOFA! An Overview of the New U.S.-Iraq Security Agreement*, ARMY LAW., May 2009, at 59 n.264.

⁵ See, e.g., GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR (2010); THE MANUAL OF INTERNATIONAL HUMANITARIAN LAW (Dieter Fleck ed., 2d ed. 2009); ROBERT COLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS (2008); GEOFFREY S. CORN, ET AL., THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE (2009); A.P.V. ROGERS, LAW ON THE BATTLEFIELD (2d ed. 2004) (1996).

⁶ See, e.g., THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT'L L. STUD. (Michael N. Schmitt ed., 2009) (U.S. Naval War College International Studies); Laura S. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1 (Jan. 2010) (incorporating interviews of at least twelve students from the 56th Judge Advocate Graduate Course in October 2007 about their experiences in Afghanistan and Iraq); AM. BAR ASS'N, 31 NAT'L SEC. LAW REPORT (2009), available at <http://www.abanet.org/natsecurity>.

⁷ See, e.g., JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007); LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS (2008); and JONATHAN MAHLER, THE CHALLENGE: *HAMDEN V. RUMSFELD* AND

During the 2009–2010 academic year, faculty members of the International and Operational Law Department (ADI) had the privilege of interacting with professors and students from international and national security law programs at civilian law schools from around the country.⁸ These exchanges, which typically include speakers from the International Committee of the Red Cross (ICRC), serve the dual purpose of exposing civilian legal institutions to the military perspective while exposing our faculty to diverse perspectives from academia and the ICRC, which ultimately enhances the overall depth and quality of our instruction.

International law and national security law scholars and students have added much to the recent debate on the law of armed conflict. From interrogation and detention to targeting and prosecution of terrorists, scholars and students have covered it all. But scholarship in the area of the law of armed conflict cannot be left to civilian academic institutions alone. The perspective of military practitioners is essential to the debate.⁹ This important perspective was captured by thirty-nine students of the 58th Judge Advocate Graduate Course, who chose to write scholarly papers on international and operational law.¹⁰ Although not all of their papers will be published, readers can expect to see many of their insights published in upcoming issues of *The Army Lawyer* and *Military Law Review*.

The International and Operational Law community in the JAG Corps has four critical components. First, and most important, are the practitioners in the field. The other three components, in no particular order, are the Center for Law and Military Operations (CLAMO), the International and Operational Law Division at the Office of The Judge Advocate General, and the International and Operational Law Department at The Judge Advocate General's Legal Center and School. Collaboration among all four components is essential to ensure all JAs are up-to-date on the latest policies, lessons learned, trends, and best practices from the field and various combat zones.¹¹

In this issue, six professors from the International and Operational Law Department and five contributing authors cover a variety of topics, including detention review boards, teaching the law of war, human rights, rule of law, means and methods of warfare in counterinsurgency, National Guard commanders, baited ambushes, reporting law of war violations, direct participation in hostilities, conflict classification, and an update on the new 2010 *Military Commissions Manual*. A brief description of each article follows.

Detention operations began in Afghanistan as early as October 2001; however, through July 2009, no clear-cut set of procedural and substantive due process rules guided the detention review process. The first article chronicles past review board procedures and then describes the new procedures of the Detainee Review Board (DRB), which are currently employed at the Detention Facility in Parwan (the facility that replaced the old Bagram Theater Internment Facility). By comparing the DRB's more robust procedures with past review practices, this article highlights the substantial changes—and enhanced protections—to the due process rights afforded to detainees in Afghanistan.

As noted above, our department has participated in law of war seminars around the country and has shared the military perspective on complex law of war issues with various audiences. Major Jeremy Marsh (U.S. Air Force), one of our premiere instructors with considerable experience in this area, offers an instructive article on teaching a law of war seminar course.

THE FIGHT OVER PRESIDENTIAL POWER (2008); MARK MARTINS, PAYING TRIBUTE TO REASON: JUDGMENTS ON TERROR, LESSONS FOR SECURITY, IN FOUR TRIALS SINCE 9/11 (2d ed. 2008).

⁸ International and Operational Law Department professors have participated in international humanitarian law (IHL) and national security law seminars and workshops at the University of Virginia School of Law; DePaul University College of Law in Chicago; Santa Clara Law School; the University of Texas School of Law; and the University of California at Berkeley, Boalt Hall School of Law. Three students from the 58th Graduate Course also had the opportunity to participate in the IHL Workshop at the Santa Clara Law School.

⁹ See Major General Charles Dunlap, *Foreword to CORN ET AL., supra note 6*, at vii. Five of the six co-authors of *The War on Terror and the Laws of War* are former JAs, including three former members of this department: Mr. Dick Jackson, Professor Geoff Corn, and Professor Eric Jensen. Major General Dunlap emphasizes that “the collective experience of these authors in the art of war—understanding the weapons, tactics, and, especially, the psychology of warriors on a non-traditional battlefield—enables the authors to provide an often overlooked perspective on these increasingly complex and important legal issues.” *Id.* at viii. That perspective is, of course, the military perspective.

¹⁰ The 58th Graduate Course had 115 students. The students had the freedom to write in any of the four academic departments, yet forty (or thirty-five percent) chose to write on international or operational law topics; thirty-one students chose administrative and civil law topics; twenty-five students chose criminal law topics; and nineteen chose contract and fiscal law topics. The Judge Advocate Gen.'s Sch., U.S. Army, 58th Graduate Course Paper Topics (Oct. 13, 2009) (on file with author).

¹¹ In addition to constant communications by judge advocates around the globe—through e-mails, secure video teleconferences, and conferences—contributions to The Judge Advocate Legal Center and School publications—such as CLAMO's *Lessons Learned* series, the *Rule of Law Handbook*, and the JAG Corps's two scholarly publications—help disseminate information back to the field.

Just as the “military perspective” is critical to the current debate on law of war matters, so is the human rights perspective. Acknowledging that JAs must understand this aspect of the debate underscores the importance of our Department’s role in teaching human rights law. In his article, CAPT Brian Bill (U.S. Navy) emphasizes this point by detailing the U.S. position on international human rights law (IHRL) in armed conflict. While IHRL has little to no applicability to U.S. combat operations overseas, JAs must still understand this crucial area of law, particularly when our allies view it differently.

In recent years, the rule of law and stability operations have reemerged as part of U.S. operations overseas, and their recent elevation in Army doctrine has increased commanders’ acceptance of rule of law as a legitimate line of operation. Lieutenant Colonel Porter Harlow (U.S. Marine Corps), a third-year faculty member who substantially developed the Department’s rule of law portfolio, including the addition of the Rule of Law Short Course, provides a timely update on rule of law doctrine and its impact on U.S. operations.

Concluding his fourth year of teaching, LTC Chris Brown (U.S. Army Reserve National Guard) is our department’s longest tenured faculty member. With considerable expertise and experience in National Guard affairs, LTC Brown and COL John Gereski¹² have teamed to co-author an article regarding the dual-status (titles 32 and 10, U.S. Code) commander in domestic operations. The article addresses both the legal authorities and lessons learned from previous uses of the dual-status command construct during National Special Security Events.

Both contemporary counterinsurgency operations (COIN) and the employment of white phosphorous munitions remain at the forefront of academic and policy discussions. Major Shane Reeves addresses these timely issues, offering insights for the operational law attorney and ultimately arguing for a more restrictive white phosphorous use policy in COIN.

Two of our contributing authors are from the International and Operational Law Division of the Office of The Judge Advocate General. In separate, but related articles, LTC Chris Jenks, the Chief of the International Law Branch, discusses the controversial tactic of “baited ambushes” where, hypothetically, a unit overwatches an engagement area of enemy wounded and dead. When the enemy returns to police up their casualties, the unit opens fire. Is this a violation of the law of war? If so, does it have to be reported? What is the JA’s role in the reporting process? Mr. Dick Jackson, Special Assistant to The Judge Advocate General for Law of War Matters answers these questions, and many more, in his article on reporting law of war violations.

The last articles cover topics that have been much debated over the past year: direct participation in hostilities, conflict classification, and procedures for the military commissions. Major Richard Taylor, a student in the 58th Graduate Course, entered the “capture versus kill” debate when he submitted his Graduate Course article and asked (and answered) the question: Is the principle of humanity now part of the targeting analysis when attacking civilians who are directly participating in hostilities? Ensign Scott Glabe examines whether the war against al Qaeda is an international armed conflict or a non-international armed conflict, and he provides a brief survey of the application of Common Article 2 and/or Common Article 3 of the Geneva Conventions to overseas contingency operations against al Qaeda. Finally, Captain Ron Alcalá, *The Army Lawyer* Editor, provides a brief description of the recently released revised 2010 *Manual for Military Commissions*.

We hope you find the articles contained in this edition helpful to your understanding and practice of international and operational law.

¹² Colonel Gereski, U.S. Army National Guard, is the Director of Operations Law at U.S. Northern Command/North American Aerospace Defense Command (NORAD), Peterson Air Force Base, Colorado.

International and Operational Law

Revised *Manual for Military Commissions* Released

On 27 April 2010, the Department of Defense issued a new *Manual for Military Commissions (MMC)*.¹ The *MMC*, which establishes the rules of evidence and procedure for military commissions, is adapted from the *Manual for Courts-Martial (MCM)* and applies to trials by military commission. The procedures for military commissions are based on the procedures for trial by general courts-martial under the Uniform Code of Military Justice (UCMJ);² however, while the judicial construction and application of the UCMJ are considered instructive, they “are not of their own force binding on military commissions.”³

The rules of evidence and procedure enumerated in the *MMC* depart from those specified in the *MCM* in several important ways. For example, the *MMC* allows for the admission of certain hearsay evidence “not otherwise admissible under the rules of evidence applicable in trial by general courts-martial.”⁴ These differences “reflect the [Secretary of Defense’s] determinations that departures are required by the unique circumstances of the conduct of military and intelligence operations during hostilities or practical need consistent with chapter 47A, title 10, United States Code.”⁵ Notably, the evidentiary and procedural rules of military commissions extend to accused individuals “all the judicial guarantees which are recognized as indispensable by civilized peoples as required by Common Article 3 of the Geneva Conventions of 1949.”⁶

The *MMC* is divided into four parts: (1) Preamble, (2) Rules of Military Commissions (R.M.C.), (3) Military Commission Rules of Evidence (Mil. Comm. R. Evid.), and (4) Crimes and Elements. The 2010 *MMC* replaces the 2006 edition and implements title 10, chapter 47A, of the U.S. Code, as amended by the Military Commissions Act of 2009.⁷—Captain Ronald T. P. Alcalá.

¹ MANUAL FOR MILITARY COMMISSIONS, UNITED STATES (2010) [hereinafter *MMC*].

² *Id.* pt. I, ¶ 1(a); *id.* R.M.C. 102(b).

³ *Id.* pt. I, ¶ 1(a).

⁴ *Id.* MIL. COMM. R. EVID. 803.

⁵ *Id.* pt. I, ¶ 2.

⁶ *Id.*

⁷ *Id.* pt. I.

Criminal Law

*Berghuis v. Thompkins*⁸: Silence Does Not Invoke the Right to Remain Silent

The Supreme Court recently decided its third *Miranda* case in just over three months. On 23 February, the Court decided in *Florida v. Powell*⁹ that the *Miranda* warnings given by law enforcement did not have to specifically advise a suspect of the right to have an attorney present during questioning, as long as the suspect was “reasonably conveyed” that right. On 24 February, the Court decided in *Maryland v. Shatzer*¹⁰ that the *Edwards*¹¹ bar had a fourteen-day temporal limit. Finally, in *Berghuis v. Thompkins*,¹² the Court held that a suspect must affirmatively invoke his right to remain silent; mere silence alone will not automatically invoke the right.

A brief summary of the facts is important to understand the holding in *Thompkins*. The defendant, Van Chester Thompkins, was suspected of a drive-by shooting in Southfield, Michigan, that resulted in the death of one victim and the serious injury of another victim who later recovered and testified against him at trial. Thompkins fled after the shooting and was arrested almost a year later in Ohio. Southfield police traveled to Ohio to interrogate Thompkins. The interrogation began at about 1:30 p.m. and lasted for about three hours. Thompkins was read his *Miranda*¹³ rights but declined to sign the form to demonstrate that he understood those rights. A police officer testified at the suppression hearing that Thompkins verbally confirmed he understood his rights; while at trial, the same officer stated that he could not remember whether he asked Thompkins verbally if he understood his rights. At no point did Thompkins invoke his right to silence or his right to counsel. However, he remained mostly silent during the interrogation. He did respond on several occasions with “yeah,” “no,” or “I don’t know.”¹⁴ He also stated that he “didn’t want a peppermint” that he was offered and that the chair he was

⁸ No. 08-1470, 2010 WL 2160784 (June 1, 2010).

⁹ 130 S.Ct. 1195 (2010). See Major Andrew D. Flor, *Florida v. Powell: The Further Erosion of Miranda Rights*, ARMY LAW., Feb. 2010, at 3 (providing a more thorough review of this case).

¹⁰ 130 S.Ct. 1213 (2010). See Major Andrew D. Flor, *Maryland v. Shatzer: Fourteen-Day Limitation on the Edwards Bar*, ARMY LAW., Feb. 2010, at 2 (providing a more thorough review of this case).

¹¹ *Edwards v. Arizona*, 451 U.S. 477 (1981).

¹² *Thompkins*, 2010 WL 2160784.

¹³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁴ *Thompkins*, 2010 WL 2160784, at *4.

“sitting in was hard.”¹⁵ Towards the end of the interrogation, the officer asked Thompkins if he believed in God. Thompkins began to tear up and said “Yes.” The officer asked if Thompkins prayed to God. Thompkins responded “Yes.” The officer then asked, “Do you pray to God to forgive you for shooting that boy down?”¹⁶ Thompkins responded “Yes” and looked away. Despite this admission, Thompkins refused to make a written confession, and the interrogation ended fifteen minutes after that.

At trial, this statement was introduced after a failed motion to suppress. Thompkins argued that he had invoked his Fifth Amendment right to remain silent, that he had not waived his right to remain silent, and that the statements were involuntary. The trial court denied the motion.¹⁷ Thompkins was convicted and sentenced to life without parole. Direct appeals were exhausted, and then Thompkins filed a federal writ of habeas corpus action. The district court denied the writ, but the U.S. Court of Appeals for the Sixth Circuit reversed. They held that while *North Carolina v. Butler*¹⁸ established that a waiver of the right to remain silent need not be express, in this case, Thompkins did not waive his right to remain silent. His “persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights.”¹⁹ The Supreme Court granted certiorari and reversed.

Justice Kennedy, writing for a 5-4 majority,²⁰ held that “a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.”²¹ This holding brought the right to remain silent in line with the right to counsel. In *Davis v. United States*, the Court held that a suspect must “unambiguously” invoke the right to counsel.²² Prior to *Thompkins*, the Court

had “not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal.”²³ In *Thompkins*, Justice Kennedy put that notion to rest, because “there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel issue in *Davis*.”²⁴

Practitioners should keep in mind three key points about this case. First, in the military context, Military Rule of Evidence (MRE) 305(g)(1) requires the accused to “affirmatively decline the right to counsel and *affirmatively consent* to making a statement.”²⁵ There are no cases interpreting this provision as it applies to the right to remain silent.²⁶ Because of this lack of case law, it is unclear whether a military *Thompkins* scenario could satisfy the affirmative consent requirement of MRE 305(g)(1). Arguably, it would not. However, with regards to the right to counsel, MRE 305(g)(2)(A) allows the Government to demonstrate, by a preponderance of the evidence, that the accused has waived the right to counsel even without an affirmative declination.²⁷ There is no counterpart to that rule for the affirmative consent requirement related to the right to remain silent. As a result, it will be difficult for counsel to argue that anything other than a clearly expressed affirmative consent will constitute waiver of the right to remain silent.²⁸

Second, even though this case brings the right to remain silent more in line with the right to counsel, there are still differences between the two rights. For example, when an accused invokes his right to remain silent, he is only entitled to a temporary respite from interrogation;²⁹ when an accused invokes his right to counsel, he is entitled to a complete break from interrogation until counsel is present, or he is released from custody.³⁰ Knowing which right the accused has invoked is still important when deciding what can happen next in the interrogation process.

¹⁵ *Id.*

¹⁶ *Id.* at *5.

¹⁷ There was an additional issue in the case that did not bear on the *Miranda* holding. Thompkins alleged that his defense counsel was ineffective for failing to object to the prosecution’s argument on his co-defendant’s trial result and for not requesting a limiting instruction regarding the outcome of that trial. *Id.* at *14. The Court denied relief on the ineffective assistance of counsel claim. *Id.* at *15. The dissent did not even comment on this issue. *Id.* at *15–27 (Sotomayor, J., dissenting).

¹⁸ 441 U.S. 369 (1979).

¹⁹ *Thompkins*, 2010 WL 2160784, at *6 (quoting *Thompkins v. Berghuis*, 547 F.3d 572, 588 (6th Cir. 2008)).

²⁰ He was joined by C.J. Roberts, J. Scalia, J. Thomas, and J. Alito. Justice Sotomayor filed a dissenting opinion, in which J. Stevens, J. Ginsburg, and J. Breyer joined.

²¹ *Thompkins*, 2010 WL 2160784, at *14.

²² 512 U.S. 452 (1994). *Davis* was a military case that made it to the Supreme Court. *Id.* at 454.

²³ *Thompkins*, 2010 WL 2160784, at *8.

²⁴ *Id.*

²⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(g)(1) (2008) [hereinafter MCM] (emphasis added).

²⁶ However, there is a case that analyzes these provisions with respect to the right to counsel. See *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990).

²⁷ MCM, *supra* note 25, MIL. R. EVID. 305(g)(2)(A).

²⁸ Military practitioners should also keep in mind that *Thompkins* applies only to *Miranda* rights. It does not change the application of Uniform Code of Military Justice, Article 31. See UCMJ art. 31 (2008).

²⁹ See *Michigan v. Mosley*, 423 U.S. 96 (1975).

³⁰ See *Edwards v. Arizona*, 451 U.S. 477 (1981).

Third, the three *Miranda* cases this term have all reduced the level of protection provided by *Miranda*. In *Powell*, the Court refused to require specificity in the *Miranda* warnings given;³¹ in *Shatzer*, the Court refused an invitation to allow the *Edwards* bar to last indefinitely;³² and, in *Thompkins*, the Court refused to allow silence to become a de facto invocation of the right to remain silent.³³ While this may seem to be a disturbing trend, there is a

common theme to these three cases. While *Miranda* was a “constitutional rule,”³⁴ these cases show that the Court will not elevate form over substance. Instead, the Court will look to the rationale behind *Miranda*—the prevention of oppressive police dominated interrogation³⁵—more than the specific words, phrases, or procedures followed by law enforcement.—Major Andrew Flor.

³¹ 130 S.Ct. 1195 (2010).

³² 130 S.Ct. 1213 (2010).

³³ *Berghuis v. Thompkins*, No. 08-1470, 2010 WL 2160784 (June 1, 2010).

³⁴ See *Dickerson v. United States*, 530 U.S. 428 (2000).

³⁵ See *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

Lore of the Corps

Indians as War Criminals? The Trial of Modoc Warriors by Military Commission

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Early in the morning of Good Friday, 11 April 1873, Brigadier General (BG) Edward R.S. “Richard” Canby stepped out of his tent, which was pitched near Tule Lake on the California-Oregon border. Canby, a 56-year-old West Point graduate and veteran of the Civil War, was the commander of the Department of the Columbia, which consisted of the State of Oregon and the Territories of Washington, Idaho, and Alaska. He was near Tule Lake that day to negotiate a peaceful settlement to the war that had broken out between a band of Modoc Indians and U.S. Army troops and territorial militia. Although he did not know it, Canby’s attempt at negotiation was destined for utter failure. Within hours he was dead—shot in the head and back by the Modoc Chief Kientpoos. Also dead was another member of Canby’s peace commission, and two more men were badly injured.¹

The brutal murders shocked Americans, and the Army’s Commander-in-Chief, Major General William T. Sherman, exclaimed that the Modoc treachery fully justified their “utter extermination.”² In any event, on 1 June 1873, Kientpoos and his fellow Modocs were in Army custody. But what was to be done? Should these assassins be summarily dealt with? Should they be turned over to civilian authorities for prosecution? After considerable discussion, the U.S. Government decided that the Modocs responsible for murdering Canby and his fellow commissioner should be tried by military commission. As a result, on 1 July 1873, Kientpoos and five other Modoc warriors stood trial for the war crime of violating a flag of truce by committing murder during a suspension of hostilities. It was the only time in U.S. history that Native Americans were tried by an Army court for war crimes.

In October 1864, the Modoc tribe had signed a treaty with the United States in which the tribe agreed to give up ancestral lands on the Oregon-California border and move thirty miles north to the Klamath Indian Reservation. Within a short time, however, the Modocs regretted their decision. In early 1870, they left the reservation and returned to their ancestral home. Led by their chief, Kientpoos, better known as “Captain Jack,” the tribe of 371 men, women, and children set up camp in an area near Tule Lake.

The Army’s mission was to force the Modocs to return to the reservation. The Modocs resisted and were only defeated, on 29 January 1873, after months of fighting. In an attempt to negotiate an end to this small war, the Secretary of the Interior appointed a special “peace commission” headed by BG Canby. The other members of the peace commission were the Reverend Eleasar Thomas, L.S. Dyar, and Alfred Meacham.

On Good Friday, 11 April 1873, the four commissioners went to meet Captain Jack and the Modocs. All agreed to come unarmed. There were some warning signs that the commissioners might be in danger, but Canby insisted that the negotiations proceed because he thought the presence of so many Soldiers in the area would intimidate Captain Jack.

Soon after the men began to parley, they reached an impasse. Then, on a signal from Captain Jack, two Modoc warriors in hiding began firing at the commissioners. Captain Jack then pulled out a pistol and shot Canby in the face, killing him instantly. Thomas was also killed in the gunfire. Dyar and Meacham survived, although the latter was badly wounded. As for Captain Jack and his accomplices, they escaped but were soon captured.

The U.S. Government was incensed that Canby had been killed while “under a flag of truce,” and his status as a Regular Army officer and Civil War veteran only heightened this anger. Local civilian authorities wanted to prosecute the Modocs for murder, but U.S. Attorney General George H. Williams and BG Joseph Holt, then serving as The Judge Advocate General, opined that a military commission should hear the case. They reasoned that the Modoc tribe was akin to a foreign nation, that a state of war existed between the tribe and the United States, and that the killing of Canby during peace negotiations was a war crime.³

On 1 July 1873, a military commission consisting of five Army officers heard evidence against Captain Jack and five other Modocs. All were found guilty of murder. Four were sentenced to be hanged by the neck until dead. Once President Ulysses S. Grant approved their sentences, the accused were hanged at Fort Klamath, Oregon, on 3 October 1873.

¹ For the details on Canby’s life, see Max L. Heyman, Jr., *Prudent Soldier: A Biography of Major General E.R.S. Canby* (1959).

² Wilfred P. Deac, *Indian Fortress Assailed*, WILD WEST, Feb. 1991, at 39.

³ For more on the decision to try the Modocs by military commission, see Doug Foster, “*Imperfect Justice: The Modoc War Crimes Trial of 1873*,” 100 OREGON HISTORICAL Q., Fall 1999, at 246–87.

Measured against today's court-martial procedure, the Modoc military commission was flawed. The accused did not have the assistance of defense counsel, and the trial lasted only four days. Perhaps most importantly, the five officers who decided the case were not impartial or unbiased; all knew Canby, and all admired him. However, this military commission was a unique event in our military legal history: the only time the Army ever prosecuted Native Americans for violating the law of armed conflict.

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Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy

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*Detention operations, while critical to successful counterinsurgency operations, also have the potential to become a strategic liability for the U.S. and ISAF. . . . Because of the classification level of the [Bagram Theater Internment Facility] and the lack of public transparency, the Afghan people see U.S. detention operations as secretive and lacking in due process.*¹

I. Introduction

United States detention operations in Afghanistan have been criticized by international law scholars, human rights organizations, and the citizens of Afghanistan on a number of fronts, from abusive physical treatment to harsh enhanced interrogation techniques.² This article does not address

* The author would like to thank Brigadier General (BG) Mark Martins, Captain Greg Belanger (U.S. Navy), Lieutenant Colonel Mike Devine of Joint Task Force (JTF) 435 Afghanistan, and Professors Bobby Chesney (University of Texas School of Law), Jack Goldsmith (Harvard Law School), Matt Waxman (Columbia Law School), and Trevor Morrison (Columbia Law School) for their invaluable insight, expertise, and suggestions.

¹ Letter from General Stanley A. McChrystal, Commander, U.S. Forces–Afghanistan/Int'l Sec. Assistance Force, Afg., to the Honorable Robert M. Gates, Sec'y of Def., subject: COMISAF's Initial Assessment, annex F, at F-1 (Aug. 30, 2009) (Detainee Operations, Rule of Law, and Afghan Corrections) (on file with author) [hereinafter General McChrystal Assessment]. In December 2009, the Bagram Theater Internment Facility (BTIF) was closed and the new \$60 million Detention Facility in Parwan (DFIP) opened. See Willy Stern, *Nothing to Hide*, WKLY. STANDARD (Jan. 4 & 11, 2010), at 20. Parwan is the name of the Afghan Province slightly northwest of Kabul Province. Bagram airfield is in Parwan Province. General McChrystal was the International and Security Assistance Force (ISAF)/U.S. Forces–Afghanistan (USFOR-A) Commander from 15 June 2009 through 23 June 2010. See *infra* note 88.

² There has been extensive scholarship in this area that provides insight and analysis on the problems that emerged as a result of flawed legal opinions provided in the former administration.

Well known is the storm of criticism that erupted over the initial US government position that the Geneva Conventions—and, presumably, customary law of armed conflict—provided no legal guarantee of minimum treatment standards for enemy combatants captured in OEF. Many critics have attributed detainee abuses in Afghanistan to these foundational legal decisions.

Matthew C. Waxman, *The Law of Armed Conflict and Detention Operations in Afghanistan*, THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT'L L. STUD. 346 (Michael N. Schmitt ed., 2009) (referring to President Bush's 7 February 2002 memorandum on humane treatment of al Qaeda and Taliban detainees). *Id.* See also Memorandum from President

those issues given that significant legal developments over the past five years have made them less pressing.³ Rather it focuses on a different aspect of treatment: “due process” afforded to detainees under international and U.S. domestic law.⁴ In recent years, lack of such substantive and

George W. Bush to Vice President et al. on Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134 (Karen J. Greenberg & Joshua Dratel eds., 2005) [hereinafter Bush February 2002 Humane Treatment Memorandum]; Dick Jackson, *Interrogation and Treatment of Detainees in the Global War on Terror*, in THE WAR ON TERROR AND THE LAW OF WAR: A MILITARY PERSPECTIVE 148–49 (Geoffrey S. Corn ed., 2009) (“These amorphous standards were susceptible to abuse, resulting in numerous subsequent investigations of misconduct toward detainees in Afghanistan.”); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 115 (2007) (“The press, scholars, human rights groups, the International Committee of the Red Cross, and American Allies balked loudly at decisions that in World War II would have been commonplace. The unusual nature of the war and extensive changes in the legal culture made previously uncontroversial wartime practices seem very controversial, illegal, even radical.”); LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS 215 (2008) (“After 9/11, there were widespread reports, often confirmed by U.S. agencies, of detainees being kicked, punched, slammed into walls, and subjected to cruel, inhuman, and degrading treatment.”).

³ All three branches of the Government took action in the 2005–06 timeframe and those efforts have continued to the present to ensure the practical implementation of the improvements in treatment and interrogation practices are maintained. Congress passed the Detainee Treatment Act (DTA) in 2005. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742–44 [hereinafter DTA]. The DTA contained provisions requiring all Department of Defense (DoD) personnel to limit their treatment and interrogation techniques to those listed in the U.S. Army Field Manual, *Intelligence Interrogation*. DTA, *supra*, § 1402 (referring to U.S. DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (28 Sept. 1992) later republished as U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (Sept. 2006) [hereinafter FM 2-22.3]). In 2006, the Supreme Court held that the minimum humane standard treatment of Common Article 3 applied in the global war on terror. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Also in 2006, the DoD issued two directives, one for its Detainee Program and one for its Law of War Program, each stating that the law of war and its humane treatment standard was applicable to all detainees in the war on terror. U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM (May 9, 2006) [hereinafter DOD LAW OF WAR PROGRAM]; U.S. DEP'T OF DEF., DIR. 2310.01E, DOD DETAINEE PROGRAM (Sept. 5, 2006). See also *infra* note 6 for a description of the actions that continued through 2009.

⁴ The author's use of the term “due process” in this article is not a reference to the U.S. concept of due process as derived from the U.S. Constitution and applied to U.S. citizens. Rather, the author uses “due process” as a more generic term to describe the application of substantive and procedural protections to non-U.S. citizen (unlawful) combatants detained on a foreign battlefield, specifically, all detainees in U.S. custody in Afghanistan. As demonstrated below, this article suggests that any basic concept of “due process”—a system with notice provisions accompanied by the detainee's ability to appear and meaningfully challenge his detention before an

procedural protections has garnered significant attention from a wide audience,⁵ including our own Government.⁶

That no person shall be deprived of life, liberty, or property without “due process of law”⁷ is a concept fundamental to all U.S. citizens. However, “due process” is mostly an American term and the concepts of due process as applied to U.S. citizens are certainly not applicable to non-U.S. citizens detained on the battlefield overseas. This article examines the process of review—primarily the procedural and substantive protections—afforded to those detained in combat operations in Afghanistan. Specifically, how does a detainee challenge his (potentially indefinite) internment in a meaningful manner? Before describing the current Detainee Review Board (DRB) process, this article briefly reviews the history of detention review and protections within that system in Afghanistan. This look at the past—from 2002 through 2009—is relevant background to the development of the more robust new DRB process.

impartial review board—was, for years, essentially ignored when it came to detainees in Afghanistan.

⁵ As with the physical aspects of detention (interrogation and treatment), there have also been numerous scholarly articles providing critical insight on the detention policy flaws, or more appropriately, lack of a policy delineating a procedural regime for the review of detention. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1108–16 (2008) (providing an in-depth analysis on the due process, or lack thereof, afforded to detainees, including a comparative chart of the procedural safeguards available in various models). *Id.* app. A, at 1133. See also BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 44–71 (2008) (discussing the Executive branch’s failure to work with Congress soon after 11 September 2001 to create a proscribed set of rules for detention and later Congress’s failure to adopt a comprehensive detention regime when enacting legislation in 2005 and 2006); Waxman, *supra* note 2, at 343 (reviewing the detention adjudicatory process); James A. Schoettler, Jr., *Detention of Combatants and the Global War on Terror*, in *THE WAR ON TERROR AND THE LAW OF WAR: A MILITARY PERSPECTIVE* 103–23 (Geoffrey S. Corn, ed., Oxford Univ. Press, 2009) (reviewing the policies and decision of the three branches of the U.S. Government). For critiques by human rights organizations, see *Undue Process: An Examination of Detention and Trials of Bagram Detainees in April 2009*, HUM. RTS. FIRST (Nov. 2009) [hereinafter *Undue Process*] (on file with author); *Fixing Bagram: Strengthening Detention Reforms to Align with U.S. Strategic Priorities*, HUM. RTS. FIRST (Nov. 2009) [hereinafter *Fixing Bagram*] (on file with author).

⁶ Recognition by our Government has come through Supreme Court litigation, executive orders, and congressional action. For an excellent, concise review of the federal litigation over detainee due process rights, see Schoettler, *supra* note 5, at 101–22 (analyzing *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 517 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Maqaleh v. Gates*, No. 09-5265, 2010 U.S. App. LEXIS 10384 (D.C. Cir. May 21, 2010). See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 [hereinafter MCA 2006]; Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2474 [hereinafter MCA 2009]. See also Exec. Order No. 13,491, 74 C.F.R. 4893 (2009) (ensuring lawful interrogations); Exec. Order No. 13,492, 74 C.F.R. 4897 (2009) (Review and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure of Detention Facilities); Exec. Order 13,493, 74 C.F.R. 4901 (2009) (Review of Detention Policy Options). The congressional action included the DTA, *supra* note 3, and the Military Commissions Acts of 2006 and 2009.

⁷ U.S. CONST. amends. V and XIV § 1.

Understandably, even with the implementation of new procedures in September 2009, many may still wonder, has the process come far enough? Then consider the perspective of U.S. forces involved in deadly combat operations in Afghanistan, and the question may be, has the process gone too far?

When discussing what substantive and procedural protections should be afforded to non-U.S. citizens, in particular, detainees captured on a foreign battlefield, the starting point is what law applies—U.S. law, the Law of Armed Conflict (LOAC), International Human Rights Law (IHRL), or some combination of the three? This article examines all three, and ultimately concludes that U.S. law and policy, as informed by the LOAC, and Common Article 3, provide the basis for the most robust set of substantive and procedural rules ever afforded to detainees in armed conflict. Additionally, this article supports the U.S. position that IHRL is not applicable to U.S. combat operations in Afghanistan.

Under a traditional law of armed conflict (LOAC) analysis, the process afforded to combatants captured in international and non-international armed conflict is guided by the Geneva Conventions⁸ and, for the United States, implementation of any such process is further guided by policy and implementing regulations.⁹ Finally, despite years of training within this paradigm prior to 11 September 2001, the United States determined that detainees in Afghanistan

⁸ See generally GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 149–67 (2010) (providing an in-depth analysis on the framework for the law of war with respect to international and non-international armed conflicts); Charles Garraway, *Afghanistan and the Nature of Conflict*, *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, 85 INT’L L. STUD. 157–80 (Michael N. Schmitt ed., 2009) (U.S. Naval War College International Studies); Geoffrey S. Corn, *What Law Applies to the War on Terror?*, in *THE WAR ON TERROR AND THE LAW OF WAR: A MILITARY PERSPECTIVE* 1–36 (Geoffrey S. Corn ed., 2009). While Common Article 3 of the four 1949 Geneva Conventions provides the baseline for humane treatment in a non-international, or internal, armed conflict (such as the current conflict in Afghanistan), only one paragraph within Common Article 3 addresses due process: “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by all civilized peoples.” Geneva Convention Relative to the Treatment of Prisoners of War art. 3, para. (1)(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. By comparison, provisions in Additional Protocols I (art. 75) and II (art. 6) of 1977 provide considerably more due process protections. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) art. 6, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II], *reprinted in* INT’L & OPERATIONAL L. DEP’T, *THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT* 208–10, 228 (2009) [hereinafter LAW OF WAR DOC. SUPP.].

⁹ DOD LAW OF WAR PROGRAM, *supra* note 3. See also U.S. DEP’T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (Oct. 1, 1997) [hereinafter AR 190-8].

would not be afforded prisoner of war status under the Third Geneva Convention.¹⁰ The law (not policy) governing the type and level of due process to be afforded to detainees in Afghanistan is difficult to determine today, let alone in 2002 when commanders and legal advisors on the ground were told to act in a “manner consistent with”¹¹ Geneva (policy), but not “in accordance with” Geneva (law).

As further discussed, the Chief Executive (and thus the Department of Defense) has a legal basis to detain persons during armed conflict. The detaining authority has an international obligation to review the circumstances of detention and provide a procedural review of such detention to the detainee.¹² The detaining authority must decide what administrative process will be used to determine if a person should remain interned. Once that process is implemented (as it has been and will be described in this article), will it pass the test of fundamental fairness sufficient to withstand the scrutiny of the international community and U.S. courts? Between 2001 and mid-2009, the system of detention review in Afghanistan did not survive such scrutiny and was fairly characterized as a “strategic liability.”¹³ Scrutiny by Article III courts is ongoing, with mixed results thus far at the district court and appellate court levels.¹⁴ This article examines the new review process directed in July 2009 and implemented in September 2009 and suggests that it can and

will survive such scrutiny and emerge as a legitimate process so long as it is (and continues to be) implemented in a robust and transparent manner.

While “detention” is a broad topic, the focus here is narrow: procedural and substantive protections afforded to LOAC detainees. To properly assess the current status of the detention review process in Afghanistan, it is appropriate and instructive to critically assess past review procedures and acknowledge the deficiencies in those processes. As the federal litigation over the issues with the Guantanamo detainees revealed flaws in the Combatant Status Review Tribunals (CSRTs),¹⁵ recognition of the “undue process”¹⁶ afforded to detainees in U.S. custody in Afghanistan gave way to gradual changes in the system.¹⁷

What follows is a critical look at the past, but more importantly, a cautiously optimistic look at the current and future state of the new DRBs in Afghanistan. Part II briefly describes the history of detention in Afghanistan and then examines the policies and procedures for review of detention between 2002 and mid-2009. Because notable scholars and commentators have provided numerous, in-depth analyses of the actions (and reactions) of the Article III courts, Congress, and the Executive pertaining to detainee rights,¹⁸ this article need not retread that ground and thus only contains brief references to the relevant cases, legislation, and executive orders or directives for contextual purposes.

Based on the history, President Obama made some immediate strategic policy decisions and ordered a review of all detention operations in January 2009. As a result of that review, the Secretary of Defense ordered new procedures for review boards and the creation of a new task force to take over detention operations in July and September 2009, respectively. Part III focuses on the improvements in the detention review procedures in Afghanistan and Joint Task Force (JTF) 435, the task force charged with running all detention operations in Afghanistan, and more specifically, the Legal Operations Directorate of JTF 435, the team responsible for the daily operations of the DRBs. A description of those new procedures—and the personnel charged with implementing them—reveals a process designed to ensure that due process protections are afforded to the detainees housed at the new Detention Facility in Parwan (DFIP).

¹⁰ Bush February 2002 Humane Treatment Memorandum, *supra* note 2. See also *infra* note 47 (discussing President Bush’s determination that Taliban and al Qaeda detainees did not qualify for prisoner of war status).

¹¹ Bush February 2002 Humane Treatment Memorandum, *supra* note 2, para. 5.

¹² Virtually all legal scholars agree that the current conflict in Afghanistan is a Common Article 3 conflict—a non-international armed conflict. See generally THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT’L L. STUD. (Michael N. Schmitt ed., 2009) (U.S. Naval War College International Studies); THE WAR ON TERROR AND THE LAW OF WAR: A MILITARY PERSPECTIVE (Geoffrey S. Corn ed., Oxford Univ. Press, 2009). Since the application of GC III (for prisoners of war) is not applicable to the current detainees in Afghanistan as a matter of law. Even so, practitioners always default to the principles of the Geneva Conventions when searching for an analogous legal framework. In this regard, rather than the “prisoner of war” terminology from GC III, the general legal framework currently applied in Afghanistan uses civilian security internee concept from the Fourth Geneva Convention. See Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. Under article 78 of GC IV, if the detaining authority “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.” *Id.* art. 78. Article 79 of GC IV then states that protected persons shall not be interned except in accordance with the provisions of articles 41, 42, 43, 68, and 78. *Id.* art. 79. Initial internment “may be ordered only if the security of the Detaining Power makes it absolutely necessary. *Id.* art. 42. Once an initial internment decision is made article 43 of GC IV requires, among other provisions, a court or administrative board to review the initial decision at least twice yearly. *Id.* art. 43. Finally, article 68 distinguishes between internment and imprisonment with the former only authorized to deprive the detainee of liberty. *Id.* art. 68.

¹³ General McChrystal Assessment, *supra* note 1.

¹⁴ Chesney & Goldsmith, *supra* note 5, at 1110–17. See also Schoettler, *supra* note 5, at 117–23.

¹⁵ See *infra* note 38.

¹⁶ *Undue Process*, *supra* note 5.

¹⁷ While the author cannot point to specific mandates to change the review process for the Afghanistan detainees between 2002 and July 2009, history shows that slight adjustments were made over time. See Part II *infra*.

¹⁸ See, e.g., FISHER, *supra* note 2; Chesney & Goldsmith, *supra* note 5; Schoettler, *supra* note 5.

Part IV reviews the criticisms of the new DRB process, primarily those made by human rights organizations. To put such criticisms in context, the section provides a brief history of such organizations and the role of international human rights law. In February 2010, a petition for writ of habeas corpus was filed in the U.S. District Court for the District of Columbia on behalf of two Bagram detainees. The timing of this petition, when put into context with the overall timeline detailed in this article, provides an excellent illustration of the rapidly evolving process, including examples of complaints rendered moot by the DRB procedures. Finally, the section considers what principles under customary international law meet the baseline due process requirements for detainees captured and interned in Afghanistan, an active theater of combat.

Part V concludes that the new detention review paradigm initiated in Afghanistan sets the conditions for a fair and transparent review process when implemented in a robust manner. The DRBs—officially stood up by Combined Joint Task Force–82 (CJTF-82) in September 2009 and taken over by JTF 435 in January 2010—remain a work in progress. As personnel continue to flow into the Legal Operations Directorate and best operating practices are refined, there is potential for policymakers to adjust the policy as necessary to improve the system. Along with a review of the current scholarship and debate on the topic of detention review comes an acknowledgment that legal scholars and the international community may not agree that the new procedures provide the appropriate level of procedural protections. However, as this article suggests, the DRB process—a process currently guided by Common Article 3 as supplemented by U.S. policy—provides more procedural protections afforded to combatants than are required by law, international or domestic. Finally, what should be revealed, even to the critics of the new process, is an undisputed improvement from past practices and the notion that the DRBs have made progress in the battle to transform what was once a strategic liability for the United States into a symbol of legitimacy for the Afghan people and a new model for security detention review processes for the world.

II. A Brief History of Detention in Afghanistan

A. September 11, 2001, and the Authorization to Use Military Force

After the terrorist attacks against the United States on 11 September 2001, Congress passed legislation—the Authorization for the Use of Military Force (AUMF)—authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or

aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁹

On 7 October 2001, the U.S. Air Force started bombing Taliban forces in Afghanistan.²⁰ Later, on 19 October, Soldiers from the 5th Special Forces Group, fighting alongside Afghan General Abdul Rashid Dostum and his tribesmen, saw the first ground combat action against the Taliban militia south of Mazar-i-Sharif, Afghanistan.²¹ By 24 November 2001, detention operations began.²² While the earliest detention of Taliban militia and al Qaeda terrorists at the Qali-i-Janga fortress near Mazir-i-Sharif was under the control of the Northern Alliance, U.S. personnel were involved.²³ As U.S. forces gained a foothold in Afghanistan, field detention sites controlled by U.S. forces began to emerge around Afghanistan.²⁴

¹⁹ See RICHARD F. GRIMMETT, CRS REPORT FOR CONGRESS, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS: LEGISLATIVE HISTORY (updated Jan. 16, 2007), available at <http://fas.org/sgp/crs/natsec/RS22357.pdf>. After the Senate passed Joint Resolution 23 on 14 September 2001, the President signed the legislation into law on 18 September 2001. Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF]. Section 2(a) of the AUMF reads:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

²⁰ See DOUGLAS STANTON, HORSE SOLDIERS: THE EXTRAORDINARY STORY OF A BAND OF U.S. SOLDIERS WHO RODE TO VICTORY IN AFGHANISTAN 46 (2009). See also Stephane Ojeda, *U.S. Detention of Taliban Fighters: Some Legal Considerations*, THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT’L L. STUD. 358–59 (Michael N. Schmitt ed., 2009) (U.S. Naval War College, International Law Studies).

²¹ Captain Mitch Nelson, Team Leader, Operational Detachment–Alpha 595, 3d Battalion, 5th Special Forces Group, called in a B-52 airstrike on Taliban militia near the village of Chapchal, Afghanistan. STANTON, *supra* note 20, at xiii–xiv, 144–58.

²² *Id.* at 289–99 (describing the combined actions of the 5th Special Forces Group and Central Intelligence Agency Paramilitary Officers, including Mike Spann who, on 25 November 2001, became the first person killed in the war on terror during a Taliban and al Qaeda uprising at the Qali-i-Janghi Fortress). *Id.* at 10–11.

²³ See generally *id.* at 289–33.

²⁴ GOLDSMITH, *supra* note 2, at 107 (describing the makeshift prisons, including the Qali-i-Janghi Fortress, a prison at Shirbarghan, at Kandahar airbase, and other U.S. bases around Afghanistan, and naval ships in the Arabian Sea).

Once the Executive Branch decided to use Guantanamo Bay (GTMO), Cuba, to house personnel captured in the Global War on Terrorism,²⁵ as early as January 2002, many suspected Taliban and al Qaeda terrorists, as well as those suspected of associating with and supporting them, were transferred from U.S. detention sites in Afghanistan to the U.S. internment facilities at GTMO.²⁶ Some other detainees remained in Afghanistan. In February 2002, the Center for Constitutional Rights filed its first motion challenging the legality of detention at GTMO in the case of *Rasul v. Bush*.²⁷ While it took more than two years to reach the Supreme Court, in June 2004, the Court opened the door for federal litigation by holding “the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”²⁸

On the same day it released the *Rasul* opinion, the Court released a separate opinion on the issue of the President’s (and therefore, U.S. forces’) authority to detain. In *Hamdi v. Rumsfeld*,²⁹ the Government asserted two bases for detention of enemy combatants: the President’s authority under Article II of the U.S. Constitution and the AUMF. A plurality of the Court in *Hamdi* held the AUMF constituted “explicit congressional authorization for the detention of individuals”;³⁰ however, the Court purposefully did not address the Government’s argument that the President had

lawful authority to detain enemy combatants under his war powers derived from Article II.³¹ Four years after *Hamdi*, the Supreme Court reaffirmed that the AUMF provides a lawful basis for detention in *Boumediene v. Bush*.³²

While U.S. forces had the legal authority to detain enemy combatants,³³ the question of continued internment—or indefinite detention—in Afghanistan was overshadowed early on by other shocking events, namely the abuses at Abu Ghraib in Iraq, the use of harsh interrogation techniques by U.S. personnel at various detention sites, and the death of

²⁵ *Id.* at 108. At some point in December 2008, the Executive Branch decided to use Guantanamo Bay as a detention site. After the decision to use military commissions as a forum to try the detainees, the Office of the Legal Counsel (OLC) rendered a legal opinion to the Department of Defense Gen. Counsel on the Habeas implications of using GTMO. See Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 25–28 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge Univ. Press, 2005); Memorandum from Patrick L. Philbin & John Yoo, Deputy Assistant Attorneys Gen. to William J. Haynes, II, Gen. Counsel, Dep’t of Defense, Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29–37 (Karen J. Greenberg & Joshua L. Dratel, eds., Cambridge Univ. Press, 2005).

²⁶ Ojeda, *supra* note 20, at 358. See also Joint Task Force Guantanamo: Safe, Humane, Legal Transparent 2 (Jan. 27, 2010) (on file with author). Joint Task Force 160 was reactivated in December 2001 and “Camp X-Ray [was] prepared as a temporary location for detention operations.” In January 2002, “[t]he first detainees are brought to Guantanamo Bay and housed in Camp X-Ray. The International Committee of the Red Cross visits six days later.” *Id.*

²⁷ 542 U.S. 466 (2004). See Center for Constitutional Rights, *Rasul v. Bush*, <http://ccrjustice.org/ourcases/past-cases/rasul-bush> (last visited Apr. 1, 2010) (providing a synopsis of the organization’s early involvement with the first detainees sent to Guantanamo Bay).

²⁸ *Rasul*, 542 U.S. at 485.

²⁹ 542 U.S. 507 (2004). See also Memorandum Opinion from John Yoo, Deputy Assistant Attorney Gen. to Timothy Flanigan, Deputy Counsel to the President, The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 3–24 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

³⁰ *Hamdi*, 542 U.S. at 517.

³¹ “The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government’s alternative position, that Congress has in fact authorized Hamdi’s detention, through the AUMF.” *Id.* at 516–17. The Government has also asserted Executive authority under the AUMF and Article II in other areas after 11 September. Notably, with respect to the Terrorist Surveillance Program (TSP), the Bush Administration’s authorization for the National Security Agency (NSA) to eavesdrop on citizens and non-citizens within the United States without a court-approved warrant was premised on AUMF and Article II authority. See FISHER, *supra* note 2, at 292. In a 2006 case challenging the Administration’s statutory and constitutional defense of the TSP, the Sixth Circuit Court of Appeals rejected both Government arguments. *Id.* at 304–09; see also Am. Civil Liberties v. Nat’l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006)).

³² 128 S. Ct. 2229 (2008). “In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), five members of the Court recognized that detention of individuals who fought against the United States in Afghanistan “for the duration of the particular conflict in which they were captured, is so fundamental and accepted as incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” *Id.* at 2240–41 (writing for 5–4 majority in *Boumediene*, Justice Kennedy quoted the plurality opinion of Justice O’Conner in *Hamdi*, 542 U.S. at 518). It should also be noted that numerous international law scholars agree with the lawful authority of the United States to detain lawful and unlawful combatants in the war on terror. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2083 (May 2005) (The authors build on the AUMF analysis undertaken by the *Hamdi* Court and provide their own extensive analysis and comparison to prior authorizations for the President to use force and conclude: “[t]he AUMF should . . . be interpreted to as conferring full congressional authorization for the President to prosecute a war against nations, organizations, and persons that he determines have the requisite connections to the September 11 attacks.”). See generally GEOFFREY S. CORN ET AL., THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE (Geoffrey S. Corn ed., 2009) (containing stand alone chapters, albeit with a common theme, drafted by six notable international law scholars, on various aspects of the war on terror. Despite the variety of topics, such as targeting, detention, interrogation, and punishment of terrorists, as Professor Corn, writing for all of the authors, notes “there is no doubt that the United States has and will continue to invoke the law of war as a source of authority for military operations to destroy, disable, capture, and incapacitate terrorist enemies.”). *Id.* at xvi. See also THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT’L L. STUD. pts. I–IV (Michael N. Schmitt ed., 2009) (U.S. Naval War College International Law Studies). In the first four parts of this volume, fourteen international law scholars examine various aspects of the war in Afghanistan, and although critical of certain policies and procedures in various facets of the war, each implicitly, if not explicitly by their subject matter, acknowledges the fundamental authority of the U.S. to detain personnel in Afghanistan. See also Major Robert E. Barnsby, *Yes We Can: The Authority to Detain as Customary International Law*, 202 MIL. L. REV. 53 (2010) (proposing that detention is part of customary international law).

³³ AUMF, *supra* note 19.

abused prisoners at Bagram.³⁴ Additionally, after grappling with the habeas litigation and military commissions³⁵ for a number of years, in 2008, in *Boumediene v. Bush*,³⁶ the Supreme Court opined that the initial review boards for GTMO detainees—the Combatant Status Review Tribunals—provided insufficiently robust procedural protection and held that the Detainee Treatment Act (DTA)³⁷ review of the CSRTs did not provide an adequate substitute for habeas corpus.³⁸ Moreover, while the Supreme Court has heard numerous cases for the GTMO detainees, the threshold issue of access to Article III courts for habeas review for detainees currently held in Afghanistan is currently making its way through the U.S. federal courts.³⁹

³⁴ See *supra* note 2. See also Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES.COM, May 20, 2005, <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html>.

³⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³⁶ 553 U.S. 723 (2008).

³⁷ DTA, *supra* note 3, § 1005(e). After providing a detailed history and explanation of the Writ of Habeas Corpus, the *Boumediene* Court holds that the Suspension Clause of the Constitution has full effect at GTMO, thus providing the GTMO detainees a Constitutional right to the writ. *Boumediene*, 128 S. Ct. at 2262. With the holding that the detainees are entitled to the privilege of habeas corpus, the Court next addresses the issue of whether Congress, through the DTA § 1005(e) has provided an adequate substitute to the writ. *Id.* at 2262–63. While the Court normally would have remanded such an issue to the Court of Appeals, because of “[t]he gravity of the separation-of-powers issues . . . and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional,” the Court takes on the task itself. *Id.* at 2263. In doing so, the Court does “not endeavor to offer a comprehensive summary of the requisites of determining an adequate substitute[, but does] consider it uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to [an erroneous application] of relevant law. (citation omitted). And the habeas court must have the power to order the conditional release of an individual unlawfully detained . . .” *Id.* at 2266. The Court found that Congress, through the DTA, did not authorize an adequate review of the CSRTs. *Id.*

³⁸ The Court continued its examination of the overall process of review, specifically the CSRTs stating “the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context.” *Id.* at 2268. In assessing “the CSRT process, the mechanism through which the [detainees’] designation as enemy combatants became final,” the Court addressed the “myriad deficiencies” in the CSRTs, primarily, “the constraints upon the detainee’s ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant.” *Id.* at 2269. Specifically, the Court notes the detainee’s limited means to find or present evidence to challenge the Government’s case; no assistance of counsel; unaware of the most critical allegations against him; access only to unclassified information; and can only confront witnesses that testify, yet unlimited hearsay. *Id.* Interestingly, while taking the extraordinary step to address the issues of review in detail, the Court “make[s] no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards,” yet the Court agrees with the detainees’ position even when all parties “act with diligence and good faith, there is considerable risk of error in the tribunal’s findings of fact [when the process] is ‘closed and accusatorial.’” *Id.* at 2270.

³⁹ See *Maqaleh v. Gates*, No. 09-5265, 2010 U.S. App. LEXIS 10384 (D.C. Cir. May 21, 2010).

In May 2010, the D.C. Circuit Court of Appeals, in *Maqaleh v. Gates*,⁴⁰ dismissed the habeas petitions of three non-Afghans. While the time period has not expired for the petitioners in *Maqaleh* to file a writ of certiorari,⁴¹ if the same litigation pattern emerges for the Afghanistan detainees, then it follows that the detention review procedures in Afghanistan will receive the same scrutiny as the CSRTs. Consider the *Boumediene* Court’s concerns about the inadequacies of the CSRTs and the *Maqaleh* Court’s holding in May 2010 in the following section’s

⁴⁰ This case began with four detainees, all captured outside Afghanistan and later transferred to Bagram. Three are non-Afghans (Fadi al Maqaleh and Amin al Bakri are Yemeni citizens who were captured in the United Arab Emirates (UAE) and Thailand, respectively; Redha al Najjar is a Tunisian citizen who was captured in Pakistan; and Haji Wazir, an Afghan citizen, was captured in Dubai). On 2 April 2009, Judge John D. Bates of the District of Columbia District Court ruled that the three non-Afghans captured outside Afghanistan and brought to Bagram have a constitutional right to habeas corpus and can challenge their detention in U.S. article III courts. Judge Bates dismissed the petition of Wazir, the Afghan, to avoid “friction with Afghanistan.” When commenting on the review process afforded to the detainees in Bagram, Judge Bates stated that they were less sophisticated than the CSRTs at GTMO, fall well short of what the *Boumediene* Court found was inadequate at GTMO, and were provided the detainee no opportunity to meaningfully rebut the Government’s assertion. *Maqaleh v. Gates*, Civ. Action No. 06-1669, mem. op. (D.D.C. Apr. 2, 2009) (Bates, J.). See also *Fixing Bagram*, *supra* note 5, at 16. See also BENJAMIN WITTES ET AL., *THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING* (2010) (Brookings Inst.). The Government appealed the decision on the remaining three detainees and it was argued at the D.C. Circuit Court of Appeals on 7 January 2010 and on 21 May 2010, that court dismissed the petitions. In the Court of Appeals decision, Chief Judge Sentelle concluded that “the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in Executive detention in the Bagram detention facility in the Afghan theater of war. *Maqaleh*, 2010 U.S. App. LEXIS 10384, at *39. In making its determination, the Court of Appeals addressed the adequacy of the process used to determine the detainee’s status. *Id.* at *27-28. While the appellate court disagreed with the district court on a number of points, on this one—the adequacy of the review process used at Bagram at the time the detainees were held—the higher court concurred that the Unlawful Enemy Combatant Review Board (UECRB) had fewer procedures than the CSRTs. *Id.* at *30. In a footnote, the court notes that the Government urged the court to consider the “new procedures that [have been] put into place at Bagram in the past few months for evaluating the continued detention of individuals.” *Id.* at *30–31. The court declined to consider the new DRBs and relied on the process in place at the time the detainees were held. *Id.*

⁴¹ When this article was submitted, it was still within the ninety days the petitioners had to file a Writ of Certiorari with the Supreme Court (approximately 21 August 2010). See RULES OF THE SUPREME COURT OF THE UNITED STATES R. 13.1, at 9 (16 Feb. 2010). Haji Wazir, the Afghan detainee whose case was dismissed by Judge Bates, was released as a result of his DRB in February 2010. For the three non-Afghan detainees involved in the *Maqaleh* case, all entered the Bagram Collection Point (as the detention facility was called at the time) in 2004: al Bakri and al Najjar on 20 May 2004 and al Maqaleh on 10 September 2004. See *infra* note 82. Since all three have been detained since 2004, they have all been through each type of review procedure at Bagram (all are described in detail below), and they remain in the DFIP. Each has been through the new DRB process, which is the main subject of this article: al Maqaleh had his initial review on 9 December 2009 and a subsequent six-month review on 12 June 2010; al Bakri had his initial review on 10 February 2010; and al Najjar had his initial review on 2 December 2009 and a subsequent six-month review on 12 June 2010. For all three, the DRB recommended continued internment. See *infra* notes 82 and 128 (all data was compiled from the “Super Tracker” during the author’s June 2010 trip to Afghanistan).

overview of the detainee review boards in Afghanistan between 2002 and mid-2009.

B. Detainee Review Boards (2002 through September 2009)

*We need to marvel at the depths from which we have come and dream of the heights to which we are yet to achieve.*⁴²

As noted above, detention operations began in Afghanistan as early as November 2001.⁴³ Initially, the primary detention site was Kandahar, an open-air site with tents. By May 2002, the Bagram Collection Point (BCP) became the primary detention facility in Afghanistan.⁴⁴ Located at Bagram Airfield (Bagram), a large coalition military base north of Kabul, the BCP was contained in a large Russian-built airplane hangar, a remnant of the Soviet occupation of Afghanistan from 1979–1989.⁴⁵ The BCP became the focal point of detention operations when CJTF-180 became the operational level headquarters in Afghanistan in May 2002. Around the same time, Combined Task Force–82 (CTF-82) took over as the tactical-level headquarters from the 10th Mountain Division. Control of detention operations by CJTF-180 included the dual mission of care and custody of detainees (by the Military Police (MPs)) and intelligence gathering operations (by Military Intelligence personnel (MI))—all under the same roof at the BCP.⁴⁶ The blurring of responsibilities of MPs and MI has been thoroughly criticized and need not be repeated here; however, the overlap likely resulted in an early system of detention review dominated by MPs and

MI—obviously interested parties—that had the responsibility to determine a detainee’s fate.⁴⁷

⁴⁷ It is worth a brief detour at this point to remind the reader why Article 5 tribunals under GC III were not implemented as a matter of course early on in Afghanistan to determine if Taliban or al Qaeda forces qualified for prisoner of war status. GC III, *supra* note 8, art. 5. As a starting point, GC III (and its provisions to determine who is entitled to prisoner of war status) is only applicable in Common Article 2 international armed conflicts (as was the situation “early on” in Afghanistan). Yet, as described in note 12 above, the current status of the armed conflict in Afghanistan is a Common Article 3 non-international, or internal, armed conflict, which means that GC III and its provisions do not apply and, thus, an insurgent in the internal armed conflict cannot get PW status. A brief explanation of the changing nature of the armed conflict in Afghanistan follows. Through 7 October 2001, Afghanistan was embroiled in an internal armed conflict; the parties to the conflict were the *de facto* Taliban-led Government of Afghanistan versus the insurgent Northern Alliance. At the time, only three of 194 nations (Pakistan, Saudi Arabia, and the United Arab Emirates) recognized the Taliban as the lawful, or *de jure*, Government of Afghanistan. Regardless, because the Taliban controlled eighty to ninety percent of Afghanistan, they were the *de facto* government pre-11 September 2001. The United States gave the Taliban Government an ultimatum to turn-over the al Qaeda terrorists who had safe-haven in Afghanistan. The Taliban Government refused. When the United States attacked Afghanistan on 7 October 2001, the international armed conflict involved the United States and its allies versus the Taliban-led Government of Afghanistan and its al Qaeda allies. It is undisputed that this was a Common Article 2 international armed conflict, thus triggering the full body of the law of war, including of course, GC III and its prisoner of war provisions. Exactly when the Common Article 2 conflict ended is a matter of debate (e.g., when the Taliban surrendered Kandahar, their seat of government, on 9 December 2009; when the Bonn Agreement was signed on 20 December 2001; or when President Hamid Karzai was elected on 13 June 2002); however, few dispute that after Karzai was appointed by the Loya Jirga in June 2002, the armed conflict clearly became an internal armed conflict. For purposes of this brief description, the author will assume June 2002 as the point the armed conflict changed in characterization from an international to an internal armed conflict: the Karzai-led Government of Afghanistan and its U.S. and coalition allies versus the insurgent Taliban and its terrorist al Qaeda allies. If GC III applied during this period of international armed conflict (October 2001 through June 2002), then why didn’t the United States implement Article 5 procedures to determine the status of Taliban and al Qaeda forces captured on the battlefield? The answer, while subject to much criticism over the years, is simple: President Bush, based on the advice of his lawyers, made two policy decisions on this exact matter: (1) that under no circumstances do any of the Geneva Conventions apply to al Qaeda, and (2) with respect to the Taliban, while GC III applies, there was no doubt as to their status. Taliban detainees were not Prisoners of War, but, rather unlawful combatants who did not comply with the laws of war; therefore, no article 5 tribunals were required to determine their status. *See generally* GOLDSMITH, *supra* note 2, at 118–19 (appropriately criticizing the Bush administration’s decision “to take a procedural shortcut with respect to the Geneva Conventions. While it was appropriate to deny al Qaeda and Taliban soldiers POW rights, there was a big question as to whether the people at Guantanamo were in fact members of the Taliban or al Qaeda.”); Waxman, *supra* note 2, at 347–49; John F. Murphy, *Afghanistan: Hard Choices for the Future of International Law*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, 85 INT’L L. STUD. 79, 84–88 (Michael N. Schmitt ed., 2009); Bush February 2002 Humane Treatment Memorandum, *supra* note 2, at 134–35 (presenting President Bush’s determination that “the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva”). In the memorandum, President Bush further stated, “I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.” *Id.* at 135. *See also* Memorandum from Jay S. Bybee, Assistant Attorney General to Alberto R. Gonzales, Counsel to the President on Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 Humane Treatment (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 136–43 (Karen J. Greenberg & Joshua Dratel eds., 2005).

⁴² Interview with Lieutenant Colonel (LTC) Michael Devine, Deputy Dir., Legal Operations Directorate, JTF 435, in Bagram, Afg. (Feb. 1, 2010) [hereinafter Devine February Interview]. The author conducted a “continuous interview” with LTC Devine from 25 Jan. through 4 Feb. 2010 to learn everything possible about the DRBs in Afghanistan.

⁴³ While the legal basis for detention is discussed in detailed above, on a practical level detention during the early phases of combat operations were based on classified criteria. In general, the classified criteria, contained in classified rules of engagement (ROE) described persons belonging to certain categories (status-based detention based primarily on intelligence) as well as those who could be detained based on their conduct (conduct-based detention based on coalition forces’ observation of traditional hostile acts or hostile intent).

⁴⁴ Based on the author’s experience as Chief, Operational Law (including duties as Legal Advisor to the BCP, Legal Advisor to the Detainee Review Board, and International Committee of the Red Cross (ICRC) Liaison), Combined Joint Task Force 180 (CJTF-180), Bagram, Afghanistan, from 12 Nov. 2002 through 5 June 2003). Such experience includes general knowledge of detention operations in 2002 prior to my arrival based on reports read and transition with my predecessor. The primary unit comprising the staff of CJTF-180 was XVIII Airborne Corps, including a relatively small legal contingent from the Corps Office of the Staff Judge Advocate (the Staff Judge Advocate (SJA), Deputy Staff Judge Advocate (DSJA) (Forward), Chief of Operational Law, three captains, and three noncommissioned officers).

⁴⁵ Stern, *supra* note 1, at 19.

⁴⁶ *See supra* note 44.

C. Detainee Review Boards (Summer 2002–Summer 2005)

The first Detainee Review Boards (as they were originally called) began soon after CJTF-180 assumed control of detention operations and detainees were transferred from Kandahar and other outlying temporary holding facilities throughout Afghanistan to Bagram. These early DRBs continued in form and substance for approximately three years from the summer of 2002 through the summer for 2005. The composition of the DRB was approximately ten personnel, including MI, MPs, the members of the Criminal Investigative Task Force (CITF), and a judge advocate legal advisor. The DRB was chaired by the CJ2 (lead intelligence officer for CJTF-180) and included three or four other MI personnel from the CJ2 section (located in the Joint Operations Center (JOC)) and from the BCP. One MP officer from the detention facility was on the DRB as well as the CJTF-180 Provost Marshal. An investigator from CITF was also assigned to the DRB. The DRB met twice weekly in the JOC, the first session being a “pre-meeting” to review the files prepared by the MI personnel in more detail. This initial session was the appropriate time for the DRB members to discuss issues and work out any discrepancies at the action officer level prior to presenting the cases to the CJ2 in the regular session. In both sessions, MI analysts were responsible for preparing the files and presenting the cases to the DRB, highlighting the factors relevant to the detention criteria.⁴⁸

During the first two years of the DRBs at Bagram, specifically the period when detainees were still being transferred from Afghanistan to GTMO (the last transfers were in September 2004),⁴⁹ the primary determination of the DRB was whether or not a detainee met the (classified) criteria to be transferred to GTMO. To make that determination, the DRB had to resolve the threshold issue of whether the detainee was an enemy combatant. All available information—whether sparse “evidence packets” from the capturing units or packets built by interrogators in the BCP—was brought before the DRB to assess the criteria. If the detainee did not appear to meet even the threshold determination of being an enemy combatant due to the lack of evidence, as a courtesy (not a requirement), a designated DRB member would contact the capturing unit after the pre-meeting to inform the commander of the detainee’s likely release recommendation if no further information was provided. In general, this revelation would often prompt units to send representatives to the DRB to “testify” about the circumstances of capture and provide relevant evidence on the detainee’s acts, if any, to make a case for continued detention.

As a detainee’s case was presented, the members of the DRB would form a consensus regarding whether the

detainee met the criteria of an enemy combatant.⁵⁰ If the consensus was that there was not enough evidence, a recommendation for release would be made, and the detainee would be placed on a “release list” to be approved by the Commander, CJTF-180. If the detainee was determined to be an enemy combatant, the next question was whether the detainee met the criteria to be sent to GTMO. Intelligence gathering, at least through the *Hamdi* decision in mid-2004 (and perhaps beyond),⁵¹ was very much a basis for

⁵⁰ See also UPDATE TO ANNEX ONE OF THE SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE COMMITTEE AGAINST TORTURE pt. One § 2(D)(2) (May 2005), available at <http://www.state.gov/g/drl/rls/55712.htm> [hereinafter 2005 COMMITTEE AGAINST TORTURE REPORT].

Detainees under DoD control in Afghanistan are subject to a review process that first determines whether an individual is an enemy combatant. The detaining Combatant Commander, or designee, shall review the initial determination that the detainee is an enemy combatant. This review is based on all available and relevant information available on the date of the review and may be subject to further review based upon newly discovered evidence or information. The Commander will review the initial determination that the detainee is an enemy combatant within 90 days from the time that a detainee comes under DoD control. After the initial 90-day status review, the detaining combatant commander, on an annual basis, is required to reassess the status of each detainee. Detainees assessed to be enemy combatants under this process remain under DoD control until they no longer present a threat. The review process is conducted under the authority of the Commander, U.S. Central Command (USCENTCOM). If, as a result of the periodic Enemy Combatant status review (90-day or annual), a detaining combatant commander concludes that a detainee no longer meets the definition of an enemy combatant, the detainee is released.

Id. See also *Fixing Bagram*, *supra* note 5, at 5 and note 23.

⁵¹ In *Hamdi*, Justice O’Connor stressed the point that while detention was clearly authorized under the AUMF, the “purpose of detention is to prevent captured individuals from returning to the field of battle and talking up arms once again.” *Hamdi*, 542 U.S. at 518. Justice O’Connor cites many examples to support her premise, and in response to *Hamdi*’s argument that the AUMF does not authorize indefinite detention, she states: “Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.” *Id.* at 521. Prior to the *Hamdi* decision in June 2004, as noted in the text, interrogation and intelligence gathering was very much as part of the decision-making process for continued internment. After the *Hamdi* decision, recognition that holding a detainee solely, or even primarily, for intelligence gathering purposes made its way to the field through the practices implemented at the review boards as described in this section. Beginning with the Enemy Combatant Review Boards in the summer of 2005, the board focus shifted to whether the detainee met the enemy combatant status criteria and away from the detainee’s intelligence value. See *infra* notes 65–66. See also U.S. DEP’T OF ARMY, FIELD MANUAL 3-24 & U.S. MARINE CORPS WARFIGHTING PUB. 3-33.5, COUNTERINSURGENCY para. 7-40 (15 Dec. 2006) (discussing information and intelligence-gathering as a basis for detention).

Individuals suspected of insurgent or terrorist activity may be detained for two reasons:

- To prevent them from conducting further attacks.
- To gather information to prevent other insurgents or terrorists from conducting attacks.

⁴⁸ See *supra* note 44.

⁴⁹ See *infra* note 61.

continued internment, whether at the BCP or GTMO. Considering that MI analysts presented the cases to the DRB, the intelligence value of the detainee was a prime factor in the decision-making process. If the detainee met the criteria for GTMO, then he would be placed on the “GTMO list” with a recommendation for transfer that the CJ2 would present to the Commander, CJTF-180.

All detainees had an initial ninety-day review and then an annual review.⁵² If a detainee was designated as an enemy combatant at the ninety-day review, but did not meet the more stringent requirements to be sent to GTMO, then the MI analysts would present a case for continued detention, if the detainee still had intelligence value or the detainee was a security threat. In such cases, the detainee’s file went back with the analyst until the detainee’s case was presented at an annual review before a DRB composed entirely of new personnel (based on personnel rotations in theater).⁵³ Although there was no known policy requiring the DRB to inform the detainee that a board actually convened to determine his status, it is possible that MI personnel advised those who were reviewed of the recommendation for continued detention at the BCP.

Because the DRB process itself was classified, the DRB legal advisor, at least during the period from late November 2002 through early June 2003, could not specifically advise the International Committee of the Red Cross (ICRC) that a review board had met or what the results were, although the ICRC was apprised of the general concept of a ninety-day and annual reviews. The results (transfer, release, or continued internment) would be self-evident based on the list of all detainees with Internment Serial Numbers (ISNs) provided to the ICRC during their recurring visits to the BCP every seven to ten days. The list had comments such as “pending transfer to GTMO” or “release” (once the final decision was approved by the CJTF-180 commander).⁵⁴

As noted, usually within days of the pre-meeting, the actual DRB was convened and chaired by the CJ2. Although the meeting followed no formal script, the legal

advisor to the DRB would officially convene the DRB, conduct a roll call, and remind the members of their responsibilities, primarily to determine enemy combatant status and to examine whether the criteria for transfer to GTMO had been met. The DRB members would listen to the same MI analysts who presented at the pre-meeting make their case to the CJ2. During this presentation, the consensus recommendation was usually not disputed because matters of significance would have already been discussed. Certainly, any major objections would be noted for the CJ2, but the previously determined, non-binding recommendation was essentially provided unaltered to the CJ2.

Once the CJ2 decided the case, the detainee could be annotated on the appropriate list for release or transfer to GTMO. The CJ2 would then present the recommendations to the CJTF-180 commander for approval.⁵⁵ Not making either list meant continued internment for another year unless new matters potentially affecting the detainee’s status were presented in the interim. This default—continued internment for another year—did not require approval; rather, the detainee’s file was simply annotated by MI and sent back into the queue for a future review.⁵⁶

Between May 2002 and June 2003, based on the CJTF-180 commander’s guidance, the maximum number of detainees in the BCP never exceeded one hundred. While the overall detainee population, which included the Kandahar detention facility and other temporary detention sites, was much larger, only those detainees at the BCP went through the DRB process. During this first year, anywhere from ten to fifteen detainee files were reviewed each week with each DRB session to review and discuss detainee files with the CJ2 lasting up to two hours. With the constant flow of detainees in and out of the BCP, the number of files reviewed was simply a calculation to process the ninety-day reviews.⁵⁷ In the summer of 2003, the maximum number of detainees authorized in the BCP doubled to two hundred; consequently, the number of files reviewed at each DRB rose accordingly.

Except for the changes in headquarters,⁵⁸ the DRB process described above remained relatively unchanged for

These reasons allow for two classes of persons to be detained and interrogated:

- Persons who have engaged in, or assisted those who engage in, terrorist or insurgent activities.
- Persons who have incidentally obtained knowledge regarding insurgent activity and terrorist activity, but who are not guilty of associating with such groups.

Id. See also Ryan Goodman, *Rationales for Detention: Security Threats and Intelligence Value*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, 85 INT’L L. STUD. 371, 375–77 (Michael N. Schmitt ed., 2009).

⁵² See 2005 COMMITTEE AGAINST TORTURE REPORT, *supra* note 50.

⁵³ See *supra* note 44.

⁵⁴ *Id.* (based on the author’s experience as the CJTF-180 Liaison to the ICRC).

⁵⁵ *Id.* See also 2005 COMMITTEE AGAINST TORTURE REPORT, *supra* note 50.

⁵⁶ See *supra* note 44 (this particular comment about the default position not requiring the commander’s approval is based on the author’s best recollection).

⁵⁷ *Id.*

⁵⁸ In May 2002, CJTF-180 became the operational level headquarters and assumed control of detention operations from the 10th Mountain Division, the tactical level headquarters. In May 2003, CTF-82 merged into CJTF-180. After months of planning, the downsizing and consolidation of the tactical-level headquarters (82d Airborne Division) into the operational level headquarters (XVIII Airborne Corps) resulted in a month period where the elements of the 82d Airborne Division headquarters assumed control of CJTF-180 and closed down CTF-82. Then, in June 2003

the next three years through the summer of 2005.⁵⁹ Throughout the transitions in the headquarters from the 82d Airborne Division to the 10th Mountain Division to the 25th Infantry Division,⁶⁰ the control of detention operations by the tactical-level headquarters, which also served as the operational-level headquarters, continued until JTF 435 assumed control of detention operations in January 2010.

In September 2004, after the Supreme Court's June 2004 rulings in *Rasul* and *Hamdi*, it appears that a policy decision was made to stop transferring detainees from Afghanistan to GTMO.⁶¹ The end of the transfers to GTMO amidst on-going combat operations in Afghanistan caused the number of detainees in Bagram to rise to five hundred detainees by 2006.⁶² In the summer of 2005, the name of the Bagram Collection Point was changed to the Bagram Theater Internment Facility (BTIF),⁶³ the name the facility retained until it was closed in December 2009.⁶⁴

(through May 2004), the 10th Mountain Division headquarters transitioned with the 82d Airborne Division to assume control of CJTF-180. With this change in June 2003, control of detention operations switched back to a headquarters now responsible for tactical control of the battle in addition to operational control. Each reference to the named units includes substantial augmentation from sister services, reserve personnel, civilian agencies, and coalition partners to make up the Combined Joint Task Force. *See supra* note 44.

⁵⁹ Interviews with Major Patrick Pflaum, former Chief, Detention Operations and DRB Legal Advisor, CJTF-180 (with 10th Mountain Division, June–Dec. 2003), in Charlottesville, Va. (Mar. 29, 2010); Major Irene Hanks, former Detention Operations Legal Advisor, CJTF-76 (with 25th Infantry Division, Apr.–Sept. 2004), in Charlottesville, Va. (Mar. 29, 2010) [hereinafter Hanks Interview].

⁶⁰ From May 2004 through May 2005, the 25th Infantry Division (Light) assumed control of the tactical and operational level headquarters and renamed CJTF-180 to CJTF-76. Hanks Interview, *supra* note 58.

⁶¹

On September 22, 2004, the Department of Defense announced that it had transferred 11 detainees from Guantanamo Bay, Cuba to Afghanistan for release. This transfer brought the number of detainees who have left Guantanamo Bay to 202 and the number of detainees held there at approximately 539 detainees. That same day, the Department of Defense issued another release in which it announced that it had transferred 10 detainees from Afghanistan to Guantanamo Bay, Cuba. This transfer increased the number of detainees held there to approximately 549 detainees.

GlobalSecurity.org, Guantanamo Bay Detainees, http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm (last visited Apr. 4, 2010) (compiling data from the U.S. DoD, Office of the Assistant Sec'y of Def. (Pub. Affairs)). The last news release announcing a transfer to GTMO was 22 September 2004. *Id.*

⁶² Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. TIMES.COM, Feb. 26, 2006, <http://www.nytimes.com/2006/02/26/international/26bagram.html> (last visited Apr. 2, 2010). Tim Golden has reported extensively on the detention conditions at Bagram.

⁶³ As the number of detainees grew, so did the BTIF. The BCP was within the old Russian hangar in one building, but the

BTIF was actually two facilities enclosed in one space behind walls and concertina wire. The larger

D. Enemy Combatant Review Boards (Summer 2005–January 2007)

In the summer of 2005, the name and composition of the review board process also changed. The name of the boards changed from Detainee Review Boards to Enemy Combatant Review Boards (ECRBs).⁶⁵ Also, the boards were reduced to five military officers, specified by position: the Deputy G2, the MI Battalion Commander in charge of intelligence operations at the BTIF, the MP Battalion Commander in charge of Military Police operations at the BTIF, the Military Police Brigade Deputy Commander, and a judge advocate legal advisor. The five officers would vote to determine if the detainee met the criteria for enemy combatant status. The ECRBs still convened to conduct initial ninety-day and yearly paper reviews, and detainees had yet to personally appear before a DRB in Afghanistan.⁶⁶

In February 2006, the 10th Mountain Division headquarters returned for its third rotation in Afghanistan and assumed command of CJTF-76. During the division's one-year tour through January 2007, the boards continued to be called ECRBs and were still composed of the five officer duty positions noted above.⁶⁷ Other than the name change and the alteration in board composition, the procedures were similar to those dating back to 2002; detainees could not appear in person before the boards, nor did they have a personal representative (PR). The ECRBs met once per week, but instead of holding pre-meetings like the ones that met in the 2002–2005 timeframe, the board members were provided detainee packets in advance and then convened to discuss the packets and vote on whether the detainee met the criteria for enemy combatant status. The only oral evidence presented at the ECRB was still given by the MI personnel who prepared the detainee packets. If the capturing unit had an interest, for either detention or release, they could send a

of the two facilities, inside the former Soviet hangar, held two matching sets of 16 groups cells (detainees sleep about 20 to a cell), as well as interrogation booths, and medical facilities. Prisoners lived in open cages with wire mesh tops for easy inspection by guards.

Stern, *supra* note 1, at 22.

⁶⁴ The timing of the name change came when the U.S. Army Southern European Task Force (SETAF) assumed command of CTF-76 in Afghanistan from the 25th Infantry Division. Hanks Interview, *supra* note 58 (noting that the name of the facility was still the BCP during her tour); Interview with Major James Hill, former Detention Operations Attorney, CTF-76 (with SETAF, May 2005–Jan. 2006) in Charlottesville, Va., Mar. 30, 2010 [hereinafter Hill Interview] (The name of the facility changed to the BTIF in the summer of 2005.).

⁶⁵ *See Fixing Bagram*, *supra* note 5, at 16 n.22 (referencing a November 2005 affidavit submitted by Colonel Rose Miller, Commander of Detention Operations at the BTIF).

⁶⁶ Hill Interview, *supra* note 64.

⁶⁷ Interview with Major Robert Barnsby, former Detention Operations Legal Advisor, CJTF-76 (with 10th Mountain Div. (Feb. 2006–Jan. 2007)), in Charlottesville, Va. (Mar. 30, 2010).

representative to the board to argue their position.⁶⁸ While transfer to GTMO was no longer an option, the ECRB could recommend release or continued detention in certain categories based on the level of threat. In an important step forward in both the Rule of Law and counterinsurgency realms, new options for the ECRBs were explored such as transfer to the Afghan authorities for prosecution or repatriation programs. These developments were still in the initial planning stages and were not executed during the 10th Mountain Division's tour.⁶⁹

E. Unlawful Enemy Combatant Review Boards (February 2007–September 2009)

Beginning in February 2007 and continuing through the implementation of the new DRBs in September 2009, the review boards experienced their second transformation in name and composition, as well as other changes in procedure and substance. The Enemy Combatant Review Board became the Unlawful Enemy Combatant Review Board (UECRB), and the board composition decreased from five to three officers: the CJTF Provost Marshal, the BTIF Commander, and the Chief of Interrogations. During this thirty-three-month period, there was three headquarters, CJTF-82 (February 2007–January 2008), CJTF-101 (February 2008–April 2009), and then CJTF-82 again (April 2009–May 2010).⁷⁰

The first major change—and major step in the right direction—was official notification to the detainee of his UECRB, which became standard beginning in April 2008. For the first time in Afghanistan, detainees could actually appear before their board and make a statement.⁷¹ Under the new procedures, the detainee “was notified of the general basis of his detention within the first two weeks of in-processing.”⁷² The initial review was conducted within seventy-five days (down from the ninety-day initial review) and then reviewed every six months (down from one year).⁷³

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ During CJTF-82's second tour during this period, from April 2009 through May 2010, they had control of detention operations through December 2009, including implementation of the initial DRBs under the new July 2009 procedures from 17 September 2009 through 7 January 2010 when JTF 435 assumed full control over detention operations and the DRB process. See *infra* notes 110–13 and accompanying text.

⁷¹ Interview with Ms. Tracey Ruppel, Intelligence Analyst, Contractor, U.S. Navy Reserve, Detainee Assessment Branch (DAB), in Bagram, Afg. (Jan. 26, 2010) [hereinafter Ruppel Interview]. The DAB stood up in 2007 to assist with the new UECRB process.

⁷² See *Fixing Bagram*, *supra* note 5, at 16 n.23 (citing Declaration of Colonel Charles A. Tennison (Sept. 15, 2008)). Colonel Tennison was CJTF-101's Commander of Detention Operations in 2008.

⁷³ *Id.*

Detainees whose detentions were being reviewed for the first time could appear at their initial “first look” seventy-five-day review and make a statement. For each subsequent review, the detainee could provide a written statement.⁷⁴ The UECRB reviewed information from a variety of sources, including classified information, testimony from personnel involved in the capture, and interrogation reports. A majority vote would determine the detainee's status and provide that recommendation—release or continued detention—to the Commanding General.⁷⁵

Similar to all past reviews, MI analysts would brief the UECRB panel, primarily, if not solely, basing their recommendation on the intelligence value of the detainee. The analysts would advocate for continued detention (based on a need for further interrogation) or transfer the case file to the Detainee Assessment Branch (DAB) to review and prepare for recommendations of further prosecution by the Afghan authorities. Because the board members had copies of the files, the analyst needed only to read a few sentences to the board and make a recommendation. Because of the volume of cases and the analysts' in-depth knowledge of their case files, the UECRB relied heavily on, and rarely disagreed with, the analyst's recommendation. The first look review was normally the detainee's best chance for release due to lack of evidence.⁷⁶

The UECRBs met in a room off the main floor in the BTIF to accommodate the detainees, who could now appear at their initial board. There was no formal script, even for the first look seventy-five-day reviews. The board president would inform a detainee that the board was reviewing his case without any discussion or description of the allegations and then ask the detainee if he wanted to make a statement. There was no PR to assist the detainee. There was no questioning of the detainee. The detainee either made a statement or not and was then escorted from the room.⁷⁷

The panel of three officers also had the responsibility of dividing the detainees into separate categories: High Level Enemy Combatant (HLEC); Low Level Enemy Combatants (LLEC); and Threat only. Those who were to be released were categorized as No Longer Enemy Combatant (NLEC).⁷⁸ As the UECRB worked its way through the six hundred detainees in the BTIF, the files of all detainees assessed as LLECs were transferred to the DAB. The DAB, comprised of military intelligence analysts and military criminal investigators, assessed the detainee files for

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Ruppel Interview, *supra* note 71.

⁷⁷ *Id.*

⁷⁸ *Id.*

potential transfer to Afghan authorities for prosecution.⁷⁹ To support the Rule of Law mission, the DAB would only recommend transfer of cases for prosecution if there was solid evidence.⁸⁰ Those detainees not recommended for transfer remained interned until their next review in six months.

As described above, the initial 2002 review process evolved slightly over seven and a half years from the DRBs to the ECRBs to the UECRBs, to include the appearance of detainees at their boards.⁸¹ Yet, the description of the various boards reveals minimal procedural protections for the detainee. Justifiable criticism has persisted for years, but more importantly, recognition of that criticism has prompted much needed changes in the detainee review system in Afghanistan.

III. The New Detainee Review Policy⁸²

Time will tell whether these reforms will be implemented effectively and can resolve

⁷⁹ In addition to detainees from Bagram, detainees from GTMO designated as LLECs were also transferred to Afghan authorities under this process. The transfers to Afghan custody went specifically to the “U.S.-built Afghan National Defense Facility in Pul-e-Charkhi prison for prosecution.” *See Undue Process*, *supra* note 5, at 21 (providing an in-depth critique of the trials of U.S. transferred detainees in the Afghan criminal justice system). *Id.* at 21–24. As of April 2009, about 200 of the transferred detainees had been convicted by the Afghan courts. *Id.*

⁸⁰ Ruppel Interview, *supra* note 71. *See also Undue Process*, *supra* note 5, at 22. While the United States may transfer a “solid” case file, this paper file is usually all the Afghan court has available to base its determination on—not live prosecution witnesses, not sworn statements, and little or no physical evidence—and yet, convictions result from this process. *Id.* at 21.

⁸¹ *See app. A* (providing a general description of the three types of review boards prior to the new DRBs).

⁸² Much of Part III draws on this experience, observations, and numerous interviews conducted by the author in Afghanistan from 24 January through 5 February 2010, and then again from 15 through 24 June 2010, during the 1st and 2d Detainee Review Board Short Courses. *See Appendix B* for a more detailed description of the short courses, including the creation of the courses and the participants during each course. *See also Memorandum from Vice Admiral Robert S. Harward, Commander, Joint Task Force 435 to U.S. Military Forces Conducting Detention Operations in Afghanistan*, at 6 (Mar. 6, 2010) [hereinafter JTF 435 Detainee Review Board Policy Memorandum] (classified version on file with author). One procedural rule within the otherwise unclassified sixteen-page document remains at the SECRET/NOFORN level. Paragraph 10, Training, provides:

a. Each Recorder and Personal Representative will complete a 35-hour Detainee Review Board Training Course prepared by and primarily taught by Professors from the US Army Judge Advocate General’s Legal Center and School. Each PR and Recorder will also complete basic and refresher training on a weekly basis.

b. The JTF 435 Legal Directorate is responsible to train Board Members on their duties and responsibilities prior to sitting as a member of the DRB.

Id.

*the underlying problems of arbitrary and indefinite detention, mistaken captures, and lack of evidence for legitimate prosecutions in Afghan courts.*⁸³

On 22 January 2009, President Obama signed three Executive Orders with the goal of correcting past deficiencies in detainee operations, including one intended to specifically review detention policy options.⁸⁴ A Special Interagency Task Force was created to “identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations.”⁸⁵ On 13 March 2009, in the *Guantanamo Bay Detainee Litigation* case before the D.C. District Court, documents submitted by the Attorney General’s Office referenced this “forward-looking multi-agency effort . . . to develop a comprehensive detention policy” and noted “the views of the Executive Branch may evolve as a result.”⁸⁶ Perhaps the most significant information contained in the 13 March 2009 memorandum was the new definitional framework for who could be detained:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks.

The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.⁸⁷

⁸³ *Fixing Bagram*, *supra* note 5, at 1.

⁸⁴ Exec. Order 13,493, 74 C.F.R. 4901 (2010) (Review of Detention Policy Options). *See supra* note 6 (listing of all three executive orders).

⁸⁵ Exec. Order 13,493, § 1(a).

⁸⁶ *In re: Guantanamo Bay Detainee Litigation*, Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to the Detainees Held at Guantanamo Bay 2 (Mar. 13, 2009). One exhibit attached to the Respondent’s Memorandum was the Declaration of Attorney General Eric Holder, which also emphasizes the on-going work of the task force directed by the President.

⁸⁷ *Id.* at 2. It should also be noted at this point that this definitional framework is essentially the same as the one used by the Bush Administration, with one exception: the insertion of the word “substantially” with respect to the level of support to the Taliban, al Qaeda, or associated forces. The prior definition just required “support,” and not “substantial support.” While the authority to detain was established in the

These definitions are now the foundation of a unit's lawful authority and substantive grounds to detain a person on the battlefield. If this threshold determination is not met on the battlefield, then a unit has no authority to detain. Once a person is detained on the battlefield, these exact criteria, which are used in the new detainee review board procedures set forth in the Secretary of Defense's July 2009 policy, are the criteria upon which the initial detention and continued internment decisions are based.

A. Combat Operations in Afghanistan ISAF/NATO and U.S. Forces–Afghanistan/OEF

Because the 2 July 2009 detention policy is explicit in its application, it is informative to describe the units operating in Afghanistan. On 30 June 2010, General David Petraeus was confirmed by the U.S. Senate as the dual-hatted Commander of U.S. Forces–Afghanistan (USFOR-A) and the International and Security Assistance Force (ISAF).⁸⁸ Although they fall under the same commander, USFOR-A and ISAF operate under two different detention

AUMF, the original definition for “enemy combatant” appeared in the Secretary of the Navy's July 2004 order establishing the CSRTs.

For purposes of this Order, the term “enemy combatant” shall mean an individual who was part of or supporting Taliban or al-Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of such enemy armed forces.

Memorandum from Paul Wolfowitz to the Secretary of the Navy on Order Establishing Combatant Status Review Tribunal (7 July 2004). In the Military Commissions Act of 2006, the term “unlawful enemy combatant” was defined, in part, as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” See MCA 2006, *supra* note 6, para. 948a(1)(i). The concept of substantial support, as described in the phrase “purposefully and materially supported” was carried through in the Military Commissions Act of 2009 which changed the term “unlawful enemy combatant” to “unprivileged enemy belligerent” and slightly altered the definition to: “an individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.” See MCA 2009, *supra* note 6, para. 948a(7) (internal quotation marks omitted).

⁸⁸ Petraeus Confirmed as New U.S. Afghan Commander, CNN.com, June 30, 2010, available at <http://www.cnn.com/2010/POLITICS/06/30/petraeus.confirmed/?hpt=Sbin>. Following controversial comments made to a *Rolling Stone* magazine reporter, General McChrystal resigned on 23 June 2010 during a meeting with President Obama. That same day, the President nominated General Petraeus, and he was unanimously confirmed in 30 June 2010. See Shaun Waterman, *McChrystal Resigns Afghan Command*, WASHINGTONTIMES.COM, June 23, 2010, available at <http://www.washingtontimes.com/news/2010/jun/23/mcchrystal-leaves-white-house-wa-r-meeting/>. See also Michael Hastings, *The Runaway General*, ROLLINGSTONE.COM, June 22, 2010, available at <http://www.rollingstone.com/politics/news/17390/119236>.

paradigms. As described in detail below, the 2 July 2009 policy for the new DRBs only applies to USFOR-A/OEF units. This section provides a brief explanation of the ISAF detention policy, which is separate and distinct from the USFOR-A detention policy.

The majority of U.S. forces in Afghanistan (78,430 out of approximately 95,000) are assigned to ISAF, which operates as part of the North Atlantic Treaty Organization (NATO) mission in Afghanistan.⁸⁹ The remaining 17,000 or so U.S. troops fall under USFOR-A and continue to operate under the authority of Operation Enduring Freedom (OEF). Currently, USFOR-A is made up of U.S. Special Operations Forces (the capturing units), Joint Task Force 435, which runs all detention operations in Afghanistan (discussed in detail below), and other critical enablers, such as route clearance and Palladin units. The 2 July 2009 detention policy does not apply to roughly 80% of U.S. troops operating in Afghanistan.

As described later, USFOR-A can send captured personnel to the DFIP whereas ISAF units (including the U.S. forces assigned to ISAF) cannot. Since December 2005, all ISAF units have been required to turn captures over to the Afghans within ninety-six hours of capture.⁹⁰ In early 2010, complaints from U.S. units (assigned to ISAF) surfaced over this relatively short time period to turn captured personnel over to Afghan authorities. In March 2010, in response to these complaints, the Secretary of Defense extended the period to fourteen days, thus authorizing the U.S. caveat to the ninety-six-hour rule for U.S. forces assigned to ISAF. The ninety-six-hour rule is still in effect for non-U.S. ISAF units.⁹¹

All insurgents captured by ISAF troops must be turned over to the Afghan National Security Directorate (NDS), either within ninety-six hours for non-U.S. ISAF units or fourteen days for U.S. ISAF units. The NDS is

⁸⁹ See International Security Assistance Force: Troop Contributing Nations (7 June 2010), available at <http://www.isaf.nato.int/images/stories/File/Placemats/100607Placemat.pdf> [hereinafter ISAF Troops]. There are currently forty-six troop contributing nations to ISAF and not surprisingly, with 78,430 U.S. troops, the United States provides the majority (66%) of the 119,500 total coalition troops. *Id.* See also Anne Gearan, *More U.S. Troops in Afghanistan than Iraq*, MSNBC.com, May 24, 2010, available at http://www.msnbc.msn.com/id/37324981/ns/us_news-life/ (revealing that in late May 2010, there were 94,000 U.S. troops in Afghanistan and 92,000 in Iraq with troop levels in Afghanistan expected to rise to 98,000 during the summer).

⁹⁰ See Ashley Deeks, *Detention in Afghanistan: The Need for an Integrated Plan*, Ctr. for Strategic & Int'l Stud. (13 Feb. 2008), available at http://csis.org/files/media/isis/pubs/080213_deeks_afghanistan.pdf. Prior to 2005, NATO forces turned over detainees to U.S. forces. Since 2005, due to the controversy surrounding Abu Ghraib, NATO forces began a policy of transferring detainees to Afghan authorities within ninety-six hours of capture. *Id.*

⁹¹ Abbie Boudreau & Scott Zamost, *U.S. to End 96-hour Rule for Afghan Detainees*, CNN.com, Mar. 17, 2010, available at http://www.cnn.com/2010/WORLD/asiapcf/03/17/Afghanistan.nato.detainees/index.html?eref=ib_top_stories.

Afghanistan's domestic intelligence agency with jurisdiction over all insurgent and terrorist activity.⁹² In essence, the NDS has the right of first refusal to accept the transfer of captured personnel believed to be insurgents or terrorists. In addition to the personnel that might be expected to make up an intelligence agency, the NDS also has a staff of investigators that specifically work to prepare cases for prosecution within the Afghan criminal justice system. Currently, a team of Afghan prosecutors and judges with special expertise are temporarily assigned to work exclusively with the NDS to coordinate this effort to try suspected insurgents and terrorists under the appropriate Afghan criminal laws within the Afghan criminal justice system. Each province in Afghanistan has at least one judge and several prosecutors assigned to work on NDS cases.⁹³

B. From Capture Through a DRB—An Overview⁹⁴

United States forces operating under OEF in Afghanistan have clear authority to detain individuals on the battlefield consistent with the laws of war. When they do, within seventy-two hours, the commander, with advice of a judge advocate, must determine if that individual meets the criteria for continued internment and transfer to the DFIP. Even critics understand that this initial determination by the combat commander is not going to be perfect. Between capture and transfer, the detainee should, under normal circumstances arrive at the DFIP within two weeks.

Once in the DFIP, the detainee is administratively segregated for the first fourteen days of his internment. This has been the process since 2002. After fourteen days at the DFIP, the detainee is assigned an Internment Serial Number (ISN) and the ICRC is allowed access to the detainee. In this same time period, the detainee is notified of the DRB process and the date of the initial DRB, which must occur

⁹² Interview with COL Richard Gross, Legal Advisor to Commander, ISAF and SJA, USFOR-A, in Kabul, Afg. (June 22, 2010).

⁹³ *Id.* Assuming success means conviction of a suspected terrorist, anecdotally, the success rate of NDS prosecutions has not been high. While no specific statistics were available, one has to further assume that as the Afghan criminal justice regains a foothold, the situation will improve. While not the subject of this article, there is a huge effort in Afghanistan (similar to efforts that were undertaken in Iraq) to help build and train an ethical-based judiciary free from corruption. Of course, this is easier said than done, but there is a multitude of coalition initiatives, both military and civilian, geared toward this specific issue. Currently, however, the NDS remains the most viable option for ISAF troops who must relinquish control of captured terrorists to Afghan authorities. The alternate—village elders or local police—is not as reliable. Anecdotally, such transfers usually find their way back to the battlefield within a number of days. The information in this footnote was generally gathered over the course of numerous conversations during the author's June trip to Afghanistan. While not specifically attributable to any one source, the author's curiosity on the topic led to many conversations with people who had varying degrees of knowledge, whether personal or anecdotal.

⁹⁴ The following section provides an overview of the Detainee Review Board process without footnotes. Subsequent sections provide detailed descriptions of each step in the process with footnotes.

within sixty days of the detainee's arrival at the DFIP. This notification is documented and later entered as an exhibit at the detainee's DRB hearing. Within thirty days of the detainee's arrival at the DFIP, a PR meets with the detainee, informs him again, this time in more detail, of the DRB process, and reviews with the detainee the unclassified summary of specific facts supporting the detainee's initial detention and potential continued internment (this is also documented and later entered as an exhibit). During this initial meeting, the PR has an incredible challenge of gaining the trust and confidence of the detainee while at the same time explaining a truly foreign process to him through an interpreter. During this initial meeting, the PR also hopes to gather enough information to be able to contact family members or others that may either appear in person, testify by telephone or video teleconference (VTC), or provide a statement on behalf of the detainee at the initial board. This is particularly critical in the case of mistaken identity. Prior to the board, the PR typically meets with the detainee at least two more times to gather more witness leads and to prepare the detainee for his statement at the board. During this period, the PR will also access all databases, classified and unclassified, containing data on the detainee to assist in his representation of the detainee at the board.

A day or two prior to the actual DRB, the PR, recorder, analysts, and other DFIP personnel, as necessary, meet in a "pre-board" session to discuss each case scheduled before a DRB that week. During this session, the PR and recorder attempt to resolve disputes so a neutral, non-adversarial case can be presented to the DRB. While recorders must remain neutral, PRs must act in the best interest of the detainee. These unique roles, coupled with the ability of the detainee to participate in the hearing with the assistance of the PR seek to balance the scales of the process in favor of the detainee. Regardless, all information, including exculpatory evidence, must be presented to the DRB. The language on the "baseball card" (a one to three page synopsis of the facts surrounding the detainee's capture); the unclassified intelligence collected on the detainee prior to capture (if any); summaries of any interrogation reports; summaries of the detainee's activities in the DFIP; and a behavioral threat assessment are all distilled down to a few pages to be presented to the board to aid in its internment determination.

Like any complex administrative proceeding, prior coordination is essential for smooth, efficient, and professionally run boards. The administrative staff of the Legal Operations Directorate is responsible for notifying all parties, primarily the board members and DFIP personnel, to include the MPs, of the hearings scheduled. On the scheduled day, all parties know in advance how many cases a particular panel is going to hear that day. The DRB hearing room has seats for spectators, and all personnel with access to the DFIP are welcome to observe the proceedings.

The board members, recorder, PR, legal advisor, reporter, and interpreter gather in the DRB hearing room, and the president convenes the DRB and goes through the

preliminary portion of the script, which includes the swearing of the parties. The first detainee is called, and the president continues through the script by informing the detainee of the purpose of the board and reminding the detainee of his rights at the board. The board president also discusses and admits the Detainee Notification Worksheet and Detainee Initial Interview Checklist as exhibits, thus confirming and adding to the record clear evidence that the detainee received prior notification and assistance prior to his hearing.

After the president's initial colloquy with the detainee, the recorder reads an unclassified summary of information, which includes the circumstances of capture and evidence against the detainee. While the board president follows the script, the exact order of statements and questioning is left to the president's discretion. Regardless of the exact order, the detainee is provided the opportunity to make a statement to the board. The statement may be made in a question and answer format with the assistance of the PR, or the detainee may simply make a statement, which has been the primary practice in the past. Alternatively, the statement may combine both of these methods. In the end, the PR's determination of the most effective format should prevail.

After the detainee's statement, the board members and recorder may ask the detainees questions—as does the PR if he has not already done so. Again, although the recorder is neutral, he may question the detainee to ferret out additional information to assist the board in making its findings and recommendations. After the recorder's questions, board presidents generally allow the PR to follow up. The amount of back and forth (direct examination, cross-examination, re-direct, and re-cross) is left to the discretion of the president.

When witnesses or documents are presented during the open, unclassified portion of the hearing, the president controls the presentation of the evidence, to include the questioning of live witnesses. Capturing units, battle space owners, and other interested staff members may appear before a board or present documentary information in support of a particular position so long as it is relevant to the board's determination. Testimony, for or against the detainee, may be presented live, via telephone or VTC, or in writing as a sworn or unsworn statement. Since March 2010, the inclusion of Afghan witness testimony has had a noticeable impact on the DRB process, not only in terms of logistics, but also in the frequency of releases for detainees supported by witness testimony. The considerable effort made to bring live witnesses to the DRBs, at least anecdotally, has also spread the word throughout Afghanistan that the DRB process is fair and legitimate and, perhaps more importantly in light of past missteps, that the treatment of the detainees in the new DFIP is exceptional.

The rules of evidence that apply in a criminal court do not apply at a DRB, which is an administrative hearing. The board may consider any information offered that it deems relevant and non-cumulative. Also, the board may consider

hearsay evidence in the form of classified and unclassified reports, threat assessments, detainee transfer requests, targeting packets, disciplinary reports from the DFIP guards, observation reports from the behavior science assessment teams, photographs, videos, sound recordings, and all forms of sworn and unsworn statements and letters. While admissibility is very broad, the board must still apply its judgment to determine the trustworthiness and appropriate weight of the information.

The rules described above apply equally to inculpatory and exculpatory information. For example, the concept of authentication is (or at least was) non-existent. If a detainee provides a cell phone number for a supporting witness, the witness is called and asked to identify himself. The witness is not sworn and there is no way to verify the person's credentials; however, as PRs learn, the questioning of detainee-requested witnesses can backfire when the witnesses have not been interviewed prior to the hearing. The only other restriction, and perhaps the most important in the proceedings, is the prohibition on the use of any statement obtained by torture or through cruel, inhuman, or degrading treatment, except against a person accused of torture as evidence that the statement was made.

Once all of the unclassified evidence has been presented, the detainee is allowed a final opportunity to make another statement to the board. Here again, preparation in consultation with the PR ensures the detainee does not squander this valuable opportunity by reiterating something said earlier or contradicting (perhaps indisputable) evidence the PR knows will be offered during the classified portion of the hearing. When the detainee completes his statement, he is excused from the room.

The recorder then opens the classified portion of the hearing by presenting documentary evidence or calling witnesses that possess classified information. The board members and PR can also question the witnesses. Once all of the classified information is presented, the recorder and PR may, at the board president's discretion, provide brief closing comments on the state of the evidence; however, they must refrain from making personal recommendations to the board. The PR can reiterate a detainee's request to be released.

After the president adjourns the board, the president and two other board members move to closed session deliberations to discuss the hearing, but they must include their individual findings and recommendations on the worksheet provided. The legal advisor collects the three sheets and records the majority vote on a consolidated worksheet, which the president must sign. Within seven days, a report of the proceedings, including a transcript and any exhibits admitted for a particular case, must be forwarded to the approval authority (the convening authority), and within fourteen days after that, the detainee must be notified in writing, in the detainee's language, of the approval authority's decision.

The increase in resources—primarily personnel—flowing into the Legal Operations Directorate has resulted in longer, more robust hearings. In September 2009, two recorders and one PR conducted twenty-six boards per day, once per week. The average time of a hearing was forty minutes and no Afghan witnesses were called. Beginning in March 2010 and continuing to the present, the Legal Operations Directorate convenes ten boards per day—split between two separate panels in two hearing rooms—five days per week. Hearing times have increased from an average of forty minutes to between ninety minutes and four hours per hearing, resulting in a more robust proceeding.

Since JTF 435 assumed control of the DRBs in January 2010, DRB personnel have continually worked to improve the system from an efficiency perspective and, more importantly, a transparency perspective. The documents that assist the participants are constantly improved, to include modifications to the findings and recommendations worksheet and the script, which assist the board members, and the PR's checklist, which aids both the PR and the detainee. The addition of Afghan witnesses and the ability of human rights organizations to view the process have gone a long way to increasing transparency. Overall, in the few short months since the DRBs have been operating under JTF 435, the task force has indisputably made considerable progress in the implementation of the procedures.

Although the details are best left for a future article, the integration of Afghan judges, prosecutors, and investigators into the Legal Operations Directorate of JTF 435 between April and May 2010 marks the start of the transition process to “phase II” of the operation. With a stated goal of turning detention operations over to the Government of the Islamic Republic of Afghanistan in 2011, the presence of the judicial team in the DFIP provides a safe and legitimate location to begin Afghan prosecutions under Afghan law run by Afghan personnel, which enhances and advances the rule of law in Afghanistan in support of the COIN strategy.

C. The Secretary of Defense's 2 July 2009 Memorandum

In July 2009, the Deputy Assistant Secretary of Defense for Detainee Policy provided the Chairman of the Senate Armed Services Committee a six-page unclassified policy letter entitled Detainee Review Procedures at Bagram Theater Internment Facility (BTIF),⁹⁵ Afghanistan. The

⁹⁵ See Letter from Mr. Phillip Carter, Deputy Assistant Sec'y of Def. for Detainee Policy, to Senator Carl Levin, Chairman of the Senate Armed Servs. Comm. (July 14, 2010) [hereinafter Carter Letter], available at <http://www.wcl.american.edu/nimj/documents/addendum.pdf?rd=1> (including Mr. Carter's two-page letter dated 14 July 2009 and the six-page 2 July 2009 Detainee Review Procedures enclosure [hereinafter Detainee Review Procedures]). This two-page letter has a six-page enclosure that, although undated, is referenced in Mr. Carter's opening line: “Please find enclosed a copy of the policy guidance that the Deputy Secretary of Defense approved on 2 July 2009, modifying the procedures for reviewing the status of aliens detained by the Department of Defense at the [BTIF], and related policy

document contains the new policy and procedures to be implemented at the new DRBs.

The enhanced detainee review procedures significantly improve the Department of Defense's ability to assess whether the facts support the detention of each detainee as an unprivileged enemy belligerent, the level of threat the detainee represents, and the detainee's potential for rehabilitation and reconciliation. The modified procedures also enhance the detainee's ability to challenge his or her detention.⁹⁶

The six-page Detainee Review Procedures policy covers the authority of USFOR-A operating under Operation Enduring Freedom (OEF) to detain and intern; the capturing unit's review and transfer requests;⁹⁷ the initial detainee notification;⁹⁸ DRB procedures, which comprise more than half of the document;⁹⁹ and finally a description of the role of the PRs.¹⁰⁰ Before discussing the specifics of the new procedures, a description of the new detention facility where the new detention task force holds the DRBs can provide context.

D. The Detention Facility in Parwan

*It's clear that the authorities looked back at lessons learned from eight years of blunders and abuse in designing the new lock-up facility.*¹⁰¹

guidance regarding the criteria for assessing the threat such aliens represent, and regarding the authority to transfer and release such aliens from the BTIF.” *Id.* Even though the 2 July 2009 policy refers to the BTIF, it is understood that this policy is applicable to the new DFIP.

⁹⁶ Carter Letter, *supra* note 95, para. 1.

⁹⁷ Detainee Review Procedures, *supra* note 95, at 2–3. While the current rules are classified, the initial unclassified procedures required OEF units to complete the initial review process within seventy-two hours of capture before that detainee could be transferred to the DFIP, or the detainee had to be released. The capturing unit commander had to receive a judge advocate's legal advice to assess whether the person met the criteria for detention and transfer to the DFIP for continued internment. Within seventy-two hours, the commander then had to forward a request to the DFIP Commander to transfer the detainee from the field detention site to the DFIP. The DFIP Commander, also with the advice of a judge advocate, could then approve the transfer and accept the detainee at the DFIP. The capturing unit commander's request, the DFIP commander's response, and the actual transfer from the capturing unit to the DFIP was required to occur within fourteen days of capture. *Id.* at 1–2. It is important to distinguish that the detention paradigm for OEF captures differs from ISAF captures that must be turned over to Afghan authorities and do not go to the DFIP.

⁹⁸ *Id.* at 2.

⁹⁹ *Id.* at 2–5.

¹⁰⁰ *Id.* at 5–6.

¹⁰¹ Jonathan Horowitz, *The New Bagram: Has Anything Changed?*, HUFFINGTON POST (Jan. 15, 2010), available at <http://www.huffingtonpost.com>.

The new \$60 million Detention Facility in Parwan (DFIP) covers forty acres near the Bagram airfield. The new DFIP is about a five mile drive around the airfield from the old BCP/BTIF. Five miles in actual distance, but an immeasurable distance from the stark conditions in the old Russian hangar that housed the detainees through the end of 2009. One of the primary complaints of the detainees held at the BCP/BTIF was the physical conditions of the facility, which had no windows and no natural light. All of that has changed at the new DFIP where complaints about the facility itself have essentially ceased due to huge cells with plenty of natural light.¹⁰² As of 18 June 2010, the DFIP had close to 900 detainees with a maximum capacity of 1,344.¹⁰³ Although the United States has funded and built the DFIP, the intent is to transfer the facility to the Government of Afghanistan in one year.¹⁰⁴

A recent tour of the state-of-the-art detention facility revealed surveillance cameras, computer systems to track detainees, and integrated locking doors in the cell block areas.¹⁰⁵ Task Force (TF) Protector, a Military Police brigade, and its subordinate battalion, TF Lone Star, were the units in charge of the care and custody of the detainees during the transition from the BTIF to the DFIP. The military police orchestrate the complex tasks of organizing and coordinating the detainees' daily schedule, from medical appointments to meals, interrogations to DRB appearances, and everything in between, including rehabilitation and reintegration programs,¹⁰⁶ vocational training, literacy programs, ICRC visitation, and outside recreation.¹⁰⁷ The detainees regularly play soccer in a large recreation yard which has basketball hoops at either end. There is a large vocational training area, and the officer-in-charge of rehabilitation programs is implementing practical programs

com/ jonathan-horowitz/the-new-bagram-has-anythi_b_365819.html. Mr. Horowitz is a consultant to the Open Society Institute and he participated in the DRB Short Course training. See app. B.

¹⁰² See *infra* note 105.

¹⁰³ On 18 June 2010, the DFIP had 893 detainees. When the DFIP opened in December 2009, its capacity was listed at 1050; however, the capacity is now listed at 1,344. E-mail from Lieutenant Colonel Michael Hosang, DRB OIC, Legal Operations Directorate, Bagram, Afg. to author (6 July 2010, 12:33 EST) (on file with author).

¹⁰⁴ Interview by Dep't of Def. Bloggers Roundtable with Vice Admiral Robert Harward, Commander, Joint Task Force 435, in Afghanistan (Jan. 27, 2010), available at http://www.defense.gov/Blog_files/Blog_assets/20100127_Harward_transcript.pdf [hereinafter Harward Transcript].

¹⁰⁵ At the direction of BG Martins, MAJ Barkei and the author were provided an in-depth tour of the entire DFIP by personnel from TF Protector on 31 January 2010 [hereinafter DFIP Tour].

¹⁰⁶ From the opening of the DFIP, JTF 435 has been working diligently to establish effective rehabilitation and reintegration programs, separating the accidental guerillas from the hardcore insurgents. The programs include literacy skills and other skills that will help the detainees reintegrate back into society. Harward Transcript, *supra* note 104, at 2-3.

¹⁰⁷ DFIP Tour, *supra* note 105. See also Stern, *supra* note 1, at 23 (stating that reintegrating includes meetings with moderate mullahs that come into the facility and meet with groups of detainees).

such as tailoring, baking, farming, and artistry that will benefit the detainees upon release. The covered walkways between the various cell and administrative wings are very long and wide. For ease and speed of detainee movement around the huge DFIP, guards use wheelchairs to transport the detainees to various appointments.¹⁰⁸ The DFIP's medical section has expensive state-of-the-art medical and dental equipment such as optometry and X-ray machines, and no chances are taken with any detainee: every actual or imagined ailment is immediately tended to by the medics, doctors, and dentists on station at the facility. Detainees with medical emergencies that cannot be handled at the DFIP are transported to the larger hospital on the main Bagram base.¹⁰⁹

E. Joint Task Force 435

On 18 September 2009, Defense Secretary Robert Gates created JTF 435.¹¹⁰ The purpose of the task force is "to provide care and custody for detainees, oversee detainee review processes and reconciliation programs, and to ensure U.S. detainee operations in Afghanistan are aligned effectively with Afghan criminal justice efforts to support the overall strategy of defeating the Taliban insurgents."¹¹¹

The first member of JTF 435 was BG Mark S. Martins,¹¹² who was appointed in September 2009 and deployed in command of the fledging task force until November 2009 before assuming the role of Deputy Commander. The Commander of JTF 435 is Vice Admiral (VADM) Robert S. Harward, who assumed command from BG Martins in late November 2009 following confirmation by the Senate. The task force was formed as a new command subordinate to U.S. Forces-Afghanistan. It's structure was built rapidly, and it reached its initial operating capability on 7 January 2010. In an interview in January

¹⁰⁸ DFIP tour, *supra* note 105.

¹⁰⁹ *Id.*; see also Stern, *supra* note 1, at 23.

¹¹⁰ Mark Seibel, *Task Force Created to Combat al Qaida in Afghan Prisons*, Oct. 1, 2009, available at <http://www.mcclatchydc.com/2009/10/01/76424/task-force-created-to-combat-al.html>.

¹¹¹ *Id.*

¹¹² Prior to his assignment to JTF 435, BG Martins had been appointed to serve as Chief Judge, U.S. Army Court of Criminal Appeals and Commander of the U.S. Army Legal Services Agency. Brigadier General Martins had served as "one of two executive secretaries of a commission President Barack Obama appointed on his first day in office to determine what legal options exist for the detention of suspected terrorists. The commission issued a preliminary report in July—signed by [BG] Martins and Brad Wiegmann, the principal deputy attorney general for national security—that called for the use of both traditional federal courts and military commissions to try suspected terrorists." Press Release, U.S. Central Command, Joint Task Force 435 Press, New Task Force Assumes Control of Detainee Operation in Afghanistan (Jan. 8, 2010), available at <http://www.centcom.mil/news/new-task-force-assumes-control-of-detainee-operations-in-afghanistan> (last visited June 28, 2010) [hereinafter JTF 435 Press Release].

2010, VADM Harwood gave the following synopsis of the task force's vision:

[Maintaining] the legitimacy of detention . . . requires that we demonstrate our commitment to transparency, the rule of law, and to individual human dignity, and that we empower the Afghan government to take responsibility for its citizens.

[In] President Karzai's inaugural address, . . . he clearly reiterated that detention operations in Afghanistan should fall under the sovereignty of the government of Afghanistan, and the desire to move in that direction. [There was a] recent memorandum of understanding signed by seven Afghan ministers that codified the transition through the Ministry of Defense. [JTF 435 has] initiated a plan, a one-year plan [to] move that transition of U.S. detention operations through the Ministry of Defense to the government of Afghanistan, leaving the door open for further transition to the Minister of Justice [at some point in the future].¹¹³

This is a challenging mission to be sure considering a disturbing, but not surprising, phenomenon called "insurgents in the wire," which refers to the radical detainees currently in U.S. custody and other criminals incarcerated in Afghan prisons: "There are more insurgents per square foot in corrections facilities than anywhere else in Afghanistan. Unchecked, Taliban/Al Qaeda leaders patiently coordinate and plan, unconcerned with interference from prison personnel or the military."¹¹⁴ In mid-2009, it was estimated that of approximately 14,500 inmates in the Afghan corrections system, 2500 were presumed to be Taliban and al Qaeda fighters seeking to radicalize non-insurgent inmates.¹¹⁵ The DFIP is no exception, where an estimated one in five of the 800 lawfully-detained insurgents are assumed to be extremists who, if "unchecked," may seize on the opportunity to use the circumstances of detention to recruit with impunity from within the facility.¹¹⁶

¹¹³ Harward Transcript, *supra* note 104.

¹¹⁴ General McChrystal Assessment, *supra* note 1, at F-1. *See also* Stern, *supra* note 1, at 21 (citing the same quote from General McChrystal, Stern continues, "Detainees have cell phones, money and influence. They control wide swaths of Afghan prisons today and they are radicalizing the other inmates.").

¹¹⁵ General McChrystal Assessment, *supra* note 1, at F-1.

¹¹⁶ JTF 435 Press Release, *supra* note 112.

"JTF 435, along with Afghan partners, will essentially be conducting counterinsurgency behind the wire," working with Afghan partners in deradicalization efforts, as well as reintegration—helping detainees who no longer pose a threat with

To combat this insurgency from within the DFIP, JTF 435 is organized to partner with multiple organizations, the most important of which is the Government of the Islamic Republic of Afghanistan. Seven Directorates comprise JTF 435, each following a Line of Operation set out in Annex F of General McChrystal's Assessment: (1) the U.S. Detention Operations Task Force, which consists of an MP Brigade (Task Force Protector) responsible for the care and custody of the detainees, prevention of insurgency inside the wire, and facilitating family visitation; (2) the Theater Intelligence Group, which is responsible for actionable intelligence collection and analysis; (3) the Biometrics Task Force, which is responsible for confirming identities and tracking recidivism; (4) the Afghanistan Detention and Corrections Cell, which is responsible for coordinating with the Afghan Central Prisons Directorate and sharing best practices with the Afghans to help them implement COIN in their prisons; (5) the Engagement and Outreach Cell, which is responsible for using strategic communications as a proactive tool to protect the truth about U.S. detention and interrogation practices and to enhance and advance the Rule of Law in Afghanistan; (6) the Reintegration Directorate, which is focused on rehabilitation and de-radicalization of those prone to the enemy's insurgent efforts with a view toward their successful reintegration into Afghan society; and (7) the Legal Operations Directorate, which is responsible for the DRBs and improving evidence packets for those cases transferred to the Afghan criminal courts.¹¹⁷

While the synchronization of this massive effort is a daunting task and no single directorate can be marginalized in the overall JTF 435 mission, the Legal Operations Directorate, as discussed below, plays a vital role in the fate of each detainee.

F. The Detainee Review Boards (17 September 2009 through 6 January 2010)

The July 2009 policy directed the new procedures to be effective within sixty days.¹¹⁸ Despite the sweeping changes required to transform the UECRBs to the new DRBs in just two months, the concomitant increase in the number of personnel to fully implement the changes lagged far behind. In light of these personnel shortages, the DRB commenced on 17 September 2009, in a "rolling-start" mode,

reading and writing and vocational skills that will help them be peaceful and productive citizens upon release. [Vice Admiral] Harward stressed the importance of the vocational training programs currently being offered at the U.S. Detention Facility in Parwan. "By providing an environment that's conducive to rehabilitation and reintegration programs, as well as vocational training," Harward said, "we are offering detainees a viable option other than returning to the insurgency." *Id.*

¹¹⁷ General McChrystal Assessment, *supra* note 1, at F-3 to F-4.

¹¹⁸ Carter Letter, *supra* note 95, at 2.

implementing additional substantive and procedural detainee protections mandated by the new policy as more personnel were added to the operation. Considering the number of personnel in the Legal Operations Directorate as of 1 May 2010 (about fifty), starting the early DRB efforts within the mandated timeframe with only twelve personnel was a considerable achievement.¹¹⁹

In July 2009, CJTF-82 still had control of detention operations and was responsible for implementing the transition from the UECRBs to the DRBs in the BTIF.¹²⁰ Captain Andrea Saglimbene, the Detention Operations Attorney for CJTF-82, was responsible for the day-to-day legal advice and coordination for all aspects of the review boards for MP and MI personnel in the BTIF.¹²¹ She was also the legal advisor to the UECRBs and became one of the first recorders (along with Major Jeremy Lassiter) for the new DRBs, presenting cases to the new board members.¹²² Having a judge advocate present the case to the board was one of the major changes from the prior review boards when MI analysts presented the detainee packets to board members.¹²³ Lieutenant Christopher Whipps, an intelligence

officer in the U.S. Navy, served as the first PR.¹²⁴ Additional recorders and PRs arrived in late October and November, respectively, but until they did, with some help from paralegals and analysts and investigators from the Detainee Assistance Branch (DAB), Captain Saglimbene, Major Lassiter, and Lieutenant Whipps conducted over 150 new DRBs in September and October.¹²⁵

As the sixty-day clock rapidly ticked down on implementation of the July 2009 policy, some initial logistical questions had to be decided. First, the command decided to implement the new DRB procedures on 17 September 2009 (the old UECRBs were held on Thursdays so that battle rhythm was maintained). The next question was how many detainee cases would be heard per day or week to cover the initial sixty-day reviews and subsequent six-month reviews for the more than 600 detainees in the BTIF.¹²⁶ It was determined that the board for any detainee in the BTIF on 16 September or earlier would be scheduled for six months from the date of their last UECRB, and these detainees would not have a sixty-day initial review under the

¹¹⁹ The initial twelve personnel assigned to the DRBs included two recorders, one personal representative, one legal advisor, seven paralegals, and an operations officer. As of 1 May 2010, fifty personnel are assigned to the DRBs, including twelve recorders and eleven PRs, along with numerous paralegals, interpreters, analysts, and investigators. E-mail from Lieutenant Colonel Michael Devine, Deputy Dir., Legal Operations Directorate, Bagram, Afg., to author (29 Apr. 2010, 15:15 EST) (on file with author) [hereinafter Devine e-mail].

¹²⁰ All detainees were not transferred from the BTIF to the DFIP until 16 December 2009. See *infra* note 126. The creation of JTF 435 was not even announced until 18 September 2009. See *supra* note 110.

¹²¹ Interview with Captain Andrea Saglimbene, Detention Operations Attorney for CJTF-82, in Bagram, Afg. (Jan. 29, 2010) [hereinafter Saglimbene Interview].

¹²² Under the new policy, recorders serve a neutral role in the process. They do not advocate on behalf of the Government or the detainee. Recordors are responsible for presenting all information reasonable available that is relevant to the board's findings and recommendations on the issues of internment, to include exculpatory information and information regarding the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society. See *infra* note 144 and accompanying text for additional discussion of the recorder's role.

¹²³

It was time for judge advocates to get more involved in the process of presenting cases to the boards, to include preparing the 'baseball card'—the one page information sheet that serves as a comprehensive summary of all pertinent biographic data, facts surrounding the reason for detention and assessments for the detainee. This meant it was the time for MI personnel to be removed from the process of making recommendations to the board members, which understandably focused on whether or not continued detention was required for intelligence gathering purposes.

Rupple Interview, *supra* note 71. Intelligence gathering remains an essential role in the overall COIN effort; however, intelligence value alone is no longer an authorized criterion for continued internment, and this fact is specifically highlighted to the new DRB members. During the early stages of the DRBs when CPT Saglimbene was the sole judge advocate recorder,

MI analysts (acting in compliance with the rules) assisted by serving as recorders on some cases. The MI analysts remained with the Detainee Assistance Branch (DAB), performing the critical two-prong role of assisting in the preparation of packets for both the recorders and PRs and continuing to assess and prepare files for prosecution in the Afghan criminal justice system. Due to this expertise, the DAB was included in the Legal Operations Directorate and remained part of the overall DRB team; however, MI personnel were phased out of the "recorder" role and replaced by judge advocates. *Id.* Four new recorders, all judge advocates, arrived in Bagram on 18 October 2009 and began the transition with CPT Saglimbene, observing boards on 22 October 2009 and then presenting cases (with supervision) at the next board session 29 October 2009. Interview with Captain Shari Shugart, Chief Recorder, Recorder Cell, Legal Operations Directorate, in Bagram, Afg. (Jan. 26, 2010) [hereinafter Shugart Interview]. Captain Shugart is a reserve judge advocate with the 78th Legal Services Organization, Los Alamitos, California, who deployed to Kuwait on 28 June 2009 in support of a U.S. Central Command mission, Task Force FOIA. When that mission was completed ahead of schedule, on 18 October 2009, along with five others, CPT Shugart volunteered to continue her deployment in support of the new DRB mission.

¹²⁴ Under the new policy, personal representatives (PRs) are non-judge advocate military officers assigned to assist detainees prepare and present their cases. Detainee Review Procedures, *supra* note 95, at 2, 3, 5. See *infra* notes 145–55 and accompanying text for additional discussion of the PR's role.

¹²⁵ Saglimbene Interview, *supra* note 121. In September, a FRAGO went out to units in Afghanistan to task officers (non-lawyers) to serve as PRs. Because PRs had to meet with the detainee at least thirty days prior to appearing before the board with the detainee, the four new PRs did not appear before boards until late November 2009. Shugart Interview, *supra* note 123. See also Detainee Review Procedures, *supra* note 95, at 6 ("The personal representative shall be appointed not later than thirty days prior to the detainee's review board.")

¹²⁶ On 17 September 2009, there were 639 detainees in the BTIF. Interview with Sergeant Charles Sonnenburg, Court Reporter, 16th Military Police Brigade (Airborne), Fort Bragg, N.C., in Bagram, Afg. (Jan. 29, 2010) [hereinafter Sonnenburg Interview]. By 16 December 2009, the last day the BTIF housed detainees, all 753 detainees were transferred from the BTIF to the DFIP. *Id.*

new DRB system.¹²⁷ The initial DRB for all detainees entering the BTIF (and then DFIP) after 17 September would be scheduled sixty days after the detainee's entrance to the facility. Based on those parameters, the initial DRB schedule had twenty-six boards per day once a week.¹²⁸

The challenge early on was balancing between conducting a meaningful review and processing over 600 detainee reviews in a timely manner—all with limited resources. From September through early November, when the board sessions were held once per week, an average daily session went for sixteen hours from 0800 until midnight, sometimes going later into the following morning. By necessity, the individual hearings were scheduled every forty minutes so the BTIF guards had a schedule for the movement of the detainees within the facility. While there was no timer going during the boards and the board members knew they could take the necessary time to be comfortable with their decisions, all parties were cognizant of the fact that the boards had to stay on some semblance of a schedule to keep the process moving.¹²⁹ As part of the overall evolution of the DRBs, the goal has been to allot more time per hearing as more personnel joined the Legal Operations Directorate and more facility space was made available.

G. The Detainee Review Boards (7 January through June 2010)

Soon after JTF 435 assumed control of all detention operations in Afghanistan and effective control of the DRB process, the number of personnel assigned to the Legal Operations Directorate to work on the DRBs increased exponentially from a few people assigned to various units to a starting staff of approximately thirty-five on 7 January 2010 when JTF 435 took over. This increase in personnel allowed boards to expand from one day per week to three days per week in January 2010 and then to five days a week in March 2010. Beginning on 15 March 2010, with the expansion to two simultaneous boards operating five days per week, capacity now exists for fifty DRBs per week—ten boards per day, five days per week. Holding boards five days per week, coupled with the opening of a second DRB hearing room in March, has resulted in the average number of cases per board per day decreasing from twenty-seven to

¹²⁷ This decision meant that detainees who appeared before the last UECRBs on 10 September 2009 would have their first DRB in early March 2010. Saglimbene Interview, *supra* note 121.

¹²⁸ Sergeant Sonnenburg had the task of analyzing the data to determine how many boards had to be held per week to provide six-month reviews for all detainees in the facility prior to 16 September 2009 and allocate time for anticipated new arrivals. He created a "Super Tracker" to compile and maintain the data. Sonnenburg Interview, *supra* note 126. The raw data in the chart at Appendix C was compiled from a review of the DRB Super Tracker from 17 September 2009 through 18 June 2010 (unclassified notes on file with author). See app. C.

¹²⁹ Saglimbene Interview, *supra* note 121.

five, thus allowing substantially more time to develop and examine each individual case.¹³⁰ The time allotted per hearing has increased significantly from an initial average of forty minutes to between ninety minutes and three hours per hearing.¹³¹

Finally, another factor driving the number of boards held per week is the number of detainees in the DFIP.¹³² As discussed above, only USFOR-A/OEF captures get transferred to the DFIP. The primary capturing units within USFOR-A are Special Operations Forces.¹³³ While the units and their operations remain classified and cannot be discussed here, for those with experience in Iraq and Afghanistan (and even those without such experience), it is not difficult to imagine or appreciate the nature of such operations, which take place at night, and generally involve nefarious bad actors that make their way to the DFIP. Based on new captures by OEF units (almost 600), since the DRB process started on 17 September 2009, the number of overall detainees in U.S. custody has steadily increased from 639 to 893 through 18 June 2010 despite a significant number of detainees ordered released (160) or transferred (168) through the DRB process.¹³⁴

H. The Detainee Review Board Personnel

In addition to a large administrative staff that contributes to the efficient operation of the DRBs, the personnel who actually participate in the DRBs include the recorder, the PR, the detainee, the board members, the legal

¹³⁰ See app. C. When the boards were held one day per week, there was an average of twenty-seven cases on that one day. When the boards expanded to two days per week, there were twenty cases each day. When the boards expanded to three days per week, there was an average of fifteen cases each day. Finally, when the boards expanded to five days per week, the average dropped to eight cases per day. As of late June 2010, typically no more than five hearings per board are held simultaneously each day in each of the two available hearing rooms, for a total of ten hearings per day, five days per week. The actual number of DRB hearings each week is mathematically driven by the detainee population and the number of initial sixty-day and subsequent six-month DRB requirements. Devine e-mail, *supra* note 119.

¹³¹ Devine February Interview, *supra* note 42.

¹³² See *supra* note 128.

¹³³ See *supra* note 89.

¹³⁴ The following chart reflects the number of detainees interned at the end of each month since the DRB process began. As of 18 June 2010, there were 893 detainees in the DFIP. The data in the text and chart was compiled from the Super Tracker during author's June visit to Afghanistan. See also app. B. The reason for any differences in the numbers of releases and transfers is due to the fact that there is a three- to four-week period between board recommendations and approvals by the convening authority.

BTIF (Sep–Dec 2009)				DFIP (Jan–May 2010)				
Sep.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May
639	670	707	753	794	790	791	812	842

advisor, and the reporter. The convening authority also plays a critical role in appointing the board members, reviewing the proceedings and recommendations, and making the final determination on the detainee's status.

The Commander, U.S. Central Command, has designated BG Martins to serve as the convening authority for the review boards.¹³⁵ In this capacity, BG Martins chooses DRB members from nominations submitted by USFOR-A and ISAF. The nominees are U.S. field grade officers, and, because of the strategic importance of the DRB mission, the members must possess certain qualifications such as "age, experience, and temperament, [and the ability] to exercise sound judgment and have a general understanding of combat operations and the current campaign plan to assess threats in theater and further the counterinsurgency mission [through] their participation on the board."¹³⁶ Additionally, to "ensure the neutrality of the review board, the convening authority shall ensure that none of its members was directly involved in the detainee's capture or transfer to the [DFIP]."¹³⁷

A DRB is composed of three field grade officers with the senior member acting as the board's president. The president is responsible for reading the script¹³⁸ and informing the detainee of his rights once the proceedings begin. The president determines if witnesses not serving with the U.S. forces are reasonably available.¹³⁹ In a closed

session, by a majority vote, using preponderance of the evidence as the burden of proof, the board must determine whether the detainee meets the criteria for internment and, if so, whether continued internment is necessary to mitigate the threat the detainee poses. If a majority of the board determines the detainee does not meet the criteria for internment, the detainee must be released from Department of Defense custody as soon as practicable. The decision to release cannot be changed by the convening authority. If a majority of the board determines the detainee does meet the criteria for internment, then they must also make a recommendation for an appropriate disposition to the convening authority. The possible recommendations include the following:

- Continued internment at the DFIP if necessary to mitigate the threat posed by the detainee.
- Transfer to Afghan authorities for criminal prosecution.¹⁴⁰
- Transfer to Afghan authorities for participation in a reconciliation program.
- Release without conditions.
- In the case of non-Afghans and non-U.S. third-country nationals, transfer to a third country for criminal prosecution, participation in a reconciliation program, or release.¹⁴¹

¹³⁵ Detainee Review Procedures, *supra* note 95, at 2. In early July 2010, BG Martins was selected to serve as the Commander of the new Rule of Law Field Force-Afghanistan (ROLFF-A). It is not yet clear how BG Martins's selection to serve as Commander, ROLFF-A, will impact his role as the convening authority for the DRBs. E-mail from BG Mark Martins, Deputy Commander, JTF 435, Parwan, Afg., to author (3 July 2010, 05:45 EST) (on file with author).

¹³⁶ Memorandum from Vice Admiral Robert S. Harward, Commander, JTF 435 to U.S. Military Forces Conducting Detention Operations in Afghanistan (Feb. 1, 2010 unclassified draft) (on file with author). *See also* JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82 (the unclassified February 2010 draft memorandum was revised into the March 2010 classified version, retaining an unclassified annex, Annex E, called the DRB Policy Memorandum).

¹³⁷ Detainee Review Procedures, *supra* note 95, at 2.

¹³⁸ Legal Operations Directorate, DRB Hearing Script (as of June 2010) (on file with author). The script is maintained by the Deputy Director, Legal Operations Directorate. Devine February Interview, *supra* note 42. One big change from the script used in February and the script used in June was the addition of a brief exchange between the President and the detainee to acknowledge two important documents being admitted and appended to the transcript of the review: the Detainee Notification Worksheet and the Detainee Initial Interview Checklist. (Copies of both are on file with author.) These documents (each signed by the detainee or marked with a thumbprint) and the acknowledgment of them at the opening of the hearing serves the dual-purpose of confirming notification and building a more robust board packet. Interview with Lieutenant Colonel Michael Devine, Deputy Dir., Legal Operations Directorate, JTF 435, in Bagram, Afg. (June 16, 2010) [hereinafter Devine June Interview]. The author conducted a "continuous interview" with LTC Devine from 16 June through 22 June 2010 to discuss all changes to the DRB process since February.

¹³⁹ *Id.* at 4.

¹⁴⁰ Transfers to the Afghan authorities from criminal prosecutions advanced significantly between the author's February and June 2010 trips to Afghanistan. In the February timeframe, recommendations from the DRB to transfer the detainee to the Afghans for criminal prosecution meant that the case file (and detainee) would be transferred to the Afghan National Detention Facility (ANDF) located in Kabul, Afghanistan. The ANDF is co-located with the Pul-e-Charkhi Prison which is run by the Afghan Ministry of the Interior. By contrast, although co-located on the same premises, the ANDF is a completely separate facility located in Block D, fenced off from its sister prison, and it is run by the Ministry of Defense (MoD) (until such time as the security environment allows for the Ministry of Justice to assume control of the facility). For now though, the Afghan National Security Forces (under the MoD), comprised of the Afghan National Army (ANA) and Afghan National Police (ANP), guard the ANDF. With the ANDF secured, judges from the Afghan Supreme Court, prosecutors from the Afghan Attorney General's office and investigators from various agencies can work safely on cases transferred from the DFIP among others. The ANA and ANP have considerable coalition partnership, and this mentorship has been critical as the Afghan criminal justice system builds momentum by working on these cases within the secure confines of the ANDF. *See generally Arbitrary Justice: Trials of Bagram and Guantanamo Detainees in Afghanistan*, HUM. RTS. FIRST (Apr. 2008) [hereinafter *Arbitrary Justice*] (on file with author). Beginning in June 2010, as part of the overall plan to transition detention operations to the Afghans by January 2011, the first Afghan criminal trial took place within the DFIP. The Afghan court convened within the DFIP (as it would have at the ANDF) to hear a case transferred through the DRB process. The Afghan judges have a goal of holding upwards of 300 trials in the DFIP by the end of 2010. While the specifics are outside the scope of this article, the fact such a process has begun is one huge step in advancing the Rule of Law in Afghanistan. Devine June Interview, *supra* note 138.

¹⁴¹ *Id.* The following chart contains all of the board recommendations compiled for the new DRBs from 17 September 2009 through 18 June 2010. It is important to note that these are board recommendations that

Each board member individually weighs the information presented, and once all of the information has been presented, the members deliberate in a closed session.¹⁴² Upon conclusion of deliberations, each member records his or her recommendations on a findings and recommendations worksheet.¹⁴³ Other than a decision to release due to a lack of information demonstrating the detainee has met the detention criteria, the board's recommendations are not binding on the convening authority. For example, even if the board finds the detainee meets the criteria for internment, that finding is not binding on the convening authority, who could decide to release the detainee. Alternatively, the board could recommend continued internment in the DFIP, and the recommendation is similarly not binding on convening authority, who could decide to transfer the detainee to the Afghan authorities.

As discussed above, the recorders are judge advocates; however, their mandate from JTF 435 is to perform their role in a non-adversarial, neutral manner.¹⁴⁴ Recorders are non-

must be approved by the convening authority. The only exception to the need for convening authority approval is that when the board recommends release, the recommendation is binding on the convening authority.

OPTION	TOTAL	%
Continued Internment	877	64%
Release	194	14%
Afghan National Defense Forces (ANDF) Transfer	156	11%
Peace Through Strength (PTS)	118	9%
Repatriation	9	1%
Third country prosecution	12	1%
Combined Total	1366	100%

¹⁴² Between 17 September 2009 and 14 March 2010, board members did not always close to deliberate on the findings and recommendations; however, as of March 15, 2010, this requirement for closed session deliberations is now strictly adhered to. Devine e-mail, *supra* note 119.

¹⁴³ To record the matters above, each board member fills in a findings and recommendations worksheet. This worksheet contains all of the relevant findings as well as spaces for the members to write in their rationale for particular decisions. "The review board's recommendation regarding disposition shall include an explanation of the board's assessment of the level of threat the detainee poses and the detainee's potential of rehabilitation, reconciliation and eventual reintegration into society." Detainee Review Procedures, *supra* note 95, at 5. The threat assessment includes classified criteria that each member must consider to determine whether, based on the facts, the detainee is an "Enduring Security Threat," a threat classification reserved for the highest-threat detainees. The board must also assess the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society. To make this assessment, the board can consider the detainee's behavior in the DFIP, including participation in rehabilitation and reconciliation programs. *Id.*; see also Detainee Review Board Report of Findings and Recommendations (Feb. 4, 2010) [hereinafter Findings and Recommendations Worksheet] (unclassified portion on file with author).

¹⁴⁴ JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82, at 6. Judge advocates are familiar with the role of the recorder in administrative board proceedings, which operate in accordance with Army Regulation 15-6. Those who have acted as a recorder at an administrative board or observed such proceedings will concur that at times, administrative boards can be just as adversarial as courts-martial proceedings. The JTF 435 Legal Operations Directorate makes great effort in training and oversight to emphasize and enforce the concept that recorder's maintain

voting members that prepare the evidence packets for the voting board members, including any exculpatory evidence if it exists. The recorder's role is different than it is at an administrative proceeding against a Soldier where they represent the command's interests. The DRB recorders represent the Government, but they do not recommend or advocate for release, transfer, or continued internment. Recorders compile all inculpatory information from the capturing units and MI analysts and present the information in a neutral manner to the boards. If a recorder is unsure about a particular fact, he or she has an obligation to make that known.

Although performing their role in a non-adversarial manner, recorders are not prohibited from "cross-examining" a detainee or a detainee's witness. Recorders should also bring forward witnesses that can offer relevant information to the board members to assist in their determination: for example, a forensics expert to discuss fingerprints, a capturing unit member to describe the circumstances of capture or impact on operations if the detainee is released, or an MI analyst to describe the insurgent threat in the detainee's home region. Overall, the recorders have the challenge of ensuring all information comes before the board so the board can make the best possible determination in the case, even when that duty requires assisting and working with the PR to do so.

The PRs have perhaps the most challenging role in the DRB process. The PRs are non-lawyer, professional officers. The PR "shall be a commissioned officer familiar with the detainee review procedures and authorized access to all reasonably available information (including classified information) relevant to the determination of whether the detainee meets the criteria for internment and whether the detainee's continued internment is necessary."¹⁴⁵ They participate in a one-week training course prepared and taught by instructors from the Judge Advocate General's Legal Center and School and other instructors.¹⁴⁶ They also receive additional weekly training with other DRB personnel to hone their representational and advocacy skills. With a few exceptions, the detainee may waive the appointment of a PR,¹⁴⁷ however, to date, no detainee has waived his PR.¹⁴⁸

their neutral role. See generally U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 5-3 (Oct. 2, 2006) [hereinafter AR 15-6] (describing the role of the recorder at administrative boards).

¹⁴⁵ Detainee Review Procedures, *supra* note 95, at 5.

¹⁴⁶ See JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82, at 6.

¹⁴⁷ *Id.* (stating that detainees cannot waive their PR if they are under eighteen years of age or they suffer "from a known mental illness, or [they are] determined by the convening authority to be otherwise incapable of understanding and participating meaningfully in the review process").

¹⁴⁸ While no detainee has appeared before a board without a PR, two detainees did limit their PRs' representation by requesting that their PRs not speak. Another detainee requested a different PR; however, that request was denied. E-mail from Lieutenant Colonel Michael Hosang, Acting

More importantly, the PR must act “in the best interests of the detainee.”¹⁴⁹

To that end, the [PR] shall assist the detainee in gathering and presenting the information reasonably available in the light most favorable to the detainee. The [PR’s] good faith efforts on behalf of the detainee shall not adversely affect his or her status as a military officer (e.g., evaluations, promotions, future assignments).¹⁵⁰

Prior to the new DRBs, one of the primary complaints of the detainees (and the ICRC) was the lack of notice or information about the reasons for their detention and their ability to challenge their detention.¹⁵¹ These concerns were eliminated by the new process because the PRs have the task of explaining the process to the detainees, to include their own role as the detainee’s representative.¹⁵² Now the detainees are apprised of when their board will convene, what to expect at the board, and the potential outcomes of the board. Additionally, the PR can assist a detainee to prepare a statement and answer questions at the board, as well as assist the detainee in gathering documents or arranging for a witness to speak on the detainee’s behalf—all rights afforded to detainees by the new process.¹⁵³ The PRs cannot disclose classified information to the detainee, and the detainee is excluded from the classified portion of the hearing, but the PR does have full access to classified information relevant to the case. The PRs are instructed, through the DRB Policy Memorandum, the PR Appointment Memorandum, and training, that they are bound by a non-disclosure agreement not to communicate information gleaned from discussions with the detainee that might be harmful to the detainee’s case.¹⁵⁴ The PRs explain this protection to the detainee. Conversely, PRs are understandably prohibited from disclosing classified information to the detainee.¹⁵⁵

Deputy Dir., Legal Operations Directorate, Bagram, Afg., to author (10 Apr. 2010, 02:28 EST) [hereinafter Hosang e-mail] (on file with author). See also Devine e-mail, *supra* note 119.

¹⁴⁹ Detainee Review Procedures, *supra* note 95, at 6.

¹⁵⁰ *Id.*

¹⁵¹ See *id.* This anecdotal information was discussed during the ICRC representative’s class during the 1st DRB Short Course in February 2010. See app. B.

¹⁵² Detainee Initial Session Checklist (21 June 2010) [hereinafter Detainee Checklist] (on file with author). This detailed checklist contains more than twenty-five areas for the PR to cover with the detainee. If followed, it serves as a failsafe measure to ensure the detainee has no doubt as to what will transpire at his DRB.

¹⁵³ *Id.* at 3–4.

¹⁵⁴ Devine e-mail, *supra* note 119.

¹⁵⁵ *Id.*

The role of the legal advisor is similar to the role of review board legal advisors in the past. As a non-voting member, the legal advisor sits through the entire board and is available to answer questions from board members. The board president can discuss any disputes over the criteria or admission of evidence, and other issues, with the legal advisor. The legal advisor also collects the findings and recommendations worksheets completed by the members and records the majority vote. The legal advisor typically reviews the hearing and the findings and recommendations of the board and provides a legal review of the proceedings.¹⁵⁶

A record of the proceedings must be prepared within seven days.¹⁵⁷ A reporter is present during the hearing compiling a summarized transcript of each DRB. The transcript, along with any exhibits that were offered to the board and the findings and recommendations, become the record of the board that is presented to the convening authority for a decision on final disposition. In all cases, the legal advisor reviews the file for legal sufficiency, and a senior judge advocate will conduct a second legal review when continued internment is recommended.¹⁵⁸ The detainee is then notified of the results within seven days of the sufficiency review.¹⁵⁹

Between 2002 and April 2008, detainees did not appear at their review boards, and likely did not even know such a board was proceeding in their absence. Between April 2008 and 10 September 2009, detainees appeared at their first UECRBs, but without the assistance of a PR and with no real opportunity to challenge the evidence against them. The detainees now have numerous protections at the new DRBs:

¹⁵⁶ *Id.*

¹⁵⁷ Detainee Review Procedures, *supra* note 95, at 5.

¹⁵⁸ *Id.* For cases where the board recommends continued internment, the July 2009 policy requires that the record be “forwarded to the first Staff Judge Advocate in the BTIF’s chain of command.” *Id.* It is understood that references in the policy to the old BTIF now mean the new DFIP, and the other factor that makes this precise language slightly inapplicable is the fact that JTF 435 now has complete control of detention operations. From September 2009 through early January 2010, when CJTF-82 still ran the DRBs, the first legal review was conducted by a judge advocate from the BTIF (the judge advocate from TF Protector) and the second legal sufficiency review was completed by a lawyer from the Office of the Staff Judge Advocate (OSJA) of the unit in charge of the BTIF (the DSJA from the CJTF-82 OSJA). The July 2009 policy further states, “The record of every review board proceeding resulting in a determination that a detainee meets the criteria for internment shall be reviewed for legal sufficiency when the record is received by the office of the Staff Judge Advocate for the Convening Authority.” *Id.* Since JTF 435 assumed total control of detention operations in January 2010, the process of two legal reviews has evolved. Now, the initial legal review is conducted by the legal advisors that are assigned to the OSJA and detailed as legal advisors to the DRB. In those cases where continued internment is recommended, the second legal review is conducted by the JTF 435 Director of Legal Operations.

¹⁵⁹ *Id.*

- First, the detainee is allowed to be present at all open sessions.
- The detainee has the assistance of a PR.
- Within two weeks of arriving at the DFIP, a member of the Detainee Criminal Investigative Division (DCID) notifies the detainee of his initial hearing within sixty days of arriving at the DFIP.
- The detainee can testify or provide a statement to the DRB; however, the detainee cannot be compelled to testify.
- The detainee can present all reasonably available evidence relevant to the board's determination of whether the detainee meets the criteria for internment and whether continued internment is necessary.¹⁶⁰

While the detainees have numerous protections under the new policy, they are, of course, meaningless unless the detainee can exercise those rights in a meaningful manner. Of the protections described above, the PR becomes the essential link between the detainee and the review proceedings. The PR helps prepare the detainee for his testimony before the board, both the direct testimony and responses to anticipated questions from the board members and recorder. If the detainee requests testimony or statements from family members or a tribal elder, the PR assists in this process as well. With the roles of the various personnel now described, how those personnel implement the procedures at the actual board will be discussed below.

I. The Detainee Review Board Procedures

The review boards follow the ten procedures prescribed by AR 190-8, paragraph 1-6e,¹⁶¹ as supplemented by the

¹⁶⁰ *Id.* While coalition criminal investigators have been part of the Legal Operations Directorate since its inception, they were formerly part of the DAB; however, as of June 2010, the team of investigators is now split off into their own section called the Detainee Criminal Investigative Division and their primary function is to assist the Afghan partners in preparing cases for prosecution within the Afghan criminal justice system. See also *supra* note 140 and Hosang e-mail, *supra* note 148.

¹⁶¹ See AR 190-8, *supra* note 9, para. 1-6e (listing ten procedures that tribunals must follow).

(1) Members of the Tribunal and the recorder shall be sworn. The recorder shall be sworn first by the President of the Tribunal. The recorder will then administer the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

sixteen procedures outlined in the July 2009 policy.¹⁶² Ten of the sixteen procedures in the 2009 policy are substantially the same as the ten listed in paragraph 1-6e.¹⁶³ The additional six procedures that appear in the 2009 policy, but not in paragraph 1-6e, include the following requirements:

(1) for the convening authority to appoint a personal representative to assist each detainee;

(2) for U.S. military personnel to conduct a reasonable investigation into any

(4) Persons whose status is to be determined shall be advised of their rights at the beginning of their hearings.

(5) Persons whose status is to be determined shall be allowed to attend all open sessions and will be provided with an interpreter if necessary.

(6) Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.

(7) Persons whose status is to be determined have a right to testify or otherwise address the Tribunal.

(8) Persons whose status is to be determined may not be compelled to testify before the Tribunal.

(9) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination.

(10) A written report of the tribunal decision is completed in each case. Possible board determinations are:

(a) EPW.

(b) Recommended RP, entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

(c) Innocent civilian who should be immediately returned to his home or released.

(d) Civilian Internee who for reasons of operational security, or probable cause incident to criminal investigation should be detained.

Id. at 2-3.

¹⁶² Detainee Review Procedures, *supra* note 95, at 3-5.

¹⁶³ Compare AR 190-8, *supra* note 9 (the procedures contained in subparagraphs 1-6e (1)-(9)), with Detainee Review Procedures, *supra* note 95, at 3 and 4 (the unnumbered fourth through eleventh bullets correspond to subparagraphs 1-6e(1)-(8) and the thirteenth bullet corresponds to 1-6e(9)). Subparagraph 1-6e(10) is similar in form; however, understandably, the substance is substantially different with 1-6e(10) relevant for Enemy Prisoner of War determinations while the fourteenth bullet of the 2009 policy is relevant to internment determinations.

exculpatory information offered by the detainee;

(3) for the board to follow a written procedural script to provide the detainee a meaningful opportunity to understand and participate in the proceedings;

(4) for the board to allow the detainee to present reasonably available documentary evidence relevant to the internment determinations;

(5) for the board to make an assessment of the detainee's threat level and an assessment of the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society; and

(6) for a written report of the review board determinations and recommendations to be prepared in each case.¹⁶⁴

The detainee review procedures outlined in the Secretary of Defense's six-page July 2009 policy have been supplemented by a sixteen-page Detainee Review Board Policy Memorandum published by the JTF 435 commander in March 2010. The March 2010 implementing policy fills in gaps, clarifies the roles, both primary and supporting, of the numerous personnel and organizations involved in the overall DRB process, and provides guidance on specific implementing procedures.¹⁶⁵ By comparison, paragraph 1-6e of AR 190-8 has ten procedures, the July 2009 policy lists sixteen procedures (including the ten from AR 190-8), and the March 2010 policy lists a total of forty-two procedures (including the sixteen from the July 2009 policy). Paragraph 12 (Detainee Review Board Procedures) specifically states that "Detainee Review Boards shall follow the procedures prescribed by [AR 190-8] paragraph 1-6.e., as supplemented below" and goes on to list the forty-two procedures.¹⁶⁶ In addition to the procedures described above, some of the paragraph 12 additions include the following:

(1) Members of the board and the recorder will be sworn;

(2) Proceedings shall be open, except for deliberations and voting by members and testimony or other matters that would compromise national or operational security;

(3) The detainee shall be advised of the purpose of the hearing, his opportunity to present information, and the consequences

of the board's decision, at the beginning of the hearing;

(4) The detainee shall be allowed to attend all open sessions (with an interpreter), but will not attend classified portions of the board, but the PR will be present;

(5) The detainee can call reasonably available witnesses and present reasonably available documentary information (in this paragraph and its sub-paragraphs, the policy describes in detail the rules for the presentation and exclusion of evidence, to include the criteria for determining relevance, whether a witness is reasonably available, alternate means to testimony, and the admissibility of various forms of hearsay);

(6) The detainee can testify, but not be compelled to testify;

(7) Units and personnel with interest can provide input and attend the hearing, including capturing units, battle space owners or other staff sections, to include the guard force.¹⁶⁷

One of the critical additions to the July 2009 policy in the March 2010 policy worth highlighting is an exclusionary rule. In one of his first acts as Commander of the new JTF 435 in October 2009,¹⁶⁸ BG Martins immediately implemented a prohibition on the use of statements obtained through torture or cruel, inhuman, or degrading treatment. Initially an oral edict adhered to by the personnel participating in the DRBs, this prohibition made its way into an early draft DRB standard operating procedure in February 2010, just after the JTF 435 assumed control of detention operations and the DRBs, and now the use of such statements is proscribed in the March 2010 policy:

Excluded information. No statements obtained by torture or cruel, inhuman, or degrading treatment will be considered by a DRB. Statements obtained through such coercive conduct will not be considered by a DRB, except against a person accused of torture as evidence that the statement was made.¹⁶⁹

As discussed above, there are open and closed sessions of the board proceedings. Because portions of the DRB proceedings are classified SECRET/NOFORN, the overall

¹⁶⁴ See Detainee Review Procedures, *supra* note 95, at 4-5 (unnumbered first, second, third, twelfth, fifteenth, and sixteenth bullets).

¹⁶⁵ See JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82; Detainee Review Procedures, *supra* note 95.

¹⁶⁶ JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82, at 6-12.

¹⁶⁷ *Id.* paras. 12d, f, g, and i-m.

¹⁶⁸ See *supra* note 112. E-mail from BG Mark Martins, Deputy Commander, JTF 435, Parwan, Afg., to author (29 Apr. 2010, 22:42 EST) (on file with author).

¹⁶⁹ JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82, para. i(4).

classification of the DRB is SECRET/NOFORN. However, as part of the overall concept of transparency, JTF 435 and its Legal Operations Directorate, led by Captain Greg Belanger, U.S. Navy, are striving to ensure as much of the process as possible remains unclassified and takes place in the presence of the detainee. The DRB remains a bifurcated hearing consisting of an unclassified session, where the detainee is present, and a classified portion, where the detainee is excluded but his personal representative remains to hear, present, and challenge information on the detainee's behalf. Many of the remaining procedures described in paragraph 12 of the March 2010 policy contain the specific rules for making, recording, and processing board determinations that are discussed elsewhere in this article.

J. "Shura Rooms" and COIN¹⁷⁰

April 2008 was the first month a Bagram detainee personally appeared before a review board. Two years later, in March 2010, the first Afghan witnesses began to appear in person before DRBs. As a major step in progressing General McChrystal's COIN effort, just three months after assuming control over all detainee operations in Afghanistan, JTF 435 and its Legal Operations Directorate began inviting Afghan witnesses to appear in person before the DRBs to present live testimony. Managing the expectations of Afghans who travel to the DFIP to testify is critical to furthering the COIN effort.

In the Afghan culture, when village elders gather for a shura, or meeting, the village elder at the top of the tribal hierarchy commands the respect and attention of the entire gathering. The village elder dispenses advice and resolves disputes. Given the deference shown to such a leader, it would be natural for the village elder to think his support for a detainee would result in release. The reality is that two of every three detainees remain interned. The potential for the opposite negative effect is large if the village elders were to return to their communities disillusioned by the DRB process, especially if the detainees they vouched for are interned for an additional six months. The DRB leadership works to prevent such scenarios.

When the plan to include Afghan witnesses in the DRB process was implemented, recognition of cultural

¹⁷⁰ In a seminar during the 2d DRB Short Course in June 2010, the question of whether the testimony of Afghan village elders could potentially be more harmful than useful to the COIN effort—because of the stronger probability that detainees will remain interned or transferred to the Afghan authorities (currently only 14% of detainees get released)—was raised. The discussion focused on the premise that a village elder's word is essentially law within his village. If a village elder were to travel to the DFIP to personally vouch for a detainee and guarantee the detainee's productive, terror-free future, then presumably, the detainee should be released. And if the detainee is not released, the village elder must explain to his community that the Americans would not listen to him. This section captures how the DRB personnel are attuned to this potential negative effect and how such situations are handled.

sensitivities resulted in the creation of two "shura" rooms within the DFIP. Two offices were cleared out and transformed into comfortable waiting rooms for Afghan witnesses. Filled with Afghan-appropriate "furniture," such as large pillows arranged on the floor around the sides of the room and large comfortable couches, Afghan witnesses feel welcome from the start. The essential part of the visit, however, is the initial meeting with the Director and/or Deputy Director of the Legal Operations Directorate. In addition to welcoming the witnesses, one of the leaders discusses the process that will follow. All witnesses are informed that their presence (and potential testimony) is critical to the process but that their presence or testimony will not guarantee release. By explaining the process in detail up front, witnesses' potential for dissatisfaction with the overall process is minimized. This does not guarantee that witnesses will not be upset over a specific result; however, by observing and participating in the process, witnesses can appreciate the United States' attempt to offer their family or tribal member a fair, transparent, and robust hearing. This is the critical message that must get back to the villages.¹⁷¹

An example from 23 March 2010 illustrates this point.¹⁷² Three DRB hearings were scheduled for 23 March 2010, and the Legal Operations Directorate hosted eleven Afghan witnesses from the villages of three detainees. Two Afghan Government officials also attended the DRB sessions, as well as three human rights advocates.¹⁷³ The markedly positive feedback collected from the Afghan nationals was most telling. "Both the government officials and villagers were overwhelmed by the day's events. They were incredibly appreciative of the treatment they received, the care and custody US forces are providing the detainees, and the DRB process."¹⁷⁴ Notable comments during a post-DRB shura included the following statements:

¹⁷¹ The observations described in the text are based on LTC Mike Devine's description of the Afghan witness process during the seminar. See *supra* note 170.

¹⁷² Legal Operations Directorate, After Action Report—23 March 2009 DRB Hearing [hereinafter DRB Witness AAR] (on file with author). This three-page AAR was drafted by LTC Mike Devine.

¹⁷³ *Id.* at 1. The two Afghan Government officials were the Provincial Council and Deputy Provincial Council from Logar Province. The Human Rights Organizations' representatives were Jonathan Horowitz (Open Society Institute), Andrea Prasow (Human Rights Watch) and Candace Rondeaux (International Crisis Group—Afghanistan Office). See also the "Promise and Problems" section in Part IV, below, which discusses Mr. Horowitz's follow-up article reflecting on his observations of the DRB process in March 2010.

¹⁷⁴ *Id.* at 2. Also noted in the DRB Witness AAR are the "less favorable" comments from the human rights representatives. Despite never being allowed access to the old BTIF, the personnel were allowed access to observe five DRB hearings. In the end, the concerns noted were the use of non-attorneys as PRs and the use of non-native Pashto speakers as interpreters. *Id.*; see *infra* Part IV (discussing Human Rights Organizations).

“I have been astonished by this whole day.”

“I would never have believed you had such great procedures.”

“I cannot believe how well we were treated.”

“The shura listened to us, asked good questions, and respected us.”

“Each [detainee] told us how well they are treated here—the food, the medical care, the religion, the respect.”

“We will carry the messages of this day to all of our villages.”¹⁷⁵

Since the introduction of Afghan witnesses to the DRB process on 6 March 2010, 411 live witnesses and 125 telephonic witnesses have testified through 30 June 2010.¹⁷⁶ Although not definitive on the topic, the data reveals that detainees who do not call witnesses have a higher rate of continued internment than those detainees who have witnesses speak on their behalf. During roughly the same period—6 March to 18 June 2010—a total of 581 DRBs were conducted. In the 404 cases where no witnesses appeared, the board recommended continued internment in 55% of the cases. In the remaining 177 cases, which involved either live or telephonic witnesses, the continued internment rates were considerably lower: 43% and 48%, respectively.¹⁷⁷ Comments such as those provided by the Afghan nationals who participated in the DRB process in March, combined with the empirical data, reveal a process that is clearly working to win over the population in support of the COIN effort in Afghanistan.

¹⁷⁵ *Id.*

¹⁷⁶ In addition to telephonic and live witnesses, Afghan nationals have submitted 347 letters of support on behalf of detainees. In total, since the Legal Operations Directorate began tracking witness support on 1 February 2010, there have been 1,163 witness appearances or letters of support. This total includes the 411 live Afghan witnesses, the 125 Afghan witnesses who testified telephonically or by VTC, and the 347 letters of support. It also includes 280 coalition witnesses such as Battle Space Owners, capturing units, or forensic witnesses who have testified either for or against the detainee. E-mail from Lieutenant Colonel Michael Devine, Deputy Dir., Legal Operations Directorate, Bagram, Afg., to author (6 July 2010, 11:52 EST) (on file with author).

¹⁷⁷ DRB Recommendations with Afghan Witnesses (1 Mar.–18 June 2010) (on file with author). This document also analyzes the data through a different lens: the number of detainees recommended for release or reintegration when supported by either live or telephonic witnesses. Only one-third of detainees are recommended for release or reintegration when no witnesses testify at their hearing, yet half of the detainees who are supported by a live or telephonic witness are recommended for release or reintegration. While the premise that witness testimony influences the board members may be challenged due to the myriad of factors in each DRB, the data clearly demonstrates that those detainees who have witnesses speak on their behalf are released at a higher rate than those who do not.

IV. Lingering Criticism

*Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess*¹⁷⁸

A. Human Rights Organizations

Until Congress enacts a law specifying the legal framework for battlefield detention review for terrorists—or, as the current trend has gone, until the Executive’s current DRB procedures are specifically commented on by the federal courts—the main question will remain: What procedural protections should be afforded to detainees captured on a foreign battlefield at an administrative hearing to determine their status and grounds for continued internment in U.S. custody? The new DRBs have gone far beyond what is currently required by the U.S. military under LOAC. An important policy determination was made to supplement Common Article 3 with more clear guidance on the procedural protections, yet despite the sweeping changes and the addition of procedures that go beyond what the law requires, areas of concern to outsiders looking in remain. Perhaps the most vocal critics of the DRB process are human rights organizations. A brief discussion of the development of human rights organizations (HRO) and their application of international human rights law (IHRL) to armed conflict helps put their criticism of the DRB process in context.

The LOAC and “international humanitarian law” (IHL) have essentially the same meaning: they are rules that attempt to mitigate the human suffering caused by armed conflict.¹⁷⁹ Separate and distinct from LOAC and IHL is international human rights law (IHRL). Prior to World War II, human rights law was regarded as a domestic matter addressing how states treat their own citizens. After World War II, however, based on the atrocities states committed against their own citizens, the internationalization of human

¹⁷⁸ *Boumediene v. Bush*, 128 S. Ct. 2229, 2279 (2008) (Roberts, C.J., dissenting).

¹⁷⁹ See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 22–23 (2010) (describing the emergence of the phrase “international humanitarian law” (IHL) to encompass “the body of international legislation that applies in situations of armed conflict” and “that body of treaty-based and customary international law aimed at protecting the individual in times of international armed conflict”). *Id.* at 23. Generally, military personnel use the term LOAC while academics and influential groups, such as the ICRC, use the term IHL.

rights laws emerged to regulate how states treat their citizens within their own borders.¹⁸⁰

The modern international human rights movement began with the United Nations (U.N.) Charter in 1945.¹⁸¹ Early conventions such as the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights that were clearly applicable in peacetime were advanced by the international community to also apply during both internal and international armed conflict.¹⁸² While non-governmental organizations (NGOs) with a humanitarian focus can be traced back to the origins of the ICRC, the proliferation of human rights NGOs coincided with the development of IHRL after World War II.¹⁸³ In 1945, article 71 of the U.N. Charter specifically authorized the U.N Economic and Social Council to consult “with non-governmental organizations which are concerned with matters within its competence.”¹⁸⁴ By 1948, when the Universal Declaration of Human Rights was finalized, there were forty-one NGOs with consultant status with the Economic and Social Council.

Today, there are over 3,000 with that status and thousands of additional organizations doing similar work. Large, influential and internationally-known human rights organizations, such as Amnesty International (“AI”) and Human Rights Watch (“HRW”), sit beside hundreds of smaller, often single-issue, NGOs in UN forums, where they can exert considerable influence on the course of proceedings.¹⁸⁵

¹⁸⁰ See generally INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 41 (2009) [hereinafter OPLAW HANDBOOK].

¹⁸¹ U.N. Charter, *reprinted in* LAW OF WAR DOC. SUPP., *supra* note 8, at 1-15. One of the purposes of the United Nations is to promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” *Id.* art. 1(3).

¹⁸² See SOLIS, *supra* note 179, at 25; OPLAW HANDBOOK, *supra* note 180, at 42; see also Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), *reprinted in* RALPH STEINHARDT, PAUL HOFFMAN & CHRISTOPHER CAMPOVINO, INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS DOCUMENTS SUPPLEMENT 389-402 (2009); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR], *reprinted in* LAW OF WAR DOC. SUPP., *supra* note 8, at 454-64. See generally RALPH STEINHARDT ET AL., INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS 1-22 (2009) [hereinafter IHR LAWYERING] (providing a detailed history of the evolution of IHRL).

¹⁸³ IHR LAWYERING, *supra* note 182, at 849-50.

¹⁸⁴ U.N. Charter art. 71.

¹⁸⁵ IHR LAWYERING, *supra* note 182, at 849 (footnote omitted). “Today, Amnesty International has nearly two million members in more than 150 countries throughout the world.” *Id.* at 850.

Interestingly, while the presence of NGOs within the U.N. is beneficial to facilitate negotiations among nations in the human rights arena, the huge number of NGOs has also become problematic for the U.N. as participation of all NGOs is simply impractical. Often the views of smaller NGOs in underdeveloped countries, perhaps where they are most needed, are not represented by the views of the larger NGOs with consultative status under article 71.¹⁸⁶ In general, human rights NGOs work within the U.N. system to advocate adherence to human rights norms through regional enforcement mechanisms. Other methods include gathering information through fact-finding investigations and reporting violations to the world community.

Human rights organizations have long used the tactic of shaming to embarrass governments into ending human rights abuses in their jurisdiction. To be effective, human rights organizations must move quickly to channel information to media outlets, distribute action alerts to organization members, and lobby politicians to shine a spotlight on human rights violators.¹⁸⁷

A critical distinction between the ICRC and the numerous human rights NGOs described above is that the ICRC is the only international organization specifically named in the 1949 Geneva Conventions.¹⁸⁸ Established in 1863 by Henri Dunant, the ICRC maintains its neutrality as an impartial, independent organization with an exclusive humanitarian mission to protect the dignity of victims of armed conflict.¹⁸⁹ The ICRC is the only organization authorized to visit detainees in the DFIP, and the essence of their effectiveness comes from the fact that they keep all of their communications confidential. This is the primary factor that distinguishes the ICRC from human rights NGOs. The close working relationship between the ICRC and the detaining authority plays a critical role in the overall detention process. Detainees communicate directly with the ICRC, and through the ICRC, detainees can communicate with their families through an exchange of incoming and outgoing notes.¹⁹⁰ This interaction with detainees in U.S.

¹⁸⁶ *Id.* at 852.

¹⁸⁷ *Id.* at 856.

¹⁸⁸ See e.g., GC III, *supra* note 8, arts. 9 & 10. Article 9 of GC III states “[t]he provisions of the present convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may . . . undertake for the protection of prisoners of war and for their relief.” *Id.* art. 9.

¹⁸⁹ See International Committee of the Red Cross (ICRC), The Mission, <http://www.icrc.org> (follow “The mission of the ICRC” hyperlink) (last visited 10 June 2010).

¹⁹⁰ Generally, during each ICRC visit, the ICRC provides notes from families to detainees to the detaining authority to screen. During each visit, the ICRC gathers out-going notes from detainees to their families and passes those to the detaining authority as well. The detaining authority has all of the notes screened by qualified analysts. At the next ICRC visit, the

custody and ability to inspect U.S. detention facilities is generally not available to other NGOs.

Central to the debate and criticism of U.S. detention policies in Afghanistan is the question of what body of law is applicable: LOAC/IHL or IHRL, or both. “The U.S. view is that LOAC generally prevails on the battlefield, to the exclusion of [I]HRL.”¹⁹¹ This view is based on the premise that the United States considers the LOAC to be a *lex specialis*—the exclusive and specialized body of law that applies during times of armed conflict.¹⁹² Human rights organizations acknowledge LOAC/IHL as one body of law applicable during armed conflict, but those organizations do not doubt that IHRL also applies. For one human rights scholar, it is not a matter of if IHRL applies during armed conflict, but a matter of when.

Two branches of international law govern attack and detention: international humanitarian law (IHL) (or the law of armed conflict) and international human rights law (IHRL). For both branches, first, a question of applicability arises: IHRL applies in every circumstance and to everyone. . . . Second, when applicable, for both IHL and IHRL the question arises as to when they allow (or rather, do not prohibit) international forces to deprive enemies of their life or their liberty. Third, if both branches apply and lead to differing results on the two issues, we must determine which of these two prevail.¹⁹³

Human rights advocates rely primarily on two International Court of Justice (ICJ) opinions to contest the U.S. view that IHRL does not apply during armed conflict.¹⁹⁴ In 2004, the ICJ provided an advisory opinion on the three possible relationships between IHL and IHRL during armed conflict: some rights may be exclusively matters of IHL, some may be exclusively matters of IHRL,

and some may be both.¹⁹⁵ “Thus, IHRL always applies, but IHL may modify how it applies based on IHL’s status as a *lex specialis*.”¹⁹⁶ This concept of complementarity (simultaneous application of IHL and IHRL) is accepted by the ICJ, human rights organization, and the vast majority of the international community.

Because they apply IHRL to armed conflict, it is understandable that detention is a focal point for human rights organizations. Additionally, when it comes to due process for detainees, human rights organizations can point to “the fundamental human rights” of AP I contained in Article 75, the “essential guarantees of independence and impartiality” of AP II contained in Article 6,¹⁹⁷ and the premise that “arbitrary deprivation of liberty is prohibited” is accepted as customary international law.¹⁹⁸ Additionally, the 2005 ICRC study on customary international humanitarian law points to three procedures required to prevent arbitrary deprivation of liberty:

- (i) an obligation to inform a person who is arrested of the reasons for arrest;
- (ii) an obligation to bring a person arrested on a criminal charge promptly before a judge; and
- (iii) an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention (i.e., the writ of habeas corpus).¹⁹⁹

Though the concepts described in the ICRC study are not specifically applicable to the DRBs in Afghanistan, they inform the perspective of human rights advocates. Two such perspectives are discussed below. The first is from a human rights advocate who participated in the DRB training in February 2010 and personally observed five DRBs in March 2010, and the second is from a Petition for Writ of Habeas Corpus filed in late February 2010 for two detainees interned at the DFIP.

detaining authority returns all screened note cards to the ICRC for distribution. The in-coming cards go to the detainees and the ICRC delivers the out-going cards to the families. See *supra* note 44.

¹⁹¹ See SOLIS, *supra* note 179, at 25.

¹⁹² OPLAW HANDBOOK, *supra* note 180, at 42.

¹⁹³ Marco Sassoli, *The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?*, in THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT’L L. STUD. 431, 431–32 (Michael N. Schmitt ed., 2009) (U.S. Naval War College, International Law Studies).

¹⁹⁴ See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

¹⁹⁵ Stephen Pomper, *Human Rights Obligations, Armed Conflict and Afghanistan: Looking Back Before Looking Ahead*, THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT’L L. STUD. 525, 530 (Michael N. Schmitt ed., 2009) (U.S. Naval War College, International Law Studies) (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9)).

¹⁹⁶ Major Jeremy Marsh, *Rule 99 of the Customary International Humanitarian Law Study and the Relationship Between the Law of Armed Conflict and International Human Rights Law*, ARMY LAW., May 2009, at 18.

¹⁹⁷ See AP I, *supra* note 8, art. 76; AP II, *supra* note 8, art. 6.

¹⁹⁸ JEAN-MARIE HEINCKAERTS & LOUISE DOSWALD BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES 344 (2005) [hereinafter RULES]. Rule 99 of the 161 rules of customary international law discussed in this study simply states, “Arbitrary deprivation of liberty is prohibited.” See also Marsh, *supra* note 196.

¹⁹⁹ RULES, *supra* note 198, at 349; see also Marsh, *supra* note 196, at 21.

B. Promise and Problems

To aid in the development of an open, transparent process for the new DRBs, BG Martins invited Mr. Jonathan Horowitz, a human rights investigator from the Open Society Institute, to participate in the DRB training in February 2010 and share his viewpoints.²⁰⁰ For the initial training session in February, Mr. Horowitz participated by video-teleconference from Washington, D.C. When addressing the audience, Mr. Horowitz expressed his concerns with the challenges of declassifying information, the production of available witnesses, the education of U.S. personnel on Afghan culture, and how to best achieve transparency and legitimacy in the process.²⁰¹ Interestingly, after observing the DRBs in person a little over a month later, Mr. Horowitz was generally pleased with what he observed, but his concerns remained.

In March 2010, Mr. Horowitz traveled to Afghanistan and observed five DRBs in person. Following his visit, in a balanced article, he reported the “promise and problems” he observed with the new DRBs.²⁰² In comparing the new DRBs to the problems with the old UECRBs,²⁰³ Mr. Horowitz noted that the DRBs were an improvement over the UECRBs, but “the improvements are relative and the bar was set very low to begin with.”²⁰⁴ Before previewing the “promise” of the new DRBs, he stated, “It remains to be seen, however, whether the United States has the right combination of procedures to build a fair process that can make an accurate determination relating to a person’s detention and freedom.”²⁰⁵ Mr. Horowitz acknowledged that the DRB hearing is not a criminal trial, yet he noted that the rules (for the administrative hearing) are a “far cry from the regular system of courtroom checks and balances.”²⁰⁶ Mr. Horowitz welcomed the addition of PRs who “are obligated to act in the ‘best interest’ of the detainee, felt free to advocate on behalf of [the] detainee, challenge the factual record, and ensure the detainee understood the procedures.” He also highlighted the prohibition over information obtained under torture, a rule not required for the UECRBs,

and that in four of the five DRBs he observed, witnesses were called. The witnesses testified to either dispute the information presented against the detainee or to vouch for the character of the detainee.²⁰⁷

After describing his opinion of the promising aspects of the DRBs, Mr. Horowitz discusses his perspective of what he describes as the “[s]erious problems [that] continue to damage the credibility of the new system.”²⁰⁸ Some of the problems noted by Mr. Horowitz seem to have “easy” solutions—for example, increasing the size of the DRB staff; improving the quality of translators; and enhancing DRB personnel’s knowledge of Afghan history and culture.²⁰⁹ If any of Mr. Horowitz’s claims of an undermanned staff, poor translators, and a lack of knowledge by U.S. personnel of Afghan history and culture are valid, then the DRB staff can address these deficiencies. Another issue addressed by Mr. Horowitz is much more challenging—that is, training Afghan legal personnel in the rule of law so they can assume responsibility of the detention process.²¹⁰ This is certainly much more time consuming and complex; however, this critical undertaking is necessary to ensure the smooth transition of the DRB process to the Afghan Government.

Of the problems Mr. Horowitz cites, the one he views as the most serious is the U.S. reliance on classified information presented outside the presence of the detainee, which makes challenging the veracity of the information nearly impossible. He had this concern both before and after observing DRBs. Interestingly, this concern goes to the core of one of the three procedures cited in the ICRC study’s discussion of Rule 99, specifically, the “obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention.”²¹¹ Having identified a problem, Mr. Horowitz offers a viable solution—which, if ignored, could result in a bleak outcome:

[T]he U.S. military and intelligence agencies need to end their culture of over-classification and give greater priority to improving their evidence gathering capacity, as opposed to their intelligence gathering capacity. Without a shift from reliance on secret sources to greater transparency, U.S. detention operations and its detainee review system are doomed.²¹²

²⁰⁰ See app. B.

²⁰¹ Author’s notes of Mr. Horowitz’ oral presentation to 1st DRB Short Course students (Feb. 1, 2010) [hereinafter Horowitz Notes] (on file with author). Interestingly, prior to his March 2010 visit to Afghanistan to observe DRBs, Mr. Horowitz expressed concern over the assignment of non-lawyers as PRs, yet, after his visit, as demonstrated by his article, he was not critical of this policy decision. Based on his article after his visit, it appears Mr. Horowitz was impressed by the representation provided by the PRs. See *infra* note 202.

²⁰² Jonathan Horowitz, *New Detention Rules Show Promise and Problem*, HUFFINGTON POST (Apr. 20, 2010), available at http://www.huffingtonpost.com/jonathan-horowitz/new-detention-rules-show_b_544509.html.

²⁰³ See *supra* notes 70–81 and accompanying text.

²⁰⁴ Horowitz Notes, *supra* note 201.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* (citing testimony of village elders assuring the panel that the detainee would not pose a threat if released and the detainee would find gainful employment).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See *supra* note 199 (referring to point iii).

²¹² Horowitz Notes, *supra* note 201. Mr. Horowitz also notes that such a cultural change is not unprecedented and cites the order to ISAF soldiers to

The use of classified information at the DRBs—or better stated, the detainee’s lack of a meaningful way to challenge or even know about classified evidence presented against him—is a challenge for JTF 435. The classified portion of the board, which occurs outside the presence of the detainee, directly contradicts the goal of transparency. This is a flaw in the system, but considering the criticality of transparency to the overall process, it is a flaw that must be minimized. The Legal Operations Directorate has implemented two aspects of the overall DRB process to remedy this issue: increased use of unclassified information in the presence of the detainee and perhaps more importantly, allowing the PR equal access to classified information and the ability to meaningfully challenge such information in the classified portion of the board.

The obvious and most transparent process would be a totally unclassified hearing. While this is not likely to occur in the near term, a culture change such as the one suggested by Mr. Horowitz—evidence gathering rather than intelligence gathering—is a method that units could adopt. If capturing units operate from this perspective, then evidence collected for detention and prosecution purposes should not be classified at the outset. Additionally, information collected by MI personnel that focuses on the belligerent or criminal acts of the detainee should also remain unclassified. Such efforts would help avoid the laborious process of declassifying information after the fact. Such a paradigm shift, while challenging, would enhance the overall transparency of the process.

Once the information is compiled and made part of the detainee’s file, it is incumbent on the recorders to present as much unclassified information as possible at the DRBs. Observations of more than thirty DRBs in early February revealed concerted efforts by recorders to do so.²¹³ Prior to the DRBs convening, the recorders, with the assistance of analysts, spent considerable time extracting unclassified information from the detainee’s file resulting in boards where detainees were apprised of the majority of the evidence against them and had the opportunity to challenge that evidence.

If DRB personnel, particularly the board members, expect the recorder (and capturing units) to produce more unclassified information as a basis for their internment decision, then the trend to provide unclassified evidence in detainee packets will become the norm. In turn, as units and supporting agencies learn what the board members expect the use of unclassified information will improve. Finally, the overall mission to transition detention operations (and

improve their evidence collection procedures. Because ISAF soldiers must turn captured personnel over to Afghan authorities within ninety-six hours for potential criminal prosecution in Afghan courts, it is in ISAF’s best interest to turn over the detainee along with evidence sufficient to warrant continued detention in the Afghan system. *Id.*

²¹³ See app. B.

potentially the review board process) to the Afghan authorities, remains a strong incentive to logically drive the process to focus on unclassified information.

As the process evolves, the boards remain a bifurcated process and classified information presented outside the presence of the detainee remains a reality. This is where the addition a PR working in the best interest of the detainee is a critical addition to the overall process. While the detainee is not physically present in the room during the classified portion of the boards, his interests certainly are. By extension, the PR is there to meaningfully challenge the evidence on the detainee’s behalf. At an administrative hearing in a non-adversarial setting, military officers serving as PRs have the requisite expertise and experience to represent the detainee on par with judge advocates. When the process is broken down to its basic level, it is about a person captured in a combat environment under stressful combat conditions by personnel trained in military matters. Military line officers are perhaps more capable than most judge advocates of understanding these circumstances. Additionally, all line officers understand and usually have considerable experience in briefing superiors. Thus, the concept of a non-lawyer PR briefing a board on the facts and information surrounding a detainee’s capture on the battlefield—all with the detainee’s best interest in mind—cannot be overlooked. Human rights advocates will continue to question whether a detainee has a meaningful opportunity to challenge information when he is excluded from the classified portion of his hearing, but the fact remains that a trained PR is present to challenge the information on behalf of the detainee to mitigate any concerns raised by the detainee’s absence.

The discussion above highlights the abilities of non-lawyers serving as PRs. Skeptical human rights critics may argue that PRs should be lawyers. Beyond the practical examples discussed, the LOAC that governs U.S. military action in Afghanistan has no precedent for lawyers to be appointed to represent an interned person at this early administrative review of detention. Even paragraph 1-6 of Army Regulation 190-8,²¹⁴ the U.S. military’s implementing procedures for Article 5 Tribunals, does not require a PR, let alone a lawyer. With the policy decision made, the training and implementation is essential to ensure the proceedings remain non-adversarial. The supervisors within the Legal Operations Directorate bear the responsibility of continuously training the recorders and PRs to work within the mandated framework. In the end, though, it will be the daily interaction, prior to and in front of the DRBs that will determine if such a process can work effectively. Early observations revealed that professional military officers can perform their roles at a high level of expertise given the proper training and resources.

²¹⁴ See AR 190-8, *supra* note 9.

Overall, Mr. Horowitz provides a balanced human rights perspective on the promises and problems with the DRB process as of March 2010. Mr. Horowitz was invited back to address the students of the 2d DRB Short Course in June by VTC. During this presentation, he shared his personal observations of the five DRBs held in March. Because many of his prior concerns have been addressed as the DRB process has evolved, Mr. Horowitz focused his June comments on the strategic vision of transferring detention operations to the Afghans. A sub-part of that strategy centers on the need to strengthen the Afghan criminal justice system so that such operations are transferred to a viable, fair system. This latter vision is a challenge, and the details of implementation still have to be worked out.²¹⁵ Additionally, the prospect of bribery and corruption is ever present and represents a huge factor that could hinder the transition. The solution to these issues—increased training and education—is essential and, as noted above, the Legal Operations Directorate has already begun the process of integrating judges, prosecutors, and investigators into the DFIP. Thus far, one Afghan criminal trial has been held in the DFIP (in mid-June) with many more to follow.²¹⁶

While silencing the critics on every aspect of the new DRBs will be virtually impossible, acknowledgment of the areas of concern ensures the DRB participants are continually seeking to improve the process. Opening the DRB process to human rights organizations fosters a climate of transparency and provides the DRB participants with a different perspective. Valid concerns must be analyzed and proposed solutions must be explored and implemented through practice on the ground in Afghanistan.

C. *Wahid v. Gates*²¹⁷

In February 2010, attorneys from the American Civil Liberties Union and International Justice Network filed suit in the U.S. District Court for the District of Columbia on behalf of two detainees interned at the DFIP.²¹⁸ The Petition for Writ of Habeas Corpus is demonstrative of human rights attorneys' complaints about the DRB process in

Afghanistan.²¹⁹ The Petition also highlights the fact that the process has evolved so rapidly that some of the specific complaints have been rendered moot. It is important to note that in May 2010, prior to the Court of Appeals for the D.C. Circuit's opinion, the Government filed an unopposed motion to stay all proceedings in the Wahid case pending the outcome of *Maqaleh v. Gates*. Of course, on 21 May 2010, the Court of Appeals held that constitutional habeas rights did not extend to aliens detained in Bagram, Afghanistan. Despite the uncertainty of the exact status of the Wahid case at this time, the February petition is informative for its attacks on the DRB process.

Not surprisingly, the petitioners rely on the premise that IHRL is applicable, and consequently, human rights principles are woven throughout their petition. The introductory paragraphs of the Petition parallel the ICRC study's three procedural requirements that should follow a deprivation of liberty: notice of the charges, access to a court, and a meaningful opportunity to challenge their detention.²²⁰ In their "Statement of Facts," the petitioners' analysis of the legal framework applicable to U.S. detention operations in Afghanistan is based on the premise that the U.S. Constitution, IHL, and IHRL are all applicable.²²¹

After the general assertion that essentially all laws apply in a non-international armed conflict, whether the process is a judicial or administrative one, the petitioners claim that all individuals detained are entitled to:

- (1) the assistance of counsel;
- (2) meaningful notice of the basis for their detention;
- (3) a meaningful opportunity to see the evidence against them;
- (4) a meaningful opportunity to rebut that evidence;
- (5) the opportunity to present all witnesses and evidence in their favor;
- (6) a meaningful opportunity to see relevant exculpatory information in the Government's possession;
- (7) the opportunity to have the detention determination made by a fair, independent, and impartial body; and

²¹⁵ Author's notes of Mr. Horowitz' oral presentation to 1st DRB Short Course students (June 18, 2010) (on file with author).

²¹⁶ Devine June Interview, *supra* note 138.

²¹⁷ Petition for Writ of Habeas Corpus, *Wahid v. Gates* (No. 10-CV-320) (D.C. Cir. Feb. 26, 2010). The three respondents were all sued in their official capacities as Secretary of Defense; Acting Commander of Detention Operations, Bagram Air Base and Custodian of Petitioners; and President of the United States. The petitioners were Haji Abdul Wahid, Zia-Ur-Rahman, and Haji Noor Saeed.

²¹⁸ Mr. Wahid and Mr. Rahman are the two detainees. Haji Noor Saeed is the cousin of Mr. Wahid and the "cousin's grandson" of Mr. Rahman, who filed suit as the Next Friend of the detainees. *Id.* at Exhibit A.

²¹⁹ Mr. Wahid and Mr. Rahman are both Afghan citizens who were captured in Afghanistan. *Id.* at 3, 4. In *Maqaleh v. Gates*, Judge Bates of the D.C. District Court granted the petitions of three non-Afghan citizens detained by the United States in Afghanistan, but he dismissed the petition of Haji Wazir, who like Wahid and Rahman, was also an Afghan citizen detained in Afghanistan. *See supra* note 40.

²²⁰ Petition for Writ of Habeas Corpus, *Wahid*, No. 10-CV-320, at 1–2 (claiming that neither detainee has been informed of their reasons for detention, neither has been allowed to meet with a lawyer, neither has been allowed to see the evidence against them, and neither has been afforded a meaningful opportunity to challenge their detention).

²²¹ *Id.* at 4–6.

(8) a meaningful opportunity to appeal the decision determination to a court of other judicial or administrative body.²²²

Against this human rights paradigm, the petitioners assert their understanding of “the process afforded Bagram prisoners to challenge their detention.”²²³ While acknowledging the assignment of PRs and the role of the three-officer panel for each DRB, the petitioners claim the lack of assignment of lawyers to represent the detainees and a judge or independent and impartial tribunal to make the status determination violate the detainees’ rights.²²⁴ The petitioners also assert facts that have changed since they filed their Petition or that are simply incorrect. For example, the petitioners state that the PRs have no duty of confidentiality to the detainees and no ethical duty to zealously advocate on the detainees’ behalf.²²⁵ These assertions are unfounded. While there is no strict rule of confidentiality, the PRs are bound by a non-disclosure agreement that, for all practical purposes, serves the same function. Similarly, the non-lawyer military officers assigned to these positions understand their obligation to act in the best interest of the detainee, which, by analogy, equates to a duty to zealously advocate on the detainee’s behalf.²²⁶

Two additional statements made by the petitioners—that “DRBs may rely on evidence obtained through torture or coercion” and that “[t]he military has no obligation to disclose relevant exculpatory information to the detainee or his personal representative”—are simply not true.²²⁷ The remaining petitioners’ “facts,” if read out of context, are intended to portray the DRBs in a negative light; however, the reality is that the procedures discussed earlier are designed to ensure a fair and transparent process. For example, the petitioners’ statement of facts asserts detainees are not allowed access to classified information;²²⁸ however, the petitioners fail to acknowledge that the PRs are entitled to equal access as described above.

The petitioners have three claims for relief, and like their statement of facts, some claims have been rendered moot or have already been resolved. The first claim, “Unauthorized and Unlawful Detention,”²²⁹ will not be addressed here as the lawful authority to detain has been

covered in a substantial fashion above. The second and third claims are illustrative of the human rights complaints based on the IHRL principles described above. The second claim states quite clearly, in the petitioners’ view, that denial of access to the courts, a fair and meaningful hearing by an impartial judicial tribunal, and assistance of counsel are “inconsistent with IHRL” and in violation of the Fifth Amendment of the U.S. Constitution.²³⁰ The third claim is similar. The petitioners first acknowledge that DRBs could be considered administrative, rather than judicial, proceedings, and then they replace the word “judicial” in the second claim with the word “administrative” to fashion the third claim.²³¹ In addition to making unfounded assertions, the claims also presume the rights described, even if founded, exist because IHRL applies and the U.S. Constitution applies extraterritorially.

Whether the petitioners in *Wahid v. Gates* will pursue their case in the D.C. District Court in light of the 21 May 2010 *Maqaleh* decision is uncertain at this time. Just as uncertain is whether the petitioners in *Maqaleh v. Gates* will file a Writ of Certiorari with the Supreme Court. What is certain, however, is that the substantive issue at the heart of this article—whether or not the DRBs provide adequate due process protections to detainees interned by U.S. forces in Afghanistan—has yet to be resolved by the federal courts. The fact that it may never be resolved makes the work of the DRBs that much more critical to ensuring the practitioners on the ground continue to ensure a fair, robust, and transparent hearing for all battlefield captures currently detained in Afghanistan.

D. Due Process During On-going Combat Operations

*Afghanistan remains a theater of active military combat. The United States and coalition forces conduct an on-going military campaign against al Qaeda, the Taliban regime, and their affiliates and supporters in Afghanistan.*²³²

Following the text quoted above, in the 21 May 2010 *Maqaleh* opinion, Chief Judge Sentelle described the combat situation in Bagram noting a March 2009 suicide bomber’s attempt to breach the gates at Bagram Airfield and a June 2009 Taliban rocket attack that killed two U.S. servicemembers and wounded six other personnel.²³³ With

²²² *Id.* at 6–7 (the eight sub-parts listed in the text above appear in paragraph 26 of the petition).

²²³ *Id.* at 10–12.

²²⁴ *Id.* at 11 (Paragraph 49 of the Petition discusses the role of the PR and paragraph 50 discusses the role of the DRB panel.).

²²⁵ *Id.*

²²⁶ See *supra* notes 145–50 and accompanying text.

²²⁷ See *supra* note 169.

²²⁸ Petition for Writ of Habeas Corpus, *Wahid*, No. 10-CV-320, at 11–12.

²²⁹ *Id.* at 16–17.

²³⁰ *Id.* at 17–18.

²³¹ *Id.* at 18–19.

²³² *Maqaleh v. Gates*, No. 09-5265, 2010 U.S. App. LEXIS 10384 (D.C. Cir. May 21, 2010).

²³³ *Id.* See also 2 *U.S. Soldiers Killed in Bagram Attack*, CBSNEWS.COM, June 21, 2009, available at <http://www.cbsnews.com/stories/2009/06/21/terror/main5101364.shtml>.

more than 100 deaths, June 2010 was “the deadliest month to date in the nine-year war.”²³⁴

There should be no doubt that Afghanistan is an active theater of war. Additionally, as reflected by the number of captures since September 2009—close to 600²³⁵—it should be self-evident that units, scattered throughout remote and dangerous areas in Afghanistan, are in harm’s way. To get a sense of what units operating in Afghanistan face on a daily basis, there are numerous books detailing small unit tactics against the insurgents.²³⁶ Understanding combat operations allows the critics of the DRB process to appreciate the nature of such operations and the challenges of gathering information on the battlefield to be used against an insurgent at a subsequent DRB hearing. While many critics have traveled to Afghanistan and fully understand the contemporary operating environment, it does not deter them from calling for more rights for detainees.

It is against this backdrop that this final section considers the DRB due process procedures required for persons captured and interned by U.S. forces in Afghanistan and compares them with the due process provisions considered customary international law for administrative detention review. Two points, emphasized throughout this article, are essential to the analysis: first, the DRBs are administrative hearings and not judicial hearings, and second, the hearings determine whether detainees should be interned for security purposes and not for punishment purposes. Another important point, seemingly disregarded by human rights advocates, is the premise that professional military officers are competent and capable of performing the roles they are assigned, whether as impartial board members or zealous personal representatives acting in the best interests of the detainee. These two points, combined with the fact that Afghanistan is still an active combat zone, puts the concept of due process in the combat zone into perspective.

This article has discussed the various sources of U.S. and international law and policy that prescribe due process

provisions, including the U.S. Constitution,²³⁷ decisions and policies from all three branches of the U.S. Government,²³⁸ LOAC/IHL,²³⁹ IHRL,²⁴⁰ and customary international law.²⁴¹ Setting aside the debate over what specific body or bodies of law apply to international and non-international armed conflict, the question becomes what fundamental guarantees of due process apply to administrative detention review procedures?

Without conceding the applicability of IHRL to armed conflict, it is difficult to dispute two fundamental concepts: (1) that no one should be detained indefinitely without some periodic review process; and (2) that no one should be arbitrarily deprived of their liberty.²⁴² For each proposition, based solely on moral principles without regard to specific laws, it is hard to imagine arguments in support of these concepts. On the other hand, for example, in addition to citing human rights treaties to support Rule 99 as customary international law, the ICRC study also relies on several Geneva Conventions provisions to support its position.²⁴³ Of course, the United States is not arbitrarily detaining

²³⁷ See *supra* note 7.

²³⁸ See *supra* notes 19–39.

²³⁹ See *supra* notes 8 and 12.

²⁴⁰ See *supra* notes 181–200.

²⁴¹ See *supra* note 198. For an in-depth study and research project suggesting the due process norms to be afforded to detainees, see *The Lexington Principles on the Rights of Detainees: A Transnational Legal Process Approach to Due Process* (R. Brooke Lewis, Project Chair, the Lexington Principles Project, Apr. 1, 2009), available at <http://law.wlu.edu/>

<http://www.lexingtonprinciples.org/images/The%20Lexington%20Principles%20Project/lexingtonprinciples09.pdf>. The Lexington Principles Project produced a 176-page response to “the 9/11 Commission Report’s recommendation regarding the development of a universal approach to the treatment of detainees. *Id.* at 16 (citing THE 9-11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 380 (W.W. Norton & Co. ed., 2004) (authorized edition), available at http://www.9-11commission.gov/report/911Report_Ch12.htm (last visited May 4, 2010)). The Lexington Principles are forty-five principles focused on the Fundamental Right to Physical Liberty and Due Process of Law (Principle 1). Part I: General Provisions contains Principles 1–10 (Principles 2–4, Scope of Application; Principles 5–8, State Responsibility; Principle 9, International Obligation; and Principle 10, Relationship to Other Laws); Part II: Procedural Due Process contains Principles 11–21 (Principles 11–13, General Statement of Procedural Rights; Principles 14–15, Notice; Principles 16–19, Opportunity to be Heard; and Principles 20–21, Fair and Impartial Decision Maker); and Part III: Substantive Due Process contains Principles 22–45 (Principle 22, General Statement of Substantive Rights; Principles 23–25, Prohibition of Arbitrary Deprivations of Physical Liberty; Principles 26–29, Prohibition of Incommunicado Detention; and Principles 30–39, Prohibition of Offenses to Personal Welfare and Human Dignity). *Id.* at 12–13. The majority of the forty-five Lexington Principles are implemented within the overall detention policy of JTF 435. For example, Principle 33—the Right to Communicate with Relatives; Principles 44—the Right to Adequate Healthcare, Nutrition, and Exercise; and Principle 45—the Right to Religious Observance, to name a few, are all implemented within the DFIP.

²⁴² RULES, *supra* note 198, at 344 (discussing Rule 99 of the ICRC’s Customary International Humanitarian Law study).

²⁴³ *Id.* at 344–46 (referring to Rule 99).

²³⁴ Jonathan Adams, *Deadliest Month Yet for NATO in Afghanistan*, CSMONITOR.COM, June 29, 2010, available at <http://www.csmonitor.com/World/terrorism-security/2010/0629/Deadliest-month-yet-for-NATO-in-Afghanistan>. The statistics in the article are attributed to icasualties.org. There were 101 deaths in June 2010, compared to 51 in May 2010. Overall, for 2010, there have been 320 deaths compared to 520 for all of 2009. Since the war in Afghanistan began in 2001, there have been 1890 total deaths (including 1149 U.S. deaths). See Operation Iraqi Freedom and Operation Enduring Freedom Casualties, <http://icasualties.org/> (last visited 30 June 2010).

²³⁵ See *supra* note 134 and accompanying text.

²³⁶ See SEBASTIAN JUNGER, *WAR* (2010); CRAIG MULLANEY, *THE UNFORGIVING MINUTE* (2009); DOUGLAS STANTON, *HORSE SOLDIERS* (2009); JON KRAKAUER, *WHERE MEN WIN GLORY* (2009); SEAN NAYLOR, *NOT A GOOD DAY TO DIE* (2004). Additionally, the author recommends AHMED RASHID, *TALIBAN* (2001) as required reading for anyone deploying to Afghanistan.

anyone—it is only detaining those that meet the 13 March 2009 definitional framework²⁴⁴—yet, the provisions cited in the Rule 99 study are instructive. Comparing all of the relevant provisions for security internees and due process the United States considers customary international law,²⁴⁵ in combination with U.S. laws, regulations, and policies, four general concepts emerge:

- (1) prompt notice to the detainee of the reasons for the detention;
- (2) prompt opportunity to be brought before an impartial tribunal;
- (3) meaningful opportunity to challenge the basis for detention; and
- (4) assignment of a qualified representative to assist with (1) through (3).

Additionally, in June 2005, Jelena Pejic, an ICRC Legal Advisor, published an informative article²⁴⁶ describing five general principles²⁴⁷ and the following twelve procedural safeguards for internment or administrative detention:

²⁴⁴ See *supra* notes 86 and 87.

²⁴⁵ See Memorandum from W. Hays Parks et al., to Mr. John H. McNeill, Assistant Attorney Gen. (Int'l), Office of the Sec'y of Def., 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (May 9, 1986), reprinted in LAW OF WAR DOC. SUPP., *supra* note 8, at 223 (recognizing art. 75, AP I, as customary international law).

²⁴⁶ Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. OF THE RED CROSS 375-91 (June 2005). Pejic “proposes a set of procedural principles and safeguards that should—as a matter of law and policy—be applied as a minimum to all cases of deprivation of liberty for security purposes.” *Id.* at 375 (noting that the author’s opinions in the article are not necessarily those of the ICRC). Pejic bases her proposal on a number of legal sources, all of which are discussed in this article, and highlights the fact that the existing bodies of law do not “specify the details of the legal framework that a detaining authority must implement” when interning a person for security purposes. *Id.* at 377. The applicable law that serves to inform the Pejic’s proposal includes GC IV, article 75 of AP I, Common Article 3, articles 5 and 6 of AP II, customary IHL, and human rights law (as a complementary source to the law of armed conflict). *Id.* at 377. See also *supra* notes 8 and 12 (discussing AP I, AP II, and GC IV). When applying the principles derived from these numerous legal sources, Pejic acknowledges situations of internment in non-international armed conflict where GC IV and AP I would not be applicable per se. See Pejic, *supra*, at 380-81.

²⁴⁷ The five general principles applicable to internment/administrative detention include the following:

- (1) internment/administrative detention is an exceptional measure
- (2) internment/administrative detention is not an alternative to criminal proceedings
- (3) internment/administrative detention can only be ordered on an individual case-by-case basis, without discrimination of any kind
- (4) internment/administrative detention must cease as soon as the reasons for it cease to exist
- (5) internment/administrative detention must conform to the principle of legality.

Pejic, *supra* note 246, at 380–83.

- (1) Right to information about the reasons for internment/administrative detention;
- (2) Right to be registered and held in a recognized place of internment/administrative detention;
- (3) Foreign nationals in internment/administrative detention;
- (4) A person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention;
- (5) Review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body;
- (6) An internee/administrative detainee should be allowed to have legal assistance;
- (7) An internee/administrative detainee has the right to periodical review of the lawfulness of continued detention;
- (8) An internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person;
- (9) An internee/administrative detainee must be allowed to have contacts with—to correspond with and be visited by—members of his or her family;
- (10) An internee/administrative detainee has the right to the medical care and attention required by his or her condition;
- (11) An internee/administrative detainee must be allowed to make submissions relating to his or her treatment and conditions of detention; and
- (12) Access to persons interned/administratively detained.²⁴⁸

²⁴⁸ *Id.* at 384–91. These twelve procedural safeguards are taken verbatim from the article. Each safeguard includes a detailed analysis, describing the purpose and legal support for the rule. While most are self-explanatory based on the descriptive titles of the safeguards, a few require additional comment here. For the third rule regarding foreign nationals, the national authorities of the person interned must be informed, unless the person concerned does not want his country informed. If there are diplomatic relations, the foreign government must be allowed to communicate and visit with their nationals. *Id.* at 385. The fifth rule regarding review by an “independent and impartial body” garnered the longest analysis by the author, and her discussion focused on whether such a body should be a court or an administrative board. Using a GC IV analysis, the author concludes that in an international armed conflict, either is authorized; however, there is a strong preference for a judicial proceeding over an administrative one. *Id.* at 386–87. While GC IV provides an option in an international armed conflict (court or administrative board), the author is quite precise in her opinion that in a non-international armed conflict, there is no option—that is, human rights law “unequivocally require[s] that challenges to the lawfulness of internment/administrative detention be heard by a court.” This opinion is based on Article 9 of the ICCPR that requires proceeding before a court. *Id.* at 387. See also ICCPR, *supra* note 182, art. 9(4). Another point made by the author, when considered in conjunction with Rule 99 of the ICRC Customary International Humanitarian Law

As detailed and described earlier in this article, the new DRBs require all four of the procedures listed after the discussion of Rule 99 above. Also, with two exceptions—the appointment of a lawyer and having a judicial body make the initial determination—the DRBs also comply with virtually all twelve of the procedural safeguards listed in Jelena Pejic’s paper. The July 2009 policy directs the implementation of procedures to ensure these fundamental guarantees are provided.²⁴⁹ In March 2010, JTF 435 further supplemented the July 2009 policy by including more procedural due process protections to the detainees.²⁵⁰ When considering the totality of the protections afforded by the DRBs in an active theater of combat, and in light of the two authoritative ICRC studies discussed above, it becomes apparent that the DRBs substantially adhere to all safeguards that could be considered customary international law and even those advanced by human rights advocates.

Yet, despite the addition of numerous procedural safeguards described throughout this article, human rights advocates aware of the new procedures remain critical.²⁵¹ One particular criticism of the DRB process is a comparison to the CSRT process. In particular, in November 2009, Amnesty International (AI) posted an article on its website stating that the new DRB guidelines (from the July 2009 policy) were “unnervingly reminiscent of the Guantanamo [CSRTs], which are farcical at best.”²⁵² While the federal courts have determined the CSRT process was inadequate,²⁵³ and comments were made on the system of review in Afghanistan prior to the DRBs,²⁵⁴ AI’s direct comparison of

study, is that if the body that hears the case orders a release, then the person must be released and continued internment or detention after a release order is considered to be a case of arbitrary detention. Pejic, *supra* note 246, at 387. The references in the sixth (legal assistance) and eighth (legal representation) rules listed in the text contemplate a lawyer to fill these roles. In the analysis following the sixth rule, the author immediately highlights the fact that “[n]either humanitarian nor human rights treaty law explicitly provide for the right to legal assistance for persons interned or administratively detained (that right is guaranteed to persons subject to criminal charges).” *Id.* at 388. The author then notes, however, that the “right to effective legal assistance is thus considered to be an essential component of the right to liberty of person.” *Id.* Similar comments are made with respect to the eighth rule. *Id.* at 389. Finally, for the twelfth rule, the ICRC must be allowed access to the detainees, and in some limited circumstances, the U.N. Commission on Human Rights must also be allowed access to places of detention. *Id.* at 391.

²⁴⁹ Detainee Review Procedures, *supra* note 95.

²⁵⁰ JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82.

²⁵¹ See, e.g., *Undue Process*, *supra* note 5; *Fixing Bagram*, *supra* note 5 (two articles submitted by Human Rights First in November 2009 after the DRB process was initiated in accordance with the July 2009 policy).

²⁵² *The “New” Bagram Unveiled: But Will There Be Change?*, Nov. 23, 2009, available at <http://www.amnesty.org.au/hrs/comments/22159/> [hereinafter *The “New” Bagram*].

²⁵³ *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008). For a full discussion of the *Boumediene* Court’s analysis of the CSRTs, see *supra* note 38.

²⁵⁴ *Maqaleh v. Gates*, No. 09-5265, 2010 U.S. App. LEXIS 10384, at *30 (D.C. Cir. May 21, 2010). For a full discussion of the *Maqaleh* court’s analysis of the CSRTs in comparison to the UECRBs in place in

the DRBs to the CSRTs was an uninformed analogy. In addition to a premature, inaccurate assessment that evidence derived from torture or cruel, inhuman, or degrading treatment could be used at the DRB hearing, another element of sharp criticism was directed at the detainee’s ability to call witnesses, which claimed (again prematurely) that “it has become apparent in similar circumstances, such as those who have gone through the [GTMO CSRTs], that three quarters of all requests were denied.”²⁵⁵

Amnesty International, one of the world’s leading human rights organizations, has unfairly compared the DRBs to the CSRTs. On the two important points mentioned above, first, evidence derived from torture or cruel, inhuman, or degrading treatment is prohibited at the DRBs,²⁵⁶ and second, witness involvement, particularly Afghan witness participation, is flourishing at the DRBs.²⁵⁷ On the latter point, with respect to Afghan witnesses, consider item nine in Jelena Pejic’s list of procedural safeguards described above: that an internee/administrative detainee must be allowed to have contacts with—to correspond with and be visited by—members of his or her family.²⁵⁸ The fact that more than 400 Afghan witnesses have appeared in person to participate in the DRBs between March and June 2010 clearly distinguishes the DRBs in Afghanistan as a much-improved process from the CSRTs at GTMO. Interestingly, the safety of GTMO, far removed from the battlefield, essentially negated the appearance of family members from the CSRTs. Yet, despite the dangers posed by the insurgency in Afghanistan, the close connection to the community, in time and location, has facilitated the presence of hundreds of witnesses at the DRB hearings. As JTF 435 continues to operate the DRB hearings in an open and transparent manner, including the invitation of human rights organizations to observe the boards, perhaps those commentators will realize that their comparisons to the CSRTs have been misplaced.

While much attention has been given to human rights organizations and the question of whether the DRBs have gone far enough to protect the rights of detainees, there is always the perspective of those who, after reading this article, may ask: Has the process gone too far? The death toll of coalition forces has been documented here (more than 100 in June 2010),²⁵⁹ as well as the number of detainees released through the DRB (approximately 14%, or 194 individuals, between mid-September 2009 and mid-June

Afghanistan as the system of review for the *Maqaleh* petitioners, see *supra* note 40.

²⁵⁵ *The “New” Bagram*, *supra* note 252.

²⁵⁶ See *supra* note 169.

²⁵⁷ See *supra* note 176.

²⁵⁸ See *supra* note 248 and accompanying text.

²⁵⁹ See *supra* note 234.

2010).²⁶⁰ There are difficult questions at the heart of this discussion: What if one bad actor gets released because the process has gone too far? Are there costs to applying these more stringent procedures in the combat zone during a time of on-going hostilities? How much risk is acceptable when that risk could result in the death of U.S. or coalition servicemembers or innocent Afghan civilians? Because empirical data indicating how many of the 194 detainees that were released have returned to the fight is not available, this article does not attempt to answer these difficult questions on acceptable risk.

In a counterinsurgency campaign, such as the one being waged in Afghanistan, it is commonly assumed that troops are inherently at more risk. Does the DRB process contribute to or decrease this risk? As part of its efforts to separate rumor from fact on questions of recidivism, in June 2010, JTF 435 hosted its first “post-release shura” for detainees in the eastern provinces that had been reintegrated by JTF 435 through DRBs. Detainees answered questions about whether they had been approached by insurgent groups, whether they had found jobs, whether mentors or family continued to support them, and whether government assistance had been made available. It is one indicator of DRBs’ contribution to COIN that 51 former detainees of the 120 reintegrated to that point by JTF 435 came to the shura on only three days’ notice. Although JTF 435 provides payments to defray the expenses of attendance, travel can present a hardship for former detainees, who sometimes cross multiple provinces to participate in such events. Joint Task Force 435 continues to track the activities of other former detainees and plans to hold a similar shura in the south to facilitate attendance by those captured and released in the southern provinces of Helmand, Kandahar, and Zabul.²⁶¹

In *Boumediene v. Bush*, Chief Justice Roberts described the CSRT procedures as “the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants.” Appreciating the fact that Chief Justice Roberts’s quote came in the dissent, it would be interesting to hear the Chief Justice’s thoughts on the protections afforded by the DRBs. When the four concepts described after Rule 99 above are implemented in a robust and transparent manner, and the twelve procedural safeguards described in the Pejic article are substantially complied with, the validity of the overall DRB process can withstand the scrutiny of the international community, human rights advocates who apply IHRL to detention operations in Afghanistan and perhaps, someday, the United States Supreme Court.

²⁶⁰ See *supra* note 141.

²⁶¹ E-mail from BG Mark Martins, Deputy Commander, JTF 435, Parwan, Afg., to author (7 July 2010, 01:24 EST) (on file with author). See also *supra* note 141.

V. Conclusion

The relatively short history of review boards in Afghanistan from May 2002 through July 2009 reveals that detainees interned by U.S. forces severely lacked due process protections by any standard. As a result, detention operations developed into a strategic liability for U.S. forces. However, as Vice Admiral Harward noted,

[It is] important, if you look at detention operations over the last eight years, they’ve been in support of a [counter-terrorism] strategy, a CT campaign. [W]e’re shifting to a COIN strategy. [D]etention operations will support that strategy and [they are] in line with [the COIN] objective in the campaign plan.²⁶²

Recognition that a change was needed to support the COIN strategy resulted in a major transformation of the detention review paradigm in Afghanistan. Beginning with President Obama’s January 2009 Executive Order to review detention policy and the creation of the special task force through the Secretary of Defense’s new Detainee Review Procedures mandated in July 2009, the conditions were set to establish a new and improved fair and transparent review process.

With the baseline procedural and substantive rules established, the next critical phase was the rapid implementation of those rules by September 2009. During the fall of 2009, while a new detention facility and new task force were being created and built to take over all U.S. detention operations in Afghanistan, a small group of individuals got the new DRBs up and running in less than 60 days from notification.

Although without a full complement of required personnel, JTF 435 commenced operations in January 2010 in the new DFIP. Several of the detainees’ primary complaints were immediately resolved: living conditions and notification. The \$60 million DFIP solved the former, and appointment of PRs and an established notification process solved the latter. In a continuous self-assessment process since it stood up in January, the Legal Operations Directorate has constantly sought ways to improve its internal processes. The focus has been, and remains, making the DRBs a robust and transparent process, while maintaining efficiencies despite the need to conduct sixty-day or six-month review boards for the nearly 900 DFIP detainees.

As new personnel continue to flow into the Legal Operations Directorate, the continuing need for training competes with the seemingly endless stream of DRBs.

²⁶² Harward Transcript, *supra* note 104, at 10.

Despite these challenges, the DRB leadership and staff continue to execute the mission. The board results reflect that fact that the process is far from a “rubber-stamp.” Approximately one-third of all DRB cases have resulted in a recommendation for release or transfer to the Afghan Government for prosecution or reconciliation.²⁶³ Professional officers, lawyers, and non-lawyers understand and apply the criteria to ensure the appropriate decisions are made in each case.

A survey of the current scholarship on detention review only highlights the fact that reasonable minds will differ on a controversial topics such as detention and due process in the Global War on Terrorism. Until Congress enacts a legal framework for detention review in Afghanistan, or until the Supreme Court rules definitively on the issue of due process for detainees in Afghanistan, the U.S. military is guided by the Executive Branch’s policies as defined by the Secretary of Defense’s July 2009 Detainee Review Board Procedures and JTF 435’s March 2010 Detainee Review Board Policy Memorandum, both of which are informed by (but also go well beyond what is required by) the LOAC and Common Article 3.

The numerous protections provided DFIP detainees before and during the DRB, an administration review of detention, have established a new precedent in the realm of “due process” in the combat zone. With the assistance of a PR, detainees are now afforded more substantive and procedural safeguards than a potential prisoner of war would

receive in an international armed conflict. Operating in a COIN environment, all personnel involved in the process are incentivized to ensure no detainee is wrongly interned or interned any longer than necessary to mitigate the threat.

Detainee Review Boards are, and continue to be, a work in progress. Progress will be made as long as the DRBs are implemented in a robust manner with particular care to present more unclassified evidence to the board in the presence of the detainee. While criticism will undoubtedly persist due to the controversial nature of the subject matter, the DRBs are an undisputed improvement over the review boards that operated from 2002 through mid-2009. Greater transparency and stronger due process protections are slowly transforming the former strategic liability of detention operations into a legitimate practice worthy of respect by the Afghan people and by fair-minded observers from the many countries with a stake in Afghanistan’s future.

²⁶³ See *supra* note 141.

Appendix A

YEARS	REVIEW BOARD	VOTING MEMBERS	TYPE OF REVIEW	AVERAGE NUMBER OF DETAINEES IN BAGRAM
May 2002–May 2005 Bagram Collection Point (BCP)	Detainee Review Board (DRB)	Total: 10 (approx.). <ul style="list-style-type: none"> • CJ2 • MI • MP • CITF • Legal Advisor 	File review to determine if: Enemy Combatant; Transfer to GTMO (until Sep.22, 2004); Intel Value 90-day and annual reviews in JOC	100 (2002–03) 200 (2003–04) 300 (2004–05) *Transfers to GTMO stopped in Sep. 2004
June 2005–Jan. 2007 Bagram Theater Internment Facility (BTIF)	Enemy Combatant Review Boards (ECRBs)	Total: 5. <ul style="list-style-type: none"> • Deputy G2 • BTIF MI Bn Cdr • BTIF MP Bn Cdr • MP Bde Dep Cdr • Legal Advisor 	Meet Enemy Combatant criteria; consider intel value and threat level 90-day and annual reviews in JOC	500 (2005–06) 600 (2006–07)
Feb. 2007–16 Sept. 2009	Unlawful Enemy Combatant Review Board (UECRB)	Total: 3. <ul style="list-style-type: none"> • CJTF Provost Marshal • BTIF Cdr • Ch, Interrogations 	2/3 vote for release or continued detention; categorize detainees as HLEC, LLEC, NLEC LLEC files to DAB for review Detainee is notified and can appear at initial board (as of April 2008) 75-day & 6-month reviews in BTIF	600 (2007–09) 639 (16 Sep. 2009)
17 Sept. 2009–present Detention Facility in Parwan (DFIP) opened on 16 December 2009	Detainee Review Board (DRB)	Total: 3. <ul style="list-style-type: none"> • Neutral field grade officers detailed by Convening Authority 	2/3 vote for meets criteria and continued internment Procedures detailed in article Afghan witnesses first appear in April 2010 60-day review and 6-month review	753 detainees transferred to DFIP (15 Dec. 2009) (last day in BTIF) 892 (18 June 2010)

Appendix B

The DRB Short Courses

In November 2009, the leadership of the U.S. Army Judge Advocate General's Corps approved a concept for The Judge Advocate General's Legal Center and School (LCS) to assist in training personnel assigned to the new Detainee Review Boards. After initial discussions, it was determined that two faculty members from the LCS would coordinate with JTF 435 and the Legal Operations Directorate to create a thirty-five-hour "short course" to cover the full spectrum of detention operations, with a focus on the procedures of the actual DRBs. In creating this course, the faculty members, the author, and Major (MAJ) James Barkei, Associate Professor, Administrative and Civil Law Department, received guidance from Brigadier General Martins and then coordinated and consulted with LTC Mike Devine, Deputy Director, JTF 435 Legal Operations Directorate; personnel from the Office of Secretary of Defense (OSD) Detainee Policy Branch (Mark Stamilio and Olivia Armenta); and the Open Society Institute (OSI) (Jon Horowitz) to ensure the course captured multiple perspectives. The end result was the 1st DRB Short Course conducted in Afghanistan over the course of three and a half days from 1 February to 4 February 2010.

The target audience was DRB recorders, personal representatives (PRs), and legal advisors. These personnel made up about half of the total audience of approximately thirty-five students. Additional students included board (court) reporters, intelligence analysts, investigators, detention facility personnel, and one board member. Non-TJAGLCS instructors (who combined to provide approximately eighteen hours of instruction) included personnel from: the International Committee of the Red Cross (ICRC); the Office of the Secretary of Defense (Policy) (via SVTC); Open Society Institute (via VTC); Office of Administrative Review of Detained Enemy Combatants (OARDEC); forensics experts (from the Combined Explosives Exploitation Cell (CEXC) and the Joint Expeditionary Forensics Facility (JEFF) labs at Bagram); Afghan legal counsel; intelligence analysts; interrogators; interpreters; investigators; battle space operators; polygraphists; behavioral sciences experts; and members of TF Protector (MP Brigade prison personnel).²

The LCS instructors combined to provide seventeen hours of instruction on topics ranging from LOAC to administrative board procedures to basic advocacy. Local instructors also included personnel experienced in the DRB process, such as Captain Andrea Saglimbene, a current recorder (CPT Paul Arentz), and the Officer-in-Charge (OIC) of the Personal Representatives (MAJ Todd Tappe). The training included tours of the DFIP and the CEXC and JEFF labs.

In June 2010, the author returned to Afghanistan for the 2d DRB Short Course, which was conducted over five days from 17 June to 21 June 2010. With a few caveats, the curriculum for the 2d DRB Short Course was substantially similar to the 1st DRB Short Course. The LCS taught sixteen of the thirty-five hours of instruction. Once again, utilizing current practitioners as instructors was vital to the course's success. Expert instruction was provided by Captain Kathy Denehy, Recorder Cell OIC; Captain Kim Aytes, Senior Recorder; and Lieutenant Commander Shane Johnson, Detainee Assistance Cell OIC. The June course had the same target audience as the February course; however, the number of attendees doubled from about thirty-five to seventy. The same non-LCS presenters noted above participated, and one very well-received block of instruction—Constitutional and Statutory Framework for Detention—was presented via video teleconference (VTC) by Professors Matt Waxman and Trevor Morrison of Columbia Law School, New York. As part of the rule of law effort and goal of transitioning the DFIP to Afghan authorities in 2011, one big change to the course was the addition of Afghan partners—judges, prosecutors, investigators, and Afghan Army personnel—who sat through fourteen hours of instruction, lead primarily by two instructors from the Defense Institute of International Legal Studies (DIILS): Mr. John Phelps and Major Christian Pappas. Although some classes were combined classes—including Detainee Litigation in the U.S. Federal Courts, which was taught by the author, Afghan Law and Due Process, which was taught by an Afghan attorney, and a class presented by the DFIP personnel in charge of Reintegration Programs—the majority of classes for the Afghan participants were held in a separate classroom due solely to translation issues. The separate Afghan partner classes included Human Rights Law, Internal Armed Conflict and Terrorism, the Law of Armed Conflict, and the Rules for the Use of Force taught by DIILS. The author also had an opportunity to lead a Comparative Law class on investigations with the judges and prosecutors.

² Lieutenant Colonel Jeff Bovarnick & Major James Barkei, Detention Review Board (DRB) Recorder and Personal Representative Training: Executive Summary (9 Feb. 2010) (on file with author).

Appendix C³

September		October		November		December	
17 Sep	26	1 Oct	28	5 Nov	27	2 Dec	16
24 Sep	26	8 Oct	26	11	20	3 Dec	14
		15 Oct	27	12 Nov	20	9 Dec	16
		22 Oct	26	18 Nov	19	10 Dec	15
		29 Oct	27	19 Nov	19	16 Dec	16
				25 Nov	20	17 Dec	16
				27 Nov	20	23 Dec	15
						24 Dec	13
						30 Dec	15
						31 Dec	16
TOTA	52		134		145		152

January		February		March 2010		April 2010		May 2010		June 2010	
6 Jan	16	6 Feb	15	1 Mar [†]	10	1 Apr	5	1 May	6	2 Jun	8
7 Jan	15	9 Feb	15	2 Mar	3	3 Apr	5	3 May	8	3 Jun	9
13 Jan	15	10	15	3 Mar	10	5 Apr	8	4 May	8	5 Jun	9
14 Jan	15	11	15	4 Mar	8	6 Apr	11	5 May	8	7 Jun	10
20 Jan	16	16	15	6 Mar	10	7 Apr	4	6 May	6	9 Jun	10
21 Jan	16	17	14	8 Mar	9	8 Apr	8	8 May	5	10 Jun	10
25 Jan [†]	15	18	15	10 Mar	10	10 Apr	7	10 May	10	12 Jun	10
28 Jan	15	23	15	11 Mar	9	12 Apr	7	11 May	6	14 Jun	10
30 Jan	15	24	15	13 Mar	10	13 Apr	9	12 May	7	15 Jun	10
		25	15	15 Mar [§]	6	14 Apr	7	13 May	10	16 Jun	10
				16 Mar	7	15 Apr	10	15 May	7	17 Jun	2
				17 Mar	9	17 Apr	10	17 May	7		
				18 Mar	10	19 Apr	7	18 May	6		
				20 Mar	7	20 Apr	5	19 May	5		
				22 Mar	5	21 Apr	7	20 May	8		
				23 Mar	10	22 Apr	9	22 May	4		
				24 Mar	9	24 Apr	4	24 May	8		
				25 Mar	10	26 Apr	7	25 May	7		
				27 Mar	9	27 Apr	5	26 May	5		
				29 Mar	10	28 Apr	5	27 May	6		
				30 Mar	6			29 May	9		
								31 May	7		
TOTA	13		149		187		140		153		98

Overall total of DRBs from 17 September 2009 through 8 June 2010 = 1344. Beginning on 17 March 2010 (six months after the start of the DRBs), there have been ninety-two “second look” DRBs where a detainee has now appeared before a DRB twice.

- * DRBs are held two days per week
- † DRBs are held three days per week
- ‡ DRBs are held five days per week
- § Two separate DRB panels

³ See app. A. All data is compiled from the “Super Tracker.”

Teaching a Law of War Class

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Introduction

When I was a managing editor of the *Saint Louis University Law Journal* in 2001, I had the privilege of working on an issue on teaching property law. This issue, part of an annual series on teaching specific areas of the law, was aimed at helping professors teach the basic property law course.¹ My experience as an editor for the issue gave me a great appreciation for the value of articles aimed at helping teachers teach specific classes. Because I do not expect the *Saint Louis University Law Journal* to publish an entire issue on teaching the law of war² anytime soon, I offer this brief article to assist teachers who either are teaching or are considering teaching a survey class on the law of war. Also, by submitting this article for publication in *The Army Lawyer*, I hope it may inspire military judge advocates, especially those in the Reserve component, to consider teaching a law of war class as adjunct professors at American law schools. By teaching this course, Army (and other service) lawyers can do a great service to law schools and students at a time when interest in the law of war is high and understanding low.³ In addition, their presence in the classroom can help recruit and mold potential members of our Judge Advocate General's Corps by introducing law students to this dynamic and exciting area of law and practice.

¹ See 44 ST. LOUIS U. L.J. 1193 (2000) (on teaching contracts); 45 ST. LOUIS U. L.J. 709 (2001) (on teaching torts); 46 ST. LOUIS U. L. J. 561 (2002) (on teaching property); 47 ST. LOUIS U. L.J. 3 (2003) (on teaching civil procedure); 48 ST. LOUIS U. L.J. 1143 (2003–2004) (on teaching criminal law); 49 ST. LOUIS U. L.J. 633 (2004–2005) (on teaching constitutional law); 50 ST. LOUIS U. L.J. 995 (2005–2006) (on teaching evidence); 51 ST. LOUIS U. L.J. 935 (2006–2007) (on teaching professional responsibility and ethics); 52 ST. LOUIS U. L.J. 715 (2007–2008) (on teaching intellectual property law); 53 ST. LOUIS U. L.J. 693 (2008–2009) (on teaching federal courts).

² This article uses the term “law of war” to describe the body of law that regulates a state’s conduct of hostilities. This body of law is also referred to as the law of armed conflict (LOAC) and international humanitarian law (IHL).

³ After 11 September 2001, law student and faculty interest in the law of war has increased substantially; however, coverage in U.S. law schools remains limited. According to a recent study conducted by the International Committee of the Red Cross and The American University Washington College of Law, only thirty-five of seventy-three law schools polled (less than half) offered a stand-alone course in the law of war or international humanitarian law (IHL). HADAR HARRIS, AM. UNIV. WASH. COLL. OF LAW, & LIZ DEMAREST, INT’L COMM. OF THE RED CROSS, TEACHING INTERNATIONAL HUMANITARIAN LAW AT U.S. LAW SCHOOLS 7–8 (n.d.) [hereinafter TEACHING IHL AT U.S. LAW SCHOOLS], available at <http://www.wcl.american.edu/humright/center/documents/IHLSurveyReort.pdf?rd=1>.

As a professor in the International and Operational Law Department (ADI)⁴ at The Judge Advocate General’s Legal Center and School (TJAGLCS), I teach a two-credit law of war class entitled “Advanced Topics in the Law of War” to an outstanding group of judge advocates and University of Virginia (UVA) law students each year. This course is always popular among the TJAGLCS LL.M. students and tends to draw the best and brightest, and most operationally experienced, members. In addition, having UVA law students in the class is both a great plus and a challenge because it means the class is composed of students with vastly different experience levels—from 1Ls with no previous exposure to the law of war to experienced judge advocates coming off their second or third deployment where they advised commanders on the law of war. Typically between fifteen and thirty members are enrolled in the class, with the ideal class size being at the lower end of that range. The class meets weekly for two hours for fourteen weeks beginning in January. In this article, I will discuss class structure, class materials, conducting the class, and evaluation. However, before I get into the nuts and bolts of the class, I would like to spend a few moments describing the reasons for teaching a survey class on the law of war.

Why Teach a Law of War Survey Course?

Obvious reasons exist for teaching a law of war class at TJAGLCS, which I will not belabor. If you are a law professor, or perhaps a judge advocate looking to get involved in teaching, you should consider teaching such a class. One need not spend much time reading the headlines of major newspapers to realize the significance of this body of law to a host of matters affecting our national security, particularly post-9/11. As I write this article, members of Congress are debating whether the Obama Administration should have detained and interrogated Christmas bomber Umar Farouk Abdulmutallab as an enemy combatant under the law of war or arrested and Mirandized him as a criminal

⁴ The International and Operational Law Department (ADI) at The Judge Advocate General’s Legal Center and School is the only department of its kind in the world. This is partly because The Judge Advocate General’s Legal Center and School is the only school of its kind in the world. The ADI is one of four departments at the school dedicated to a particular subject matter—in this case, international and operational law. The ADI is composed of operationally experienced judge advocates from all four services (Army, Navy, Air Force, and Marines) and aims to prepare judge advocates, our primary student population, to advise commanders and train servicemembers on law of war matters.

under U.S. domestic law. Newspapers are reporting on civilian casualties associated with targeted killings in Pakistan and airstrikes in Afghanistan. The 9/11 mastermind Khalid Sheikh Mohammed is awaiting a decision whether his trial will be in federal court or a military commission while the men responsible for the USS *Cole* attack await their trials by military commission at a location yet to be determined. States are turning more and more to robots and the tools of cyberspace to carry out attacks to which the application of the laws of war is unclear. Since 9/11, hardly a day has gone by without a major news story that does not in some way have a law of war component or question embedded within it.

Despite this, based on a recent survey conducted by the International Committee of the Red Cross (ICRC) and The American University Washington College of Law, less than half of U.S. law schools offer a stand-alone course on the law of war.⁵ Instead, as reported in the study, it is more common to include some limited coverage of the law of war in a course on public international law or national security law.⁶ Interest in national security law or international law courses, which may include a lesson or two on the law of war,⁷ demonstrates American law students' desire to understand the difficult legal issues contained in the news stories I describe above. However, I would argue that a lesson or two in a national security law or international law course is insufficient for the average law student to gain the kind of nuanced understanding of the law of war that might equip him or her to apply it correctly as a lawyer, judge advocate, or policy-maker. For this reason, I must recommend teaching the law of war as its own stand-alone class. I will now discuss the class materials, structure, conduct, and evaluation of such a course.

Class Materials

To successfully teach a stand-alone law of war class, I would recommend, at a minimum, that teachers use a documentary supplement that includes all of the main law of war treaties and a comprehensive casebook or text book that includes a narrative description of the history, sources, and principles of the law of war. Teachers may also decide to create a separate course supplement that includes selected pieces of the most up-to-date scholarship, reports, and articles on the law of war and its contemporary application. The ADI publishes its own documentary supplement, which

is available online through the Library of Congress website;⁸ however, there are other good supplements available for purchase.⁹

Unfortunately, very few comprehensive law of war textbooks are available. In fact, the study on teaching international humanitarian law (IHL) at U.S. law schools noted the lack of materials as a key impediment to the teaching of IHL.¹⁰ Fortunately, this void is beginning to be filled with the recent publication of Gary Solis' book, *The Law of Armed Conflict: International Humanitarian Law at War*,¹¹ and the upcoming publication of a casebook entitled *International Humanitarian Law*¹² edited by Professors Ryan Goodman, Derek Jinks, and Michael Schmitt. The two textbooks that I am most familiar with, Marco Sassoli's *How Does Law Protect in War*¹³ and Gary Solis's book are both solid texts with different strengths and weaknesses. This year, I used Solis's new book with a good deal of satisfaction; it is relevant, comprehensive, and very accessible. In his preface, Solis explained the purpose of the book is to "introduce law students and undergraduates to the law of war in an age of terrorism."¹⁴ In addition, Solis acknowledged that his book is a "United States-weighted text that incorporates lessons and legal opinions from jurisdictions worldwide."¹⁵ If there is a weakness to Solis's text it is that some of the case excerpts included at the end of each chapter are truncated, with very few associated discussion questions. In this sense, it is less of a casebook than it is a narrative text. *How Does Law Protect in War*, the text I used prior to this year, is a more traditional law school casebook. This two-volume text is designed specifically for teaching the law of war. In fact, Volume I is a teacher's guide with narrative text written by Marco

⁸ INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT (2009), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-of-war-documentary-supplement_2009.pdf. This is only one of many great sources on the Library of Congress's Military Legal Resources website. The resources that prospective teachers and scholars can find on this website include war crimes materials, Geneva Conventions materials, and even entire electronic copies of books, such as MARCO SASSOLI & ANTOINE A. BOUVIER, *HOW DOES LAW PROTECT IN WAR* (2d ed. 2006) and FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* (3d ed. 2001) (both books are under the Geneva Conventions materials). See Library of Congress, Military Legal Resources, http://www.loc.gov/rr/frd/Military_Law/ (last visited May 17, 2010).

⁹ E.g., DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) (recommendation by the author).

¹⁰ TEACHING IHL AT U.S. LAW SCHOOLS, *supra* note 3 at 8.

¹¹ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW AT WAR* (2010).

¹² INTERNATIONAL HUMANITARIAN LAW (Ryan Goodman et al eds., Oxford University Press) (forthcoming Sept. 2011).

¹³ SASSOLI & BOUVIER, *supra* note 8.

¹⁴ *Id.* at preface.

¹⁵ *Id.*

⁵ TEACHING IHL AT U.S. LAW SCHOOLS, *supra* note 3, at 9.

⁶ *Id.* at 9-10. Professor Scott Silliman of the Duke University School of Law has written that student interest in National Security Law is as strong as ever. Scott L. Silliman, *Teaching National Security Law*, 1 J. NAT'L SEC. L. & POL'Y 161, 162 (2005).

⁷ For example, Professor John Norton Moore's course in national security law at the University of Virginia School of Law devotes two class periods to the law of war.

Sassoli and Antoine Bouvier, and volume II is a collection of more than 200 cases and reports, each followed by discussion questions.

Because *How Does Law Protect in War* contains cases that I want my students to read, as well as excerpts from certain Geneva commentaries and important law review articles, I typically compile a separate course supplement containing additional class readings. Some of these readings are required while others are supplemental or optional. Especially when using a text as up-to-date as Solis's text, a teacher may rely on the textbook and documentary supplement without creating a separate course supplement.

Structuring the Class

As mentioned above, my law of war seminar class is a two-credit elective that meets fourteen times for two hours each session. I divide these fourteen sessions up into the following three broad areas of the *jus in bello*:¹⁶ (1) Scope and Application of the Law of War; (2) "Hague Law"; and (3) "Geneva Law." In the "scope and application" portion of the class, we begin by exploring the philosophy of regulating the law of war and how this unique body of law is at the "vanishing point" of international law. We then spend a day looking at the history and principal sources of the law of war, followed by two weeks discussing the "triggering clauses" of the law of war. Our examination of these clauses involves a close look at the United States' objections to Additional Protocol I, the nature and application of Common Article 3 to the Geneva Conventions, and the law governing noninternational armed conflicts, the most prominent type of conflict today. We conclude our examination of the scope and application of the law of war by examining how the law of war interfaces with international human rights law and whether and to what degree it is the appropriate body of law to govern the United States response to modern transnational terrorism.¹⁷

Next, we turn our attention to "Hague law," also known as the targeting tradition in the law of war. Perhaps because the bulk of my students are judge advocates who may soon be advising commanders on targeting decisions, we examine Hague law before examining Geneva law.¹⁸ The Hague law classes are relatively straightforward and are based on the

¹⁶ In a two-credit class, there is simply not enough time to thoroughly cover both *jus ad bellum* and *jus in bello*. Consequently, the focus of my class is on *jus in bello* topics. However, many of the students in my law of war seminar will have also taken my national security law class, which devotes two class sessions to *jus ad bellum* questions.

¹⁷ One might also choose to conclude a course on the law of war with discussions on the application of human rights law and the war on terrorism.

¹⁸ There is another reason for using this order. Hague law deals with the conduct of hostilities (the use of force against pre-submission opponents) whereas Geneva law deals with treatment of post-submission opponents in the hands of the enemy. Hence, studying Hague law before Geneva law provides an order consistent with the typical order of battle.

four core principles of the law of war.¹⁹ Day one is dedicated to military necessity and distinction and the associated targeting concept of military objective; day two is dedicated to proportionality; and day three is dedicated to unnecessary suffering and new technologies (e.g., robots). Our last "Hague law" class is spent examining the targeting of civilians who are directly participating in hostilities. These Hague law classes tend to present some great possibilities to discuss modern developments on the battlefield, as well as issues from recent headlines.²⁰

The course concludes with a two to three week examination of substantive Geneva law, with a focus on the Third and Fourth Geneva Conventions. These classes focus on combatant status issues, modern detention operations, and how the Fourth Geneva Convention protects civilians both in times of conflict and occupation. Tying together the Hague and Geneva traditions, we conclude the class by examining the difference between lawful ruses and unlawful perfidy with a focus on uniform use. Our last class is typically devoted to a discussion of the future of the law of war, often with a guest speaker.

Conducting the Class

I've learned that the best class sessions are the ones in which the students participate most. For this reason, I do my best to foster robust class discussion while also providing enough structure to ensure that students understand, and can apply, the black letter law. To strike this balance, I use a mixture of a lecture and seminar approach. I typically use a short PowerPoint presentation to make preliminary points about the day's subject matter and to structure class discussion. The presentation includes key rules and questions I would like the class to explore. Of course, providing a roadmap does not preclude the class from going down different roads or exploring other questions they have identified.

In order to ensure that students come to class prepared and ready to participate, I allocate class participation points based on both reading and class participation. Half of the class participation points are awarded solely based on completion of assigned readings. The remainder of the class participation points come from actual class participation. For this, I use a technique I call "on-the-hook." Every day, between three and five students are "on-the-hook" for that day's class. This means that they are my primary "targets" for class participation that day. Prior to class, I typically let my "on-the-hook" students know what I would like them to

¹⁹ These principles are military necessity, distinction, unnecessary suffering, and proportionality.

²⁰ For example, my recent class on "Direct Participation in Hostilities" devoted a portion of class discussing the law of war implications of last summer's CIA Predator drone strike against Pakistan Taliban leader Baitullah Mehsud.

focus on (often a supplementary reading) during their class preparation. Sometimes I give them a specific question I expect them to discuss in class. This technique has generated some great class discussions and ensures that all students—even the quiet ones—participate. I also allocate some class participation points to general class participation.

I close each class with a PowerPoint slide providing “concluding observations.” These are basically the main points I want students to “take-away” from the class. Sometimes the list is short; sometimes it is long. Sometimes, I ask the students to add their own concluding observations. In order to tie classes together and reinforce these main points, I always begin the next class with a brief review of the previous week’s “concluding observations.” During my review, I ask the class if they have thoughts or questions related to the previous week. In addition, I use this time to address any questions left unanswered during the previous week or to reiterate main themes from the previous week. Students seem to appreciate this.

Evaluation

I base grades on the following exercises: a short paper (10-14 pages), a “take-home” examination, class participation, and response memoranda. The short paper addresses a topic chosen by the student and gives the student a chance to delve into an area of particular interest to the individual. I work with students to develop their topics and often publish a list of possible topics for their consideration. The “take-home” examination, which I now give to them as a “mid-term,” may be a single essay question, a multi-part question or set of questions. Finally, I require students to write 1-2 page response memoranda considering a certain aspect (or aspects) of the assigned reading where appropriate to foster greater reflection on a particular issue. Of course, I realize my approach may not be best for every professor. A variety of factors affect the choice of an evaluation method, including class size, class make-up, and style of instruction. Professors should use what works best for them given their particular situation.

Conferences and Outside Classes

I encourage professors considering teaching a class in the law of war to attend a conference or class focused on law of war teaching. Each year, the ICRC co-hosts a two-day workshop on teaching IHL.²¹ The ICRC does a great job of partnering with experienced law of war professors to share best practices with each other at the workshop. Because the conference is dedicated to the teaching of IHL at law schools, it provides an excellent forum for gathering ideas

²¹ This year’s workshop occurred in April of 2010 and was co-hosted by the University of California, Berkeley, Boalt Hall School of Law’s Miller Institute for Global Challenges and the Law.

on everything from how to build a syllabus, to teaching methods, to evaluation. In fact, the conference materials include several syllabi from respected law of war teachers. For these reasons, I can think of no better way for a budding law of war professor to prepare for success than to attend a course such as this.

Another useful course is the National Security Law Faculty Workshop hosted by Professor Bobby Chesney, now at the University of Texas at Austin, given in the spring. While slightly broader in scope than the Teaching IHL workshop, Professor Chesney’s workshop involves a substantial law of war component. In fact, this year’s workshop included six hours of law of war instruction provided jointly by the ICRC and the Army JAG School.

Finally, judge advocates and other U.S. Government attorneys should consider attending the Army JAG School’s Operational Law of War Course. This course meets twice annually for two weeks²² and is another great means by which to deepen one’s knowledge of the law of war in preparation for teaching a law of war class.

Conclusion

Whether you are a legal academic interested in developing expertise in the law of war or a judge advocate who is thinking about entering the world of legal academia, teaching a stand-alone law of war class is something I would highly recommend. Recent studies demonstrate that interest in the law of war is extremely high²³ but coverage in U.S. law schools is quite low. This presents an opportunity for both law professors and judge advocates. Anyone who has taught a course at any level knows how much more satisfying it is to teach when students are highly interested in the subject matter. The law of war is a fascinating area of the law, and my experience is that students enjoy studying it. Today, the resources and texts available to aid would-be teachers of such a class are only getting better. Moreover, there are now multiple workshops and other courses designed to help professors prepare to teach the law of war. For these reasons, as well as the importance of this body of law, law professors and judge advocates should both strongly consider how they might serve our nations’ law students by teaching a stand-alone class on the law of war.

²² The Operational Law of War Course is offered yearly in late February and late July.

²³ Law professors polled by the ICRC and The American University Washington College of Law perceived that 96% of law students are interested in legal issues relating to armed conflict. TEACHING IHL AT U.S. LAW SCHOOLS, *supra* note 3 at 8.

Human Rights: Time for Greater Judge Advocate Understanding

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I. Introduction

For any Army judge advocate, and for judge advocates of other services as well, the instruction provided by the International and Operational Law Department at The Judge Advocate General's Legal Center and School follows a familiar pattern, whether provided in the Judge Advocate Officer Basic Course, the Judge Advocate Officer Graduate Course, or short courses, such as the Operational Law of War seminar. After a refresher on general public international law topics and the history of the law of war, a presentation outlines the legal bases for the use of force, or *jus ad bellum*. Turning to *jus in bello*, blocks of instruction are devoted to treatment of non-combatants as set forth by the various Geneva Conventions, followed by a longer individual block on means and methods of warfare, which discusses all aspects of the law related to weapons and targeting. The law of war instruction ends with a class devoted to war crimes. Depending on the course, the instruction then shifts to various operational law topics, such as rules of engagement, rule of law, and information operations.

Sandwiched somewhere in there will be a short block of instruction on human rights law. It contains all the information a judge advocate needs to know to understand the U.S. position on human rights. As discussed below, the class boils down to a few simple points, the overarching one being that human rights law has little to no applicability to operations on the ground, and, therefore, is not a topic about which the average judge advocate need be concerned.

However, the time is coming, if it has not already arrived, when judge advocates will require a more sophisticated knowledge of human rights law, not merely in an academic sense, but also as a practical aspect of operations. This article is offered in the hope of spurring greater interest in this important area of the law.

II. The United States and Human Rights

Human rights is fundamental to the fabric of the United States, and has been since its inception. The Declaration of Independence begins with the well-known words, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and

the pursuit of Happiness."¹ Here was a ringing expression of human rights, applicable to all persons merely as a result of their being human. The Declaration goes on to present a view of government as the guarantor of those rights: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."² While the final clause expresses the preference for a democratic form of government, the preceding clause expresses the Lockean view that a legitimate government has responsibilities to secure human rights to its own people.

The subsequent Constitution was concerned mostly with constructing the governmental apparatus of a representative democracy; the amendments comprising the Bill of Rights were designed to ensure that the Federal Government did not transgress any of the rights expressed therein. Compared to the Declaration's "life, liberty, and the pursuit of happiness," the enumerated rights in the Bill of Rights were necessarily more circumscribed by being specifically defined (though still in very general language); the guarantees inherent in those rights were also limited, both for being applicable only to the Federal Government and being exercised only by citizens. Nevertheless, our constitutional guarantees were great innovations of their day, and as they have been applied and expanded through additional amendments and court interpretations, have become a domestic human rights regime without peer. We should be justifiably proud of our human rights guarantees.

In the immediate aftermath of World War II, the image of government as the benevolent guarantor of the rights of its people—to the extent that this image was ever widely shared—was seriously reconsidered. One need only recall the horrors of Nazi Germany to realize that governments had often become the prime violator of rights. The *jus ad bellum* and *jus in bello*, both of which pre-dated World War II, were appreciably strengthened by the U.N. Charter and 1949 Geneva Conventions, respectively, as a result of the experience. Still, neither of these legal regimes specifically protected citizens from actions of their own government. International human rights law was born for just that purpose. The United States, secure in its domestic guarantees against these abuses, was a leading proponent of the human rights movement. Our satisfaction with the U.S. Constitution led, paradoxically, to the United States becoming party to few of the human rights treaties which it

¹ The Declaration of Independence para. 1 (U.S. 1776).

² *Id.*

helped to negotiate: Why become bound to an international convention with unknown consequences when the Constitution is perfectly adequate (with known consequences) to protect those same rights?

The United States has also made the observance of human rights a matter of foreign policy significance.³ The U.S. State Department has long studied and commented on the human rights records of other countries, and foreign aid is often conditioned upon the receiving government's "grade."⁴ Quite apart from foreign aid, the human rights comments by the United States could potentially spawn a level of human rights activism both within and without the country in question, which might lead to other human rights improvements. The State Department reports are no longer alone in the field, as non-governmental organizations, such as Amnesty International, Human Rights Watch, Freedom House, and others, publish regular reports of the human rights records of all countries.⁵

These latter organizations' efforts, by often highlighting shortcomings in the United States' own human rights record, have in many ways forced the United States onto the defensive regarding human rights. The United States is accused, rightly or wrongly, with enforcing a double standard when it comes to human rights.⁶ The many uncomfortable questions with which we have to deal include, "Why should we in Country X have to listen to you (the United States) lecture us about human rights when your record isn't that good?"; "Why do you lecture us about human rights when you are not party to the relevant treaties?"; and "If you're a party, why do you make so many reservations to the treaties or disclaim having to follow the rules outside the United States?" There are answers to all these questions, as discussed below, but merely providing a sterile legal answer to these questions neither advances the cause of human rights in general nor U.S. engagement interests in particular. Putting the United States back on the

³ See 22 U.S.C. § 2151n (LEXIS 2010) (providing that no assistance may be provided under portions of the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424, codified at 22 U.S.C. §§ 2151–2431, to countries which "engage in a consistent pattern of gross violations of internationally recognized human rights."). *Id.* § 2151n(a).

⁴ See U.S. Dep't of State, *Human Rights Reports*, <http://www.state.gov/g/drl/rls/hrrpt/> (last visited June 3, 2010) (containing country reports dating back to 1999). The reports are prepared in accordance 22 U.S.C. § 2151n(d), which requires the Secretary of State to prepare and submit to Congress "a full and complete report regarding . . . the status of internationally recognized human rights" for countries that receive U.S. foreign assistance and those that do not.

⁵ See Part IV.2 *infra*.

⁶ See Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 2D 365 (1998). The connection between human rights and a perceived double standard is not confined to the United States. See Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards?*, 25 LAW & INEQ. J. 467 (2007) (noting that those states against which human rights charges are levied often claim that they are being held to a different standard than others).

human rights "offensive" will require an effort as much political as legal.⁷

III. Explaining the U.S. Legal Position

A. General History of Human Rights Treaties

The U.N. Charter, while primarily a *jus ad bellum* instrument, also recognizes the need for human rights. Accordingly, "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" was included among the Purposes and Principles⁸ of the Charter and, using a similar formulation, a matter which the U.N. itself⁹ and individual members¹⁰ each pledged to promote. Needless to say, the extreme generality of the underlying rights, and the responsibilities of states to observe them, make these provisions little more than indicators of future steps.

Shortly after the formation of the United Nations, human rights instruments of greater specificity were developed. The U.N. Human Rights Commission, headed by Eleanor Roosevelt, prepared the Universal Declaration of Human Rights (UDHR).¹¹ In its thirty articles, the UDHR sets forth simple declarative rights ranging from those that are fundamental (the right to life, freedom from torture, equality before the law) to those that are more aspirational (favorable conditions of work, acceptable standards of living). Notably absent is any explicit obligation for states to observe these rights, though for many of the rights, the only possible violators are clearly states. The UDHR was accepted unanimously by the General Assembly in 1948.¹² It is not, however, a treaty.¹³

⁷ See Harold Hongju Koh, *Repairing Our Human Rights Reputation*, 31 W. NEW ENG. L. REV. 11 (2009). Koh, previously Dean of Yale Law School, is now the Department of State Legal Adviser. His article, written well prior to his becoming Legal Adviser, prescribes mostly policy changes in order to cure the problems he notes with the U.S. human rights reputation.

⁸ U.N. Charter art. 1, para. 3.

⁹ *Id.* art. 55, para. c.

¹⁰ *Id.* art. 56.

¹¹ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

¹² There were eight abstentions: the Soviet Union and several of its then-satellite states, Saudi Arabia, and South Africa. See Note, *The Declaration of Human Rights, The United Nations Charter and Their Effect on the Domestic Law of Human Rights*, 36 VA. L. REV. 1059, 1066 (1950).

¹³ Writing contemporaneously with the adoption of the Declaration, Professor Lauterpacht observed: "The practical unanimity of the Members of the United Nations in stressing the importance of the Declaration was accompanied by an equally general repudiation of the idea that the Declaration imposed upon them a legal obligation to respect the human rights and fundamental freedoms which it proclaimed." H. Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT'L L. 354, 356 (1948). For a detailed examination on whether the Declaration has attained the status of customary international law, and therefore become

While the U.N. Human Rights Commission was working on the UDHR, the General Assembly developed the Genocide Convention,¹⁴ which was adopted by the General Assembly in 1948 and came into force in 1951. The United States ratified the Convention in 1988. This single-purpose instrument is relatively simple in its conception and execution: the crime of genocide is defined, and states are obligated to criminalize it. Interestingly, the Genocide Convention does not by itself provide for universal jurisdiction over the crime of genocide, but it does require extradition to states that have jurisdiction to prosecute¹⁵ and contemplates that jurisdiction might be vested in international tribunals through other means.¹⁶ Concerning the latter point, specialized international tribunals, such as those addressing conflicts in the former Yugoslavia¹⁷ and Rwanda,¹⁸ have been vested with the jurisdiction to punish individuals who committed genocide, and it is also within the competence of the International Criminal Court to do the same.¹⁹

The next effort sought to turn the UDHR into binding treaty obligations. As memories of the atrocities of World War II began to fade and as many new states emerged into a world that had become increasingly polarized by the Cold War, this took longer than first anticipated. Through long negotiation, two instruments appeared in 1966: the International Covenant for Civil and Political Rights (ICCPR)²⁰ and the International Covenant for Economic, Social, and Cultural Rights (ICESCR).²¹ As suggested by

binding, see Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317 (1995). Hannum presents an exhaustive survey of the pronouncements of states, courts, and commentators since 1948 on the status of the Declaration, concluding only that the Declaration has greatly contributed to whatever customary international law of human rights exists. *Id.* at 353.

¹⁴ Convention for the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

¹⁵ *Id.* art. 7.

¹⁶ *Id.* art. 6.

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Id.

¹⁷ Statute of the International Criminal Tribunal (Former Yugoslavia), May 25, 1993, 32 I.L.M. 1192.

¹⁸ Statute of the International Criminal Tribunal (Rwanda) art. 2, Nov. 8, 1994, 33 I.L.M. 1602.

¹⁹ Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 90.

²⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

²¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

their titles, the ICCPR contains most of the fundamental civil rights contained in the UDHR, while the ICESCR contains many of those that could be considered more aspirational in nature. Together, they capture all the rights in the UDHR and impose on states the obligation to observe the rights. The United States ratified the ICCPR in 1992 subject to a number of reservations;²² it signed, but has yet to ratify, the ICESCR. The ICCPR is the single most important and comprehensive human rights treaty, and its significance will be discussed below.

Continuing this chronological survey, the effort to advance human rights has generally turned to refining the rights enumerated in the UDHR and ICCPR/ICESCR, and providing some mechanism for adjudicating those rights. Article 7 of the ICCPR contains a general prohibition on torture and other cruel, inhuman, or degrading treatment;²³ the Torture Convention²⁴ of 1984 defines torture in greater detail and also requires states to widely criminalize torture, though it, like the Genocide Convention, does not go so far as to provide for universal jurisdiction. The United States ratified the Torture Convention in 1994. Similar treaties defining specific rights abound, as a short perusal of a comprehensive site such as the University of Minnesota Human Rights Library²⁵ will attest. Of the many, the United States is party to few: the Convention Concerning the Abolition of Forced Labour;²⁶ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);²⁷ the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;²⁸ and the Optional Protocol to the

²² The U.N. Treaty Database contains the status of all human rights treaties (including the ICCPR), and the reservations entered to each, at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>. The United States entered five reservations, five understandings, four declarations, and one proviso to its instrument of ratification for the ICCPR. Compare William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277 (1995) (examining each of the U.S. reservations, and concluding that they are incompatible with the ICCPR and therefore invalid), with Jack Goldsmith, *The Unexceptional U.S. Human Rights RUDs*, 31 U. ST. THOMAS L. J. 311 (2005) (arguing that the quantity and quality of the U.S. RUDs (reservations, understandings, and declarations) are consistent with those of other parties to the ICCPR).

²³ ICCPR, *supra* note 20, art. 7.

²⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 112.

²⁵ University of Minnesota, Human Rights Library, <http://www1.umn.edu/humanrts/index.html> (last visited June 3, 2010).

²⁶ Convention Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 292. The Convention entered into force in 1959, and the United States ratified it in 1992.

²⁷ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195. The Convention entered into force in 1969, and the United States ratified it in 1994.

²⁸ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, U.N. Doc. A/RES/54/263, Annex I. The United States ratified the Protocol, and it also came into force, in 2002.

Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography.²⁹ These others have little practical application for a practicing judge advocate, and no more will be said about them here.

B. The International Covenant for Civil and Political Rights

The ICCPR contains the bulk of the universally recognized human rights protections. Apart from the listing of rights, the ICCPR contains two other aspects that are critical to understanding the U.S. position. The first relates to the obligations accepted by states party. The operative language is in paragraph 1 of article 2, which provides,

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁰

Note the highlighted language, which is presented in the conjunctive. By the plain text, a state is bound to observe these rights only for those individuals who fulfill both conditions. The Covenant was initially drafted with the only condition being that the individual be subject to the state's jurisdiction. The United States proposed adding the words "within its territory," making it clear that it did not want an extraterritorial effect given to the rights. The matter was debated intensely, but the U.S. position—or, at least, the U.S.-proposed text—was adopted.³¹

Were this provision a part of a domestic statute interpreted by a domestic court, the result would be clear: the plain meaning of the text would govern, and both conditions in article 2 would have to be satisfied to impose the obligation on a state. The court would have no reason to consult any of the legislative history. However, treaties are different from domestic statutes. The Vienna Convention of Treaties³² makes this clear in part III, section 3, on

²⁹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, May 25, 2000, U.N. Doc. A/RES/54/263, Annex II. The United States ratified the Protocol, and it also came into force, in 2002.

³⁰ ICCPR, *supra* note 20, art. 1 (emphasis added).

³¹ See Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 123 (2005).

³² Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The United States has signed, but not yet ratified the Vienna Convention. When submitting the Convention to the Senate for its advice and consent, President Nixon included a Department of State report which declared that although "not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty

"Interpretation of Treaties." Article 31 announces the general rule that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."³³ The relevant difference from domestic interpretation rules is that for treaties, the "object and purpose" are given roughly equal weight with the text. Article 32 provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31."³⁴ Together these provisions indicate that an international body interpreting a treaty is freer than a domestic court to consult sources outside of the text.

This leads to the second relevant aspect of the ICCPR. Part IV of the Covenant is devoted to creating a body called the Human Rights Committee and defining its role and powers.³⁵ In short, the Committee is empowered to collect reports periodically submitted by states party concerning their implementation of the rights contained within the ICCPR. After studying the reports, the Committee prepares its own report and "such general comments as it may consider appropriate,"³⁶ distributing both to all states party. The Committee serves to both advance the cause of human rights under the Covenant and to publicize those shortcomings it notes in the performance of the states party. It has no defined enforcement powers. Additionally, nothing in the Covenant ascribes to the Committee the power to authoritatively interpret the Covenant, though the Committee has purported to do so on many occasions.

For present purposes, the most important occasion came through General Comment 31,³⁷ in which the Committee discussed the obligations assumed by states party under article 2. Specifically, the Committee opined,

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to

law and practice." Vienna Convention on the Law of Treaties Transmitted to the Senate, Sec'y Rodgers Report on the Vienna Convention on the Law of Treaties, *reprinted in* 65 DEP'T STATE BULL. 684, 685 (1971).

³³ Vienna Convention, *supra* note 32, art. 31.

³⁴ *Id.* art. 32.

³⁵ ICCPR, *supra* note 20, pt. IV (arts. 28–45).

³⁶ *Id.* art. 40(4).

³⁷ U.N. Hum. Rights Comm., *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.³⁸

In short, the Committee interprets the language “within its territory *and* subject to its jurisdiction” of article 2 to really mean “within its territory *or* subject to its jurisdiction.” Per the example provided in the last sentence quoted above, the ICCPR, in the Committee’s view, has clear extraterritorial effect.

The United States strenuously disagrees with the position of the Human Rights Committee on this interpretation and has done so publicly over the years. Most recently, the United States responded,

The United States takes this opportunity to reaffirm its long-standing position that the Covenant does not apply extraterritorially. States Parties are required to ensure the rights in the Covenant only to individuals who are (1) within the territory of a State Party and (2) subject to that State Party’s jurisdiction. The United States Government’s position on this matter is supported by the plain text of Article 2 of the Covenant and is confirmed in the Covenant’s negotiating history (*travaux preparatoires*). Since the time that U.S. delegate Eleanor Roosevelt successfully proposed the language that was adopted as part of Article 2 providing that the Covenant does not apply outside the territory of a State Party, the United States has interpreted the treaty in that manner. . .

Accordingly, the United States respectfully disagrees with the view of the Committee that the Covenant applies extraterritorially.³⁹

The dispute between the United States and the Human Rights Committee will not be resolved here, nor need it be. It is important for a judge advocate to know the basis of the dispute, but more importantly, to be able to enunciate U.S. policy: *treaty-based human rights law does not apply extraterritorially.*

C. *Lex Specialis*

The second major issue critical to the U.S. position on human rights involves the relationship between human rights law and the law of war.⁴⁰ Prior to the advent of human rights law, the law of war promoted and protected rights that, in many ways, are indistinguishable from rights subsequently recognized under human rights law, though with two main differences. First, the law of war is not merely a humanitarian code: it recognizes, through the principle of military necessity, that death and destruction are inevitable results of any armed conflict. Accordingly, it balances humanitarian principles against military necessity, occasionally favoring one over the other.⁴¹ Second, the law of war is applicable in a limited set of circumstances. More specifically, the law of war is only “triggered” during situations defined by Common Article 2 of the Geneva Conventions; that is, periods of war, international armed conflict, or occupation.⁴²

³⁹ U.S. Dep’t of State, U.S. Government’s 1-year Follow-up Report to the Committee’s Conclusions & Recommendations 1–2 (Oct. 10, 2007) (emphasis in original) (internal footnote omitted), available at <http://2001-2009.state.gov/documents/organization/100845.pdf>.

⁴⁰ The law of war is increasingly referred to as international humanitarian law, or IHL; the two terms are interchangeable, though the U.S. military continues to prefer the former term. One of the problems with IHL is that, for those new to the area, it is easy to confuse it as being concerned with human rights law.

⁴¹ See U.S. DEP’T OF ARMY, FIELD MANUAL, 27-10, THE LAW OF LAND WARFARE para. 3 (18 July 1956) (C1, 15 July 1976), available at http://www.loc.gov/r/r/frd/Military_Law/pdf/law_warfare-1956.pdf.

⁴² Article 2 is common to all four Geneva Conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. Common Article 2 states,

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall

³⁸ *Id.* ¶ 10.

Human rights law, by contrast, is of much more general application. It is applicable to persons at all times, not just during periods of conflict. Many of the rights are stated in absolute terms, with no balancing against military considerations, and although certain protections may be suspended during times of national emergencies, these do not include the most fundamental rights.⁴³

Using this quick sketch of the two legal regimes, the law of war is clearly the more specialized set of rules, and human rights law the more generalized, though both share common humanitarian concerns. Lawyers often turn to the maxim *lex specialis derogat legi generali*, meaning special law prevails over general law, as an interpretive rule to be used when faced with two applicable but competing rules. To explain its operation in simple terms, assume there is a law establishing that no vehicle may travel faster than sixty-five miles per hour. A separate statute regulating heavy commercial trucks decrees that no commercial truck may travel faster than fifty-five miles per hour. It is easy to see that the special rule (for trucks) should control over the general rule. The same argument underlies general U.S. policy: in situations where the law of war applies, the law of war (*lex specialis*) prevails over human rights law (*lex generalis*).⁴⁴

IV. Why This Area Requires Greater Study

In a law of war program of instruction that contains a great deal of material, we have considered that the graduating judge advocate who can enunciate the U.S. policy on human rights—non-extraterritoriality and the *lex*

also apply to all cases of partial or total occupation of the territory of a High Contracting Party.

GC IV, *supra*, art. 2.

⁴³ See ICCPR, *supra* note 20, art. 4. Derogation is possible in time of “public emergency which threatens the life of the nation.” *Id.* art. 4(1). The state derogating must officially proclaim the situation to other state parties through the U.N. Secretary-General. *Id.* art. 4(3). By art. 4(2), the state may not fail to observe certain rights contained in the Covenant, even in time of emergency. These rights include arbitrary deprivation of life, torture, and slavery and servitude.

⁴⁴ The U.S. policy is stated very generally, implying that the law of war, when applicable, completely displaces human rights law. While it is easy to teach and subsequently apply such a bright-line rule, the truth is that the U.S. position is much more nuanced, though finding a comprehensive U.S. policy pronouncement is difficult. The *lex specialis* argument is more typically deployed by the United States to discrete factual circumstances. See, e.g., Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Detainees: Fuzzy Thinking All Around?*, 12 ILSA J. INT’L & COMP. L. 460, 472 (2005) (arguing that as regards the detention of combatants, the *lex specialis* of the law of war should trump human rights law). Dennis, an attorney-advisor within the State Department’s Office of the Legal Adviser, is a prolific author defending the U.S. position on extraterritoriality and *lex specialis*. See also Michael J. Dennis, *Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict*, 40 ISR. L. REV. 453 (2007). He makes clear, however, that his writings are presented in his personal capacity.

specialis/lex generalis distinction—is a success. After all, there are only so many hours of instruction available, and even if there were more, students can be expected to learn and remember only so much. For new judge advocates in the Basic Course and those attending short courses, we might not expect to do more. However, for students in the Graduate Course and for those seeking independent studies and continuing development as a judge advocate, human rights law is an area that deserves a much greater depth of knowledge, for some of the following reasons.

A. Human Rights Law Is Expanding

Except for some treaties related to specific weapons, the law of war has not changed appreciably in decades or more; for example, rules announced in the 1907 Hague Regulations⁴⁵ still form the basis of much of the law related to means and methods of warfare. Human rights law, though later to develop than the law of war, has blossomed since. New treaties are being proposed all of the time; bodies such as the Human Rights Committee continually issue general comments on the interpretation and execution of their particular treaties; and courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights, regularly issue opinions which, while technically applicable only to those parties to their underlying treaties, have wide-spread persuasive weight. Keeping up with all of the changes is a full-time job and is neither possible nor desirable for a practicing judge advocate. The point here is not necessarily on the substance of the changes, but rather on the focus of the international community to continually expand human rights law. That focus is unlikely to change in the near future. The practicing judge advocate who ignores the growth of human rights law will eventually find that he or she is forfeiting the opportunity to participate in the formation and execution of relevant law.

B. Human Rights Advocates Have Been Successful

The International Committee of the Red Cross (ICRC) has always had the preminent role as the guarantor of and advocate for the law of war,⁴⁶ or, in their terms, international

⁴⁵ Regulations Respecting the Laws and Customs of War on Land, Annexed to the Convention (IV) Respecting the Law and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, U.S.T.S. 539. Many of the Hague Regulations were updated, in detail if not in principle, by Additional Protocol I. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Note that Additional Protocol I is now over thirty years old, with no successor treaty in sight.

⁴⁶ See INT’L COMM. OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK (2009), available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/html/all/p0963/\\$File/ICRC_002_0963.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/all/p0963/$File/ICRC_002_0963.PDF). In short, the Geneva Conventions provide the ICRC a mandate to conduct its humanitarian missions during

humanitarian law. Their role continues undiminished today. Nevertheless, much of their work is out of the public eye; in return for being granted special access to governmental areas and facilities, they agree to a degree of confidentiality in their correspondence with that government regarding their findings and opinions. The ICRC does maintain a robust public information campaign, as a quick perusal of their website (www.icrc.org) confirms. But lacking the ability to highlight spectacular and very specific findings of abuse, their presence in the public consciousness is muted.

The same cannot be said for those organizations advocating human rights. Unshackled by any special agreements with governments (and also rarely permitted access to facilities in which human rights abuses may occur), they are free to publish their findings to as wide an audience as possible. Having no enforcement powers over governments, publicity is their most effective, and maybe only, tool to encourage states to comply with human rights norms. Insofar as official bodies are concerned, their pronouncements reach a relatively small audience; it is unlikely that the average American citizen has even heard of the Human Rights Committee, much less read any of its general comments. Non-governmental organizations such as Amnesty International and Human Rights Watch have been much more successful in broadening their audience. Dependent as they are on private funding, mostly from individual membership dues and contributions, wide publicity also ensures the continued viability of the organization. Average citizens are still unlikely to have read the latest report by Amnesty International or Human Rights Watch, but they are likely to be exposed to media stories that incorporate aspects of those reports or comments from the organizations' representatives. Human rights advocacy has been especially effective at raising the general level of awareness of human rights practices around the world.

Allied with this is their special emphasis, and maybe over-emphasis, on U.S. human rights practices, including those of its military forces. Some of that results from the transparency associated with many of our military operations. Reporting on the military's human rights activity is relatively easy, and such reports are given greater credibility if the reporter is permitted to view, and even participate, in the operation. Much of the emphasis also relates to the reality that detailing human rights abuses by a regime such as North Korea is not news; detailing human rights abuses by the United States fits into the category of "man bites dog." For whatever reason, human rights advocates have been largely successful in changing the public discourse such that human rights are now the prism through which all military operations are viewed and judged. There is a significant hurdle to reorienting the discussion back to the law of war. Explaining issues of non-extraterritoriality or *lex specialis* doesn't fit into a sound bite

periods of armed conflict and the right to offer its services during periods of noninternational armed conflict. *Id.* at 7.

if the United States is accused of violating human rights in Iraq or Afghanistan.

C. Extraterritoriality Increasingly the Norm

The stand-off between the United States and the Human Rights Committee on the extraterritorial application of the ICCPR will not be resolved soon. The position of the United States, based as it is on the plain text of the ICCPR, is eminently reasonable. Nevertheless, the movement seems to be toward that espoused by the Human Rights Committee. For example, in the International Court of Justice's *Wall Advisory Opinion*,⁴⁷ Israel maintained the same non-extraterritorial application of the ICCPR as has the United States. The court initially assumed without discussion, that the meaning of "in the territory and subject to its jurisdiction" in article 2 of the ICCPR was ambiguous, and after noting that the Human Rights Committee had maintained its position for a number of years and after stating in conclusory fashion that the *travaux préparatoires* supported the conclusion, the court adopted the Human Rights Committee interpretation.⁴⁸ Although the court's analysis was singularly unconvincing in the case, the court's view has weight around the world, even if not in U.S. policymaking circles.

Those states party to the European Convention on Human Rights⁴⁹ (ECHR) have also had to confront extraterritoriality. Under that convention, the state must observe the rights of all persons "within their jurisdiction";⁵⁰ there is no explicit requirement that individuals be within the state's territory, which is the case under the ICCPR. In the seminal *Banković* case,⁵¹ the Grand Chamber of the European Court of Human Rights determined that the NATO bombing of Kosovo did not subject individuals on the ground to the jurisdiction of those NATO states party to the Convention. The court reasoned that "jurisdiction" is primarily a territorial concept and that extraterritorial application of jurisdiction, while possible, is an extraordinary exercise of jurisdiction,⁵² which the facts in *Banković* did not support. A subsequent case, decided by a panel of the same court, cast *Banković* into some doubt. In *Issa v. Turkey*,⁵³ the court opined that victims (shepherds in northern Iraq) could sustain a claim under the ECHR if Turkey (a state party) was shown to be operating in that

⁴⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9).

⁴⁸ *Id.* paras. 108–11.

⁴⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

⁵⁰ *Id.* art. 1.

⁵¹ *Banković v. Belgium*, App. No. 52207/99, 2001-XII Eur. Ct. H.R. 333.

⁵² *Id.* para. 61.

⁵³ *Issa v. Turkey*, App. No. 31821/96, 41 Eur. H.R. Rep. 567 (2004).

area, even though the conduct occurred outside the territory of Turkey.⁵⁴ Subsequent courts have struggled to reconcile the two decisions. In *al-Skeini*,⁵⁵ the British House of Lords faced the issue in a suit by several Iraqis alleging violation of the ECHR by British soldiers in Iraq. The Lords chose to follow *Banković*, distinguishing *Issa* and similar cases, in finding that military operations in another country did not *per se* trigger jurisdiction under the Convention; however, in the case of one of the claimants, who had been killed while in a British detention facility, the Lords agreed that he was within British jurisdiction and that the claim could go forward. The issue of extraterritorial jurisdiction remains an unsettled one in the European system, and no attempt will be made to resolve it here. The point is merely that the issue is unsettled, but the consensus is moving toward extraterritorial applications of human rights responsibilities.

Clearly, these court decisions have no direct bearing on U.S. practice; decisions of the International Court of Justice technically have no precedential weight,⁵⁶ and the United States is not party to the European Convention. Nevertheless, simply citing their inapplicability does not justify ignorance of the developments. Human rights advocates will continue to press for the extraterritorial application of relevant treaties and are bound to experience successes here and there. Maintaining an absolute, though principled, position on non-extraterritoriality, as the United States does, will certainly subject that position to greater scrutiny as other states move in the opposite direction. (Commentators and human rights advocates have completed their movement. They already call for absolute extraterritorial application of human rights norms.)⁵⁷ Judge advocates will be well positioned to help their commanders withstand the scrutiny once they become more conversant with the issues.

⁵⁴ After reviewing the facts, the court determined that the evidence was not sufficient to show that Turkish forces were actually operating in the area, and it therefore dismissed the claim. *Id.*

⁵⁵ *Al-Skeini v. Sec'y State for Def.* [2007] UKHL 26.

⁵⁶ See Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1031, 1055 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”).

⁵⁷ See, e.g., Shane Darcy, *Human Rights Protections During The “War on Terror”*: *Two Steps Back, One Step Forward*, 16 MINN. J. INT’L L. 353 (2007).

There is now a growing jurisprudence of various international and regional human rights and judicial bodies confirming that human rights law can apply extraterritorially and during wartime. And as one commentator has put it, “the resisters [to this development] are fighting a losing battle and should lay down their arms and accept the applicability of human rights law in times of armed conflict.”

Id. at 358 (quoting Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT’L REV. RED CROSS 737, 738 (2005)).

D. Understanding Our Coalition Partners

Coalition operations are the norm today. Especially among NATO countries, a degree of standardization has developed allowing for effective and nearly unified operations. However, as is well known, each participating nation still brings along its own laws and practices, which continues to make coalition operations challenging. For example, the United States is not a party to Additional Protocol I⁵⁸ or the Ottawa Treaty⁵⁹ on anti-personnel landmines, while nearly all of our coalition partners are. With this in mind, our coalition partners may not be permitted to conduct an operation, or conduct it in the same manner, as the United States.⁶⁰ Human rights law is another area that can affect operations among coalition members with different legal obligations. As already discussed, the British must observe the ECHR in their detention facilities. Should the United States choose to operate a joint detention facility with the British (such as the NATO-run International Security Assistance Force facilities in Afghanistan), they must be run in accordance with the ECHR. At the very least, U.S. judge advocates should appreciate the constraints under which our allies (and sometimes we) operate. Judge advocates will also find that their legal peers among coalition forces are much more aware of human rights developments. This is to be expected given their nations’ human rights obligations. In discussions about human rights, U.S. judge advocate will typically be the “odd man out,” which, while not very serious, is uncomfortable for a legal professional.

E. *Lex Specialis* Under Attack

As noted above, *lex specialis* is an interpretative canon, one born in domestic jurisprudence. Given two equally clear statutes, the more specific should be preferred over the more general. However, like all canons of interpretation, another canon will often counsel the opposite result. For example, a reasonable case can be made to apply a later-in-time general statute over an early specific one.⁶¹ Applied to the law of war–human rights law dilemma, *lex specialis* favors the application of the law of war, while a later-in-time analysis mostly favors human rights law. Again, the purpose here is

⁵⁸ Additional Protocol I, *supra* note 45.

⁵⁹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Treaty), Sept. 18, 1997, 2056 U.N.T.S. 211.

⁶⁰ See Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killings*, 15 DUKE J. COMP. & INT’L L. 281 (2005) (discussing the differing obligations assumed by Canada by being party to Additional Protocol I and the Ottawa Treaty and highlighting the challenges of coalition operations with the United States).

⁶¹ See Vienna Convention, *supra* note 32, art. 30(3), which provides that when successive treaties relate to the *same* subject matter, the later treaty controls over incompatible provisions of the earlier treaty.

not to suggest a resolution, but only to suggest that the *lex specialis* argument is no longer as unassailable as it once was, and to stress that judge advocates must appreciate some of the argument's other weaknesses discussed below.

The law of war and human rights law, dependent on multilateral treaties and customary international law, do not share the specificity of domestic statutes.⁶² They are often intentionally unclear in their application and rely on vague language to attract states as parties. Frequently conventional law also addresses problems incrementally. An early treaty may establish broad norms that later treaties are expected to supplement, and until such time, if ever, that later treaties come into effect, parties must operate under the broad norms. When human rights law was in its developmental stages, the law of war was easily preferred over it; the law of war's longer lineage permitted more detailed treaty norms to develop, while human rights law was still based largely on the Universal Declaration of Human Rights. But the continued development of human rights law has arguably eclipsed that of the law of war. As already discussed, courts and expert bodies refine human rights law all the time, and new expressions of human rights norms continue to be raised as potential areas of treaty law. By comparison, the law of war is standing still. Areas remain where the law of war addresses an issue more completely than human rights law—the treatment of prisoners of war⁶³ is one such area—but in general, human rights law is becoming the more specific regime.⁶⁴

Were the law of war truly comprehensive, *lex specialis* would also have considerable weight, yet it is difficult to argue that the law of war has an answer to every question. What happens when the law of war is silent on an issue? There are three options. The most ardent *lex specialis* adherents would argue that *no* binding law addresses the issue, other than general principles, such as those of the Martens clause,⁶⁵ and that states are free to do as they please so long they do not violate other positive obligations. Others, disliking a legal vacuum, might construct a binding rule within the parameters of the law of war, arguing by

⁶² See Nancie Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISR. L. REV. 356, 381 (2007) (noting that “the nature of international law makes it a poor environment for the application of the *lex specialis* principle”).

⁶³ See GC III, *supra* note 42.

⁶⁴ It should be recalled that these human rights law developments are generally not binding on the United States, as it has ratified few among the proliferation of human rights treaties.

⁶⁵ See Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78 (2000). Professor Meron traces the development of the Martens clause from its original appearance in 1899 through its most modern incarnation in Additional Protocol I: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.” Additional Protocol I, *supra* note 45, art. 1(2).

analogy to other positive rules the law of war, or suggesting that customary international law fills the void. The third group denies the applicability of *lex specialis* to the situation at all—what special law is applicable if there is no law to apply?—and therefore looks outside of the law of war to the more general rules contained within human rights law for a resolution.

But what about the case where both the law of war and human rights law have something relevant to say about a particular issue? Here the International Court of Justice has endorsed a partial *lex specialis* view. As applied to intentional killings, the Court noted that the human rights norm against arbitrary killings by the State must be interpreted in light of the law of war rules related to distinction and proportionality. In a provision from the *Nuclear Weapons*⁶⁶ case that is frequently quoted, the Court said:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁶⁷

In other words, a killing that complies with the law of war will not be arbitrary under human rights law. Note that the Court is calling for a complementary application of the two bodies of law, not one excluding the other. This view seems to have been adopted by most commentators,⁶⁸ making the

⁶⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

⁶⁷ *Id.* para. 25.

⁶⁸ See, e.g., Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict* (forthcoming 2010). Corn reviews the literature and notes the trend toward complementary application. He argues, however, that such a complementary application is most logical in the treatment of non-

strict *lex specialis* argument increasingly difficult to maintain.

F. What Is There to Fear from Human Rights Law?

The discussion to this point has characterized the law of war and human rights law as being essentially antagonistic: in the fight for law, one body of law must prevail over the other. But need it be? Many commentators believe it to be so, and their apocalyptic pronouncements for the consequences of choosing one body of law over the other appear to make a compromise position impossible.⁶⁹

Yet when looked at dispassionately, the two bodies of law are not all that different in their protections. The fundamental protections against cruel and inhuman treatment in Common Article 3⁷⁰ are not inferior to the same protections granted by human rights instruments.⁷¹ Trial rights are another example. Common Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”;⁷² the judicial guarantees are further developed in Article 75 of Additional Protocol I.⁷³ These instruments contain nearly

combatants (“post-submission treatment of operational opponents,” in his terms); the law of war alone should govern for issues related to targeting (“pre-submission”), especially as it relates to the killing of opponents.

⁶⁹ Compare Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law Into Armed Conflict*, 194 MIL. L. REV. 1 (2007) (the title accurately portrays the argument) with Dr. Saby Ghoshray, *When does Collateral Damage Rise to the Level of a War Crime?: Expanding the Adequacy of Laws of War Against Contemporary Human Rights Discourse*, 41 CREIGHTON L. REV. 679 (2008) (questioning the continued validity of the military principles of military necessity and proportionality in light of human rights norms).

⁷⁰ Like article 2, article 3 is common to all the Geneva Conventions. See GC I, *supra* note 42, art. 3; GC II, *supra* note 42, art. 3; GC III, *supra* note 42, art. 3; GC IV, *supra* note 42, art. 3 [hereinafter Common Article 3]. Although by its terms Common Article 3 applies only to armed conflicts “not of an international character occurring in the territory of one of the High Contracting Parties,” the Commentary makes clear that these same standards were intended to apply to all armed conflicts. The Commentary states:

The value of the provision [sub-paragraph (1) of Common Article 3] is not limited to the field within Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in international armed conflicts proper, when all the provisions of the Convention are applicable. For ‘the greater obligation must include the lesser,’ as one might say.

COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 38 (Jean S. Pictet ed., 1958).

⁷¹ See ICCPR, *supra* note 20, art. 7 (also prohibiting cruel, inhuman, or degrading treatment).

⁷² Common Article 3, *supra* note 70, para. 1(d).

⁷³ Additional Protocol I, *supra* note 45, art. 75. Article 75 states that any conviction must be “pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial

everything granted to defendants by the ICCPR.⁷⁴ If the scheme of complementary application suggested by the International Court of Justice, discussed above, is adopted, there may be very little practical difference in operations.

Two concerns remain, however, with an uncritical embrace of the application of human rights during times of war. The first is enforcement. In the European system, a person who has suffered a human rights violation may seek damages, but those suffering current or potential future violations may seek injunctive relief.⁷⁵ The specter of a domestic, super-national, or international court involving itself in real-time battlefield decisions, under the rubric of human rights, is a legitimate fear. The law of war contains no intrinsic mechanism for real-time assessment; where such assessment occurs, if at all, is in *post hoc* investigations or prosecutions of war crimes. However, the fear of court involvement may be overblown. In the U.S. human rights architecture, human rights treaties are generally non-self-executing, meaning courts do not have the ability to adjudicate claims based on the treaties absent implementing legislation. Also, U.S. human rights are essentially co-extensive with the Constitution, and the courts have never shown a willingness to get involved with Constitutional claims that have battlefield effects.⁷⁶ Given the near-infinite creativity of the plaintiff’s bar, newer arguments will likely be made, and will occasionally prevail, in levying judgments for damages due to human rights abuses, but few arguments will successfully change the execution of decisions made by commanders to any greater degree than already exists with the law of war.

The second concern is with the bases upon which each body of law rests. Both share a motivation to increase

procedure,” and then goes on to provide a non-exhaustive list of such judicial procedures. *Id.* para. 4. Article 75 is generally considered by the United States to be customary international law, and therefore, binding on the United States. See Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 427 (1987); *Hamden v. Rumsfeld*, 548 U.S. 557, 633 (2006) (recognizing the lack of a U.S. objection to article 75).

⁷⁴ See ICCPR, *supra* note 20, art. 14. Article 14 contains a right to counsel, in paragraphs 3(b) and 3(d), that is lacking in Common Article 3 and article 75 of Additional Protocol I. Since U.S. practice is to provide counsel to defendants in any law of war fora, this disparity between the legal regimes is inconsequential. See UCMJ art. 38(b) (2008) (providing right to counsel in courts-martial); Military Commissions Act of 2009, § 1802 (§ 949c); 10 U.S.C. § 949c (2006) (providing right to counsel in military commissions).

⁷⁵ A prime example, with a connection to the United States, is *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). In that case, the European Court of Human Rights prevented the United Kingdom from extraditing Soering to the United States to face trial in Virginia for capital murder, deciding that the “death row phenomenon,” should he be convicted, violated Soering’s rights under the European Convention.

⁷⁶ The series of cases culminating in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008), might indicate a trend in the opposite direction, though they may also be explained by the persons in question having been in U.S. custody for several years, far removed from the battlefield.

humanitarian protections, but the law of war's equal emphasis on military necessity is much stronger than the limited derogation provisions in human rights law. To raise only the most obvious example, the law of war prohibits the intentional targeting of civilians, but permits a certain number of civilian deaths, euphemistically characterized as "collateral damage," if the value of the military objective targeted is sufficiently great.⁷⁷ Within human rights law, government-initiated killings are permissible in only the most limited circumstances. The danger of shifting the terms of the argument to one entirely based in human rights is that the rules associated with military necessity will become increasingly difficult to defend, resulting in potentially unwelcome and unwise constraints.

V. Caveats

The discussion above was designed to highlight some of the complexities associated with human rights law and to suggest that the topic is worthy of greater study. Several caveats are in order, though.

First, the U.S. position on the application of human rights law extraterritorially and during war is the result of careful policy analysis. Judge advocates are not in a position to apply a different policy: our job is to be able to enunciate and defend the current U.S. policy. As discussed earlier in the paper, the U.S. policy is rather easy to state; defending it with any degree of sophistication is difficult given the limited academic instruction provided to judge advocates on the topic. Judge advocates who do investigate this area of law are welcome participants in academic discussions of the policies when it is clear that those views, to the extent that they diverge from official policy, are presented as private and not official pronouncements. At more senior levels, judge advocates may be able to participate in policy review and formation. But in the end, judge advocates are policy implementers, and therefore must know the policy in order to implement it.

Second, the current U.S. policy is reasonable and benefits from having been consistently applied over many years. The preceding discussion of the policy was designed to highlight potential weaknesses of the policy. Every position has weaknesses, and to acknowledge them does not signal defeat. Rather, an advocate must fully understand the weaknesses of a position in order to better argue its strengths.

Third, discussing the problems with the law is not as important as following the portions of the law with which we all agree. In other words, the contentious issues should not blind us to the reality that the great bulk of human rights law is not contentious and that the United States remains an important and effective advocate for the promotion of human rights worldwide. We can, and should, press aggressively for advancing human rights around the world, and we need not let some of the issues discussed above deter us from that worthy goal.

VI. Conclusion

Human rights is a huge topic, made to mean so many things that it occasionally means almost nothing. This article has attempted to focus on specific treaty obligations under both human rights law and the law of war, and the intersection of the two. These are topics squarely within the range of issues with which a practicing judge advocate should be conversant. Being familiar with the U.S. position is an absolute "must know." This article has provided a mere sketch of additional areas in the law that judge advocates are encouraged to explore and for which their interest will be amply repaid.

⁷⁷ The rule of proportionality is stated in Additional Protocol I, *supra* note 45, art. 51(5)(b).

Publishing Doctrine on Stability Operations and the Rule of Law During Conflict

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In a 2009 article in the *Armed Forces Journal*, Field Artillery Captain (CPT) Robert Chamberlain wrote, "The American military has become relatively self-congratulatory of late about our newfound aptitude for counterinsurgency."¹ Captain Chamberlain, a veteran of two tours in Iraq, compared the military's preparation for its counterinsurgency mission with that of Leeroy Jenkins, the World of Warcraft avatar whose YouTube video has been seen by over fifteen million viewers.² At the beginning of the video, approximately twenty players of the popular online game are heard planning a dungeon raid in which they expect to engage many enemies. While the players discuss the specific tactics and weapons they will use, one of the players interrupts the planning by shouting, "Alright, times up. Let's do this! LEEROY JENKINS!" Leeroy then charges in alone, forcing his teammates to abort their planning and follow him into the dungeon, shouting instructions at each other as they fight. Similarly, the doctrine writers continue to publish in reaction to events in Iraq and Afghanistan. They pursue and record the most recent thoughts and practices.

This article discusses several developments during the last eighteen months. These developments show that doctrine writers have tried to reflect recent practices while those practices continue to evolve. In the first part, this article discusses recently published Department of Defense Instruction (DoDI) 3000.05,³ the progeny of the revolutionary DoD Directive of the same number that placed stability operations on par with combat operations.⁴ In the second part, this article discusses the U.S. Government's

formal adoption of a definition for rule of law that had been in use for several years. This article argues that the vagaries of the definition have failed to communicate the "cornerstone" of what the rule of law means for Soldiers and Marines fighting a counterinsurgency (COIN): an effective and legitimate criminal justice system.⁵ Nonetheless, the vagueness of the definition is forgivable since it must be broad enough to provide for the many different government agencies and their necessary perspectives on the rule of law. Operational forces in the U.S. Army and Marine Corps must bear the responsibility for focusing their efforts under an unfocused definition.

I. Embracing the Tension

The new DoDI 3000.05 fully acknowledges DoD's awkward position of preparing to lead stability operations as well as supporting them when other agencies lead them.⁶ The new instruction is a minor update of its predecessor, DoDD 3000.05.⁷ The instruction is initially modest as it demurs to other organizations better suited for nation building. It does this by tasking DoD to "be prepared to . . . [s]upport stability operations activities led by other U.S. Government departments or agencies."⁸ However, the instruction then embraces the reality on the ground in Iraq and Afghanistan when it tasks the DoD with being prepared to "[l]ead stability operations . . . until such time as it is feasible to transition lead responsibility to other U.S. Government agencies, foreign governments and security forces, or international governmental organizations."⁹

¹ Captain Robert M. Chamberlain, *Let's Do This! Leeroy Jenkins and the American Way of Advising*, ARMED FORCES J. 32 (June 2009). Captain Chamberlain, a former advisor to an Iraqi Army maneuver battalion, wrote about the U.S. military's failure to plan for the mission of advising the Iraqi Army and the failure to prepare Soldiers for the task. *Id.* His lessons learned mentoring Iraqi Army officers and Soldiers are applicable to others mentoring Iraqi judges, police, and corrections officers. Accordingly, The Judge Advocate General's Legal Center and School invited CPT Chamberlain to speak at the Second Rule of Law course in July 2009 where student evaluations rated him as the second best speaker among twenty-five presenters. Captain Chamberlain, a former Truman and Rhodes Scholar, recently concluded his battery command and is now pursuing a Ph.D. at Columbia University.

² Leeroy Jenkins, <http://www.youtube.com/watch?v=LkCNJRfSZBU> (Aug. 6, 2006).

³ U.S. DEP'T OF DEF., INSTR. 3000.05, STABILITY OPERATIONS (16 Sept. 2009) [hereinafter DoDI 3000.05].

⁴ U.S. DEP'T OF DEF., DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) para. 4(a) (28 Nov. 2005) [hereinafter DoDD 3000.05].

⁵ U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-131 (15 Dec. 2006) [hereinafter FM 3-24].

⁶ The instruction defines stability operations as an "overarching term encompassing various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief." DoDI 3000.05, *supra* note 3, para. 3.

⁷ DoDD 3000.05, *supra* note 4, at 4.1.

⁸ DoDI 3000.05, *supra* note 3, at 4(a)(2).

⁹ *Id.* para.4(a)(3). See also JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at V-24 (17 Sept. 2006) (C1, 13 Feb. 2008); Thomas B. Nachbar, *Defining the Rule of Law Problem*, 12 GREEN BAG 2D 303 (2009). Nachbar argues,

The military is the U.S. government's development agency of last resort, likely leading rule of law development programs only when indigenous capacity is so diminished that U.S. forces are providing not only development assistance but

The tension between leading versus supporting stability operations ultimately derives not from the Secretary of Defense (SECDEF) but from the President. National Security Presidential Directive 44 (NSPD-44) tasked the Secretary of State to “coordinate and lead integrated United States Government efforts” to stabilize and reconstruct post-conflict countries.¹⁰ The President ordered all other agencies to “enable” and “assist” the Secretary of State. The tension lies in the fact that the agency with the mandate to lead does not have the resources, personnel, or the ability to project an effective amount of either into post-conflict countries like Afghanistan or Iraq. Though relatively significant for the interagency processes for those working in Washington, D.C., NSPD-44 did not have nearly as much impact on the operating forces as DoDD 3000.05¹¹ published about ten days before.

Department of Defense Directive 3000.05 “dramatically changed” DoD policy towards nation building.¹² The change came with the declaration that stability operations were a “core U.S. military mission” on par with combat operations.¹³ This created another tension as Soldiers and Marines compared the amount of training their units spent preparing for combat with what they realized the actual mission to be: building police stations and prisons, recruiting and training police officers, mentoring judges and corrections officers, and working with tribal councils. The directive appeared to be a change of direction for the U.S. Army, which had recently reaffirmed its mission to “fight

security itself. In those situations, the definition of the rule of law that drives the development effort may not be as important as the one that defines the approach that U.S. forces take to their own operations.

Id. at 318.

¹⁰ NAT’L SEC. PRESIDENTIAL DIR./NSPD-44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTING AND STABILIZATION 1 (Dec. 7, 2005).

¹¹ DoDD 3000.05, *supra* note 4, para. 4(a).

¹² Major Timothy Austin Furin, *Legally Funding Support to Stability, Security, Transition, and Reconstruction Operations*, ARMY LAW., Oct. 2008, at 10. While DoDD 3000.05 may have drastically changed policy, others argue that the U.S. Army and Marine Corps have performed this mission throughout their histories. See Lieutenant Commander Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW., July 2007, at 45. In the article, Lieutenant Commander Tasikas argued that 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. . . . The truth is that the United States has always engaged in protracted military endeavors short of full-scale wars.

Id.

¹³ DoDD 3000.05, *supra* note 3, para. 4.1.

and win the Nation’s wars.”¹⁴ Although the mission remains intact, the directive caused a broadening of the definition of war and a resulting broader mission for the U.S. Army.¹⁵ Additionally, the SECDEF acknowledged the change as he directed the services to integrate stability operations into all of their activities, to include “doctrine, organizations, training, education, exercises, materiel, leadership, personnel, facilities, and planning.”¹⁶

One of the most prolific areas of change has been in doctrine. The changing mission of the U.S. Army and Marine Corps was first reflected in their counterinsurgency manual published in 2006. It stated,

The purpose of America’s ground forces is to fight and win the Nation’s wars. Throughout history, however, the Army and Marine Corps have been called on to perform many tasks beyond pure combat; this has been particularly true during the conduct of COIN operations. COIN requires Soldiers and Marines to be ready both to fight and to build—depending on the security situation and a variety of other factors.¹⁷

The COIN manual’s foreword, signed by then-Army Lieutenant General Petraeus and Marine Corps Lieutenant General Amos, expressed in even more plain terms that this broadening definition of war would be a reality not only at the strategic and operational level, but also at the tactical level for individual Soldiers and Marines. They wrote,

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. The list of such tasks is long; performing them involves extensive coordination and cooperation with many intergovernmental, host-nation, and international agencies.¹⁸

¹⁴ U.S. DEP’T OF ARMY, FIELD MANUAL 1, THE ARMY para. 1-2 (14 June 2005).

¹⁵ Jack D. Kern, *The Army’s Primary Purpose: Fight and Win the Nation’s Wars?*, COMBINED ARMS CENTER BLOG, Mar. 24, 2009, <http://usacac.army.mil/blog/blogs/reflectionsfromfront/archive/2009/03/24/the-army-s-primary-purpose-fight-and-win-the-nation-s-wars.aspx>.

¹⁶ DoDD 3000.05, *supra* note 4.

¹⁷ FM 3-24, *supra* note 5, at 1-105.

¹⁸ *Id.* at foreword.

The next significant doctrinal publication to reflect the changing mission was the 2008 republication of Field Manual (FM) 3-0. It stated,

Winning battles and engagements is important but alone is not sufficient. Shaping the civil situation is just as important to success. Informing the public and influencing specific audiences is central to mission accomplishment. Within the context of current operations worldwide, stability operations are often as important as—or more important than—offensive and defensive operations.¹⁹

In summary, the broadening definition of war has changed the way individual Soldiers and Marines conceive of their role on the world stage.

A second area of great change ordered by DoDD 3000.05 was in the education provided by various schools throughout the DoD. In 2007, The Judge Advocate General's Legal Center School (TJAGLCS) offered its first one-hour class on the rule of law for the 55th Graduate Course, as well as sixteen hours in an elective seminar. By 2010, the 58th Graduate Course received four hours of instruction and application, as well as thirty-two hours of elective seminars on rule of law operations; students also received comparative law instruction that was specifically focused in the context of rule of law operations. The School had also integrated rule of law instruction and seminars into the Judge Advocate Officer Basic Course, the Senior Officer Legal Orientation, the Operational Law of War Course, and the Judge Advocate Officer Advanced Course. For judge advocates outside the School, TJAGLCS provided the first Rule of Law Course in 2008, which was also open to attorneys from the Department of State (DoS) and Department of Justice scheduled for assignments overseas to engage in rule of law activities. The course has become an annually recurring event. As the foundational text for each of these courses, TJAGLCS used the *Rule of Law Handbook*, which is published by the Center for Law and Military Operations (CLAMO) and is continually updated.²⁰

II. U.S. Government Adopts a Definition

A. A “New” Definition

In February 2009, three agencies of the U.S. Government finally agreed upon a definition for the rule of

¹⁹ FM 3-0, *supra* note 9, at vii.

²⁰ THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., CTR. FOR LAW & MILITARY OPERATIONS, *RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES* (2009) [hereinafter *RULE OF LAW HANDBOOK*]. The *Rule of Law Handbook* was first published in 2007 and is revised annually.

law that had been in use by the Multi-National Corps–Iraq (MNC–I) commander for several years.²¹ The DoD, the U.S. Agency for International Development (USAID), and the DoS published the following abbreviated version of the definition:

Rule of law is a principle under which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights law.²²

The U.N. Office of the Secretary General originally provided this definition in 2004.²³ Despite the definition's failure to emphasize the role of security in providing for the rule of law,²⁴ the commander of MNC–I adopted the

²¹ MULTI-NATIONAL CORPS–IRAQ, OPERATIONS ORDER 06-03, APPENDIX 2 TO ANNEX G (2007).

²² U.S. AGENCY FOR INT'L DEV., U.S. DEP'T OF STATE, U.S. DEP'T OF DEF., SECURITY SECTOR REFORM 4 (Feb. 2009), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/SSR_JS_Mar2009.pdf. The complete definition, contained in a separate document, stated,

Rule of law is a principle under which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights law. It also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. Human rights derive from the inherent dignity of the individual and are to be enjoyed by all without distinction as to race, color, sex, language, religion, national or social origin, property, birth or other status. They include fundamental freedoms of expression, association, peaceful assembly and religion set out in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. They also include rights in labor conventions and provisions of national civil rights legislation. They reflect a common sense of decency, fairness and justice; and states have a duty to respect and ensure these rights and incorporate them into the processes of government and law.

U.S. DEP'T OF STATE, SUPPLEMENTAL REFERENCE: FOREIGN ASSISTANCE STANDARDIZED PROGRAM STRUCTURE AND DEFINITIONS 26, 26–27, Oct. 15, 2007, *available at* <http://www.state.gov/documents/organization/93447.pdf> (providing definitions for “Rule of Law and Human Rights”).

²³ The Secretary-General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, U.N. Doc. S/2004/616, at 4 (Aug. 23, 2004).

²⁴ See Major Tonya Jankunis, *Military Strategists Are from Mars, Rule of Law Theorists Are from Venus*, 197 MIL. L. REV. 16, 55 (2008). See also

definition for use in operation orders as early as 2006.²⁵ U.S. Army doctrine had subsequently adopted the definition, which first appeared in U.S. Army FM 3-07, *Stability Operations*, in 2008²⁶ and later appeared in FM 1-04, U.S. Army JAG Corps doctrine, during 2009.²⁷

Both FM 3-07 and FM 1-04 supplemented the definition with seven effects that are achieved by the rule of law in an ideal society.²⁸ Those effects add value when used alongside the U.N. definition because they emphasize security, as exemplified by the first two effects, which state, “The state monopolizes the use of force in the resolution of disputes,” and “Individuals are secure in their persons and property.”²⁹ Three law school professors were the first to offer the effects as part of their effort to provide a more practical definition

Nachbar, *supra* note 9, at 308. Nachbar illustrates the irony that a corps operations order would adopt a definition that neglects security, since

[i]n many ways, providing security is the ultimate purpose of any state. For any deployed military force, providing security is going to be the first element in any rule of law plan and, depending on the status of operations, it may be the only real contribution that U.S. forces can make to implementing the rule of law.

Id.

²⁵ MULTI-NATIONAL CORPS IRAQ, OPERATIONS ORDER 06-03, APPENDIX 2 TO ANNEX G.

²⁶ U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS 1-40 (6 Oct. 2008) [hereinafter FM 3-07].

²⁷ U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY, at D-4 (15 Apr. 2009) [hereinafter FM 1-04]. See Major Joseph N. Orenstein, *Doctrine Practice Note: Publication of Field Manual 1-04*, ARMY LAW., Aug. 2009, at 48.

²⁸ Those effects are listed as follows:

The state monopolizes the use of force in the resolution of disputes;

Individuals are secure in their persons and property;

The state is itself bound by law and does not act arbitrarily;

The law can be readily determined and is stable enough to allow individuals to plan their affairs;

Individuals have meaningful access to an effective and impartial legal system;

The state protects basic human rights and fundamental freedoms, and

Individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives.

FM 3-07, *supra* note 26, at 1-40; FM 1-04, *supra* note 27, at D-4. The effects first appeared in the initial edition of the *Rule of Law Handbook*, published for judge advocates by the Center for Law and Military Operations (CLAMO). See RULE OF LAW HANDBOOK, *supra* note 20.

²⁹ FM 3-07, *supra* note 26, at 1-40; FM 1-04, *supra* note 27, at D-4.

for the rule of law.³⁰ The combination of the definition and the effects is sometimes visually depicted by the rule of law temple, which is reproduced in an appendix to this article.³¹

By adopting the U.N. definition and augmenting it with the seven effects, the DoD has provided a broad end state in which units in the field may nest more specific rule of law activities that are designed to address specific weaknesses in specific locations. While this definition lacks the focus that some may desire, focus can be added by units as they task subordinate units.

B. Failing to Focus on the Three Cs

The recently adopted definition and the seven effects fail to directly acknowledge what the counterinsurgent sees as the “cornerstone” of the rule of law, which is whether a country has an effective criminal justice system.³² Using Soldiers and Marines to detain insurgents in a U.S. detention facility is not the best COIN tactic because, while it labels the insurgent a criminal in the eyes of the U.S. military, it is less likely to label the insurgent as a criminal in the eyes of the most important audience: local nationals. Local nationals are more likely to see an insurgent as a criminal when a local national policeman detains him, a local national judge convicts him of a crime, and a local national incarcerates him in a local prison. Accordingly, mothers and fathers may be less willing to allow a son to join a criminal organization than an alternatively identified sectarian or ethnic organization.

³⁰ JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 78 (2006). See also Nachbar, *supra* note 9, at 307.

³¹ Lieutenant Colonel Al Goshi, Military Rule of Law Programs in Afghanistan (Mar 11, 2009) (slide on file with author). See *infra* Appendix (providing an “Operational Construct for Rule of Law”).

³² FM 3-24, *supra* note 5, at 1-131.

The cornerstone of any COIN effort is establishing security for the civilian populace. Without a secure environment, no permanent reforms can be implemented and disorder spreads. To establish legitimacy, commanders transition security activities from combat operations to law enforcement as quickly as feasible. When insurgents are seen as criminals, they lose public support. Using a legal system established in line with local culture and practices to deal with such criminals enhances the HN government’s legitimacy. Soldiers and Marines help establish HN institutions that sustain that legal regime, including police forces, court systems, and penal facilities. It is important to remember that the violence level must be reduced enough for police forces to maintain order prior to any transition; otherwise, COIN forces will be unable to secure the populace and may lose the legitimacy gained by the transition.

Id.

Whether using the shorthand “three Cs” for courts, cops and corrections or the “three Ps” for police, prosecutors, and prisons, those engaged in rule of law operations have been focusing their activities on strengthening the capacity and legitimacy of the Iraqi and Afghan criminal justice systems for several years. In 2007, prior to the Anbar Awakening that has been viewed as a watershed moment when security in Anbar province greatly increased, the Second Marine Expeditionary Force (Forward) defined rule of law using the U.N. definition required at the time by MNC–I, but focused its efforts on “improvement of the Iraqi Criminal Justice System.”³³ The command’s “priority was a functioning criminal justice system.”³⁴

The definitions used by other organizations more strongly emphasize the role of the criminal justice system in their understanding of the rule of law. Doctrine for U.S. Army Civil Affairs expressly addresses the police and prisons while strongly implying the role of the courts when it describes the rule of law as “the fair, competent, and efficient application and fair and effective enforcement of the civil and criminal laws of a society through impartial legal institutions and competent police and corrections institutions.”³⁵ The Counterinsurgency Guide published in 2009 for the entire executive branch of the U.S. Government³⁶ expressly addresses the need to focus on the criminal justice system when it encourages rule of law activities that focus on “ineffective” systems such as the “judiciary . . . court and prison systems, police, prosecutors, defense attorneys, and legal record-keeping systems.”³⁷

Despite its vagaries, the DoD definition does indirectly provide the substance for those who want to focus on the three Cs of courts, cops, and corrections. All three are public “institutions” that should be “accountable to the laws” of the state.³⁸ In other words, every state has laws on the books that regulate its criminal justice system, but Soldiers and Marines must assess how the real system measures up to the law on the books. The definition’s requirement that the laws be “equally enforced” could apply to the police, prosecutors, and investigative judges. Rule of law operators could assess whether the police and judges respond to legitimate allegations of criminal conduct or only respond to ethnic, tribal, class, or sectarian affinities. The definition’s

requirement that the laws be “independently adjudicated” could be similarly assessed. Finally, “human rights norms” could be used to measure the effectiveness of a state’s correctional facilities. While states’ inability to agree on what comprises human rights norms is a legitimate criticism of the definition,³⁹ most of the issues encountered in post-conflict countries are likely to be obvious and uncontroversial, such as that prisons should feed their prisoners.⁴⁰

In summary, rule of law definitions must be a large umbrella that encompasses the many different concerns that various agencies may have. For example, the rule of law must satisfactorily provide for the protection of commercial property rights if a corporation is going to invest significant capital in a post-conflict nation. However, U.S. military units must ignore the breadth of the definition and focus on the criminal justice system if commanders hope to get their enemy off the streets through a legitimate, local national criminal justice system. While the recently adopted DoD definition does not address the three Cs as directly as some other definitions, the adopted definition’s indirect references to the three Cs does provide enough substance for units in the field.

III. Conclusion

Just as Leeroy’s teammates shouted instructions at each other as they fought their way through the dungeon, military doctrine writers continue to publish in reaction to events in Iraq and Afghanistan. This must continue as the military develops counterinsurgency techniques, tactics, and procedures to defeat insurgent threats. However, doctrine must be broad enough to anticipate and guide Soldiers and Marines in a variety of situations. Just as rule of law operations may be different from province to province or country to country, they are different from conflict to conflict. What worked in Iraq does not work in Afghanistan. What worked in Iraq and Afghanistan may not be necessary in Haiti. Accordingly, doctrine must be flexible enough to provide for each and every context in which units may engage in stability operations. Department of Defense

³³ Lieutenant Colonel Alex Peterson, Deputy Staff Judge Advocate, II Marine Expeditionary Force, MNF–W Rule of Law Case Studies (Apr. 3, 2008).

³⁴ *Id.*

³⁵ U.S. DEP’T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS 2-6 (29 Sept. 2006) [hereinafter FM 3-05.40].

³⁶ The departments and agencies contributing to this “whole of government” formulation include the Departments of State, Defense, Justice, Treasury, Homeland Security, Agriculture, Transportation, USAID, and the Director of National Intelligence.

³⁷ U.S. DEP’T OF STATE, COUNTERINSURGENCY GUIDE 38 (2009).

³⁸ FM 3-07, *supra* note 26, at 1-40.

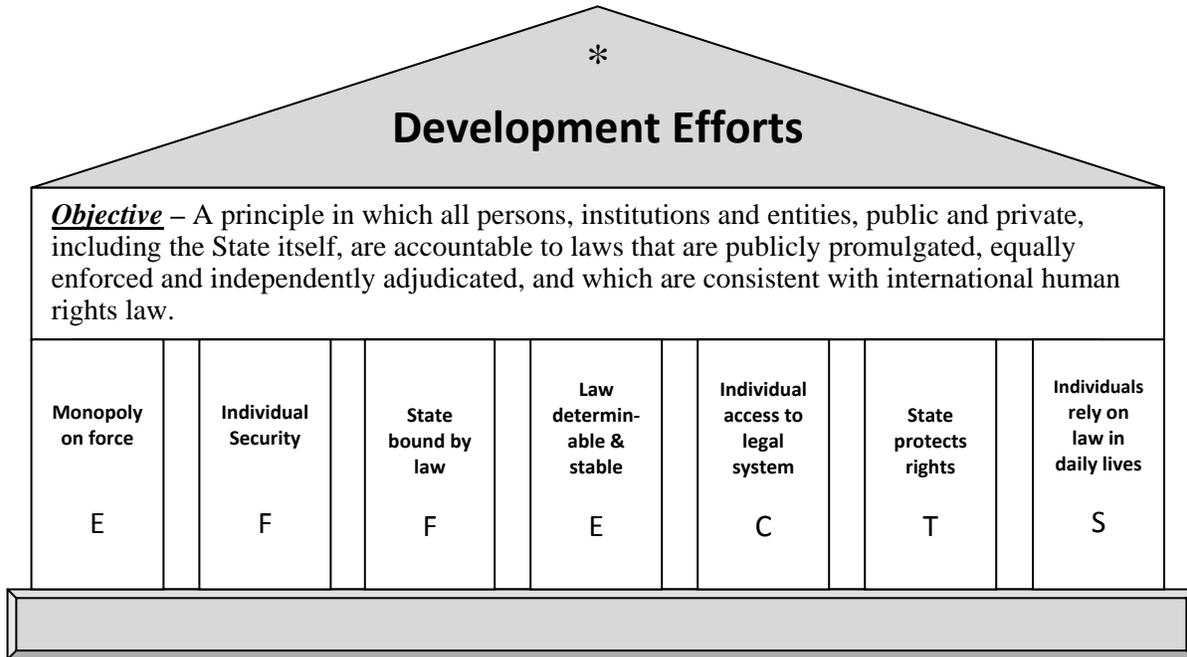
³⁹ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., OPLAW HANDBOOK ch. 3 (2009) (Human Rights).

⁴⁰ In 2008, Major General John Kelly, the Commanding General, I MEF (FWD) in Anbar Province, Iraq, found out while he was reading Michael Totten’s blog that the Iraqi jails in Fallujah and Ramadi were not feeding prisoners. The Dungeon of Fallujah—Upgraded, <http://www.michaeltotten.com/2008/03/the-dungeon-of-fallujah-upgraded.php> (Mar. 25, 2008, 11:31 EST).

Instruction 3000.05 provides enough flexibility for the DoD regardless of whether it is leading a stability operation or supporting another agency. Similarly, the recently adopted definition for the rule of law provides broad enough substance for a variety of U.S. Government perspectives

while simultaneously providing the indirect support for DoD units that need to focus on a criminal justice system. Commanders and staffs in the field will continue to innovate and task subordinate units in order to address the specific threats encountered in their context.

An Operational Construct for Rule of Law



Two Hats Are Better Than One: The Dual-Status Commander in Domestic Operations

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I. Introduction

The event is scheduled and has been nationally advertised. It will draw tens of thousands of political supporters from across the United States, including leading presidential candidates, and will be broadcast during primetime on a major television network in high definition.

The local and state authorities where the event will be held are relieved that the National Security Council (NSC) has designated the event a National Special Security Event (NSSE).¹ Consequently, the U.S. Secret Service (USSS) is in charge of securing the event on behalf of federal authorities.² The USSS is coordinating with the host city regarding overall security and has requested the Department

of Defense (DoD) provide capabilities to assist the USSS in securing the site. In response to the request, U.S. Northern Command (USNORTHCOM), the geographic combatant command responsible for securing the homeland, intends to deploy explosive ordnance disposal (EOD) teams, bomb-sniffing dogs, and parts of its Chemical, Biological, Radiological, Nuclear and High Yield Explosives (CBRNE) Consequence Management Reaction Force (CCMRF)³ to the area. It is also working with the National Guard Bureau (NGB)⁴ to coordinate with the state's National Guard (NG).

The state plans to initially mobilize its NG forces in a State Active Duty (SAD) status⁵ and has planned title 32, U.S. Code,⁶ training exercises to coincide with the event. Because this is a "national event," and in light of limited state resources, the state is also sending a request through NGB to the Office of the Secretary of Defense (SECDEF),

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¹ The Secretary of the Department of Homeland Security, after consultation with the Homeland Security Council, is responsible for designating events as National Special Security Events (NSSEs). Homeland Security Presidential Directive 7, Critical Infrastructure Identification, Prioritization, and Protection, 39 WEEKLY COMP. PRES. DOC. 1816 (Dec. 17, 2003). The Secretary and the Homeland Security Council consider a number of factors when designating an NSSE, such as (1) the anticipated attendance by dignitaries, (2) the size of the event, and (3) the significance of the event. Department of Homeland Security, *Fact Sheet: National Special Security Events* (Dec. 28, 2006), http://www.dhs.gov/xnews/releases/pr_1167323822753.shtm.

² When directed by the President, the U.S. Secret Service (USSS) is authorized to participate, under the direction of the Secretary of Homeland Security, in the planning, coordination, and implementation of security operations at special events of national significance, as determined by the President. 18 U.S.C.A. § 3056(e)(1) (Westlaw 2010). The USSS partners with federal, state, and local law enforcement and public safety officials with the goal of coordinating participating agencies to provide a safe and secure environment for the event and those in attendance. Dep't of Homeland Sec., *Fact Sheet: National Special Security Events* (Dec. 28, 2006), http://www.dhs.gov/xnews/releases/pr_1167323822753.shtm. See also U.S. Secret Serv., National Special Security Events, <http://www.secretservice.gov/nsse.shtml> (last visited May 14, 2010).

³ The CBRNE CCMRF is a federal military task force comprised of both Active and Reserve component capabilities. The CCMRF's primary role when responding to a CBRNE event is to augment the consequence management efforts of the first responders. The current structure relies heavily on the Army, with limited capabilities provided by the other services. On 1 October 2008, the Army assigned approximately 2900 of the 4700 Department of Defense (DoD) personnel to the Commander, USNORTHCOM for CCMRF-One. The Army CCMRF forces include robust command and control, comprehensive decontamination of personnel and equipment, hazardous material handling and disposal, air and land transportation, aerial evacuation, and sustainment. U.S. Dep't of Army, Chemical, Biological, Radiological, Nuclear and High Yield Explosive (CBRNE) Consequence Management Reaction Force (CCMRF), http://www.army.mil/aps/09/information_papers/cbrne_consequence_mgmt_ccmrf.html (last visited May 14, 2010).

⁴ The NGB is the channel of communications on all matters pertaining to the NG, the Army NG of the United States, and the Air NG of the United States between (1) the Department of the Army and the Department of the Air Force, and (2) the several states. 10 U.S.C. § 10501(b) (2006).

⁵ U.S. DEP'TS OF ARMY AND AIR FORCE, NATIONAL GUARD REG. 500-1/AIR NATIONAL GUARD, INSTR. 10-8101, NATIONAL GUARD DOMESTIC OPERATIONS para. 3-2a(a) (13 June 2008) [hereinafter NGR 500-1] ("Unless ordered into federal service, National Guard Soldiers and Airmen serve in a State Active Duty or Title 32 status, under a state chain of command, with the Governor as commander in chief."). *Id.* para. 3-2(a)(1)(a). State Active Duty is duty performed under state law with state funding.

⁶ National Guard, 32 U.S.C. (2006).

requesting the SECDEF approve the state's NG members to serve in a state-controlled, federally-funded, 32 U.S.C. § 502(f)(2) "operational" status.⁷ As it stands, at the time of the event, there will be within the area of operations, federal (title 10, U.S. Code) military personnel and NG personnel serving in either an SAD status or under title 32, U.S. Code.⁸ A single commander, referred to as a dual-status commander (DSC), will command both the state NG and federal Active Duty forces in a mutually exclusive manner so as to keep distinct the federal *and* state chains of command. At first blush, it introduces a very different construct: one commander, two chains of command. This newest construct, both in theory and in operation, has presented military leaders new options and new opportunities to plan how to meld the unique capabilities and command and control structures of both federal and state forces into agile and complementary forces prepared to meet the ever-changing challenges in domestic operations.

The DSC is a statutorily authorized construct. Under the construct, the President must authorize and the governor must consent for a specified officer to command both federal and state forces.⁹ Although a non-traditional concept not frequently utilized, the DoD is comfortable with the DSC arrangement as it has proven successful before—at such highly visible events as the G-8 Summit at Sea Island, Georgia, in 2004; Operation Winter Freeze in 2005; the Republican and Democratic National Conventions of 2004 and 2008; and the G-20 Summit in 2009. Those unfamiliar with the construct may question its authority, the need for supporting agreements, and its ability to adapt to catastrophic national events such as a large-scale terrorist attack or like-type calamities. Quite frankly, many of the military members, both active and NG, who will ultimately serve under this DSC have many questions, too.

In order to answer those questions, this article will demonstrate how, since 2004, the operational use of the DSC construct has increased the ability of the U.S. and state governments to secure events of national significance. Through this discussion, the reader will recognize that the DSC construct is a not only legal, but offers a very adaptive, alternative command relationship that only strengthens the abilities of the federal and state forces to accomplish their missions. More importantly, it provides a common operating picture to both sovereigns, thereby allowing for greater efficiency, less redundancy, and greater unity of effort.

⁷ See Major Christopher R. Brown, *Been There, Doing That in a Title 32 Status, The National Guard Now Authorized to Perform its 400-Year Old Domestic Mission in Title 32 Status*, ARMY LAW., May 2008, at 31–32.

⁸ Also within the area of operations may be State Defense Forces, which are those state militia forces organized and maintained under state law not belonging to the NG. 32 U.S.C. § 109(c). Discussion of the command of State Defense Forces is outside the scope of this article.

⁹ *Id.* § 325(a)(2).

II. The Dual-Status Commander

Under the Constitution, the President serves as the commander-in-chief of the Army and Navy.¹⁰ State governors command their respective organized militias, i.e., their NG forces¹¹ except when called to federal service.¹² Consequently, only the federal chain of command may command title 10 forces, and only the state chain of command may command its NG forces when serving in a SAD status or under title 32. There are, however, specific federal statutory authorities allowing for designated DSCs to serve in a hybrid federal and state status.

The DSC may not command both the federal and state military personnel *simultaneously*.¹³ Rather, this "dual status" authorizes the DSC to command both federal and state forces in a mutually exclusive manner. A DSC may be either (1) a NG officer who becomes federalized and retains his or her state NG status¹⁴ or (2) a Regular Army officer who receives a state NG commission while retaining his or her federal military status.¹⁵

The DSC provides for a unity of effort so state and federal forces operating in the same space can perform interrelated missions. Rather than having separate federal and state level commanders directing the activities of the separate and various federal and state military forces, likely resulting in a duplication or conflict of efforts, the DSC is able to ensure both forces' efforts are carried out efficiently. As succinctly stated by the then-commander of USNORTHCOM, Admiral Timothy Keating, when testifying to the Senate Armed Services Committee,

This centralized command and control construct provides both the federal and state chains of command with a common operating picture through the eyes of the [DSC.] It also enables the [DSC] to maximize his or her federal and state

¹⁰ U.S. CONST. art. 2, § 2.

¹¹ Congress created the "organized militia," known as the NG, in 1903. The Dick Act, ch. 196, 32 Stat. 775 (1903). Consequently, the NG consists of the constitutionally authorized militias of the states that receive federal funding to train for a federal military mission. See *generally id.*

¹² National Guard members can be federalized as members of their respective Reserve components, i.e., the Army or Air NG of the United States. 10 U.S.C. § 10101 (2006). National Guard members can also be federalized as members of the militia under title 10, chapter 15, U.S. Code (the Insurrection Statutes).

¹³ *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990). See also Jeff Bovarnick, *Perpich v. United States Department of Defense: Who's in Charge of the National Guard?*, 26 NEW ENG. L. REV. 453, 459 (1991).

¹⁴ 32 U.S.C. § 325(a)(2).

¹⁵ *Id.* § 315.

capabilities, as well as facilitate unity of effort from all assigned forces.¹⁶

A. The National Guard Dual-Status Commander Under 32 U.S.C. § 325

The U.S. Supreme Court stated in *Perpich v. Department of Defense*, “In a sense, all [National Guard members] now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time.”¹⁷ Therefore, when called into federal service under the provisions title 10, members of the NG generally lose their NG (state) status. Federal statutory law dictates this bifurcation of service at 32 U.S.C. § 325(a)(1):

(a) Relief required.

(1) Except as provided in paragraph (2), each member of the Army National Guard of the United States or the Air National Guard of the United States who is ordered to active duty *is relieved from duty in the National Guard of his State or Territory, or of Puerto Rico, or the District of Columbia*, as the case may be, *from the effective date of his order to active duty* until he is relieved from that duty.¹⁸

In 2004, however, Congress passed 32 U.S.C. § 325(a)(2), allowing for an NG commander to hold both a federal and state commission, that is, “dual status.” The statute reads:

(a) Relief required.

...

(2) An officer of the Army National Guard of the United States or the Air National Guard of the United States *is not relieved from duty in the National Guard of his State, or of the Commonwealth of Puerto Rico, Guam, or the Virgin Islands or the District of Columbia*, under paragraph (1) *while serving on active duty if—*

(A) the President authorizes such service in both duty statuses; and

(B) the Governor of his State, or of the Commonwealth of Puerto Rico,

Guam or the Virgin Islands, or the commanding general of the District of Columbia National Guard, as the case may be, consents to such service in both duty statuses.

(b) Advance Authorization and Consent. The President and the Governor of a State or Territory, or of the Commonwealth of Puerto Rico, or the commanding general of the District of Columbia National Guard, as applicable, may give the authorization or consent required by subsection (a)(2) with respect to an officer in advance for the purpose of establishing the succession of command of a unit.¹⁹

Since 2004, DSCs serving under 32 U.S.C. § 325 have been used for numerous high-profile domestic events. While DSCs serving under 32 U.S.C. § 325 have been loosely referred to as a “dual-hat commanders,” in order to comply with the Supreme Court’s guidance and its three-hat analogy in *Perpich*, these officers actually enjoyed a “dual-status.” To be consistent with *Perpich*, the DSC must exercise his command responsibilities in both his state NG and title 10 statuses, but never at the same time. In terms of *Perpich*, the DSC carries his state militia hat in one hand and his federal hat in the other, but may only “wear” one at a time. In practice, the DSC wearing his NG hat receives orders from the governor or state chain of command and orders the state forces to perform these missions. In the alternative, wearing his title 10 hat, orders received from the President or the federal chain of command are issued to title 10 subordinates to perform their title 10 mission. It is important to note that the governor has no authority to order, through the DSC, title 10 forces to perform any mission. Similarly, the President may not order, through the DSC, state NG forces to perform any mission. The respective sovereigns have command authority only over their own forces.

B. The Regular Army or Air Force Dual-Status Commander Under 32 U.S.C. § 315

Federal statutory law at 32 U.S.C. § 315 requires the Secretaries of the Army and Air Force to detail commissioned officers of both the Army and Air Force to the Army NG and Air NG of each state, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands.²⁰ For these detailed officers, the statute further allows that

¹⁶ *Hearing Before the Senate Armed Services Committee*, 109th Cong. (2005), available at <http://armed-services.senate.gov/statemnt/2005/March/Keating%2003-15-05.pdf> (statement of Admiral Timothy J. Keating, Commander, N. Am. Aerospace Def. Command and USNORTHCOM).

¹⁷ *Perpich*, 496 U.S. at 347.

¹⁸ 32 U.S.C. § 325(a)(1) (emphasis added).

¹⁹ *Id.* § 325(a)(2) (emphasis added).

²⁰ *Id.* § 315(a) (stating that the Secretaries of the Army and Air Force “shall” detail commissioned officers to the separate NGs) (emphasis added). The statute further allows for the Secretary of the Army and Secretary of the Air Force to also detail enlisted members to the Army and Air NG but does

[w]ith the permission of the President, [these Regular Army or Regular Air Force officers] so detailed *may accept a commission in the Army National Guard or the Air National Guard*, as the case may be, terminable in the President's discretion, *without prejudicing his rank and without vacating his regular appointment*.²¹

While the statute allows for such a duty status, the U.S. Constitution reserves to the states the authority to appoint their own militia officers;²² therefore, state law must then be consulted to determine state requirements for officer appointments in its NG.²³

The authority for a Regular Army officer to concurrently hold both a state NG and federal title 10 commission dates back to 1916.²⁴ While initial plans have been developed to employ a DSC under 32 U.S.C. § 315 for recent domestic operations,²⁵ a title 10 DSC under this statute has not yet been used in the domestic operational environment.

III. Dual-Status Commander Agreements

As a result of planning for multiple DSC operations over the past several years, DoD, NGB, and many states have learned that such operations justify deliberate preparation. Among these preparations is an agreement

not provide the authority for them to become members of those NGs. *Id.* § 315 (b).

²¹ *Id.* § 315(a). State law may require a state commission to command state troops or to administer justice under the State Code of Military Justice. Otherwise, acceptance of a state commission appears to be an honorary event for practical purposes, as the officer's Regular Army status is paramount. E-mail from Mr. William Berkson, Senior Attorney, Nat'l Guard Bureau, Arlington, Va., to Major Christopher R. Brown, Assoc. Professor, Int'l & Operational Law Dep't, The Judge Advocate Gen. Legal Ctr. & Sch., U.S. Army, Charlottesville, Va. (Mar. 8, 2010, 13:28 EST) (on file with authors).

²² U.S. CONST. art. I, § 8, cl. 15.

²³ See, e.g., LA. REV. STAT. ANN. § 29:13.A (2010) ("All persons qualified according to the laws of Louisiana and the United States of America . . . may be commissioned by the governor as officers in the national guard."); *id.* § 29:12 (requiring assistant adjutant generals holding rank of brigadier general be a citizen of the state and member of national guard for at least three years immediately prior to appointment).

²⁴ June 3, 1916, ch. 134, § 100, 39 Stat. 208.

²⁵ Hurricane Katrina was not an NSSE; however, President Bush proposed a title 10 dual-status commander structure to Louisiana Governor Blanco during the Hurricane Katrina response, but she rejected it. Hurricane Katrina, Lessons Learned for Army Planning and Operations 64, available at http://www.rand.org/pubs/monographs/2007/RAND_MG603.pdf. The authors are unaware of any historical use of a dual-status commander under 32 U.S.C. § 315.

approving a nominated officer as the DSC, as well as an agreement that lays out the legal, operational, fiscal, and administrative responsibilities of the federal forces and the state NG forces. Our discussion will focus on the legal issues.

The nominated officer, typically a general officer, must be vetted and agreed upon by representatives of both sovereigns. Next, the governor (or his or her delegate) must consent and the President (or his or her delegate) must authorize the appointment of the nominated commander.²⁶ Often simultaneous to this process, operators and legal counsel from NGB, DoD/USNORTHCOM, and the state prepare and execute a detailed Memorandum of Agreement (MOA). In drafting the MOA, various statutory, regulatory, and command relationship issues are considered and documented to provide for the successful execution and use of the DSC. Signatories are typically the governor and the President or their respective delegates. The MOAs have become fairly standardized documents but are adjusted to address operation-specific issues, as well as to incorporate lessons learned from previous events utilizing a DSC. The DSC construct was most recently employed during the 2009 G-20 Summit in Pittsburgh, Pennsylvania. This particular MOA (G-20 MOA),²⁷ located in the appendix, reflects the most up-to-date language, and one should look at its particular provisions in relation to the following discussion.

A. Mutually Exclusive Chains of Command

It is well understood that the President serves as the commander-in-chief of the federal armed forces and the governor controls his or her organized militia, the NG, while serving in a state status. There is no authority for a title 10 commander to give a lawful order to state forces serving in a SAD status or under title 32. Similarly, there is no authority for a state commander serving in a SAD status or under title 32 to give a lawful order to title 10 forces.

The DSC, however, serves in both the federal and state chains of command and commands both federal and state forces. To remain consistent with the three-hat analogy outlined in *Perpich*,²⁸ the commander must exercise command over state and federal forces in a mutually exclusive manner. Clear understanding and application of this issue is of such import that the implementing MOAs contain several related provisions. The G-20 MOA, for example, documents these "mutually exclusive chains of

²⁶ 32 U.S.C. § 325(a)(2).

²⁷ The purpose of the G-20 Summit was to convene world leaders who represent eighty-five percent of the world's economy. Memorandum of Agreement Between Robert Gates, Secretary of Defense, and Edward G. Rendell, Governor, Commonwealth of Pennsylvania 1 (Sept. 10, 11, 2009) [hereinafter G-20 MOA] (appendix) (copy of signed original on file with authors).

²⁸ *Perpich v. Dep't of Def.*, 496 U.S. 334, 347 (1990).

command,”²⁹ and requires that these separate chains of command “recognize and respect the [DSC]’s duty to exercise all authority in a completely mutually exclusive manner, i.e., either in a federal or state capacity, but never in both capacities at the same time.”³⁰ The G-20 MOA further requires the DSC to “describe the status of all forces in writing. The purpose of this requirement is to avoid assigning federal responsibilities to state forces and avoid assigning state responsibilities to federal forces.”³¹

The G-20 MOA also memorializes other necessary considerations regarding the separate state and federal chains of command. It recognizes that the governor, through the adjutant general, commands the state NG and recognizes that the command and control of other NG forces flowing into the state, if applicable, “will be determined by prior coordination between those states.”³² This provision recognizes that NG forces may flow into one state (the receiving state) from another (the sending state) in support of the receiving state’s designated mission. It is important to understand that the governor of the sending state remains the commander in chief of his or her state NG forces even while serving outside of the sending state. Consequently, the governor of the sending state must grant the receiving state’s governor the authority to direct the activities of the sending state’s NG forces while within the receiving state.³³ This is typically accomplished through the Emergency Management Assistance Compact (EMAC)³⁴ or through a separate MOA among the participating states.³⁵

²⁹ G-20 MOA, *supra* note 27, at 1.

³⁰ *Id.* (emphasis in original).

³¹ *Id.* at 4.

³² *Id.* at 1, 2.

³³ This is, in effect, but not technically, tactical control (TACON).

TACON . . . may be delegated to commanders at any echelon at or below the level of combatant command and exercised over assigned or attached forces or military capabilities or forces made available for tasking. TACON typically is exercised by functional component commanders over military capabilities or forces made available for tasking. It is limited to the detailed direction and control of movements or maneuvers. TACON provides sufficient authority for controlling and directing the application of force or tactical use of combat support assets within the assigned mission or task.

JOINT CHIEFS OF STAFF, JOINT-PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS, at III-5 (17 Sept. 2006) (C1, 13 Feb. 2008). Because the sending state retains “command authority” over its NG personnel even while serving outside of the state, there is no “assignment” or “attach[ment]” of forces. The sending (commanding) state, however, gives the receiving state the authority to direct the movements and maneuvers of the sending state’s NG Soldiers while within the receiving state.

³⁴ The Emergency Management Assistance Compact (EMAC) is “a congressionally ratified organization that provides form and structure to interstate mutual aid. Through EMAC, a disaster impacted state can request and receive assistance from other member states quickly and efficiently,

Regarding the federal chain of command, the G-20 MOA specifically recognizes the DSC as a federal, title 10 officer subject to the orders of the President, the Secretary of Defense, and the designated federal chain of command.³⁶ While the federal forces may be tasked to provide support to civil authorities who are enforcing the law,³⁷ the G-20 MOA requires the DSC to ensure the federal military forces do not provide direct support to these agencies and, thereby, violate the Posse Comitatus Act (PCA).³⁸ Note that this provision is not applicable to state-controlled, NG forces; the PCA does not apply to the NG when under state control.³⁹

When ordering title 10 forces to perform this mission, the DSC must don his “federal hat.” When directing state NG forces, which may be conducting law enforcement activities in accordance with state law, the DSC must instead don his “state” hat so as not to run afoul of the Posse

resolving two key issues upfront: liability and reimbursement.” Emergency Management Assistance Compact, <http://www.emacweb.org/> (last visited Feb. 11, 2009). Congress approved EMAC through a joint resolution passed in 1996. Pub. L. No. 104-321, 110 Stat. 3877.

³⁵ Article IV of EMAC states

Each party state shall afford to the emergency forces of any party state, while operating within its state limits under the terms and conditions of this compact, the same powers (*except that of arrest unless specifically authorized by the receiving state*), duties, rights, and privileges as are afforded forces of the state in which they are performing emergency services.

EMAC, Emergency Management Assistance Compact, Model EMAC Legislation, <http://www.emacweb.org/?13> (last visited Mar. 8, 2009) (emphasis added). During the 2005 Operation Winter Freeze operation in New Hampshire, NG forces from Vermont and New York supported the New Hampshire Governor in the state controlled portion of the operation.

³⁶ “The [DSC], as a federal officer ordered to active duty under Title 10 (of the U.S. Code) is subject to the orders of the President, the Secretary of Defense, and the Commander, USNORTHCOM, or those federal officers ordered to act on their behalf.” G-20 MOA, *supra* note 27, at 2.

³⁷ Military Support for Civilian Law Enforcement Agencies, 10 U.S.C. ch. 18 (2006).

³⁸ “In accordance with the Posse Comitatus Act, direct civilian law enforcement activities are not to be performed by Federal forces supporting the Summit.” G-20 MOA, *supra* note 27, at 2. The Posse Comitatus Act reads:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”

18 U.S.C. § 1385 (2006).

³⁹ National Guard forces remain subject to state law, which may or may not authorize them to conduct law enforcement activities when in a state controlled duty status.

Comitatus Act or DoD policy.⁴⁰ This is a critical example of why the DSC cannot “wear” two hats at a time and is likely the most important operational and legally intensive aspect of the mutually exclusive chains of command.

B. Serving Two Masters—The Federal Status Reigns Supreme

While serving in a dual-status, the DSC may run into conflicts between the two sovereigns he serves. For example, if the governor directs the DSC to use state forces to perform a non-law enforcement mission that the President has instead directed should be performed by federal forces, whose orders should the commander follow? Fortunately, to date, the DSC has not had to confront this issue; however, the MOA provides a “mission conflicts” process to address this issues should it arise. Past MOAs, including the G-20 MOA, direct the DSC to ensure there are no conflicts between federal and state mission taskings.⁴¹ Where conflict exists, the DSC should notify both chains of command at the earliest opportunity, and both chains of command and the DSC must be involved in resolving such conflicts.⁴²

Specifically, the G-20 MOA directs that where the mission conflict cannot be resolved, the DSC “should consult with a judge advocate from *both* the federal chain of command and the State chain of command.”⁴³ While the conflict is being resolved, the orders of the federal chain of command have supremacy.⁴⁴

C. Good Order and Discipline

Finally and importantly, the G-20 MOA distinguishes the disciplinary authority of the DSC regarding the separate state and federal forces. The Uniform Code of Military Justice (UCMJ) does not apply to NG forces serving in a SAD status or under title 32. United States Army regulations clearly state “ARNG Soldiers are not subject to the UCMJ while in State service under title 32, U.S. Code.”⁴⁵ Recognizing the lack of UCMJ jurisdiction, the G-

⁴⁰ By policy, as directed by 10 U.S.C. § 375, the DoD generally extended the restrictions of the PCA to the U.S. Navy and Marine Corps. U.S. DEP’T OF DEFENSE, DIR. 5525.5, DO D COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (15 Jan. 1986) (C1, 20 Dec. 1989) (Administrative Reissuance).

⁴¹ G-20 MOA, *supra* note 27, at 3.

⁴² *Id.* at 4.

⁴³ *Id.*

⁴⁴ “While the conflict is being resolved, the dual-status commander will continue to execute his federal missions, and will continue to execute those State missions in areas not subject to the conflict.” *Id.*

⁴⁵ U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 21-2(b) (16 Nov. 2005).

20 MOA dictates that “[a]ll military justice issues concerning . . . National Guard forces will be determined in accordance with the [state’s] Code of Military Justice.”⁴⁶ Thus, for the 2009 G-20 Summit in Pennsylvania, the Pennsylvania Code of Military Justice applied to members of the Pennsylvania NG serving in SAD or under title 32. National Guard forces of sending states, however, are subject to the jurisdiction of their home state’s code of military justice. Addressing military justice issues for title 10 forces, the G-20 MOA declares, “[a]ll military justice issues for supporting federal forces will be determined in accordance with the [UCMJ].”⁴⁷

IV. Practical Considerations and Lessons Learned

As with all military operations, one learns a great deal by conducting actual operations. The seven previous events supported by the DSC construct are no different. The following discussion addresses lessons that have been either observed consistently or were of such import that a comment would benefit judge advocates and other participants supporting future DSC operations.

A. Develop Rapport

It is critical for the separate NG and federal joint task forces (JTFs) to build a rapport well before the event. In the seven events where a DSC was used, the DSC’s state NG and federal staffs were, to varying degrees, integrated into a joint/combined staff. During the event, it was necessary for the joint/combined NG and federal staffs to work within the same battle rhythm and execute integrated processes and procedures. Lessons learned from this process reveal that trusting relationships and staff efficiencies cannot be fostered at the time of the event. Every effort should be made by NG and federal staff participants to attend and actively engage in integrated planning conferences, tabletop exercises, and staff briefings. These events build community, understanding of culture, and most importantly, trust. Quite frankly, as most NSSEs typically run for a very short duration, it is too late to build these relationships and understand the different state and federal cultures at the time of the event.

B. Deputy Commanders

In order to ensure the federal and state chains of command and their respective operations remain separate, past DSCs have utilized two deputy commanders: one NG officer in state status and the other a title 10, federal military

⁴⁶ G-20 MOA, *supra* note 27, at 2.

⁴⁷ *Id.*

officer. Under this construct, the NG deputy ensures the commander's "state" orders are given and acted upon by the assigned state NG forces. Similarly, the title 10 deputy ensures the DSC's "federal" orders are given and acted upon by assigned federal forces. In addition, the deputies coordinate between themselves to ensure operational gaps and seams are identified and addressed. State and federal forces have been observed to take cues from their NG and federal deputy commanders respectively. If the two deputies are unable to achieve and project a positive working relationship, the working relationship between the separate staffs and military personnel will likely be strained as well. Ultimately, the deputies play an enormous role in the DSC's ability to successfully command and control the two forces and achieve a unity of effort.

C. Distinguish Federal and State Missions

Importantly, the deputies must ensure that their respective forces understand which tasks and missions are assigned to the separate NG and federal forces. As previously discussed, because the PCA⁴⁸ and DoD policy⁴⁹ restrict the use of federal forces in providing direct support to law enforcement, it is important to keep mission responsibility separate. It is, therefore, recommended that operation orders (OPORDs) clearly identify the force with the associated task. Additionally, all slide presentations and command publications should clearly depict which force is conducting which operation. For example, if NG forces have been tasked to assist law enforcement in maintaining security at a particular location, all forms of command communication should ensure that only NG forces are associated with this task. Though not required, some DSCs have directed separate NG and title 10 operations briefings and slides.

D. Intelligence and Force Protection

One of the most critical responsibilities of the DSC's title 10 and NG judge advocates is ensuring assigned forces understand and distinguish Intelligence Oversight (IO) rules regarding the collection of intelligence on U.S. persons from rules pertaining to sensitive information regarding non-DoD-affiliated persons. Simply stated, IO rules apply to both state NG⁵⁰ and title 10 intelligence personnel.⁵¹ Sensitive

information rules apply to all non-intelligence, DoD personnel.⁵² Policies and procedures regarding collection, retention, dissemination, redaction, and purging of information used for intelligence or force protection purposes should be clearly delineated in OPORDs and standard operating procedures to ensure that there is an organized and structured approach to the handling of information about individuals. In addition, because of the application of IO rules to intelligence personnel, these personnel should only be tasked with missions associated with foreign intelligence⁵³ or counter-intelligence.⁵⁴

Non-intelligence, force protection personnel, however, are not limited by these IO restrictions where there is a direct threat to the force. For example, if demonstrators become unruly and begin throwing bottles at policemen and others, including military personnel in the area, force protection personnel may collect this information and disseminate it to the force so that they may protect themselves from this activity. If an intelligence analyst were added to the force protection staff, however, this intelligence analyst would likely commit an IO violation by collecting the same information because of the limits on the type of information he or she can collect. Therefore, it is unwise to use intelligence personnel to augment the force protection staff because the IO rules would still apply to the intelligence personnel.⁵⁵ Due to the importance of this area of practice, one should expect a great deal of oversight not only from the Combatant Command but also NGB, the Joint Staff, and the Office of the Secretary of Defense.

⁵¹ Executive Order No. 12,333, U.S. Intelligence Activities, 46 Fed. Reg. 59,941 (4 Dec. 1981); U.S. DEP'T OF DEFENSE, REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (Dec. 1982).

⁵² Sensitive information is unclassified, but is For Official Use Only (FOUO). U.S. DEP'T OF DEF., DIR. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE (7 Jan. 1980).

⁵³ Foreign intelligence is information relating to the capabilities, intentions, and activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. National Security Act of 1947, 50 U.S.C. § 401a (2006).

⁵⁴ Counterintelligence is information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. Joint Pub 1-2. Within the United States, the Federal Bureau of Intelligence (FBI) has primary responsibility for conducting counterintelligence and coordinating the counterintelligence efforts of all other U.S. Government agencies. Executive Order No. 12,333, 46 Fed. Reg. 59,941 para. 1.14(a).

⁵⁵ U.S. DEP'T OF DEF., DIR. 2000.12, DOD ANTITERRORISM (AT) PROGRAM (18 Aug. 2003) (certified current as of 14 Dec. 2007). The Department of Defense's AT program is one of several security-related programs that fall under the overarching Combating Terrorism and Force Protection programs. *Id.* para. 4.8.

⁴⁸ See discussion *supra* note 38.

⁴⁹ See discussion *supra* note 40.

⁵⁰ National Guard Bureau Policy directs that the provisions of DoD 5240.1-R are applicable to all NG intelligence personnel, and the provisions of DoDD 5200.27 are applicable to all NG non-intelligence personnel serving in title 10 or title 32 status. Memorandum, Chief, National Guard Bureau, to the Adjutant Generals of All States, Puerto Rico, the U.S. Virgin Islands, Guam, and the Commanding General of the District of Columbia, subject: NGB Policy for Handling of U.S. Persons Information (18 June 2008).

E. Check Out the Orders

It is important that someone verify that all personnel assigned are serving under the appropriate duty orders. That means that NG forces must be on title 32 or SAD orders. Similarly, federal forces must be on title 10 orders. This is important because orders are the fundamental documents in establishing military justice jurisdiction as well as protections under the Uniformed Services Employment and Reemployment Rights Act, Federal Tort Claims Act, and various state laws providing NG personnel with authorities, benefits, and protections. State law may, for example, grant members of the NG with law enforcement authorities. Without orders reflecting the appropriate state status, one could argue that a NG Soldier had no more authority than a civilian.

It is equally important to ensure the DSC carries two sets of orders: both title 10 and title 32. Without both types, the commander may not have authority to issue lawful orders to either force or be afforded the protections and authorities identified above. Even though the governor and the President may have consented and authorized the officer to serve as the DSC, orders must be cut to confer proper and appropriate status.

V. Conclusion

Some have called the DSC a “success story” and point to the efficiencies and synchronization of the title 10 and NG staffs as bringing together the best of the title 10 and title 32 systems, processes, and capabilities. Major General Randall R. Marchi, the 2009 G-20 DSC, said, “I can’t see how an operation like this can be . . . efficiently done without a dual-status commander. A parallel command construct likely would have failed to capitalize on this synergy.”⁵⁶ Similarly, Brigadier General William Hudson, 2008 Democratic National Convention Dual-Status Commander said, “Dual Status is the right way to go for planned NSSEs.”⁵⁷

The ability of a single DSC to achieve unity of effort of state and federal forces to assist the USSS and the state in securing an NSSE greatly enhances both sovereigns’ situational awareness and their overall ability to secure an event and protect the American people. It does so by capitalizing on the military expertise of both sovereign military forces, increasing efficiency by reducing duplicative effort, providing synergy, and ensuring unity of effort among federal and state uniformed forces.⁵⁸

⁵⁶ E-mail from Mr. Mario Carillo, Standing Joint Force Headquarters, USNORTHCOM, Colorado Springs, Colo., to Colonel John T. Gereski, Dir., Operations Law, USNORTHCOM, Colorado Springs, Colo. (Apr. 29, 2010, 12:22 MST) (on file with authors). Mr. Carillo is involved with the compilation of after action reports (AARs) of domestic operations for USNORTHCOM.

⁵⁷ *Id.*

⁵⁸ G-20 MOA, *supra* note 27, at 3.

Appendix

MEMORANDUM OF AGREEMENT CONCERNING AUTHORIZATION, CONSENT, AND USE OF DUAL-STATUS COMMANDER PURSUANT TO 32 U.S.C. § 325 FOR THE PITTSBURGH SUMMIT 2009

1. Purpose. This Memorandum of Agreement (MOA) outlines the separate chains of command and responsibilities of the dual-status commander for the Pittsburgh Summit of G-20 Leaders (hereinafter “the Summit”), which will be held September 24- 25, 2009, in Pittsburgh, Pennsylvania, for the purpose of convening world leaders who represent 85 percent of the world’s economy. The President of the United States, or his designee, and the Governor of the Commonwealth of Pennsylvania, by executing this MOA have provided authorization and consent for the activation of this commander pursuant to 32 U.S.C. § 325(a)(2). The commander’s activation is not expected to exceed 15 days, beginning on or about September 15, 2009, and ending on or about September 30, 2009.

2. Mutually Exclusive Chains of Command. The dual-status commander will receive orders from a Federal chain of command and a State chain of command. As such, the dual-status commander is an intermediate link in two distinct, separate chains of command flowing from different sovereigns. Although the dual-status commander may receive orders from two chains of command, those chains of command must recognize and respect the dual-status commander’s duty to exercise all authority in a completely mutually exclusive manner, *i.e.*, either in a Federal or State capacity, but never in both capacities at the same time. This MOA contains special procedures to maintain the required separation of State and Federal chains of command.

A. State Command and Control.

1. The Pennsylvania Governor, through his Adjutant General, will provide command and control over the supporting National Guard forces. As a member of the Pennsylvania National Guard in a State status, the dual-status commander is subject to the orders of the Governor through the Adjutant General of the Commonwealth of Pennsylvania.
2. The dual-status commander, acting pursuant to State authority, may issue orders to National Guard forces serving in a State status (*i.e.*, Title 32 or State Active Duty).
3. Command and control of National Guard forces provided to Pennsylvania from other states, if applicable, will be determined by prior coordination between those states and Pennsylvania. Authority for those forces to provide support in Title 32 status must be granted in advance by the Secretary of Defense.

4. All military justice issues concerning Pennsylvania National Guard forces will be determined in accordance with the Pennsylvania Code of Military Justice. Military Justice issues concerning National Guard forces from states other than Pennsylvania will be determined in accordance with those states' codes of military justice.

B. Federal Chain of Command.

1. The Commander, U.S. Northern Command (USNORTHCOM), will provide command and control over the supporting Federal forces. The dual-status commander, as a Federal officer ordered to active duty under Title 10 (of the U.S. Code), is subject to the orders of the President, the Secretary of Defense, and the Commander, USNORTHCOM, or those Federal officers ordered to act on their behalf.
2. The dual-status commander, acting pursuant to Federal authority, may issue orders to Federal forces, *i.e.*, active duty forces, including reserve forces serving on active duty such as Federalized National Guard forces (Title 10 status). In accordance with the Posse Comitatus Act, direct civilian law enforcement activities are not to be performed by Federal forces supporting the Summit.
3. All military justice issues for supporting Federal forces will be determined in accordance with the Uniform Code of Military Justice as implemented by applicable Military Department regulatory guidance.

3. Missions.

A. *State Military Mission:* Plan, coordinate, and provide requested, authorized, and approved support to lead Federal agencies, and State agencies performing activities related to the Summit.

B. *Federal Military Mission:* Plan, coordinate, and provide requested, authorized, and approved support to lead Federal agencies performing activities related to the Summit.

4. Purpose of Dual-Status Command Structure. Utilizing a dual-status commander allows the efficient use of both Federal and State authorities to execute authorized missions in support of Federal and State agencies for the Summit. This relationship will capitalize on the military expertise of both sovereign military forces, reduce duplicative effort, provide synergy, and ensure unity of effort. The dual-status commander will have enhanced situational awareness through this dual status, and both Federal and State chains of command will have a common operating picture. This enhanced situational awareness will ensure optimal tasking and mission accomplishment by State and Federal military forces.

5. Compliance with Federal and State law. The dual-status commander must comply with all State and Federal laws appropriate to the mission while executing his duties. If the dual-status commander perceives that orders provided by the Federal or State chain of command may violate Federal or State law or create a potential conflict of interest or mission conflict, the dual-status commander must immediately inform both chains of command of the perceived problem.

6. Sharing of Documentation. To avoid miscommunication, the Federal and State chains of command should share all documents/guidance concerning their respective missions at the earliest possible opportunity.

7. Anti-terrorism/Force Protection Standards. During the Summit, the Pennsylvania National Guard agrees that National Guard Forces participating in activities related to the Summit will comply with anti-terrorism/force protection (AT/FP) guidance established by USNORTHCOM unless the Pennsylvania National Guard has established more stringent guidance. USNORTHCOM will provide AT/FP guidance in all warning, planning, alert, deployment, or execute orders. Any obstacles in achieving compliance with the paragraph will be resolved by the Adjutant General of Pennsylvania and the Commander, USNORTHCOM.

8. Mission Conflicts.

A. The dual-status commander should attempt to ensure there are no conflicts between Federal and State mission taskings. If the dual-status commander believes a conflict exists, he should notify both chains of command at the earliest possible opportunity. Both chains of command and the dual-status commander must be involved in the resolution of such conflicts.

B. In the event that a mission tasking conflict cannot be resolved, the dual-status commander should consult with a judge advocate from both the Federal chain of command and the State chain of command. While the conflict is being resolved, the dual-status commander will continue to execute his federal missions, and will continue to execute those State missions in areas not subject to the conflict.

9. Status. During the course of this mission, the dual-status commander shall describe the status of all forces in writing. The purpose of this requirement is to avoid assigning Federal responsibilities to State forces and to avoid assigning State responsibilities to Federal forces. If it becomes necessary to make a change to the status of forces, the dual-status commander will ensure both chains of command are aware of the necessity for such changes, but the dual-status commander does not have the authority to make those changes.

10. Delegation from Sovereigns. It is agreed and understood that the Federal and State sovereigns may delegate their command authority to intermediate officials or officers who will provide orders to the dual-status commander. This delegation will typically occur via written orders but may take another form in exigent circumstances.

11. Incapacity of the Dual-Status Commander. In the event that the dual-status commander becomes incapacitated, subordinates will need to be in place to assume command of both the Federal and State chains of command. For this reason, the dual-status commander needs a Federal status deputy commander and a State status deputy commander.

12. Effective Date. This MOA shall become effective after the signing of the document by the parties and upon the order to active duty of the dual-status commander. Upon the effective date of the MOA, the dual-status commander may maintain ongoing direct liaison authority with his Federal and State chains of command and exercise State authority and Federal authority as provided by those sovereigns.

13. Modifications to MOA. This MOA may be amended, revised, or extended by the written mutual agreement of the parties.

14. Termination. This MOA will automatically terminate upon the redeployment of forces from the performance of activities related to the Summit. If either party decides to withdraw from this MOA, it should do so in writing with sufficient notice to allow proper mission accomplishment, if possible, by the other party. Termination of this MOA will result in the release of the dual-status commander from duty in a Title 10 status.

-original signed -
Robert Gates
Secretary of Defense

9-10-09
Date

-original signed -
Edward G. Rendell
Governor, Commonwealth of Pennsylvania

9-11-09
Date

The “Incendiary” Effect of White Phosphorous in Counterinsurgency Operations

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I. Introduction

On 15 September 2009 the United Nations (U.N.) Fact Finding Mission on the Gaza Conflict,¹ commonly referred to as the “Goldstone Report,”² was published. The report alleges numerous law of war³ violations by both Israel and Hamas during the military campaign that took place from 27 December 2008 to 18 January 2009 in the Gaza Strip.⁴ Among the noted violations, the report’s condemnation of the Israeli Government’s use of white phosphorous stands out as particularly blunt and critical.⁵

Specifically, the report criticizes Israel not only for how and where white phosphorous projectiles were employed, but also for the very decision to use white phosphorous.⁶ Though the Goldstone Report’s findings are controversial⁷ and the report’s recommendation to severely limit the use of white phosphorous is unsupported under current international law,⁸ the prudent operational law attorney should not dismiss the report as inconsequential or irrelevant. Rather, the Goldstone Report offers a glimpse of the increasingly negative perception of white phosphorous within the international community and the stringent scrutiny placed on the decision to employ white phosphorous.⁹

Denunciation, negative media coverage, and war crime allegations are, as the Goldstone Report clearly indicates, tangible risks associated with the use of white phosphorous.¹⁰ This form of attention, though obviously counter-productive in any military operation, is particularly damaging in counterinsurgency, where the strategic value of securing popular support is of utmost importance.¹¹ It is

¹ The U.N. Human Rights Council established the U.N. Fact Finding Mission on the Gaza Conflict on 3 April 2009 with the express mandate “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009. . . .” Hum. Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict* 5, U.N. Doc. A/HRC/12/48 (15 Sept. 2009) [hereinafter Goldstone Report], available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf.

² Justice Richard Goldstone, “former judge of the Constitutional Court of South Africa and former Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda,” was appointed to lead the mission. *Id.* As a result, his name has become synonymous with the fact-finding mission and is commonly used as the short form for the report. See, e.g., John Bolton, *Israel, the U.S., and the Goldstone Report*, WALL ST. J., Oct. 19, 2009, available at <http://online.wsj.com/article/SB10001424052748704500604574480932924540724.html>; Yitzhak Benhorin, *U.N. Passes Goldstone Report Resolution*, YNET NEWS.COM, Feb. 26, 2010, available at <http://www.ynetnews.com/articles/0,7340,L-3855048,00.html>.

³ The Department of Defense (DoD) defines the law of war as “[t]hat part of international law that regulates the conduct of armed hostilities. It is often called ‘the law of armed conflict.’” U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 3.1 (9 May 2006). The law of war, the law of armed conflict, and international humanitarian law are interchangeable. For the remainder of this article I will use the term “law of war” as this traditional term clearly notates the *lex specialis* that governs during a time of armed conflict. See also MARK MARTINS, PAYING TRIBUTE TO REASON: JUDGMENTS ON TERROR, LESSONS FOR SECURITY, IN FOUR TRIALS SINCE 9/11 (forthcoming 2010) (manuscript at 141, on file with author) (stating “[t]he ‘law of war’ and ‘law of land warfare’ continue to be preferred terms among government lawyers and military professionals.”).

⁴ See generally Goldstone Report, *supra* note 1.

⁵ See *id.* at 14, 247–50; but see State of Israel, *Gaza Operations Investigations: An Update* 32 (Jan. 2010) [hereinafter Israel Update], available at <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf> (“With respect to exploding munitions containing white phosphorous, the Military Advocate General concluded that the use of this weapon in the operation was consistent with Israel’s obligations under international law.”).

⁶ Goldstone Report, *supra* note 1, at 16 (determining that the Israeli use of white phosphorous was “reckless” and that “serious consideration should be given to banning the use of white phosphorous in built-up areas”).

⁷ See Israel Update, *supra* note 5, at ii (“As Israel has clarified before, Israel disagrees with the findings and recommendations of the Report, which reflect many misunderstandings and fundamental mistakes with regard to the Gaza Operation, its purposes, and Israel’s legal system.”); see also H.R. Res. 867, 111th Cong. (2009) (calling “on the President and the Secretary of State to oppose unequivocally any endorsement or further consideration of the ‘Report of the United Nations Fact Finding Mission on the Gaza Conflict’ in a multilateral fora” by a vote of 344-36).

⁸ Compare Goldstone Report, *supra* note 1, at 250, 535, 549 (arguing that white phosphorous should be banned for use in built-up areas, as an obscurant, and possibly altogether), with *infra* Part II (discussing the permissible uses of white phosphorous under international law).

⁹ See Goldstone Report, *supra* note 1, at 14, 173, 247–50, 533–35, 549. The Goldstone Report concludes with a recommendation that the General Assembly conduct “an urgent discussion on the future legality” of white phosphorous use “in light of the human suffering and damage” caused in the Gaza Strip. *Id.* at 549.

¹⁰ Similar to Israel in the Gaza Conflict, the United States has received harsh international criticism for white phosphorous use in recent military operations. See, e.g., FALLUJAH, THE HIDDEN MASSACRE (Italian State Owned Television Station RAI broadcast Nov. 8, 2005) (alleging war crimes, in particular illegal use of white phosphorous munitions, by the U.S. military in Fallujah, Iraq, in 2004).

¹¹ See DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE 4 (Praeger Sec. Int’l 2006) (1964) (noting that the civilian population is the objective for both the insurgent and counterinsurgent); see also U.S. DEP’T OF ARMY, FIELD MANUAL 3-24 / U.S. MARINE CORPS WARFIGHTING PUBLICATION 3-33.5, COUNTERINSURGENCY, at x, 1–4, 5–8

therefore imperative that the use of white phosphorous in contemporary counterinsurgency operations not only comply with international law, but also demonstrate heightened sensitivity to civilian concerns in order to gain both international consensus and local popular support.¹²

To accomplish this recognizably difficult task, it is important to understand the difference between using white phosphorous as a smoke or signaling system versus as an incendiary weapon. Whereas the traditional principles of the law of war¹³ apply when white phosphorous is used as a non-incendiary, a more arduous legal standard, articulated in the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III)¹⁴ of the Certain

(15 Dec. 2006) [hereinafter FM 3-24] (discussing generally the ability of insurgents to “cleverly use the tools of the global information revolution” to “create propaganda that furthers their aims” and thus secure local population support).

¹² See FM 3-24, *supra* note 11, at 1-24 (“Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.”); HEADQUARTERS, INT’L SEC. ASSISTANCE FORCE, TACTICAL DIR. (July 6, 2009) [hereinafter TACTICAL DIR.] (unclassified version), available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf. Referencing on-going counterinsurgency operations in Afghanistan, the tactical directive notes that “[w]e must avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people.” *Id.* The directive goes on to state that this is not just “a legal or moral issue” but also an “operational issue” and, therefore, all military actions must be conducted “in a manner which will win” the local population’s support. *Id.*

¹³ The principles of the law of war include military necessity, distinction, proportionality, and unnecessary suffering. Military necessity is “that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.” U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 3.a (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10], available at http://www.loc.gov/nrr/frd/Military_Law/pdf/law_warfare-1956.pdf. Distinction requires “the Parties to the conflict [to] at all times distinguish between the civilian population and combatants and between civilian objects and military objectives” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Proportionality determines whether “an attack . . . may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof [that will] be excessive in relation to the concrete and direct military advantage anticipated.” *Id.* art. 51(5)(b); see also FM 27-10, *supra* para. 39-41. Finally, parties to a conflict are forbidden “to employ arms, projectiles, or material calculated to cause unnecessary suffering.” Convention (IV) Respecting the Laws and Customs of War on Land art. 23(e) Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV]; see also AP I, *supra*, art. 35(2). It is important to note that the United States has not ratified AP I, but finds many portions of the protocol customary international law. See Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419 (1987). For a consolidated summary of the law of war principles, see U.S. DEP’T OF NAVY, NAVAL WARFARE PUB. 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF MILITARY OPERATIONS 5-2 to 5-3 (July 2007) [hereinafter COMMANDER’S HANDBOOK].

¹⁴ Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, 1342 U.N.T.S. 171, 19 I.L.M. 1534 [hereinafter Protocol III]. The U.S. ratification came with a reservation. *Id.* Specifically, the United States “reserve[d] the right to use incendiary

Conventional Weapons Treaty (CCW),¹⁵ applies if used for incendiary purposes.¹⁶ Contrasting the legal requirements for incendiary and non-incendiary white phosphorous use illustrates that the heightened Protocol III requirements place greater emphasis on minimizing harm to civilians and thus more directly comports with the counterinsurgency strategic vision of “not isolating,” “alienating,” or angering the civilian population.¹⁷ Based upon this conclusion, the United States, as a matter of policy and not as a matter of international law, should openly communicate a willingness to voluntarily limit all uses of white phosphorous in counterinsurgency operations to those situations that comply with the heightened legal threshold of Protocol III.

II. White Phosphorous and the Law

Much of the legal confusion concerning white phosphorous is attributable to its various capabilities.¹⁸

weapons against military objectives located in concentrations of civilians” when determined that such use would cause fewer casualties than alternative weapons. *Id.* For a discussion on the logic behind the reservation, see W. Hays Parks, *The Protocol on Incendiary Weapons*, 279 INT’L REV. OF THE RED CROSS 535, 538–41 (Nov.–Dec. 1990).

¹⁵ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW].

¹⁶ Due to its chemical composition, there are those who argue that white phosphorous is also regulated by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction (CWC). See *Q&A: White Phosphorous*, BBC NEWS, Nov. 16, 2005, available at http://news.bbc.co.uk/2/hi/middle_east/4441902.stm (stating “[s]ome have claimed the use of white phosphorus contravenes the 1993 Chemical Weapons Convention”). The applicability of the CWC to white phosphorus has been directly addressed and dismissed by the spokesman of the treaty implementing body of the CWC. See Paul Reynolds, *White Phosphorus: Weapon on the Edge*, BBC NEWS, Nov. 16, 2005, available at <http://news.bbc.co.uk/2/hi/americas/4442988.stm> (quoting Peter Kaiser, spokesman for the Organisation for the Prohibition of Chemical Weapons, as stating, “No[white phosphorus] is not forbidden by the CWC if it is used within the context of a military application which does not require or does not intend to use the toxic properties of white phosphorus”). This position is further supported by the absence of white phosphorus in the CWC’s schedules of toxic chemicals. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45; see also Major Craig Burton, *Recent Issues with the Use of Matching Bullets and White Phosphorous Weapons in Iraq*, ARMY LAW., Aug. 2006, at 21 (concluding “in spite of the obvious fact that WP [white phosphorus] is a chemical, it is not classified as a chemical weapon under the CWC and the Convention’s prohibitions do not apply to its use”).

¹⁷ TACTICAL DIR., *supra* note 12, at 1-2.

¹⁸ See GlobalSecurity.org, *White Phosphorus (WP)*, <http://www.globalsecurity.org/military/systems/munitions/wp.htm> (last visited Mar. 4, 2010) (noting that white phosphorous “is used for signaling, screening, and incendiary purposes. White phosphorus can be used to destroy the enemy’s equipment or to limit his vision. It is used against vehicles, petroleum, oils and lubricants (POL) and ammunition storage areas, and enemy observers. White phosphorous can be used as an aid in target location and navigation.”). See also Mark Cantora, *Israel and White Phosphorous During Operation Cast Lead: A Case Study in Adherence to Inadequate Humanitarian Laws*, 13 GONZ. J. INT’L L. 2, 2 (2009–2010) (“White phosphorus’s dual nature, as both a tactically useful and relatively safe

White phosphorous munitions are primarily intended to act as an obscurant or signaling system, albeit with incidental incendiary effects.¹⁹ However, white phosphorous is at times employed solely because of its “incidental” incendiary effects, thus essentially converting the munition into an incendiary weapon.²⁰ International law regulates smoke munitions differently than incendiary weapons, and understanding the intent for the use of white phosphorous is, therefore, a prerequisite for determining the applicable law.²¹

The white phosphorous use in the Gaza Conflict coincidentally occurred nearly simultaneously with the United States’ ratification of Protocol III of the CCW.²² Though the United States previously adhered to Protocol III as a matter of policy,²³ depositing the instruments of ratification made compliance obligatory as a matter of international law.²⁴ Protocol III contains prohibitions and restrictions on the use of incendiary weapons, which are defined as “any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to

obscurant and illuminant, and as a deadly and destructive incendiary, has made it a controversial substance.”).

¹⁹ See U.S. DEP’T OF ARMY, FIELD MANUAL 3-11.9, POTENTIAL MILITARY CHEMICAL/BIOLOGICAL AGENTS AND COMPOUNDS, at III-16–18 (Jan. 2005) [hereinafter FM 3-11.9] (stating that white phosphorous “is used primarily as a smoke agent” but “can also function as an antipersonnel flame compound capable of causing serious burns”).

²⁰ See, e.g., *Israel Admits Phosphorous Bombing*, BBC NEWS, Oct. 22, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/6075408.stm (confirming that Israel used white phosphorous in Lebanon in 2006 to target Hezbollah members considered to be in “open ground”); Captain James T. Cobb et al., *TF 2-2 IN FSE AAR: Indirect Fires in the Battle of Fallujah*, FIELD ARTILLERY, Mar.–Apr. 2005, at 26 (on file with author) (discussing how white phosphorous was used during operations in Fallujah, Iraq, as an incendiary in “shake and bake” missions to force insurgents out of fighting positions).

²¹ See Int’l Comm. of the Red Cross (ICRC), *Phosphorous Weapons—The ICRC View* (Jan. 17, 2009) [hereinafter *The ICRC View*], available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/weapons-interview-170109> (discussing the different legal standards that apply to white phosphorous munitions dependent upon use).

²² *Compare U.S. Joins Four Law of War Treaties*, DEP’T ST. MEDIA NOTE, Jan. 23, 2009, available at <http://www.state.gov/r/pa/prs/ps/2009/01/115309.htm> (noting that “[o]n January 21, [2009] the United States deposited its instruments of ratification for Protocols III, IV, and V” of the CCW “and for an amendment to that Convention,” and that “Protocol III covers incendiary weapons, Protocol IV covers blinding laser weapons, and Protocol V deals with explosive remnants of war. The Amendment expands the scope of the Convention to non-international armed conflicts.”), with Goldstone Report, *supra* note 1, at 5 (stating that the Gaza conflict occurred from 27 December 2008 to 18 January 2009).

²³ See Dick Jackson, *Law of War Treaties Pass the Senate*, ARMY LAW., Jan. 2009, at 58 (noting that the United States has complied with Protocol III as a matter of practice prior to its ratification and citing *Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 2 (Apr. 15, 2008) (statement of John Bellinger, Legal Advisor for Dep’t of State)).

²⁴ “Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon . . . (b) their deposit with the depositary.” Vienna Convention on the Law of Treaties art. 16, May 23, 1969, 1155 U.N.T.S. 331.

persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.”²⁵ The protocol further states that “[i]ncendiary weapons do not include munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signaling systems.”²⁶ The applicability of Protocol III to white phosphorous thus hinges on whether the munitions’ incendiary capabilities are the primary reason for use.²⁷

When white phosphorous munitions are employed for a non-incendiary purpose,²⁸ the munitions clearly fall outside the definition of an “incendiary weapon” and will not be regulated by Protocol III.²⁹ Instead, traditional law of war principles control, and the legality of the white phosphorous munitions, similar to any other weapon not subject to specific international law,³⁰ is determined by compliance with these base rules.³¹ Fulfilling this legal obligation, therefore, requires the employing actor, prior to the use of non-incendiary white phosphorous, to distinguish civilian and civilian objects from combatants and military objectives,³² to determine the advantage of targeting the military objective,³³ and to weigh whether the incidental³⁴

²⁵ Protocol III, *supra* note 14, art. 1(1).

²⁶ *Id.* art. 1(1)(b)(i).

²⁷ See *The ICRC View*, *supra* note 21 (discussing the applicability of Protocol III to white phosphorous when used as an incendiary).

²⁸ Examples of non-incendiary uses include obscuring movement, marking a target, or signaling a location. See FM 3-11.9, *supra* note 19, at III-16.

²⁹ See *supra* notes 25–26 and accompanying text (defining incendiary weapon and the applicability of Protocol III).

³⁰ See Kathleen Lawand, *Reviewing the Legality of New Weapons, Means and Methods of Warfare*, 864 INT’L REV. OF THE RED CROSS 925, 925 (Dec. 2006), available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/review-864-p925/\\$File/irrc_864_Lawand.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/review-864-p925/$File/irrc_864_Lawand.pdf) (noting that while the traditional rules of “international humanitarian law” apply to all weapons, specific weapons are regulated by particular treaties and customs); see, e.g., Protocol on Prohibitions or Restrictions on the Use Mines, Booby-Traps and Other Devices (Protocol II), as amended May 3, 1996, 2048 U.N.T.S. 133 [hereinafter Protocol II] (regulating landmines and booby-traps); Protocol III, *supra* note 14 (regulating incendiaries).

³¹ See *The ICRC View*, *supra* note 21 (stating “[t]he use of weapons containing white phosphorous is, like the use of any other weapon, regulated by the basic rules of international humanitarian law”). See generally COMMANDER’S HANDBOOK, *supra* note 13, at 8-1 to 8-17 (discussing the law of war as it applies to targeting).

³² See AP I, *supra* note 13, art. 48.

³³ “Attacks shall be limited strictly to military objectives,” see *id.* art. 52(2); thus, “[i]n applying the principle of military necessity a commander should ask whether the object of attack is a valid military objective.” COMMANDER’S HANDBOOK, *supra* note 13, at 5.3.1.

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective military contribution . . . and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage.

adverse effects on the civilian population would be excessive³⁵ compared to the concrete and direct military advantage expected.³⁶ Assuming the employing actor satisfies these obligations and is not using the munitions to intentionally cause suffering or superfluous injury,³⁷ international law would allow for the use of white phosphorous in the vicinity of the civilian population with no further constraints.³⁸

AP I, *supra* note 13, art. 52(2). Combatants may also be targeted as “military objectives.” See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 635 (Yves Sandoz et al. eds., 1987). The Commentary notes that military objectives, though generally limited to objects, include “members of the armed forces.” *Id.* “Armed forces” are generally defined as “combatants” and since these individuals “have the right to participate directly in hostilities,” they may also “be the object of hostile acts.” *Id.*

³⁴ “Incidental” civilian casualties are used in contrast to “intentional” civilian casualties. Intentional targeting of civilians and civilian objects is strictly prohibited under the law of war. See AP I, *supra* note 13, arts. 51(2), 52(2). See also Matheson, *supra* note 13, at 426 (noting that “[c]ivilian populations and individual citizens shall not be the object of acts or threats of violence. . . .”); W. Hays Parks, *Rolling Thunder and the Law of War*, AIR U. REV., Jan.–Feb. 1982, available at <http://www.airpower.au.af.mil/airchronicles/aureview/1982/jan-feb/parks.html> (“The law of war recognizes the inevitability of collateral civilian casualties; what it prohibits is the intentional attack of the civilian population per se or individual civilians not taking part in the conflict . . .”). Another common term often used for “incidental” civilian casualties and damage to civilian objects is “collateral damage.” See COMMANDER’S HANDBOOK, *supra* note 13, at 8.1, 8.3.

³⁵ The term “excessive” is not defined in Additional Protocol I and simply means “exceeding what is proper, normal, or reasonable.” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 450 (Houghton Mifflin Co. 1988). Determination whether incidental loss of civilian life or damage to civilian objects is “excessive” is thus driven by the specific facts and circumstances surrounding the weapon employment decision. See, e.g., Goldstone Report, *supra* note 1, at 173. The fact-finding mission determined that the threat to “several hundred civilian lives and . . . civilian property” was disproportionate in comparison to the “advantage gained from using white phosphorous to screen Israeli armed forces” tanks from anti-tank fire from armed opposition groups.” *Id.* Therefore, the Israeli’s violated the principle of proportionality since the risks to “the civilian population and civilian objects in the area under attack were excessive in relation to the specific military advantages sought.” *Id.* at 249. But see Parks, *supra* note 34 (stating that “excessive” collateral civilian casualties is a high threshold that requires a number of casualties so vast that it “shock[s] the conscience of the world” and only “acts so blatant as to be tantamount to a total disregard for the safety of the civilian population” are condemned).

³⁶ See AP I, *supra* note 13, arts. 51(5)(b); 57(2)(a)(iii). See also COMMANDER’S HANDBOOK, *supra* note 13, at 5.3.3 (“The principle of proportionality requires the commander to conduct a balancing test to determine if the incidental injury, including deaths to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained.”); FM 27-10, *supra* note 13, paras. 39–41.

³⁷ Hague IV, *supra* note 13, art. 23(e); AP I, *supra* note 13, art. 35(2) (“It is prohibited to employ weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”). See also Burton, *supra* note 16, at 22 (“The use of WP [white phosphorous] would be unlawful, even against combatants, were it used specifically to cause suffering rather than for a recognized, valid purpose.”).

³⁸ See Goldstone Report, *supra* note 1, at 534 (“In relation to the weapons used by the Israeli armed forces during military operations the Mission accepts that white phosphorous . . . [is] not currently proscribed under international law. . . . [U]se is, however, restricted or even prohibited in certain circumstances by virtue of the principles of proportionality and

In contrast, when the primary intent of the white phosphorous use is to “set fire to objects or to cause burn injury to persons,” the munition is considered an incendiary,³⁹ and Protocol III will apply.⁴⁰ Supplementing the civilian protections embedded in the traditional principles of the law of war,⁴¹ the specific prohibitions and restrictions on incendiary weapon use found in Protocol III afford civilians and civilian objects additional safeguards from adverse effects.⁴² Article 2 of Protocol III specifically re-emphasizes the existing prohibition on making the civilian population the object of attack⁴³ and bans the use of air-delivered incendiary weapons against a “military objective,⁴⁴ located within a concentration of civilians.”⁴⁵ Additionally, article 2 restricts “incendiary weapons other than air-delivered incendiary weapons” by prohibiting their use against “any military objective located within a concentration of civilians” except “when such military objective is clearly separated from the concentration of civilians and all feasible precautions⁴⁶ are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing” the incidental negative effects on the civilian population.⁴⁷ The

precautions necessary in the attack.”); Israel Update, *supra* note 5, at 32–33 (concluding that international law does not prohibit non-incendiary use of white phosphorous in military operations).

³⁹ See *supra* notes 25–26 and accompanying text.

⁴⁰ See generally Protocol III, *supra* note 14.

⁴¹ As required for all weapons, and similar to white phosphorous munitions used for a non-incendiary purpose, compliance with the traditional law of war principles is mandatory prior to use of white phosphorous for incendiary purposes. See *supra* notes 32–38 (discussing how the traditional principles of the law of war apply to the employment of a weapon).

⁴² See Protocol III, *supra* note 14, art. 2 (protection of civilians and civilian objects).

⁴³ *Id.* art. 2(1). Other than expressly articulating the applicability of this prohibition to incendiary weapons, this is not a change from the strict ban on intentional targeting of civilians or civilian objects that exists in the law of war. See *supra* note 34 (discussing the strict prohibition on intentional targeting of civilians or civilian objects).

⁴⁴ The Protocol III definition of “military objective” mirrors the definition found in Additional Protocol I. Compare Protocol III, *supra* note 14, art. 1(3) (defining “military objective”), with AP I, *supra* note 13, art. 52(2), and discussion *supra* note 33 (explaining and defining “military objective”).

⁴⁵ See Protocol III, *supra* note 14, art. 2(2). “‘Concentration of civilians’ means any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads.” *Id.* art. 1(2).

⁴⁶ “‘Feasible precautions’ are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.” Protocol III, *supra* note 14, art. 1(5). The phrase “feasible precautions” is defined the same in Protocol II referencing mines, booby-traps, and other devices, see Protocol II, *supra* note 30, art. 3(10); however, Protocol II goes on to give a non-exhaustive list of circumstances that help determine whether “feasible precautions” have been taken. See *id.* art. 3(10)(a)–(d).

⁴⁷ See Protocol III, *supra* note 14, art. 2(3). Additional Protocol I has similar, but less specific, requirements for those conducting an “attack” to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects.” AP I, *supra*

Protocol III emphasis on protecting “concentration of civilians,”⁴⁸ coupled with the traditional law of war civilian protections,⁴⁹ limits the employment of white phosphorous for an incendiary purpose and, consequently, significantly minimizes harmful effects to the civilian population.

In terms of application, the legal nuance between non-incendiary and incendiary use of white phosphorous may alter the employment decision. For example, assume a commander is leading a unit conducting a military operation in a city where civilians and civilian objects are commingled with combatants and military objectives. If the commander reasonably determines the traditional law of war principles are satisfied, he may use white phosphorous to obscure the unit’s movement through the city despite incidental civilian casualties or incidental damage to civilian objects. However, if the same commander decides to use white phosphorous to burn enemy positions in that same city, any incidental civilian casualties or incidental damage to civilian objects would violate Protocol III. The only discernable difference between these two scenarios is the commander’s reason for employing white phosphorous, yet the consequences are dramatically different and illustrate why operational law attorneys should understand the legal distinction between non-incendiary and incendiary use of white phosphorous.

III. White Phosphorous and Counterinsurgency Doctrine

Regardless of why white phosphorous is employed, incendiary effects are a natural consequence of use.⁵⁰ Though international law may liberally allow white phosphorous use for a non-incendiary purpose in the vicinity

note 13, art. 57(2)(a)(ii). Protocol III, article 2(3) is unique in that it requires a military objective to be separated from the concentration of civilians prior to incendiary weapon use. See Protocol III, *supra* note 14, art. (2)(3). Though the United States has a reservation to Protocol III’s universal prohibition against using incendiary weapons against military objectives located in concentrations of civilians, see *supra* note 14, the reservation would only be invoked in the rare situation that an incendiary weapon could be used to “cause fewer casualties and/or less collateral damage” than an alternative weapon. See Protocol III, *supra* note 14. An example would include using an air-delivered incendiary weapon, instead of a conventional weapon, against a chemical weapons plant in the middle of a densely-populated city to limit civilian casualties. See Parks, *supra* note 14, at 548.

⁴⁸ Protocol III, article 2 also prohibits the use of incendiary weapons against “forest or other kinds of plant cover” except “when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.” Protocol III, *supra* note 14, art. 2(4). Discussion on this prohibition is outside the scope of this article.

⁴⁹ See *supra* note 41 (noting that the law of war remains applicable to incendiary weapons in addition to Protocol III).

⁵⁰ See FM 3-11.9, *supra* note 19, at III-17–18 (“WP [white phosphorous] is a very active chemical that will readily combine with oxygen in the air, even at room temperature. As oxidation occurs, WP becomes luminous and bursts into flames within minutes.”).

of civilians,⁵¹ the heightened protections provided to civilians in Protocol III more closely align with counterinsurgency (COIN) doctrine.⁵² Thematic in COIN doctrine is the overriding importance of providing safety and security to the local population⁵³ and the counter-productiveness of unnecessary force.⁵⁴ With the objective in COIN operations “being the population itself,”⁵⁵ success is not based on conventional metrics,⁵⁶ but rather on popular support for the operation.⁵⁷ As a result, the local population’s perception of both the insurgent and counterinsurgent is the primary concern.⁵⁸

In this unconventional environment, propaganda plays a significant and powerful role in determining the outcome of the conflict.⁵⁹ Not restricted by truth,⁶⁰ insurgents will often

⁵¹ See generally *supra* Part II.

⁵² Compare Protocol III, *supra* note 14, art. 2 (providing additional protections for the civilian population from the effects of incendiary weapons), with GALULA, *supra* note 11, at 83 (discussing the importance of providing safety for the local population as the “counterinsurgent cannot achieve much if the population is not, and does not feel, protected against the insurgent.”), and FM 3-24, *supra* note 11, at 1-23 (“All efforts focus on supporting the local populace . . .”).

⁵³ See FM 3-24, *supra* note 11, at 1-23 (“The cornerstone of any COIN effort is establishing security for the civilian populace.”); GALULA, *supra* note 11, at 8 (noting that the civilian population is often concerned more with safety than the merits of the opposing parties reason for fighting).

⁵⁴ See FM 3-24, *supra* note 11, at 1-25 (“counterinsurgents should calculate carefully the type and amount of force to be applied and who yields it for any operation. An operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents.”); GALULA, *supra* note 11, at 66 (“A soldier fired upon in conventional war who does not fire back with every available weapon would be guilty of a dereliction of duty; the reverse would be the case in counterinsurgency warfare, where the rule is to apply the minimum of fire.”).

⁵⁵ GALULA, *supra* note 11, at 5. See also TACTICAL DIR., *supra* note 12, at 1 (“Gaining and maintaining the support” of the population “must be our overriding operational imperative—and the ultimate objective of every action we take.”).

⁵⁶ See GALULA, *supra* note 11, at 5 (observing “military action remains the principal instrument of the conventional war,” whereas operations in a counterinsurgency conflict are focused on “winning over” the local population and, therefore, “every military move has to be weighed with regard to its political effects”).

⁵⁷ See *id.* at 54 (stating that victory for a counterinsurgent is “permanent isolation of the insurgent from the population, isolation not enforced upon the population but maintained by and with the population”); FM 3-24, *supra* note 11, at 1-23 (“[K]illing every insurgent is normally impossible. Attempting to do so can also be counterproductive in some cases; it risks generating popular resentment, creating martyrs that motivate new recruits, and producing cycles of revenge.”).

⁵⁸ See GALULA, *supra* note 11, at 70 (discussing the importance of the civilian population’s views on the insurgents and counterinsurgents); FM 3-24, *supra* note 11, at 6-16 (stating “[i]nsurgent warfare is largely about perceptions”).

⁵⁹ See GALULA, *supra* note 11, at 9 (discussing the importance of propaganda, particularly for the insurgent).

⁶⁰ “The insurgent, having no responsibility . . . can lie, cheat, [or] exaggerate.” *Id.* “He is not obliged to prove; he is judged by what he promises, not by what he does.” *Id.*

attempt to mischaracterize, exaggerate, or lie about counterinsurgent actions to garner the support of the local population.⁶¹ Constantly bidding to win sympathy, insurgents will go so far as to “carry out a terrorist act or guerilla raid” in hopes of “enticing counterinsurgents to overreact, or at least react in a way that insurgents can exploit.”⁶² In comparison, the counterinsurgent is “tied to his responsibilities and to his past” and “judged on what he does, not on what he says.”⁶³ These greater expectations place the counterinsurgent at a disadvantage⁶⁴ by forcing him to only use propaganda “to inform and not to fool,” as lying or exaggerating risks permanent loss of credibility with the local population.⁶⁵

Faced with this reality and competing for the support of the local population⁶⁶ with an adversary that continuously attempts to exploit and twist operational facts,⁶⁷ the counterinsurgent’s overemphasis on conventional warfare is a recipe for failure.⁶⁸ To avoid “winning tactical victories” but “suffering strategic defeats,”⁶⁹ the counterinsurgent must diligently mitigate insurgent propaganda by minimizing exploitation opportunities through the judicious use of force.⁷⁰ For this reason, traditional employment of white phosphorous in a COIN environment is ill advised.⁷¹ As the

⁶¹ See *id.*; FM 3-24, *supra* note 11, at 3-23, 5-8.

⁶² FM 3-24, *supra* note 11, at 1-27. Examples of insurgent operations used to trigger disproportionate counterinsurgent responses include “opening fire on a crowd,” see *id.*, or using indiscriminate indirect fire.

⁶³ GALULA, *supra* note 11, at 9.

⁶⁴ See also John A. Nagl, *Foreword* to GALULA, *supra* note 11, at ix. “Counterinsurgency is not a fair fight” as the insurgent is free to “use every trick necessary,” and, therefore, it is important for the counterinsurgent “to fight an even more adroit information war.” *Id.*

⁶⁵ GALULA, *supra* note 11, at 9.

⁶⁶ See Nagl, *Foreword* to GALULA, *supra* note 11, at viii (stating “[a]n insurgency is a competition between insurgent and government for the support of the civilian population”); FM 3-24, *supra* note 11, at 1-27 (“Arguably, the decisive battle is for the people’s minds.”).

⁶⁷ See FM 3-24, *supra* note 11, at 8-5 (noting how insurgent propaganda “can twist” images into evidence of the counterinsurgent’s bad intentions).

⁶⁸ See *id.* at 1-29 (providing a table of unsuccessful practices in a counterinsurgent operation, including overemphasis on killing or capturing the enemy versus securing the local population).

⁶⁹ TACTICAL DIR., *supra* note 12, at 1.

⁷⁰ See FM 3-24, *supra* note 11, at 1-27 (“Using substantial force also increases the opportunity for insurgent propaganda to portray lethal military activities as brutal.”). Another crucial aspect to countering insurgent propaganda is through a comprehensive and widely disseminated information program. See *id.* at 2-2, 5-19.

⁷¹ See Nagl, *Foreword* to GALULA, *supra* note 11, at viii (noting that “[a]lthough protecting the local people clearly requires some kinetic actions against committed insurgents, conventional military forces are too prone to emphasize offensive actions . . . rather than the predominantly political, economic, and security requirements upon which the ultimate defeat of the insurgency depends.”); FM 3-24, *supra* note 11, at 1-25 (“In a COIN environment, it is vital for commanders to adopt appropriate and measured levels of force and apply that force precisely so that it accomplishes the mission without causing unnecessary loss of life or suffering.”).

Goldstone Report clearly illustrates, white phosphorous use in the vicinity of civilian population centers, regardless of legality and reason, will likely result in international condemnation, accusations of indifference towards civilian suffering, and endless, horrendous images.⁷² Providing insurgents with such material allows for a major propaganda victory, and in a conflict “largely about perceptions,”⁷³ endangers the possibility of long-term strategic success.

Instead, a nontraditional employment of white phosphorous, or more specifically, a well-publicized, voluntary adherence to the restrictive Protocol III requirements in all white phosphorous use, can preempt insurgent propaganda while simultaneously demonstrating concern for the local population.⁷⁴ The importance of minimizing civilian casualties and damage to civilian infrastructure in counterinsurgent operations cannot be overstated as “the social upheaval caused by collateral damage from combat can be [a] major escalating factor . . . for insurgencies.”⁷⁵ By recognizing the polarizing and contentious nature of white phosphorous and self-imposing a restrictive employment policy, the proponents of current U.S. counterinsurgency operations can show an understanding of the primacy of civilian support and the ability to adapt to win that support.⁷⁶

IV. Conclusion

Voluntarily choosing to restrain a specific means or method of warfare in furtherance of counterinsurgency strategy has contemporary precedent⁷⁷ and is congruent with established doctrine.⁷⁸ Requiring all white phosphorous use in contemporary counterinsurgency operations to comply with the heightened Protocol III requirements is a clear

⁷² See *supra* notes 5–10 and accompanying text.

⁷³ FM 3-24, *supra* note 11, at 6-16.

⁷⁴ See *id.* at 7-36 (discussing the importance of selecting the appropriate weapon in counterinsurgency operations).

⁷⁵ *Id.* at 1-9.

⁷⁶ See *id.* at 1-27 (“As noted above, the key for counterinsurgents is knowing when more force is needed—and when it might be counterproductive.”); TACTICAL DIR., *supra* note 12, at 1 (“[W]e must respect and protect the population from coercion and violence—and operate in a manner which will win their support.”).

⁷⁷ The tactical directive expressly directs commanders to limit close air support (CAS) in situations where it will likely “produce civilian casualties . . . which in the long run make mission success more difficult and turn the Afghan people against us.” TACTICAL DIR., *supra* note 12, at 1-2.

⁷⁸ “The COIN environment requires counterinsurgents to not only determine the kinds of weapons to use and how to employ them but also establish whether lethal means are desired—or even permitted.” FM 3-24, *supra* note 11, at 7-36. Leaders must “consider not only the first order, desired effects of a munition or action but also possible second- and third-order effects—including undesired ones.” *Id.* This often requires “employing tactics and weapons appropriate to the situation” and possibly “avoiding the use of area munitions to minimize the potential harm inflicted” upon the civilian population. *Id.*

policy decision, versus an international legal obligation, and is best communicated through a supplemental measure in theater-specific rules of engagement (ROE).⁷⁹ Though establishing a policy barrier when international law allows for white phosphorous use may seem a subtle and insidious way to subvert a commander's ability to conduct operations, in the counter-intuitive nature of COIN operations, reducing unnecessary force results in increased local support and

eventual isolation of the insurgency.⁸⁰ Victory comes from this isolation, not from physical destruction of the insurgent;⁸¹ thus, it is a mistake to view the limiting of a highly controversial weapon in counterinsurgency as an infringement upon force protection. Defeating an insurgency requires unorthodox approaches, and only the military force that is "able to overcome" the "institutional inclination to wage conventional war" can be successful.⁸²

⁷⁹ Rules of engagement are defined as "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered." JOINT CHIEFS OF STAFF, JOINT PUB. 1-2, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 408-09 (12 Apr. 2001). In particular, the ROE "establish fundamental policies and procedures governing the actions to be taken by US commanders" during a military operation. JOINT CHIEFS OF STAFF, INSTR. 3121.01B, THE STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES app. A-1 (13 June 2005). Combining operational requirements, policy, and international law therefore make the ROE more restrictive than the law of war. Supplemental measures, which "enable commanders to tailor ROE for specific missions," are the recognized tool to implement restrictions on the use of force for particular "political and military goals that are often unique to the situation." *Id.* app. I-1.

⁸⁰ FM 3-24, *supra* note 11, at 1-27 (noting that the use of force can be counterproductive); TACTICAL DIR., *supra* note 12, at 2 ("We will not isolate the population from us through our daily conduct or execution of combat operations.").

⁸¹ GALULA, *supra* note 11, at 54.

⁸² FM 3-24, *supra* note 11, at ix.

The Law and Policy Implications of “Baited Ambushes” Utilizing Enemy Dead and Wounded

Lieutenant Colonel Chris Jenks*

Introduction

You are the brigade judge advocate for a U.S. Army Stryker brigade combat team in the midst of a combat deployment to Afghanistan. Arriving at the tactical operations center one morning, you are accosted by the brigade executive officer who tells you that the commander, Colonel (COL) Smith, is looking for you. After you dutifully report, the commander tells you about a significant activity report that one of the battalion commanders, Lieutenant Colonel (LTC) Jones, recently submitted. The report deals with one of the infantry companies, Alpha Company, also known as “Kill Company,” and its engagement with the enemy the night prior, which resulted in seven enemy killed in action and eighteen enemy wounded; there were no U.S. or coalition casualties. Colonel Smith tells you that upon seeing the report, he contacted LTC Jones to congratulate him and discuss the tactics, techniques, and procedures Kill Company had used.

“Jones told me that Kill used a baited ambush,” COL Smith informs you. “When I asked him what he meant, he said that Kill had been in an engagement earlier in the day, feigned breaking contact, and left its third platoon in an overwatch position of the engagement area,” he added. “The platoon kept ‘eyes on’ and waited for a couple of hours until the enemy returned to police up their dead and wounded. Then third platoon opened up on them.” Rubbing his forehead with his hand, COL Smith closes with “I don’t know whether to recommend them for an award or start an investigation. What do you think?”

This hypothetical is based, in part, on a news report that U.S. forces in Afghanistan targeted enemy forces attempting to collect their dead.¹ This note uses the hypothetical as a

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¹ Greg Jaffe, ‘Almost a Lost Cause’: One of the Deadliest Attacks of the Afghan War Is a Symbol of the U.S. Military’s Missteps, WASH. POST, Oct. 4, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/03/AR2009100303048.html?sid=ST2009100401053>. The article describes how a U.S. Army unit purportedly called in artillery fire on insurgents who returned to the battlefield to collect their dead from an engagement hours earlier. Members of the unit filmed the artillery strike and can be heard laughing and cheering, which presents additional challenges to a command. See also Michael Yon, Adam Ray, MICHAEL YON ONLINE MAG., Feb. 18, 2010, <http://www.michaelyon-online.com/adam-ray.htm>. In describing efforts by U.S. Army forces to counter the IED threat in Afghanistan, Yon references a tactic that also comes close to, if not enters, the law of war violation continuum discussed *infra*. The U.S. military has been taking inventory of culverts, identifying their exact locations and documenting them with photos and maps, and has also embarked on a program to place barriers on culverts regularly used by U.S. forces. Because the enemy continually tries to remove or circumvent the barriers, small kill teams (SKTs) move from place to place, day and

vehicle to draw out the law and policy implications of such targeting. Because assessments cannot be made divorced from the specifics of the battlefield at issue, this note does not attempt to answer the question of whether such targeting is permissible. It neither discourages nor extols such targeting. Instead, this note strives to inform judge advocates in the field about the issues involved, and, in so doing, seeks to better equip them to handle the challenging questions such targeting raises.

Law or Policy?

Before considering the hypothetical, the applicable law and policy that affect the issues and upon which any assessment must be based should be examined. Academics can easily descend into a legal inquiry from which extraction is difficult by attempting to characterize the conflicts in which the United States is currently engaged, the applicable law of those conflicts, and even the triggers for the law’s application. However, from the military practitioner’s perspective, the answers to these issues are straightforward, and they derive from policy rather than legal grounds.

Department of Defense’s (DoD) policy directs that “[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”² Under this policy, the law of war is defined as

[t]hat part of international law that regulates the conduct of armed hostilities. . . . The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.³

Consequently, the full panoply of the law of armed conflict applies to the hypothetical in Afghanistan, but that answer stems from U.S. policy and not a legal determination.⁴

night, watching the culverts. The SKTs frequently call for fire that kills men who have come to emplace bombs; when enemy forces arrive to collect the bodies, the SKTs engage them, too.

² U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM ¶ 4.1 (9 May 2006) [hereinafter DODD 2311.01E].

³ *Id.* ¶ 3.1.

⁴ The DoD policy, in addition to being required, provides a more straightforward solution than the traditional “right person, right conflict” legal analysis. As applied to the hypothetical, the right person analysis would focus on the characterization of the “enemy” to determine whether

What Is the Law?

The law most relevant to the baited ambush is the Geneva Conventions, specifically the first Geneva Convention (GC I), which protects wounded and sick soldiers on land during war. Pursuant to article 15 of GC I,

[a]t all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled. Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield. Likewise, local arrangements may be conducted between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to the area.⁵

The Commentary to GC I describes the nature and extent of the obligation. The Commentary notes that the predecessor to the 1949 Geneva Conventions, the 1929 Convention, while listing a similar responsibility, imposed the obligation only “after each engagement” and only on “the occupant of the field of battle.”⁶ By contrast, article 15

the individuals are combatants or civilians and whether wounded or sick. The right conflict analysis would consider whether the conflict was international (Common Article 2) or noninternational (Common Article 3) in nature. The policy obviates the need for this complicated legal analysis, standardizing the United States’ approach in the process.

⁵ Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field art. 15, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]. The International Committee of the Red Cross, in its study of customary international law, found that “State practice establishes [art. 15] as a norm of customary international law applicable in both international and non-international armed conflicts.” JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 406 (2005).

⁶ COMMENTARY, I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet ed., 1958) [hereinafter ICRC COMMENTARY] (quoting Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 3, July 27 1929, 47 Stat. 2021 [hereinafter 1929 GC]). Under Article 3 of the 1929 GC,

[a]fter each engagement the occupant of the field of battle shall take measures to search for the wounded and dead, and to and to protect them against pillage and maltreatment. Whenever circumstances permit, a local armistice or a suspension of fire shall be arranged to permit the removal of the wounded remaining between the lines.

of GC I imposes the obligation “at all times” and on all the parties to the engagement.

Returning to the hypothetical, the members of Kill Company did have an obligation to search for and care for the enemy wounded, as well as an obligation to search for the dead and prevent them from being despoiled.⁷ But does that mean that Kill Company, by not initially conducting such a search or by leaving third platoon to attack the enemy when it returned to collect its dead and wounded, violated the Geneva Convention? Not necessarily. Although the plain language of the article requires Kill Company to take all possible measures, the obligations of article 15 are not absolute. As the Commentary notes, “there are times when military operations will make the obligation to search for the fallen impracticable.”⁸

How should the practitioner distinguish what is and is not practicable? One answer is to imagine a continuum ranging from least to greatest responsibility. Information from the battlefield and unit in question would then guide placement on the continuum. This information would include the proximity, both geographical and temporal, of the unit to the engagement area, the unit’s disposition, capabilities, and mission.

For example, consider two extremes. The first involves an engagement in Afghanistan. A U.S. Army unit employs indirect fire to wound or kill the enemy 5000 meters to the north, and more significantly, down the ridgeline, across an open and exposed valley, and up on another ridge line from where the under-strength third platoon of Kill Company is located. Kill Company has only been in the area a short period of time, and the area is considered “insurgent territory.” Kill Company has also just received orders to immediately move south. In contrast, the second example is an urban engagement in Mosul, Iraq. The engagement involves direct fire weapons at ranges of 100–200 yards. Third platoon is at full strength, has been in the same combat outpost for some time, and is not going anywhere any time soon.

Placing the two scenarios on the same continuum, the responsibility to search for the dead under article 15 is considerably greater in the latter example. This reflects the Commentary’s recognition that “[t]he search for the fallen combatants and their collection may present different aspects according to circumstances.”⁹ The Commentary continues by acknowledging that

Id.

⁷ The Commentary explains that “the wounded and sick must be guarded and, if necessary, defended against all parties, whether military or civilian, who may seek to lay hands on them. *Id.* at 152.

⁸ *Id.* at 151.

⁹ *Id.*

the commonest and the most important case will be that of enemy troops retiring in the face on an attack. The occupant of the battlefield must then, without delay, make a thorough search of the captured ground as to pick up all the victims. The dead must also be looked for and brought back behind the lines with as much care as the wounded.¹⁰

Ultimately, in the absence of an armistice or suspension of fire, engaging combatants attempting to recover their dead and wounded is not a per se violation of the law of war, but utilizing known—or even suspected—enemy wounded and dead as “bait” for such targeting enters the continuum and, at some point, will constitute a violation of article 15. The more time that passes following the engagement, the closer the engagement is to U.S. forces, and the more control U.S. forces have over the “field of battle,” the more likely the failure to search for enemy wounded and dead becomes to violating the Geneva Convention.

Distinguishing Violations

Assuming arguendo that Kill Company’s action (or inaction) did constitute a violation of article 15, what then? Too often, terms like “grave breach” or “war crime” are thrown around without the requisite care for their definition and application. To clarify, for the purposes of GC I, grave breaches are

those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.¹¹

¹⁰ *Id.*

¹¹ GC I, *supra* note 5, art. 50. To that list, the Geneva Convention Relative to the Treatment of Prisoners of War (GC III) adds “compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) further adds “unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

War crimes under the U.S. Code are

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23 [poison, treachery, etc], 25 [attack of undefended places], 27 [steps taken during siege or bombardment to spare cultural property], or 28 [pillage of town or place] of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.¹²

Violating article 15 by itself¹³ is neither a grave breach nor a war crime.¹⁴ Indeed there are countless ways by which a State Party may violate the Geneva Conventions, very few of them rising to the level of grave breach or war crime. Which is not to trivialize such offenses; they are violations of the law of war for which there are ramifications.

¹² 18 U.S.C. § 2441(c) (2006).

¹³ A violation of article 15 that also involved wilful killing of an enemy hors de combat would rise to the level of a grave breach of GC I. Similarly, an article 15 violation that included feigning a cessation of hostilities or the killing or wounding of enemy soldiers attempting to surrender would violate Hague IV. Either of those scenarios would constitute a war crime under the U.S. Code, but the additional conduct, and not just the article 15 violation, push the offense over the threshold level.

¹⁴ *But see* U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 499 (18 July 1956) (C1, 15 July 1976) (stating that “[t]he term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.”). This approach, adopted in the 1956 version of Field Manual 27-10, preceded the War Crimes Act and the trend of criminalizing only the most “serious crimes” or “grave breaches” evident in recent legislation. Compare the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. § 948a), with War Crimes Act of 1996, 18 U.S.C. § 2441 (2006).

Under the Geneva Conventions, “[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than . . . grave breaches.”¹⁵ This means that the United States has agreed to take action to respond to violations of the first Geneva Convention, like article 15, which do not rise to the level of a grave breach. That action, or measures, should be designed to “suppress” the prohibited behavior. While action could be taken under the Uniform Code of Military Justice, it can also be administrative, which includes reprimands, counseling, and retraining. Potentially more significant to COL Smith, a violation of article 15, and thus the law of war, is a reportable incident under the DoD law of war program.¹⁶

While ambushing the enemy when they are collecting their wounded or dead may not be a war crime, such targeting may incur more risk than units realize, or want, and any short-term tactical advantage may be outweighed by the ramifications of reporting and investigating a possible violation of the law of armed conflict.

Conclusion

The purpose of this note is to remind practitioners of the law and policy relevant to ambushes which utilize enemy dead and wounded as “bait.” Units are to be commended for the agile and adaptive ways in which they bring the fight to an amorphous enemy. Our job as judge advocates and as legal advisors is to inform our commanders when their means and methods of warfare tread close to the line separating permissible conduct from law of war violations.

¹⁵ GC I, *supra* note 5, art. 50.

¹⁶ DODD 2311.01E, *supra* note 2, ¶ 3.2. Under the Law of War Program, a reportable incident is defined as “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.” *Id.*

Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War

Dick Jackson*

The alleged law of war violation in the previous article¹ is a great example to use to discuss reporting requirements. If it is, indeed, a violation of the law of war, does it have to be reported? What are the treaty and regulatory requirements? What is the intent of the law of war reporting requirements? And how are they applied in practice? How do administrative and criminal investigations impact or interact with reporting? Are they mutually exclusive or mutually reinforcing? What tools are available to the judge advocate at the brigade combat team level, or above, to assist in evaluating and accomplishing these requirements? Can we make the system more responsive to the needs of commanders and civilian leaders, at all levels? These questions, and many of their answers, have echoed through the years, as judge advocates have grappled with law of war reporting since the Vietnam era. More recently, reporting was a key issue in the Haditha case, where the battalion commander, Lieutenant Colonel (LtCol) Chessani, was charged with dereliction of duty for his failure to report the death of numerous civilians during a village clearance mission.² And the “Goldstone Report,” a report by the U.N. Special Rapporteur on alleged law of war violations during Operation Cast Lead, the Israeli incursion into Gaza last year, concluded that the Israeli investigation of allegations was inadequate.³ Adequate reporting and investigation of law of war violations is a policy requirement and a legal obligation, derived from binding law of war treaties, including the Geneva Conventions.

Legal and Regulatory Requirements

All four Geneva Conventions of 1949 establish the baseline for extensive investigation and reporting requirements for law of war violations. The Geneva Conventions require states to (1) establish “effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention”; (2) “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts” (or hand over such persons for trial by another state party); and (3) “take measures necessary for the suppression of all acts contrary to the provisions of the present convention other than grave breaches.”⁴ These provisions include the so-called “prosecute or extradite” requirement, expressed in Latin as *aut dedere aut pedire*.⁵ The third provision established the requirement for corrective actions to address lesser violations of the law of war, to include criminal sanctions, administrative actions, or additional training.⁶ These Geneva Conventions requirements are the “cornerstone of the system used for the repression of breaches of the convention,”⁷ establishing the bedrock requirement to punish serious violations, mandating a “feedback loop” to suppress other violations, and clearly implying a need for reporting and investigation.

The other source for the legal obligation to report is derived from the treaty and case law on command responsibility.⁸ The requirement to ensure Soldiers act pursuant to the lawful orders of an equally responsible chain of command is built into the definition of lawful combatants, who, according to the Prisoner of War Convention, must be “commanded by a person responsible for his subordinates,” who are all charged with “conducting their operations in

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¹ Lieutenant Colonel Chris Jenks, *The Law and Policy Implications of “Baited Ambushes” Utilizing Enemy Dead and Wounded*, ARMY LAW., June 2010, at 92.

² Mark Walker, *Chessani Reserves Plea in Haditha Charges*, N. COUNTY TIMES, Nov. 16, 2007, available at http://www.nctimes.com/news/local/article_7bb042fa-81ca-52a9-81e5-8716b279ee87.html (“The crux of the case against Chessani is that he failed to accurately report and investigate a possible violation of war by Marines under his command.”).

³ Statement by Richard Goldstone on Behalf of the Members of the United Nations Fact Finding Mission on the Gaza Conflict before the Human Rights Council, Human Rights Council 12th Session 5 (29 Sept. 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/OpeningStatement_GazaFFM_290909.doc (“The Mission is highly critical of the pusillanimous efforts by Israel to investigate alleged violations of international law . . .”). This was a somewhat unfair characterization of Israeli investigation and reporting efforts, as the Israeli Defense Forces have a reporting, administrative, and criminal investigation system that has engaged in extensive independent investigation of the conflict. See Israeli Ministry of Foreign Affairs, Initial Response to Report of the Fact Finding Mission on Gaza Established Pursuant to Resolution S-9/1 of the Human Rights Council (24 Sept. 2009), available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Initial-response-goldstone-report-24-Sep-2009.htm>.

⁴ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. All four Geneva Conventions have similar provisions.

⁵ COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 585 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY]; see also EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 108 (2008).

⁶ COMMENTARY, *supra* note 5, at 594 (“In the opinion of the International Committee, it covers everything which can be done by the State to avoid acts contrary to the Convention being committed or repeated.”).

⁷ *Id.* at 590.

⁸ See generally William Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

accordance with the laws and customs of war.”⁹ The responsibility of the commander is established explicitly by the provisions cited above, if he or she “orders to be committed” a crime.¹⁰ Responsibility of the commander as a principal is succeeded by responsibility as an accessory to law of war violations. As General A.P.V. Rogers, the former U.K. Judge Advocate General, put it, “There is a very fine distinction between complicity in war crimes committed by others on the one hand and an omission to act, which may itself amount to a war crime, on the other.”¹¹ The standard established in the *Yamashita* case, a case arising from Japanese atrocities committed in the Philippines at the end of World War II, was whether the commander “knew or should have known” about the alleged offenses.¹² Field Manual 27-10, *The Law of Land Warfare*, explicitly describes this theory of command responsibility:

The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.¹³

Whether the commander could be charged as a principal or an accessory to the crime, commanders may also be held responsible for dereliction of duty, under Article 92 of the Uniform Code of Military Justice (UCMJ), for a failure to adequately investigate. This theory was applied to LtCol Chessani in the Haditha investigation. As the Article 32 Investigating Officer (IO) noted:

In this case, LtCol Chessani failed to do his duty. He failed to thoroughly and accurately report and investigate a combat engagement that clearly needed scrutiny, particularly in light of the requirements of MCO 3300.4 [the service equivalent of directives discussed below]. He failed to

accurately report facts that he knew or should have known and inaccurately reported at least one critical fact he specifically knew (his claim to have “moved to the scene to conduct a command assessment of the events”) to his higher headquarters. I believe from my investigation that these acts constitute a violation of Article 92¹⁴

Current implementing regulations require the commander to report all “reportable incidents,” which are defined as “a possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.”¹⁵ Reports are to be transmitted through command channels “for ultimate transmission to appropriate U.S. agencies, allied governments, or other appropriate authorities.”¹⁶ The reporting requirements, though broad in scope, are intended to reflect several concepts embodied in the treaties and case law—the need to investigate, prosecute, or extradite individuals who have committed grave breaches; the need to take corrective action, or whatever measures are necessary to prevent other violations of the law of war; and the requirement for higher level commanders to know what is occurring in their area of operations so they can intervene to prevent further violations. Finally, the reporting requirements are intended to keep senior leadership informed of “serious incidents,” whether or not further criminal investigation is required.¹⁷

The operational reporting requirements are further elaborated in the Chairman of the Joint Chiefs of Staff Instruction. The current version of the Instruction, CJCSI 5810.01C (31 January 2007), contains little more than a repetition of the standards in the Department of Defense (DoD) Directive. It does, however, make it clear that dual reporting (in criminal investigation and command channels) is essential, so that initial reports are clearly communicated in command channels, while mechanisms are established to ensure these reports are also referred to the “appropriate military investigative authorities.”¹⁸ The upcoming revision

⁹ Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

¹⁰ *Id.* art. 146.

¹¹ GENERAL A.P.V. ROGERS, LAW ON THE BATTLEFIELD 196 (2004).

¹² *In re Yamashita*, 327 U.S. 1 (1946). *But see* Parks, *supra* note 8, at 87. Parks notes that “the offenses committed by the troops under General Yamashita were so widespread that under the circumstances he exhibited a personal neglect or abrogation of his duties and responsibilities as a commander amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence,” rather than imputed knowledge. *Id.* at 31.

¹³ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 501 (18 July 1956) (C1, 15 July 1976).

¹⁴ Memorandum, Investigating Officer, to Commander, U.S. Marine Corps Forces, Cent. Command, subject: Executive Summary of Pretrial Investigative Report in the Case of Lieutenant Colonel Jeffrey R. Chessani, USMC (10 July 2007) (on file with author).

¹⁵ U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM 2 (9 May 2006) [hereinafter DODD 2311.01E].

¹⁶ *Id.*

¹⁷ Violations of the law of war by enemy personnel against U.S. personnel or contractors should be reported through channels to the Department of the Army, which has Executive Agency for coordinating the investigation and prosecution of enemy personnel, through tribunals, extradition, or some other means. *Id.*

¹⁸ CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (31 Jan. 2007) [hereinafter CJCSI 5810.01C].

of the instruction, CJCSI 5810.01D, which has recently cleared combatant command and service staffing, will shorten and clarify the existing instruction, requiring the National Joint Operations/Intelligence Center to consolidate and disseminate operational reports and add specific reference to the “Defense Incident Based Reporting System” and referral of serious crimes or grave breaches to major criminal investigative organizations (MCIO).¹⁹ Serious, or felony-level, crimes are under the investigative purview of MCIOs, like the Army Criminal Investigative Division (CID). By including these agencies in a dual-reporting role, it enables the command (after the initial report) to refer allegations of major crimes to the appropriate investigative agency without a concern about command influence, as subsequent criminal reports are made through appropriate CID and UCMJ reporting channels. In addition, the new instruction reiterates the need for reportable incidents to be reported through combatant command and military department chains of command, concurrently.²⁰ The DoD and Joint reporting instructions are further supplemented by combatant commander and service directives.

The U.S. Central Command (CENTCOM) has extensive guidance on and experience with law of war reporting, and CENTCOM regulations generally reflect the same attention to detail and compliance with the DoD Directive and CJCSI as other combatant commands.²¹ The CENTCOM Regulation, 27-1, dated March 2000, repeats the provisions of the regulatory guidance from higher headquarters. It also provides for over-inclusive reporting and preserves the dual-reporting concept of command (both combatant command and military department) and criminal investigative channels.²² The regulation emphasizes the need for thorough investigation and reporting of the results of investigation, through service and operational channels, and cautions commanders to ensure proper collection and preservation of evidence for possible subsequent prosecution. It refers to initial reports in operational channels, to be provided in the “OPREP-3” format dictated by the Joint Service Manual.²³ Subsequent CENTCOM guidance was issued in CENTCOM Fragmentary Order (FRAGO) 09-683, which “highlighted the need to reemphasize reporting requirements throughout the USCENTCOM AOR . . . to ensure senior leadership is

aware of potential high interest events.”²⁴ The FRAGO emphasizes the need to send immediate initial reports without delay “to ensure all information is available or correct and may be lacking in some level of detail”; it also requires follow-up reporting and that all formal and informal investigations be forwarded to the CENTCOM Staff Judge Advocate as soon as it is available.²⁵ The supplemental guidance in no way discourages parallel reporting, through service and criminal investigative channels, while emphasizing the command responsibility of the responsible combatant commander and subordinate commanders at all levels.

The Department of the Army (DA) reporting requirements for “reportable incidents” are embodied in Army Regulation (AR) 190-45, the “Law Enforcement Reporting” regulation. Paragraph 8-2b of the regulation categorizes “war crimes” as Category 1 “serious incidents,” to be reported in law enforcement reporting channels, with copies furnished to commanders and legal advisors, all the way up to the Headquarters, DA level.²⁶ The specific requirement of the AR is to report “[w]ar crimes, including mistreatment of enemy prisoners of war, detainees, displaced persons, retained persons, or civilian internees; violations of the Geneva Conventions; and atrocities.”²⁷ The regulation is intended to be over-inclusive to provide a mechanism to keep higher headquarters informed of potentially serious incidents. As paragraph 8-1 explains:

Commanders should report any incident that might concern HQDA as a serious incident, regardless of whether it is specifically listed in paragraphs 8-2 and 8-3, below. In cases of doubt, report the incident. In determining whether an incident is of concern to HQDA, the following factors should be considered:

- (1) Severity of the incident.
- (2) Potential for adverse publicity.
- (3) Potential consequences of the incident.²⁸

Category 1 reports are to be transmitted by telephone, to be followed by a more detailed electronic message or e-mail report. The reporting formats are relatively straightforward, requiring “who, what, when, where” information, with

¹⁹ U.S. DEP’T OF DEF., DIR. 7730.74, DEFENSE INCIDENT-BASED REPORTING SYSTEM (15 Oct. 1996).

²⁰ See CJCSI 5810.01C, *supra* note 18, para. 7 (requiring units to submit the “initial report through the applicable operational command and Military Department”).

²¹ See, e.g., U.S. EUROPEAN COMMAND, DIR. 45-1, LAW OF WAR PROGRAM (7 Nov. 2006) [hereinafter USEC DIR. 45-1].

²² U.S. CENTRAL COMMAND, REG. 27-1, LAW OF WAR PROGRAM 3 (Mar. 2000) [hereinafter CENTCOM REG. 27-1].

²³ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, MANUAL 3150.03C, JOINT REPORTING STRUCTURE EVENT AND INCIDENT REPORTS (1 Feb. 2009).

²⁴ U.S. CENTRAL COMMAND, FRAGO 09-683, OPERATION IRAQI FREEDOM (4 Dec. 2004) [hereinafter CENTCOM FRAGO 09-683] (on file with author).

²⁵ *Id.*

²⁶ U.S. DEP’T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING (20 Mar. 2007) [hereinafter AR 190-45].

²⁷ *Id.* The term “war crimes” invokes the definition of war crimes from title 18, U.S. Code. War Crimes Act, 18 U.S.C. § 2441 (2006).

²⁸ *Id.*

whatever information is available at the time.²⁹ The idea is to provide an initial report with the information available, without waiting for all the facts or a preliminary adjudication of the facts to be completed.

What is a “Possible, Alleged, or Suspected Violation of the Law of War”?

The choice of an over-inclusive reporting standard was intentional. The reporting standard is intended to cause higher headquarters to react and provide the requisite amount of command attention to an allegation. As the IO in the Chessani Article 32 noted:

The program directive defines a reportable incident as a “possible, alleged, or suspected violation of the law of war.” Mr. Parks made the point [during his Article 32 testimony] that this low threshold is used specifically to generate reporting and investigation. This is due to the historical reluctance of organizations to look internally for wrongdoing in a combat environment [e.g., “my Marines don’t commit war crimes”], at least at the Battalion level. As he put it: “If it looks bad, report it.” In addition, the MCO [service directive] requires prompt reporting and thorough investigation of a reportable incident, to include directing that “on-scene commanders shall ensure that measures are taken to preserve evidence of reportable incidents” Accordingly, I believe that the multiple deaths of civilians, including women and children in their homes, should have clearly hit the low threshold of this order. In other words, a reasonable and prudent commander should have made a sufficient inquiry to see if his Marines were following proper Rules of Engagement and Law of War during this engagement.

Reporting potential law of war violations may be counterintuitive to the company or battalion commander on the ground, but it reinforces command responsibility by addressing allegations with a “report and investigate” response that demonstrates the reporting commander and each successive commander in the chain of command is concerned about law of war compliance by his or her subordinates. When in doubt, report, particularly when the allegation involves grave breaches or serious crimes (like numerous civilian deaths or severe detainee abuse) that

could call into question the U.S. commitment to disciplined military operations and accountability for law of war violations. As the combatant command and service guidance indicates, higher headquarters should be sent real-time, though incomplete, reports, supplemented by follow-up reports as relevant information becomes available. This enables commanders at each level of command to provide the right amount of command and control to ensure military operations are conducted in a disciplined fashion, as their professional and treaty obligations demand.

Reporting, investigation, and accountability also demonstrate U.S. commitment to protecting the local populace in counterinsurgency operations. As the IO noted, again, in the *Chessani* case:

These actions display not only negligence with regard to those duties reasonably expected of a Battalion Commander in combat; they also belie a willful and callous disregard for the basic tenants [sic] of counterinsurgency operations and the need for popular support and legitimacy. A commander’s responsibility also includes setting the right command climate and matching commander’s intent to the operational environment. You cannot win popular support by killing over twice as many civilians as insurgents in one day’s engagement, and then attempting to lay the blame at the feet of that same population and their leaders, regardless of how corrupt you may perceive them. In LtCol Chessani’s own words, “he [the insurgents] wanted to make us look bad” and in this case the insurgents succeeded. To not recognize the potential for this event to reverberate far beyond the confines of Haditha is not to be in touch with the current nature of the conflict.

The current conflict in Afghanistan calls for a similar line of reasoning when reporting and investigating civilian deaths. As General McCrystal has made clear in his “Tactical Directive,” civilian deaths set back the allied cause and must be prevented, even at the cost of putting Soldiers at a tactical risk.³⁰ The strategic effect of failing to properly report and investigate law of war violations can be catastrophic for the mission.

²⁹ *Id.* fig.9-1.

³⁰ COMMANDER, INTERNATIONAL SECURITY ASSISTANCE FORCE (ISAF), TACTICAL DIR. (6 July 2009) (“I recognize that the carefully controlled and disciplined employment of force entails risks to our troops—and we must work to mitigate that risk whenever possible. But excessive use of force resulting in an alienated population will produce far greater risks. We must understand this reality at every level in our force.”).

But Is It a Credible Allegation?

A rule of reason should be applied to the reporting standard, however, and that is what is behind the addition of the “credibility” review to the reporting process. While the intent of the regulation and the implementing guidance is clearly over-inclusive, the addition of the term “credible” before “possible, alleged, or suspected violation” allows the commander and his judge advocate to sort the wheat from the chaff and only report “credible” allegations. But what is “credible”? Construing the reporting requirement too broadly will likely prompt superfluous reporting and jam the system; alternatively, construing the reporting requirement too narrowly runs the risk of excluding reports the spirit of the directives would otherwise include. There are several possible definitions of “credible information.” One suggestion would be to include information obtained by the commander that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead him to presume the fact or facts in question may be true or require further investigation. Another possible definition would include several factors.

Information, although incomplete, is deemed credible when considering the source and nature of the information and totality of the circumstances the information leads a prudent person to *suspect* [emphasis added] that a law of war violation may have occurred and investigate the allegation further. The severity of the alleged offense, the source of the information, and corroboration (if any) are all factors to consider in determining whether the allegation is credible. In case of doubt, the information must be presumed credible.

Each of these definitions, though not adopted or incorporated into the directive (to date), has several provisions in common: they require a preliminary review of the facts available, consideration of the “totality of the circumstances,” and application of a rule of reasonable suspicion to the reporting requirement. This approach is very similar to the criminal law concept which, under Military Rule of Evidence 314(f), authorizes further investigation of suspected criminal activity.³¹ Reasonable

³¹ The cite to this standard is not intended to propose the use of investigative detention in investigating allegations; the author merely proposes the standard of proof adopted in the classic *Terry* stop, by analogy. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 302 discussion (2008) [hereinafter MCM]; see also 1 STEPHEN A. SALZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 3-375 (5th ed. 2006). While some would argue that the “credibility review” articulated above is closer to a “probable cause” standard, which, per RCM 302(c), authorizes the military equivalent of arrest or “apprehension,” adopting this standard would make the credibility review too high a standard for reporting and preliminary investigation.

suspicion exists if, after “reviewing the totality of the circumstances,” the commander has a “particularized and objective basis for suspecting illegal activity.”³²

The commander and his judge advocate have a number of tools available to conduct a “credibility review.” The most flexible is Rule for Court-Martial (RCM) 303. What is usually referred to as a “commander’s inquiry” consists of an informal preliminary review of “all reasonably available evidence” by the commander or his designee. In “serious or complex cases,” however, the commander should seek the assistance of law enforcement personnel (including the appropriate MCIO, or the CID for the Army).³³ Recommending the criminal investigation experts apply their skills to allegations of grave breaches or complex cases like Haditha is good advice, and immediate reporting and MCIO investigations should be the rule, rather than the exception, in such cases.

Another approach, often mandated by higher headquarters for civilian deaths or so-called “escalation of force” incidents at check-points,³⁴ is to conduct an informal administrative investigation, under provisions of AR 15-6 for the Army. The regulation allows for informal procedures to be used to gather additional information about an alleged incident. The appointing authority, usually a battalion commander or above, will appoint an uninvolved officer to conduct the inquiry and sort out the facts, making recommendations to the commander as to corrective action (in the case of lesser violations of the law of war), no further action, or further criminal investigation. The informal procedures allow for expedited evidence gathering and consideration of sworn statements and routine reports, rather than taking direct evidence.³⁵ While this approach provides

³² SALZBURG, SCHINASI & SCHLUETER, *supra* note 31, at 3-385 (“As the courts have recognized, the concept of reasonable suspicion is abstract, and not easily reduced to any sort of checklist or formula. In assessing reasonable suspicion . . . they may take into account their experience, training, reasonable inferences, and knowledge . . .”).

³³ MCM, *supra* note 31, R.C.M. 303.

³⁴ See, e.g., Robert F. Worth, *U.S. Military Braces for Flurry of Criminal Cases in Iraq*, N.Y. TIMES, July 9, 2006 (“In April, Lt. Gen. Peter W. Chiarelli, the No. 2 American commander in Iraq, issued an order that specified for the first time that American forces must investigate any use of force against Iraqis that resulted in death, injury or property damage greater than \$10,000.”); see also COMMANDER, INTERNATIONAL SECURITY ASSISTANCE FORCE (ISAF), INITIAL ASSESSMENT, at E-3 (30 Aug. 2009) (“The fact that civilians were killed or property was damaged needs to be acknowledged and investigated, and measures must be taken for redress.”).

³⁵ U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS 13 (2 Oct. 2006). A detailed discussion of the conduct of AR 15-6 investigations is beyond the scope of this article, but judge advocates advising the investigating officer may, for example, be asked to provide advice on whether to give rights warnings, what criminal offenses may have been committed, and what appropriate adverse administrative actions to recommend. Additionally, a review by a judge advocate is usually required prior to action by the appointing authority. *Id.* at 7 (“The appointing authority will also seek legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative

additional operational flexibility and time for consideration of the facts, an administrative investigation should not be used as a tool to prevent timely reporting and referral to the appropriate law enforcement investigative agency. As the CENTCOM FRAGO notes, “timely reporting and [effective] investigation” of alleged or suspected violations are the goals of the law of war reporting directives.³⁶

What’s Next?

Initial reporting and investigation to determine credibility is only the beginning. Usually some follow-up reporting is required to complete the treaty obligations mentioned above. Presumably, in order for senior commanders to complete their obligations under a “command responsibility” theory, they need to follow up on allegations to take preventive measures, or prosecute, as appropriate.³⁷ Additionally, criminal law and the regulatory guidance permit various alternative dispositions for substantiated allegations, depending on the particular circumstance of each case, including who committed the alleged offenses, where they were committed, and against whom. The ultimate disposition of the most serious substantiated law of war violations would be to fulfill the “prosecute or extradite” requirements of the law of war treaties.

The CENTCOM requirements for law of war reporting have extensive follow-up requirements that are not required in the directives of higher headquarters. The combatant commander is charged with supervising his operational chain of command to ensure compliance with the law of war. This includes instituting programs to prevent violations, and periodic review of plans, policies, and directives (to include rules of engagement), “particularly in light of any violations reported.”³⁸ In order to accomplish this task, many combatant commanders and their service component commands have included a requirement to provide higher headquarters with follow-up reports and copies of final investigations.³⁹ While follow-up reporting is normally provided to services in law enforcement channels for

action (see para. 1-9), or will be relied upon in actions by higher headquarters.”).

³⁶ CENTCOM FRAGO 09-683, *supra* note 24.

³⁷ The commander and his judge advocate have to be careful to avoid “command influence,” the “mortal enemy of military justice,” in the charging and forwarding decision; however, this issue should not confuse or limit the commander’s ability to report and refer cases to criminal investigators. MCM, *supra* note 31, R.C.M. 306; *United States v. Griffin*, 41 M.J. 607 (C.A.A.F. 1994); *see also* UCMJ art. 37 (2008); MCM, *supra* note 31, R.C.M.s 104 & 401. Ironically, the *Chessani* case was the subject of a Government interlocutory appeal based on command influence issues. *See United States v. Chessani*, 2009 WL 690110 (N-M. Ct. Crim. App. 2009).

³⁸ DoDD 2311.01E, *supra* note 15, at 6.

³⁹ CENTCOM REG. 27-1, *supra* note 22, at 6.

substantiated allegations,⁴⁰ the follow-up of administrative investigations is essential to establish command responsibility and “take all measures necessary to suppress” lesser violations of the law of war, per the requirements of the Geneva Conventions.⁴¹ Whether or not criminal investigation or prosecution proceeds, the commander has an obligation under the law of war to follow up on substantiated law of war violations to ensure that appropriate measures—administrative sanctions, corrective actions, changes in doctrine or techniques, tactics and procedures, or training—are taken to make certain future military operations are conducted in a disciplined fashion.

Reports of suspected law of war violations by the enemy must be evaluated by the Executive Agent for such matters, the Secretary of the Army, who will propose (in coordination with the General Counsel of the Secretary of Defense, the State Department, and the Department of Justice (DoJ)) the appropriate mechanism for disposition of any war crimes prosecutions for enemy combatants.⁴² Recent examples of such a sorting process include the Iraqi War Crimes Documentation Center from the First Gulf War, which developed criminal cases against Saddam Hussein for his crimes against Kuwait;⁴³ the Regime Crimes Liaison Office of Operation Iraqi Freedom, which assisted the development of the Iraqi Special Tribunal that convicted Hussein and others;⁴⁴ the Central Criminal Court of Iraq, which prosecuted insurgents who directed their violence against coalition forces in Iraq;⁴⁵ and the Criminal Investigation Task Force, which investigated individuals subject to the Military Commissions Act.⁴⁶ Additionally, reports of alleged violations by allies are distributed to the combatant commanders, who are charged with determining the extent of further investigation and reporting, in coordination with “appropriate U.S. agencies, allied governments, or other appropriate authorities.”⁴⁷ The requirement to prosecute or extradite includes the obligation to prosecute for war crimes those individuals under control of the state and provide information to other states so they can exercise jurisdiction under their domestic law to that end.⁴⁸

⁴⁰ *See, e.g.*, AR 190-45, *supra* note 26, at 94.

⁴¹ COMMENTARY, *supra* note 5 and accompanying text.

⁴² DoDD 2311.01E, *supra* note 15, at 4.

⁴³ U.S. DEP’T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 623 (Apr. 1992).

⁴⁴ MICHAEL NEWTON & MICHAEL SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 60 (2008).

⁴⁵ COALITION PROVISIONAL AUTHORITY, ORDER 13 (Apr. 24, 2004), available at www.iraqcoalition.org/.../20040422_CPAORD_13_Revised_Amended.pdf (last visited Mar. 1, 2010).

⁴⁶ Eric Patterson, *CITF: Criminal Investigative Task Force—OSI*, BNET (Nov.–Dec. 2003), available at http://findarticles.com/p/articles/mi_m0PAJ/is_6_55/ai_112482127/.

⁴⁷ DoDD 2311.01E, *supra* note 15, at 7.

⁴⁸ LA HAYE, *supra* note 5, at 108.

Under U.S. law, both civilian and military authority exists to prosecute war crimes. For crimes committed on military installations and those committed off military installations that are normally subject to courts-martial, the military normally prosecutes as a matter of policy. The DoD and the DoJ have allocated responsibility for investigation and prosecution of war crimes committed by or against DoD personnel in a 1984 Memorandum of Understanding (MOU) between DoD and DoJ.⁴⁹ The MOU provides that DoD is responsible for investigating most crimes committed on a military installation or during military operations. When a crime is committed by a person subject to the UCMJ, the Military Department concerned will take the lead in prosecuting the offender; when the perpetrator is not subject to the UCMJ, DoJ is responsible for the prosecution.⁵⁰ The prosecution of Green (who had since been administratively eliminated from the service) for the rape of a young girl and the murder of her family members in Mahmudiyah provides a stark example of DoJ's authority to prosecute under these procedures.⁵¹ Coordination for DoJ prosecution should be done through service channels. Although the general court-martial convening authority (GCMCA) is empowered to coordinate such a prosecution at the lowest levels, the Criminal Law Division at OTJAG is available to assist in coordinating DoJ prosecutions, through the General Counsel of DoD.⁵²

Criminal prosecution under the UCMJ is ordinarily accomplished by charging a specific violation of the code, rather than a violation of the law of war, as a matter of practicality and policy.⁵³ Although the UCMJ provides the authority to prosecute "war crimes," per se, the code mentions no specific "law of war violation." However, that does not prevent military prosecutors and commanders from sanctioning such conduct. The UCMJ includes substantive criminal offenses that match the war crimes delineated in 18 U.S.C. § 2441 and the grave breaches enumerated in the Geneva Conventions, Common Article 3, and the Additional

Protocols.⁵⁴ Examples of substantive offenses that may be used to prosecute law of war violations include the following:

1. Art. 93 (10 U.S.C. § 893), Cruelty and Maltreatment;
2. Art. 103 (10 U.S.C. § 903), Captured or Abandoned Property;
3. Art. 109 (10 U.S.C. § 909), Waste, spoilage, or destruction of property other than military property of the United States;
4. Art. 118 (10 U.S.C. § 918), Murder;
5. Art. 120 (10 U.S.C. § 920), Sexual offenses;
6. Art. 121 (10 U.S.C. § 921), Larceny;
7. Art. 122 (10 U.S.C. § 922), Robbery;
8. Art. 128 (10 U.S.C. § 928), Assault; or
9. Art. 92 (10 U.S.C. § 892), Failure to Obey a Lawful Order or Regulation; Dereliction of Duty

Moreover, the examples of these sanctions applied to law of war violations by U.S. servicemembers are legion. The most notorious war crimes prosecution since World War II was the "My Lai massacre" prosecution of William Calley.⁵⁵ The *Chessani* case, discussed above, was only one of the Haditha prosecutions that originally included a "dereliction of duty charge" against the battalion legal advisor.⁵⁶ Additionally, numerous prosecutions for crimes arising from law of war violations have been pursued since the Iraq War began in 2003. Soldiers have been convicted of killing an Iraqi detainee after he had been bound and blindfolded,⁵⁷ and the perpetrators of the abuse in Abu Ghraib prison were prosecuted for their transgressions.⁵⁸ More recently, an Army sniper was convicted of killing an Iraqi civilian who stumbled into his position at night, and he was sentenced to ten years in prison.⁵⁹ This anecdotal evidence, which is backed up by numerous cases prosecuted in military courts, shows the efficacy of military prosecutions for law of war violations. The UCMJ manifests the U.S. commitment to the law of war and good order and discipline by providing an

⁴⁹ See U.S. DEP'T OF DEF., DIR. 5525.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES (22 Jan. 1985); see also MCM, *supra* note 31, app. 3.

⁵⁰ MCM, *supra* note 31, at A3-2. Prosecution of contract employees of the Department of Defense accompanying the force "in time of declared war or contingency operation" is subject to the same approach (of primary DoJ jurisdiction), despite the amendment to Article 2(a)(10) of the UCMJ, per agreement with DoJ. Department of Justice prosecution for serious crimes may be pursued under the War Crimes Act. 18 U.S.C. § 2441 (2006).

⁵¹ For a complete discussion of this incident and the subsequent investigation, see JIM FREDERICK, BLACK HEARTS: ONE PLATOON'S DESCENT INTO MADNESS IN IRAQ'S TRIANGLE OF DEATH (2010). See also Andrew Wolfson, *Ex-Soldier Convicted of Killing Iraqis*, LOUISVILLE COURIER-J., May 8, 2009, at A1.

⁵² U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 2-2; FM 27-10, *supra* note 13.

⁵³ See MCM, *supra* note 31; *id.* R.C.M. 307(c)(2) discussion.

⁵⁴ For example, "murder of a protected person" under 18 U.S.C. § 2441, which is a grave breach of each law of war treaty, would be charged as "murder" under Article 118, UCMJ. UCMJ art. 118 (2008).

⁵⁵ *United States v. Calley*, 48 C.M.R. 19 (C.M.A. 1973).

⁵⁶ Mark Walker, *Stone Case May Set Tone for Haditha Prosecutions*, N. COUNTY TIMES, May 6, 2007. All, but the squad leader, Staff Sergeant Wuterich have had their cases dismissed, however. Mark Walker, *Court Upholds Dismissal of Haditha Prosecution*, N. COUNTY TIMES, Mar. 17, 2009.

⁵⁷ Steve Liewer, *1st ID Soldier Gets Seven Years in Killing of Iraqi Detainee During Interrogation*, STARS & STRIPES, May 20, 2005, at 3.

⁵⁸ John Gonzalez, *Prosecutions Wind Down at Fort Hood*, HOUS. CHRON. Apr. 4, 2005, at 1.

⁵⁹ *10 Years for Army Sniper for Killing Iraqi Civilian*, AP, Feb. 10, 2008, available at <http://www.msnbc.msn.com/id/23086927>.

established and effective mechanism to prosecute crimes that constitute violations of the law of war.

Conclusion

Several tools, and voluminous directives, can assist commanders and their judge advocates sort out possible, alleged, or suspected law of war violations, but the issue really boils down to judgment and the question every staff officer asks in determining information flow: “Who else needs to know?” The next level commander needs to know to fulfill his obligation, as the responsible commander, to prevent law of war violations from occurring. The MCIO needs to know about serious crimes or grave breaches to fulfill their investigative responsibility and to assist the commander and the nation in fulfilling their treaty obligations to investigate, prosecute, or extradite individuals responsible for grave breaches. Finally, the commander must correct less serious violations of the law of war; reporting and investigation also serve that aim.

Commanders are required to at least inquire into every allegation of a crime and to ensure appropriate investigation and disposition. Reports of what would amount to grave breaches or other serious misconduct, like murder of protected persons, rape, willful and wanton destruction of civilian property, or assaults or other serious abuse of detainees, trigger both reporting to higher headquarters and investigation by an MCIO. Reports of less serious violations of the law of war—like mutilation of an enemy corpse, failure to collect and bury the dead, theft of detainee property, misuse of a red cross symbol that does not result in death or serious bodily harm to an enemy combatant, or any other of a myriad of potentially less serious violations of the law of war—may require reporting, depending on the severity of the incident, the potential for adverse publicity, or the potential consequences of the incident. At a minimum, these reports require a commander’s inquiry to assess whether further investigation is required. In any case, commanders remain responsible to appropriately dispose of alleged offenses, under the particular circumstances of each case.

So how should the judge advocate or commander deal with an allegation of “baiting,” as discussed in Lieutenant Colonel Chris Jenks’s preceding article? They should first gather the pertinent facts, probably using the “commander’s inquiry” technique, to engage in a “credibility review” of the information. If the conduct appears to be a minor, debatable violation, easily correctible at the company level, without the involvement of perfidy or other grave breaches, the incident may not have to be reported or investigated further. For example, failure to collect the dead, alone, when the unit does not control the ground or cannot safely do so, may not even be a violation. If a pattern of questionable activity is evident, or more detailed facts cannot be ascertained with a “commander’s inquiry,” an informal AR 15-6 investigation might provide the commander better information with which to decide whether a credible allegation exists.

A clear violation of the law of war should be reported, and steps should be taken to prevent such violations in the future. When an initial report comes from a non-governmental organization, a reporter, or the ICRC, reporting is essential, with or without a “credibility review.” However, in cases of serious crimes or grave breaches—such as the murder of another combatant (lawful or unlawful) through misuse of a protective emblem, booby-trapping of a dead body, or collateral damage to civilians because of intentional misuse of civilian cultural and religious requirements to bury their dead—a report should be sent without delay, and the nearest MCIO should be notified. Further reporting through criminal investigation channels can assist commanders in determining the appropriate disposition of criminal charges, and follow-up reporting of the investigation (criminal or administrative) to the higher headquarters, along the lines of CENTCOM’s supplemental instructions, can prevent systemic violations in the future. Reporting and investigation, in the end, serves several purposes: correcting misconduct or mistakes and sanctioning serious criminal behavior, as well as allowing military commanders to ensure that their command responsibility is fulfilled in accordance with the treaty obligations of the United States.

The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities?

Major Richard S. Taylor*

I. Introduction

“The essence of warfare is ‘the attack.’”¹ Today, however, “the legal norms regarding attacks are increasingly revealing themselves to be less than fully settled.”² A particularly contentious case in point concerns the legal norms applicable to lethally attacking (i.e., lethally targeting) civilians who directly participate in hostilities.³

In an effort to bring clarity and consistency of application to this area of international humanitarian law (IHL), the International Committee of the Red Cross (ICRC) published its *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (Guidance)* in May 2009.⁴ The stated purpose behind the ICRC project was to “identify the defining elements of ‘direct participation in hostilities’ and to establish guidelines for the interpretation of that notion in both international and noninternational armed conflict.”⁵

While the *Guidance* did provide clarification as to some of the norms, it also brought to the fore yet another major schism. Midway through the five-year project, the ICRC inexplicably broadened its scope to address the question of whether international law placed restraints on the kind and degree of force permissible in attacks against civilians taking a direct part in hostilities.⁶ Specifically, the original debate

over restraints on the use of force began over the question of whether a “military necessity” to kill a civilian directly participating in hostilities must exist before that individual can be attacked with lethal force.⁷ The question soon morphed into the more colloquial form: Do the parties to an armed conflict have a legal obligation to attempt to capture rather than kill a civilian who has become a lawful target because he has taken direct part in hostilities? This discussion then highlighted the difference of opinion between those who believe and those who do not believe the general principles of humanity and military necessity require—as a matter of law—restraint in the kind and degree of force permissible when attacking civilians who are directly participating in hostilities.⁸

Some experts expressed their belief that IHL did impose such restraints on the use of force in direct attack.⁹ Other experts rejected the proposition stating “as long as the threshold of armed conflict was reached, there was no legal basis in IHL to claim parties had an obligation to capture rather than kill, to give an opportunity to surrender before an attack, or to operate against each other under a law enforcement paradigm.”¹⁰ After consideration of the competing arguments and interests, the ICRC ultimately concurred with the first set of experts stating that, under IHL, “the kind and degree of force which is permissible against persons not entitled to protection against direct attack *must* not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”¹¹ In other words, the ICRC viewed IHL as requiring the application of the least amount of force necessary to accomplish the mission. Under this reading, commanders would now have to weigh the possibility of capture, or the application of other non-lethal means, before they could mount an attack with lethal force.¹²

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¹ Michael N. Schmitt, *Fault Lines in the Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 277 (Susan Breaux & Agnieszka Jachec-Neale eds., Brit. Inst. of Int’l & Comp. Law, 2006), <http://www.michaelschmitt.org/images/FaultLinesintheLawofTargeting.pdf>.

² *Id.* at 277.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. According to AP I, article 51(3), civilians lose protection from attack for such time as they take direct part in hostilities. *Id.* art. 51(3).

⁴ NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereinafter GUIDANCE].

⁵ NILS MELZER, INT’L COMM. OF THE RED CROSS, SUMMARY REPORT OF SECOND EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 2 (2004) [hereinafter SECOND SUMMARY REPORT].

⁶ The term “international law” is being used intentionally here to denote reference to both international humanitarian law (IHL) and human rights law. Both areas of the law played greatly in the debate over restraint. See generally NILS MELZER, INT’L COMM. OF THE RED CROSS, SUMMARY

REPORT OF FOURTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 75–79 (2006) [hereinafter FOURTH SUMMARY REPORT].

⁷ NILS MELZER, INT’L COMM. OF THE RED CROSS, SUMMARY REPORT OF THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 45 (2005) [hereinafter THIRD SUMMARY REPORT].

⁸ MELZER, FOURTH SUMMARY REPORT, *supra* note 6, at 75–79.

⁹ MELZER, THIRD SUMMARY REPORT, *supra* note 7, at 46; see also MELZER, FOURTH SUMMARY REPORT, *supra* note 6, at 75–79.

¹⁰ MELZER, THIRD SUMMARY REPORT, *supra* note 7, at 46; see also MELZER, FOURTH SUMMARY REPORT, *supra* note 6, at 75–79.

¹¹ MELZER, GUIDANCE, *supra* note 4, at 77 (emphasis added).

¹² *Id.* at 82. The ICRC concedes situations may exist in which capture would not be appropriate: “[O]perating forces can hardly be required to take additional risks for themselves or the civilian population.” *Id.*

In support of its view, the ICRC relied upon the general principles of humanity and military necessity “which underlie and inform the entire normative framework of IHL.”¹³ In stating the applicability of these general principles, the ICRC emphasized its opinion that IHL did not expressly regulate attacks against civilians directly participating in hostilities. That in this “absence of regulation,” the principle of humanity—first given prominence in the Martens Clause and later codified in article 1(2) of Additional Protocol I (API)—restrained the kind and degree of force belligerents could assert against civilians who had lost protection from attack because of their direct participation in hostilities.¹⁴ The ICRC went on to state that while its *Guidance* was not a “text of a legally binding nature,”¹⁵ it did “provide an interpretation of the notion of direct participation in hostilities within existing legal parameters.”¹⁶ At least in the ICRC’s view, such restraint on the use of force against civilians directly participating in hostilities was required as a matter of law.¹⁷ In crafting this paradigm, the ICRC effectively created the requirement that the principle of humanity be considered as part of any future targeting analysis.¹⁸

Whether military forces must first attempt to capture a civilian who is directly participating in hostilities is a highly relevant—and contentious—question for today’s military commanders and lawyers. This is because military operations, at least for the foreseeable future, will continue to involve the intentional, lethal targeting of civilians—whether they are labeled insurgents, terrorists, unlawful combatants, or unprivileged belligerents—who are taking direct part in hostilities.¹⁹ Moreover, the United States will

continue to operate with coalition partners who may adopt the new ICRC *Guidance*, thus limiting their employment of lethal force against directly participating civilians to those situations in which non-lethal force has been affirmatively ruled out.²⁰ The potential for divergent opinions between coalition partners about the lawfulness of lethally targeting civilians could result in questions being raised from a number of different sources. Consequently, U.S. military commanders and lawyers need to be familiar with the *Guidance* in order to effectively articulate that restraints on the kind and degree of force permissible in the attack are not a matter of law, as stated by the ICRC, but a matter of policy or practice best left to the discretion of the state.

This article evaluates the ICRC’s view and argues that contrary to the ICRC’s assertion, IHL does not demand consideration of “capture rather than wounds, and wounds rather than death”²¹ as part of the targeting analysis when planning attacks against civilians directly participating in hostilities. The first part provides an overview of the ICRC’s stated position and the rationale behind that position. The second part then evaluates the strength of the ICRC’s assertion that IHL restricts the kind and degree of force permissible in direct attack against civilians who are directly participating in hostilities. In conclusion, the article argues that the ICRC’s *Guidance* does not incorporate humanity into the targeting analysis as a matter of law.²²

II. Framing the ICRC’s View

A. The Need to Clarify the Notion of Civilian Direct Participation in Hostilities

The notion of civilian direct participation in hostilities is, at best, an opaque area of the law.²³ International humanitarian law experts generally agree that civilians who directly participate in hostilities lose protection from attack, but that seems to be the extent of their agreement.²⁴

¹³ *Id.* at 78.

¹⁴ Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899 32 Stat. 1803, 187 Consol. T.S. 429 (containing the original Martens Clause in the preamble); AP I *supra* note 3, art. 1(2).

¹⁵ MELZER, *GUIDANCE*, *supra* note 4, at 6.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 5 (“The Interpretative Guidance provides a legal reading of the notion of ‘direct participation in hostilities’”); *id.* at 6 (“[T]he Guidance does not purport to change the law, but provides an interpretation of the notion of direct participation in hostilities within existing legal parameters.”); *id.* at 9 (explaining that the Interpretative Guidance does “not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC’s institutional position as to how existing IHL should be interpreted”).

¹⁸ *Id.* at 80. The ICRC suggests the consideration of humanity would apply to the targeting of all military objectives, not just civilians taking direct part in hostilities, but that in “classic large scale confrontations . . . the principles . . . are unlikely to restrict the use of force beyond what is already required by specific provisions of IHL.” *Id.*

¹⁹ See generally Peter Baker, *Surgical Strikes Shape Afghanistan Debate*, N.Y. TIMES, Oct. 5 2009, available at <http://www.nytimes.com/2009/10/06/world/asia/06prexy.html>; Aislinn Simpson, *Pakistani Fury as Suspected US Drone Attack Kills 12*, Sept. 12, 2008, <http://www.telegraph.co.uk/news/asia/pakistan/2827257/Pakistani-fury-as-suspected-US-drone-attack-kills-12.html>; Phil Stewart & Robert Birsel, *Analysis—Under Obama, Drone Attacks on the Rise in Pakistan*, REUTERS, Oct. 12, 2009, <http://www.reuters.com/article/idUSN11520882>.

²⁰ MELZER, *GUIDANCE*, *supra* note 4, at 82 (stating that the ICRC concedes situations may exist in which capture would not be appropriate).

²¹ JEAN PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* 32 (1975).

²² While incorporating humanity into the targeting analysis is not a matter of law, it may, depending on the circumstances, be a matter of best practice or policy, especially in counterinsurgency operations.

²³ See generally Daphne Richmond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001, 1022 (2006–2007) (“Efforts to clarify what is meant by ‘direct participation in hostilities’ have only highlighted the lack of consensus on the contours of the concept and the difficulty of applying the concept to modern warfare.”).

²⁴ See INT’L COMM. OF THE RED CROSS INFORMAL EXPERT SEMINAR SUMMARY REPORT ON DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2003); MELZER, SECOND SUMMARY REPORT, *supra* note 5; MELZER, FOURTH SUMMARY REPORT, *supra* note 6; NILS MELZER, INT’L COMM. OF THE RED CROSS, SUMMARY REPORT OF FIFTH EXPERT MEETING ON THE NOTION OF DIRECT

Opinions vary widely on what constitutes direct participation in hostilities; when protection from attack ends; and under what circumstances lethal force may be used against a civilian who is determined to be directly participating in hostilities.²⁵ Because of the lack of consensus in this important area of the law of war, the ICRC invited more than fifty experts from around the world to a series of meetings between 2003 and 2008 to help clarify the notion of civilian direct participation in hostilities.²⁶

During these discussions, international law experts debated the use of various methodologies for analyzing what constituted civilian direct participation in hostilities and when civilians lost protection from attack. The two primary methodologies they debated were the AP I approach,²⁷ which provides a very narrow definition of direct participation, and the functional approach,²⁸ which is significantly more expansive in scope.²⁹ As it became apparent that the expert panel was going to recommend an

PARTICIPATION IN HOSTILITIES (2008) [hereinafter FIFTH SUMMARY REPORT].

²⁵ See generally sources cited *supra* note 24.

²⁶ MELZER, GUIDANCE, *supra* note 4, at 9.

²⁷ The AP I “direct part” test is employed by the majority of the international community and requires a close temporal and physical proximity nexus to the harm. According to AP I, article 51(3), civilians enjoy protection from attack “unless and for such time as they take a direct part in hostilities.” AP I, *supra* note 3, art. 51(3). The commentary further defines direct participation as requiring actual harm to the personnel and equipment of the enemy forces and implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place. Consequently, the AP I test permits civilians to be targeted only for such time as they are involved in causing “actual harm” to enemy forces. This approach, if strictly followed, creates what is commonly referred to as the revolving door of targeting.

²⁸ The debate originally focused on the membership approach. However, the result seems to have been consensus on the functional approach. The functional approach is the broader “net” of the two approaches. Under this test, a civilian may be targeted based on the importance of the function he performs for the duration he performs the function. A civilian whose function remains critical at all times, such as a leader or highly skilled bomb maker, would remain a lawful target at all times. Conversely, a person whose function is critical only part of the time would be targetable only for such time as he is performing that function. The functional test used by the United States places less value on the causal connection to harm in favor of evaluating the importance of the function performed.

²⁹ See generally MELZER, SECOND SUMMARY REPORT *supra* note 5, at 22–23; MELZER, FOURTH SUMMARY REPORT, *supra* note 6, at 64–66; MELZER, FIFTH SUMMARY REPORT *supra* note 24, at 33–42. In discussing when civilians lose protection from attack, the expert panel debated the concepts of the “revolving door” approach and “continuous combat function” approach. The “revolving door” approach limits attacks to those times when a civilian is actually directly participating in hostilities. For example, a farmer by day and insurgent by night would only be targetable when involved in insurgent activities at night. He would not be targetable during the day. This “revolving door” concept is closely aligned with the AP I approach. The “continuous combat function” approach is much broader in that it permits attacks so long as the directly participating civilian continues to directly participate in hostilities. For example, under the “continuous combat function” approach, unless and until the farmer ceased to directly participate, he would be targetable at all times. This concept is aligned with the functional approach.

expansive approach for determining what constituted direct participation—which, concomitantly, would subject more civilians directly participating in hostilities to attack—the ICRC began searching for a “counterbalance to the adoption of the functional approach.”³⁰ In practical terms, the ICRC became concerned that the expansive notion of direct participation recommended by the expert panel would encourage states to increasingly attack (i.e., employ lethal force against) civilians directly participating in hostilities, and it decided it needed to find some other way to restrain this application of lethal force.³¹

The problem facing the ICRC in terms of finding a restraint on the use of force in the attack was twofold. First, conventional and customary IHL expressly regulates whom and what belligerents can attack. Second, conventional and customary IHL does not expressly restrict the kind and degree of force that can be applied against an individualized target so long as the attack is otherwise lawful under IHL.³² One can see this construct in the Geneva Conventions of 1949, the Additional Protocols of 1977, and customary international law. All three bodies of IHL expressly remove the protections against attack from civilians who directly participate in hostilities.³³ In law of war terms, these civilians become legitimate military objectives.³⁴ Once they

³⁰ MELZER, FOURTH SUMMARY REPORT, *supra* note 6, at 77.

³¹ In the author’s opinion, a couple of reasons explain the ICRC’s desire to limit the impact of the adoption of the functional approach. Foremost, the *Guidance* is the first ICRC document to ever define the circumstances under which a civilian loses protection and can lawfully be attacked. All other treaties and documents are prohibitive in nature. Second, the ICRC had to balance the competing interests between those arguing for the broad targeting scheme and those against it. As a compromise, the ICRC adopted the functional approach and continuous combat function paradigms for determining what constitutes direct participation in hostilities and when a directly participating civilian could be attacked, but then closed the barn door somewhat by placing kind and degree restraints on the attack itself.

³² See generally MELZER, GUIDANCE, *supra* note 4, at 78.

³³ Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field art. 3(1) Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I] (“Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely . . .”); Geneva Convention for the Protection of Civilian Persons in Time of War art. 15, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] (providing for the establishment of neutral zones to protect “civilian persons who take no part in hostilities”); AP I, *supra* note 3, 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.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II] (“All persons who do not take a direct part or who have ceased to take direct part in hostilities . . . are entitled to respect for their person.”); *id.* art. 13(3) (“Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.”); CUSTOMARY INTERNATIONAL HUMANITARIAN LAW II: PRACTICE 107–33 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter PRACTICE].

³⁴ See AP I, *supra* note 3, art. 52(2). This article defines military objectives as “those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

are legitimate military objectives, the law of targeting then determines the lawfulness and, in some cases, the kind and degree of force permissible in the attack.³⁵ The purpose behind this targeting analysis is not to protect the intended target from lethal attack—in this case the civilian directly participating in hostilities—but to protect against excessive collateral injury, death, or damage to nearby civilians and civilian objects.³⁶ Moreover, while the laws pertaining to targeting may incidentally restrain the scope (i.e., kind and degree) of force allowable in the attack—in order to prevent excessive collateral harm—they do not expressly regulate the kind or degree of force a commander may employ against a specific target.³⁷ Consequently, the ICRC was faced with finding restraints on the use of lethal force in an IHL paradigm that quite simply permits belligerents to attack and kill combatants and civilians deemed to be directly participating in hostilities, without resort to lesser means of force.

Cognizant that black letter IHL provided no restraints on the use of deadly force against otherwise lawful military objectives, the ICRC crafted an interpretation of IHL that implicated the principles of humanity and military necessity as restraints on the kind and degree of force permissible in the attack against the military objective itself.³⁸ Under the ICRC view, in the absence of express regulation, the underlying principles of IHL—humanity and military necessity—“inform the entire normative [IHL] framework”³⁹

and require, as a matter of law, restraint on the kind and degree of force permissible in the attack. With its counterbalance decided upon, the ICRC set forth its view and supporting rationale.

B. The ICRC View and the Rationale Behind Its View

The ICRC articulated its “counterbalance” to the expansive approach recommended by the panel of experts in Section IX of its *Guidance*. It reads:

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.⁴⁰

The commentary to Section IX provides a roadmap to the thought process and rationale used by the ICRC in crafting this position.

As a starting point, the ICRC stated that all “direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.”⁴¹

Because the ICRC intended the *Guidance* to be an “analysis and interpretation of IHL only,” it imposed a restriction against reaching out to other branches of international law, such as human rights law, for support.⁴² Additionally, the ICRC could not find support for its view in positive IHL, which “simply refrain[ed] from providing certain categories of persons, including civilians directly participating in hostilities, with protection from direct ‘attacks’”⁴³ Nonetheless, the ICRC opined, “[T]he fact

³⁵ See generally Schmitt, *supra*, note 1, at 277.

The law governing attack is linear. First, the target must qualify as a ‘military objective’, . . . Second, the ‘means’ (weapon) and ‘method’ (tactics) employed must be lawful. Third, attacks with lawful methods and means against legitimate military objectives must still comply with the rule of proportionality, which prohibits attacks causing unintended but foreseeable damage to civilian objects (collateral damage) and harm to civilians (incidental injury) that is excessive relative to the concrete and direct military advantage anticipated. Fourth, LOIAC [Law of International Armed Conflict] requires attackers to take certain specified precautions. Only attacks meeting each of the four cumulative conditions are lawful.

³⁶ Combatants and civilians directly participating in hostilities may be lethally attacked because of their status as combatants or because of the loss of protection from attack based on direct participation in hostilities. See W. Hayes Parks, Memorandum of Law, Executive Order 12,333 and Assassination, ARMY LAW., Dec. 1989, at 4, 4–5 (“In wartime, the role of the military includes the legalized killing (as opposed to murder) of the enemy, whether lawful combatants or unprivileged belligerents, and may include in either category civilians who take part in hostilities. . . . Combatants are liable to attack at any time or place regardless of their activity when attacked.”); see also Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1, 17 (2004) (“To the extent civilians fulfill the same function as combatants . . . they are logically subject to targeting under the same provisions of international humanitarian law.”).

³⁷ Distinction, proportionality, and precaution can all affect the kind and degree of force a commander may use against an otherwise lawful target.

³⁸ See MELZER, GUIDANCE, *supra* note 4, at 77–82.

³⁹ *Id.* at 78.

⁴⁰ *Id.* at 77.

⁴¹ *Id.*

⁴² While the integration of human rights law (HRL) into IHL is not discussed in detail in this article, it is clear the ICRC relied heavily on HRL in drafting Section IX. The ICRC’s statement that HRL did not affect its viewpoint seems less than convincing. The only bodies of law that require restraints on the kinds and degrees of force a state actor can employ against another person are domestic law enforcement law and HRL; not IHL. By stating that states must only employ the amount of force “actually necessary to accomplish a legitimate military purpose in the prevailing circumstances,” the ICRC has in fact mandated the use of a force continuum only known to law enforcement i.e., HRL.

⁴³ MELZER, GUIDANCE, *supra* note 4, at 78.

that a particular category of persons is not protected against offensive or defensive acts of violence, is not equivalent to a legal entitlement to kill such persons without further considerations.”⁴⁴ To determine what these “further considerations” should be, the ICRC turned to the general principles of humanity and military necessity.

According to the ICRC, “in the absence of express regulation,” belligerents are still bound by the principle of humanity as set forth in custom (the Martens Clause) and Treaty (AP I, article 1(2)). Humanity, states the ICRC, complements and is “implicit in the principle of military necessity.”⁴⁵ “Military necessity and humanity, which underlie and inform the entire normative framework of IHL . . . shape the context in which its rules must be interpreted.”⁴⁶ Humanity, on one hand, “forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes,”⁴⁷ while military necessity permits “only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve . . . the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”⁴⁸ When read together, these two principles “reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.”⁴⁹ Using this rationale, the ICRC concluded that the principle of humanity restrained the “kind and degree of force . . . permissible against persons not entitled to protection against direct attack” to that which was “actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”⁵⁰

III. Analysis of the ICRC View

A. IHL Does Not Support the ICRC’s View

Turning to the principles underlying IHL for guidance in unclear situations is not a new concept. In war, unforeseen cases develop that fall outside the parameters of treaty or customary law. At these times, “the law on these subjects must be shaped—so far as it can be shaped at all—by reference *not to existing law but to more compelling*

considerations of humanity . . .”⁵¹ However, before turning to the general principles underlying IHL to inform the law, the written law must lack clarity. In other words, there must be a genuine need to interpret the law, such as an unforeseen case or vagueness in the law that rises to the level of an absence of regulation; not merely a desire to do so. Additionally, a compelling argument can be made that the general principles of humanity and military necessity take on a different quality depending on whether they are used at the macro or micro level of application. As such, the ICRC view has substantial hurdles to overcome both in terms of nesting its stated position and the rationale behind that position in IHL.

This section reviews the applicable positive and customary IHL to determine (1) whether there is a legitimate absence of regulation in the area of targeting civilians taking a direct part in hostilities and (2) whether the general principles of humanity and military necessity act to proscribe the kind and degree of force as the ICRC contends they do.

1. Civilians Taking Direct Part in Hostilities Forfeit Protection from Attack

The legality of lethally targeting a civilian directly participating in hostilities is a customary international law concept that was conventionalized in the Additional Protocols of 1977. Because the United States and a number of other countries are not parties to the Additional Protocols, customary international law retains its importance in this area of IHL. The recent ICRC Customary International Law (ICRC CIL) Study considers the legal norms pertaining to civilian direct participation to constitute customary international law.⁵² Additionally, article 51 of AP I and article 13 of AP II, which contain the treaty provisions expressing that civilians forfeit protection from attack “for such time as they take direct part in hostilities,” are considered, in pertinent part, customary international law by the United States.⁵³ Therefore, both treaty and customary

⁴⁴ *Id.*

⁴⁵ *Id.* at 79.

⁴⁶ *Id.* at 78.

⁴⁷ *Id.* at 79 (citing UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT sec. 2.4 (2004) [hereinafter MINISTRY OF DEFENSE MANUAL]).

⁴⁸ *Id.* (citing MINISTRY OF DEFENCE MANUAL, *supra* note 47, sec. 2.2.)

⁴⁹ *Id.* at 79.

⁵⁰ *Id.* at 82.

⁵¹ COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1394 (Yves Sandoz, Christoph Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY TO THE ADDITIONAL PROTOCOLS] (emphasis added); *see also* U.S. Dep’t of War, Gen. Order No. 100, art. 4 (Apr. 24, 1863) [hereinafter Lieber Code] (providing “Instructions for the Government of the Armies of the United States in the Field”), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (D. Schindler & J. Toman eds., 3d rev. ed. 1988); GC I, *supra* note 33, art. 45.

⁵² 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, RULES 20 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter RULES] (civilian direct participation in hostilities is a “norm of customary international law in both international and non-international armed conflict.”).

⁵³ AP I *supra* note 3, art. 51(3); AP II *supra* note 33, art. 13(3); *see also* Remarks of Michael J. Matheson, 2 AM. U.J. INT’L L. & POL’Y 419 (1987) [hereinafter Matheson Remarks]; Memorandum, W. Hayes Parks, Chief Int’l Law Branch, U.S. Army et al., to John H. McNeil, Assistant Gen.

IHL expressly permit belligerents to attack civilians who have been identified as directly participating in hostilities.

The treaty law on civilian direct participation is contained primarily in the Additional Protocols. Specifically, article 51(3), AP I, contains the provision applicable in international armed conflict while article 13(3), AP II, is the operative provision for noninternational armed conflict. The commentary to the Additional Protocols provides valuable insight on the intent of the various states' negotiators. Upon review, it is abundantly clear that states specifically intended for civilians taking direct part in hostilities to forfeit protection from attack. The commentary to article 51(3), AP I, states, in relevant part, that immunity from attack is "subject to an overriding condition . . . abstaining from all hostile acts."⁵⁴ Moreover, any civilian who takes part in armed combat "becomes a legitimate target, though only for as long as he takes part in hostilities."⁵⁵ Similar language is found in the commentary to AP II: civilians "lose their right to protection . . . if they take a direct part in hostilities and throughout the duration of such participation."⁵⁶ And, civilians, "it is clear, . . . will not enjoy any protection against attacks for as long as . . . participation lasts."⁵⁷ Based on the express provisions of the Additional Protocols and the accompanying commentary, it is clear the negotiators intended for civilians directly participating in hostilities to be subject to attack.

Customary law norms pertaining to civilian direct participation are equally clear. Based on a review of national practice, the ICRC concluded the loss of protection from attack was widely accepted as the norm.⁵⁸ Rule 6 of the ICRC CIL Study concluded that "State practice establishes . . . as a norm of customary international law applicable in both international and noninternational armed conflicts"⁵⁹ that "civilians are protected against attack unless and for such time as they take direct part in hostilities."⁶⁰ If civilians directly participate in hostilities, they "become legitimate military targets."⁶¹ Like its treaty based partner, customary international law also expressly suspends protection from attack for civilians directly participating in hostilities. Consequently, treaty and customary IHL

pertaining to civilian direct participation are consistent and unambiguous: Civilians who directly participate in hostilities lose protection from attack. Defining the treaty and customary understanding of the term "attack" now becomes an important factor in determining whether an absence of express regulation genuinely exists.

2. IHL Already Regulates Attacks on Civilians Directly Participating in Hostilities

The fact that civilians directly participating in hostilities forfeit protection from "attack" makes the definition of that term under treaty and customary IHL a critical factor in evaluating the "absence of regulation." The ICRC claims that the loss of protection from attack "is not equivalent to a legal entitlement to kill"⁶² and that "in the absence of express regulation" the principles of humanity and military necessity impliedly restrain the kind and degree of force a commander may lawfully employ against a civilian directly participating in hostilities. This view is not supported by contemporary IHL.⁶³

The customary law of attack developed as a means to restrain "violence and destruction . . . *superfluous* to actual military necessity."⁶⁴ Under the early "Just War Doctrine," protection from attack extended to clerics and civilians, including "harmless agricultural folk," and "the peaceable civilian population."⁶⁵ Later, the focus shifted from protecting civilians to protecting Armies, which had become exceedingly costly to train and equip.⁶⁶ In the mid-1800s, the focus again shifted and became protective of certain persons and property. The Lieber Code is demonstrative of the shift toward broader protections in the law of war.⁶⁷ It prohibited "any acts of hostility which makes the return to peace unnecessarily difficult."⁶⁸ The concept of providing broader protections from attack to certain persons and property was carried forward into today's conventional scheme through the negotiated balancing of the guiding principles of humanity and military necessity.⁶⁹

Counsel (Int'l) U.S. Office of the Sec'y of Def., subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986) [hereinafter McNeil Memo].

⁵⁴ COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 51, ¶ 1942.

⁵⁵ *Id.* ¶ 1942.

⁵⁶ *Id.* ¶ 4787.

⁵⁷ *Id.* ¶ 4789.

⁵⁸ See generally PRACTICE, *supra* note 33, at 107–33.

⁵⁹ RULES, *supra* note 52, at 20.

⁶⁰ *Id.* at 19 (discussing customary law norms in international armed conflict).

⁶¹ *Id.* at 21 (discussing customary law norms in noninternational armed conflict).

⁶² MELZER, GUIDANCE, *supra* note 4, at 78.

⁶³ The Israeli Targeted Killings case is cited as an example of restraints on the kind and degree of force permissible in the attack. However, it was decided on grounds of Israeli domestic law not IHL. Pub. Comm. Against Torture in Israel v. Gov't of Israel, HJC 769/02 ¶ 40.

⁶⁴ Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U.J. INT'L L. & POL'Y 117, 117 (1986) (emphasis added).

⁶⁵ *Id.* at 119.

⁶⁶ *Id.* at 120.

⁶⁷ Lieber Code, *supra* note 51. The Lieber Code provided instructions on the laws of war to be followed by U.S. troops during the Civil War.

⁶⁸ See *id.*

⁶⁹ G.I.A.D. Draper, *Humanitarian Law and Human Rights*, 1979 ACTA JURIDICA 193, 193 (1979) ("Since the second half of the nineteenth century when codification of much of the customary law of war was undertaken, the

Under contemporary treaty law, attacks are defined as “acts of violence against the adversary, whether in offense or defense.”⁷⁰ The definition of attack is an expression of contrast to the general protections against “violence to life and person” afforded to certain civilians and combatants under other provisions of IHL.⁷¹ Numerous scholars agree that the plain meaning of attack is the application of lethal force against an enemy.⁷² According to Charles Garraway, under IHL an enemy forfeits his “inherent right to life . . . merely because of who he is” and “may be attacked at any time and in any place, including by lethal force.”⁷³ Professor Fritz Kalshoven has opined that an attack involves “the use of means of warfare (i.e. weapons) and does not include taking prisoners of war, even though that may involve the application of force.”⁷⁴ Another eminent scholar, Professor Michael Schmitt, has concluded that “the term ‘attack’ logically includes all acts that cause violent consequences, i.e., death or injury . . .”⁷⁵ Additionally, he points to certain AP I provisions to support his conclusion that the term ‘attack’ means “acts causing death, injury, damage or destruction.”⁷⁶ Because the loss of protection from attack removes prohibitions against the application of lethal force, a great body of treaty and customary law has developed to govern the attack. Professor Michael N. Schmitt describes “the law governing attack” as being “linear.”

First, the target must qualify as a ‘military objective’, . . . Second, the ‘means’ (weapon) and ‘method’ (tactics) employed must be lawful. Third, attacks with lawful methods and means against legitimate military objectives must still comply with the rule of proportionality, which prohibits attacks causing unintended but foreseeable

restraints imposed have been guided and informed by the principle of humanity, i.e. of compassion for human suffering.”); Solf, *supra* note 64, at 122 (“The rules of the 1907 Hague Regulations were negotiated with military necessity in mind, and cited necessity expressly to justify derogations from certain prohibitory rules.”).

⁷⁰ AP I, *supra* note 3, art. 49.

⁷¹ GC I, *supra* note 33, art. 3 (protecting “persons taking no active part in hostilities” against “violence to life and person”).

⁷² See MICHAEL BOTHE, DIRECT PARTICIPATION IN HOSTILITIES IN NON-INTERNATIONAL ARMED CONFLICT: EXPERT PAPER SUBMITTED TO THE ICRC SECOND EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES (Oct. 2004) (“Both fighters and unprotected civilians constitute legitimate military objectives.”); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 316 (1959) (“Enemy combatants may be killed . . .”); PEARCE HIGGINS, WAR AND THE PRIVATE CITIZEN 42 (1912) (“The citizen who committed acts of hostility without belonging to a force . . . would find himself . . . put to death . . .”).

⁷³ CHARLES GARRAWAY, “THE WAR ON TERROR”: DO THE RULES NEED CHANGING? 9 (Chatham House 2006), http://www.chathamhouse.org.uk/files/3353_bpwaronterror.pdf.

⁷⁴ A.P.V. ROGERS, LAW ON THE BATTLEFIELD 24 (1996).

⁷⁵ Schmitt, *supra* note 1, at 291.

⁷⁶ *Id.*

damage to civilian objects (collateral damage) and harm to civilians (incidental injury) that is excessive relative to the concrete and direct military advantage anticipated. Fourth, LOIAC [Law of International Armed Conflict] requires attackers to take certain specified precautions. Only attacks meeting each of the four cumulative conditions are lawful.⁷⁷

As used above, military objective, lawful means and methods, proportionality, and precaution are all legal terms of art. Each derives from customary use and each is now a normative standard within the *lex scripta* of IHL.⁷⁸

Through the targeting paradigm outlined above, treaty and customary IHL act to constrain the application of force before and during the attack.⁷⁹ For example, IHL prohibits attacks against protected persons, such as civilians and combatants *hors de combat* through wounds or surrender. International humanitarian law also protects all non-military objectives, such as undefended places and civilian objects, from attack.⁸⁰ International humanitarian law further prohibits, through the regulation of means (weapons) and methods (tactics), the employment of any kind of force designed to cause unnecessary suffering.⁸¹ Finally, IHL expressly requires belligerents to take into consideration distinction, proportionality, and precaution whenever targeting a military objective that may result in foreseeable civilian casualties.⁸² Consequently, the ICRC’s claim that attacks against civilians directly participating in hostilities are unregulated is simply not a valid assertion.

3. Absence of Restraints in the Attack Do Not Amount to an Absence of Regulation

In the preceding paragraphs, the customary and treaty norms pertaining to loss of protection and the notion of attack were reviewed in order to demonstrate the pervasiveness of regulation in this area of the law. The loss

⁷⁷ *Id.* at 277–78.

⁷⁸ AP I, *supra* note 3, art. 52(2) (codifying military objective); art. 51(5)b (codifying proportionality); arts. 57 and 58 (codifying precaution); Convention (IV) Respecting the Laws and Customs of War on Land arts. 22 and 23, Oct. 18, 1907, 36 Stat. 2277, U.S.T.S. 539 [hereinafter Hague IV] (prohibiting certain means and methods).

⁷⁹ AP I, *supra* note 3, art. 49(1) (defining an attack as any act of “violence against the adversary, whether in offense or defence”); ROGERS, *supra* note 74, at 24 (“Kalshoven explains that ‘act of violence’ involves the use of means of warfare (i.e. weapons) and does not include taking prisoners of war, even though that may involve the application of force.”).

⁸⁰ Hague IV *supra* note 78, arts. 23c, 25, and 27; GC I, *supra* note 33, art. 12; GC IV *supra* note 33, art. 16.

⁸¹ Hague IV *supra* note 78, arts. 22 and 23.

⁸² See generally AP I, *supra* note 3, arts. 48, 51, 52, 57 and 58.

of protection from attack (i.e., becoming a military objective) is only the first step in the modern formulation of the law of targeting. Before an actual attack can occur, the belligerent must also ensure the lawful use of means and methods, the proportionality of the attack, and the consideration of precautions. These requirements evolved throughout the centuries as customary practice and have been memorialized as norms of modern warfare. Strikingly absent from this construct is any customary or conventional restraint on the kind and degree of force permissible in the direct attack.⁸³ According to one IHL expert, this was no mistake; “positive IHL essentially left it up to the parties to the conflict to decide what kind and degree of force was permissible against persons not entitled to protection against direct attack.”⁸⁴ As such, the absence of restraint should be viewed not as an absence of regulation, but as an intentional omission by the states which were concerned about being hobbled by escalation of force requirements.

4. The ICRC Position is Implausible at the Micro Level of Application

When attacks are viewed from the perspective of a macro or micro concept, it becomes questionable whether the general principles of humanity and military necessity transcend from the macro level—broad concepts used to negotiate treaties—to the micro level of battlefield application with the same meaning. At the macro level of treaty negotiation, the principles of humanity and military necessity most certainly place restraints on the kind and degree of force states may employ.⁸⁵ States knowingly permit this restraint on military action, likely in order to further some national objective, but the restraint on kind and degree of force is really just a byproduct of the decision to ban certain types of weapons because they cause unnecessary suffering (e.g., blinding lasers, non-detectable fragments, chemical weapons) or their effects cannot reasonably be limited to combatants (e.g., chemical weapons, dumb mines). Humanity and military necessity, as such, do limit the kind and degree of force permissible in the attack incidental to the limiting of certain means and methods of warfare.

⁸³ Jeffrey K. Walker, *Strategic Targeting and International Law: The Ambiguity of Law Meets the Reality of a Single-Superpower World*, in ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS 120, 127 (Richard B. Jaques ed., 2006) (“The agenda worked by the major powers . . . during the negotiation of all the major law of war conventions was to find a way to present a humane face to the world while avoiding any meaningful restrictions on the use of military force.”); Solf, *supra* note 64, at 121 (stating that humanitarian scholars intentionally “limited the text” of the Hague Conventions “to prohibitions without stating what was permitted . . . based on the belief . . . that a humanitarian instrument should provide what is to be spared, and should not explicitly authorize violence”).

⁸⁴ MELZER, FIFTH SUMMARY REPORT, *supra* note 24, at 23.

⁸⁵ See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137.

However, humanity and military necessity take on decidedly different qualities at the micro level of application. Since the middle of the 20th century, the International Court of Justice (ICJ) has had a number of opportunities to add meaning to the “principles of humanity” within the construct of modern IHL. In the 1949 *Corfu Channel* and 1986 *Nicaragua* cases, the ICJ developed the concept that Common Article 3 to the Geneva Conventions of 1949 reflects “the elementary considerations of humanity applicable under customary international law to any armed conflict, whether it is of an internal or international character.”⁸⁶ Additionally, in 2006, the U.S. Supreme Court found that Common Article 3 was intended to provide “minimal protection” within a broad scope of armed conflict.⁸⁷ Consequently, Common Article 3 is, in all likelihood, the modern meaning for the “principles of humanity” at the micro level of application.⁸⁸

Military necessity likewise transcends from the macro level to the micro level with a different quality. At the

⁸⁶ See generally Dale Stephens, *Human Rights and Armed Conflict, The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Opinion*, 4 YALE HUM. RTS. & DEV. L. J. 1, 16 (2001); Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Oct. 2, 1995).

⁸⁷ See *Hamdan v. Rumsfeld*, 548 U.S. 557 n.63 (2006) (citing “GCIII Commentary 35 (Common Article 3 ‘has the merit of being simple and clear. . . Its observance does not depend upon preliminary discussions on the nature of the conflict’); COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 51 (“[N]obody in enemy hands can be outside the law.”)); INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., LAW OF WAR HANDBOOK 144 (2004) (Common Article 3 “serves as a ‘minimum yardstick of protection in all conflicts, not just internal armed conflicts’” (quoting Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 218 (June 27)); Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Oct. 2, 1995) (stating that “the character of the conflict is irrelevant” in deciding whether Common Article 3 applies).

⁸⁸ GC I, *supra* note 33, art. 3. In relevant part, Common Article 3 sets forth the following ‘elementary considerations’ of humanity:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for.

Id.

macro level, the general principle of military necessity acts as a balance to the general principle of humanity, thereby ensuring states have sufficient means and methods available to take necessary military action against an enemy. At the micro level of application, however, military necessity is a specifically enunciated provision in certain treaties that permits a derogation from an otherwise accepted norm.⁸⁹ Consequently, the general principles of humanity and military necessity do not transcend from the macro to micro level of application with the meanings the ICRC ascribed to them.

B. Restraint Is Not a Matter of Law

By taking the position that the principle of humanity now mandates consideration of the kind and degree of force used in an attack as part of the traditional targeting analysis, the ICRC is in effect attempting to legislate in an area in which the states have not consented to be encumbered by additional restraints. Contemporary IHL is a matter of

⁸⁹ See GC I, *supra* note 33, art. 33; GC IV, *supra* note 33, art. 147; AP I, *supra* note 3, arts. 54(5), 62(1) (“Civilian civil defence organizations and their personnel shall be respected and protected, subject to the provisions of this Protocol, particularly the provisions of this section. They shall be entitled to perform their civil defence tasks except in case of imperative military necessity.”). Article 33 of GCI declares,

The buildings, material and stores of fixed medical establishments of the armed forces shall remain subject to the laws of war, but may not be diverted from their purpose as long as they are required for the care of wounded and sick. Nevertheless, the commanders of forces in the field may make use of them, in case of urgent military necessity, provided that they make previous arrangements for the welfare of the wounded and sick who are nursed in them.

GC I, *supra* note 33, art. 33. Article 147 of GC IV explains,

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

GC IV, *supra* note 33, art. 147. Similarly, article 54(5) of API states,

In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

AP I, *supra* note 3, arts. 54(5).

agreement and negotiation. Rules are agreed upon and followed out of a sense of legal obligation, or they are negotiated and placed in treaty form. In either respect, the sovereign intentionally forfeits a portion of its power to wage war. Conversely, whatever powers the sovereign does not relinquish it retains and can exercise within the accepted lawful boundaries of IHL.⁹⁰

Because states have a vested interest in how they wage war—based on national objectives—it is imperative they retain discretion over the kind and degree of force they can employ within the confines of contemporary IHL. As such, states have always retained the right to regulate the kind and degree of force used in the individualized attack based on policy determinations (typically enunciated in rules of engagement). Doing otherwise would seriously inhibit the state’s ability to formulate and carry out national goals. For this reason, states have not, either through custom or treaty, permitted the regulation of the kind and degree of force permissible in the direct attack outside of the current prohibitive IHL paradigm.

IV. Conclusion

Fritz Kalshoven once commented that a “situation of armed conflict does not provide a ‘license to kill’ On the contrary, the destruction of basic values, such as life, health, or property . . . remains prohibited in principle . . . but can be exceptionally justified.”⁹¹ When civilians choose to directly participate in hostilities, they forfeit protection from attack and become legitimate military objectives. Their destruction becomes an “exceptionally justified” act within the confines of IHL. The modern IHL paradigm provides a sound, comprehensive methodology upon which military commanders and lawyers can rely in determining whom to target, when to target, and how to target. States, by and large, have agreed to be bound by this scheme and to operate within its legal parameters. By asserting that attacks are now constrained by the additional consideration of humanity (i.e., kind and degree), the ICRC has lost sight of its role as trusted advisor and has assumed the position of international legislator. To remedy this situation, the ICRC should clarify its position and reassert that restraint on the use of force in direct attack is not a matter of the *lex lata* of IHL, but, rather, a notion of *lex ferenda* and matter of policy within the sound discretion of the state.

⁹⁰ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 238 (arguing that dicta in the Lotus case supported the contention that “restrictions upon the independence of States cannot . . . be presumed”).

⁹¹ Fritz Kalshoven, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC’Y INT’L L. PROC 39, 41 (1992).

Conflict Classification and Detainee Treatment in the War Against al Qaeda

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Introduction

As the widespread opposition to the Justice Department's November 2009 announcement that alleged 9/11 mastermind Khalid Sheikh Mohammed would be tried in civilian court suggests,¹ most Americans believe that war, rather than criminal law enforcement, provides the better framework for the global U.S. response to the terrorism of al Qaeda and its affiliates.² Though the current Administration has jettisoned the term "Global War on Terrorism" (GWOT) in favor of "overseas contingency operations" (OCO),³ President Obama, in his inaugural address, affirmed that "[o]ur nation is at war, against a far-reaching network of violence and hatred."⁴ Yet, nearly nine years into what will likely become the longest armed conflict in American history, there is little consensus as to exactly what kind of war the United States is fighting. How OCOs are classified under the law of armed conflict is of great salience to contemporary policy debates, particularly those concerning whether and under what circumstances detainees may be tried by military commissions.⁵ It also matters to the Soldier on the ground: international law, which greatly influences the manner in which combatants are targeted, captured, detained, and interrogated by U.S. troops, prescribes different rules for different categories of conflicts.

This article proceeds on the premise that the military action authorized by a joint resolution of Congress on 18 September 2001⁶ should not be characterized as a war against the sovereign nation of Afghanistan, but rather as an armed conflict against al Qaeda and its affiliates taking place primarily, but not exclusively, in Afghan territory.⁷ The four 1949 Geneva Conventions, which "have achieved a universal status unique among modern treaties,"⁸ apply to two types of armed conflict. The treaties as a whole apply in four situations specified by each convention's Common Article 2 (CA2). Three of these fall into the category of international armed conflict between nation-states, while the fourth is "occupation of the territory of a High Contracting Party."⁹ The conventions' Common Article 3 (CA3)—and that Article alone—applies "in cases of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties"¹⁰

The application of the Geneva Conventions to ongoing OCOs against al Qaeda and its affiliates raises four possibilities: (1) CA2 but not CA3 applies; (2) CA3 but not CA2 applies; (3) both CA2 and CA3 apply; and (4) neither CA2 nor CA3 apply. This article briefly surveys the arguments for and against each of these possible categorizations. It then argues that the last classification—that neither CA2 nor CA3 applies to OCOs against al Qaeda—is the most accurate, but that, perhaps counterintuitively, this conclusion provides the most potential protections for detained enemy combatants.

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¹ Thomas M. DeFrank, *Majority of Americans Agree That Khalid Sheikh Mohammed Should Tried [sic] Outside New York, Shows Poll*, N.Y. DAILY NEWS, Feb. 10, 2010, available at http://www.nydailynews.com/ny_local/2010/02/10/2010-02-10_majority_of_americans_agree_that_khalid_sheikh_mohammed_should_tried_outside_new.html. For more on Attorney General Holder's initial announcement, see Charlie Savage, *Accused 9/11 Mastermind to Face Civilian Trial in N.Y.*, N.Y. TIMES, Nov. 13, 2009, available at <http://www.nytimes.com/2009/11/14/us/14terror.html>.

² Most commentators agree. See, e.g., BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 168–73 (2008); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 2–4 (2006); David W. Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 63–68 (2006); Philip Zelikow, *Legal Policy for a Twilight War*, 30 HOUS. J. INT'L L. 89, 95–100 (2007). *Contra* Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326–28 (2003).

³ Scott Wilson & Al Kamen, *'Global War on Terror' Is Given New Name*, WASH. POST, Mar. 25, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

⁴ Barack Obama, *Inaugural Address* (Jan. 20, 2009), available at http://www.c-span.org/pdf/obama_inauguralAddress.pdf.

⁵ See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Glazier, *supra* note 2, at 55.

⁶ Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . .").

⁷ See Glazier, *supra* note 2, at 77–78. The specific and challenging legal issues raised by the detention of al Qaeda members and affiliates incident to the ongoing war in Iraq are generally outside the scope of this article.

⁸ *Id.* at 70–71.

⁹ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

¹⁰ GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3.

The War Against al Qaeda as a Common Article 2 Conflict

The Israeli Supreme Court has adopted the view that military operations against terrorism constitute “armed conflict . . . of an international character” and therefore trigger the application of CA2 of the Geneva Conventions.¹¹ The court justified this classification in a 2006 opinion concerning the targeted killings of Palestinian terrorists by noting that terrorist organizations often possess military capabilities that rival or exceed those of states; therefore, it concluded that “[c]onfronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of an international character.”¹²

While this reasoning is appealing in its simplicity,¹³ it is facially inconsistent with the language of CA2, which applies only to four situations: (1) “all cases of declared war . . . between two or more of the High Contracting Parties”; (2) “any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”; (3) “all cases of partial or total occupation of the territory of a High Contracting Party”; and (4) situations in which a Power not party to the convention “accepts and applies the provisions thereof.”¹⁴ No terrorist organization is a High Contracting Party, ruling out situations (1) to (3). Al Qaeda is not a Power (since it is not a nation-state) nor has it “accept[ed] and applie[d] the provisions” of the Geneva Conventions.¹⁵ Thus, there is no way that a war between the United States and a global terrorist organization could trigger an application of the Geneva Conventions under the terms of CA2.

Furthermore, the Israeli Supreme Court’s argument, if taken to its logical conclusion, would purport to apply the law of international armed conflict to almost every civil war and, perhaps, even other forms of internal strife previously considered to be definitively outside the scope of CA2. If capabilities alone are sufficient to constitute an international armed conflict, a multitude of non-state actors, not just terrorists, would potentially qualify for the whole swath of Geneva Conventions protections, rendering the body of international law intended to specifically govern non-international armed conflict virtually meaningless.

¹¹ HCJ 769/02 Public Comm. Against Torture in Israel v. Gov’t of Israel [2006], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.a34.pdf (last visited May 12, 2010).

¹² *Id.* ¶ 21.

¹³ David Turns, *The Treatment of Detainees and the “Global War on Terror”*: Selected Legal Issues, in 84 INT’L L. STUD. 199, 212 (Michael D. Carsten ed., 2008).

¹⁴ GC I, *supra* note 9, art. 2; GC II, *supra* note 9, art. 2; GC III, *supra* note 9, art. 2; GC IV, *supra* note 9, art. 2.

¹⁵ Glazier, *supra* note 2, at 77.

More fundamentally, classifying the war against al Qaeda as a CA2 conflict would leave difficult questions unanswered—namely, whether captured combatants qualify for prisoner of war (POW) status under the Convention Relative to the Treatment of Prisoners of War (GC III).¹⁶ Most commentators agree that al Qaeda would fail to satisfy the four criteria enumerated in that convention’s Article 4, rendering its members ineligible for POW status.¹⁷ This, in turn, would risk leaving combatants with no Geneva Convention protections at all, despite GC III’s theoretically broad scope—although a limited number of detainees might technically be eligible for “protected person” status under the Convention Relative to the Protection of Civilian Persons in Time of War (GC IV).¹⁸ Those eager to apply CA2 for its supposedly robust protections should be chastened by this result, while those wishing to deny detained combatants Geneva protections can argue for this same outcome via less convoluted means. It is thus unlikely that the war against al Qaeda and its affiliates will be widely considered a CA2 conflict anytime soon.

The War Against al Qaeda as a Common Article 3 Conflict

In *Hamdan v. Rumsfeld*, the U.S. Supreme Court held that the Global War on Terrorism is a CA3 conflict because “[t]he term ‘conflict not of an international character’ is used [in CA3] in contradistinction to a conflict between nations,” meaning that CA3 applies to any armed conflict not covered by CA2.¹⁹ The assertion that there is no “gap” between CA2 and CA3 is textually colorable, particularly given that the trigger for CA3 is phrased in the negative (“conflict not of an international character”) rather than in the affirmative (e.g., “internal armed conflict”).²⁰ The Court’s reasoning in this regard is also historically tenable, given that the drafting of CA3 was triggered by and intended to include civil wars with “trans-national characteristics.”²¹

¹⁶ GC III, *supra* note 9.

¹⁷ Glazier, *supra* note 2, at 82–83; see GC III, *supra* note 9, art. 4.

¹⁸ If denied POW status, detainees would receive this protection if (1) CA2 applies to OCOs against al Qaeda and its affiliates, (2) the detainees were captured in Iraq or Afghanistan at a time when the United States was an “occupying power,” and (3) the detainees are nationals of a country with which the United States does not have normal diplomatic relations. See GC 4, *supra* note 9, arts. 2, 4. See generally Memorandum from Jack L. Goldsmith, Assistant Attorney Gen., Dep’t of Justice, to Alberto Gonzales, Counsel to the President, The White House, subject: “Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention (Mar. 18, 2004), available at <http://www.usdoj.gov/olc/2004/gc4mar18.pdf>. It is unlikely that many of the detainees in question would satisfy all of these criteria. See Glazier, *supra* note 2, at 88–89.

¹⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006).

²⁰ See GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3.

²¹ Geoffrey S. Corn, *Snipers in the Minaret—What Is the Rule? The Law of War and the Protection of Cultural Property: A Complex Equation*, ARMY LAW., July 2005, at 28, 31 n.27.

The Court's approach in *Hamdan* also has the benefit of substantive clarity since, in CA3 conflicts, there is a direct relationship between conflict classification and detainee protections: all of its provisions apply to all persons "taking no active part in hostilities."²² Common Article 3 specifies that such individuals "shall in all circumstances be treated humanely" and prohibits, among other things, "violence to life and person," "outrages upon personal dignity [including] cruel treatment and torture," and "the passing of sentences without . . . previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by free peoples."²³ It was this last provision that was at issue in *Hamdan*.

Since CA3 constitutes a "convention in miniature,"²⁴ the precise nature of these protections is far from clear.²⁵ Furthermore, the Article is frustratingly limited in scope. For instance, it does not even address the treatment of individuals directly participating in hostilities and the attendant distinction between combatants and civilians, both of which are extremely salient in the context of transnational terrorism.²⁶ However, given both the general uncertainty surrounding the proper treatment of OCO detainees and the reluctance of the George W. Bush Administration to provide al Qaeda combatants with any Geneva Convention protections, CA3's practical straightforwardness in applying all of its (limited) protections to all individuals not taking part in hostilities in all circumstances at least partially accounts for the Supreme Court's classification of the war against al Qaeda as a CA3 conflict.

Despite its utility, *Hamdan*'s characterization of CA3 is textually dubious, given that the Article applies only to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."²⁷ The OCOs against al Qaeda and its affiliates are taking place simultaneously in the territory of many High Contracting Parties.²⁸ One could argue that this modifying clause is a minimum "floor," which allows for the reading an implicit "at least" into the sentence, but such a reading would be

inconsistent with the purpose of CA3, which was to apply minimum protections of the law of war to disputes within a single country that rose to the level of armed conflict.²⁹

Furthermore, *Hamdan*'s assertion that there is perfect complementarity between CA2 and CA3—that is, that an armed conflict must fall under one or the other—is historically suspect. Support for this contention comes from an unlikely source: the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (AP I), which the United States has not ratified.³⁰ Article 1, section 2 of that treaty institutes bare minimum protections for "cases not covered by this Protocol or by other international agreements," thereby implicitly suggesting that there are armed conflicts that fall outside the purview of CA2, CA3, and AP I.³¹

The War Against al Qaeda as Both a Common Article 2 and a Common Article 3 Conflict

The British Government has, at least in the past, taken the position that operations against terrorists can be classified as within the purview of either CA2 or CA3, depending on the circumstances.³² Thus, an operation within Afghanistan or Iraq might fall under CA3 (since the British Government regards the conflicts there to be civil wars)³³ while an operation to capture or kill an al Qaeda member elsewhere could trigger CA2.

While this approach is admirable for its ability to provide maximum flexibility in adapting to a complex reality, it would prove unworkable for U.S. forces and judge advocates on the ground, as well as for policymakers. Moreover, allowing OCOs to be alternately classified as falling under CA2 or CA3 would invite opportunism in characterizing them; given the global unpopularity of the U.S. approach to the Geneva Conventions after 9/11, the United States can ill afford even the perception of abuse that might accompany such a classification scheme.

²² GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3.

²³ GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3.

²⁴ COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 32 (Jean S. Pictet ed., 1958), available at <http://www.icrc.org/ihl.nsf/COM/380-600006?OpenDocument>.

²⁵ Glazier, *supra* note 2, at 93.

²⁶ For an introduction to the concept of "direct participation in hostilities," see *Direct Participation in Hostilities: Questions and Answers*, INT'L COMM. OF THE RED CROSS, June 2, 2009, <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-faq-020609>.

²⁷ GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3 (emphasis added).

²⁸ Glazier, *supra* note 2, at 93.

²⁹ Corn, *supra* note 21, at 31 n.27.

³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3-608 [hereinafter AP I].

³¹ *Id.* art. 1 ("In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience."); Glazier, *supra* note 2, at 93.

³² Turns, *supra* note 13, at 213-14.

³³ *Id.* at 214.

The War Against al Qaeda as Neither a Common Article 2 Nor a Common Article 3 Conflict

Some have argued that the war against al Qaeda falls within a “gap” between CA2 and CA3 because it is neither an international armed conflict between parties of the Geneva Conventions nor a non-international armed conflict within the territory of a single nation-state. This reasoning was used by then-U.S. Assistant Attorney General Jay S. Bybee in a January 2002 memo that formed the basis of President Bush’s February 2002 determination that denied members of al Qaeda any protections of the Geneva Conventions.³⁴ Many found this determination both legally and morally objectionable, and it sparked much of the controversy and litigation that has surrounded anti-terror OCOs for the last eight years.

However, the “gap” argument put forth in Bybee’s now infamous memo, while heavily criticized, is facially consistent with the text of both CA2 and CA3. Quite simply, a global war against a non-state actor is neither an international armed conflict between High Contracting Parties under CA2 nor an “armed conflict not of an international character” within the common-sense meaning of CA3.³⁵ As noted above, this interpretation of the text is bolstered by AP I’s reference to “cases not covered by . . . international agreements.”³⁶

It is important to note that Bybee’s premise does not lead inexorably to his preferred conclusion. Even if neither CA2 nor CA3 applies to the war against al Qaeda and its affiliates as a matter of treaty law, it is still possible for the treatment provisions of CA3 to apply as a matter of customary international law. In support of this proposition, one can argue that CA3 codified fundamental principles of *international* armed conflicts and explicitly applied them to *non-international* armed conflicts. This explicit application, arguably an abrogation of the longstanding legal tradition that a sovereign reigned supreme within its borders, “was motivated by a perceived need to interject some limited humanitarian regulation into the realm of ‘internal’ conflicts”³⁷ It does not preclude an *implicit* application of the

principles in CA3 to *all* armed conflict as a matter of customary international law.³⁸

The view that CA3 has now become a “minimum yardstick of protection of all conflicts,” in the words of the International Court of Justice in *Nicaragua v. United States*,³⁹ is consistent with both the spirit of international law dating back to the Martens Clause and, more importantly, recent jurisprudence: in *Prosecutor v. Tadić*, the International Criminal Tribunal for the former Yugoslavia held that “the character of the conflict is irrelevant” in deciding whether CA3 applies.⁴⁰ This view is not inconsistent with *Hamdan*, in which the plurality never explicitly holds that the war against al Qaeda falls under CA3 *because* it is an “armed conflict not of an international character.”⁴¹ The Court is insistent that CA3 applies to OCOs against transnational terrorists, but it never says exactly why—and it cites both *Nicaragua v. United States* and *Prosecutor v. Tadić* as part of its reasoning.⁴²

Rendering CA3 applicable to war against al Qaeda based on customary international law would allow for the explicit importation of other aspects of customary international law, most notably Article 75 of AP I.⁴³ Article 75 elaborates in great detail on many of the general pronouncements made by CA3.

[u]nlike the rather ambiguous ‘judicial guarantees which are recognized as indispensable by civilized peoples’ standard of CA3, [Article 75] contains ten specifically enumerated criteria amplifying the general proviso that requires trial by ‘an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.’⁴⁴

While, as noted above, the United States has not ratified AP I, multiple high-ranking U.S. officials have stated that they consider Article 75 to be binding customary

³⁴ Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep’t of Def., subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees 10 (Jan. 22, 2002), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf> [hereinafter Bybee Memo]; see Memorandum from President George W. Bush to Richard B. Cheney, Vice President et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (“I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al-Qaida in Afghanistan or elsewhere throughout the world . . .”).

³⁵ See GC I, *supra* note 9, arts. 2–3; GC II, *supra* note 9, arts. 2–3; GC III, *supra* note 9, arts. 2–3; GC IV, *supra* note 9, arts. 2–3.

³⁶ AP I, *supra* note 30, art. 1.

³⁷ See Corn, *supra* note 21, at 31 n.27.

³⁸ See *id.*; Turns, *supra* note 13, at 212.

³⁹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27).

⁴⁰ Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Oct. 2, 1995); Corn, *supra* note 21, at 31 n.27 (“Common Article 3 can be regarded as somewhat of an extension of the principle that absent applicable treaty provisions, individuals effected [sic] by conflict remain under the protection of the principles of humanity. This principle is reflected in the ‘Martens Clause,’ which was first included in the Preamble of the Hague Convention of 1899 and has been replicated in subsequent law of war treaties and statutes.”).

⁴¹ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–32 (2006).

⁴² *Id.* at 631 n.63.

⁴³ AP I, *supra* note 30, art. 75.

⁴⁴ Glazier, *supra* note 2, at 114.

international law.⁴⁵ In 2003, then-State Department Legal Adviser William Howard Taft IV stated categorically that “the United States . . . does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.”⁴⁶ While some might argue that the United States only recognizes Article 75 as customary international law in CA2 conflicts (since those are the conflicts to which AP I, by its own terms, applies), Taft’s statement was unequivocal in its reference to “all persons.” Moreover, many of Article 75’s protections are repeated verbatim in Articles 4 and 5 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (AP II), to which “the United States has not raised serious objections” and which the Reagan Administration transmitted to the Senate for advice and consent in 1987.⁴⁷

In addition to providing detainees the protection of multiple treaties via an application of customary international law, the classification of the war against al Qaeda as neither a CA2 nor a CA3 conflict has numerous comparative advantages over the other options discussed above. In contrast to all three of the other possibilities, this approach allows for a policy that respects the substance of the Geneva Conventions without distorting their text. It avoids the risk inherent in classifying the current war as only a CA2 conflict in which detainees will get no protection whatsoever if they fail to qualify for POW status. Applying CA3 as a matter of customary international law rather than as a matter of treaty law also provides a compelling alternative to the U.S. Supreme Court’s approach in *Hamdan*, which, at least implicitly, purports to limit the protections available to detainees at the same time it guarantees them. Additionally, it allows the U.S. Government to recognize the novel nature of the conflict with al Qaeda without resorting to the unworkable view adopted by the British Government that individual anti-terror operations fall within the purview of either CA2 or CA3 depending on the circumstances.

Conclusion

There is nothing inherently contradictory in the view that the war against al Qaeda is not a CA2 and/or CA3 conflict but that CA3 (and perhaps Article 75 of AP I) also applies as a matter of customary international law. It is understandable that some might be hesitant to rely on customary international law alone for detainee protections given the skepticism towards it exhibited by some members of the previous Administration.⁴⁸ However, now that the Executive Branch, along with the Supreme Court, seems to be implicitly assuming that CA3 applies to all armed conflict,⁴⁹ it is perhaps time to make those assumptions explicit and assert customary international law as the basis of U.S. detainee policy. To do so instead of relying on a distorted interpretation of the text of the Geneva Conventions would be to simultaneously show respect for those venerable treaties, for the novel nature of ongoing OCOs, and for the authority and relevance of properly-applied customary international law.

To heed this call would, of course, require placing yet another burden on the Judge Advocate General’s Corps, which is already charged with developing and implementing rule-of-law frameworks for wars in Afghanistan and Iraq. However, there is no better time to properly classify ongoing OCOs against al Qaeda and other terrorists than now—when the military possesses a trained cadre of judge advocates with deep knowledge of the law of armed conflict and extensive experience with detainee operations.

⁴⁵ *Id.* at 116.

⁴⁶ William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 322 (2003).

⁴⁷ Glazier, *supra* note 2, at 116–18; see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 4–5, June 8, 1977, 1125 U.N.T.S. 609–99.

⁴⁸ See Bybee Memo, *supra* note 34, at 32–37 (“[C]ustomary international law does not bind the President or the U.S. Armed Forces in their decisions concerning the detention conditions of al Qaeda and Taliban prisoners.”).

⁴⁹ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 n.63 (2006); U.S. DEP’T OF DEF., DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM para. 4.2 (Sept. 5, 2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf> (“All persons subject to this Directive shall . . . apply, *without regard to a detainee’s legal status, at a minimum* the standards articulated in Common Article 3 to the Geneva Conventions of 1949”) (emphasis added).

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 (800) 552-3978, extension 3307.

d. The ATRRS 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 ATRRS 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 ATRRS 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 2010–September 2011) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5-27-C20	183d JAOBC/BOLC III (Ph 2)	5 Nov – 2 Feb 11
5-27-C20	184th JAOBC/BOLC III (Ph 2)	18 Feb – 4 May 11
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10
5F-F1	214th Senior Officer Legal Orientation Course	18 – 22 Oct 10
5F-F1	215th Senior Officer Legal Orientation Course	24 – 28 Jan 11
5F-F1	216th Senior Officer Legal Orientation Course	21 – 25 Mar 11
5F-F1	217th Senior Officer Legal Orientation Course	13 – 17 Jun 11
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
5F-F3	17th RC General Officer Legal Orientation Course	1 – 3 Jun 11

5F-F5	2011 Congressional Staff Legal Orientation (COLO)	17 – 18 Feb 11
5F-F52	41st Staff Judge Advocate Course	6 – 10 Jun 11
5F-F52-S	14th SJA Team Leadership Course	6 – 8 Jun 11
5F-F55	2011 JAOAC	3 – 14 Jan 11
5F-F70	41st Methods of Instruction	15 – 16 Jul 20
5F-F70	42d Methods of Instruction	7 – 8 Jul 11
5F-JAG	2010 WWCLE	4 – 8 Oct 10
JARC-181	2010 Judge Advocate Recruiting Conference	21 – 23 Jul 10
JARC 181	2011 Judge Advocate Recruiting Conference	20 – 22 Jul 11

NCO ACADEMY COURSES

512-27D30	5th Advanced Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D30	1st Advanced Leaders Course (Ph 2)	4 Oct – 9 Nov10
512-27D30	2d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	3d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	4th Advanced Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D30	5th Advanced Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D30	6th Advanced Leaders Course (Ph 2)	1 Aug – 6 Sep 11
512-27D40	3d Senior Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D40	4th Senior Leaders Course (Ph 2)	26 Jul – 31 Aug 10
512-27D40	1st Senior Leaders Course (Ph 2)	4 Oct – 9 Nov 10
512-27D40	2d Senior Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D40	3d Senior Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D40	4th Senior Leaders Course (Ph 2)	1 Aug – 6 Sep 11

WARRANT OFFICER COURSES

7A-270A0	18th JA Warrant Officer Basic Course	23 May – 17 Jun 11
7A-270A1	22d Legal Administrator Course	13 – 17 Jun 11
7A-270A2	11th JA Warrant Officer Advanced Course	6 – 30 Jul 10
7A-270A2	12th JA Warrant Officer Advanced Course	28 Mar – 22 Apr 11
7A-270A3	2011 Senior Legal Administrator Symposium	1 – 5 Nov 10

ENLISTED COURSES

512-27D/20/30	22d Law for Paralegal NCO Course	21 – 25 Mar 11
512-27D/DCSP	20th Senior Paralegal Course	20 – 24 Jun 11
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10

512-27DC5	34th Court Reporter Course	24 Jan – 25 Mar 1
512-27DC5	35th Court Reporter Course	18 Apr – 17 Jun 11
512-27DC5	36th Court Reporter Course	25 Jul – 23 Sep 11
512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10
512-27DC6	11th Senior Court Reporter Course	11 – 15 Jul 11
512-27DC7	14th Redictation Course	3 – 7 Jan 11
512-27DC7	15th Redictation Course	28 Mar – 1 Apr 11
5F-F58	27D Command Paralegal Course	1 – 5 Nov 10

ADMINISTRATIVE AND CIVIL LAW

5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F23	66th Legal Assistance Course	25 – 29 Oct 10
5F-F23E	2010 USAREUR Legal Assistance CLE Course	18 – 22 Oct 10
5F-F24	35th Administrative Law for Military Installations & Operations	14 – 18 Mar 11
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
5F-F24E	2011 USAREUR Administrative Law CLE	12 – 16 Sep 11
5F-F28	2010 Income Tax Law Course	6 - 10 Dec 10
5F-F28E	2010 USAREUR Tax CLE Course	29 Nov – 3 Dec 10
5F-F28H	2011 Hawaii Income Tax CLE Course	10 – 13 Jan 11
5F-F28P	2011 PACOM Income Tax CLE Course	3 – 6 Jan 11
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F202	9th Ethics Counselors Course	11 – 15 Apr 11

CONTRACT AND FISCAL LAW

5F-F10	163d Contract Attorneys Course	19 – 30 Jul 10
5F-F10	164th Contract Attorneys Course	18 – 29 Jul 11
5F-F11	2010 Contract & Fiscal Law Symposium	17 – 20 Nov 10
5F-F12	82d Fiscal Law Course	7 – 11 Mar 11
5F-F14	29th Comptrollers Accreditation Fiscal Law Course	28 Feb – 4 Mar 11
5F-F103	2011 Advanced Contract Law Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F33	54th Military Judge Course	18 Apr – 6 May 11
5F-F34	34th Criminal Law Advocacy Course	13 – 17 Sep 10
5F-F34	35th Criminal Law Advocacy Course	20 – 24 Sep 10
5F-F34	36th Criminal Law Advocacy Course	31 Jan – 4 Feb 11
5F-F34	37th Criminal Law Advocacy Course	7 – 11 Feb 11
5F-F34	38th Criminal Law Advocacy Course	12 – 16 Sep 11
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Oct 11

INTERNATIONAL AND OPERATIONAL LAW		
5F-F40	Brigade Judge Advocate Symposium	9 – 13 May 11
5F-F41	6th Intelligence Law Course	9 – 13 Aug 10
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F45	10th Domestic Operational Law	19 – 23 Oct 10
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F47	55th Operational Law of War Course	22 Feb – 4 Mar 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F47E	2010 USAREUR Operational Law CLE	20 – 24 Sep 10
5F-F47E	2011 USAREUR Operational Law CLE	19 – 23 Sep 10
5F-F48	3d Rule of Law Course	16 – 20 Aug 10
5F-F48	4th Rule of Law Course	11 -15 Jul 11

3. Naval Justice School and FY 2009–2010 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (030)	2 Aug – 9 Oct 10
0258	Senior Officer (050) Senior Officer (060) Senior Officer (070)	12 – 16 Jul 10 (Newport) 23 – 27 Aug 10 (Newport) 27 Sep – 1 Oct 10 (Newport)
2622	Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040)	14 – 18 Dec 10 (Hawaii) 10 – 14 May 10 (Naples, Italy) 19 – 23 Jul 10 (Quantico, VA)

	Senior Officer (Fleet) (050)	26 – 30 Jul 10 (Camp Lejeune, NC)
03RF	Legalman Accession Course (030)	10 May – 23 Jul 10
03TP	Trial Refresher Enhancement Training (020)	2 – 6 Aug 10
4046	Mid Level Legalman Course (020)	14 – 25 Jun 10 (Norfolk)
3938	Computer Crimes (010)	21 – 25 Jun 10
525N	Prosecuting Complex Cases (010)	19 – 23 Jul 10
627S	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)	29 Jun – 1 Jul 10 (San Diego) 9 – 13 Aug 10 (Great Lakes) 13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk)
748A	Law of Naval Operations (010)	13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10
786R	Advanced SJA/Ethics (010)	26 – 30 Jul 10
7878	Legal Assistance Paralegal Course (010)	30 Aug – 3 Sep 10
846L	Senior Legalman Leadership Course (010)	26 – 30 Jul 10
850T	Staff Judge Advocate Course (020)	5 – 16 Jul 10 (San Diego)
900B	Reserve Lawyer Course (020)	20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010)	2 – 13 Aug 10
961J	Defending Complex Cases (010)	12 – 16 Jul 10
NA	Iraq Pre-Deployment Training (040)	6 – 9 Jul 10

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	14 Jun – 2 Jul 10 12 – 30 Jul 10 16 Aug – 3 Sep 10
0379	Legal Clerk Course (060) Legal Clerk Course (070)	19 – 30 Jul 10 23 Aug – 3 Sep 10
3760	Senior Officer Course (060) Senior Officer Course (070)	9 – 13 Aug 10 13 – 17 Sep 10

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	7 – 25 Jun 10 19 Jul – 6 Aug 10 16 Aug – 3 Sep 10
947J	Legal Clerk Course (070) Legal Clerk Course (080)	26 Jul – 6 Aug 10 16 – 27 Aug 10
3759	Senior Officer Course (090)	13 – 17 Sep 10 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2010–2011 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Staff Judge Advocate Course, Class 10-A	14 – 25 Jun 10
Law Office Management Course, Class 10-A	14 – 25 Jun 10
Paralegal Apprentice Course, Class 10-05	22 Jun – 5 Aug 10
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10
Defense Orientation Course, Class 11-A	4 – 8 Oct 2010
Federal Employee Labor Law Course, Class 11-A	4 – 8 Oct 2010
Paralegal Apprentice Course, Class 11-01	5 Oct – 17 Nov 2010
Judge Advocate Staff Officer Course, Class 11-A	12 Oct – 16 Dec 2010
Paralegal Craftsman Course, Class 11-01	12 Oct – 23 Nov 2010
Advanced Environmental Law Course, Class 11-A (Off-Site, Wash., DC Location)	19 – 20 Oct 2010
Civilian Attorney Orientation, Class 11-A	21 – 22 Oct 2010
Article 32 Investigating Officer's Course, Class 11-A	19 – 20 Nov 2010

Deployed Fiscal Law & Contingency Contracting Course, Class 11-A	6 – 10 Dec 2010
Pacific Trial Advocacy Course, Class 11-A (Off-Site, Japan)	13 – 17 Dec 2010
Trial & Defense Advocacy Course, Class 11-A	3 – 14 Jan 2011
Paralegal Apprentice Course, Class 11-02	3 Jan – 16 Feb 2011
Gateway III, Class 11-A	19 Jan – 4 Feb 2011
Air Force Reserve & Air National Guard Annual Survey of the Law, Class 11-A (Off-Site)	21 – 22 Jan 2011
Homeland Defense/Homeland Security Course, Class 11-A	24 – 28 Jan 2011
CONUS Trial Advocacy Course, Class 11-A (Off-Site, Charleston, SC)	31 Jan – 4 Feb 2011
Interservice Military Judges' Seminar, Class 11-A	1 – 4 Feb 2011
Legal & Administrative Investigations Course, Class 11-A	7 – 11 Feb 2011
European Trial Advocacy Course, Class 11-A (Off-Site, Kapaun AS, Germany)	14 – 18 Feb 2011
Judge Advocate Staff Officer Course, Class 11-B	14 Feb – 15 Apr 2011
Paralegal Craftsman Course, Class 11-02	14 Feb – 30 Mar 2011
Paralegal Apprentice Course, Class 11-03	28 Feb – 12 Apr 2011
Environmental Law Update Course (SAT-DL), Class 11-A	22 – 24 Mar 2011
Defense Orientation Course, Class 11-B	4 – 8 Apr 2011
Advanced Labor & Employment Law Course, Class 11-A (Off-Site, Rosslyn, VA location)	12 – 14 Apr 2011
Military Justice Administration Course, Class 11-A	18 – 22 Apr 2011
Paralegal Apprentice Course, Class 11-04	25 Apr – 8 Jun 2011
Cyber Law Course, Class 11-A	26 – 28 Apr 2011
Total Air Force Operations Law Course, Class 11-A	29 Apr – 1 May 2011
Advanced Trial Advocacy Course, Class 11-A	9 – 13 May 2011
Operations Law Course, Class 11-A	16 – 27 May 2011
Negotiation and Appropriate Dispute Resolution Course, 11-A	23 – 27 May 2011
Reserve Forces Paralegal Course, Class 11-A	6 – 10 Jun 2011
Staff Judge Advocate Course, Class 11-A	13 – 24 Jun 2011
Law Office Management Course, Class 11-A	13 – 24 Jun 2011
Paralegal Apprentice Course, Class 11-05	20 Jun – 3 Aug 2011

Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 2011
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 2011
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 2011
Environmental Law Course, Class 11-A	22 – 26 Aug 2011
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 2011
Accident Investigation Course, Class 11-A	12 – 16 Sep 2011

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2011 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2010 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Judge Advocate General's Fiscal Year 2010 On-Site Continuing Legal Education Training

Date	Region	Location	Units	ATRRS Number	POCs
16 – 18 Jul 2010	Heartland On-Site	San Antonio, TX	1st LSO 2nd LSO 8th LSO 214th LSO	007	LTC Chris Ryan Christopher.w.ryan1@dhs.gov Christopher.w.ryan@us.army.mil 915.526.9385 MAJ Rob Yale Roburt.yale@navy.mil Rob.yale@us.army.mil 703.463.4045
24 – 25 Jul 2010	Make-up On-Site	TJAGLCS, Charlottesville, VA			COL Vivian Shafer Vivian.Shafer@us.army.mil 301.944.3723

2. 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 step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA 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 Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA 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 TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA 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.

4. 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 Mr. Daniel C. Lavering, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.