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International and Operational Law

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Stick to the High Ground

Colonel Richard B. Jackson

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“Snipers in the Minaret—What is the Rule?”

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Foreword

*Lieutenant Colonel Paul Kantwill
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Welcome to the first-ever edition of *The Army Lawyer* devoted entirely to international and operational law topics. It is an exciting time to be a student of these burgeoning legal disciplines as, arguably, there has never been such a fast-moving period in international law. While Coalition forces continue to wage pitched battle in Afghanistan and Iraq, Judge Advocates are deployed in unprecedented numbers and with unparalleled frequency. Those serving far forward are not surprisingly, performing magnificently as they handle incredibly complex international legal challenges.

What is surprising, however, is the topics they master and issues they handle. Long considered a “niche” practice unique to but a few Judge Advocates, this subject matter has become a core competency of all military attorneys and even part of the American lexicon. The mass media, talk show hosts, and ordinary citizens debate some of the very issues with which our uniformed judge advocates wrestle daily: the status of combatants and non-combatants, civilian protections, detainee operations, and intelligence interrogations, to name a few. The Geneva Conventions are the subject of cocktail party banter and the long-used military acronym “GTMO” is probably one of the most frequently “Googled” terms in the world.

With that recognition, let us embark on our journey. Following are pieces on a wide variety of different, yet inexorably linked topics. They originate in The Judge Advocate General's Legal Center and School, the Pentagon, and in the field. Whatever their source, they are intended to meet the true spirit of *The Army Lawyer*—to aid the practitioner. The edition has a great and provocative beginning with Colonel Dick Jackson's essay on the importance of maintaining the moral high ground through steadfast adherence to the Law of War. Subsequent pieces include a primer on intelligence interrogations, a thorough examination of the Law of War as it relates to Cultural Property, and a prospective look at the effects of transformation on International Agreements.

We hope that the contents of this *Army Lawyer* will succeed in its ultimate mission—to inform and assist the practitioner in the field. We hope also that a venture such as this will inspire those who do the “heavy lifting” in these important areas to share their thoughts and experiences with the rest of us.

Stick to the High Ground

Colonel Richard B. Jackson
Legal Advisor, Allied Joint Force Command
Naples, Italy

*No matter how hard we try to take our world with us, we will still find that we sometimes must fight the enemy on his ground, by his rules. This is the hardest form of combat for the United States, because our own rules cripple us and, at worst, kill us.*¹

Asymmetric warfare has had a profound impact on the law of war.² The terrorist attacks of 9/11 and terrorist techniques employed since have flouted the law of war and directed indiscriminate attacks against those the law and professional Soldiers are sworn to protect—the innocents or those who are *hors de combat*.³ Recent peacekeeping and peace enforcement actions in the Balkans, as well as recent combat in the Global War on Terror (GWOT) from Afghanistan to Iraq, have provided examples of morally and legally asymmetric methods employed by terrorists, paramilitary groups, and even military personnel. In a somewhat disturbing trend, Western militaries and their civilian leaders have occasionally replied in kind, adopting an approach that employs legal techniques to meet the terrorist on his own moral base level, deeming the law of war inapplicable to counter-terrorist operations and declaring “unlawful combatants” unfit for prisoner of war (POW) treatment.

Several prominent authors, like Ralph Peters, have suggested that the “warrior class” that Soldiers face in the asymmetric warfare of the future must be met with new moral standards, with a fresh new look at the law of war. In *Future Warfare*, a collection of his essays on asymmetric warfare, Peters frequently decries the hamstrung Western militaries, with restrictive rules of engagement and arcane legal constructs that have no impact on the warriors who employ asymmetric techniques.

We play by rules, sometimes encoded in our own laws or in international laws and customs, other matters of habit that have so long endured that they have acquired totemic power in our collective consciousness. When other world actors play by our rules, we triumph. Increasingly, however, the world doesn't give a damn about our laws, customs, or table manners.⁴

Peters suggests that Western militaries are becoming “word people,” bound by treaties that have no power over the “true sources of power, asymmetrical to our own”; in response, he says, the military personnel should become “deed people” and stop speaking “Latin in the computer age.”⁵ In his seminal work on counter-guerrilla strategies, *Low Intensity Operations: Subversion, Insurgency and Peacekeeping*, noted author Frank Kitson also cautioned that military “difficulties” with using too little force may unduly inhibit counter-insurgency, suggesting that the military “fight fire with fire,” meeting the asymmetric tactics of the terrorist or paramilitary warrior with retaliation in kind.⁶

Recent history is replete with examples of attacks that violate each major tenet of the law of war. Terrorists, paramilitaries, and some national military forces have failed to respect and protect POWs, civilians, and wounded military in violation of the Geneva Conventions.⁷ They have employed means and methods of warfare prohibited by the Hague

¹ RALPH PETERS, *FIGHTING FOR THE FUTURE* 15 (1999).

² The law of war is also known as the law of armed conflict (LOAC) or international humanitarian law (IHL). The law of war (LOW), however, is a more succinct and descriptive term of the disciplined application of law to the very undisciplined profession of arms. Asymmetry is “acting, organizing and thinking differently than opponents, in order to maximize one’s own advantages, exploit an opponent’s weaknesses, attain the initiative, or gain greater freedom of action.” STEVE M. ETZ & DAVID JOHNSON, *ASYMMETRY AND U.S. MILITARY STRATEGY: DEFINITIONS, BACKGROUND, AND STRATEGIC CONCEPTS* 36 (2001).

³ The official ICRC Commentary on the Geneva Conventions describes the purpose of the LOW as protection of those who are “out of combat.” OSCAR UHLER & HENRI COURSIER, *GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY*, vol. IV, at 13 (ICRC 1958) [hereinafter COMMENTARY].

⁴ PETERS, *supra* note 1, at 22.

⁵ *Id.* at 23.

⁶ FRANK KITSON, *LOW INTENSITY OPERATIONS: SUBVERSION, INSURGENCY, AND PEACEKEEPING* 70 (1971), *quoted in* Robert R. Tomes, *Relearning Counterinsurgency Warfare*, *PARAMETERS* (Spring 2005), at 25.

⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T.

Conventions and other conventions and protocols on banned weapons.⁸ The United States and coalition forces have occasionally responded with asymmetric techniques, from POW operations to targeting or misuse of cultural properties.

Each of these techniques presents some tactical or political advantage. Terrorism, by definition, is intended to use asymmetric techniques to achieve political ends.⁹ It is the “idiosyncratic approach” of the terrorists that presents the greatest challenge to military forces accustomed to applying the law of war. As General Meigs said, “idiosyncrasy connotes an unorthodox approach or means of applying a capability, one that does not follow the rules and is peculiar in a sinister sense.”¹⁰ For the terrorist, the advantage of using an asymmetric approach is the ability to strike terror into the hearts of the target population, to create religious fervor in their supporters, and (for many Iraqi insurgents) to restore the terrorist state run by the Baathists of Saddam Hussein’s government. Without these tactics, the terrorists cannot hope to win, as they are outmatched by the firepower and technological prowess of the coalition allies. Increasingly, they are also outmatched by the political will being expressed in Afghanistan and Iraq by the very people they seek to control.

And the response by Western militaries has, likewise, been justified as a temporary means to an important end from tactical advantage to preservation of national security, or from some immediate need to protect against an imminent threat against innocent lives to misplaced “military necessity.” But none of these advantages or rationalizations outweighs the political and moral costs of yielding the high ground to asymmetric tactics by lowering our standards. Values, including the law of war, are the bedrock of our profession. Strict adherence to the spirit and intent of the law of armed conflict, in all military operations (however characterized), is the current policy of the Department of Defense (DOD).¹¹ And there is no legal vacuum in the law of war—the “Martens Clause,”¹² an international law doctrine that enshrines the principle of humanity in the law, supports adoption of a policy that is grounded in the bedrock of the law of war.¹³ Any other approach, while attractive in the short term, is morally bankrupt in the long term. It places our Soldiers at greater risk and attacks the legitimacy of our strategic direction. The U.S. military and our coalition partners cannot afford to flirt with legal standards that match those of the once and future “warrior class.”

Means and Methods of Warfare

Operation Iraqi Freedom provides numerous examples of the use of illegal asymmetric means and methods of warfare, particularly by the Saddam Fedayeen and the current Iraqi insurgents, to blunt the impact of superior coalition technology and gain psychological advantage through the use of terror. The Saddam Fedayeen used ruses of war, like a feigned surrender or misuse of ambulances and hospitals, to gain a temporary advantage over coalition forces.¹⁴ Feigned surrender is “perfidy” under the law of war—an impermissible ruse of war that takes advantage of the obligation to protect those who surrender.¹⁵ Misuse of ambulances and hospitals also takes advantage of the requirement to care for the sick and wounded on

3316, 75 U.N.T.S. 135 [hereinafter GPW]; 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].

⁸ Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague Convention IV], reprinted in U.S. DEP’T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (1956); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Method of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Cultural Property Convention]; U.N. 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, 19 I.L.M. 1523 [hereinafter CCW], reprinted in ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR (2001).

⁹ BRIAN JENKINS, TERRORISM AND BEYOND: AN INTERNATIONAL CONFERENCE ON TERRORISM AND LOW-LEVEL CONFLICT 9 (1982).

¹⁰ Montgomery C. Meigs, *Unorthodox Thoughts About Asymmetric Warfare*, PARAMETERS (Summer 2003), at 4.

¹¹ U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM 2 (9 Dec. 1998).

¹² See Hague Convention IV, *supra* note 8, pmb1. The Martens Clause was first included in the preamble of the 1899 Hague Convention II at the request of Fyodor Fyodorovich Martens, the Russian delegate at the Hague Peace Conferences. See Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT’L REV. OF THE RED CROSS 125-34 (1997).

¹³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, para. 78 (July 8), available at http://www.icj-cij.org/icjwww/icasess/iunan_judgment_advisory%20opinion__1996078.htm (last visited June 11, 2005).

¹⁴ See, e.g., Arian Campo-Flores, *Tougher Tactics*, *Newsweek Web Exclusive* (Mar. 25, 2003), available at <http://www.nl.newsbank.com/nl-search/we/Archives.htm> (last visited May 1, 2005).

¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 37, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Prohibited acts include feigning truce or surrender, feigning incapacitation from wounds or sickness, feigning civilian or non-combatant status, and feigning protected status by the use of signs, emblems, or uniforms of the U.N. or neutral states. *Id.*

the battlefield; their benefit to the enemy is evident—under this protected status they move weapons, men, and equipment between virtual sanctuaries, protected by the Red Crescent. These are all acts clearly prohibited by the Hague Rules and the Geneva Conventions, to which Iraq was a party.¹⁶ Even as a nation-state, Iraq laid the groundwork for an asymmetric approach, in violation of the laws and customs of war.

These prohibited means and methods have continued, to an exponential degree, with the Iraqi insurgents. Vehicle-borne improvised explosive devices (VBIED's) have become part of the lexicon of reporting about the conflict. They are placed against civilian targets—mosques, funeral processions, or lines of voters exercising their new-found freedom. They are detonated against coalition convoys, Iraqi security forces, or innocent passing motorists. These weapons cause indiscriminate effects, clearly intended as part of a terror campaign designed to dissuade the Iraqi people and their newly elected officials from exercising their newfound political power. They are manifestly prohibited by the rules of war.¹⁷ Under the Conventional Weapons Mine and Booby-trap Protocol (ratified by the United States, unlike the Ottawa Anti-Personnel Landmine Convention), Soldiers are required to take “precautions to protect civilians from the effects” of these weapons; they are also “forbidden from employing a method or means of delivery which cannot be directed at a specific military objective.”¹⁸ But the insurgents flout the rules for a clear political purpose, because they are unable to fight the fledgling Iraqi government or coalition forces in any conventional manner.

Rather than flout the laws of war, coalition forces have generally held to the policy that the Geneva and Hague Conventions are applicable in any armed conflict, no matter how characterized.¹⁹ On occasion, coalition forces have been open to criticism for minor violations of the rules regarding means and methods of war. A recent *Washington Post* article talked about “U.S. Army snipers in the 1200 year-old spiral minaret at a Samarra mosque,” where they intended to counter insurgent attacks.²⁰ An ancient mosque is clearly cultural property, which must not be occupied by military forces if such actions are “likely to expose it to destruction or damage in the event of an armed conflict.”²¹ The tactical advantage of such a position is evident. And if the enemy occupied it, it would provide him no sanctuary, since the cultural status of the mosque, *per se*, does not prevent attacking the insurgent who misuses the object. But the temporary positional advantage, perceived by a young coalition soldier on the ground, is heavily outweighed by the perception that is created of a military that fails to respect the culture and traditions of the people they are protecting. Criticism that can be leveled against misuse of the mosque can expose the coalition soldier to war crimes accusations and jeopardize the good will that military units have developed in the area.

An object lesson, learned to a greater degree in Najaf, is the meticulous concern exercised by coalition and Iraqi personnel to protect the Imam Ali shrine. Both the Iraqis and the U.S. forces understood the stakes, “If they blunder into the heart of the old city and attack the Imam Ali shrine—Mr. Sadr’s headquarters and one of the holiest sites in the Shia faith—they risk increasing the size of the rebellion exponentially.”²² Instead, in the first combined operation by Iraqi security forces and the U.S. military, the coalition forces were careful to never attack the shrine directly.²³ After reducing Al Sadr militia positions in the nearby cemetery and parts of the town near the shrine, they relied on negotiations by the Grand Ayatollah Al Sistani to help clear the shrine. It is evident that the care taken to protect the shrine served great dividends in winning the “hearts and minds” (and gaining the political endorsement) of the Iraqi Shiites, who revere the sacred property. In contrast, the use of the shrine by Al Sadr supporters (in clear violation of the Cultural Property Convention) put the mosque at risk and earned the opprobrium of key Shiite leaders, like Al Sistani.

¹⁶ Hague Convention IV, *supra* note 8, arts. 23f, and 27. See also GWS, *supra* note 7, art. 19 (regarding the requirement to respect and protect “fixed establishments and mobile medical units.”). *Id.* art. 21 (containing a reciprocal requirement to warn such establishments before attack, even if they are being misused).

¹⁷ Hague Convention IV, *supra* note 8, art. 23. See generally CCW, *supra* note 8.

¹⁸ *Id.* art. 3.

¹⁹ S.C. Res. 1483, U.N. SCOR, 4761st mtg. U.N. Doc S/RES/1483 (May 22, 2003) (recognizing the authority of the coalition forces in Iraq under the obligations of the Fourth Geneva Convention and the Hague).

²⁰ Josh White, *For U.S. Soldiers, A Frustrating and Fulfilling Mission*, WASH. POST, Jan. 2, 2005, at A12.

²¹ Hague Convention IV, *supra* note 8, art. 27; Cultural Property Convention, *supra* note 8, art. 4.

²² Rory McCarthy, *From Inside the Imam Ali Shrine*, GUARDIAN, Aug. 13, 2004, available at <http://www.contranet.org/iraq-mccarthy130004.htm> (last visited May 2, 2005) (referring to radical Shia cleric, Moqtada Sadr).

²³ *Id.*

Targeting of Civilians

Recent coalition operations have scrupulously avoided targeting innocent civilians. The Kosovo bombing campaign, a North Atlantic Treaty Organization (NATO) operation designed to compel Milosovic's Serb forces to abandon their ethnic cleansing campaign in Kosovo, was the subject of an exhaustive look by a group of attorneys appointed by the office of the prosecutor (OTP) of the International Criminal Tribunal for the Former Yugoslavia (ICTY).²⁴ The report analyzed such issues as the potential long-term damage to the environment, the definition of the military objective, and the principles of proportionality, applied to the Kosovo bombing campaign.²⁵ The authors applied the key definition of military objective from Protocol I to the Geneva Conventions:

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 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.²⁶

They went on to conduct the proportionality balance between "legitimate destructive effect and undesirable collateral effects,"²⁷ identical to the analysis conducted by NATO lawyers and commanders during the conflict. The conclusions of the OTP were that some of the targets were legally debatable, on the margins, but no war crimes occurred and no further investigation was necessary.²⁸ Though mistakes were made, due to intelligence errors in choosing targets (like the accidental targeting of the Chinese Embassy) or in implementing the plans, none of these mistakes were made with sufficient criminal intent (or *mens rea*) to warrant prosecution.²⁹

Most questionable targeting decisions in Iraq and Afghanistan received the scrutiny of administrative investigations to dispel any concerns that civilians were intentionally targeted. Military directives require prompt investigation of suspected law of war violations by either party to the conflict.³⁰ Either a criminal investigation—if criminality is suspected and a suspect has been identified—or an administrative investigation will be initiated. For example, an exhaustive administrative investigation, under *Army Regulation 15-6*, was conducted to determine the reason for the bombing of an "Afghan wedding," where alleged celebratory gunfire was interpreted as a threat to military operations in the vicinity. While there was disagreement from the Afghans as to the facts of the incident, the pilot was not found criminally responsible for the reasonable targeting decision to return fire from the walled compound where the "wedding" took place.³¹

The Afghans' response to the wedding incident highlights the importance of scrupulously applying the law of war, investigating any alleged misconduct, and publicizing the result. The Afghan government and people were upset with the apparent loss of civilian life, but they were satisfied with the apology from the U.S. President and the earnest endeavor to investigate and explain what happened.³² While accidental bombings (based on faulty intelligence) or unintended excessive collateral damage, may occur, coalition targeting procedures have developed to such a fine degree that it is clear they have not intentionally violated the law of war. On the contrary, when compared with previous wars (including carpet bombing or incendiary use against Axis cities³³), the precision capabilities of the U.S.-led coalition forces make the prevention of collateral damage one of the success stories of the law of war in military operations. Coalition operations have seized the

²⁴ See INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA (June 13, 2000), *reprinted in* 39 I.L.M. 1257 (2000) [hereinafter ICTY Final Report].

²⁵ See *id.* para. IV(A)(i) and IV(A)(iv).

²⁶ Protocol I, *supra* note 15, art. 52.

²⁷ See ICTY FINAL REPORT, *supra* note 24, para. IV(A)(iv)(d).

²⁸ See ICTY FINAL REPORT, *supra* note 24, para. V.

²⁹ See generally *id.*

³⁰ DOD DIR. 5100.77, *supra* note 11, at 2.

³¹ *Afghans Protest Over Wedding Party Bombing*, CNN.com (4 July 2002), available at <http://archives.cnn.com/2002/world/asiapcf/central/0704/afghanistan.bombing/> (last visited Apr. 30, 2005).

³² *Id.*

³³ *But see* FREDERICK TAYLOR, DRESDEN (2004) (providing objective evidence to support an argument that Dresden was a military target; it is a gripping and balanced account of the tragedy, a must-read for targeting and law of war specialists).

moral high ground by demonstrating that targeting decisions have clearly been calculated to minimize the suffering of civilian populations and minimize excessive collateral damage that characterized many twentieth century wars.

In stark contrast, terrorists and insurgents have intentionally targeted civilians. September 11th stands as one of the greatest war crimes in history as there is no justification under any rational interpretation of the law of armed conflict for the murder of thousands of innocents—their “crime” was merely working in two buildings that served as a symbol of Western economic might and globalization. Subsequent statements by Zawahiri and bin Laden have only accentuated the contrast in motives between Al Qaeda and the military personnel defending freedom in the GWOT. Ayman al-Zawahiri’s al Qaeda manifesto, *Knights Under the Prophet’s Banner*, explains that it is legitimate (in his eyes) to strike Western populations, not just their governments and institutions, because “they only know the language of self-interest, backed by brute military force.”³⁴ “In consequence,” he adds, “if we want to hold a dialogue with them and cause them to be aware of our rights, we must speak to them in a language they understand.”³⁵ Zawahiri defends suicide attacks as “the most efficient means of inflicting losses on adversaries and the least costly, in human terms, for the mujajedeen.”³⁶ Al Qaeda’s leaders have made it clear that the ends justify any asymmetric means, including the intentional targeting of civilian populations.

Al Qaeda in Iraq, led by Zarqawi, as well as the loose confederation of other anti-Iraqi forces, have adopted a similar approach to targeting. They have even been so bold as to explain the disproportionate effect on the Iraqi population as permissible “collateral damage.”³⁷ There is some hope on the horizon for a rejection of the radical values behind the asymmetric terrorist approach. Elections in both Afghanistan and Iraq, combined with increased information from Iraqi citizens about insurgent hideouts and tactics, indicate that the public relations war is turning toward a more universal rejection of these morally repugnant tactics.³⁸ Attempts by mainstream Sunni political groups to become part of the political process are also a partial recognition that the terrorist tactics threaten to alienate the very population they say they serve.

Treaty-based law and customary international law have continued to progress in this area, by outlawing and sanctioning indiscriminate attacks or attacks directed solely at civilian targets. In 1949, Pictet noted that the motivation for the establishment of a new Fourth Geneva Convention, relating to the protection of civilians, was to prevent the ravages of the kind of “total war” practiced in World Wars I and II from having such a catastrophic impact on the civilian population.³⁹ While terrorists have expanded their capabilities, and even threatened the use of weapons of mass destruction, the world community has sought to strengthen the application of these protections to civilian populations in international and internal armed conflict. The nations that are signatories to the Geneva Conventions asked that the International Committee of the Red Cross (ICRC) prepare a study on the current state of customary international humanitarian law (the law of war).⁴⁰ The ten-year project was recently unveiled, providing a resource for interpretation and some useful rules for practical application of the law of armed conflict in modern conflicts.⁴¹

As the result of special tribunals established in war-torn Rwanda and Yugoslavia, the case law protecting civilians from the ravages of war has also progressed. The best examples of this progression come from the ICTY, which has advanced the progress of the law of war in even the most difficult forms of internecine warfare and genocide. The *Tadic* case,⁴² which demonstrated the application of the law of war to internal armed conflicts in the Balkans, began this trend. Cases like *Simic*,⁴³ punishing those who intentionally targeted civilians and engaged in “ethnic cleansing” in Bosnia, have shown that the law of war has teeth. Both perpetrators and those responsible for planning, supervising, and coordinating the attacks on

³⁴ Ayman al-Zawahiri, *Knights Under the Prophet’s Banner*, quoted in Mahmood Mamdani, *Whither Political Islam?*, FOREIGN AFFAIRS, Jan./Feb.2005, at 150.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Eric Schmidt, *U.S. Doubts Iraq Rebels Can Keep it Up*, INT’L HERALD TRIB., May 9, 2005, at 1.

³⁹ Commentary, *supra* note 3, at 5.

⁴⁰ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW vols. I, II, at iii (Cambridge Univ. Press, 2005).

⁴¹ *Id.*

⁴² Prosecutor v. Tadic, Case No. IT-94-1-T, Judgement in Sentencing Appeals (Jan. 26, 2000), available at http://www.un.org/icty/tadic/appeal/judgement/index_2.htm.

⁴³ Prosecutor v. Simic, Tadic, & Zaric, Case No. IT-95-9-T, Judgement (Oct. 17, 2003), available at <http://www.un.org/icty/simic/trialc3/judgement/index1.htm>.

minority enclaves in Bosnia and Kosovo are facing up to life in prison for their misconduct; also, the ICTY has not succumbed to the ethnic bias claimed by critics—all ethnicities and ranks, from all parties to the conflict, have been indicted and are being brought to justice.

Treatment of POWs

The treatment of prisoners, including POWs and detainees,⁴⁴ has also produced a very sharp contrast between the terrorists' asymmetric approach and the U.S. government's response. The terrorists, or Iraqi insurgents, have no respect for the lives of their captives or the law. The justification is a corrupted reading of their religion—when they kill individuals for “sin and corruption,” they quote the Koran; “We have not done injustice unto them, but they to themselves.”⁴⁵ They execute captives on live streaming video to maximize the terror effects on the Iraqi population and world opinion; as a result they have been successful in deterring some nations from assisting in the counter-terrorist war in Iraq. They hold civilians hostage and then execute them, both of which violate some of the clearest tenets of the law of war. Women, reporters, and aid workers are kidnapped, held for ransom, or executed outright, all in violation of the Geneva Convention for the protection of civilians.⁴⁶ They execute captured security forces, with their hands tied behind their backs, in violation of the Geneva Convention protections for POWs.⁴⁷ There is no dispute about “status,” or other legal niceties, within the ranks of the jihadists and other insurgent elements, yet they are quick to request treatment consistent with the Geneva Conventions or point out the failure of coalition partners to respect the law.

The vast majority of coalition actions stand in stark contrast to the approach of the terrorists. Most coalition Soldiers are very careful to treat prisoners with dignity and respect, even in hectic and dangerous conditions on the battlefield, and often at risk to themselves. When prisoners are injured or killed by an errant Soldier or Marine, prosecution quickly follows; there have been dozens of military courts-martial for misconduct on the battlefield. For example, a Soldier of the 1st Infantry Division was recently convicted and sentenced to seven years in prison for the murder of an Iraqi who had already been bound with his hands behind his back.⁴⁸ In another case, a Marine major faced four-and-a-half years in prison for maltreatment of a prisoner, who later died of his wounds.⁴⁹ In addition, the Soldiers identified as perpetrators of the abuse in Abu Ghraib prison were prosecuted for their transgressions.⁵⁰ Specialist Charles Graner, the alleged “ring leader” of the group of military police on the night shift at Abu Ghraib, was sentenced to ten years in prison for abuse of prisoners.⁵¹ A CIA contractor who used rough treatment in 2003 to interrogate an Afghan who later died is being prosecuted by the U.S. Attorney in Raleigh, North Carolina.⁵² Finally, two British Soldiers have been convicted, and up to nine more have been charged with prisoner abuse in Basra, at Camp Breadbasket, where the prisoners were beaten and otherwise mistreated.⁵³ Whether it is the maltreatment of detainees, including the abuses of Abu Ghraib, abuse by interrogators in Afghanistan, or the cruelty inflicted by British Soldiers in Basra, each incident is investigated and prosecuted in accordance with the requirements of the Geneva Conventions.⁵⁴

There is no denying, however, that publicity about misconduct can do grave injury to coalition efforts to restore a rule of law in Iraq. It is a double-edged sword—in open Western societies, trials are public, creating “bad publicity” for the force,

⁴⁴ Prisoners of war are treated in accordance with the GPW, while detainees are treated as civilians, under the GC. Although the ICRC only recognizes these two categories of prisoner, the United States has created another status—“unlawful enemy combatant.” See Memorandum, Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, regarding: Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 22, 2002), at 8, available at <http://www.washingtonpost.com/wp-srv/national/documents/012202bybee.pdf>.

⁴⁵ Steve Fainaru, *In Mosul, A Battle Beyond Ruthless*, WASH. POST, Apr. 13, 2005, at 1.

⁴⁶ GC, *supra* note 7, art. 34, art. 33 (reprisals against protected persons are prohibited).

⁴⁷ GPW, *supra* note 7, art. 13.

⁴⁸ Steve Liewer, *1st ID Soldier Gets Seven Years in Killing of Iraqi Detainee During Interrogation*, STARS AND STRIPES, May 20, 2005, at 3.

⁴⁹ Associated Press, *Court Martial Begins in Iraqi Prison Death* (Nov. 2, 2004), available at <http://msnbc.msn.com/id/6394480>.

⁵⁰ John Gonzalez, *Prosecutions Wind Down at Fort Hood*, HOUS. CHRON., Apr. 4, 2005, at 1.

⁵¹ Rowan Scarborough, *Abu Ghraib Convict Breaks Silence*, WASH. TIMES, Apr. 13, 2005, at 5.

⁵² R. Jeffrey Smith, *Interrogator Says U.S. Approved Handling of Detainee Who Died*, WASH. POST, Apr. 13, 2005, at 7.

⁵³ *British Soldiers Convicted of Prisoner Abuse*, SYDNEY MORNING HERALD, Feb. 25, 2005, available at <http://www.smh.com.au/news/World/British-soldiers-convicted-of-prisoner-abuse/2005/02/24/1109180047384.html?from=moreStories>.

⁵⁴ GPW, *supra* note 7, art. 132.

and due process is deliberate, but sometimes slow. The prolonged courts-martial, cited above, provide frequent reminders to the Arab and U.S. public that there are some military personnel who do not respect the law. Pictures of prisoner mistreatment, broadcast on the ubiquitous satellite dishes, via Al Jazeera and other biased media outlets in the Arab world, have done much to destroy the law-abiding image of coalition forces. Despite President Bush's preemptive attack on Arab perceptions, "to many in the Arab world, this abuse (at Abu Ghraib) is America."⁵⁵ Zarqawi's group wasted no time in citing the Abu Ghraib maltreatment as a rallying point for their cause; they even used the misdeeds as an excuse to attempt to break into Abu Ghraib to free prisoners, presumably hoping to rally the Sunni minority to their cause.

The U.S. government has exacerbated the public perception that the administration is seeking some sort of legal and moral equivalency with the terrorists with the legal opinion on "unlawful combatants" and the so-called "torture memo."⁵⁶ In a misguided attempt to change the law to conform to the unprecedented GWOT, the "unlawful combatant" memo⁵⁷ created a separate category of Al Qaeda and Taliban detainees captured in Afghanistan, having them inhabit a netherworld between POWs (covered by the GPW) and civilian detainees (protected by the GC).⁵⁸ The memorandum, supported by a series of Department of Justice and White House counsel opinions, reasoned that Afghanistan was a "failed state," which was largely in the control of terrorist forces, and unable and unwilling to abide by the law of war.⁵⁹ Despite a spirited debate from the State Department and protests from military attorneys, arguing that the Geneva Conventions should be presumptively applied to captives (consistent with long-standing DOD directives), the President signed a decree that Taliban prisoners were not protected under the Geneva Conventions, but were to be treated "humanely," and given the protections, "to the extent appropriate and consistent with military necessity, consistent with the Geneva Conventions of 1949."⁶⁰ The net effect of the memorandum was to produce the perception that the Bush Administration was above the law in the GWOT—in effect, the administration adopted Ralph Peter's approach of treating the new "warrior class" under their own asymmetric legal approach.

The political parsing of international law led to another ill-fated memo, the so-called "torture memo," which opined that physical torture "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" to violate the torture statute or the Convention on Prevention of Torture.⁶¹ The Office of Legal Counsel, Department of Justice, memo was attempting to interpret the definition of torture under the criminal code, 18 U.S.C., section 2340A, and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment; the author, (now) Judge Jay S. Bybee, chose a definition of "the intentional infliction of severe pain or suffering" that has been characterized as a "very aggressive approach."⁶² The same issue was addressed, in a more cautious fashion, at the Combined Joint Task Force 7 level, on 13 September 2003, where Lieutenant General Sanchez first approved a series of progressively more aggressive interrogation techniques (to be reserved at his level for final approval), then rescinded the approval in an October 2003 follow-up memo. Lieutenant General Sanchez never actually approved the use of any aggressive techniques, however, in any particular cases.⁶³ And in one more serendipitous act, which has fueled the

⁵⁵ David Paul Kuhn, *Damage Control on Abu Ghraib*, May 5, 2004, available at <http://www.cbsnews.com/stories/2004/05/05/politics/main615811.shtml>.

⁵⁶ See Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush*, WASH. POST, June 9, 2004, at 3, available at <http://www.washingtonpost.com/wp-dyn/articles/A26401-2004Jun8.html>.

⁵⁷ See Memorandum, Alberto R. Gonzales, Counsel to the President, to The President, subject: regarding: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002) [hereinafter Gonzales Memo].

⁵⁸ The memorandum focuses on the highly charged political question of "status," rather than adopting the focus of the Geneva Conventions on humanitarian "treatment" of those that are out of combat; Commentary, *supra* note 3, at 13. See also Jess Bravin, *U.S. Mishandled Prisoner Policy, Ex-Advisor Says*, WALL ST. J., Apr. 5, 2005, at B9 (William H. Taft, IV, former Legal Advisor to Secretary Powell, goes public with the State Department position, debated in the "unlawful combatant memo," that international law, including the law of war, did not justify establishing a separate category). Prisoner of war treatment does not preclude prosecution for war crimes, or the prisoner's eventual "status" as war criminals; see GPW, *supra* note 7, art. 83.

⁵⁹ Gonzales Memo, *supra* note 57.

⁶⁰ Memorandum, the President of the United States, to the Vice President et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002)

⁶¹ Allen & Priest, *supra* note 56, at 3.

⁶² *Id.* Compare Memorandum, Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, regarding: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf#search=Standards%20of%20Conduct%20for%20Interrogation%20under%20bybee>, with Memorandum, Daniel Levin, Acting Assistant Attorney General, to Deputy Attorney General, subject: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (30 December 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

⁶³ Jon R. Anderson, *ACLU: Sanchez Lied at Abu Ghraib Hearing*, STARS & STRIPES, Apr. 1, 2005, at 10.

conspiracy theorists, Major General Miller (the Commander of Guantanamo) visited Abu Ghraib in the early fall of 2003 to provide advice on how the military police and intelligence officials could work together to increase the output of the interrogation process. Although the Taguba Report⁶⁴ [and several subsequent investigations] found no connection between the series of memos, the Miller visit, and the Abu Ghraib maltreatment, the perception persists that a diminution of standards was endorsed through the chain of command.⁶⁵

The U.S. public (and, by extension, the world) viewed the U.S. government legal memoranda as the source of the eventual abuse.

Their legal briefs dutifully argued that the president could suspend the Geneva Conventions when he chose, that he could even sanction torture, which could be redefined so narrowly that it could seem legal . . . The [administration lawyers] reaffirmed the notion that Bush could choose when to apply the Geneva Conventions. That principle was originally aimed at the supposed members of Al Qaeda held at Guantanamo, but it was quickly exported to Iraq and led, inexorably, to the horrors at Abu Ghraib and other recently disclosed crimes by American soldiers against Iraqi and Afghan prisoners.⁶⁶

And later attempts to outline correct interrogation procedures have done little to dispel the perception that, at a minimum, “senior officials—including Defense Secretary Donald H. Rumsfeld and Lt. Gen. Ricardo S. Sanchez, the former top commander in Iraq—[added] to the confusion by giving approval, then rescinding it, for limited use of harsh techniques that went beyond what was allowed in the manual.”⁶⁷ Once again, at a key juncture in developing the standards for prosecution of the GWOT, the Bush Administration adopted Ralph Peter’s approach—aggressively push the law to obtain temporary gain (presumably more timely intelligence through coercive interrogation techniques). Except in extreme cases, where the fate of thousands hang in balance, or there is a reasonable belief that the terrorist has information on an imminent catastrophic event, the value of actionable tactical intelligence is outweighed by the loss of public perception that the anti-terror coalition occupies the moral high ground.

Values and the CNN Test

While the majority of the law of war issues that arise from recent conflict demonstrate a uniform application of universally accepted standards, the attempts by the U.S. government to meet asymmetric moral and legal approaches of the terrorists with asymmetric legal approaches have been an unmitigated disaster. In the Information Age, it is “Circus Maximus 24 hours a day, 7 days a week;” with the “glare of the public spotlight on everything, each individual event takes on a potential importance unlike anything in past times.”⁶⁸ This is a clear restatement of the “CNN Test”: Policy makers should be prepared for their decisions to see the light of day in a free society, with ubiquitous media presence, and a permissive Freedom of Information Act (FOIA) (the majority of the documents posted on the web and cited above were obtained by various public-interest organizations through the use of FOIA). It is also axiomatic in strategic thinking, since the Vietnam War, that retaining public support is critical to military decision-making.⁶⁹ Public opinion in the United States, across much of Europe, and (more importantly) within the Arab world has been unfavorably disposed toward these attempts by the Bush Administration to change the standards of warfare to suit the GWOT. The painful, inexorable re-imposition of those standards (through court action and public policy changes) will eventually bring the law of war back on an even keel. But it is clear, in 20-20 hindsight, that the administration should have listened to the wise counsel of the secretary of state and senior military lawyers⁷⁰ to eschew any deviation from well-established international legal principles (and the extant DOD policy on the application of the law of war.⁷¹) More than public fallout or hindsight, however, unchanging norms are justified by a values-based approach to the law of war.

⁶⁴ Major General Antonio M. Taguba, Army Regulation 15-6 Report of Investigation on the 800th Military Police Brigade, *available at* <http://www.agonist.org/annex/taguba.htm> (last visited July 25, 2005).

⁶⁵ Allen & Priest, *supra* note 56, at 3. See also Matthew B. Stannard, *Many Shared Blame in Abu Ghraib*, SAN FRAN. CHRON., Apr. 2, 2005, at 7.

⁶⁶ Andrew Rosenthal, *Bush’s Housebroken Lawyers*, INT’L HERALD TRIB., Dec. 31, 2004, at 6.

⁶⁷ Eric Schmitt, *Army, in Manual, Limiting Tactics in Interrogation*, N.Y. TIMES, Apr. 28, 2005, at 1, *available at* <https://www.us.army.mil/suite/earlybird/Apr2005/e20050428365538.html> (last visited Apr. 28, 2005).

⁶⁸ DAVID S. ALBERS ET AL., NETWORK CENTRIC WARFARE: DEVELOPING AND LEVERAGING INFORMATION SUPERIORITY 64 (2002).

⁶⁹ DR. STEVEN METZ ET AL., THE FUTURE OF AMERICAN LANDPOWER: STRATEGIC CHALLENGES FOR THE 21ST CENTURY 16 (1996).

⁷⁰ Rosenthal, *supra* note 66, at 6.

⁷¹ DOD DIR. 5100.77, *supra* note 11, at 2.

Clausewitz recognized the importance of the moral aspects of warfare. Although he saw international law of his time as a “self-imposed, imperceptible limitation, hardly worth mentioning” that “scarcely weaken(s)” the use of force,⁷² he appreciated the “spirit and other moral qualities of an army.”⁷³ In his view, it is “paltry philosophy if in the old-fashioned way one lays down rules and principles in the total disregard of moral values.”⁷⁴ As Colonel Thomas J. Williams suggests in *Strategic Leader Readiness and Competencies for Asymmetric Warfare*, maybe it is Clausewitz’s concept of “*coup d’oeil*” that should guide the strategic leader in confronting the “unforeseen.”⁷⁵ That “inner light that leads to truth” should shine from a value system that includes the bedrock principles of international law that are enshrined in the Geneva Conventions and the binding customary international law of war.

Contrary to the assertions of many, including Peters, the asymmetric tactics used by terrorists and insurgents are not new tactics, presented in a legal and moral vacuum, requiring new legal standards. As the International Court of Justice said in the Nuclear Weapons Advisory Opinion, the law of war has proved very resilient in addressing the “rapid evolution of military technology,”⁷⁶ the same is true of asymmetric tactics. The foundational principle, enshrined in binding customary international law, is enunciated in Article 1, of Additional Protocol I of 1977, which says:

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 the dictates of public conscience.⁷⁷

There is no question that the law exists to sanction violations of the law of war by our Soldiers and our enemies, guide our conduct, and serve as a touchstone for value-based application of the law to military operations.

Telford Taylor, the prosecutor in Nuremberg and a giant in the field of international law, also urged good faith fidelity to the law of war. In his book, *Nuremberg and Vietnam: An American Tragedy*, Taylor notes the importance of the law of war as a moral compass for the individual soldier.⁷⁸ He emphasizes the need to “diminish the corrosive effect” on the Soldiers, themselves:

Unless troops are trained and required to draw the distinction between military and nonmilitary killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives . . . As Francis Lieber put the matter in his 1863 army regulations: ‘Men who take up arms against one another in public war do not cease on this account to be moral human beings, responsible to one another and to God.’⁷⁹

No matter how effective or ineffective (particularly in the short term) the law might be in a given scenario, one of the most important—and subtle—purposes of the law is to preserve the moral well being of our troops. Asking them to kill and destroy challenges their basic sense of right and wrong; giving them meaningful rules that do not fluctuate to guide their conduct helps them cope with that violence on a deeper, moral level.

As the Army is transformed, while undergoing the stress of combat, certain things should not change. The new Secretary of the Army, Francis J. Harvey, has emphasized the “will to do what is right and proper, regardless of the personal cost,” rejecting straying from conscience “for expediency, or any other reason [that would] betray the trust of our countrymen and ourselves.”⁸⁰ The Chief of Staff, General Schoomaker, has made Soldiers the centerpiece of his transformation efforts,⁸¹

⁷² CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret eds. 1989).

⁷³ *Id.* at 184.

⁷⁴ *Id.*

⁷⁵ Thomas J. Williams, *Strategic Leader Readiness and Competencies for Asymmetric Warfare*, PARAMETERS (Summer 2003), at 26.

⁷⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, para. 78 (July 8), available at http://www.icj-cij.org/icjwww/icasess/iunan_judgment_advisory%20opinion_1996078.htm (last visited June 11, 2005).

⁷⁷ U.S. DEP’T OF ARMY, PAM. 27-1-1, PROTOCOLS TO THE GENEVA CONVENTION OF 12 AUGUST 1949, at 4 (1979).

⁷⁸ TELFORD TAYLOR, WAR CRIMES, in WAR, MORALITY AND THE MILITARY PROFESSION 378 (Malham M. Wakin, ed. 1986).

⁷⁹ *Id.*

⁸⁰ FRANCIS J. HARVEY, COMMITMENT TO FEDERAL ETHICS STANDARDS (Department of the Army, Washington, D.C., Apr. 5, 2005).

⁸¹ United States Army, The 2004 Army Posture Statement, at <http://www.army.mil/aps/04/core.html> (last visited July 25, 2004).

adopting a “Soldier’s Creed” (which includes the Warrior Ethos) that incorporates the best traits and beliefs that have been exemplified by American Soldiers throughout history. These values, including adherence to the principals and spirit of the law of war, in whatever conflict, however characterized, should serve as guideposts for Soldiers now and in the future.

The approach that Ralph Peters suggests, an approach of moral and legal equivalency to respond to the legally asymmetric attacks by terrorists of the “warrior class,” is morally bankrupt. The short-term gain of additional intelligence, or a temporary tactical advantage, is vastly outweighed by the loss of legitimacy caused by any reduction in the legal standards. For the U.S. military to properly represent that “shining city on the hill,” which is a values-based nation, the standards should not change with the winds of war.

“Improving the Fighting Position”
A Practitioner’s Guide to Operational Law Support to the Interrogation Process

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If there is doubt as to the legality of a proposed form of interrogation not specifically authorized in this manual, the advice of the command judge advocate should be sought before using the method in question.¹

Introduction

The purpose of this article is to share with military practitioners the product of a recent effort spearheaded by The Judge Advocate General’s Legal Center and School (TJAGLCS) to better synchronize training efforts related to legal support of the most visible area of operational law practice in the Global War on Terror (GWOT)—interrogation operations. This article summarizes the actions taken to achieve this objective, as well as a discussion of some fundamental concepts that provide the foundation for future training and legal support activities.

The International and Operational Law Department recently hosted a conference spotlighting many months of hard work by judge advocates (JA) throughout the Judge Advocate General’s Corps (the Corps) related to legal support of interrogation operations. The goal of the conference was to bring these parties together to allow them to share their products and exchange ideas and expertise on interrogation operations and intelligence law. The recognized need to have comprehensive and coordinated training packages for the training of interrogators, commanders of units with interrogation or collection missions, human intelligence (HUMINT) collection teams, and the JA population in general drove an ambitious agenda and spirited discussion. Representatives from the Intelligence and Security Command (INSCOM), Office of The Judge Advocate General, International and Operation Law Division (OTJAG ILAW), the U.S. Army Intelligence Center and School (USAIC), Center for Law and Military Operations (CLAMO), the Chairman of the Joint Chiefs’ Legal Staff, and practitioners fresh from the field shared their collective expertise and recent experiences. The issues, however, are complicated and much hard work is left to be done.

It is not the authors’ intent to provide authoritative guidance for dealing with issues related to this area of operational law practice. Indeed, the major motivation behind the efforts summarized below was the recognition that the recent scrutiny of interrogation practice, and the accordant ongoing efforts to review, refine, and publish more comprehensive and effective directives, instructions, doctrine, tactics (techniques), and procedures, has resulted in disparate and sometimes conflicting training resources. This article will not summarize the training package developed as the result of the collective efforts of military practitioners. Instead, it is intended to summarize the efforts to leverage the collective expertise of the Corps to develop an effective and synchronized resource for training both JAs and interrogators, and to discuss some of the cornerstones of this training resource.

¹ U.S. DEP’T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION 1-8 (Sept. 1992) [hereinafter FM 34-52]. *Field Manual 34-53* is currently under revision and will be superseded by *FM 2-22.3*.

A Doctrinal “Twilight Zone”

Critical reviews of interrogation efforts in Guantanamo Bay (GTMO), Cuba, Afghanistan, and Iraq have highlighted the many significant challenges faced by personnel participating in intelligence collection and interrogation missions. One of the most fundamental and significant of those challenges still exists—personnel performing these missions often did so in what many believed to be a “doctrinal twilight zone.”

This is not to deny that doctrine did and does exist. Clearly a version of *Field Manual 34-52, Intelligence Interrogations*,² was in effect and utilized by personnel in Afghanistan, Iraq, and, initially, at GTMO. However, due to initial confusion regarding the status of al Qaeda and Taliban personnel taken captive in Afghanistan, and a follow-on decision that such personnel were unlawful combatants and, thus, not entitled to prisoner of war (POW) status,³ a determination was made that the doctrinal guidance contained in *Field Manual (FM) 34-52* regarding the treatment and interrogation of the individuals detained at GTMO would not apply.⁴ This determination led to an apparent misunderstanding concerning the continued applicability of this doctrine to the ongoing conflict in Afghanistan. The triggering events leading to this confusion unfolded at GTMO.

In the fall of 2002, during interrogations at GTMO, it became apparent that many detainees were capable of offering a greater degree of resistance to established interrogation approaches and techniques than that which had been anticipated. In response to this development, the Director of Intelligence operations for Combined Joint Task Force 170, in charge of interrogation operations, authored a memo stating that, because many of the detainees had shown great resistance to the doctrinally-sanctioned interrogation techniques in *FM 34-52*, the command was seeking approval to employ non-doctrinal counter-resistance procedures.⁵

The request was then forwarded to the Combined Joint Task Force (CJTF) Staff Judge Advocate (SJA) for a legal review. The CJTF SJA made the following determinations: international law (and therefore the Geneva Conventions) did not apply to the situation,⁶ military necessity required more stringent counter-measures,⁷ and the requested counter-measures did not violate applicable federal law.⁸ Also, significantly, the CJTF SJA requested a further legal review of certain categories of the proposed techniques by higher headquarters.⁹

The legal review prepared by the CJTF SJA (a seven-page comprehensive document) relied on several significant premises. First, the Geneva Conventions did not apply—the President determined in a 7 February 2002 directive¹⁰ that detainees were not enemy prisoners of war.¹¹ Despite this, however, the SJA opined that detainees “must be treated humanely and, subject to military necessity, in accordance with the principles of GC.”¹² Second, the SJA noted that Army *FM 34-52* was based upon the Geneva Conventions and since the detainees were not prisoners of war and the Geneva Conventions did not apply to them, the FM was not binding.¹³ After a lengthy discussion of many bodies and facets of international law, the

² *Id.*

³ Memorandum, Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 January 2002), available at <http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> [hereinafter Bybee Memo].

⁴ Memorandum, Staff Judge Advocate, JTF-170, to Commander JTF-170, subject: Legal Review of Aggressive Interrogation Techniques (Oct. 11, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf> [hereinafter JTF 170 Legal Review]; Memorandum, Staff Judge Advocate, JTF-170, to Commander JTF-170, subject: Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf> [hereinafter JTF 170 Legal Brief].

⁵ Memorandum, Lieutenant Colonel Jerald Phifer, J2, to Commander, JTF 170, subject: Request for Approval of Counter-Resistance Strategies (Oct. 11, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf> [hereinafter J2 Interrogation Request].

⁶ JTF 170 Legal Brief, *supra* note 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*; JTF 170 Legal Review, *supra* note 4.

¹⁰ Memorandum, President of the United States, to Vice President, et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> [hereinafter President Bush Memo].

¹¹ JTF 170 Legal Brief, *supra* note 4.

¹² *Id.*

¹³ *Id.*

SJA determined that “no international body of law directly applies.”¹⁴ Finally, the CJTF SJA considered extensively the application of domestic law, concluding ultimately that “the proposed strategies did not violate applicable federal law.”¹⁵

Clearly, much of this analysis is subject to dispute. The analysis, for example, provides a debatable interpretation of the applicability of the Convention Against Torture¹⁶ and the implementing U.S. Torture Statute¹⁷ in opining that none of the requested techniques constituted torture or cruel, inhumane, or degrading treatment in violation of these laws. Neither, unfortunately, did the analysis include consideration of what is generally deemed to be the baseline “humane treatment standard” reflected in the provisions of Common Article 3 of the Geneva Conventions.¹⁸ The opinion’s proposal to immunize interrogators, given that a number of the proposed techniques in issue constituted violations of the UCMJ, was not only unprecedented, but lacked any basis in law. The opinion’s reasoning, however, is not the point of this reference. Rather, this historical anecdote is used to illustrate the more significant point—when the doctrinal foundation of interrogation operations—*FM 34-52*—was removed from the equation—interrogators conducting operations at GTMO were left with a void of guidance that was filled in an ad hoc basis.

Even with the assistance of the *FM 34-52*, there remains a void. Tactics, techniques, and procedures (TTPs), standing operating procedures (SOPs), and other resources that distill doctrine into usable nuggets for those in the field were simply not available. This problem was related primarily to the individuals associated with al Qaeda and detained at GTMO, and was derivative of the overall issue of uncertainty as to the status and accordant standards applicable to these personnel. While the status and standards issue was far less complex with regard to individuals presumptively qualifying as POWs or civilian internees (CI) in Iraq, the underlying importance of developing and disseminating comprehensive standards and TTPs related to the interrogation of such individuals cannot be overemphasized. Although *FM 34-52* is currently under review, soon to be re-published as *FM 2-22.3*, and is likely to be a more complete and functional document, there remains an apparent need for what might best be described as a “commentary” on the overall issue of interrogation operations conducted within the context of the GWOT.

Consider as proof of this requirement a dynamic cited in many of the investigations of interrogation activities: the informal migration of policies and procedures from one theater to another. The well-documented problem with this migration was that no one-size-fits-all approach could be taken when the status of the detainee in each of those theaters was often dramatically different. Certainly, if interrogators had fully complied with the existing doctrinal guidance, *AR 190-8*¹⁹ and *FM 34-52*,²⁰ the abuses in issue would have probably been averted. In many ways, failure to comprehend the pervasive applicability of these sources of authority, rather than a genuine lack of doctrine, led to the abusive behavior.²¹ Unfortunately, a comprehensive understanding of applicable standards at the tactical level was lacking, causing well-intentioned persons charged with important missions to seek assistance wherever they could find it. As a result, individuals who had served in Afghanistan and the documents that had been used t/here were exported to GTMO, or vice versa.

Clearly, a more effective understanding of both the interrogation process, and the applicability of authorities related thereto, is required by both interrogation operations specialists and the JAs charged with legal support for these activities. Doctrine plays a vital role in warfighting and in the many missions that contribute to operational success. Our Army is

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113.

¹⁷ 18 U.S.C. § 2340A (2000).

¹⁸ Common Article 3 provides protection from, *inter alia*, murder, mutilation, torture, hostage-taking, summary executions, and irregular trial proceedings. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWSS]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287 (GC) [hereinafter GC I-IV]. Article 3 is common in all four Conventions.

¹⁹ U.S. DEP’T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Oct. 1997) [hereinafter AR 190-8] (*Army Regulation 190-8* is a multi-service publication and is designated as *OPNAVINST 3461.6* (Navy), *AFJI 31-304* (Air Force), and *MCO 3461.1* (Marine Corps)).

²⁰ *FM 34-52*, *supra* note 1.

²¹ The only uncertainty with respect to applicable doctrine that should have arisen was that in play at GTMO—where all detainees had been classified as unlawful combatants. See President Bush Memo, *supra* note 10. With respect to this category of detainees, military practitioners do need to formulate doctrinal guidance concerning treatment and interrogation—based not on the GC, but on other clearly applicable international and domestic law.

doctrine-based (*i.e.*, doctrine is the authoritative guide to how forces fight wars and conduct operations).²² While doctrine reflects a shared vision and serves as the basis for planning operations, training, and leading, it cannot be the end point. To perform their missions effectively, leaders, trainers, and practitioners need TTPs, mission essential tasks lists, and training plans to establish conditions, standards, and training objectives. In short, doctrine must be distilled in a manner that assists practitioners at the lowest tactical levels, enabling practitioners to identify what “right” looks like.

Synchronization Is Critical

All of the factors cited above clarify the requirement that the efforts of all participants in the interrogation mission must be synchronized. Indeed, the United States military has seen the effects resulting from either a lack of guidance or absolute clarity of standards. In this critical transitory time when the training mission continues at many levels involving many players, and many echelons of command continue to debate, draft, and refine doctrine, there can be no greater concern than uniformity and coordination. This is precisely why the International and Operational Law Department thought the school houses and centers most critically involved must adopt a proactive approach to reviewing, and when appropriate, contributing to, training efforts.

Another reason necessitating the involvement of JAs is their role in the legal support process, which may take several forms. The first form is that of a general operational law attorney—in essence, all JAs deployed with or serving their units. Operational law attorneys will be involved in the training of units within their sphere of influence and will assist the commander in his oversight responsibilities. A good example is the Brigade Operational Law Team (BOLT) that supports a divisional military intelligence (MI) battalion. Sometimes, however, JAs will directly support units tasked with intelligence collection or interrogation missions. These JAs will require specialized training to provide such support. The information provided below is intended to assist all JAs to execute their respective responsibilities.

Command and Control of the Interrogation Process

Judge advocates providing legal support to interrogation operations must understand their client’s mission—the interrogation process—and how that mission is executed. The unique nature of the “art” of interrogation makes this understanding essential to providing effective legal advice and effectively executing the legal support process, as this process is unlike any other activity normally associated with operational law tasks. It is the fluid nature of this process, which targets the mind and in which the battle is psychological, that renders it so unique.

Events related to recent U.S. military operations have revealed the danger of failing to identify and disseminate clear and well-defined standards—those derived from either international law or military doctrine—to regulate every approach or method that might pry critical information from detainees. This problem is compounded because what occurs in an interrogation booth causes great concern to national political leaders and the American public. Although the vast majority of interrogators conduct their activities within appropriate bounds, it is still a “dark art” in which misconduct or errors in judgment by a few can have long-lasting implications for future intelligence collection efforts.

Because of these realities, JAs must be prepared to assist interrogators in developing interrogation policy and to provide comprehensive legal support to interrogation operations. Supervising JAs need to provide on-site legal resources to interrogation facilities to ensure that interrogators and senior intelligence leaders have access to timely, competent legal advice. A small number of JAs assigned to interrogation-related units and specializing in the relevant authorities should continue to perform this function. Recent events have highlighted, however, that every operational legal advisor must be familiar with the interrogation process in order to effectively perform the much more common legal support mission.

Traditional interrogations take place in an interrogation facility. These are usually small operations located inside detention facilities. It is critical to note that an interrogation facility is not a detention facility. Doctrinally, the care, feeding, and maintenance of detainees are the responsibility of the capturing unit or, once the detainee is transferred to the first detention facility, the detention facility commander. Detainee questioning takes place within the interrogation facility, utilizing space located within the main detention facility. The physical set up of an interrogation facility will include administrative areas, life-support areas, and interrogation booths. Normally, the interrogation facility is physically separate

²² See generally U.S. DEP’T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS (1 Mar. 2000) [hereinafter FM 27-100].

from detention facility workspaces and is accessible only to a limited number of personnel within the intelligence community.

The following example serves to illustrate the system by which a detention or interrogation facility processes a captured detainee. A detainee is captured during a cordon and search operation based on information provided by his neighbors that he has been building improvised explosive devices (IEDs). Because the shock effect of capture is greatest at the moment of capture, the infantry unit that conducted the operation had been accompanied by an interrogator from its local interrogation facility to assist in the initial detainee questioning. If the capturing unit did not have an interrogator available, a designated Soldier, probably a senior noncommissioned officer, would have conducted the tactical questioning (TQ) of the detainee.²³

The TQ is not interrogation, but rather an expedient method of questioning conducted by non-interrogators seeking information of immediate value.²⁴ It is not a method of answering a higher echelon's priority intelligence requirements (PIR), but is intended to provide the operational unit with a method of gathering current battlefield information important to that particular patrolling or raiding unit.²⁵ Rather than formal questioning, TQ occurs more in the form of a conversation between the tactical unit and the detainee.²⁶ Because this initial questioning can set the stage for further interrogation and exploitation, however, leaders are advised to provide specific guidance for TQ in the operations orders issued for their missions.²⁷ Currently, in both Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF), only the direct approach (discussed below) may be used in TQ.

Once captured, the detainee is evacuated to the capturing unit's forward operating base in accordance with established timelines. Under most task force and echelon above corps detainee and enlisted prisoner of war (EPW) policies, the detainee would subsequently be evacuated quickly to the brigade detention facility, normally administered by the brigade's military police (MP) unit.²⁸ The brigade's MI company will conduct the initial interrogation based on the brigade's PIR, usually for a period of twenty-four to forty-eight hours. It should be noted that only trained interrogators interrogate. In the Army, a trained interrogator is a Soldier who holds the military occupational skill, 97E, Human Intelligence Collector. The detainee will then be evacuated to the division detention facility and be similarly processed by the division's MI cadre. In most cases, he will be transferred to an echelon above corps or to a joint interrogation facility. Traditionally, these latter facilities were known as either theater intelligence facilities (TIF) or joint intelligence facilities. Recent joint doctrinal changes to HUMINT collection policies, however, have created the joint interrogation and debriefing centers (JIDC), which are the final holding facilities where long term interrogations take place. Regardless of the nomenclature, this is the location at which deeper level—and inherently more risk-prone—interrogations are conducted.

The command and control structure of the JIDC can be traced to the old TIF structure, as outlined in *FM 34-52*, but which is now also found in *Joint Publication 2-01*.²⁹ Doctrinally, the JIDC is "managed" by the joint force's HUMINT staff (known as the HUMINT Operations Center (HOC)),³⁰ usually utilizing an O-5 staff officer as the officer-in-charge (OIC), rather than a commander. Manpower for the JIDC is provided by various service intelligence units, which place their interrogators under the operational control of the JIDC, but which retain command and administrative authority.³¹ For instance, in the Army, the corps or theater intelligence brigade commander assigns an interrogation and exploitation battalion commander responsible for exercising administrative control over the JIDC's Soldiers; however, the JIDC OIC would effect the day-to-day management of the interrogators.

²³ See *FM 34-52*, *supra* note 1, at 2-13.

²⁴ See *id.* at 2-2, 2-13.

²⁵ See, e.g., *id.* at app. C (providing a guide for tactical questioning).

²⁶ Judge advocates must ensure that all personnel who may be involved in tactical questioning, with a particular emphasis on small unit leaders, understand that the same humane treatment based obligations applicable during interrogation apply during tactical questioning. In fact, evidence gathered during recent military operations indicates that the risk of detainee abuse is greater during the tactical questioning phase of exploitation than during the interrogation phase. See *id.* at 2-13. Leaders at all levels must remain vigilant in ensuring that detainees are treated consistently with law and policy from the moment of capture through every phase of custody.

²⁷ U.S. ARMY INTELLIGENCE CENTER, ST 2-91.6, SMALL UNIT SUPPORT TO INTELLIGENCE (2 Mar. 2004). The INSCOM has taken the lead in creating training materials and providing JAG support to mobile training teams preparing deploying units and personnel at home station. Judge advocates advising maneuver units are encouraged to attend this training.

²⁸ See *FM 34-52*, *supra* note 1, at 2-9, 2-13.

²⁹ JOINT CHIEFS OF STAFF, JOINT PUB. 2-01, JOINT AND NATIONAL INTELLIGENCE SUPPORT TO MILITARY OPERATIONS app. G (7 Oct. 2004)

³⁰ *Id.*

³¹ See *id.*

Ongoing revisions to joint doctrine will likely result in vesting the JIDC commander with full control, including disciplinary control, over JIDC personnel, to include interrogators. In addition, this will provide the JIDC commander with the full complement of staff officers and command resources necessary to better accomplish the interrogation mission. It is also possible that these revisions will require both the JIDC commander and the detention facility commander to answer to a flag officer joint task force or joint detention operations commander, who will act as the intermediary between the disparate and conflicting interrogation and detention operations being conducted in the joint operational area.

An important variant to this organizational structure is the potential role of civilian contract personnel. Operational legal advisors must be prepared to encounter contract support personnel, performing both analysis and interrogation functions. These personnel will normally be “procured” through the Army service component command responsible for providing administrative control (ADCOM) over Army personnel in the joint operational environment, and, more specifically, by the intelligence staff for that command. As a result, it is probable that the contracting officer’s representative for such personnel will be associated with an intelligence staff agency. Regardless of the source of the procurement of this support, however, these contract personnel are subject to the direction and control of the commander responsible for the interrogation operation. Furthermore, pending revisions to Army and Department of Defense (DOD) doctrine will emphasize the obligation of these individuals to fully comply with the law of war and all other applicable law and policy related to interrogation operations.

The JIDC, apart from administrative support, normally consists of two sections: operations and analysis. The interrogation operations section, normally headed by a senior warrant officer and interrogator, is the heart of JIDC activity. The interrogation operations OIC is responsible for overseeing the screening process and the assignment and management of interrogators and their interrogation priorities, effecting liaison with the detention facility guards and other agencies, the approval of interrogation plans, and the general supervision of interrogation collection activities.

Analysts are also becoming more closely associated with the execution of interrogations. Unlike the traditional interrogation practice, when experienced analysts were located in the interrogation facility, but well removed from actual collection activities, analysts, today, are often integral to the execution of interrogations. Much of this shift in practice has resulted from the changing emphasis of intelligence analysis. In past operations, the focus of such analysis has been “order of battle” (OB) development—knowing the enemy’s capabilities and location at any given time. In current operations against an asymmetric enemy, OB has given way to “link analysis,” the identification of individuals, networks, terrorist cells, and associations and the determination where these fit into the overall global terrorism or local insurgency landscape. The immediate analysis of interrogation collection has become critical, as many detainees today possess information related to critical PIRs—such as the locations of IEDs or IED-manufacturing facilities, the location of insurgent cells or their leadership, or knowledge of ongoing anti-U.S. or anti-coalition operations.

The newest organization to evolve from this analysis enhancement effort is the HUMINT Analysis and Research Center (HARC). Another important development to emerge from this enhanced process is the concept of “tiger teams”—the pairing of interrogators and analysts in the interrogation booth, with the analyst providing real-time support to the interrogator so that information might be culled in a more timely and accurate manner. None of these developments, however, justifies any deviation from the legal and doctrinal detainee treatment requirements, or alters the basic legal support requirement to be performed by JAs.

Finally, experience indicates that, in addition to the regular cadre of staff officers, most JIDCs should be staffed with a legal advisor. Designating a legal advisor to support the JIDC is consistent with the concept of METT-TC (mission, enemy, troops, terrain and weather, time available, and civilian considerations) based “tailored” operational legal support described in *FM 27-100*.³² The JIDC operations are legally intensive, and the JA is responsible for assisting in the interrogation planning process, effecting liaison with the MP community, and exercising intelligence activities oversight under *AR 381-10*.³³ The JA might be assigned to the staff of the JTF-detention operations commander and provide legal support to both interrogation and detention operations. Alternatively, he could be specifically assigned to the JIDC and provide legal support in a specific intelligence community context. Currently, there are two JA billets on the JIDC joint manning document in OIF—one Air Force and one Army billet. The Army position is filled by a captain; the Air Force billet has not been staffed.

³² FM 27-100, *supra* note 22, para. 2.4.2.

³³ U.S. DEP’T OF ARMY, REG. 381-10, US ARMY INTELLIGENCE ACTIVITIES (1 July 1984).

The Interrogation Process

With an understanding of the command and control of the interrogation process, it is important to understand the interrogation process. For purposes of interrogation execution, any subject of interrogation can be regarded simply as a detainee—even if the detainee actually qualifies for a more specific status under the law of war. When a detainee is transferred to a JTF detention facility, he will be in-processed by the facility's MP personnel. This will include a medical screening and the establishment of an administrative record. The detainee will also undergo an initial intelligence screening. At every echelon, detainees are screened to determine both their level of cooperation and knowledge, as well as who among them might best satisfy the commander's PIR.³⁴ Not only is the detainee questioned; anything found on him at the time of capture will be reviewed. This includes "pocket litter", such as photos, identification cards, or letters. These items might later be used as possible tools in exploiting a particular need of a detainee, or used to build trust or to provide the detainee with an incentive to provide information.

From the moment the detainee is transferred to a facility, he is observed by various facility personnel, to include the facility guards. What the MPs passively observe is noted and may prove to be helpful in building a profile of the detainee that an interrogator can use in formulating an interrogation plan. The use of MPs to observe and note detainee behavior is permissible and encouraged;³⁵ however, they cannot engage in active intelligence activities.

Once the detainee has been screened, the OIC or senior interrogator will assign an interrogator possessing the commensurate skills dictated by the detainee's profile and the interrogation process will be initiated. This process is a five-phase sequence that enables the interrogator to effectively approach and question the detainee and serves to ensure that built-in protections are utilized. These phases are:

- (1) Planning and Preparation Phase;
- (2) Approach Phase;
- (3) Questioning Phase;
- (4) Termination Phase; and,
- (5) Reporting Phase.³⁶

In our example, an Army interrogator, *Specialist (SPC) Interrogator*, has been assigned to interrogate a detainee. In the planning and preparation phase, prior to the subject being transferred from the detainee holding area to the interrogation facility, *SPC Interrogator* will obtain the detainee's file and review the capture data noted by the capturing unit, the circumstances surrounding the capture, the pocket litter found on the detainee, and any notes made by previous interrogators at subordinate interrogation facilities. She may talk to the MPs who guard the detainee in order to discuss his behavior and demeanor. She may also contact other intelligence support elements, such as the HARC, the analytical control element, or the information dominance center (IDC), and review information previously collected and data-based. With this in mind, she will then draft her interrogation plan, a document describing her interrogation objective, her observations of the detainee, her primary and alternate approach plans, and the questioning techniques she plans to use.

Once she has designed her plan, she will staff it with the operations OIC or the senior interrogator, who reviews it and authorizes her to proceed.³⁷ If the interrogation plan involves any methods or techniques that are questionable, "non-dogmatic," or which require higher-level approval, the operations OIC will prepare the plan to be reviewed and approved by higher echelons and call upon legal support to assist in the planning process or provide legal support during the execution of the plan.

Once the interrogation plan is approved, *SPC Interrogator* will request the MPs to escort the detainee to her interrogation booth, usually a small room with a table and chairs for the detainee, the interrogator, and, possibly, an analyst or an interpreter. Once the detainee is present, the interrogation begins, and the interrogator executes her planned approach.

The approach is the key to a successful interrogation. When the detainee is prepared to talk, the interrogator simply has to listen and to ask appropriate follow-up questions. Judge advocates can easily liken it to the ultimate cross-examination in

³⁴ FM 34-52, *supra* note 1, at 2-11.

³⁵ *Id.* at 2-11.

³⁶ *Id.* at 3-7 to 3-29.

³⁷ *Id.* at 3-10.

trial. The challenge is to have the detainee divulge information that he is inclined to withhold. The laws and policies on interrogation proscribe torture and coercive questioning (tactics which will be addressed later in this article); therefore, the approach phase must take into account these boundaries, while still providing the result that the detainee reveals information that he or she is determined to withhold.

The underlying philosophy is to make these approaches both legal and effective. The interrogator must avoid “outer” pressures and, instead, create “internal” pressures that have the effect of manipulating the detainee. For example, an interrogator cannot place the proverbial dagger on the table—which would create fear in the mind of the subject that his refusal to cooperate will result in physical harm.³⁸ The interrogator, however, can certainly exploit the inherent fear associated with the “unknown” in the mind of the detainee. The difference may appear insignificant, but it is enough of a distinction to effect a differentiation between a legal and an illegal interrogation.

The Army has identified eighteen different ways in which an interrogator may approach an interrogation subject and apply subtle psychological pressure, without crossing over impermissible boundaries such as torture or coercion.³⁹ The

³⁸ See *id.* at 3-16.

³⁹ See *id.* at 3-14 to 3-20. These approaches are:

a. Direct Approach. The direct approach is the basic method for interrogation and usually the first-used approach. This involves standard questioning of name, rank, unit affiliation, unit mission, etc. Past operations have shown this method to be 90-95% effective. The shock and awe of capture alone puts detainees in a state of mind where they are willing to divulge anything. However, recent anecdotal evidence suggests that detainees in current operations are savvy as to U.S. interrogation methods and have even been trained on interrogation resistance techniques, similar to our SERE training, and that the direct approach is less and less effective.

b. Incentive Approach. Traditionally, this approach involves identifying a luxury item important to the subject and either offering it in exchange for information or if they are already receiving the item, having it withdrawn. Interrogators are clearly and explicitly trained that the luxury item does not mean items or rights guaranteed by the Geneva Conventions or other applicable laws and rules. For instance, upgrading meal choices from MREs to better food, granting extra privileges, or authorizing comfort items like cigarettes in exchange for information is allowed. Withholding medical care, religious items or worship time, or withholding items the U.S. military is legally obligated to provide, however, would be unauthorized. Interrogators may also not offer incentives they deliver, such as asylum (the prerogative of the State Department) or immunity for their illegal activities (the prerogative of either the GCMCA or host-nation legal system).

c. Emotional Approach. With this approach, the intent is to identify and exploit emotional motivators, such as love, hate, revenge, etc. The key is to identify the dominant emotion and apply pressure to divulge in order to resolve the internal emotional conflict. There are two subsets of this approach: Emotional Love or Emotional Hate.

In Emotional Love approaches, the interrogator looks for something in the subject’s background that implicates a love of family, comrades, or homeland. For instance, a photograph or letter from a loved-one, or an appeal to how their cooperation can save the lives of the subject’s comrades or nation, combined with sincerity and genuine concern for the subject can give the subject a reason to divulge information.

In Emotional Hate, the interrogator identifies feelings of hate towards family, comrades, or country that the subject may feel. Maybe his unit or organization left him behind or gave him up. Maybe his leadership was incompetent, which led to his capture. Some subjects have built-in racial or religious prejudices that can be discussed with a view towards channeling that hate into divulging information.

d. Fear-Up. This is the approach that needs the most monitoring. This technique is used on fragile sources, such as the young or the nervous. It is frequently (although incorrectly) used on intransigent subjects who do not respond to anything but brute power. The purpose is not (nor cannot be) to create fear of harm in the subject; rather, the purpose is to identify a fear, whether real or not, and then exploit that already-existing fear. For instance, a subject may come into the facility knowing or believing that they have committed a war crime and having been caught, will be severely punished for it (which severe punishment may have occurred had they been caught by another regime). Rather than dispel that fear initially, an interrogator can allow the subject to maintain the fear (without further feeding it) and let them know that the fear can be alleviated by cooperation. As FM 34-52 explains it, “a good interrogator will implant in the source’s mind that the interrogator himself is not the object to be feared, but is a possible way out of the trap.” Many times, this approach utilizes yelling and banging on tables, but cannot involve touching or harm to the subject, or event the communicated threat of actual harm. Experienced interrogators are also aware that once the Fear Up approach is used, the interrogator using this method will probably never be able to go back in the booth again with that subject because of the likelihood of a complete breakdown in the ability to create trust.

e. Fear Down. This approach works best with the subject who is so frightened that they withdraw into themselves or go into a regressed state. By using a calming, soothing voice and using incentives to build trust, the interrogator can befriend the scared subject and use that relationship to extract needed information. In essence, the subject becomes dependent on the interrogator to alleviate fear and divulges information to keep the protective relationship intact. This may involve the interrogator asking her chain of command for permission to provide luxury items, secure quarters, or other emotional “safety nets.”

f. Pride and Ego. Here the interrogator appeals to a subject’s ego through flattery or appeal to their superiority. This is most effective with captured senior leaders who are proud of their position in life. The reverse approach is to question their superiority despite mistakes that led to their capture. Experience holds that proud subjects will divulge a great deal of information to justify their decisions. Another way to use this approach is Pride and Ego Down, or to attack the subject’s sense of self-worth by exploiting capture circumstances or by exploiting real or perceived inferiority issues. Like Fear Up, if an interrogator has to resort to a Pride and Ego Down approach and cannot succeed, there is little chance of ever rebuilding relations between that interrogator and the subject again.

g. Futility. This usually involves showing the subject that their resistance is futile by using logic to walk them through the consequences of their thoughts and actions, with the end state revealing that they are in no position to withhold information. Futility can exploit their captured situation, the battlefield

interrogator will select one of these approaches, identify it in the interrogation plan, and engage the detainee. Once the detainee is willing to enter into a dialogue, the interrogation moves to the questioning phase, in which the interrogator poses questions seeking specific information.⁴⁰ Like the move from combat operations to sustainment operations in battle, there is no bright line between the approach and questioning phases, and frequently the process moves back and forth between the two as the subject provides small amounts of information. If the subject ceases to cooperate, the interrogator must re-engage the subject and look for exploitation opportunities that will either reestablish trust or convince the subject to continue providing information. In addition to asking direct questions regarding information the command deems important, the interrogator might also pose “order of battle” questions. He will do this in order to build a picture of enemy forces and networks using maps and map tracking to determine the location of enemy or insurgent forces.

Once the interrogator has gathered all of the information within the subject’s knowledge, the interrogation moves into the termination phase. In this phase, the interrogator will reinforce successful approach strategies and advise the detainee that the accuracy or veracity of the information that he has provided will be assessed—providing the detainee with an opportunity to make amendments to his statements.⁴¹

Termination does not end the interrogation process. The interrogator must return to the administrative area and prepare an interrogation report.⁴² This report may include PIR information, the location of enemy forces using a SALUTE⁴³ report, or the status of the interrogation process. This can be used for planning future approaches and interrogations by identifying the weaknesses and “hot buttons” inherent in the particular subject.

Operational legal advisors must be prepared to perform the legal support mission at all phases of the interrogation process. This primer will hopefully facilitate this important function. While the extensive efforts of the JAs assigned to intelligence organizations will remain critical to the legally sound execution of the interrogation mission, it is impossible for these legal advisors to provide comprehensive operational legal support during large scale joint operations. Their efforts must be augmented by operational legal advisors at every level of command, and an understanding of both the relevant law and policy, and the “client,” is essential to an execution of this critical responsibility.

situation, the idea that in the end everyone will eventually capitulate and talk, or that the past is the past and that they cannot change their circumstances. Like other approaches, the key is to help the subject know that resolution of the feelings of hopelessness that accompany futility comes through cooperation.

h. We Know All. By becoming familiar with all the data surrounding the subject, including statements made by other comrades and sources, the interrogator can walk into the booth armed with enough information to convince the subject that “the jig is up” and cooperation is the only choice. The interrogator can also use the information to test the veracity of the subject, ask questions they already know, and confront them when they lie.

i. File and Dossier. In this approach, the interrogator comes into the booth with a dossier built on the subject. By showing information already known about the subject or his organization, along with the illusion that the interrogator knows more than she may actually know, the interrogator can create the impression that, again, resistance is futile.

j. Establish Your Identity. Here the interrogator accuses the subject of being someone infamous or wanted by higher authorities. By forcing the detainee to deny the allegations, they are more likely to provide real information in order to clear their name.

k. Repetition. Here the interrogator uses repetitious questioning or monotony to literally bore the subject into divulging information out of a desire to end the process.

l. Rapid Fire. By firing a series of questions in no particular logical order, or by using two or more interrogators asking dissimilar questions, the source has no time to use the “canned” answer, but is more likely to divulge real information or contradict themselves so badly that they begin to try to explain themselves and either divulge information or open up questioning leads for further exploitation.

m. Silent. Similar to a game of “stare-down”, the interrogator just sits and stares at the subject until the discomfort becomes so great that the subject is willing to at least answer some questions in order to remove the discomfort. This can lead to enough information to exploit and open up further questioning.

n. Change of Scene. Used with the Incentive approach, if the interrogator and subject have been meeting with each other over a long period of time, the interrogator can use the idea of questioning taking place in another, less-hostile environment. This builds on relationships of trust established between interrogator and subject and can also be used successfully with a Pride and Ego approach, using a softer approach on senior leaders willing to cooperate with their captors for extra privileges such as a “civilized cup of tea” with their new “friend”. Change of Scene is not an approach that uses a negative change in environment such as placement in isolation or involves manipulation of environmental controls such as light or temperature. These are non-doctrinal methods that are either unauthorized or require a high level of authorization.

⁴⁰ See *id.* at 3-21.

⁴¹ See *id.* at 3-14 to 3-28.

⁴² See *id.* at 3-28.

⁴³ Size, Activity, Location, Unit, Time, and Equipment. See *id.* at app. E, 1-3.

Regulation of Interrogation: The Relationship Between Law and Policy

How to best identify and articulate the source or sources of regulation of interrogation operations is an important aspect of legal support to these operations. There is little dispute that the baseline standard of humane treatment—traditionally understood as the prohibition against any treatment that can be reasonably regarded as cruel, inhumane, or degrading—is the “umbrella” concept under which the more specifically prohibited interrogation techniques fall. Furthermore, as noted above, this humane treatment standard is regarded as a baseline standard applicable to the armed forces of the United States by operation of Departmental policy, and potentially as a matter of domestic law⁴⁴ and customary international law.⁴⁵ This mandate operates to shield all individuals detained by U.S. armed forces from any act or omission considered inhumane. A more complicated matter is the identification of the existing prohibitions against specific interrogation techniques.

As noted above, law and policy establish humane treatment as a baseline standard applicable during all interrogations. The National Command Authorities and subordinate commanders, however, retain the prerogative to impose more restrictive policies on the conduct of interrogation. When such policy based restrictions are imposed by competent authority, military necessity provides no basis for subordinate commanders to authorize deviation. Because policy considerations may result in restricting the utilization of certain techniques not prohibited by law, however, it would be potentially overly broad to characterize all “prohibited” interrogation techniques as “illegal.” Although engaging in techniques prohibited by policy could certainly result in an interrogator facing criminal liability (for disobedience or dereliction), characterizing such techniques as illegal blurs the distinction between legal and policy-based constraints. Judge advocates must be able to understand and articulate the nature of the specific constraints placed on interrogation tactics. Some constraints, such as the prohibition against physical abuse of detainees, falls within the category of legal constraints; whereas others, such as the withholding of certain non-legally mandated privileges, are of a policy-based nature. Because policy-based constraints are subject to modification (as long as such modification comports with the applicable law), this blurring carries with it the risk that individuals involved in the interrogation process may lack an appreciation for why authorized techniques may be modified, or may vary, among different commands. A potential consequence of this risk is a perception that what is, or is not, “legal” is malleable. This is a perception that must be vigorously guarded against, as it not only diminishes the credibility of the law, but also bolsters the view that the concept of “military necessity” should be available to override any constraint on interrogation techniques.

Humane Treatment: The Umbrella Concept under Which Legal Constraints on Specific Interrogation Techniques Fall

It is not uncommon for the term “the Geneva Conventions” to be used in the context of issues related to detention and interrogation. Judge advocates must understand that the use of this reference is often technically overly broad. Referring to “the Geneva Conventions” suggests that the provisions of these four treaties apply only collectively. While this may be true in certain situations, these treaties, and specific provisions of these treaties, may (and often do) apply individually. A specific Geneva Convention provision may be the controlling authority for an interrogation tactic in issue, based on the nature of the armed conflict or the status of the individual detainee. Additionally, principles reflected in many of these treaty provisions may also apply as a matter of customary international law.

Combat operations related to the GWOT may, as a matter of international law, fluctuate between international armed conflict and non-international armed conflict, depending upon the nature of the particular military operation in issue. For example, operations directed against former regime armed forces should fall into the category of international armed conflict; whereas, operations directed against dissident groups opposing the interim government, even when conducted contemporaneously with operations directed against former regime elements, might fall into the category of a non-international armed conflict. Fortunately, from a legal support perspective, this fluctuation does not impact the obligation to treat those detained in the course of the conflict “humanely.” This obligation applies across the entire spectrum of conflict.

Policy constraints on interrogation techniques may vary, based on time, location, and mission. It is also clear, however, that certain core constraints fall into the category of legal prohibitions—binding at all times and locations. The basic source of authority for these prohibitions is derived from the “humane treatment” principle reflected in Common Article 3 of the four Geneva Conventions,⁴⁶ and emphasized throughout other specific provisions of the Geneva Conventions (and Additional

⁴⁴ See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091, 115 Stat. 1811 (2004).

⁴⁵ The principle of humane treatment as reflected in Common Article 3. See GC I-IV, *supra* note 18, art. 3.

⁴⁶ See GC I-IV, *supra* note 18, art. 3.

Protocols I⁴⁷ and II⁴⁸). The *Commentary to the four Geneva Conventions*,⁴⁹ established the DOD policy,⁵⁰ and domestic and international jurisprudence⁵¹ all support the conclusion that this humane treatment principle forms a baseline standard of treatment for any person affected by armed conflict who is not, or is no longer, taking part in hostilities.

Judge advocates, and the clients they advise, must recognize the applicability, scope, and significance of this baseline “benefit package” granted to all detainees or any other individual subject to interrogation. Based on the nature of an operation and the status of a detainee, it is certainly possible that individual detainees may be vested with additional “benefits” derived from other treaty or customary international law provisions specifically applicable to them as a matter of law. It is critical to recognize, however, that the baseline standard of humane treatment, and the accordant prohibition against cruel, inhumane, or degrading treatment, is the umbrella principle under which such additional legally-based constraints fall. Accordingly, the fact that a detainee may be determined “not eligible” for additional “benefit packages” derived from the law of war in no way undermines the binding nature of prohibited interrogation techniques derived from this baseline principle.

The Distinction Between Manipulation and Coercion: Implementing the Humane Treatment Obligation

Since the initiation of the GWOT, there has been substantial debate regarding the issue of “coercion” in relation to interrogation.⁵² While it is difficult, if not impossible, to define with precision the exact parameters of what constitutes coercion, there are several important reference points for use by JAs involved in interrogation planning, execution, or other support.

As a preliminary matter, however, the source of the prohibition against coercive measures must be determined. Detainees who qualify for status as prisoners of war under the provisions of the GPW,⁵³ or as “protected persons” under the provisions of the GC,⁵⁴ benefit from the express prohibition against coercion contained in those respective treaties. While there is no analogous express prohibition reflected in Common Article 3, it is appropriate to presume that interrogation tactics that would violate these express prohibitions *vis à vis* prisoners of war or protected civilians would also constitute cruel, inhumane, or degrading treatment, and therefore be prohibited *vis à vis* all detainees. It must also be noted that the approaches set forth in *FM 34-52* have been determined to comply with the law of war prohibition against coercion during interrogation,⁵⁵ and, as a result, compliance with this doctrinal authority would almost always translate into compliance with the law of war.

The concept of coercion implies the use of physical or mental pain or intimidation to compel an unwilling detainee to provide information.⁵⁶ While certain tactics fall squarely within this implied definition—such as beating a detainee or

⁴⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. The United States is not a party to Protocol I, but recognizes certain of its provisions reflect principles of customary international law. The same is true for Protocol II.

⁴⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted*, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

⁴⁹ See, e.g., COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY III].

⁵⁰ See U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) [hereinafter DOD DIR. 5100.77].

⁵¹ See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-I-AR72, Appeal on Jurisdiction (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (analyzing the customary international law status of Common Article 3).

⁵² For example, there have been differing conclusions regarding techniques such as sleep deprivation, exposure to loud noise, diet manipulation, presence of dogs, hooding, etc.

⁵³ See GPW, *supra* note 18, art. 4.

⁵⁴ See GC, *supra* note 18, art. 31.

⁵⁵ See FM 34-52, *supra* note 1, at preface.

⁵⁶ According to *FM 34-52*, “Coercion is defined as actions designed to unlawfully induce another to compel an act against one’s will.” Examples of coercion included:

Threatening or implying physical or mental torture to the subject, his family, or others to whom he owes loyalty.
Intentionally denying medical assistance or care in exchange for the information sought or other cooperation.

threatening to execute a detainee—the legality of other less severe tactics and techniques will invariably require case-by-case analysis. In conducting this analysis, the following two considerations may be useful.

First, coercion must be distinguished from the use of incentives, whereby a detainee can improve his or her comfort through cooperation. In the first instance, physical pain or mental suffering is inflicted with the objective of compelling cooperation as the result of a desire to obtain relief from the pain or suffering. In the second instance, even if a privilege is withdrawn, the consequence will be a return to a baseline standard of care and treatment, which cannot be equated to the infliction of pain or suffering.

Second, while the prohibition against inhumane treatment prohibits tactics that fall within the meaning of coercion, as this term is used in the GPW and the GC, there is no prohibition against manipulation, so long as the manipulation does not involve inhumane tactics. Indeed, interrogators should be skilled in the art of manipulating the subject of an interrogation into providing information that he may have been initially determined to withhold. Vigilance in protecting detainees against inhumane coercive tactics must be balanced against the legitimate interests of obtaining valuable information through the use of “humane manipulation.” The instinct of interrogators to develop creative manipulation techniques should be encouraged, so long as such techniques are monitored to ensure that they remain within the bounds of humane treatment.

This analysis may be aided by considering the effect of the manipulation. If the manipulation deprives or jeopardizes an obligation owed to a detainee, it probably crosses the line into the realm of coercion. In contrast, if the manipulation deprives or jeopardizes a privilege granted to a detainee, it probably does not cross this line. Certainly, physical abuse could be categorized as a form of manipulation. As noted above, however, the humane treatment obligation vests detainees with a right to be protected from physical abuse. Therefore, such abuse would not be permissible, even if characterized as a form of manipulation. A more relevant example involves rations. It is clear that adequate nutrition is an element of the humane treatment obligation owed to detainees.⁵⁷ Deprivation of such rations, or even the threat to deprive a detainee of adequate nutrition, would be impermissible as a form of manipulation, as it would result in inhumane treatment.⁵⁸ It is conceivable, however, that extra rations, in the form of an award, may be provided to detainees as a privilege that supplements the obligatory rations. The issuance or deprivation of such extra rations, if used as a form of manipulation, would not violate the humane treatment obligation.⁵⁹ Additionally, no detainee has a right to be protected against trickery, deception, or manipulation through the issuance of incentives, all of which are traditional techniques utilized by interrogators to obtain cooperation.

This balance between legitimate manipulation and inhumane treatment in the form of physical or mental abuse or coercion is articulated as a key principle of interrogation operations in *FM 34-52*:

The GWS, GPW, GC, and US policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.

...

Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.

...

Threatening or implying that other rights guaranteed by the GWS, GPW, or GC will not be provided unless cooperation is forthcoming.

Id. at 1-8.

⁵⁷ See, e.g., GPW, *supra* note 18, art. 26 (“The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and prevent loss of weight or the development of nutritional deficiencies”).

⁵⁸ Because the rations referenced in the text would be provided in satisfaction of the minimum legally acceptable level of nutrition and maintenance, deprivation of such rations would be prohibited by the law of war. Deprivation of such a legally mandated minimum level of nutritional maintenance would subject the subject of the interrogation to the type of physical suffering (starvation or malnutrition) expressly prohibited by the law of war.

⁵⁹ The use of the qualifier “extra” in the text necessarily infers rations that are additional to the minimum legally required. Thus, because such “extra” rations would not be legally required, deprivation of such rations would not violate a legal obligation.

Limitations on the use of methods identified herein as expressly prohibited should not be confused with psychological ploys, verbal trickery, or other nonviolent or noncoercive ruses used by the interrogator in the successful interrogation of hesitant or uncooperative sources.

The psychological techniques and principles in this manual should neither be confused with, nor construed to be synonymous with, unauthorized techniques such as brainwashing, *physical or mental torture, or any other form of mental coercion*. . . .⁶⁰

In summary, the obligation of humane treatment, and the more specific prohibition against coercion derived from this obligation does not operate to deprive interrogators from practicing their craft, but only to prohibit abusive tactics that are inherently inhumane. This point is emphasized in the GPW Commentary discussion of the prohibition against using coercion to obtain information from prisoners of war:

The authors of the new Convention were not content to confirm the 1929 text: they made it more categorical by prohibiting not only "coercion" but also "physical or mental torture Be this as it may, a State which has captured prisoners of war will always try to obtain military information from them. Such attempts are not forbidden; the present paragraph covers only the methods to which it expressly refers [coercion].⁶¹

The Relationship Between Component Authorities and the Joint Operational Command⁶²

The analysis offered thus far in this article has continually emphasized the importance of understanding and applying Army regulatory and doctrinal authorities. However, one of the most perplexing issues confronting service JA's called upon to provide legal support to operations conducted within the context of a joint operation is determining the force and effect of such service-specific regulations, policies, doctrine, tactics (techniques), and procedures. There is no definitive statutory, DOD, or Army-controlling authority that speaks to this issue. As a result, the absence of a unified and controlling position has forced legal advisors at all levels of command to resolve this issue on an *ad hoc* basis.

At its most elemental level, this issue requires a determination of whether service-specific authorities remain in effect once a service provides forces to a combatant commander for the execution of operations in accordance with the statutory command and control structure established by the Goldwater-Nichols Act,⁶³ and derivative implementing authorities.

It is doctrinally established that the command authority over service forces provided to the combatant commander for the execution of military operations vests, in that commander, the authority to issue lawful orders, directives, policies, or any other authorities that supersede and take precedence over service-specific authorities.⁶⁴ While it is not uncommon for such authorities to be promulgated by the combatant command or subordinate joint commands, it would be misleading to suggest that such authorities provide comprehensive coverage of all issues related to the execution of operations.

The logical effect of the situation created is that the customary practice of the services becomes a valid source of evidence from which to derive the "implied intent" of the joint command concerning a particular subject. This justifies the conclusion that, absent an express directive from the joint command controlling any specific issue, legal advisors must presume that the authorities that the component forces "bring with them to the fight" remain in effect, and retain the same force and effect as they did prior to the force being placed under the operational control of the joint command. This presumption is the logical extension of the relationship between the service component commander and the combatant commander, whereby the service component commander is responsible for providing, to the combatant commander a trained, equipped, and ready force for the execution of the operational mission. This relationship requires the combatant commander to presume that the regulations, doctrine, training, and equipment that the service forces bring to the fight are effective, and

⁶⁰ FM 34-52, *supra* note 1, at 1-8 (emphasis added).

⁶¹ See COMMENTARY III, *supra* note 49, at 163-164.

⁶² See JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS ch. II (10 Sept. 2001) [hereinafter JP 3-0] (discussing the doctrinal relationship between combatant and component commands).

⁶³ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992, codified in scattered sections of 10 U.S.C.

⁶⁴ JP 3-0, *supra* note 62, at II-6-7.

remain effective once the forces fall under combatant command (COCOM).⁶⁵ This presumption is clearly rebuttable, as noted above, but it allows the DOD, a COCOM, or any subordinate joint command to focus on those issues determined to be in particular need of “joint” controlling authority, without the necessity of providing for the “regulation” of every aspect of force activities.

This construct is reflected in the doctrinal relationship of COCOM and administrative control (ADCON).⁶⁶ The COCOM reflects the ultimate authority of the joint command to promulgate any lawful directive determined necessary for the effective execution of the operational mission. Administrative control, however, reflects the continuing responsibility of the service component commander to ensure his or her forces remain fully capable of executing the mission. For Army forces, this ADCON responsibility is often referred to as “Title 10” responsibility—a characterization apparently derived from the *U.S. Code* statutory obligation imposed upon the Army to establish forces prepared to fight and win the nation’s wars.⁶⁷ This results in the necessary inference that, in order to satisfy this statutory obligation, Army commanders must ensure forces are properly constituted, resourced, and trained. The doctrinal concept of ADCON more precisely establishes the continuing responsibility of the Army service component commander to ensure that component forces are well prepared to accomplish all tasks imposed upon Army forces in the joint operational area—by statute, or any other source of controlling authority.⁶⁸ One aspect of satisfying this responsibility is the requirement to promulgate regulations, policies, doctrine, and other authorities to facilitate mission execution. Thus, execution of the ADCON responsibility requires that Army commanders presume the continued validity and applicability of such pre-deployment “green” authorities in the absence of superseding “purple” authorities. In the specific context of interrogation operations, this construct supports reliance on multiple sources of authority requiring adherence to the humane treatment standard.

First, the requirement to provide humane treatment for all detainees is established by multiple sources. The National Defense Authorization Act of 2005 emphasizes the responsibility of all DOD elements to comply with this standard.⁶⁹ This standard is also derived from the international law of war in the form of the principles reflected in Common Article 3 to the four Geneva Conventions.⁷⁰ Whether applicable as a matter of binding treaty obligation, customary international law, or through the conduit of the DOD Law of War Program,⁷¹ however, this baseline treatment standard is perhaps the most clear cut example of a “fundamental principle” of the law of war. The requirement to comply with this “fundamental principle” is reinforced by instruction promulgated by the Chairman, Joint Chiefs of Staff instruction implementing the DOD Law of War Program,⁷² and, with regard to the GWOT, presidential policy statements.⁷³

Second, service regulation, *AR 190-8*, imposes an obligation to comply with this standard of humane treatment.⁷⁴ This regulation is a multi-service regulation promulgated by the Army pursuant to its executive agent authority for EPW and detainee affairs.⁷⁵ The multi-service nature of this regulation certainly enhances its force and effect, and promulgation pursuant to executive agent authority renders *AR 190-8* binding in the operational realm. This conclusion is supported by the delegation of executive agent authority contained in *Department of Defense Directive 2310.01, DoD Enemy POW Detainee Program*,⁷⁶ which establishes the scope of this authority as follows:

⁶⁵ *Id.* at II-6.

⁶⁶ *Id.* at II-10 - 11.

⁶⁷ 10 U.S.C. § 3062 (2000).

⁶⁸ GC I-IV, *supra* note 18, art. 3.

⁶⁹ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091, 115 Stat. 1811 (2004).

⁷⁰ GC I-IV, *supra* note 18, art. 3.

⁷¹ See DOD DIR. 5100.77, *supra* note 50; see also CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (25 Mar. 2002) [hereinafter CJCS INSTR. 5810.01B].

⁷² See CJCS INSTR. 5810.01B, *supra* note 101.

⁷³ President Bush Memo, *supra* note 10. After finding that the Geneva Conventions did not apply, as a matter of law, to members of Al Qaeda, and that members of the Taliban did not qualify for status as prisoners of war, the Directive indicates: “of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment . . .” *Id.* para. 3.

⁷⁴ See *AR 190-8*, *supra* note 19, para. 1-4g (indicating that “Commanders at all levels will ensure that all EPW, CI, RP, and ODs are accounted for and humanely treated, and that collection, evacuation, internment, transfers, release, and repatriation operations are conducted per this regulation.”).

⁷⁵ See U.S. DEP’T OF DEFENSE, DIR. 2310.01, DOD PROGRAM FOR ENEMY PRISONERS OF WAR (EPOW) AND OTHER DETAINEES (SHORT TITLE DOD ENEMY POW DETAINEE PROGRAM) paras. 4.2 – 4.2.1 (18 Aug. 1994).

⁷⁶ See *AR 190-8*, *supra* note 19, para. 1-1.

4.2. The Secretary of the Army, as the DoD Executive Agent for the administration of the DoD EPOW Detainee Program, shall act on behalf of the Department of Defense in the administration of the DoD EPOW Detainee Program to:

4.2.1. Develop and provide policy and planning guidance for the treatment, care, accountability, legal status, and administrative procedures to be followed about personnel captured or detained by, or transferred from the care, custody, and control of, the U.S. Military Services.⁷⁷

The binding character of *AR 190-8* is buttressed by the terms of the Regulation itself, which indicates that

This regulation provides policy, procedures, and responsibilities for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces.⁷⁸

Because the regulation includes mandates directed towards the COCOMs (as noted above with regard to humane treatment), there is little doubt regarding the force and effect of *AR 190-8*. It is binding during all military operations, requiring the humane treatment of all detainees. Thus, the humane treatment mandate of *AR 190-8* would appear to be binding authority in the joint operational environment not as a matter of inference, but as an express consequence of the executive agency vested upon the Army by the DOD.

Finally, as noted above, the presumption of applicability also applies to Army doctrine and tactics (techniques) and procedures. Legal advisors providing legal support to interrogation operations planned and executed by Army forces should continue to refer to *FM 34-52* as authoritative doctrine (until this FM is superseded).

The Way Ahead

While the JA community continues to make great progress toward the goal of standardized detainee interrogation legal support training packages, pending revisions to regulations and field manuals, and the prospect of the publication of TTPs and other guidance in this area, render it difficult, if not impossible, to provide definitive guidance at this time. In the interim, however, the training requirement persists. Our Soldiers still deploy; they will capture and detain the enemy, and interrogations will take place. The Corps must, therefore, continue to ensure that JAs receive the best preparation possible, guided by the azimuth points derived from current law and policy, and a common sense understanding of the relationship between the interrogation process and operational legal support. This will facilitate legal support to both training and execution.

Surely, the Corps cannot attempt to “legislate” success. The key to success is training, which combines initiative and judgment, the legal advisors “stock in trade.” With this in mind, training packages will be published as soon as it is prudent. All legal personnel will be trained as they rotate through TJAGLCS. The INSCOM and USAIC will continue to effect their training mission. The CLAMO⁷⁹ will continue its efforts to obtain and post all related materials for retrieval from the field. For example, a copy of the training package that evolved from the meeting that generated this article may be accessed from the CLAMO website.⁸⁰ Finally, practitioners in the field must continue to advise those responsible for formulating doctrine, guidance, and training materials in this area of what they have learned, and what they require.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ The CLAMO is located at the U.S. Army Judge Advocate General’s Legal Center and School and serves as a resource for operational lawyers. It seeks to fulfill its mission in five ways: acting as the central repository within the JAGC for all-source data/information, memoranda, after action materials and lessons learned pertaining to legal support to operations, foreign and domestic; supporting JAs worldwide by analyzing all data and information, developing lessons learned across all military disciplines, and by disseminating those lessons learned and other operational information to the Army, Marine Corps, and Joint communities through publications, instruction, training, and databases accessible to operational forces world-wide; supporting JAs in the field by responding to requests for assistance; integrating lessons learned from operations and the Combat Training Centers into emerging doctrine and into the curricula of all relevant courses, workshops, orientations, and seminars conducted at the JAG Center and School; and, in conjunction with the center and School, sponsoring conferences and symposia on topics of interest to operational lawyers.

⁸⁰ See The Center for Law and Military Operations, at [https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/Operational+Law/CLAMO.nsf/\(JAGCNetDocID\)/HOME?OpenDocument](https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/Operational+Law/CLAMO.nsf/(JAGCNetDocID)/HOME?OpenDocument) (last visited 11 July 05).

In the final analysis, however, the lessons of the past four years have validated several truisms related to effective legal support to interrogation operations. First, JAs must remain vigilant in ensuring understanding of and compliance with the principle of humane treatment. Second, all detainees are vested with the “benefit” of human treatment, even when they don’t qualify for a more favorable “benefit package” under the Geneva Conventions. Third, JAs must understand, and ensure their clients understand, the force and effect of “purple” and “green” authorities in the joint operational environment. Reliance on these truisms when training for or executing interrogations should minimize the risk of detainee abuse in the future.

“Snipers in the Minaret—What Is the Rule?”

The Law of War and the Protection of Cultural Property: A Complex Equation

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On 2 January 2005, the *Washington Post* ran an article entitled “For U.S. Soldiers, A Frustrating and Fulfilling Mission.”¹ That article included a photograph with the following caption: “U.S. Army snipers took over the top of this nearly 1,200 year-old spiral minaret at a Samarra mosque after the streets below became the scene of frequent attacks by insurgents in the restless city.”² The article also stated that:

Soldiers occupy this vantage point 24 hours a day, working in pairs for 12 hours at a time. An intersection below had become the scene of almost incessant attacks, and American commanders decided that placing snipers with .50-caliber rifles and powerful scopes in this circle of stone 10 feet in diameter, 180 feet above the ground, could deter insurgents.³

The characterization of this operational vantage point as a 1,200 year old minaret or mosque clearly raises concerns that this object falls within the category of cultural property. Assuming this minaret does in fact satisfy the definition of protected cultural property, was its use as a vantage point improper? The initial answer appears to be “no.” In fact, the use may very well have been permissible. The equation that must be used to reach that answer is complex, and reflects the challenge of the source, scope, and effect of law of war-related proscriptions in the current operational environment. The purpose of this article is to use this incident to illustrate several of the legal issues related to determining the appropriate “rule of decision” for the employment of means and methods of warfare within the context of current combat operations.

The Legal Equation

The minaret incident highlights a number of operational law issues, almost all of which transcend analysis of this specific issue. These issues include the impact of the status of the conflict on the analysis of applicable rules of decision; the impact of Department of Defense (DOD) policy⁴ related to the law of war on the same issue; domestic legal principles related to the applicability of treaty obligations;⁵ and ultimately, the specific law of war rules related to the use of religious and cultural property for military purposes.⁶ Each of these issues is addressed below.

Impact of Conflict Status on Legal Analysis

Perhaps the most complex issue related to analysis of this situation is determining the applicable law of war obligations. Resolution of this issue requires determining whether the conduct occurred during the course of an armed conflict within the

¹ Josh White, *For U.S. Soldiers, A Frustrating and Fulfilling Mission*, WASH. POST, Jan. 2, 2005, at A12.

² *Id.*

³ *Id.*

⁴ See U.S. DEP’T OF DEFENSE, DIR. 5100.77, DoD LAW OF WAR PROGRAM (8 Dec. 1998) [hereinafter DOD DIR. 5100.77]; see also CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DoD LAW OF WAR PROGRAM (25 Mar. 2002) [hereinafter CJCS INSTR. 5810.01B].

⁵ See generally THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 301-26 (2005) [hereinafter THE RESTATEMENT].

⁶ See generally U. S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956) [hereinafter FM 27-10]; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. Treaty Doc. No. 106-1, 249 U.N.T.S. 215 [hereinafter the Cultural Property Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted*, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987) [hereinafter PROTOCOL COMMENTARY].

meaning of international law, and if so, the nature of that conflict.⁷ These determinations will dictate whether, as a matter of law, the law of war is applicable to the situation, and if so, what provision of that law provides the relevant rule of decision.⁸

The question of whether military operations in Iraq qualify as an armed conflict under international law, and if so, whether that armed conflict is an international armed conflict has become far more complex since the establishment of the interim government of Iraq on 28 June 2004.⁹ Before that date, there was a general consensus that military operations in Iraq qualified as an international armed conflict consistent with the standard reflected in Common Article 2 of the Geneva Conventions,¹⁰ either as a result of conflict or belligerent occupation. The initial phases of *Operation Iraqi Freedom* clearly involved hostilities between the armed forces of the United States and Iraq. A period of belligerent occupation followed the conclusion of major combat operations. During these phases, the full range of law of war provisions applied to the conduct of military operations by U.S. forces.¹¹

The establishment of the interim Iraqi government marked a restoration of Iraqi sovereign authority and a termination of belligerent occupation.¹² While this shift in authority had minimal impact on the nature of the operations conducted by U.S. and multi-national forces in Iraq, it did, arguably, result in removing military operations in Iraq from the rubric of international armed conflict.¹³ Although U.S. and multi-national forces continued (and continue) to conduct combat operations in Iraq, these operations were not directed against the armed forces of Iraq, or even against militia groups or volunteer groups forming a part of those armed forces.¹⁴ Instead, they were, and remain, directed against armed dissident groups opposed to both the presence of Coalition forces in Iraq and the Iraqi government. In addition, the transfer of sovereignty back to an Iraqi government ostensibly terminated, from a formal legal perspective, the period of belligerent occupation, even though U.S. and Coalition forces continued to perform many of the military functions associated with that occupation.¹⁵ No matter how similar the tasks and missions may be to those conducted during belligerent occupation, the restoration of Iraqi sovereignty, and the absence of conflict between the armed forces of Iraq and Coalition forces, are the decisive factors in analyzing the nature of the conflict in Iraq.¹⁶

⁷ See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 14-16 (2004); see also GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 242 (1994).

⁸ *Id.*

⁹ See Iraqi Interim Government, *Path to Democracy*, at <http://www.iraqigovernment.org/pathdemo.htm> (last visited Feb. 25, 2005) [hereinafter Iraqi Interim Government].

¹⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, August 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]; see also FM 27-10, *supra* note 6, at 9 (“As the customary law of war applies to cases of international armed *conflict* and to forcible occupation of enemy territory generally as well as to declared war in its strict sense, a declaration of war is not an essential condition of the application of this body of law.”) (emphasis added).

¹¹ See GWS, *supra* note 10, at art. 2; GPW, *supra* note 10, at art. 2; GC, *supra* note 10, at art. 2; see also DINSTEIN, *supra* note 7, at 14-16.

¹² See Iraqi Interim Government, *supra* note 9.

¹³ The *sine quo non* of an international armed conflict is a dispute between two States, or a State and a recognized belligerent entity with all the indicia of statehood. See COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean S. Pictet ed., 1960) [hereinafter GPW COMMENTARY] (“Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2”). Once sovereignty was assumed by a government with which the United States had no “dispute,” this requirement became a factual impossibility.

¹⁴ Because the new governing authority for Iraq was not opposed to U.S. operations, elements opposing U.S. forces were not considered to have been operating under the authority of the State of Iraq.

¹⁵ The internationally accepted definition of occupation requires territory to be placed under the functional control of a *hostile* armed force. See FM 27-10, *supra* note 6, paras. 351-353. Thus, once sovereignty over Iraq was passed to the interim government—a government supporting the continued presence of U.S. and coalition forces—U.S. and coalition forces were no longer considered “hostile” to the State of Iraq.

¹⁶ See *id.* paras. 351-61 (discussing the existence, maintenance, and termination of belligerent occupation).

If the conclusion that the situation in Iraq no longer qualifies as an international armed conflict is valid,¹⁷ it leads to the question of whether an armed conflict continues in Iraq, and if so, whether it qualifies for any law of war regulation. It seems logically and factually justified to conclude that armed conflict, within the meaning of international law, continues in Iraq. The regular armed forces of Iraq, the United States, and multi-national forces continue to conduct large scale military operations against highly organized, armed dissident groups. This situation appears to fall within the rubric of a conflict not of an international character to which Common Article 3 of the Geneva Conventions refers, which reflects the customary international law standard for triggering the law of war applicable to such conflicts.¹⁸ Reference to the ICRC commentary to the Geneva Conventions supports this conclusion:

“Cases of armed conflict.” What is meant by “armed conflict not of an international character”? The expression is so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry . . . these different conditions, although in no way obligatory, constitute convenient criteria, and we therefore think it well to give a list drawn from the various amendments discussed; they are as follows:

(1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.

. . .

Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions? We do not subscribe to this view. *We think, on the contrary, that the scope of application of the Article must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed . . .* Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with ‘armed forces’ on either side engaged in ‘hostilities’ -- conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.¹⁹

The situation in Iraq, however, includes certain characteristics that were not contemplated at the time Common Article 3 was developed, and arguably not even when the Protocol II’s triggering standard for internal armed conflict was developed.²⁰ Specifically, the participation in the ongoing conflict of members of international terrorist groups, ostensibly devoted not to any change of government in Iraq, but simply to killing Coalition forces and destabilizing Iraq, renders analysis of the nature of the conflict extremely difficult. This difficulty is exacerbated by the links between these groups and transnational terrorist organizations such as al Qaeda.²¹ Further complicating the analysis is the United States’ characterization of the fight against terrorism as a “Global War,”²² invoking the inherent right of self-defense reflected in Article 51 of the Charter of the United

¹⁷ Whether continued resistance by armed groups formerly associated with an enemy government after a friendly government assumes control of a nation, through a process considered legitimate by the international community (unlike the imposition of a “puppet” regime) results in a continuation of the period if international armed conflict is a novel issue, and is not addressed in either the relevant law of war treaties or International Committee of the Red Cross (ICRC) commentaries thereto. It is, however, relatively well accepted that different types of armed conflicts can exist in the same territory during the same timeframe. See DINSTEIN, *supra* note 7, at 15; see also Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996). Ultimately, the question of whether an international armed conflict continues in Iraq, and at what point it terminates, is a question of fact which must be resolved by the parties to the conflict.

¹⁸ See generally GPW COMMENTARY, *supra* note 13, at 61; Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1 (Winter, 2003) (analyzing the meaning of Common Article 3 and non-international armed conflict within the context of the Global War on Terror).

¹⁹ GPW COMMENTARY, *supra* note 13, at 35-37 (emphasis added).

²⁰ See PROTOCOL COMMENTARY, *supra* note 6, at 1347-56.

²¹ Dexter Filkins, *Wanted Rebel Vows Loyalty to bin Laden*, *Web Sites Say*, N.Y. TIMES, Oct. 18, 2004, at A6; Walter Pincus, *Zarqawi Is Said to Swear Allegiance to Bin Laden*, WASH. POST, Oct. 19, 2004, at A16.

²² Following the attacks of 9/11, Congress passed a resolution authorizing the use of military force in the war against terrorist organizations. That Resolution states in part:

Nations²³—a right normally associated with conflict between sovereign states.²⁴ These unusual aspects of the conflict in Iraq point to two potentially divergent conclusions: that the terrorist nature of the enemy removes the conflict from the realm of law of war regulation altogether; or that the international character of the same terrorist organizations, and the U.S. war against them, place military operations into the category of international armed conflict.

From a policy perspective, there is no indication that the original U.S. characterization of operations in Iraq as falling into the category of international armed conflict has been “downgraded.” In addition, as will be discussed below, application of DOD policy related to the law of war renders this issue somewhat irrelevant due to the requirement to treat all armed conflicts as “international” for the purpose of law of war applicability.²⁵ Nonetheless, as was noted in such a pointed manner by the United States District Court for the Southern District of Florida in *United States v. Noriega*,²⁶ policy established by the executive branch is always subject to modification, whereas law is not, and therefore determining binding legal standards is never truly obviated by a policy-based application of those standards.²⁷

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.

Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001). There is no geographic limitation to this authorization, which uses language normally associated with congressional authorizations traditionally regarded as “functional equivalents” to a declaration of war. See generally Major Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 212-15 (1998).

²³ See S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001); see also S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

²⁴ See Oscar Schachter, *Self Defense and the Rule of Law*, 83 AM. J. INT’L L. 259 (Apr. 1989).

²⁵ See *infra* notes 30-34 and accompanying text.

²⁶ 808 F. Supp. 791 (1992).

²⁷ *Id.* at 794.

The government has thus far obviated the need for a formal determination of General Noriega’s status. On a number of occasions as the case developed, counsel for the government advised that General Noriega was being and would continue to be afforded all of the benefits of the Geneva Convention. At no time was it agreed that he was, in fact, a prisoner of war.

The government’s position provides no assurances that the government will not at some point in the future decide that Noriega is not a POW, and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against. Because of the issues presented in connection with the General’s further confinement and treatment, it seems appropriate -- even necessary -- to address the issue of Defendant’s status. Articles 2, 4, and 5 of Geneva III establish the standard for determining who is a POW. Must this determination await some kind of formal complaint by Defendant or a lawsuit presented on his behalf? In view of the issues presently raised by Defendant, the Court thinks not.

Id. (footnotes omitted).

In the opinion of this author, the conflict against Al Qaeda is simply an armed conflict, regulated by what might be regarded as original fundamental principles of the law of war. This theory is based on the belief that the historic trigger for basic law of war principles was the international legal analogue of what was traditionally characterized as war, which was simply “armed conflict.” See GPW COMMENTARY, *supra* note 13, at 19-23. In the opinion of this author, as a matter of historical custom, when armed forces engaged in such armed conflict, they carried with them the fundamental principles of the law of war, both permissive and restrictive. As a result, they invoked the principle of military necessity, providing authority to take all measures not forbidden by international law necessary to achieve the prompt submission of their opponents; and they were constrained by the basic principle of humanity, as understood in historical context.

This “basic principle” concept was clearly strained during the years between the first and second World Wars. During this period, brutal internal conflicts in Spain, Russia, and China challenged the customary expectation that forces engaged in armed conflict would conduct themselves in accordance with basic principles of the law of war. This perceived failure of international law to provide effective regulation for non-international armed conflicts was the primary motivation underlying the creation of Common Article 3. GPW COMMENTARY, *supra* note 13, at 28-35. It is somewhat misleading, however, to suggest that Common Article 3 was “necessary” to ensure compliance with basic principles during such conflicts. Common Article 3 might instead be legitimately viewed as a fail-safe to provide the international community a basis to demand compliance with such principles when armed forces refuse to comply with the customary standards of conduct related to any military operation involving the use of force.

Indeed, even Common Article 2 appears to have been a response to a failure of the traditional expectation that armed forces engaged in “war” between states would acknowledge applicability of the law of war. The rejection of “war” as a trigger for the law of war in favor of “armed conflict” was an attempt to prevent what might best be described as “bad faith avoidance” of compliance with the customary standards related to the *jus in bello*. The qualifier of “international” was, as indicated in the ICRC Commentary, an effort to emphasize that specific provisions of the Geneva Conventions were triggered by armed conflicts conducted under state authority. See GPW COMMENTARY, *supra* note 13, at 22 (emphasizing that the obligations triggered by Article 2 were focused on inter-state relations). As that same commentary indicates, however, it is the “armed conflict” nature of military operations that distinguish them—and the law that regulates them—from law enforcement activities. See GPW COMMENTARY, *supra* note 13, at 36.

It is clear that the global war on terror (GWOT) has strained traditional application of the Common Article 2 and Common Article 3 triggers for law of war application. Perhaps, however, these articles have been misinterpreted as the exclusive triggers for law of war application. While they clearly serve as triggers for application of the treaty provisions of the treaties they relate to, these provisions might be better understood as a layer of regulation augmenting

the fundamental principles of the law of war triggered by *any* armed conflict. In short, whenever an armed force engages in conflict operations, fundamental principles of military necessity and humanity are triggered by those operations. When such operations also satisfy the criteria of Common Article 2, these principles become augmented by the provisions of the conventions triggered by such a conflict. With regard to the trigger of Common Article 3, operations falling within the traditional definition of internal armed conflict would unquestionably be regulated by the substance of that article. The basic principles reflected in Common Article 3, however, are redundant with the basic principles of humanity triggered by any armed conflict, and therefore the substantive effect of such a conclusion would be *de minimis*. In contrast, however, failure to satisfy the Common Article 3 trigger—even when armed forces were engaged in conflict operations (such as operations conducted against non-state actors operating outside the territory of the state targeting those actors)—would not undermine application of the same basic principles.

It is interesting to consider the relationship of this theory with the traditional policy of the United States regarding the law of war. It has been the longstanding policy of the DOD to treat *any* armed conflict as the trigger for application of the law of war. See DOD DIR. 5100.77, *supra* note 4; see also Major Timothy E. Bullman, *A Dangerous Guessing Game Disguised as an Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152 (1999) (analyzing the potential that the U.S. law of war policy could be asserted as evidence of a customary norm of international law). This policy has been the foundation for law of war application during every phase of the GWOT, and reflects the basic proposition that armed conflict equals application of basic principles of the law of war, no matter how that conflict is characterized. Perhaps this “policy” is actually a reflection of an underlying norm of customary international law.

From a pragmatic perspective, in order to emphasize the unique nature of the armed conflict ongoing against trans-national terrorist organizations, and distinguish it from the traditionally acknowledged categories of “international” armed conflict and “internal” armed conflict—it might be useful to adopt the characterization of “trans-national armed conflict.” It is important to emphasize that with the “armed conflict” theory outlined above, this “trans national” qualifier is more a reflection of the nature of the operations and not essential for triggering basic law of war principles. It is the armed conflict nature of the operations that results in application of these basic principles. Nonetheless, characterizing the GWOT as a “trans-national” armed conflict seems justified by a careful analysis of the underlying humanitarian rationale of Common Article 3, the history of armed conflicts since 1949, and the fundamental purpose of the law of armed conflict.

For purposes of determining the scope of regulation, such conflicts fall, as a matter of customary international law, within the category of conflicts regulated by the principles reflected in Common Article 3. This does not, however, reflect a purely internal nature of such trans-national armed conflicts. Instead, the application of the “armed conflict” triggering criteria emphasized in the ICRC Commentary to Common Article 3 is relevant exclusively to determining the scope of law of war regulation, because it reflects a recognition that the nature of such conflicts falls outside the accepted definition of an international armed conflict for purposes of determining the scope and extent of law of war regulations, as such conflicts require a dispute between two entities satisfying the accepted criteria for statehood. See GPW COMMENTARY, *supra* note 13, at 23.

In determining the validity of this category of armed conflicts, it is critical to note that the source of this “triggering” standard for the baseline principle of humane treatment (and, by inference, military necessity) that should apply to *any* armed conflict (dispute requiring the intervention of armed forces), as reflected in Common Article 3 to the four Geneva Conventions, does not use the phrase “internal armed conflict.” Instead, Common Article 3 imposes upon the parties to a “conflict not of an international character,” an obligation to treat all persons not participating or no longer participating in the conflict humanely. Common Article 3 reads as follows: “*In the case of armed conflict not of an international character . . .*” See GWS, GWS Sea, GPW, and GC, *supra* note 10, art. 3 (emphasis added).

Virtually every non-international armed conflict that has occurred during the later half of the twentieth century involved trans-national characteristics—ranging from the use of adjacent territories for safe-haven to the receipt of active logistics, training, and command and control support obtained from neighboring states. Indeed, even the Spanish Civil War of 1936 to 1939, which served as a major motivation for the development of Common Article 3, involved substantial trans-national aspects in the form of arm, equip, train, and even voluntary participation programs executed by Germany and Italy (on behalf of the Nationalists) and the Soviet Union (on behalf of the Republicans). See Lieutenant Colonel Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109 (Dec. 2000) (analyzing the impact of the Spanish Civil War on the development of Common Article 3). Additionally, in the two seminal international tribunal cases analyzing the relationship between internal and international armed conflicts, the issue of external involvement and sponsorship was addressed and determined not to transform these conflicts from non-international to international. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. REP. 14 (June 27); see also *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996). This historical context and jurisprudence is relevant because it demonstrates that the concept of non-international armed conflict has always involved a *de facto* trans-national character, even though that character has not been sufficient to transform such conflicts into international armed conflicts).

As a result, and due to the expanding nature of such operations within the broader context of the GWOT, it is essential to carefully assess the customary meaning of the term “conflicts not of an international character” for purpose of determining applicable provisions of the law of war. In so doing, the following considerations are useful: the interpretive guidance provided by the ICRC Commentary; the humanitarian rationale underlying application of baseline standards to military operations not involving two opposing state entities; and U.S. practice with regard to the scope of Common Article 3.

The GPW Commentary notes that there is no objective set of criteria for determining the existence of an armed conflict not of an international character. The Commentary, however, states:

Speaking *generally*, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities* – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.

See GPW COMMENTARY, *supra* note 13, at 35.

This excerpt from the Commentary clearly refers to what is traditionally regarded as “internal” armed conflicts. This reference, however, need not be treated as dispositive. It is reasonable to consider this quotation as a reflection of the historical context in which the provision was drafted, which is also manifested by the suggestion that Common Article 3 would only apply when “the party in revolt has an organized military force under responsible command, operating within a determinate territory, and has the means of respecting the GC.” *Id.* at 37. The actual provision it seeks to explain is written in much broader terms, a practice not uncommon with provisions of multi-lateral treaties, often intended to provide interpretive flexibility. What seems clear from the ICRC Commentary is that the drafters were attempting to respond to the need to ensure some international legal regulation of activities that rose to the level of “armed conflicts,” even if such conflicts did not take on a “international” character, while mitigating fears that Common Article 3 would be applied to internal events that did not rise to the level of conflicts, thereby serving as an unjustified basis for intrusion into state sovereignty. *Id.* at 36. The plain

meaning of the term “not of an international character,” and the object and purpose of this treaty provision, should, in accordance with customary international law, guide its interpretation. *Id.* at 35-37.

There is absolutely no indication that the drafters of Common Article 3 considered conflicts between the regular armed forces of a state and a trans-national non-state actor entity. In this regard, however, it is useful to consider what is often regarded as the most effective “interpretive aid” provided by the ICRC Commentary: that the line between an internal disturbance immune from international regulation and a conflict requiring international regulation is crossed when “the legal government is obliged to resort to the regular military forces to combat the party in revolt.” *Id.* at 36. This interpretive aid indicates that the nature of the military activities, and not the locale, is most instructive on the applicability of international regulation to any given military operation. This focus seems to transcend operations that were historically considered purely “internal,” and provides a logical analytical justification for determining when the limited law of war regulation associated with Common Article 3 should be applied to military operations.

There is also no doubt that Common Article 3 was motivated by a perceived need to interject some limited humanitarian regulation into the realm of “internal” conflicts. *Id.* at 38-41. It is improper to conclude, however, that because the contextual motivation for this monumental development in the regulation of armed conflict was “internal” conflicts, the fundamental goal of ensuring a baseline of humanitarian regulation of armed conflict falling somewhere below the threshold of Common Article 2 should be restricted to conflicts totally confined to the internal territory of a nation state. Instead, it was the desire to inject law of war application to any situation rising above the threshold of domestic law enforcement activity and into the realm of military armed conflict that justifies the recognition of the trans-national armed conflict standard.

It is clear from a review of the ICRC Commentary that the desire to interject some limited humanitarian regulation into a realm of activities historically shielded from international regulation served as the motivating drive behind inclusion of Common Article 3 into the four Conventions. Indeed, it was the almost “self evident” legitimacy of requiring such limited humanitarian respect in such conflicts that served as the logical basis for the international regulation of events solely within the sphere of state sovereignty. In this respect, Common Article 3 can be regarded as somewhat of an extension of the principle that absent applicable treaty provisions, individuals effected 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.

[I]n cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

See Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, pmb., 36 Stat. 2277, T.S. 539 [hereinafter Hague IV], reprinted in U.S. DEP’T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE, (Dec. 1956). The “Martens Clause” took its name from Fyodor Martens, the Russian diplomat responsible for first proposing the language during the first World Peace Conference in The Hague in 1899.

The continuing validity of this clause in the analysis of protections applicable during armed conflicts was most recently confirmed by the International Court of Justice in the advisory opinion on the legality of the threat or use of nuclear weapons. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8); see also Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT’L REV. OF THE RED CROSS 125-34 (1997). It would therefore appear consistent with this history to embrace a scope of application that focused on the nature of the activities, and the derivative need to provide for some limited international regulation when operations rise to the level of military conflict, and not the locale of the opposition group, in determining whether to classify an operation as a “common article 3 conflict.”

United States practice with regard to the scope of Common Article 3 also tends to support a broad application of this baseline standard of conflict regulation. On 29 January 1987, President Reagan transmitted Protocol II to the Senate for its advice and consent. With certain declarations, reservations, and understandings, he recommended its ratification. Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protections of Victims of Non International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987) [hereinafter Letter of Transmittal]).

The purpose of Protocol II was to supplement, without altering the field of applicability, Common Article 3 for the protection of victims of conflicts not of an international character. See Protocol II, *supra* note 6, at art. 1. The ICRC United States position regarding the scope provision of Protocol II reflects support for a broad application of these protections, and by implication, an expanded definition of what qualifies as such a conflict:

The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerilla operations over a wide area. We are therefore recommending that the U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts) which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence).

See Letter of Transmittal *supra*.

While this language refers to “traditionally defined” non-international armed conflicts, it also clearly represents U.S. opposition to narrowly defining the scope of Common Article 3 and Protocol II, with a clear intent to exclude only “non-conflict” internal matters from this scope of coverage. This position seems logical considering the quasi trans-national nature of many “internal” armed conflicts that occurred during this period (e.g., Vietnam, Afghanistan, Nicaragua, El Salvador). Defining what constitutes a “traditional” non-international armed conflict today differs substantially from how that term would have been defined in 1986. The emergence of trans-national, highly organized and well equipped groups espousing a goal of waging “war” against democratic nations is primarily a post Cold War phenomenon. While conflict with such groups was obviously not the object of United States concern at the time this position was asserted, the pragmatic nature of the U.S. policy reflected in this position supports expanding the definition of “traditional” to encompass such hostile groups.

In summary, military operations conducted by the United States against non-state trans-national terrorist elements are simply “armed conflicts.” Accordingly, such operations trigger the basic principles of military necessity (and the customary standards of means and methods applicable to non-international armed conflicts) and humanity (the principles reflected in Common Article 3 and GP II) as a matter of customary international law.

One aspect of military operations in Iraq seems undeniable—the U.S. and multi-national forces are engaged in an “armed conflict” of some character. Whether international, internal, or hybrid such as trans-national, the undeniable “armed conflict” aspect of these operations require analysis of not only the applicability of the law of war as a matter of law, but also as a matter of policy through the conduit of the *DOD Law of War Program*.²⁸

Impact of DOD Policy on Legal Analysis

Any analysis of applicable rules related to the conduct of military operations by U.S. forces in Iraq requires analysis of DOD policy—specifically the DOD policy related to compliance with the law of war established in *DOD Directive 5100.77*.²⁹ The simple policy mandate of that directive—that the armed forces of the United States will comply with the law of war during all conflicts, no matter how those conflicts are characterized³⁰—is directly applicable to military operations in Iraq. Indeed, it was the almost inevitable uncertainty related to determining the legal character of such armed conflicts that motivated a policy mandate requiring full compliance with the law of war during any armed conflict as the default standard for the armed forces of the United States.³¹

As is often the case with “simple” mandates, the devil is in the details. Whether this truism is applicable to this policy mandate has been the subject of substantial debate within the community of operational law specialists. In this situation, however, this basic mandate would purport to obviate the need to determine whether the conflict in Iraq qualified as “international,” “internal,” or some hybrid category such as “trans national.” Instead, the policy would require U.S. forces to treat all operations as if they were being conducted during the course of an international armed conflict, and accordingly, comply with all rules derived from the law of war considered by the United States applicable to such conflicts.³²

Because unlike legal mandates, policy is more easily subject to authorized deviation, a legitimate question related to this policy is whether deviation is ever justified, and if so, what level of authority is empowered to authorize such deviation. While the Chairman, Joint Chiefs of Staff (CJCS) implementing instruction expressly allows for “competent authority” to authorize deviation from the required application of law of war “principles” during non-conflict operations,³³ there is no analogous deviation provision during armed conflicts. Thus, it would appear that no commander is empowered to authorize deviation from compliance with the entire body of the law of war, even during a conflict not triggering such broad application as a matter of law. While it seems logical to conclude that the CJCS, as the proponent of the policy mandate, or any higher competent command, retain the authority to direct or authorize deviation from this broad mandate, it seems improper to derive an “implied” authority for subordinate commands to do so.

Analyzing Applicability of Law of War Treaties

Whether applicable as a matter of law, or as a matter of policy, a determination of which provisions of the law of war are considered binding by the United States is still required. In relation to the specific issue raised by the use of the minaret, this determination requires an understanding of the distinction between treaties ratified by the United States, and treaties signed by the United States, but pending ratification. This distinction is the result of the disparate status of the two primary treaties

Pragmatically, these armed conflicts are best characterized as trans-national armed conflicts, a characterization that reflects the global nature of such operations.

²⁸ DOD DIR. 5100.77, *supra* note 4.

²⁹ *Id.*

³⁰ *Id.*

³¹ See Lieutenant Colonel Paul E. Kantwill & Major Sean M. Watts, *Effects-Based Lawyering: Legal Consequences of the United States’ Response to 9/11*, 28 *FORDHAM INT’L L.J.* (Feb. 2005).

³² It is not uncommon for practitioners to assert that this policy mandate requires compliance with only the “principles and spirit” of the law of war. The plain language of the directive, however, renders this position patently erroneous. While following the principles and spirit of the law of war is without doubt required during all military operations, any operation that is considered by the United States to fall within the rubric of “armed conflict” triggers application of the law of war as if such application was required as a matter of law. DOD DIR. 5100.77, *supra* note 4, para. 5.3.1. The forthcoming revision to this directive will not in any way alter this conclusion, and will in fact elevate the requirement to comply with the law of war during all armed conflicts from a service component responsibility to an explicit statement of DOD policy. See U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (revised version pending publication).

³³ CJCS INSTR. 5810.01B, *supra* note 4, para. 4.a.

addressing the use of cultural property: Hague IV and Annexed Regulations,³⁴ and the Convention for the Protection of Cultural Property in the Event of Armed Conflict.³⁵ While the United States is a party to Hague IV (the provisions of which are generally regarded as customary international law), the United States has signed, but never ratified, the Cultural Property Convention.

Having been ratified by the United States, after receiving the requisite advice and consent of the Senate, Hague IV falls within the scope of the Supremacy Clause of the Constitution,³⁶ and therefore must be regarded as the “supreme law of the land.” While U.S. jurisprudence related to the law of treaties does allow for a later in time statutory contradiction to this treaty,³⁷ no such statute exists, and indeed, every statutory and policy reference to the subject matter of the law of war has confirmed the binding nature of this treaty.³⁸ (The customary international law status of the provisions of this treaty provide an additional basis for concluding the United States is bound to them).

In contrast to the Hague IV, the Cultural Property Convention falls into an authoritative “twilight zone” under traditional doctrines of the relationship between U.S. and international law. The Cultural Property Convention was signed by the United States on 14 May 1954.³⁹ It was not, however, transmitted to the Senate for advice and consent until January 1999,⁴⁰ and as of this date, advice and consent has not been granted. Thus, this treaty is signed by the United States, but is not ratified. Therefore, as a matter of domestic law, the treaty does not fall under the auspices of the Supremacy Clause, and as a matter of international law, the United States is not a party to the treaty.⁴¹

A signed treaty that is pending advice and consent and subsequent ratification for a long time period is not uncommon in United States treaty practice,⁴² nor among other states in the community of nations.⁴³ As a result, customary international law has developed a doctrine to address the question of the force and effect of treaties pending ratification.⁴⁴ This doctrine is reflected in Article 18 of the Vienna Convention on the Law of Treaties,⁴⁵ which, ironically, is a treaty that itself has been signed by the United States, but not yet ratified.⁴⁶ Known as the “object and purpose” rule, this principle of customary international law imposes an obligation on states that have expressed intent to be bound to a treaty through signature to refrain from any activity that might defeat the “object and purpose” of that treaty for the period of time ratification is pending.⁴⁷

This “Article 18” obligation is terminated only when a signatory state has taken appropriate steps to demonstrate a clear intention not to become a party to the treaty.⁴⁸ This is normally understood as requiring some action at the international level,

³⁴ See Hague Convention IV, *supra* note 27, at art. 22.

³⁵ Cultural Property Convention, *supra* note 6.

³⁶ U.S. CONST. art. VI.

³⁷ See THE RESTATEMENT, *supra* note 5, § 115.

³⁸ See, e.g., FM 27-10, *supra* note 6; U.S. DEP'T OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 5-10 (1997) (rev. A).

³⁹ See Letter of Transmittal from President William Clinton, to the Senate for Ratification of the Hague Convention for the Protection of Cultural Property in the Event of Armed conflict (The Convention) and for Accession, the Hague Protocol, Concluded on May 14, 1954, and Entered Into Force on August 7, 1956 with Accompanying Report from the Department of State on the Convention and the Hague Protocol, S. Treaty Doc. No. 106 - 1, 106th Cong., 1st Sess., at III (1999) [hereinafter Cultural Property Letter of Transmittal].

⁴⁰ *Id.*

⁴¹ See generally THE RESTATEMENT, *supra* note 5, §§ 301-26.

⁴² See *Treaties and Other International Agreements: The Role of the United States Senate*, S. Prt. 106-71, 106th Cong. (2d Sess. 2001) [hereinafter *Treaties and the Senate*].

⁴³ For example, the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was signed by the United States in 1925, but not ratified until 1975.

⁴⁴ See THE RESTATEMENT, *supra* note 5, §§ 301-26.

⁴⁵ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, UN Doc. A/CONF.39/27 (1969), *reprinted in* 63 A.J.I.L. 875 (1969), 8 I.L.M. 679 (1969).

⁴⁶ *Treaties and the Senate*, *supra* note 42, at 23-4.

⁴⁷ *Id.* at 116-21.

⁴⁸ *Id.*

such as submitting a formal diplomatic note to the treaty depository.⁴⁹ The United States has taken no action to manifest its intent not to become a party to the Cultural Property Convention. On the contrary, as recently as 1999, the President reinforced the executive branch's desire that the United States become a party to this treaty.⁵⁰ As a result, customary international law would appear to require the United States to refrain from activities that defeat the "object and purpose" of that treaty.

Rules Applicable to This Incident⁵¹

Pursuant to DOD policy, the armed forces of the United States must comply with the law of war in Iraq regardless of the actual characterization of the conflict as "international" or "non-international." In order to execute this obligation, however, the *prima facie* issue of what the United States considers to be the applicable rules of the law of war triggered by the policy mandate of the DOD Law of War Program must be resolved.⁵² There is no dispute that the provisions of Hague IV, which operate to protect cultural and religious property through Article 27, fall within this category of applicable rules. The Hague IV requires the following:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.⁵³

While this provision reflects a general goal of protecting religious and cultural objects, it does not expressly prohibit the use of such objects for military purposes. Furthermore, the "as far as possible" caveat suggests a "military necessity" exception to this general prohibition. There is simply nothing in Hague IV that, through the conduit of the DOD Law of War Program, categorically prohibits the method in which this minaret was used.

Hague IV does include an apparently absolute prohibition on the use of religious property during belligerent occupation.

Art. 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.⁵⁴

⁴⁹ This principle of international law is also presumptively applicable to the two Additional Protocols to the Geneva Conventions. See Protocol I, *supra* note 6; Protocol II, *supra* note 6. Both treaties were signed by the United States, and neither has been ratified. United States signature created a *prima facie* presumption that the object and purpose rule is applicable to those treaties. It is true that with regard to Protocol I, the Executive Branch informed the Senate that it did not intend to submit the treaty for advice and consent because it was considered "fatally flawed." See Letter of Transmittal, *supra* note 27. While this might appear to satisfy the requirement to demonstrate U.S. intent not to become a party to the treaty, the purely domestic nature of this action renders such a conclusion questionable. Release from this obligation would appear to require some international declaration of similar content, although it is plausible that the cumulative effect of the Letter of Transmittal, the passage of time since signature, and other evidence that the U.S. does not consider itself bound to this treaty (military manuals and an absence to any reference to provisions of Protocol I in ICRC U.S. policies related to military operations), sufficiently demonstrate U.S. intent not to become a party to this treaty. See *Treaties and the Senate*, *supra* note 42, at 113-14. It is also possible that the Senate might question the constitutionality of carrying out treaty obligations pursuant to this rule of international law prior to the treaty receiving the requisite constitutional advice and consent from the Senate. In such a situation, domestic validity of compliance is enhanced proportionally to the degree to which the subject matter is associated with the President's Article II authority. Such association seems extremely close with regard to a treaty regulating the conduct of military operations. In contrast, Protocol II has been submitted by the Executive Branch for advice and consent, with subsequent requests by the Executive Branch for the Senate to complete this action. Thus, unlike Protocol I, there appears to be little doubt that the United States remains obligated under the object and purpose rule *vis à vis* Protocol II.

⁵⁰ See Cultural Property Letter of Transmittal, *supra* note 39, at III.

⁵¹ See generally *Protection of Cultural Property During Expeditionary Operations Other Than War*, TJAGSA Practice Note: International and Operational Law Note, ARMY LAW., Mar. 1999, at 25; see also Captain Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277 (1997).

⁵² A policy mandate to comply with the "law of war" during all conflicts, no matter how characterized, necessitates by implication a requirement to ascertain those law of war obligations considered by the United States to be binding as a matter of law.

⁵³ Hague IV, *supra* note 27, art. 30.

⁵⁴ *Id.* at art. 56.

Article 56, however, is not dispositive to the issue presented herein. First, it is located in the occupation section of Hague IV. This rule must be interpreted within the context of rules developed at the beginning of the last century for control and temporary administration of enemy territory during belligerent occupation. Within this context, it is reasonable to presume that this rule was based on an expectation that the occupation would be generally unopposed, a situation clearly distinguishable from that in Iraq. Second, and far more significant, this rule must be considered within the context of subsequent treaty provisions developed for the specific purpose of protecting cultural property during armed conflict. As will be explained below, these rules did not adopt a distinct framework for such protection during belligerent occupation. In fact, the Geneva Convention for the Treatment of Civilians in Time of War of 1949,⁵⁵ the most comprehensive source of authority for the conduct of belligerent occupation, does not include any provision mandating special protection for religious property, but instead applies to such religious property the general prohibition against the destruction of property in occupied territory, *absent imperative military necessity*.⁵⁶ These later in time treaty provisions, some of which specifically address the issue of the treatment of religious property of cultural heritage, should be interpreted as controlling even if they purport to contradict the unqualified prohibition of the Hague IV.⁵⁷

Reference to the provisions of these other law of war treaties does appear to provide a more precise rule of decision, although the “implied” military necessity exception noted above continues to have analytical impact. Article 4 of the Cultural Property Convention imposes the following obligation on the parties to a conflict:

[r]espect cultural property⁵⁸ situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.⁵⁹

This obligation, however, is qualified by the subsequent section, which provides that “[T]he obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.”⁶⁰ Thus, use of cultural property as an observation position appears consistent with the principles reflected in the Cultural Property Convention if such use is the only feasible means available for the commander to achieve a valid military objective. Certainly, the protection of friendly forces or the local population from threats posed by dissident or hostile elements during a period of occupation qualify as such a purpose. In the opinion of this author, the key consideration in analyzing the permissibility of such use would be the legitimacy of the conclusion that no other feasible alternate was available to achieve the important military objective.⁶¹

With regard to this imperative military necessity qualifier, it is critical to distinguish the protection afforded cultural property as defined in Article 1 of the Cultural Property Convention from property granted the status of “special protection” in accordance with Article 8 of that Convention. Pursuant to Article 9 of the Convention, military use of property granted “special protection,” or military use of surrounding areas, is prohibited with no military necessity exception.⁶² Reference to

⁵⁵ See GC, *supra* note 10.

⁵⁶ *Id.* at art. 54.

⁵⁷ Hague IV, *supra* note 27.

⁵⁸ Cultural property is defined in the Convention as follows:

Article 1. For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments".

Cultural Property Convention, *supra* note 6, art. 1.

⁵⁹ *Id.* art. 4(1).

⁶⁰ *Id.* art. 4(2).

⁶¹ See *id.*

⁶² *Id.* art. 9.

this article often mistakenly leads to the conclusion that cultural property, as defined in Article 1 of the Convention, is absolutely immune from military use. While, as noted above, such use should only be made under conditions of imperative military necessity, the unqualified immunity provided by Article 9 is applicable only to property designated with “special protection” as defined in Article 8 of the Convention.⁶³ As of the date of this article, only the Vatican has been so designated.⁶⁴

The constraint against military use of religious property of cultural heritage is more categorical in Protocols I and II to the Geneva Conventions. Article 53 of Protocol I (applicable to international armed conflict) prohibits use in support of the military effort of all “places of worship which constitute the cultural or spiritual heritage of the people.”⁶⁵ Article 16 of Protocol II (applicable to non-international armed conflict) reflects an analogous prohibition.⁶⁶ Both of these articles, however, begin with the following introductory language: “[W]ithout prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments”.⁶⁷ According to the International Committee of the Red Cross Commentary to this article:

The protection laid down in this article is accorded “without prejudice” to the provisions of other relevant international instruments. From the beginning of the discussions regarding Article 53 it was agreed that there was no need to revise the existing rules on the subject, but that the protection and respect for cultural objects should be confirmed. It was therefore necessary to state at the beginning of the article that it did not modify the relevant existing instruments. *For example, this means that in case of a contradiction between this article and a rule of the 1954 Convention the latter is applicable*, though of course only insofar as the Parties concerned are bound by that Convention. If one of the Parties is not bound by the Convention, Article 53 applies. Moreover, Article 53 applies even if all the Parties concerned are bound by another international instrument insofar as it supplements the rules of that instrument.⁶⁸

Thus, while neither Protocol I nor II expressly provide for an imperative military necessity exception to the prohibition against the use of cultural property in support of the military effort, if the application of such an exception is appropriate in

⁶³ According to Article 8:

Granting of Special Protection

Art. 8. 1. There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:

(a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;

(b) are not used for military purposes.

2. A refuge for movable cultural property may also be placed under special protection, whatever its location, if it is so constructed that, in all probability, it will not be damaged by bombs.

3. A centre containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the centre.

4. The guarding of cultural property mentioned in paragraph 1 above by armed custodians specially empowered to do so, or the presence, in the vicinity of such cultural property, of police forces normally responsible for the maintenance of public order, shall not be deemed to be used for military purposes.

5. If any cultural property mentioned in paragraph 1 of the present Article is situated near an important military objective as defined in the said paragraph, it may nevertheless be placed under special protection if the High Contracting Party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic therefrom. In that event, such diversion shall be prepared in time of peace.

6. Special protection is granted to cultural property by its entry in the "International Register of Cultural Property under Special Protection". This entry shall only be made, in accordance with the provisions of the present Convention and under the conditions provided for in the Regulations for the execution of the Convention.

Id. art. 8.

⁶⁴ Interview with Mr. W. Hays Parks, Department of Defense Office of General Counsel, in Washington, D.C. (May 19, 2004).

⁶⁵ Protocol I, *supra* note 6, art. 53.

⁶⁶ Protocol II, *supra* note 6, art. 16.

⁶⁷ Protocol I, *supra* note 6, art. 53.

⁶⁸ See PROTOCOL COMMENTARY, *supra* note 6, at 640 (emphasis added).

accordance with the provisions of the Cultural Property Convention, the authority of that treaty would trump the unqualified prohibition reflected in the Protocols. Recall also that the United States is not a party to either Protocol I or II.⁶⁹

The principles reflected in the provisions of the Cultural Property Convention seem most relevant for analysis of the use of this property based on both the subject of the treaty and the fact that the United States has signed this treaty and appears to remain committed to ratification. This treaty, by its terms, applies to both international and non-international armed conflict, and is implicated by the “object and purpose” rule reflected in Article 18 of the Vienna Convention.⁷⁰ There is no clear definition of the scope and extent of this “Article 18” obligation, although it is generally accepted that it certainly does not require full treaty compliance. Instead, a good faith assessment of the activity in question must be engaged in to determine if such activity appears to be a flagrant derogation from the essence of the treaty, thereby defeating the basic purpose of that treaty.⁷¹ As noted above, reconciling the use of the minaret in this situation with the principles reflected in the Cultural Property Convention requires a precise understanding of the distinction between generally protected cultural property and specially protected cultural property. The use of the minaret in this situation was presumptively based on a determination of imperative military necessity. If this presumption is valid, there is no reason to conclude that the use violated the object and purpose of the treaty, and in fact the use would have been consistent with the obligations imposed by the treaty had it been binding at the time. However, if the presumption is invalid—if some feasible alternate to the use of the minaret had been available to the commander—it is difficult to reconcile the unnecessary transformation of the minaret into a valid and highly significant military objective for an opponent as being consistent with the fundamental purpose of the Cultural Property Convention.⁷²

As with many provisions of law of war treaties that have not been ratified by the United States, legal advisors are often called upon to assess whether the provision was at the time of drafting, or subsequently evolved into, customary international law. In such a situation, the United States is bound to comply not with the particular article of the treaty, but with the principle reflected in that article.⁷³ Whether the collective effect of these treaty provisions justifies a conclusion that the general obligation to refrain from military use of cultural property—subject to an imperative military necessity exception—amounts to a customary international law norm is subject to debate.

A comprehensive discussion of the relationship between treaty law and customary international law is beyond the scope of this article. Suffice to say that it is a well accepted principle of international law that the provision of a treaty can create a new obligation that subsequently “ripens” into a customary obligation; or codify a pre-existing customary obligation. For example, according to various sources, the most oft cited of which is the “Matheson” statement,⁷⁴ at the time Protocol I was drafted the United States regarded many of the articles as either a reflection of existing customary international law

⁶⁹ Int’l Comm. of the Red Cross, *States Party to the Main Treaties* (June 15, 2005), at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) [hereinafter Listing of States party] (listing States party to Protocol I and Protocol II).

⁷⁰ *See id.*

⁷¹ *See* Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L L. 465 (1970).

⁷² *See* Andrea Cuning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT’L L. 211 (Fall, 2003); *see also* TJAGSA Practice Note: International and Operational Law Note, *Protection of Cultural Property During Expeditionary Operations Other Than War*, ARMY LAW., Mar. 1999, at 25.

⁷³ According to *FM 27-10*:

4. Sources

The law of war is derived from two principle sources:

- a. *Lawmaking Treaties (or Conventions)*, such as the Hague and Geneva Conventions.
- b. *Custom*: Although some of the law of war has not been incorporated in any treaty or convention which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law.

See FM 27-10, *supra* note 6, para. 4.

⁷⁴ *See* Michael J. Matheson, *Remarks in Session One: 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, 425 (1987).

obligations, or positive developments in the law of war.⁷⁵ Subsequent practice also suggests that some articles of Protocol I may have ripened into customary international law.⁷⁶

There is no explicit United States position on whether the rules related to the military use of cultural property reflected in the treaties analyzed above fall into the category of customary international law, either as a reflection of a customary obligation that existed at the time they were drafted, or as a positive development in the law of war that has subsequently ripened into a customary obligation. There is ample implied support, however, for such a conclusion. First, as noted above, the Cultural Property Convention was signed by the United States, and remains the subject of executive branch ratification efforts. Second, there is no indication that the United States included Article 53 of Protocol I among those articles of Protocol I considered so fatally flawed that they required rejection of the entire Protocol.⁷⁷ Third, and perhaps of most significant, the basic concept of an extremely proscribed military use of cultural property is reflected not only in the Cultural Property Convention, but also in Protocol II⁷⁸—a treaty signed by the United States and also subject to executive branch ratification efforts.⁷⁹ Furthermore, both these treaties expressly extend this principle into the realm of non-international armed conflict, supporting the conclusion that it is considered a fundamental norm of the law of war.

Thus, either through operation of the “object and purpose” rule as it relates to the Cultural Property Convention, or through the conclusion that Article 53 of Protocol I related to the use of cultural property for military purposes reflects a principle of customary international law, the extremely limited justification for the military use of cultural property appears to fall under the auspices of the “comply with the law of war” mandate of *DOD Directive 5100.77*. Accordingly, regardless of the characterization of the conflict in Iraq, such use would be improper absent imperative military necessity. Furthermore, there is a strong argument to support the conclusion that regardless of the characterization of the conflict in Iraq, this prohibition is applicable as a matter of international law. The combination of the Cultural Property Convention and the effort to reinforce the protection of cultural property reflected in Protocol’s I and II provide substantial indication that this prohibition is applicable in both international and internal conflict as a customary international law principle applicable to all conflicts.

Conclusion

Assuming, *arguendo*, that the minaret used by U.S. forces in the referenced article fell within the definition of cultural property, the use was permissible based only on a determination of imperative military necessity. While use of the vantage point offered by such a structure was undoubtedly intended to enhance the effectiveness of the operation, the prohibition against the military use of cultural property absent such a justification does not allow for a general military necessity based exception. Instead, the concept of imperative necessity suggests that no other feasible alternative be available for achieving what is presumptively an important military objective. This prohibition has arguably attained customary international law status, and at a minimum, appears to be binding on U.S. forces through either operation of the object and purpose rule derived from the international law of treaties, or through operation of *DOD Directive 5100.77*

As noted above, however, this article was not intended to simply address the question of whether use of this minaret was or was not consistent with the law of war. Instead, this reported incident was relied upon to illustrate the variety of considerations associated with such an issue. In so doing, it is hoped that this article will contribute to the ability of judge advocates to address similar issues during future operations.

⁷⁵ *Id.*

⁷⁶ See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996); see also Hans-Peter Gasser, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: An Appeal for Ratification by the United States*, 81 AM. J. INT’L L. 912 (Oct. 1987).

⁷⁷ See Letter of Transmittal, *supra* note 27.

⁷⁸ See *supra* note 6.

⁷⁹ See *supra* notes 34-42, and accompanying text.

**Bringing International Agreements Out of the Shadows:
Confronting the Challenges of a Changing Force**

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The legal practice related to international agreements has received minimal attention during recent years. Although the Office of the Judge Advocate General is the proponent for *Army Regulation (AR) 550-51*,¹ expertise in this area has generally been confined to a small number of uniformed and civilian members of the Judge Advocate General's Corps who have been involved in extensive agreements practice. For these experts, the experience they have derived from "sitting around the agreements campfire" has been essential to augment the authority reflected in *AR 550-51*, and other Department of Defense (DOD) and Joint authorities related to this practice. While this paradigm may have been effective during the period of limited Army expeditionary operations, with most training taking place locally, it is no longer satisfactory.

The practice in the area of international agreements is changing just as the Army's focus is changing. Army forces are moving towards a more expeditionary orientation, seeking ever more effective "out of area" training opportunities and virtually always within the context of an increasing emphasis on the authority and responsibility of combatant commands. As a result, the International and Operational Law Division (DAJA-IO) recommended to The Judge Advocate General to update *AR 550-51* to provide a more effective and comprehensive treatment of this area of practice.

In order to maximize the effectiveness of this revision, DAJA-IO recently hosted a two-day regulation review and revision conference at the National Conference Center in Leesburg, Virginia.² Participants included several members of the Corps with recognized expertise in this area of practice and representatives from major commands (MACOMs) and other offices (including the Department of Army (DA) Office of the General Counsel) that engage in this practice area. The purposes were to share the objectives of the action officers at DAJA-IO responsible for the revision of the regulation and to initiate proposed changes that would maximize the future utility of the regulation. Leveraging the collective expertise of the participants resulted in a greatly enhanced focus for the revision effort that will be implemented as the revision is completed over the next year.

What follows below is a discussion of some of the key issues addressed during the conference. The purpose of this discussion is to highlight these key issues for the Corps and provide a primer on the essential aspects of providing legal support to the international agreements process. This article is not intended to serve as a substitute for developing a comprehensive understanding of the Army regulation or other controlling authorities. On the contrary, such an understanding is essential to engaging in this area of practice, and it is the express intent of the authors to emphasize the value of knowing the "chapter and verse" as it relates to international agreements. The article will, however, attempt to provide what might be best characterized as a "commentary" to the Army regulation in order to facilitate the development of legally sound agreements practice throughout the Corps.

Before turning to this discussion, it is important for military practitioners to understand the purpose and requirements of *AR 550-51*. The regulation implements a delegation of authority to negotiate and conclude international agreements.³ This delegation has been granted to the Secretary of the Army (SA) by the Secretary of Defense and higher authorities.⁴ The regulation lists the subordinate agencies within the DA to which the SA's authority has been further delegated, and establishes procedural requirements that must be met in order for the delegated authority to be used.⁵ These procedural

¹ U.S. DEP'T OF ARMY, REG. 550-51, INTERNATIONAL AGREEMENTS (15 Apr. 1998) [hereinafter *AR 550-51*].

² The authors shared responsibility for the revision of *AR 550-51*, and proposed convening the working group in order to ensure consideration of different command perspectives related to international agreements practice in the Army. Much of the information contained herein was gathered by the authors during this conference. An excerpt of the Draft *AR 550-51* (as of 25 May 2005) is at the Appendix.

³ See U.S. DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS para. 13 (11 June 1987) (C1, Feb. 18, 1991) [hereinafter *DOD DIR. 5530.3*]; see also *AR 550-51*, *supra* note 1, at para. 5.

⁴ See *AR 550-51*, *supra* note 1, para. 5.

⁵ See generally *id.*

requirements include the preparation of fiscal and legal memoranda to support the negotiation of the agreement, as well as required coordination with various agencies within DOD and DA.⁶ The regulation also lists categories of agreements for which the delegated authority is either withheld or subject to a requirement for prior approval by higher authority.⁷

Compliance with the regulation requires careful planning by the proponent of the international agreement and early involvement of legal counsel. Unfortunately, in a high tempo operational environment, compliance may become an obstacle to quickly putting in place necessary arrangements for a last minute exercise or other international activity, and proponents may be tempted to find ways to circumvent the regulation's requirements or pressure counsel to interpret the scope of the regulation narrowly. Proponents and their counsel who succumb to these temptations risk (at a minimum) an uncomfortable scrutiny of their command's international activities by higher headquarters and potentially could find themselves in the "penalty box" with respect to future activities.

At the same time, it needs to be acknowledged that the regulation itself lacks guidance in certain key areas that create doubts as to its scope. While a conservative approach might be to conclude that all international arrangements should be treated as international agreements subject to the regulation or its joint counterpart,⁸ a careful examination of the regulation and the legal authorities upon which it is based suggests that this approach is not justified. Therefore, an overarching purpose of DAJA-IO's review and revision of *AR 550-51* is to improve the clarity of the regulation—to include a better articulation of what arrangements do or do not fall within its scope—and facilitate full and uniform compliance with its requirements by commands and agencies throughout the Army.

To Be Or Not To Be, That Is the First Question!

One of the concerns validated by the symposium was the lack of a consistent understanding of what constitutes an international agreement. Establishing such a common understanding is essential for the legally sound agreements practice throughout the Army. While authorities ranging from the *Code of Federal Regulations*⁹ to *AR 550-51* include definitions, criteria, or both to analyze what qualifies as an international agreement, Army practice suggests a "know it when you see it" standard. One of the most important objectives of the pending regulation revision is to provide a more effective definition of international agreement that reconciles existing legal and regulatory guidance with the evolving practice among subordinate commands.

The current version of *AR 550-51* provides an extremely broad definition of international agreement:¹⁰

"Any written agreement that is concluded with one or more foreign governments (including their agencies, instrumentalities, or political subdivisions) or with an international organization, and —

(a) Is signed or agreed to by personnel of any organizational element of the DOD, or by representatives of the Department of State, or any other Department or Agency of the U.S. Government.

(b) Signifies the intention of the parties to be bound by international law.

⁶ *Id.* para. 6(b).

⁷ It is important for all readers to understand is that *AR 550-51* only provides the "procedural authority" to negotiate international agreements. *Id.* para. 5.c. Before an international agreement can be negotiated, the proponent must also identify the "substantive legal authority" that authorizes each obligation proposed to be assumed by the United States in the international agreement to be negotiated. This authority must be found outside the regulation, for example, in provisions of the U.S. Code or other federal regulations.

⁸ As discussed *infra*, *AR 550-51* regulates the negotiation and conclusion of international agreements that deal with predominantly DA matters. *Id.* para. 5(a). International agreements that deal with matters falling within the purview of joint commands typically will be governed by CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR., 2300.01B, INTERNATIONAL AGREEMENTS (1 Nov. 2003) [hereinafter CJCS INSTR. 2300.01B] rather than *AR 550-51*, while agreements dealing with matters at the DOD-level are governed by DOD DIR. 5530.3.

⁹ Coordination, Reporting and Publication of International Agreements, 22 C.F.R. pt. 181 (2005).

¹⁰ The regulation also provides that an international agreement includes any oral agreement that meets the criteria for an international agreement. Such an agreement must be reduced to writing by the DOD representative who enters into the agreement. *AR 550-51*, *supra* note 1, at glossary, sec. II.a. (defining international agreements).

(c) Is denominated as an international agreement, or as a memorandum of understanding, memorandum of agreement, memorandum of arrangements, exchange of notes, exchange of letters, technical arrangement, protocol, note verbale, aide memoire, agreed minute, contract, arrangement, statement of intent, letter of intent, statement of understanding, or any other term connoting a similar legal commitment.”¹¹

AR 550-51 provides two specific examples of international agreements:

“A North Atlantic Treaty Organization (NATO) Standardization Agreement (STANAG) that provides for mutual support or cross-servicing of military equipment, ammunition, supplies and stores, or the mutual rendering of defense services, including training.”

“Umbrella agreements, implementing arrangements, and cross-servicing agreements concluded under the NATO Mutual Support Act (10 U.S.C. § 2341, et seq.).”¹²

The regulation also lists a number of agreements that are *not* to be considered international agreements for the purposes of AR 550-51:

(a) Contracts made under the *Federal Acquisition Regulations* (FAR).

(b) Foreign Military Sales Credit Agreements.

(c) Foreign Military Sales Letters of Offer and Acceptance or Defense Sales Agreements.

(d) Shipping contracts performed under an international government bill of lading or other similar transportation documents.

(e) Foreign Military Sales Letters of Intent.

(f) Standardization Agreements (STANAGs) and Quadripartite Standardization Agreements (QSTANAGs) that record the adoption of like or similar military equipment, ammunition, supplies and stores; or operational, logistic, and administrative procedures.

(g) Leases under 10 U.S.C. §§ 2667 or 2675.

(h) Leases under 22 U.S.C. § 2796.

(i) Agreements that establish only administrative procedures.

(j) Acquisitions or orders made pursuant to cross-servicing agreements concluded under the authority of the NATO Mutual Support Act (10 U.S.C. § 2341, et seq.) and *DOD Directive 2010.9*.¹³

This definition, including the list of excluded agreements, mirrors the definition found in *DOD Directive 5530.03*, which is, in turn, incorporated by reference in *CJCS Instruction 2300.01B*.¹⁴ The *CJCSI*, however, also emphasizes the essential criteria of an international agreement when it states “the operative requirement is whether the agreement signifies intention of the parties to be bound in international law.”¹⁵

¹¹ *Id.*

¹² *Id.* The regulation notes that “[a]ny extension, revision, or other amendment or modification” to an agreement defined in the regulation is also to be treated as an international agreement. *Id.*

¹³ See AR 550-51, *supra* note 1; see also U.S. DEP’T OF DEFENSE, DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (28 Apr. 2003)

¹⁴ DOD DIR. 5530.3, *supra* note 3, at enclosure 2, para. E.2.1.1; CJCS INSTR. 2300.01B, *supra* note 3, para. 5.

¹⁵ CJCS INSTR. 2300.01B, *supra* note 3, para. 5.

This “intent to be bound” standard is indeed the *sine quo non* of an international agreement.¹⁶ The standard implies that when an agreement between two nations does not signify such an intent to be bound under international law, the agreement does not rise to the level of an international agreement *for purposes of authorities controlling the negotiation and conclusion of international agreements*.¹⁷ While this defining criterion is well-accepted throughout the government, including the DOD, there is virtually no guidance in *AR 550-51* or superior DOD-level authorities to illuminate the meaning of this standard. As a result, it appears that different commands throughout the Army have adopted differing understandings of this standard. For example, one command might focus on whether the agreement requires the commitment of financial resources during execution to determine whether it signifies intent of the parties to be bound by international law. Others may focus on whether the terms require deviation from previously executed international agreements—such as status of forces agreements. Thus, an agreement that merely confirms obligations already assumed under an international agreement would not be a new international agreement. Still others may focus on whether the document requires more than *de minimis* performance by the United States. Thus, even though an agreement may involve some minor new obligation (*e.g.*, to use reasonable efforts to provide a periodic status report on a matter), the failure to perform the obligation would not be material and would have no remedy or consequence, making it effectively non-binding.

All of these various approaches to defining the meaning of “intent to be bound by international law” reflect several common themes. The first of these themes is the lack of an effective or uniform understanding of this standard on an Army-wide basis. The second theme is the perception that the procedural requirements related to the negotiation and conclusion of international agreements are an impediment to mission accomplishment for many commands, and therefore, international arrangements should be creatively “defined out” of the regulation where possible. The third theme is that the majority of the arrangements concluded between subordinate Army commands and their international counterparts do not rise (or should not be deemed to rise) to a sufficient level of significance to qualify as “international agreements.”

Collectively, these common themes expose the need for *AR 550-51* to provide clear guidance to the field about what is, and equally importantly what is not, an international agreement. In order to provide a more effective definition of international agreement for purposes of the regulation, it is useful to refer to the criteria published in 22 C.F.R. § 181.1.¹⁸ These criteria are established by the Department of State for the purpose of “deciding whether any undertaking, oral agreement, document, or set of documents, including an exchanger of notes or of correspondence, constitutes an international agreement within the meaning of the [Case] Act . . .”¹⁹ These criteria are:

1. Identity and intention of the parties (state entities entering into a legally (not politically or morally) binding obligation).
2. Significance of the Arrangement (excludes “minor or trivial” undertakings).
3. Specificity, including objective criteria for determining enforceability (excluding vague or general terms incapable of enforcement).
4. Necessity of two or more parties (excluding unilateral undertakings).
5. Form (acknowledging that the form of an arrangement is not controlling in analyzing whether it is an international agreement, it is nonetheless relevant to this analysis).²⁰

The revised *AR 550-51* will take these factors into account. Additionally, the revision will emphasize that arrangements that manifest a clear intent *not* to create a binding obligation under international law (*e.g.*, statements of aspiration or intent—sometimes referred to as political arrangements) or arrangements that merely reconfirm obligations under existing international agreements (*e.g.*, a Status of Forces Agreements (SOFA)) do not independently qualify as international agreements unless they also include new substantive obligations. It must be noted, however, that as a general rule, the DOD favors a very narrow interpretation of valid exceptions to the definition of international agreement and is particularly sensitive to agreements that address on “policy significant” issues (see discussion below) even if the treatment of “policy

¹⁶ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 301 (3d ed. 1987) (defining, an international agreement as “an agreement between two or more states or international organizations that is intended to be legally binding and governed by international law”).

¹⁷ *Id.* § 301 n.2. (noting that “[a] nonbinding agreement is sometimes used in order to avoid processes required by a national constitutional system for making legally-binding agreements.”).

¹⁸ 22 C.F.R. § 181.1 (2005); *see also* DOD DIR. 5530.01, *supra* note 3, at enclosure 3.

¹⁹ 1 U.S.C. § 112b (2000) (stating that the Case Act requires that international agreements be transmitted to Congress within sixty days after the agreement comes into force with respect to the United States). *Army Regulation 550-51* includes procedures to ensure Army compliance with the Case Act. *AR 550-51*, *supra* note 1, para. 9.d.

²⁰ 22 C.F.R. § 181.1.

significant” issues is derived from existing authority.²¹ Accordingly, the revised regulation will indicate that an implementing agreement will only fall outside the definition of an international agreement so long as it does not: (i) in any way expand or deviate from the basic agreement, *and* (ii) address policy significant issues.

“Below the threshold” arrangements remain, in the opinion of the authors, an important component of international agreements practice. Commanders often need to memorialize, with their foreign counterpart, the existing authorities that will apply to an exercise or other activity with a foreign government. “Excludable agreements” permit the commander to do this without having also to engage the procedural apparatus of *AR 550-51*. Moreover, the authority to enter into such arrangements is not derived from international agreement authorities, but instead from the inherent authority of the respective commander to set the conditions for mission execution.

It is equally important to emphasize, however, that the scope of this category of excludable agreements must be narrowly construed and subjected to careful legal oversight by the servicing staff judge advocate. Any proposal for the use of such an arrangement should be subject to the same initial legal review requirement applied to proposed international agreements. This should result in an opinion articulating exactly why the proposed arrangement does not qualify as an international agreement. The opinion should also establish the permissible scope of the arrangement, with intermediate review requirements. In short, the narrow scope of this category of excludable agreements should be contrasted with the over-reliance on this category by some commands as a means to circumvent the procedural requirements related to international agreements. Accordingly, any decision to classify a proposed arrangement as falling below the threshold of international agreement should be subject to significant scrutiny by the proponent of the arrangement and by the legal advisor. To this end, rather than relying on a determination of whether an arrangement falls within or outside the definition of international agreement, commands should create a formal review process for all proposed international undertakings to ensure the proper categorization and accordant procedures for negotiating and concluding such arrangements.

Expanding the Concept of the “Agreement Process” to Ensure Sufficient Legal Oversight

Because the determination of whether a proposed arrangement qualifies as an international agreement will have a profound impact on establishing the proper authority and procedure for the negotiation and conclusion of such an arrangement, it is absolutely essential that legal review begin at the earliest possible point in the agreement concept development process, and continue throughout the process. Accordingly, the revised regulation will include the following broad definition of the “agreement process:”

The process by which an arrangement between the Army or an Army element and a foreign nation or international organization is conceived, proposed, negotiated, concluded, and implemented. The Agreement Process begins at the concept development phase, and continues through implementation of the ultimate arrangement.

The revised regulation will also require initiation of a legal review at the earliest possible point in this process.

Further, the revised regulation will recommend that each MACOM/Army Service Component Command (ASCC) to designate a central office of record for the agreement process. The purpose of this requirement is to ensure that a focal point for management of the agreement process exists at the MACOM/ASCC level due to the increasing necessity for such commands to engage in the agreement process. This central command focal point will be responsible for receiving all agreement proposals at the concept phase of development and subsequently ensuring the required legal review is obtained. It is essential that this initial review take place as early as possible in the agreement process to allow the servicing legal office to opine on whether the subject of the proposed agreement does or does not qualify as an international agreement and to review the proponent’s determination about other matters that may be determinative as to approval or coordination requirements.²²

The initial legal review is essential in order to determine the scope of authority vested in the command to pursue the arrangement. A determination that the arrangement is not an international agreement also should be accompanied by a legal

²¹ See *infra* notes 35-39 and accompanying text.

²² For example, if the legal office determines that the arrangement is an international agreement, the legal office would review the proponent’s determination whether the international agreement involves a “policy significant” matter or a “predominantly DA matter.” Both of these determinations impact which approval and coordination requirements would apply to the agreement.

opinion about whether the command is vested with appropriate procedural and substantive authority to pursue the “excludable agreement.”

Any limitations, substantive or procedural, deemed essential to the servicing legal office’s opinion should be clearly articulated. Ideally, the command’s local procedures should require continued review or involvement of the servicing legal office to ensure that the terms of the ultimate arrangement does not alter the opinions reached in the initial review and complies with other applicable law and regulation.

During the conference, representatives from the United States Army, Europe (USAREUR), Office of the Judge Advocate (OJA), outlined how the proposed process is currently implemented. In USAREUR, the G-8 includes an Agreements Division, which serves as the central focal point for all international arrangements and agreements for the command. When a staff proponent determines that a mission requires the conclusion of some type of arrangement with a foreign counterpart, a request to negotiate such an agreement is submitted to the Agreements Division. This request is then forwarded to the International Law Division of the OJA, which renders an opinion as to whether the proposed arrangement is or is not an international agreement, the source of authority for pursuing the initiative, and any limits on the substance or procedures related to negotiating and concluding the arrangement (note that all of these issue are addressed regardless of whether the arrangement does or does not qualify as an international agreement). The opinion also establishes subsequent review requirements.

If the legal opinion indicates that authority does not exist to pursue the initiative, the Agreements Division notifies the proponent, with possible recommendations as to how to obtain proper authority (*e.g.*, requesting a delegation from the combatant command). If the legal opinion indicates that authority does exist for the initiative, the Agreements Division will coordinate the development of drafts and the identification of an appropriate group to participate in any negotiation meeting. This team will normally include a representative from the OJA.

The procedure followed in USAREUR provides a good model for local implementation of the Agreements Process. Accordingly, the revised regulation will encourage creation of a central agreements office at each MACOM, and the participation of a qualified legal advisor in any negotiation teams whenever feasible. A centralized office and early involvement of legal expertise will ensure that the limits of applicable authority are respected and that any proposed revisions to a previously approved agreement concept do not result in a modification that is inconsistent with the initially determined scope of authority.

It must be emphasized that in today’s operational environment, there are many instances in which MACOM/ASCC interests will intersect with those of combatant commands responsible for the geographical area in which the MACOM/ASCC’s international counterpart is located.²³ It is also possible that, due to the complex nature of international initiatives, MACOM/ASCC interests intersect with those of the DOD or its field operating agencies. While *AR 550-51* may expressly require coordination with the combatant command or the DOD in such cases, and may even require that the MACOM/ASCC secure prior approval of the combatant command or the DOD before negotiation certain international agreements, there may be instances where such prior approval or coordination is not required. In those instances, the MACOM/ASCC should still be sensitive to the interests of these organizations and should coordinate with them wherever possible. This coordination can occur in technical channels. For example, when preparing initial opinions in response to Agreement Division requests, the USAREUR OJA routinely consults with the U.S. European Command Legal Advisor about the proposed initiative. Such coordination serves the dual purposes of vetting the judgments reached by the OJA in its opinion and ensuring the combatant command is well informed of agreement initiatives conducted in the area of responsibility (AOR).

The intent of the revisions discussed above should be clear. First, it is essential that legal oversight begin at the earliest possible point in the process of developing the agreement concept. A broad definition of the “agreement process” and the establishment of a command focal point for that process is intended to facilitate early involvement of qualified legal personnel. Second, it is essential that any proposed arrangement with a foreign entity be subject to legal review to ensure that both the substance and the procedure related to the arrangement fall within the authority of the proponent command. Third, coordination with higher headquarters along technical lines (*e.g.*, coordination between MACOM/ASCC legal advisors and the responsible Combatant Command legal advisors) should be the rule, and not the exception, to validate judgments related to the agreement, resolve differences early in the process, and ensure maximum situational awareness of agreement initiatives.

²³ See generally JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS ch. II (10 Sept. 2001) [hereinafter JP 3-0] (discussing the doctrinal relationship between combatant and component commands).

The Decreasing Scope of Predominately Army Agreements and the Reality of Operating Under Joint Authorities

As noted above, maximum coordination of agreement initiatives with the combatant command is encouraged, even where not required by *AR 550-51* or the DOD directive. For MACOM/ASCC's, this coordination is related to the broader issue of how best to judiciously use the MACOM/ASCC's authority for pursuing an agreement initiative. If, based upon legal review, the command determines that an initiative does not qualify as an international agreement, its authority to pursue the initiative would be derived from the responsibility of the command to set the conditions for accomplishing whatever mission the initiative is related to.²⁴ If the initiative qualifies as an international agreement, however, the MACOM/ASCC authority must be derived from a delegation from either the DA under *AR 550-51*²⁵ or from the combatant command under *CJCSI 2300.01B*.²⁶ Thus, whenever a MACOM/ASCC is pursuing an international agreement (in other words, when the servicing legal office, based upon the initial legal review, reaches the conclusion that the proposed arrangement is not a "excludable agreements") the procedural basis for the MACOM/ASCC's negotiating authority is derived through either "green" (*AR 550-51*) or "purple" (*CJCSI 2300.01B*) delegation.²⁷

Under *AR 550-51*, an agreement concluded under "green" authority pertains to a "predominantly DA matter."²⁸ Agreements falling into this category are negotiated and concluded based on the authority delegated to the Secretary of the Army by *DOD Directive 5530.03*,²⁹ and further delegated to the MACOM commander by *AR 550-51*.³⁰ The revision of the regulation will preserve this delegation (although it will extend it to ASCC's).

In the last two decades, the number of agreements that address a "predominantly DA matter" has been diminished by combatant commanders' increasing assertion of authority over international agreement practice. This is manifested by the following excerpt from a 1999 interim change to DOD directive 5530.03:

Before negotiation, military command and other DOD organizational elements assigned to or located within the geographic areas of responsibility of Unified commands shall advise the appropriate Unified Commands of any international negotiations that might have an impact on the plans and programs of such commands, and shall furnish them with a copy of each agreement upon conclusion.³¹

²⁴ The implied authority for an Army Service Component Commander to direct activities, not otherwise prohibited by law or policy, necessary to ensure a properly trained, equipped, and ready force is available, to the Combatant Commander is often referred to as "Title 10 responsibility." This is a reference to the statutory mission of the Army established as follows in Title 10 of U.S. Code, section 3062:

§ 3062. Policy; composition; organized peace establishment

(a) It is the intent of Congress to provide an Army that is capable, in conjunction with the other armed forces, of—

- (1) preserving the peace and security, and providing for the defense, of the United States, the Territories, Commonwealths, and possessions, and any areas occupied by the United States;
- (2) supporting the national policies;
- (3) implementing the national objectives; and
- (4) overcoming any nations responsible for aggressive acts that imperil the peace and security of the United States.

(b) In general, the Army, within the Department of the Army, includes land combat and service forces and such aviation and water transport as may be organic therein. It shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations on land. It is responsible for the preparation of land forces necessary for the effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Army to meet the needs of war.

Id. This concept is doctrinally referenced in the discussion of ADCON contained in JOINT PUBLICATION 3-0, *supra* note 17, at II-10 – II-11.

²⁵ *AR 550-51*, *supra* note 1, para. 1.

²⁶ *CJCS INSTR. 2300.01B*, *supra* note 3, at enclosure A.

²⁷ In all cases, the substantive basis for the negotiation also must be identified. Neither *AR 550-51* nor *CJCS Instr. 2300.01B* provide substantive authority for an international agreement or a "excludable agreement". See *AR 550-51*, *supra* note 1, para. 5.c.; see also *CJCS INSTR. 2300.01B*, *supra* note 3, para. 1.

²⁸ *AR 550-51*, *supra* note 1, para. 5.a.

²⁹ *DOD DIR. 5530.3*, *supra* note 3, para. 13.

³⁰ *AR 550-51*, *supra* note 1, para. 5.b.

³¹ See Memorandum, General Counsel of the Department of Defense, subject: Interim Guidance on DOD Directive 5530.03 (International Agreements) (12 Sept. 1997).

This expansive mandate clearly requires coordination by the MACOM/ASCC of any negotiations having a potential impact on the combatant command AOR, even if the authority to negotiate and conclude the agreement is derived through the Army channel of authority set out in *AR 550-51*.³² As a result, it is imperative that the MACOM/ASCC (including their servicing legal offices) establish a close working relationship with an appropriate counterpart at the combatant command that is responsible for the AOR or AOR's in which the MACOM/ASCC routinely operates. This relationship can then be leveraged to do the following: streamline coordination efforts (which often times are conducted under time constraints); identify appropriate coordination points; informally vet judgments related to the source of authority to pursue an agreement or the nature of a proposed agreement (*e.g.*, is it or is it not an international agreement?); and streamline subsequent coordination requirements with higher authorities at DOD.

While maximum coordination between Army elements and combatant commands with a stake in the outcome of agreement initiatives is clearly essential to a legally sound agreements practice, this does not justify a conclusion that the "predominantly DA matter" channel of delegation is irrelevant. Although the line between a DA matter and a Joint matter is often times blurry, both the DOD directive and the current (and anticipated revised) version of *AR 550-51* manifest an intent to preserve for the Army a legitimate realm of authority over international agreements related predominantly to the execution of Army missions. Coordination requirements maximize situational awareness between the combatant commands and the MACOM/ASCC commands—a result consistent with this realm of authority—but do not eliminate the authority itself.

In order to attempt to better clarify the meaning of a "predominantly DA matter," the proposed revision to the regulation will define this phrase as:

A matter related to the execution of a specified or implied Army task not derived from a mission assigned by a non-Army command (Department of Defense or a subordinate Combatant Command).

The definition will include the following additional guidance about interpreting the "predominantly DA matter" concept:

Because virtually any matter addressed by an international agreement and/or arrangement within a Combatant Command AOR could be of some interest to the Combatant Command, it is often difficult to distinguish between a predominately DA matter and a predominately Combatant Command matter. As a general rule, agreements and/or arrangements intended for the primary purpose of recruiting, organizing, supplying, equipping, training, servicing, mobilizing, demobilizing, maintaining, outfitting, and constructing Army forces, equipment and facilities shall be considered to fall within the meaning of predominately DA matters. For example, an international agreement and/or arrangement intended to enhance the readiness of Army forces by providing training opportunities for those forces would be a predominately DA matter.

Due to the sensitivity about the lines between joint and single service activities, the regulation will further provides that where there is doubt about whether a negotiation or agreement involves a predominantly DA matter, the proponent must coordinate the matter with the combatant command.

This emphasis on missions derived from Army obligations, and not from an express or implied tasking from a combatant command, is an attempt to reconcile the scope of proper Army authority with the need to set conditions for accomplishing Army missions. This is perhaps best illustrated with regard to setting the conditions for "out of area" training events. Consider the experience of USAREUR. The Commander, USAREUR, is tasked with the mission of training and preparing Army forces for potential provision to a combatant commander.³³ This mission is derivative of the Army mission to provide a trained and ready force, and therefore while serving the interests of the combatant command that ultimately might receive the force, it is not a mission derived from an express or implied task related to a joint mission. It therefore is properly regarded as a predominantly DA matter. Contrast this scenario with the same type of training conducted in execution of the

³² *AR 550-51*, *supra* note 1, para. 4.a.(ii).

³³ According to the official website for Headquarters, U.S. Army Europe:

MISSION STATEMENT

As a forward based land component, USAREUR demonstrates national resolve and strategic leadership by assuring stability and security, and leading joint and combined forces *in support of the Combatant Commander*.

See USAREUR, *Mission Statement*, available at <http://www.hqusareur.army.mil/missionstatement.htm> (last visited 21 July 2005) (emphasis added).

combatant commander's theater engagement strategy. The training is now in execution of a task imposed by the combatant command, and therefore authority must be derived through the Joint channel.

It should be noted that this view is not universally accepted, with several DOD attorneys experienced in this area asserting an extremely limited scope for what should properly be considered a predominantly DA (or service) matter. This, however, is simply another important reason for maximum coordination between Army and combatant commands. Ultimately, the consequence of a debate between the Army and the combatant commands as to the applicability of "green v. purple" authority will be minimized by early and extensive coordination. A conclusion that an agreement initiative does not properly fall into the "pure Army authority" category would not halt the initiative, but merely require reliance on Joint authorities for the delegation. In such a situation, the Army command must ensure full compliance with the procedures established in *CJCSI 2300.01B*³⁴ and any supplementary regulations of the applicable Combatant Command.

Understanding the Meaning and Effect of "Policy Significance"

Perhaps the most elusive concept related to international agreements practice is that of "policy significance." Under *DOD Directive 5530.3*, "all proposed international agreements having policy significance shall be approved by OUSD(P) before any negotiation thereof, and again before they are concluded."³⁵ Accordingly, understanding the scope of the term "policy significance" is essential to legally sound practice in this area because a conclusion that an issue is policy significant has the practical effect of nullifying any express or implied delegation of negotiation and conclusion authority under *AR 550-51*. In this regard, "policy significance" can have a profound impact on agreements practice.

The constraint related to policy significance initially established in the DOD directive is incorporated in all relevant agreement authorities,³⁶ but the directive only provides a general definition of policy significance. Per the directive, the essential component of a policy significant issue is that by its nature, it "would require approval, negotiation or signature at the OSD or the diplomatic level."³⁷ Determining what falls within this category can obviously be difficult, and in many ways policy significance represents the proverbial "ball that is determined to be glass only after the juggler has dropped it."

Any Army command with significant international engagement activities should consider the long-term benefit of a comprehensive review of local agreements practice, and the development of a local regulation or standing operating procedure controlling such practice. It is hoped that the eventual revision of *AR 550-51* will facilitate the reconciliation of compliance with the international agreement requirements and the needs of a transforming and more expeditionary Army.

In order to aid in the interpretation of this term, the revised regulation will include a list of examples of policy significant issues. This list was derived from both references to other service authorities³⁸ and also the symposium participants' collective experience. While this list is non-exclusive, ideally, it will facilitate the recognition of most policy significant issues. Once again, however, the importance of vetting "suspected" policy significant issues with the appropriate combatant command legal advisors, and where appropriate, the DOD general counsel, cannot be overemphasized. It will often be the case that such legal advisors will have extensive experience in dealing with such issues, and will therefore be able to rapidly assess whether this constraint is triggered.

As noted above, if it is determined that an issue falls within the definition of policy significance, DOD approval is required prior to any negotiation related thereto. There is no exception to this constraint. Here again is another justification for maximum coordination with the combatant command or DOD legal advisor or both—only through prompt identification of such issues can the necessary coordination and approvals be accomplished.

³⁴ CJCS INSTR. 23001.01B, *supra* note 3, para. 3.

³⁵ DOD DIR. 5530.03, *supra* note 3, para. 8.4.

³⁶ See *AR 550-51*, *supra* note 1, para. 6.a.(1); see also *CJS INSTR.* 2300.01B, *supra* note 3, at enclosure A, para. 4.

³⁷ See DOD DIR. 5530.03, *supra* note 3, para. 8.4.1.

³⁸ See, e.g., CJCS INSTR. I 2300.01B, *supra* note 3; U.S. DEP'T OF THE AIR FORCE, INSTR. 51-701, NEGOTIATING, CONCLUDING, REPORTING, AND MAINTAINING INTERNATIONAL AGREEMENTS attachment 1, sec. C (9 May 1994) (listing agreements that have "policy significance"); U.S. DEP'T OF NAVY, SECNAV INSTR. 5710.25A, INTERNATIONAL AGREEMENTS para. 4.d (2 Feb 1998). This list is also based on the many comments received during the "regulation and review revision conference" described in the introduction to this article.

“Policy significance” is not a legal question, per se. Accordingly, under the regulation, the proponent of an international agreement will be required to make the initial judgment about policy significance. The servicing legal office will review this judgment, and the basis thereof, for sufficiency. Early involvement by the servicing legal office in the agreements process, and frequent dialogue with the combatant command legal advisor, will substantially mitigate the risk that a questionable judgment will be reached by the proponent on this issue.

Setting the Conditions for an Effective Agreements Practice

The effort to revise *AR 550-51* is only the first step in improving Army international agreements practice. In addition to providing guidance to the field, one of the primary objectives of this revision process is to stimulate a comprehensive review and possible revision of local agreements practice. Establishing a local agreements policy that (i) includes a command focal point for agreements issues, (ii) maximizes legal involvement in the Agreements Process, (iii) mandates comprehensive coordination with the supported Combatant Command(s), (iv) outlines the procedures for working through the Agreements Process, and (v) establishes an analogous process for command “excludable agreements” that are determined to fall below the threshold of international agreement will set the conditions for effective and efficient international agreements practice.

Appendix

(excerpt from Draft AR 550-51 (as of 25 May 2005))

(6) *Policy Significant*. Any issue identified during the Agreement Process³⁹ which, if the subject of an international agreement, in whole or in part, would result in application of the rules in paragraph 8.4.1 of *DOD Directive 5530.3* regarding agreements “having policy significance”. Under *DOD Directive 5530.3* agreements “having policy significance” include agreements that:

- (a) specify national disclosure, technology-sharing or work-sharing arrangements, coproduction of military equipment or offset commitments as part of an agreement for international cooperation in the research, development, test, evaluation, or production of defense articles, services, or technology;
- (b) because of their intrinsic importance or sensitivity, would directly and significantly affect foreign or defense relations between the United States and another government;
- (c) by their nature, would require approval, negotiation or signature at the OSD or the diplomatic level; or
- (d) would create security commitments currently not assumed by the United States in existing mutual security or other defense agreements and arrangements, or which would increase U.S. obligations with respect to the defense of a foreign government or area.

There is no comprehensive list of subjects that fall within this category. In the event of uncertainty as to the applicability of this definition to a specific issue or agreement, Army elements should seek guidance from the supported Combatant Command Legal Advisor. However, any agreement provision related to any of the following subjects should be regarded as presumptively “policy significant”:

- (a) provisions that would relinquish existing U.S. rights or incur a new type of U.S. obligation and/or liability (this does not include an obligation to pay for goods or services procured in accordance with existing legal authorities);
- (b) provisions that would subject U.S. forces to any type of foreign environmental regulation or requirements (distinguished from a commitment to comply with existing DOD and Army policies related to environmental stewardship);
- (c) provisions that would impose a new obligation on the United States to respect or obey foreign law;
- (d) provisions that would compromise the ability of U.S. forces to comply with all applicable force protection and security directives, regulations, and policies, *e.g.*, by limiting the ability of U.S. forces to carry weapons or ammunition;
- (e) provisions that create, modify, restrict or terminate permanent basing arrangements for U.S. forces in any country;
- (f) provisions imposing new obligations related to the payment of foreign taxes or granting immunity from foreign taxes;
- (g) provisions that are inconsistent with any existing policy of the DOD or the applicable Combatant Command; or
- (h) provisions that address in any fashion the jurisdiction of the International Criminal Court or any similar international tribunal *vis-à-vis* U.S. forces.

³⁹ Note: In the current draft, the “Agreement Process” is defined as “[t]he process by which an arrangement between the Army or an Army element and a foreign nation or international organization is conceived, proposed, negotiated, concluded, and implemented. The Agreement Process begins at the concept development phase, and continues through implementation of the ultimate arrangement.”

Book Review

THE DARKEST JUNGLE THE TRUE STORY OF THE DARIÉN EXPEDITION AND AMERICA'S ILL-FATED RACE TO CONNECT THE SEAS¹

REVIEWED BY MAJOR SUSANA E. WATKINS²

In *The Darkest Jungle*, Todd Balf once again proves himself to be a masterful writer.³ By telling the simple tragic story of an American expedition gone terribly wrong,⁴ Mr. Balf clearly succeeds in bringing the tale of the Darién Expedition to life for the modern reader. Mr. Balf details the long-forgotten, true adventure story of thirty-two-year-old Navy Lieutenant (LT) Isaac Strain,⁵ as he trekked across the Darién Gap (the Isthmus of Panama) in 1854 in pursuit of a future shipping canal that would connect the Atlantic and Pacific Oceans.⁶ *The Darkest Jungle*, however, is not merely a titillating historical narrative adventure. Mr. Balf also ventures into leadership issues. Given these observations, *The Darkest Jungle* is definitely worth reading as a historical, adventure narrative offering insights into leadership.

As a historical adventure, Mr. Balf strategically begins his story with the end—jolting the reader into the dire circumstances of LT Strain and a member of his exploration team. Immersed in the jungle for nearly two months,⁷ an English rescue party finally spotted the men⁸ as “two skeletal, corpse-white figures” in the “ragged remains of a uniform”⁹ aboard a flimsy, makeshift raft¹⁰ floating down the Chucunaque River.¹¹ Lieutenant Strain’s skin displayed “a hieroglyph of rashes, boils, and insect bites.”¹² He had been lost for forty-nine days¹³ and weighed about seventy-five pounds,¹⁴ approximately half his normal body weight.¹⁵ Such a vivid introduction propels the reader forward and causes one to question how the official, Navy-sponsored U.S. Darién Exploring Expedition¹⁶ deteriorated to such a desperate state. Mr. Balf successfully feeds the reader’s hunger for an explanation in the pages that follow.

Mr. Balf first places the Darién Expedition in its wider context, explaining the long international competition behind the quest for a path across the Darién Gap, dating back to 1503 and Christopher Columbus.¹⁷ He then neatly ties in the American concept of Manifest Destiny.¹⁸ After providing the reader with contextual background, Mr. Balf tells the horrible story of this “ill-fated” mission in graphic, gut-wrenching detail. For example, after just one week in the jungle, the following

¹ TODD BALF, *THE DARKEST JUNGLE, THE TRUE STORY OF THE DARIÉN EXPEDITION AND AMERICA'S ILL-FATED RACE TO CONNECT THE SEAS* (2003).

² U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General’s Legal Center and School, U.S. Army, Charlottesville, Virginia.

³ Todd Balf’s first book, *The Last River*, was named one of the top ten nonfiction books of 2000. Book Reviews, at <http://www.booknoise.net/darkestjungle> (last visited May 11, 2005) [hereinafter Booknoise Reviews].

⁴ In an interview, Mr. Balf says he wanted to tell LT Strain’s story because LT Strain was “incredibly ambitious” and yet a “[b]eautiful loser[.]” Interview by Robert Birnbaum with Todd Balf (May 5, 2004), at <http://identitytheory.com/interviews/birnbaum145.php> (last visited May 11, 2005) [hereinafter Balf Interview]. In taking an “anecdotal approach to history,” Mr. Balf desires to recapture some of America’s “risk-taking personality.” *Id.*

⁵ See BALF, *supra* note 1, at 5, 25.

⁶ See *id.* at 23.

⁷ Lieutenant Strain left the anchored *Cyane* on 13 January 1854 to begin his expedition into the jungle and was rescued on 9 March 1854. See *id.* at 1, 64.

⁸ See *id.* at 200-01, 310.

⁹ *Id.* at 1.

¹⁰ See *id.* at 1, 196-97.

¹¹ See *id.* at 199-200.

¹² *Id.* at 1.

¹³ *Id.* at 2.

¹⁴ *Id.* at 2, 201.

¹⁵ See *id.* at 201.

¹⁶ See *id.* at 7.

¹⁷ See *id.* at 9-10. Competition between America and England grew especially heated at the time of LT Strain’s expedition. See *id.* at 63-64, 71.

¹⁸ See *id.* at 64 (“The Americans were crossing independently and they, and they alone, had known it from the start.”); see also *id.* at 26-28, 42, 111.

nightmarish discovery unfolded: “a vampire bat, excised such a tiny piece of flesh [from the sleeping men and] . . . [a]n anticoagulant in the bat’s saliva produced a steady trickle of blood that flowed freely all night long.”¹⁹ Later in the expedition, the explorers suffer from another bizarre predator—the botfly.²⁰ With the benefit of modern science, Mr. Balf describes, almost with relish, the havoc wreaked by this larval parasite:

Getting under their skin, either through a fresh bite or existing sores, the larvae is initially unnoticeable but becomes larger and extremely painful as it fattens on human tissue. River bathing produced the most excruciating episodes because the maggot, which employs a snorkel-like apparatus to breathe, feels its air supply shut off and begins to writhe, using its sharp anal hooks to mobilize. . . . Crude attempts at removal . . . did [the men] more harm than good. The portions of the maggot they couldn’t excise with either their fingernails or knife blades rotted beneath their skin, leading to still further infection.²¹

Throughout the expedition, the effects of diminishing food consumption by the men steadily became more pronounced, until the crew was faced with the specter of starvation and its consequences, both physical and mental.²² The exploration party was forced to abandon the weak and dying in the interest of saving the remaining men.²³ Mr. Balf explores how the despair of some turned to grim desperation, that is, thoughts of cannibalism.²⁴ Based on the recollection of Seaman Parks,²⁵ Mr. Balf describes the gruesome plans: “When the party left, [Lombard and Parks] would sneak back and dig up the corpse [of their shipmate], using his flesh to nourish them for the long trip back.”²⁶ How could any adventure or exploration reader not be hopelessly captivated by Mr. Balf’s true story of excruciating human endurance?

In addition to being an adventure story, *The Darkest Jungle* also offers insight into lessons on leadership. Relying upon various historical sources listed in his chapter notes,²⁷ Mr. Balf relays that LT Strain was born into a family of “God-fearing Scotch-Irish Presbyterians”²⁸ in 1821 in a small Appalachian town²⁹ where he attended an exacting school “instilling him with generous doses of Latin and literature, [and] also a sense of [his], and [his] country’s, keen future.”³⁰ By the age of sixteen, LT Strain had begun his career, reporting for military duty at the Boston Navy Yard.³¹ In the end, however, Mr. Balf admits, in all fairness, that the “makeup of an explorer is impossible to divine.”³²

Mr. Balf’s admission notwithstanding, the reader cannot deny the probable significance that a mentor from the world of science had on young LT Strain.³³ It should be no surprise that LT Strain later engaged on a career path that ultimately put him at the keel of the Darién Expedition, which was both an expeditionary *and* scientific mission.³⁴ The connection between LT Strain’s mentor and his career of choice demonstrates the significance mentors can have in the lives of others. Also

¹⁹ *Id.* at 138.

²⁰ *See id.* at 169.

²¹ *Id.*

²² *See id.* at 194, 197-98.

²³ *See id.* at 177. Mr. Balf describes one such parting, as follows: “[Polanco] attempted to follow, the journal duly noted, but collapsed shrieking as the party trailed off into the forest.” *Id.*

²⁴ *See id.* at 169-73.

²⁵ *Id.* at 172.

²⁶ *Id.* at 170; *see also id.* at 220, 245-46, 311 (discussing accusation of cannibalism after rescue, but commenting that no one on the expedition “resorted to a ‘disgraceful expedient’ in order to sustain themselves”).

²⁷ *See id.* at 298-301 (citing three successive editions of the 1855 *Harper’s New Monthly*, original church records, genealogical researchers, and a book, *Heartland*, by the Clark County Historical Society in Pennsylvania).

²⁸ *Id.* at 26.

²⁹ *See id.* at 25.

³⁰ *Id.* at 26.

³¹ *See id.* at 31.

³² *Id.* at 29. *But see id.* at 56 (offering that “[g]reat leaders [are] undeterred, resourceful, and uncompromising in the face of even overwhelming odds”); *id.* at 154 (observing that “successful survival leadership” requires “firm but nimble thinking, sensible planning, and strong group dynamics”).

³³ *See id.* at 33. By way of comparison, Mr. Balf, too, had a mentor that he acknowledges may have been influential in his professional life. In an interview, Mr. Balf remarks, “I actually had a very good history teacher who loved to delve into the obscurity.” Balf Interview, *supra* note 4.

³⁴ *See* BALF, *supra* note 1, at 109-10 (discussing the numerous scientific instruments that had to be abandoned); *see also, e.g., id.* at 276.

relevant in a discussion on leadership is the leader's personal experiences; LT Strain had wide and various experiences during those intervening sixteen years before leading the Darién Expedition.³⁵ Mr. Balf suggests that LT Strain's miserable failure in a prior expedition of the South American jungle was, in all likelihood, pivotal in defining his driving ambition on the Darién Expedition.³⁶ On another occasion, however, Mr. Balf suggests that leadership stems from one's innate personality: "Others had faltered, stumbling in the heat and fever and the wilderness of the unknown. But [LT Strain] saw himself as adapted, perhaps even deserving [of success as an explorer]."³⁷ Is the author suggesting that LT Strain was a born leader or that innate personality is merely one factor in the calculation?

Regardless of how this question is answered, LT Strain exercised leadership by making careful choices during the early planning stages of the expedition. For example, LT Strain selected men with demonstrated ability through past experience for his crossing team.³⁸ He also established his command structure early on, before setting one foot in the jungle.³⁹ These decisions ultimately helped save the expedition from abject failure. Lieutenant Strain demonstrated flexibility, as well. Due to the life and death circumstances, he sometimes made untried decisions that proved highly effective for survival, despite wisdom to the contrary. For example,

Military custom dictated that the officers and men split into their two messes, or dining groups. Each camp . . . had its own fire and guard. There the differences were supposed to end. When it came to the basics of military life—how much one ate and how hard one was asked to work—Strain felt there should be no difference between the men and those who led them.⁴⁰

While blending the ranks with respect to the "basics of military life" might be frowned upon in various organizations today, and especially in the military, such flexibility might have a place in the new realities of today's unpredictable world as the United States engages in military activities aimed at eradicating terrorism worldwide.

Nonetheless, *The Darkest Jungle* is lacking as a guide on leadership because any presumed leadership lessons are based on a flawed premise, that is, that LT Strain was a great leader. His actions demonstrate that he was not.⁴¹ Admittedly, the mission was ultimately saved by LT Strain's leadership—his men followed him devotedly.⁴² What is troubling, however, is why the mission ever disintegrated so completely, resulting in unacceptable human costs? That answer, in all likelihood, lies in LT Strain's driving ambition. This ambition is revealed early on, before any of the men ever entered the jungle.

Prior to disembarking the *Cyane* and heading for shore, LT Strain had meticulously prepared for the expedition, he read books about the region,⁴³ personally oversaw supplies,⁴⁴ hand-picked his men,⁴⁵ gathered information from the local Cartagena population,⁴⁶ and negotiated permission to cross Darién with the local Indian chiefs.⁴⁷ In his impatience at the

³⁵ See *id.* at 31-42, 277.

³⁶ See *id.* at 34-35, 43.

³⁷ *Id.* at 42; see also, *e.g.*, *id.* at 28 (observing that as a boy, LT Strain "could not have felt anything other than blessed by his birthright"); *id.* at 34 (describing LT Strain as "incredibly self-assured and a bit hungry for notoriety").

³⁸ See *id.* at 102-04.

³⁹ See *id.* at 24.

⁴⁰ *Id.* at 120.

⁴¹ Moreover, while the gripping nature of Mr. Balf's adventure story is compelling nonfiction, the storyline distracts from any attempt to discern meaningful lessons on leadership. Students of leadership are better advised to seek out books devoted exclusively to leadership. See, *e.g.*, AL KALTMAN, CIGARS, WHISKEY & WINNING LEADERSHIP LESSONS FROM GENERAL ULYSSES S. GRANT (1998) (providing 250 leadership lessons of general applicability based on historical facts); JEFFREY A. KRAMES, THE RUMSFELD WAY (2002) (discussing the leadership style of Secretary of Defense Donald Rumsfeld).

⁴² See BALF, *supra* note 1, at 103. For example, LT Strain left First Officer (FO) Truxton behind and in charge of seventeen other members of the expedition who were too sick to move along at a steady pace. See *id.* at 24, 159-60, 218. Lieutenant Strain planned to move ahead at a quick pace toward the Pacific with three of the strongest men, in search of canoes and provisions. See *id.* at 159-60. First Officer Truxton's team was supposed to recover and then move forward after them. See *id.* at 160, 168. However, the first death of those left behind, LT Strain's prolonged absence, and plummeting morale, coupled to cause First Officer Truxton to decide to return to the ship. See *id.* at 173-74. After thirty-eight days and five eventual deaths in Truxton's party, LT Strain finally returned. See *id.* at 218. Even after all his hardship, FO Truxton still sought approval, asking LT Strain, "Did I do right to turn back?" *Id.* at 219.

⁴³ See *id.* at 11-12.

⁴⁴ See *id.* at 11, 54-55, 110-11.

⁴⁵ See *id.* at 102-04.

⁴⁶ See *id.* at 56-57. Lieutenant Strain also examined the shore prior to disembarking the *Cyane*. See *id.* at 98.

very end,⁴⁸ however, LT Strain miscalculated. The surf—the pounding waves toppled his boats, washing all the supplies and equipment into the ocean.⁴⁹ Lieutenant Strain’s men spent a miserable first night on the beach, tired and wet⁵⁰—hardly the mark of an expedition by a “great” leader and undoubtedly an indication of LT Strain’s ambition to be the first to cross the Darién Gap.⁵¹

Lieutenant Strain’s most significant failure in leadership, however, was at his war council where he decided to continue the exploration despite mounting adversity.⁵² Mr. Balf writes that the war council was conducted “in an atmosphere approaching true democracy.”⁵³ Lieutenant Strain wrote, “No proposition to return to the ship was made, and I believe that every one felt that nothing but a transit from sea to sea would . . . make our work complete.”⁵⁴ But the end of the first week, the Sucubti and Chucunas Indian guides had abandoned the expedition,⁵⁵ food provisions were quickly dwindling,⁵⁶ and physical exhaustion and trauma were taking its toll.⁵⁷ At this point LT Strain should have recognized the critical situation and exercised leadership by retracing his steps back to the *Cyane*, in spite of the group opinion.⁵⁸ In doing so, he could have saved his men from despair, starvation, and death. He was fighting no war, he was not in search of a lost platoon, there was no need for the ultimate sacrifice paid by many of his men.⁵⁹ There was nothing but national pride and personal glory driving LT Strain forward.⁶⁰ A “great” leader would not have put the lives of his men at peril for mere pride and glory.⁶¹

Regardless of one’s motivation for reading *The Darkest Jungle*, whether for pleasure or for leadership instruction, there are four flaws that detract from the book. First, the author provides substantial information about several competing contemporary expeditions.⁶² Too detailed, this information often confused the main storyline. Not until the end of the book, did the relevance of these other expeditions become apparent.⁶³

⁴⁷ See *id.* at 98-101.

⁴⁸ Lieutenant Strain was impatient to launch from the *Cyane* to shore. He “lost the entire morning awaiting the return” of two men from shore and had been waiting days for an expert promised by the governor of New Granada (present-day Columbia). See *id.* at 25, 54, 62-63, 66, 105. Members of the crew were falling sick daily. See *id.* at 62. Moreover, the lieutenant was keenly aware of the international race for discovery of the Darién Strait, as revealed in his correspondence to the Secretary of the Navy mentioning the “many rumors of English and French expeditions now on their way to the Isthmus.” *Id.* at 63. In fact, LT Strain’s American expedition purposefully began the trek into the jungle just days before the arrival of the British, in clear contravention of previous arrangements for a “joint effort” and a recent treaty between the two nations “pledging neutrality on the isthmus.” *Id.* at 64.

⁴⁹ See *id.* at 105.

⁵⁰ See *id.* at 105-06. In retrospect, this landing fiasco could be seen as an ominous prelude to LT Strain’s later decision to “drive on.” See *infra* text accompanying notes 52-61.

⁵¹ See, e.g., BALF, *supra* note 1, at 111, 141; see also *supra* text accompanying note 36.

⁵² See KALTMAN, *supra* note 41, at 211 (“Guard against unrealistic expectations by . . . yourself, and your subordinates.”).

⁵³ BALF, *supra* note 1, at 140.

⁵⁴ *Id.* at 141.

⁵⁵ See *id.* at 139-40.

⁵⁶ See *id.* at 138-39.

⁵⁷ See *id.* at 137-38.

⁵⁸ See KALTMAN, *supra* note 41, 136 (“[Y]ou abdicate your . . . responsibilities by putting decisions to a vote.”).

⁵⁹ See BALF, *supra* note 1, at 211, 218, 224; Balf Interview, *supra* note 4 (noting that seven men from the expedition starved to death).

⁶⁰ Mr. Balf acknowledges as much in his chapter notes where he keenly observes that the “anxious political climate” contributed to LT Strain’s unwillingness to return to the *Cyane*. BALF, *supra* note 1, at 306-07.

⁶¹ See KALTMAN, *supra* note 41, at 284 (“[A] desire for personal acclaim is certain to fail.”). In contrast, LT Strain’s contemporary, Commander Thomas O. Selfridge, widely-lauded even today for what was then a new approach to jungle exploration, turned his men around after three weeks on the Darién Gap to seek additional help, thus avoiding the catastrophe that befell LT Strain. See BALF, *supra* note 1, at 279-80, 306-07. In contrast to LT Strain’s expedition, Commander Selfridge’s new approach to jungle exploration was characterized by “extraordinary preparations,” such that “[t]here were six hundred pairs of shoes for one hundred men.” *Id.* at 279-80.

⁶² See, e.g., *id.* at 59-61, 71-91 (discussing the exploits of William Paterson (a Scotsman) in 1698, Alexander von Humboldt (a Prussian naturalist) in 1803, Edward Cullen (an Irish physician) in 1850 and 1851, Lionel Gisborne (a British engineer) in 1852, and James C. Prevost (on orders from the British navy) in 1852). Comments by Dr. Cullen started the international race for discovery of the Darién Strait. See *id.* at 75-76. In 1850, Dr. Cullen wrote: “From a tree on the top of a mountain . . . I enjoyed a view of both Atlantic and Pacific, so narrow is the isthmus here.” *Id.* at 75.

⁶³ Lieutenant Strain’s reliance on faulty and incomplete information from previous explorers proved fatal to the success of his expedition. See, e.g., *id.* at 118-19 (noting LT Strain’s difficulty in finding the lowest point on the isthmus as a result of reliance upon the inaccuracies in Mr. Gisborne’s reports); *id.* at 138 (noting LT Strain’s miscalculation resulting from reliance upon Mr. Gisborne’s inaccurate maps); see also *id.* at 24, 72, 110 (discussing LT Strain’s reliance on the maps, information, and testimony of previous explorers); *id.* at 76-83 (discussing Dr. Cullen’s falsehoods and inaccurate maps of Darién); *id.* at 61-62 (discussing the exaggerations in von Humboldt’s scientific writings); *id.* at 129-32 (discussing Mr. Gisborne’s grossly inaccurate survey of Darién).

Second, Mr. Balf's footnote style invites criticism for lack of credibility. Admittedly, summarized footnotes at the end of the book allows for fluid reading.⁶⁴ But this writing style causes confusion about the precise source of textual facts. Mr. Balf ably deflects some of this critique by attributing information to its source directly in the text. For example, he writes, "'I shall never forget the 1st night,' wrote Winthrop. 'My watch was from 12 to 2 the moon had just risen . . .'"⁶⁵ There is no question in this passage about the source of the historical information—clearly Mr. Winthrop made the observation. Not all information, however, is annotated in this manner and the reader is frequently left wondering if facts in the text are from original documents, secondary sources, or the writer's own observations or opinions. Overall, this footnote writing style tends to weaken the reliability of *The Darkest Jungle* as a historical narrative.⁶⁶

The third flaw with the book is Mr. Balf's lack of objectivity. Mr. Balf occasionally provides unwarranted support for LT Strain's actions. For example, in his chapter notes, Mr. Balf defends LT Strain against criticism that LT Strain was unprepared, impatient, and amateurish.⁶⁷ Admittedly, LT Strain should be judged against the backdrop of his time period, the "bully age of Manifest Destiny,"⁶⁸ but Mr. Balf should give more leeway to the reader to draw conclusions from the facts. On other occasions, Mr. Balf inflates LT Strain's accomplishments and importance in history.⁶⁹ As a result, the reader must be discerning to distinguish between fact and opinion.

Fourth, the lack of pictures and modern maps was disappointing. Mr. Balf writes that there are "No surviving photographs of the *Cyane's* crew,"⁷⁰ and he includes no pictures or drawings of the expedition in his book. Mr. Balf's statement is admittedly true, but drawings from the time period, as well as modern photographs of the region would have been welcomed to give the reader a visual peek into this inhospitable world. The internet has a literary web site discussing Mr. Balf's book; the site includes drawings of the expedition from *Harper's New Monthly* and colorful modern wildlife photographs taken by Mr. Balf, himself.⁷¹ Mr. Balf's readers would have been better served had the author included these kinds of drawings and pictures directly within the pages of the text instead of leaving readers to search the internet for this visual information. Moreover, although Mr. Balf includes a map from the time period, detailing various expeditions and routes,⁷² it would have been interesting to see those same expeditions and routes over a modern map.

Overall, these critiques are minor.⁷³ The readability of *The Darkest Jungle* cannot be challenged. The story flows logically and chronologically. Contextual information and LT Strain's family history are well-placed to maximize understanding of the motivations of the period and "the big picture." Any shortcomings are overcome as a result of Mr. Balf's thorough research and sound insight. This insight is firmly supported by Mr. Balf's personal experience in the jungle. He first visited Darién in the early 1990's as a magazine correspondent,⁷⁴ and then later in 2001 in a concerted effort to

⁶⁴ See *id.* at 297-313.

⁶⁵ *Id.* at 111 (emphasis added).

⁶⁶ Mr. Balf also admits to being unable to use the official Darién Expedition journal. See *id.* at 297-98. Lieutenant Strain's voluminous journal entries were filed with the Navy depository, Mr. Balf writes, but they are not there today; nor are the journals located in the National Archives or at the Library of Congress. See *id.* at 297. Mr. Balf remarks that the Navy library staff has searched unsuccessfully for the Darién journals and notebooks on several occasions over the last century. *Id.* Mr. Balf engaged in a two-year search for the journals and notebooks, also to no avail. *Id.* As a result, for many of the details Mr. Balf relied on three successive issues of the 1855 *Harper's New Monthly*, a contemporary magazine that "retold" LT Strain's amazing story. See *id.* at 244-45, 298-99. The 1855 *Harper's New Monthly* contains verbatim journal entries from members of the Darién Expedition, as written by historian Joel Headley. See *id.* at 298.

⁶⁷ See *id.* at 302, 304, 306-07.

⁶⁸ *Id.* at 64.

⁶⁹ For example, Mr. Balf states, "[LT Strain] was, it seemed, the realization of a strange and perfectly new kind of species." *Id.* at 42; see also *id.* at 33-34 (remarking on LT Strain's "extraordinary future path").

⁷⁰ *Id.* at 8.

⁷¹ See Booknoise Reviews, *supra* note 3 (citing *Harper's New Monthly* (1855 and 1873)).

⁷² BALF, *supra* note 1, title page, at 78-9.

⁷³ One final observation with respect to flaws in *The Darkest Jungle* is Mr. Balf's choice of quotation on one occasion. In describing life in the jungle, Mr. Balf quotes an entry from Mr. Winthrop's journal in which Mr. Winthrop describes a bullet ant "as spiteful and venomous as emancipated niggers." *Id.* at 151-52. This gratuitous description of ants is unnecessarily inflammatory, irrelevant to the story of the Darién Expedition, and certainly a poor choice for a direct quotation given the purpose of the book. Mr. Balf mentions race relations only minimally, primarily in the context of the subsequent Civil War service of some of the Darién Expedition survivors. See, e.g., *id.* at 252-54, 256-61.

⁷⁴ Balf Interview, *supra* note 4.

retrace LT Strain's expedition.⁷⁵ When the compelling and historic details of LT Strain's arduous and death-defying march across the Darién Gap are added to the mix, the end-result is a first-rate adventure story. Accordingly, *The Darkest Jungle* is recommended as a page-turning, must-read adventure book.⁷⁶ It also offers insight into leadership issues. Finally, *The Darkest Jungle* should be especially enjoyable to military members, given that the Darién Exploring Expedition was a military venture.⁷⁷

⁷⁵ See NATIONAL GEOGRAPHIC ADVENTURE (Feb. 2004) (cited by Booknoise Reviews, *supra* note 3). Thus, for example, in describing the slow progress of the expedition, Mr. Balf at one point states, "The combination of wading in swift water and cutting along the densely forested banks made the going deadly slow." Balf, *supra* note 1, at 111. This description of the natural conditions, even if gleaned from historical resource material, was certainly enhanced by Mr. Balf's own jungle experience.

⁷⁶ Accolades from book reviewers abound. See, e.g., Booknoise Reviews, *supra* note 3 ("[c]rack contemporary place writing, related in wrenching, enchanting detail" (quoting *Kirkus Reviews*)); Powell's City of Books, Book Review, at <http://www.powells.com/cgi-bin/biblio?inkey=62-0609609890-0> (last visited May 11, 2005) ("a compelling, tragic story" (quoting *Publishers Weekly*)).

⁷⁷ Mr. Balf deftly describes Navy protocol, practices, pride, and discipline. See, e.g., Balf, *supra* note 1, at 24, 105, 201, 220. Thus, in describing the debacle of the beach landing, he remarks: "Military bearing was no small thing, and the way in which an American outfit carried itself and performed a deck drill, much less how it made a foreign arrival, was viewed with exaggerated importance." *Id.* at 105.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, U.S. Army (TJAGSA), 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, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, dial 1, extension 3304.

When requesting a reservation, please have the following information:

TJAGSA Code—181

Course Name—155th Contract Attorneys Course 5F-F10

Course Number—155th Contract Attorneys Course 5F-F10

Class Number—155th Contract Attorneys Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

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. TJAGSA CLE Course Schedule (August 2004 - September 2006)

| Course Title | Dates | ATRRS No. |
|----------------------|--|-----------|
| GENERAL | | |
| 54th Graduate Course | 15 August 05—25 May 06 | 5-27-C22 |
| 167th Basic Course | 31 May—23 June 05 (Phase I—Ft. Lee) | 5-27-C20 |
| | 24 June—1 September 05 (Phase II—TJAGSA) | 5-27-C20 |
| 168th Basic Course | 13 September—6 October 05 (Phase I—Ft. Lee) | 5-27-C20 |
| | 7 October—15 December 05 (Phase II—TJAGSA) | 5-27-C20 |
| 169th Basic Course | 3—26 January 06 (Phase I—Ft. Lee) | 5-27-C20 |
| | 27 January—7 April 06 (Phase II—TJAGSA) | 5-27-C20 |
| 170th Basic Course | 30 May—22 June (Phase I—Ft. Lee) | 5-27-C20 |
| | 23 June—31 August (Phase II—TJAGSA) | 5-27-C20 |
| 171st Basic Course | 12 September 06—TBD (Phase I—Ft. Lee) | 5-27-C20 |

| | | |
|--|---------------------------|---------------|
| 10th Speech Recognition Training | 17—28 October 05 | 512-71DC4 |
| 18th Court Reporter Course | 1 August—5 October 05 | 512-27DC5 |
| 19th Court Reporter Course | 31 January—24 March 06 | 512-27DC5 |
| 20th Court Reporter Course | 24 April—23 June 06 | 512-27DC5 |
| 21st Court Reporter Course | 31 July—6 October 06 | 512-27DC5 |
| 6th Court Reporting Symposium | 31 October—4 November 05 | 512-27DC6 |
| 188th Senior Officers Legal Orientation Course | 12—16 September 05 | 5F-F1 |
| 189th Senior Officers Legal Orientation Course | 14—18 November 05 | 5F-F1 |
| 190th Senior Officers Legal Orientation Course | 30 January—3 February 06 | 5F-F1 |
| 191st Senior Officers Legal Orientation Course | 27—31 March 06 | 5F-F1 |
| 192d Senior Officers Legal Orientation Course | 12—16 June 06 | 5F-F1 |
| 193d Senior Officers Legal Orientation Course | 11—15 September 06 | 5F-F1 |
| 12th RC General Officers Legal Orientation Course | 25—27 January 06 | 5F-F3 |
| 36th Staff Judge Advocate Course | 5—9 June 06 | 5F-F52 |
| 9th Staff Judge Advocate Team Leadership Course | 5—7 June 06 | 5F-F52S |
| 2006 JAOAC (Phase II) | 8—20 January 06 | 5F-F55 |
| 37th Methods of Instruction Course | 30 May—2 June 06 | 5F-F70 |
| 2005 JAG Annual CLE Workshop | 3—7 October 05 | 5F-JAG |
| 17th Legal Administrators Course | 19—23 June 06 | 7A-270A1 |
| 3d Paralegal SGM Training Symposium | 6—10 December 2005 | 512-27D-50 |
| 17th Law for Paralegal NCOs Course | 27—31 March 06 | 512-27D/20/30 |
| 5th 27D BNCOC | 23 July—19 August 05 | |
| 6th 27D BNCOC | 10 September—9 October 05 | |
| 3d 27D ANCOG | 24 July—16 August 05 | |
| 4th 27D ANCOG | 17 September—9 October 05 | |
| 13th JA Warrant Officer Basic Course | 30 May—23 June 06 | 7A-270A0 |
| JA Professional Recruiting Seminar | 12—15 July 05 | JARC-181 |
| JA Professional Recruiting Seminar | 11—14 July 06 | JARC-181 |
| 6th JA Warrant Officer Advanced Course | 11 July—5 August 05 | 7A-270A2 |
| 7th JA Warrant Officer Advanced Course | 10 July—4 August 06 | 7A-270A2 |
| ADMINISTRATIVE AND CIVIL LAW | | |
| 4th Advanced Federal Labor Relations Course | 19—21 October 05 | 5F-F21 |
| 59th Federal Labor Relations Course | 17—21 October 05 | 5F-F22 |
| 57th Legal Assistance Course (Estate Planning focus) | 31 October—4 November 05 | 5F-F23 |

| | | |
|---|---------------------------|---------|
| 58th Legal Assistance Course (Family Law focus) | 15—19 May 06 | 5F-F23 |
| | | |
| 2005 USAREUR Legal Assistance CLE | 17—21 October 05 | 5F-F23E |
| 30th Admin Law for Military Installations Course | 13—17 March 06 | 5F-F24 |
| | | |
| 2005 USAREUR Administrative Law CLE | 12—16 September 05 | 5F-F24E |
| 2006 USAREUR Administrative Law CLE | 11—14 September 06 | 5F-F24E |
| | | |
| 2005 Maxwell AFB Income Tax Course | 12—16 December 05 | 5F-F28 |
| | | |
| 2005 USAREUR Income Tax CLE | 5—9 December 05 | 5F-F28E |
| | | |
| 2006 Hawaii Income Tax CLE | TBD | 5F-F28H |
| | | |
| 2005 USAREUR Claims Course | 28 November—2 December 05 | 5F-F26E |
| | | |
| 2006 PACOM Income Tax CLE | 9—13 June 2006 | 5F-F28P |
| | | |
| 23d Federal Litigation Course | 1—5 August 05 | 5F-F29 |
| 24th Federal Litigation Course | 31 July—4 August 06 | 5F-F29 |
| | | |
| 4th Ethics Counselors Course | 17—21 April 06 | 5F-F202 |
| CONTRACT AND FISCAL LAW | | |
| 7th Advanced Contract Attorneys Course | 20—24 March 06 | 5F-F103 |
| | | |
| 155th Contract Attorneys Course | 25 July—5 August 05 | 5F-F10 |
| 156th Contract Attorneys Course | 24 July—4 August 06 | 5F-F10 |
| | | |
| 7th Contract Litigation Course | 20—24 March 06 | 5F-F102 |
| | | |
| 2005 Government Contract & Fiscal Law Symposium | 6—9 December 05 | 5F-F11 |
| | | |
| 73d Fiscal Law Course | 24—28 October 05 | 5F-F12 |
| 74th Fiscal Law Course | 24—28 April 06 | 5F-F12 |
| 75th Fiscal Law Course | 1—5 May 06 | 5F-F12 |
| | | |
| 2d Operational Contracting Course | 27 February—3 March 06 | 5F-F13 |
| | | |
| 12th Comptrollers Accreditation Course (Hawaii) | 26—30 January 04 | 5F-F14 |
| 13th Comptrollers Accreditation Course (Fort Monmouth) | 14—17 June 04 | 5F-F14 |
| | | |
| 7th Procurement Fraud Course | 31 May —2 June 06 | 5F-F101 |
| | | |
| 2006 USAREUR Contract & Fiscal Law CLE | 28—31 March 06 | 5F-F15E |
| | | |
| 2006 Maxwell AFB Fiscal Law Course | 6—9 February 06 | |
| CRIMINAL LAW | | |
| 11th Military Justice Managers Course | 22—26 August 05 | 5F-F31 |
| 12th Military Justice Managers Course | 21—25 August 06 | 5F-F31 |
| | | |
| 49th Military Judge Course | 24 April—12 May 06 | 5F-F33 |

| | | |
|---|---------------------------|---------|
| 24th Criminal Law Advocacy Course | 12—23 September 05 | 5F-F34 |
| 25th Criminal Law Advocacy Course | 13—17 March 06 | 5F-F34 |
| 26th Criminal Law Advocacy Course | 11—15 September 06 | 5F-F34 |
| 29th Criminal Law New Developments Course | 14—17 November 05 | 5F-F35 |
| 2006 USAREUR Criminal Law CLE | 9—13 January 06 | 5F-F35E |
| INTERNATIONAL AND OPERATIONAL LAW | | |
| 5th Domestic Operational Law Course | 24—28 October 05 | 5F-F45 |
| 84th Law of War Course | 11—15 July 05 | 5F-F42 |
| 85th Law of War Course | 30 January—3 February 06 | 5F-F42 |
| 86th Law of War Course | 10—14 July 06 | 5F-F42 |
| 44th Operational Law Course | 8—19 August 05 | 5F-F47 |
| 45th Operational Law Course | 27 February—10 March 06 | 5F-F47 |
| 46th Operational Law Course | 7—18 August 06 | 5F-F47 |
| 2004 USAREUR Operational Law Course | 29 November—2 December 05 | 5F-F47E |

3. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2005 issue of *The Army Lawyer*.

4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2005**, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2006 (“2006 JAOAC”). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2006 JAOAC will be held in January 2006, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2005). If the student receives notice of the need to re-do any examination or exercise after 1 October 2005, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2005 will not be cleared to attend the 2006 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact Lieutenant Colonel JT. Parker, telephone (434) 971-3357, or e-mail JT.Parker@hqda.army.mil.

5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

| <u>Jurisdiction</u> | <u>Reporting Month</u> |
|----------------------------|-------------------------------|
| Alabama** | 31 December annually |
| Arizona | 15 September annually |
| Arkansas | 30 June annually |

| | |
|----------------------|--|
| California* | 1 February annually |
| Colorado Delaware | Anytime within three-year period Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc. |
| Florida** | Assigned month every three years |
| Georgia | 31 January annually |
| Idaho | 31 December, every third year, depending on year of admission |
| Indiana | 31 December annually |
| Iowa | 1 March annually |
| Kansas | Thirty days after program, hours must be completed in compliance period 1 July to June 30 |
| Kentucky | 10 August; completion required by 30 June |
| Louisiana** | 31 January annually; credits must be earned by 31 December |
| Maine** | 31 July annually |
| Minnesota | 30 August annually |
| Mississippi** | 15 August annually; 1 August to 31 July reporting period |
| Missouri | 31 July annually; reporting year from 1 July to 30 June |
| Montana | 1 April annually |
| Nevada | 1 March annually |
| New Hampshire** | 1 August annually; 1 July to 30 June reporting year |
| New Mexico | 30 April annually; 1 January to 31 December reporting year |
| New York* | Every two years within thirty days after the attorney's birthday |
| North Carolina** | 28 February annually |

| | |
|------------------|---|
| North Dakota | 31 July annually for year ending 30 June |
| Ohio* | 31 January biennially |
| Oklahoma** | 15 February annually |
| Oregon | Period end 31 December; due 31 January |
| Pennsylvania** | Group 1: 30 April Group 2: 31 August Group 3: 31 December |
| Rhode Island | 30 June annually |
| South Carolina** | 1 January annually |
| Tennessee* | 1 March annually |
| Texas | Minimum credits must be completed and reported by last day of birth month each year |
| Utah | 31 January annually |
| Vermont | 2 July annually |
| Virginia | 31 October completion deadline; 15 December reporting deadline |
| Washington | 31 January triennially |
| West Virginia | 31 July biennially; reporting period ends 30 June |
| Wisconsin* | 1 February biennially; period ends 31 December |
| Wyoming | 30 January annually |

* Military exempt (exemption must be declared with state).

**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2004-2005).

| | | | |
|---------------|---|--|--|
| 5 – 6 Nov. 05 | Topeka, KS Washburn School of Law | Civil Law Legal Assistance Operational Law Criminal Law | MAJ Fran Brunner (785) 274-1027 Fran.brunner@ks.ngb.army.mil |
|---------------|---|--|--|

2. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available through the Defense Technical Information Center (DTIC)

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in

electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

- AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.
- AD A301095 Government Contract Law Desk book, vol. 2, JA-501-2-95.
- AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

- AD A384333 Soldiers' and Sailors' Civil Relief Act Guide, JA-260 (2000).
- AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).
- AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (1998).

AD A350514 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (1998).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Deployment Guide, JA-272 (1994).

AD A360704 Uniformed Services Former Spouses' Protection Act, JA 274 (2002).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231 (2002).

AD A347157 Environmental Law Deskbook, JA-234 (2002).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1997).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (1998).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (1999).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A303842 Trial Counsel and Defense Counsel Handbook, JA-310 (1995).

AD A302445 Nonjudicial Punishment, JA-330 (1995).

AD A302674 Crimes and Defenses Deskbook, JA-337 (1994).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2003).

* Indicates new publication or revised edition.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGSA Publications Available Through the LAAWS XXI JAGCNet, see the March 2005 issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia

continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. 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 TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

By Order of the Secretary of the Army:

PETER J. SCHOOMAKER
General, United States Army
Chief of Staff

Official:



SANDRA L. RILEY
Administrative Assistant to the
Secretary of the Army
0520109

Department of the Army
The Judge Advocate General's School
U.S. Army
ATTN: JAGS-ADA-P
Charlottesville, VA 22903-1781

PERIODICALS
