

CHAPTER 11

DETAINEE OPERATIONS

REFERENCES

1. Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949.
2. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.
3. Detainee Treatment Act of 2005, Pub. L. 109-148, Div. A, Title X, SEC. 1002-1006; and 42 U.S.C. § 2000dd-2000dd-1.
4. U.S. DEP'T OF ARMY, ARMY REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Oct. 97) (also published as a multi service regulation as MCO 3461.1, OPNAVINST 3461.6, AFJI 31-304).
5. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956)(incorporating Change No. 1 of 15 July 1976).
6. U.S. DEP'T OF DEFENSE DIR. 2310.01E, DoD DETAINEE PROGRAM (5 Sept. 2006).
7. Memorandum for Secretaries of the Military Departments, et al, Subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense, dtd. 7 Jul. 2006
8. U.S. DEP'T OF DEFENSE DIR. 2311.01E, DoD LAW OF WAR PROGRAM (9 May 2006), Incorporating Change 1 (15 Nov. 2010)
9. U.S. DEP'T OF THE ARMY, FIELD MANUAL 2-22.3. HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006)
10. U.S. DEP'T OF DEFENSE INSTR. 2310.08E MEDICAL PROGRAM SUPPORT FOR DETAINEE OPERATIONS (6 June 2006).
11. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-63, DETENTION OPERATIONS (30 May 2008)
12. Jennifer Elsea, Treatment of "Battlefield Detainees" in the War on Terrorism, Congressional Research Service Report, (15 Nov. 05), *available at* <http://fpc.state.gov/documents/organization/58279.pdf>.
13. U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-39.40, INTERNMENT AND RESETTLEMENT OPERATIONS (12 Feb. 2010).

I. FRAMEWORK

A. Throughout the 20th century, American forces have engaged adversaries in numerous conflicts across the spectrum of conflict. From the Banana Wars of the middle 1920s to World War II and Operation Desert Storm, American forces have captured personnel and treated them as criminals, insurgents, and prisoners of war (POWs). Following the attacks of September 11, 2001, American forces continued to detain individuals during conflicts.

B. The United States has been at the forefront of legally defining and treating its enemies since the inception of the Lieber Code in 1863.¹ The Hague Conventions of 1907 provided the first international attempt to codify treatment of captured individuals.² The first substantive treatment of captured personnel, however, was codified in the 1929 Geneva Conventions Relative to Prisoners of War.³ Following World War II, the international community came together to improve the 1929 POW Conventions to address significant shortcomings that arose during World War II. The 1949 Geneva Conventions became the preeminent international standard for treatment of POWs.⁴

¹ Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, (Apr. 24, 1863), reprinted in *The Laws of Armed Conflicts 3* (Dietrich Schindler & Jiri Tomas eds., 3d ed., 1988) [hereinafter Lieber Code].

² See Hague Convention IV Respecting Laws & Customs of War on Land, Oct. 18, 1907, art. 4-20, 36 Stat. 2227 [hereinafter Hague IV].

³ Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 Bevans 932.

⁴ See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III], Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

1. The full body of customary international law, as well as the Geneva Conventions of 1949, is triggered when an international armed conflict arises between two high contracting parties to the convention.⁵ Referred to as Common Article 2 conflicts, international armed conflict occurs during declared war or *de facto* conflicts between two contracting states. The easiest example to describe a recent international armed conflict is Operation Iraqi Freedom in which the United States and its coalition partners fought against the country of Iraq.

2. Partial or total occupation of the territory of a high contracting party also triggers the full body of customary international law as well as the Geneva Conventions of 1949.⁶

C. The United States has also participated in various non-international armed conflicts.⁷ Common Article 3 of the Geneva Conventions defines this type of conflict as an “[a]rmed conflict not of an international character occurring in the territory of one of the High Contracting Parties”⁸ These types of conflicts make up the vast bulk of ongoing conflicts. Whereas the existence of an international armed conflict triggers the entire body of the law of armed conflict, the existence of a non-international armed conflict only triggers application of Common Article 3’s “mini convention” protections.

1. Non-international armed conflicts are traditionally known as civil wars. They do not involve two belligerent states fighting each other. Rather, they involve one nation fighting indigenous forces, and may involve another state assisting the current government’s attempt to retain its sovereignty. Recently, however, the scope of these conflicts has expanded to include conflicts not contained within the boundaries of a single state.⁹ Non-international armed conflicts are deemed to be those armed conflicts between a state and an organized armed group that is not a recognized state (i.e any armed conflict that is not between nations).¹⁰

2. Non-international armed conflicts have significantly less international protections for its combatants than are provided by international law to combatants in international armed conflicts; the primary protections afforded to those involved in internal armed conflict derive from domestic law. Common Article 3 of the Geneva Conventions affords a minimal amount of protections for combatants involved in internal armed conflicts.¹¹ These protections are generally accepted as so basic to fundamental human rights that their universality is rarely questioned. The United States’ ongoing operations against Al Qaeda and the past American assistance to Columbia in its fight against the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarios de Colombia) (FARC) are examples of American forces in non-international armed conflicts.

D. Within the framework of the Global War on Terrorism (GWOT), are examples of both international and internal armed conflicts.

1. The United States characterized military operations conducted against the Taliban in Afghanistan during Operation Enduring Freedom (OEF) as international armed conflict, even though there was some question as to whether the Taliban constituted a government of that nation or was more appropriately characterized as one of a number of warring factions in a failed state. The United States also characterized military operations against the armed forces of Iraq in Operation Iraqi Freedom (OIF) as an international armed conflict.

2. The nature of the conflicts in both Afghanistan and Iraq evolved over time. In both cases, the continued U.S. / Coalition presence is/was based on our status as an invitee to the country as reflected in the either respective United Nations Security Council Resolutions (UNSCR) or the Security Agreement with Iraq.

3. Other coalition partners, nations, international organizations, and commentators have asserted that while U.S. forces were engaged in international armed conflict initially in Afghanistan and Iraq, U.S. forces became engaged in internal armed conflicts in support of the nascent Afghan and Iraqi governments as they endeavored to defeat opposition groups. For U.S. legal advisors, this required analysis of applicable policy related to the conduct of military operations —specifically DOD policy related to compliance with the law of war is established in DoD Directive 2311.01E.¹² The clear policy mandate of that directive is that the armed forces of the United States will

⁵ GC III, *supra* note 4, art. 2.

⁶ *Id.*

⁷ *See id.* art. 3.

⁸ *Id.*

⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 (2006).

¹⁰ *See id.*

¹¹ GC III, *supra* note 4, art. 3.

¹² U.S. DEP’T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM, (9 May 2005), incorporating Change 1 (15 Nov. 2010) [hereinafter DoD Dir. 2311.01E].

comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.¹³ The Army doctrine for specific treatment of detainees and the internment or resettlement of civilians is contained in JP 3-63, FM 3-63, and AR 190-8,¹⁴ all of which are drafted with Geneva Conventions III and IV as the standard. These standards of treatment are the default standards for detainee operations, unless directed otherwise by competent authority (usually the Combatant Commander or higher).

4. The main take-away for legal advisors involved in detainee operations is that there will likely be some uncertainty related to the nature of armed conflicts. Even when the nature of the conflict seems relatively apparent, each conflict will likely include new policy changes. With respect to detainee issues, it is essential to emphasize the basic mandate to treat all detainees humanely; to treat captured personnel consistently with the GC III until a more precise determination is made regarding status; and to raise specific issues on a case-by-case basis when resort to the policy mandate is insufficient to provide effective guidance to the operational decision-makers.

II. LEGALLY PROTECTED PERSONS

A. Under international law, JAs must analyze both the type of conflict and the type of person to determine the protections afforded to an individual by law. Since this is an evolving area of law and policy, JAs must be familiar with the doctrinal terminology. Military doctrine is grounded in the United States international treaties and judge advocates must be familiar with the terms found in the Geneva Conventions.

1. The following definitions are found in DoDD 2310.01E, DoD Detainee Program, and Joint Publication 3-63, Detainee Operations.¹⁵

a. *Detainee*. Any individual captured by, or transferred to the custody or control of, DoD personnel pursuant to the law of war. This does not include persons being held solely for law enforcement purposes, except where the United States is the occupying power. Detainees who are U.S. citizens or U.S. resident aliens will continue to enjoy all applicable rights and privileges under U.S. law and DoD regulations. As a matter of policy, all detainees will be treated as Enemy Prisoner of War (EPWs) until the appropriate legal status is determined and granted by competent authority IAW the criteria enumerated in GC III. Detaining officials must recognize that detained belligerents who have not satisfied the applicable criteria in GC III are still entitled to humane treatment, IAW Common Article 3 of GC III during non-international armed conflicts, and the principles set forth in Article 75 of Additional Protocol I to the Geneva Conventions during international armed conflicts. The inhumane treatment of detainees is prohibited and is not justified by the stress of combat or deep provocation.

b. *Belligerent*.¹⁶ In general, a person who is engaged in hostilities against the US or its multinational partners during an armed conflict. The term belligerent includes both privileged belligerent and unprivileged enemy belligerent.

(1) *Lawful Enemy Combatant*.¹⁷ Privileged belligerents are EPWs upon capture, and are entitled to combatant immunity for their lawful pre-capture war-like acts. They may be prosecuted for violations of the law of war. If so prosecuted, they still retain their status as EPWs.¹⁸

(2) *Unprivileged Enemy Belligerent*.¹⁹ Unprivileged enemy belligerents are belligerents who do not qualify for the distinct privileges of combatant status (e.g., combatant immunity). Examples of unprivileged belligerents are: (1) individuals who have forfeited the protections of civilian status by joining or substantially

¹³ *Id.* para. 4.1.

¹⁴ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-63, DETENTION OPERATIONS (13 Nov. 2014) [hereinafter JP 3-63] is the joint level doctrine for detention operations.

¹⁵ U.S. DEP'T OF DEFENSE, DIR. 2310.01E, DO DETAINEE PROGRAM, Glossary, Part II. (19 Aug. 2014) [hereinafter DoD DIR. 2310.01E].

¹⁶ JP 3-63, *supra* note 14 at viii. DoD DIR. 2310.01E does not define “belligerent,” only “unprivileged belligerent.”

¹⁷ DoD DIR. 2310.01E, *supra* note 15, at I-4.

¹⁸ This language mirrors the requirements found in article 4(a)(2) of the Third Geneva Convention (GC III). See GC III, *supra* note 4, art. 4. Therefore, in cases where additional guidance may be required, look to the law surrounding the development of GC III, article 4. This definition of lawful enemy combatant is narrower than the definition of enemy prisoner of war. The definition of lawful enemy combatant is limited to GC III, art. 4(a)(1) & (2); whereas, the definition of enemy prisoner of war includes all six categories of potential prisoner of war found in GC III, art. 4(a)(1)-(6). GC III, *supra* note 4, art. 4.

¹⁹ DoD DIR. 2310.01E, *supra* note 15, para. E.2.1.1.2.

supporting an enemy non-state armed group in the conduct of hostilities, and (2) Combatants who may forfeit the privileges of combatant status by engaging in spying, sabotage, or other similar acts behind enemy lines.

c. *Prisoner of War*.²⁰ An individual who is described by Articles 4 and 5 of GC III and who is in the custody or control of DoD.

d. *Retained Person*.²¹ An individual who is described by Article 28 of GC I²² and Article 33 of GC III and who is in the custody or control of DoD.

e. *Civilian Internee*.²³ Any civilian, including any person described by Article 4 of GC IV, who is in the custody or control of DoD during an armed conflict or case of occupation, such as those held for imperative reasons of security or protection.²⁴

2. The following are defined persons found in Geneva Conventions III (GC III) and IV (GC IV).

a. *Prisoner of War (POW)*. A detained person as defined in Article 4 of GC III. Traditionally these are members of the armed forces of a party or militias forming a part of an armed force who comply with criteria set out in Article 4(a)(2) of GC III. The term Enemy Prisoner of War (EPW) is also used by U.S. forces.²⁵ There is no legal difference between POWs and EPWs. As a matter of practice, EPW refers to POWs that Americans capture in international armed conflict. POW is the term for US service members captured by our enemy. POW is also the international name of choice for armed forces captured on the battlefield.

b. *Protected Person*. A person protected under GC IV is any person who at a given moment and in any manner whatsoever finds himself in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power, of which he is not a national.²⁶ Furthermore, if an individual falls into one of the following four categories, they are excluded from the protections given to a “protected person” under the GC IV: a) nationals of a State not bound by the GC; b) nationals of a neutral State with normal diplomatic relations with the Detaining Power; c) nationals of a co-belligerent State with normal diplomatic relations with the Detaining Power; or d) individuals covered by another Geneva Convention.²⁷

c. *Detainee*. This term is not specifically defined in the Geneva Conventions.²⁸ However, this term is used in some articles discussing the due process rights of civilians being held by an Occupying Power.

d. *Civilian Internee*. A civilian internee is a civilian who is interned during international armed conflict or occupation for imperative reasons of security or for committing an offense against the detaining power.²⁹

3. Other terms for Detainees. The following names have been used to describe persons detained by U.S. forces in the since 2001. Some of the terms have no legal background while others are used to describe persons who did not appear to fit neatly into the recognized framework of the Geneva Conventions. Since the adoption of various definitions in DoD Directive 2310.01E, JAs should work to categorizing detainees in accordance with the DoD Detainee Program or Geneva Conventions at the lowest possible level.

- a. Unlawful Enemy Combatant
- b. Person of Interest / Person Under US Control (PUC)

²⁰ *Id.*

²¹ *Id.*

²² Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956 [hereinafter GC I].

²³ DoD DIR. 2310.01E, *supra* note 15 at 13.

²⁴ These individuals qualify as “protected persons” under the Fourth Geneva Convention (GC IV). *See* GC IV, *supra* note 4, art. 4. Protected persons are entitled to various protections in Part II and Part III of GC IV. *Id.* Refer to the GC IV outline for additional details.

²⁵ *See* JP 3-63, *supra* note 14, at I-2.

²⁶ GC IV, *supra* note 4, art. 4.

²⁷ *Id.* In practice, few individuals would fall outside the protected person status since virtually all nations today consider themselves bound by the Conventions and any individual meeting the criteria of exclusion b and c should already receive some level of protection based upon the bilateral relationship between their State and the detaining powers. Thus, in current operations in and OEF, almost all persons would be “protected persons” in some way.

²⁸ GC IV, *supra* note 4, art. 76.

²⁹ *See generally*, GC IV, *supra* note 4, art. 79-135 (discussing the protections afforded to civilian internees).

- c. Terrorist
- d. Security Detainee

B. Status v. Treatment. The key for JAs is to ensure that servicemembers treat all detainees humanely.³⁰ Judge Advocates can look to Common Article 3 as a minimum yardstick for humane treatment.³¹ Although individuals defined as a person protected in the Geneva Conventions during international armed conflict may be entitled to greater protections as a matter of law, all individuals initially are entitled to humane treatment.

C. Detainee Treatment Act. On December 30, 2005, President Bush signed the Department of Defense Appropriations Act of 2006 that included the “Detainee Treatment Act of 2005.”³²

1. Section 1002 directly relates to the treatment of detainees under DoD custody or effective control. No detainee in custody shall be subject to any treatment not authorized by the Army Field Manual on Intelligence Interrogation. The FM was re-released as FM 2-22.3, Human Intelligence Collector Operations, on September 6, 2006. By Executive Order, President Obama extended the coverage of section 1002 to ALL agencies in the US Government. After January 22, 2009, “any individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3 (Manual).”³³

2. Section 1003 states that no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhumane, or degrading treatment or punishment.³⁴ Note this section goes beyond DoD to the entire USG. This should be of special emphasis to JAs when dealing with agencies and personnel outside of DoD.

D. The Detainee Treatment Act, along with numerous DoD publications recently published or revised, will be the guidance for commanders and JAs as we continue to prosecute the GWOT.

III. DETAINEE OPERATIONS IN GWOT

A. Operation Enduring Freedom (OEF)³⁵

1. Following the attacks on the United States on September 11, 2001, the United States prepared a myriad of potential responses against the attackers. Once Al Qaida was identified as the entity responsible for the attack, the United States attacked the Al Qaida leadership and their Taliban allies in Afghanistan. In an Order dated 13 November 2001, the President authorized the Secretary of Defense (SECDEF) to detain individual subjects captured by American forces.³⁶ The order listed the basic protections that the individuals would receive,

- a. Humane treatment without distinction based on race, color, religion, gender, birth, wealth, or similar criteria;³⁷
- b. Adequate food, drinking water, shelter, clothing, and medical treatment;³⁸

³⁰ DoD DIR. 2310.01E, *supra* note 15, para. 4.1.

³¹ Exec. Order 13,491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4,893, 4,894 (Jan. 27, 2009).

³² Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (also commonly referred to as the McCain Amendment); Detainee Treatment Act of 2005, Pub. L. No. 109-148. This law was passed twice, with identical language, in both the 2005 National Defense Appropriations Act and the National Defense Authorization Act. For purposes of this outline, all references to the Detainee Treatment Act will be as published in Public Law 109-148.

³³ Exec. Order 13,491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4,893, 4,894 (Jan. 27, 2009).

³⁴ “[C]ruel, inhuman, or degrading treatment or punishment means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.” Detainee Treatment Act § 1003(d).

³⁵ For a full discussion of the historical treatment of both Al Qaida and the Taliban during the Global War on Terror see Congressional Research Service Report, *Treatment of “Battlefield Detainees” in the War on Terrorism*, Jennifer Elsea, updated 27 March 06 at <http://fpc.state.gov/documents/organization/58279.pdf>

³⁶ 66 Fed. Reg. 57833, 57834.

³⁷ *Id.*

- c. Free exercise of religion consistent with requirements for detention,³⁹ and
- d. In accordance with other such conditions as the SECDEF may proscribe.⁴⁰

2. The protections afforded captured individuals were not as broad as those found in Common Article 3 of the Geneva Conventions and were subject to criticism from domestic and international commentators.

3. On July 7, 2006, the Deputy Secretary of Defense issued new guidance to DoD in regards to individuals detained in the GWOT.⁴¹ Following the U.S. Supreme Court's decision in *Hamdan v. Rumsfeld*,⁴² the official DoD position is that Common Article 3 of the 1949 Geneva Conventions applies as a matter of law to the conflict with al Qaida.⁴³ The status of al Qaida, as an organization, has not changed. They remain a non-party to Geneva Conventions and therefore do not qualify for protection under the full body of the Geneva Conventions and customary international law. However, all individuals detained during OEF were entitled to humane treatment.

4. Two separate lines of command operated in Afghanistan under United Nations Security Council Resolutions: International Security Assistance Forces (ISAF) and Operation Enduring Freedom (OEF) forces. U.S. forces assigned to ISAF will comply with ISAF rules regarding detainee operations. U.S. forces assigned to OEF followed OEF rules regarding detainee operations. In both cases, the minimal standard of care owed to any individual captured by either ISAF or OEF forces was humane treatment. The specifics regarding the processing of an individual from point of capture (POC) to final disposition (release, continued detention, or prosecution) are guided by theater specific Standard Operating Procedures (SOPs). From September 2009 until September 2014, Combined Interagency Joint Task Force (CJIATF) 435 "was responsible for developing Afghanistan's rule of law and assisting the Afghan National Army in maintaining secure custody and humane treatment of detainees and U.S. Law of Armed Conflict detention operations during its five-year mission."⁴⁴ On 31 December 2014, the ISAF mission ended and the new NATO-led mission—Resolute Support (RS)—transitioned from a combat role to a train, advise, and assist mission,⁴⁵ effectively ending U.S. detention operations in Afghanistan.

B. Operation Iraqi Freedom (OIF)

1. American forces with their coalition allies began combat operations against Iraq in March 2003.⁴⁶ The USG announced that the entire body of the law of war, including the Geneva Conventions, would apply to American forces during OIF.

2. Immediately after combat operations began, American and allied coalition Soldiers captured Iraqi soldiers who were dressed in civilian clothes. Allied forces also were engaged by Saddam Fedayeen⁴⁷ forces wearing civilian clothes. The majority of Iraqi forces captured in the opening days of the war were taken to Camp Bucca in southeastern Iraq. Some of these individuals qualified for protection under GC III as POWs. However,

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (7 July 2006) available at <http://www.defenselink.mil/news/Aug2006/d20060814comm3.pdf> (last visited July 31, 2007) [hereinafter England Memorandum].

⁴² *Hamdan v. Rumsfeld*, 344 F.Supp. 2d 152, 162 (D.D.C. 2004), *rev'd* 413 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. 557 (2006).

⁴³ DoD DIR. 2310.01E, *supra* note 15, para. 4.2.

⁴⁴ North Atlantic Treaty Organization (NATO), Afghanistan Resolute Support, *CJIATF 435 holds inactivation ceremony*, available at <http://www.rs.nato.int/article/isaf-news/cjiatf-435-holds-inactivation-ceremony.html> (last visited June 4, 2015).

⁴⁵ North Atlantic Treaty Organization (NATO), Afghanistan Resolute Support, *About RS*, available at <http://www.rs.nato.int/mission.html> (last visited June 4, 2015).

⁴⁶ George W. Bush, President, President Bush Addresses the Nation (Mar. 19, 2003) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html>. (last visited Mar. 14, 2013)

⁴⁷ The paramilitary Fedayeen Saddam (Saddam's 'Men of Sacrifice') was founded by Saddam's son Uday in 1995. Saddam's Martyrs "Men of Sacrifice" *Fedayeen Saddam*, <http://www.globalsecurity.org/intell/world/iraq/fedayeen.htm> (last visited Aug. 6, 2007 – website no longer available). The Fedayeen, with a total strength reportedly between 18,000 and 40,000 troops, was composed of young soldiers recruited from regions loyal to Saddam. *Id.* The unit reported directly to the Presidential Palace, rather than through the army command, and was responsible for patrol and anti-smuggling duties. *Id.* Though at times improperly termed an "elite" unit, the Fedayeen was a politically reliable force that could be counted on to support Saddam against domestic opponents. *Id.*

other individuals who were detained were civilians who took a direct part in hostilities or posed a threat to security, but who would not qualify as a POW under GC III, art. 4.

3. President Bush declared an end to major combat activities on May 1, 2003.⁴⁸ This ostensibly began the occupation of Iraq by American and allied forces. The American occupation ended on June 28, 2004 with the transfer of sovereignty to the interim Iraqi government.⁴⁹ During major combat operations as well as during the occupation, individual detainees, who met the criteria of GC III, art. 4, could have qualified as a POW.

4. After January 1, 2009, and before full withdrawal in 2011, U.S. forces were supporting the Government of Iraq and were conducting operations in accordance with a security agreement.⁵⁰ Under the security agreement, “no detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi Law and pursuant to Article 4.”⁵¹ Article 4 allowed U.S. forces to conduct military operations that were coordinated with Iraqi authorities and conducted in accordance with Iraqi law.⁵² “In the event the United States Forces detain or arrest persons as authorized by . . . [the] agreement or Iraqi law, such persons must be handed over to competent Iraqi authorities within twenty-four hours from the time of their detention or arrest.”⁵³ Therefore, the detention regime in Iraq changed from one based on international law, where detention was necessary for imperative reasons of security, to a law enforcement detention regime grounded in Iraq’s domestic criminal law.

IV. PRACTICAL CONSIDERATIONS IN DETAINEE OPERATIONS

A. In any operation, there should be a system in place “for the capture, evidence collection, processing, questioning, tracking, internment, prosecution, and subsequent release of captured individuals.”⁵⁴ While some of the specific details and procedures will be classified, the basic requirements for compiling a detainee packet are likely to remain the same.

B. The JA must be familiar with the specific authority authorizing detention of the individual. Detention authority may come from the Geneva Conventions, a United Nations Security Council Resolution, or the host nation domestic criminal law. The specific authority to detain individuals will likely impact some of the due process owed to an individual detainee. However, at a minimum, all detainees should receive humane treatment.

C. To ensure that an individual is properly detained, the unit must complete the correct administrative paperwork, provide evidence linking the detainee to the reason for detention (e.g. attack on US Forces), and provide evidence linking the detainee to the witnesses.⁵⁵ Evidence linking the detainee to the basis for detention includes photographs, sworn statements, diagrams, and physical evidence.⁵⁶ However, the legal basis for which you are detaining the individual will play a significant role in what type of evidence is collected and how much risk and time

⁴⁸ George W. Bush, President, President Bush Announces Major Combat Operations in Iraq Have Ended, Remarks by the President from the USS Abraham Lincoln At Sea Off the Coast of San Diego, California, (May 1, 2003) *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-15.html>. (last visited Mar. 14, 2013).

⁴⁹ S. C. Res. 1546, ¶ 1, U.N. Doc. S/RES/1546 (June 8, 2004).

⁵⁰ Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq (Nov. 17, 2008) [hereinafter Security Agreement].

⁵¹ *Id.* art. 22.

⁵² *Id.* art. 4. After January 1, 2009, U.S. forces are conducting detention operations under the Iraqi criminal procedure code and the Security Agreement between the United States and Iraq. *Id.* Iraq follows the civil law legal tradition. Major W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—A Look at the Task Force 134 Process and the Future of Detainee Prosecutions* ARMY LAW., July 2007, at 72, 73. The Iraqi Code of Criminal Proceedings does not appear to specify any evidentiary standards for either an arrest warrant or a search warrant. *See id.* at 73-75; *see also* Chapter 4, Section 2, of the Iraqi Law on Criminal Proceedings detailing how witnesses are heard and their testimony recorded under Iraqi law.

⁵³ *Id.* art. 22.

⁵⁴ CENTER FOR MILITARY LAW AND OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, FORGED IN THE FIRE, LEGAL LESSONS LEARNED DURING MILITARY OPERATION 1994-2006 33 (Sept. 2006).

⁵⁵ PowerPoint Presentation, Detainee Operations, Joint Readiness Training Center (2006) [hereinafter JRTC PowerPoint].

⁵⁶ TASK FORCE 134, MULTI-NATIONAL FORCE – IRAQ, SOLDIER’S INVESTIGATION GUIDE AND CRIME TIP MANUAL 3 (2006) [hereinafter TF 134 Guide].

will be allocated to the evidence collection effort. For example, if the detainee is a prisoner of war captured with the rest of his unit, the on-scene commander will likely be more concerned with properly completing the capture tag than with collecting evidence for use in a criminal trial. Conversely, if the theater of operations has evolved to evidence based targeting operations, the collection of evidence at the point of capture may be the decisive point of the operation.

1. Photographs. Units should use photographs to connect the individual detained to the basis for detention. These photographs can be and frequently are presented to host nation judges or magistrates who review files to determine if continued detention is appropriate.⁵⁷ Individuals from the unit should take photographs of all potentially relevant evidence, such as weapons, ammunition, money, detonators, etc.⁵⁸ Taking photographs helps maintain the integrity of the evidence. “In documenting your evidence at the site, you have not only shown the evidence exists, but what it looked like when you found it and where it was when you found it.”⁵⁹ Therefore, take photographs before the evidence is moved.⁶⁰ Attempt to capture photographs covering 360 degrees around the site.⁶¹ Furthermore, the photographs should include any notable landmarks or reference points which may be helpful to put the scene into context for the judge or other reviewer.⁶² A series of photographs of the site, building, or area will help establish the view so that the judge can formulate an idea of what the site looked like to Soldiers on the day of the operation.⁶³ It is important to mark the photographs with a date time stamp.

2. Statements. At least two, preferably three, Soldiers who were at the scene must write a detailed account of why the individual is being detained.⁶⁴ Each sworn statement should cover the who, what, when, where, why and how of the detention.⁶⁵ These statements provide much of the information used to conduct the initial magistrate’s review and should support the potentially higher legal standard applied during the potential future criminal prosecution. Operational concerns make it is unlikely that the unit will make an additional trip to the point of detention to collect additional information. It is important to collect as much information in the initial sworn statements as possible to fully describe the circumstances of detention. Remember, it is the content of the statement that is key. Therefore, even if the Soldiers do not have a DA Form 2823 (Sworn Statement) available at the point of capture, they should record the information on any piece of paper and transfer the information to a DA Form 2823 as soon as the security situation permits. A common mistake is that a Soldier without firsthand knowledge relates a statement about what they heard happened leading to the detention. Often, the statement is written down by a detainee escort who had no involvement in the actual detention of the individual. These statements are unreliable and lack credibility when presented to host nation judges or magistrates.

a. Who: Clearly identify the detainee by name and capture tag number. If multiple individuals are detained in the same operation, list all individuals who are detained together. It is important to link potential co-defendants together in both the sworn statement and on the apprehension form.⁶⁶ Furthermore, the statement should also identify other members of the unit who were present for the operation by full name and rank.⁶⁷

⁵⁷ Although the Central Criminal Court of Iraq (CCCI) originally worked out of the Green Zone, it now has ten panels throughout Iraq located in Baghdad, Kut, Hillah, Baquba, Tikrit, Najaf, Karbala, Basrah. JRTC PowerPoint, *supra* note 73, at slide 12.

⁵⁸ TF 134 GUIDE, *supra* note 53, at 4.

⁵⁹ PowerPoint Presentation, The All Army Evidence Awareness Training Support Package (3 Aug. 2007) (information contained in the notes section of slide 22) [hereinafter Evidence PowerPoint Presentation].

⁶⁰ *Id.* If time permits, take multiple photographs of the evidence. *Id.* One set should contain a measuring device to give the judge perspective. *Id.* If possible, take photographs from a ninety degree angle (from overhead) to capture the most accurate dimension. *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Evidence PowerPoint Presentation, *supra* note 56, slide 22.

⁶⁴ See U.S. DEP’T OF ARMY, FIELD MANUAL 3-90.6, THE BRIGADE COMBAT TEAM Table G-1(4 Aug. 2006). Documenting the reason for detention is part of a common task trained to all Soldiers. Writing a sworn statement is part of the Tag requirement from the 5Ss and T (Silence, Segregate, Safeguard, Speed to a Safe Area / Rear and Tag) training for detainees at the point of capture. *Id.* This is not a task imposed by the prosecutors.

⁶⁵ *Id.*

⁶⁶ If one of the potential co-defendants is released and others are forwarded to the theater internment facility (TIF), annotate the reason for the release in the files of all remaining co-defendants. Do not allow the detainees to “blame the crime on the guy who was released” when they are tried before the Central Criminal Court of Iraq.

⁶⁷ TF 134 GUIDE, *supra* note 53, at 4. Ideally, you should list at least five Soldiers who were actual witnesses to the detention. *Id.* Remember that the individuals prosecuting this case are likely not assigned to your unit. The prosecutors are likely assigned

b. What: Explain what happened and the events leading up to the detainee's capture.⁶⁸ This description should include what the overall mission of the unit was that day, such as, patrol, convoy, or raid. Furthermore, this explanation should include what the unit found in terms of contraband, if anything.

c. When: Record the date and time of the incident.⁶⁹ Include the time and location of all significant events that occurred during the mission. For example, if the unit took small arms fire before detaining the individual, include the time and location for both the small arms fire and the detention.

d. Where: The statement should include both a grid location and physical description of where the individual was detained. While other members of the military can relate to the grid location, local judges are better able to relate to a physical description that refers to local landmarks. Therefore, the where section of the statement should identify the nearest town, street name (local not the Main Supply Route (MSR) name given by US forces), mosque, or other notable landmark.⁷⁰

e. Why: Explain what the events and / or unclassified information that led the unit to the search or to the detention. Furthermore, annotate whether or not the detainee made a confession or admission at the point of capture.⁷¹

f. How: Explain how the unit accomplished the mission and how the items or detainees were found.

g. Classification: Attempt to ensure that the content of each statement is unclassified. While the detainee packet itself may contain information from classified target folders, intelligence debriefings, or other classified information, the statements should contain only information that is releasable to the host nation.

3. Diagrams. Diagrams or sketches are essential to put the operation into context for the judge. The diagram relates the location of the physical evidence seized by US forces to the location of the detainee in the house, on the street, or in the field. The diagram, or sketch, "is the quickest and easiest way to document and exhibit the layout of a site."⁷² Ideally, Soldiers should complete the diagram "before the evidence is collected and it should be used to reaffirm the location of evidence, and the location of your site."⁷³ The diagram should also correspond to the photographs taken at the site.⁷⁴ The diagram can help relate the location of landmarks or other significant points of interest to where the evidence was found. Make sure that the diagram has a key or legend, as required. Ensure that distances are properly marked. Estimates of sizes and distances are acceptable if taking exact measurements is not feasible.

D. The contents of the detainee packet supplement the physical evidence taken from the objective. The unit may and should seize items that connect the detainee to the basis for detention.⁷⁵ Examples of evidence seized by U.S. forces could include the following: weapons, scopes, ammunition, cell phones, pagers, documents, computers,

to another service. The case may not go to trial for six to twelve months. Add as much contact information as possible to help make future witness production easier.

⁶⁸ TF 134 GUIDE, *supra* note 53, at 5.

⁶⁹ *Id.* The time date group should be consistent with the information presented on the apprehension form. If there is any inconsistency between the date time group in the sworn statement and that in the apprehension form, then the Combined Review and Release Board will use the information on the apprehension form. Interview with Lieutenant Commander David D. Furry, Student 55th Judge Advocate Officer Advanced Course, in Charlottesville, VA (Nov. 16, 2006) (discussing his previous assignment with Task Force 134 working on the Combined Review and Release Board).

⁷⁰ TF 134 GUIDE, *supra* note 53, at 5.

⁷¹ *Id.* Furthermore, the statement should refer to whether or not the detainee signed the evidence inventory form.

⁷² Evidence PowerPoint Presentation, *supra* note 56, slide 23.

⁷³ *Id.*

⁷⁴ Clearly label the diagram so that the link to various photographs is as clear as possible.

⁷⁵ The general rule regarding property is that "it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Hague IV, *supra* note 2, art. 23(g). Any property seized by members of the United States armed forces is property of the United States and not property of the individual conducting the seizure. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10 THE LAW OF LAND WARFARE para. 396 (18 July 1956) [hereinafter FM 27-10].

thumb drives, fake identification documents, passports, bomb making material (such as wiring, circuit boards, blasting caps, plastic explosives, artillery rounds, copper, batteries, car alarms, garage door openers, and timers).⁷⁶

1. Evidence Handling: Attempt to maintain evidence consistent with chain of custody requirements for evidence presented in U.S. courts. While the evidence may not be presented before a judge, the chain of custody is still important from an operational, intelligence, and legal perspective.

2. It is important to document all property seizures with either a DD Form 2745 (Enemy Prisoner of War [EPW] Capture Tag) or DA Form 4137 (Evidence Property/Custody Document).⁷⁷ Make sure that the documentation clearly ties the item to one individual if multiple individuals are detained during the same operation. If neither the DD Form 2745 nor the DA Form 4137 is available on the objective, capture the content of the information to be transferred to the proper form later in a more secure location.

3. Note that only a Commander can order the seizure of funds. If the unit seizes any money, account for each piece of currency by amount. Furthermore, United States currency must be accounted for by serial number. Thus, a key element of unit level planning is also obtaining a safe to ensure the evidence custodian has a means to secure cash and other high value items. Such funds may be turned over to finance, but all evidence custodians should be trained and maintain records of such transactions just as would a Class A agent or armorer.

E. Some common forms required in previous operations include:

1. Capture Tag or Theater Specific Apprehension Form
2. DA Form 2823 (Sworn Statement) (times two)
3. DA Form 4137 (Evidence Property / Custody Document)
4. DD Form 2708 Receipt for Inmate or Detained Person
5. Theater Specific Evidence Accountability and Tracking Forms

F. Some common errors in detainee evidence packet development include:⁷⁸

1. Statements with insufficient detail.
2. Explosive Residue test results as the sole basis for detention.
3. Detaining groups without investigating the culpability of each member of the group (this results in insufficient evidentiary packets; without evidence substantiating the reason for detention, detainees must be released)
4. Enemy propaganda as the sole basis for detention.
5. Statement written by Soldier without actual knowledge of content of the statement – relaying hearsay.
6. Identical statements provided by multiple witnesses.
7. Detainee engaged in suspicious activity (lying to or fleeing from Coalition Forces) as the sole basis for continued confinement.

⁷⁶ PowerPoint Presentation, The All Army Evidence Awareness Training Support Package (3 Aug. 2007).

⁷⁷ See FM 27-10, *supra* note 72, para 409. The information contained on the DA Form 4137 may be used to support or refute future claims by detainees. Therefore, the content should be as thorough and accurate as possible.

⁷⁸ 4th Infantry Division (OIF 05-07) After Action Review, 11-12 (1 Feb. 2007) (covering lessons learned by the Office of the Staff Judge Advocate).

8. Only evidence supporting detention is guilt by association (phone activity with known bad guys)
9. Lack of photos or diagrams.
10. Failure to corroborate times with events.

G. The Role of the Judge Advocate may include the following:

1. Participate in targeting meetings and assist in target folder development. In some cases, the unclassified evidence in the target folder will form the basis for a host nation arrest or search warrant. The JA may be called upon to serve as the liaison with the host nation judge to obtain warrants for unit targets.

2. Review the initial packet for completeness and conduct a magistrate's review.

3. Ensure accuracy of the forms submitted in the packet and assist the unit in identifying relevant evidence or information that could support continued detention.

4. Be the counselor who is willing to advise the Commander when the evidence does not support continued detention.

5. Be prepared to answer requests for assistance from higher headquarters prosecuting the detainee in the host nation legal system.

6. Provide an advocacy memorandum for select detainees being processed for early release.

7. Participate in regular inspections of detention facilities.

8. Help prepare unit witnesses to testify before a host nation court.

H. Point of Capture (POC) Processing:

1. Note that the Appendix that accompanied this Chapter in 2014 has been deleted. FM 3-90.6, *Brigade Combat Team* (14 Sept. 2010) deleted an appendix from the 2006 version of FM 3-90.6 that listed steps for processing detainees using the "5 S's and T" standard. The new FM 3-63, *Detainee Operations* (28 Apr. 2014) (FOR OFFICIAL USE ONLY) contains a wealth of information on conducting tactical detention operations, including from the initial POC; however, because of the "FOR OFFICIAL USE ONLY (FOUO)" security classification, public distribution of information in the manual, while unclassified, is restricted. Practitioners should refer to Chapter 4 of FM 3-63 for further guidance.⁷⁹

⁷⁹ FM 3-63 is available at the U.S. Army's Official Department of the Army (DA) Publication and Forms portal at: <https://armypubs.us.army.mil> (Common Access Card log-in required). Users are reminded to properly transmit and store FOUO material in accordance with Army Regulations (ARs). See U.S. DEP'T OF ARMY, REG. 380-5, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM (29 Sept. 2000) [hereinafter AR 380-5] and AR 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM (1 Nov. 1997).

THIS PAGE INTENTIONALLY BLANK