

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/iccjwww/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 mujajedeem.”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.