

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

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

Introduction

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

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

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

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

A Doctrinal “Twilight Zone”

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

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

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

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

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

² *Id.*

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

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

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

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

⁷ *Id.*

⁸ *Id.*

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

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

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

¹² *Id.*

¹³ *Id.*

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

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

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

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

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

¹⁴ *Id.*

¹⁵ *Id.*

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

¹⁷ 18 U.S.C. § 2340A (2000).

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

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

²⁰ *FM 34-52*, *supra* note 1.

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

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

Synchronization Is Critical

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

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

Command and Control of the Interrogation Process

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

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

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

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

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

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

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

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

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

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

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

²⁴ See *id.* at 2-2, 2-13.

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

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

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

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

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

³⁰ *Id.*

³¹ See *id.*

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

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

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

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

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

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

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

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

The Interrogation Process

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

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

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

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

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

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

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

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

³⁴ FM 34-52, *supra* note 1, at 2-11.

³⁵ *Id.* at 2-11.

³⁶ *Id.* at 3-7 to 3-29.

³⁷ *Id.* at 3-10.

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

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

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

³⁸ See *id.* at 3-16.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁰ See *id.* at 3-21.

⁴¹ See *id.* at 3-14 to 3-28.

⁴² See *id.* at 3-28.

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

Regulation of Interrogation: The Relationship Between Law and Policy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵³ See GPW, *supra* note 18, art. 4.

⁵⁴ See GC, *supra* note 18, art. 31.

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

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

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

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

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

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

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

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

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

. . .

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

. . .

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

Id. at 1-8.

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

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

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

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

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

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

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

The Relationship Between Component Authorities and the Joint Operational Command⁶²

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁵ *Id.* at II-6.

⁶⁶ *Id.* at II-10 - 11.

⁶⁷ 10 U.S.C. § 3062 (2000).

⁶⁸ GC I-IV, *supra* note 18, art. 3.

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

⁷⁰ GC I-IV, *supra* note 18, art. 3.

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

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

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

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

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

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

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

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

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

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

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

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

The Way Ahead

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

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

⁷⁷ *Id.*

⁷⁸ *Id.*

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

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

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

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

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

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

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

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

The Legal Equation

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

Impact of Conflict Status on Legal Analysis

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

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

² *Id.*

³ *Id.*

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

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

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

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

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

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

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

⁸ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

. . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁶ 808 F. Supp. 791 (1992).

²⁷ *Id.* at 794.

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

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

Id. (footnotes omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is clear from a review of the ICRC Commentary that the desire to interject some limited humanitarian regulation into a realm of activities historically shielded from international regulation served as the motivating drive behind inclusion of Common Article 3 into the four Conventions. Indeed, it was the almost “self evident” legitimacy of requiring such limited humanitarian respect in such conflicts that served as the logical basis for the international regulation of events solely within the sphere of state sovereignty. In this respect, Common Article 3 can be regarded as somewhat of an extension of the principle that absent applicable treaty provisions, individuals effected by conflict remain under the protection of the principles of humanity. This principle is reflected in the “Martens” Clause,” which was first included in the Preamble of the Hague Convention of 1899 and has been replicated in subsequent law of war treaties and statutes.

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

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

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

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

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

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

See Letter of Transmittal *supra*.

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

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

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

Impact of DOD Policy on Legal Analysis

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

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

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

Analyzing Applicability of Law of War Treaties

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

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

²⁸ DOD DIR. 5100.77, *supra* note 4.

²⁹ *Id.*

³⁰ *Id.*

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

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

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

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

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

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

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

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

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

³⁵ Cultural Property Convention, *supra* note 6.

³⁶ U.S. CONST. art. VI.

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

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

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

⁴⁰ *Id.*

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

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

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

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

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

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

⁴⁷ *Id.* at 116-21.

⁴⁸ *Id.*

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

Rules Applicable to This Incident⁵¹

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

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

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

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

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

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

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

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

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

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

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

⁵⁴ *Id.* at art. 56.

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

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

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

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

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

⁵⁵ See GC, *supra* note 10.

⁵⁶ *Id.* at art. 54.

⁵⁷ Hague IV, *supra* note 27.

⁵⁸ Cultural property is defined in the Convention as follows:

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

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

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

⁵⁹ *Id.* art. 4(1).

⁶⁰ *Id.* art. 4(2).

⁶¹ See *id.*

⁶² *Id.* art. 9.

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

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

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

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

⁶³ According to Article 8:

Granting of Special Protection

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

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

(b) are not used for military purposes.

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

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

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

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

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

Id. art. 8.

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

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

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

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

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

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

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

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

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

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

⁷⁰ *See id.*

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

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

⁷³ According to *FM 27-10*:

4. Sources

The law of war is derived from two principle sources:

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

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

⁷⁴ *See* Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 425 (1987).

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

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

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

Conclusion

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

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

⁷⁵ *Id.*

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

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

⁷⁸ See *supra* note 6.

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