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Articles

Book Review

Child Soldiers: Legal Obligations and U.S. Implementation

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Introduction

As the world continues its voyage into the 21st century, the international community continues to confront the issue of child soldiers. More than 300,000 children, some as young as seven or eight, are involved in more than thirty conflicts worldwide.[1] Some fight directly as combatants, while others serve as cooks, guards, or spies.[2] In Afghanistan, Taliban militants attempted to trick a six-year-old boy into being a suicide bomber.[3] In Iraq, al-Qaeda militants have used mentally handicapped children in their fight against Iraqi and Coalition forces.[4] Children have also been used as decoys in vehicles, to allow car bombs to approach or pass through checkpoints without raising suspicions.[5] Perhaps incrementally, the world legal community has begun to face this challenging problem. The first case to come before the International Criminal Court (ICC) involves a prosecution for the enlistment, conscription, and use of child soldiers.[6] The Special Court for Sierra Leone[7] recently rendered guilty verdicts against three senior members of an armed faction for, among other crimes, conscripting and using child soldiers.[8]

Meanwhile, activists both in and out of government continue to press for increased protections for children. A bill pending in Congress would, *inter alia*, prohibit military assistance to militaries or groups that recruit or use child soldiers.[9] Various nongovernmental organizations advocate on behalf of child soldiers, seeking increased legal protections as well as more direct humanitarian aid.[10] Given the international environment, judge advocates (JAs) are encouraged to develop a working knowledge of the law regarding child soldiers, as well as familiarity with the U.S. policies designed to ensure compliance with those laws. This article summarizes the basic legal obligations regarding the employment of children[11] and young adults as soldiers, and will further discuss U.S. practice to comply with those obligations.

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[1] UNICEF, Fact Sheet: Child Soldiers (on file with author); U.S. Dep't of State, The Facts About Child Soldiers, Aug. 8, 2005, *available at* http://www.state.gov/documents/organization/51160.pdf.

[2] *Id.*

[3] Jason Straziuso, *Boy: Taliban Recruited Me to Bomb Troops*, ASSOCIATED PRESS, June 25, 2007, http://www.breitbart.com/article.php?id=D8Q01SKG0&show_article=1.

[4] IRIN: UN Office for the Coordination of Humanitarian Affairs, Iraq: Mentally Hanicapped Children Used in Attacks, Apr. 10, 2007, http://www.irinnews.org/PrintReport.aspx?ReportId=71257.

[5] *Children Reportedly Used as Decoys in Bombing*, ASSOCIATED PRESS, 21 Mar. 2007, http://www.msnbc.msn.com/id/17724957/.

[6] International Criminal Court, The Office of the Prosecutor, *Report on the Activities Performed During the First Three Years (June 2003-June 2006)* 2 (Sept. 12, 2006), *available at* http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf.

[7] The Special Court for Sierra Leone is an independent tribunal established jointly by the United Nations and the Government of Sierra Leone.

[8] Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-04-16-T, Trial Chamber II, Judgment (June 20, 2007) (Special Court for Sierra Leone,).

[9] Child Soldier Prevention Act of 2007, S. 1175, 110th Cong. § 5.

[10] *E.g.*, Coalition to Stop the Use of Child Soldiers, http://www.child-soldiers.org (last visited Oct. 9, 2007); Human Rights Watch, Children's Rights, *Child Soldiers*, http://hrw.org/campaigns/crp/index.htm (last visited Oct. 9, 2007); Amnesty International, *Child Soldiers*, http://web.amnest.org/pages/childsoldiers-index-eng (last visited Aug. 8, 2007); American Friends Service Committee, *Child Soldiers*, http://www.afsc.org/issues/issue.php?id=315 (last visited Oct 9, 2007); War Child International, http://www.warchild.org/index.html (last visited Oct 9, 2007).

[11] Various treaties govern the employment of young individuals, and to do so define the term "children" and/or set forth permissible and impermissible uses of such persons. This article uses the term "children" only in a general sense. The term "child soldiers" will similarly be used in a general sense, often to refer to those individuals whom specific or collective treaties attempt to bar from participation in armed conflict.

Law

The participation of children in armed conflict has been subject to regulation only in recent years. Although the law of war has provided certain protections for children,[12] the ability of children to participate in armed conflict remained unregulated until the 1977 adoption of Additional Protocol I to the Geneva Conventions (Protocol I).[13] Protocol I requires parties to "take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities . . . ."[14] Protocol I allows the recruitment of persons ages fifteen to seventeen, but with a preference for those eighteen and older.[15] Although the United States is not a party to Protocol I, it has generally supported the application of this particular principle.[16] Protocol II, applicable to non-international armed conflicts, similarly prohibits the recruitment or participation of children in hostilities.[17] As with Protocol I, the United States is not a party to Protocol II; however, President Reagan submitted Protocol II to the Senate for advice and consent,[18] a request renewed by President Clinton.[19]

When defining punishable war crimes, the drafters of the Rome Statute of the ICC followed a similar course, allowing for the prosecution of those who conscript or enlist children under fifteen into armed forces or groups or use them to participate actively in hostilities.[20] Indeed, of four situations pending before the ICC,[21] all involve or are likely to involve the use of child soldiers.[22]

In addition to regulation under the laws of war, the use of child soldiers has been further regulated by human rights treaties. When the Convention on the Rights of the Child (CRC) came into being in 1989, it continued the framework of the 1977 Protocols and set as fifteen the minimum age for recruitment or participation in armed conflict.[23] The CRC was

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[12] *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 14, Aug. 12, 1949 ,6 U.S.T.S. 287 [hereinafter GC IV] (creating safety zones for protection of, among others, children under fifteen); art. 17 (encouraging removal of children from besieged or encircled areas); art. 23 (allowing for free passage of essential foodstuffs, clothing and tonics intended for children under fifteen); art. 24 (addressing children under fifteen who become orphaned or separated from their parents); art. 38 (granting certain rights to children under fifteen years); art. 50 (providing for care and education of children during occupation); art. 82 (addressing the internment of children together with their parents); art. 89 (allowing additional food for interned children under 15); art. 94 (addressing the education of interned children); art. 132 (providing information on release, repatriation, return, or accommodation of interned children).

[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

[14] *Id.* art. 77. Article 77 is contained in Part IV (Civilian Population), Section III (Treatment of Persons in the Power of a Party to the Conflict), Chapter II (Measures in Favour of Women and Children).

[15] *Id.*

[16] Michael J. Matheson, *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, 428 (1987).

[17] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4, 8 June 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

[18] LETTER OF TRANSMITTAL FROM PRESIDENT RONALD REAGAN, PROTOCOL II TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY NO. 2, 100th Cong., 1st Sess., at 111 (1987), *reprinted in* 81 AJIL 910 (1987). The State Department recommended ratification of Protocol II subject to one reservation and three understandings, none of which involved the provision on child soldiers. Letter of Submittal from the Secretary of State George P. Schultz, S. TREATY DOC. NO. 2, AT VII, IX(accompanying President Reagan's letter of transmittal dated 29 January 1987).

[19] LETTER OF TRANSMITTAL FROM PRESIDENT WILLIAM J. CLINTON, HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF AN ARMED CONFLICT, 1 PUB. PAPERS OF THE PRESIDENTS, WILLIAM J. CLINTON 13-14 (Jan. 6, 1999) (transmitting for advice and consent the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and reiterating support for Protocol II). The ratification of Protocol II does not appear to be a priority to President Bush. Letter from Jeffrey T. Bergner, Assistant Secretary Legislative Affairs, Department of State, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on Foreign Relations, U.S. Senate (Feb. 7, 2007) (noting the Administration's treaty priority list for the 110th Congress, and omitting Protocol II).

[20] Rome Statute of the International Criminal Court art. 8 (2)(e)(vii), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002. Although the United States is not party to the ICC, it is difficult to imagine U.S. objections to this particular provision.

[21] Democratic Republic of the Congo, Uganda, Central African Republic, and Sudan.

[22] *See* Ninth Diplomatic Briefing on the International Criminal Court: Information Package Mar. 29, 2007, at http://www.icc-cpi.int/library/about/ICC_DB9_IP_En.pdf; International Criminal Court, Fifth Session of the Assembly of State Parties, Opening Remarks, Statement of Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Nov. 23, 2006, at http://www.icc-cpi.int/library/organs/otp/LMO_20061123_en.pdf; Coalition to Stop Child Soldiers, Child Soldiers Global Report 2004, at http://www.child-soldiers.org/document_get.php?id=966.

[23] Convention on the Rights of the Child, art. 38, Nov. 20, 1989 (entered into force Sept. 2, 1990).

followed by the International Labour Organization's 1999 Worst Forms of Child Labour Convention (Child Labour Convention), a treaty to which the United States is a party.[24] Defining "children" as those persons under eighteen,[25] it prohibits forced or compulsory recruitment of children for use in armed conflict.[26] Under the Child Labour Convention, voluntary recruitment of children under eighteen remains permissible.

Although the United States has not ratified the CRC, it has endorsed even greater restrictions on the use of child soldiers. Since 2003, the United States has been party to the Optional Protocol to the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol on Children in Armed Conflict). The Optional Protocol on Children in Armed Conflict prohibits the compulsory recruitment of persons under age eighteen and requires that states "take all feasible measures" to ensure that those under eighteen "do not take a direct part in hostilities."[27] However, it permits voluntary recruitment of persons under eighteen, if the particular state party deposits a declaration at the time of ratification.[28] The United States did so, setting the minimum age for voluntary recruitment as age seventeen.[29] This declaration is consistent with U.S. law, which sets the minimum age for recruitment at eighteen, or seventeen with the written consent of the recruit's parent or guardian.[30] Other western powers have joined the Optional Protocol on Children in Armed Conflict with similar declarations.[31]

U.S. Military Policies

In accordance with U.S. law, many high school seniors sign enlistment contracts to enter the armed services.[32] These individuals are placed in the delayed entry program, and most turn eighteen before graduating from high school and beginning basic training.[33] Approximately 4% of new enlistees are age seventeen upon arrival at basic training, and 80% of those turn eighteen while in training.[34] To ensure that all feasible measures are taken to ensure that those still seventeen when assigned to their first post-training unit do not take a direct part in hostilities, the U.S. military services have adopted implementation plans. All the service policies well exceed the requirement to take "all feasible measures" to avoid "direct participation" in hostilities.[35]

> States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities . . . . States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

Id. at 38 (2-3). The United States signed the CRC on 16 February 1995, but has not ratified the treaty and does not appear inclined to do so, but for reasons unrelated to the participation of children in armed conflict. *See* Jeffrey T. Bergner, Assistant Secretary Legislative Affairs, U.S. Department of State Treaty Priority List for the 110th Congress (Feb. 7, 2007),

[24] Worst Forms of Child Labour Convention (No. 182), art. 2, June 17, 1999 (entered into force Nov. 19, 2000).

[25] *Id.*

[26] *Id.* art. 3.

[27] Optional Protocol to the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000 (entered into force Feb. 12, 2002) [hereinafter Optional Protocol on Children in Armed Conflict].

[28] *Id.*

[29] Declaration and Understandings by the United States to the Optional Protocol on Children in Armed Conflict, *supra* note 27, at http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=595&ps=P.

[30] 10 U.S.C. § 505(a) (2000).

[31] For example, Australia, Germany, Italy, France, and New Zealand all allow some form of voluntary recruitment at age seventeen. The United Kingdom allows voluntary recruitment at age sixteen, and further declares certain circumstances in which preventing those under eighteen from taking direct part in hostilities would not be feasible. Declarations by Australia, Germany, Italy, France, New Zealand, and the United Kingdom to the Optional Protocol on Children in Armed Conflict, *supra* note 27, at http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=595&ps=P.

[32] Initial Report of the United States of America to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict art. 3, at 7 (Sept. 14, 2002), *available at* http://www.state.gov/documents/organization/84649.pdf [hereinafter Initial Report on the Involvement of Children in Armed Conflict].

[33] *Id.*

[34] *Id.*

[35] *Id.* art. 1, at 1-2. Because the service policies are overly protective, this article does not address two important aspects related to the Optional Protocol on Children in Armed Conflict: (1) the meaning of "feasible measures," or under what circumstances a party could employ children under eighteen in a direct combat role; and (2) the meaning of "direct part in hostilities." Despite the fact that the United States is party to the most modern, protective treaty

Department of Defense (DOD)

The DOD has no formal directive or regulation governing the implementation of the Optional Protocol on Children in Armed Conflict, but did direct the implementation of and approve the plans of the military departments.[36]

Army

Soldiers may not be assigned or deployed outside the continental United States, and if inadvertently sent overseas, must be returned. However, Soldiers under eighteen may be assigned to or deploy to Alaska, Hawaii, and Puerto Rico, as well as to territories and possessions of the United States.[37]

Navy

Enlisted Sailors may not be issued orders to report to an operational command prior to age eighteen.[38] When practical, Sailors under eighteen will remain in the training pipeline.[39] If not practical to remain in the training pipeline, Sailors under eighteen will be assigned to shore duty.[40]

Air Force

The Air Force does not assign Airmen under eighteen to hostile fire/imminent danger areas.[41]

Marine Corps

Marines younger than eighteen years will not be assigned to units scheduled to operationally deploy, nor will commanders operationally deploy such Marines.[42] However, Marines younger than eighteen may deploy for training or exercises.[43]

Coast Guard

It is Coast Guard practice to not assign recent basic training graduates to conflict areas or to cutters serving in those regions.[44]

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regulating child soldiers, some advocates continue to direct criticism at the United States, either because the United States continues to recruit seventeen-year-olds, or because the United States is not aggressively advocating for increased prohibitions. *E.g.*, Human Rights Watch, Promises Broken: An Assessment of Children's Rights on the 10th Anniversary of the Convention on the Rights of the Child, at http://www.hrw.org/campaigns/crp/promises/soldiers.html; Coalition to Stop Child Soldiers, Child Soldiers Global Report 2004, at http://www.child-soldiers.org/document_get.php?id=966. The Child Soldiers Global Report 2004 notes that sixty-two seventeen-year-old U.S. servicemembers deployed to Iraq and Afghanistan in 2003 and 2004, but fails to address whether these servicemembers participated directly in hostilities or whether the United States took feasible measures in an attempt to prevent their participation. *Id.*

[36] Memorandum, Under Secretary of Defense, to Secretaries of the Army, Navy, and Air Force, subject: Approval of Service Plans to Comply with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (16 Jan. 2003).

[37] U.S. DEP'T OF ARMY, REG. 614-30, OVERSEAS SERVICE tbl. 3-1, para. 3-8h (11 Apr. 2007).

[38] U.S. DEP'T OF NAVY, NAVY MILITARY PERSONNEL MANUAL § 1306-126 (9 Apr. 2007).

[39] *Id.*

[40] *Id.* Sailors under eighteen may not be assigned to sea duty, overseas sea duty, or overseas remote land-based duty, but may be assigned to either shore duty or overseas shore duty. *Id.* § 1306-102, 126.

[41] U.S. DEP'T OF AIR FORCE, INSTR. 36-2110, ASSIGNMENTS para. 2.13 (20 Apr. 2005).

[42] Message, 1921140Z Apr 07, MARADMIN 272/07, subject: Revised 17 Year Old Marines in Combat Policy.

[43] *Id.*

Other Issues: Targeting and Prosecuting

Despite efforts by countries such as the United States, children will continue to take up arms against U.S. forces. With regard to targeting, young soldiers serving in a hostile army receive no special protection derived from their status as children.[45] Members of an armed force, no matter their age, can be targeted as combatants.[46] Children who are not members of an armed force are treated like any other civilian—they cannot be targeted unless and for such time as they take part in hostilities.[47] Of course, children may happen to be injured or killed, along with other civilians, if they are located in the proximity of military objectives.[48] Moreover, children who commit hostile acts or demonstrate hostile intent may lawfully be engaged in self-defense.[49]

Though international law has increasingly sought to prohibit child soldiers, the mere fact that a child serves in an armed force or participates in armed conflict does not itself render the child subject to criminal liability. Indeed, the assorted treaties governing child soldiers, from the Additional Protocols to the Optional Protocol on Children in Armed Conflict, do not prohibit the conduct of children, but instead reserve culpability for those who conscript or enlist child soldiers.[50] Though the child soldier is immune from prosecution for acts as such, he may still be subject to prosecution for the commission of war crimes, such as the murder of innocent civilians or the torture of detainees. In non-international armed conflict, insurgent fighters, including child soldiers, are not entitled to combatant immunity and may be prosecuted under domestic law for having engaged in hostilities. Of whatever form, prosecutions of child soldiers are rare, and the international legal community has yet to confront the myriad issues surrounding the prosecution of a person for war crimes committed as a child.[51]

Conclusion

Though the assorted U.S. military policies should prevent any seventeen-year-old service members from inadvertently taking a direct part in hostilities, JAs are advised to remain aware of the policies and their legal underpinnings. As international legal and advocacy communities focus their efforts on the elimination of the horrors associated with child

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[44] Initial Report on Children in Armed Conflict, *supra* note 32, at 6; *e.g.*, Message, 301750Z Mar 07, Commander, Coast Guard Personnel Command, subject: Solicitation for Afloat and Shoreside PATFORSWA Positions ISO Operation Iraqi Freedom.

[45] *See, e.g.*, GC IV, *supra* note 12; Protocol I, *supra* note 13. In an effort to protect those they view as innocent children, some advocates may declare that children are subject to "special respect" and protection, in accordance with GC IV and Protocol I. GC IV, *supra* note 12; Protocol I, *supra* note 13, art. 77. This view is faulty, however, in several respects. First, it is contrary to the very construction of Protocol I. Article 77, which provides for special respect and protection for children, is located in the section on "Treatment of Persons in the Power of a Party to the Conflict." *Id.* Both Article 77 and those in GC IV are designed to protect children who have been detained or who are present in an occupation or occupation-like setting. Neither of the commentaries written in the aftermath of the adoption of Protocol I supports a view that would extend special protection to underage combatants. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 897-903 (Yves Sandoz, et al. eds. 1987); MICHAEL BOTHE, ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICT: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 473-479 (1982) (noting that "a child below the age of fifteen who is in fact a member of the armed forces retains his combatant privilege and his entitlement to be a prisoner of war.").

[46] *See* Protocol I, *supra* note 13, arts. 43, 50.

[47] Protocol I allows the targeting of civilians "unless and for such time as they take a direct part in hostilities." *Id.* art. 51(3). The United States is not party to Protocol I, and the exact meaning and application of this particular phrase remains contested and controversial.

[48] *See id.*, art. 51(5)(b).

[49] CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE encl. A, paras. 2-4 (13 June 2005).

[50] BOTHE ET AL., *supra* note 45, at 477.

[51] William Glaberson, *A Legal Debate in Guantánamo on Boy Fighters*, N.Y. TIMES, June 3, 2007, at 1 (quoting Professor Michael Newton, Vanderbilt University Law School, as stating, "More and more child soldiers are being recruited, and they are committing heinous crimes. This is an issue the international community is going to have to confront."). The Additional Protocols clearly envision the prosecution of child soldiers for war crimes, as they prohibit the implementation of the death penalty on those under eighteen at the time of the offense. Protocol I, *supra* note 13, art. 77; Protocol II, *supra* note 17, art. 6. However, the ICC may not prosecute individuals who were under eighteen at the time of the offense. Rome Statute of the International Criminal Court art. 26, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002. Though the United States is not party to the ICC, it is party to the Optional Protocol on Children in Armed Conflict, which provides that child soldiers should be "demobilized or otherwise released from service" and "accord[ed] . . . all appropriate assistance for their physical and psychological recovery and their social reintegration." Optional Protocol on Children in Armed Conflict, *supra* note 27, art. 6. The Optional Protocol on Children in Armed Conflict does not explicitly bar prosecution of child soldiers for war crimes, but some advocates have asserted that the cited language does just that. Glaberson, *supra* note 51, at 1.

soldiers, the United States may find itself subject to criticism, both as to our own personnel policies and our actions against combatants who happen to be children. By understanding the law and U.S. policies, JAs can prevent inadvertent acts by U.S. forces, and act quickly to dispel any myths and rumors concerning our legal obligations.

Updating Army Regulation 550-51[1] to Meet the Needs of the Army's Evolving Mission

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This article represents an expansion of the 2005 article, "Bringing International Agreements Out of the Shadows: Confronting the Challenges of a Changing Force," printed in *The Army Lawyer*.[3] The 2005 article discussed several proposed changes to Army Regulation (AR) 550-51, which prescribes the Army policy, responsibilities, and procedures for the negotiation, conclusion, forwarding, and depositing of international agreements.[4] Between 2005 and 2007, additional changes have been incorporated into AR 550-51, which is now undergoing the process of publication.[5] This revised AR 550-51 calls for significant involvement of the Judge Advocate General's (JAG) Corps in the Army's International Agreement Process, and due to the extent of this involvement these revisions are of importance to each and every Army JAG officer.

The revised AR 550-51 is intended to implement Department of Defense Directive (DOD Dir.) 5530.3,[6] which in turn implements the applicable State Department guidance on the negotiation and execution of international agreements. In addition, the revision incorporates the Case-Zablocki Act (Case Act),[7] which requires the reporting of executive agreements to Congress. Practitioners in this area must be familiar with all of these sources of law.

The regulation was revised to take into account the needs of today's Army, while still ensuring that all agreements are made under the proper authority and by following the correct procedures. To accomplish these goals, five major revisions have been made to AR 550-51. The regulation now: (1) differentiates "International Agreements" from "Other International Arrangements" to more precisely clarify which agreements require coordination with, and approval from, higher authorities in the Department of the Army (DA) and the DOD; (2) provides detailed guidance on exactly when lawyers must become involved in the process of negotiation and conclusion of international agreements and international arrangements (called the "Agreement Process" in the regulation), and what the lawyer's role is once involved; (3) provides greater detail about the requirement for proponents of any proposed international agreement to identify specific substantive authority for each new obligation to be undertaken in the agreement;[8] (4) creates safeguards to ensure that all international agreements are made within the constraints set forth by DOD Dir. 5530.3 and Joint Chief of Staff Instruction (CJCSI) 2300.01C;[9] and (5) takes into account joint and inter-agency issues that were previously not explicitly considered in the former version of AR 550-51.

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[1] U.S. DEP'T OF ARMY, REG. 550-51, INTERNATIONAL AGREEMENTS AND OTHER INTERNATIONAL ARRANGEMENTS (forthcoming Fall 2007) [hereinafter AR 550-51].

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[3] Geoffrey Corn & Colonel James A. Schoettler, Jr., *Bringing International Agreements Out of the Shadows: Confronting the Challenges of a Changing Force*, ARMY LAW., July 2005, at 41.

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

[5] Note that language quoted in the 2005 article as being proposed for the new regulation has, in some cases, been revised or superseded since the 2005 article appeared.

[6] U.S. DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS (11 June 1987) [hereinafter DOD DIR. 5530.3].

[7] Case-Zablocki Act, 1 U.S.C. § 112b (2000).

[8] As is true of the 1998 AR 550-51, the revised AR 550-51 expressly states that it only provides the procedural authority to negotiate and conclude agreements, and that the substantive authority must be found elsewhere. However, this point has been often overlooked. Accordingly, the revised AR 550-51 includes greater detail on this requirement, making it a specific issue to be addressed in the required legal review at the beginning of the Agreement Process.

[9] JOINT CHIEF OF STAFF, JOINT PUB. 2300.01C, INTERNATIONAL AGREEMENTS (15 Mar. 2007) [hereinafter CJCSI 2300.01C].

Section I. Other International Arrangements

The nature of today's military operations frequently requires Army commanders to reach understandings with foreign counterparts regarding the implementation of their respective duties.[10] Where such arrangements do not involve new commitments on the part of the Army or the United States, but rather implement existing commitments, it makes little sense to require a commander to go through several levels of approval, including Headquarters, DA (HQDA), before such simple, yet essential, agreements can be completed. At the same time, HQDA, and the United States have a significant amount of interest in any agreement individual commanders may make with foreign entities, even at the local level, where such agreements involve new commitments of funds or new obligations on the part of the United States. In order to differentiate between immaterial local arrangements from commitments that could implicate broader Army and U.S. interests, the concept of an "Other International Arrangement" has been incorporated into the revised AR 550-51. An Other International Arrangement is defined as:

> Any instrument or arrangement concluded with one or more foreign governments (including their agencies, instrumentalities, or political subdivisions), or with an international organization that:
>
> (a) By its express terms, does not create any legal obligations on the part of the United States, such as arrangements and training plans, to include technical and operational annexes thereto, which are not intended, nor have the effect, of creating any international legal obligations between the United States and another state or international organization;
>
> (b) Is not considered an International Agreement under the provisions of 22 C.F.R. pt 181; and
>
> (c) Does not otherwise meet the definition of an International Agreement under this regulation.
>
> Other International Arrangements include "[a]greements solely to establish administrative procedures," as defined in paragraph E2.1.1.3.6, of DOD Dir. 5530.3, that simply set out procedures for the exercise of U.S. rights, and the performance of U.S. obligations, under an existing International Agreement without expanding, modifying or constraining those rights or obligations.[11]

The concept of Other International Arrangements has been introduced into the revised AR 550-51 to clarify that commanders may make arrangements within the scope of existing U.S. commitments without having to expend the time and resources required for the negotiation and conclusion of International Agreements.[12] However, in order to ensure that the concept is not (intentionally or inadvertently) misapplied in the field, the revised AR 550-51 also limits the scope of agreements and understandings that can be considered as Other International Arrangements.[13] Before any commander may conclude that a proposed agreement qualifies as an Other International Arrangement, the proposed agreement must be submitted for legal review.[14] This review must occur before negotiations may commence and before a draft agreement may be given to a foreign counterpart.[15] By requiring a legal review at this preliminary stage, the revised AR 550-51 ensures that the distinction between Other International Arrangements and International Agreements is properly observed, while at the same time affording commanders an early indication of what steps will be required for their proposed agreement to meet the requirements of the regulation.

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[10] For example, where the United States has negotiated mutual support arrangements with a country in which U.S. Army units are stationed, a local installation commander might wish to agree with the local fire department on the procedures by which the installation and the local fire department might cooperate in the event of a fire on the installation.

[11] AR 550-51, *supra* note 1, app. A, terms, para. 6.

[12] The terms "Negotiation" and "Conclusion" are each defined in the revised AR 550-51. *Id.* app. A, terms, paras. 3 & 5.

[13] For example, AR 550-51, paras. 4a(6) (any agreement which involves unprogrammed costs or U.S. fiscal implications ***must*** be an International Agreement), 4a(8) (any agreement which involves changes in U.S. logistic support ***must*** be an International Agreement), 4a(11) (any agreement which may potentially impact plans and programs of a combatant command ***must*** be an International Agreement), 4a(12) (any agreement which may potentially impact the development or procurement of weapons systems within NATO ***must*** be an International Agreement), and 4a(13) (any agreement which may involve the release of classified information ***must*** be an International Agreement). *Id.* paras. 4a(6), 4a(8), 4a(11), 4a(12), 4a(13) (emphasis added).

[14] *Id.* para. 4a(2)(e); *see infra* sec. II.

[15] *Id*.

The balance of this article focuses primarily upon the requirements applicable for the negotiation and conclusion of International Agreements. However, practitioners should be aware that many of these requirements, including legal reviews and record-keeping requirements, remain applicable to Other International Arrangements under the terms of the revised AR 550-51, although these requirements may be met within the command. The revised AR 550-51 should be read carefully to identify where requirements apply to Other International Agreements.

Section II. The Lawyer's Role

The process of negotiating and concluding International Agreements and Other International Arrangements can be very complicated, and may implicate issues of interest to various agencies within the executive branch. To ensure that these issues are appropriately addressed, it is imperative to have legal counsel involved at an early stage to identify applicable legal authorities, appropriately characterize the proposed agreement (i.e., is it an "International Agreement" or an "Other International Arrangement"), and to determine the specific agencies within the DA and the DOD with whom the proponent will need to coordinate during the Agreement Process. The revised AR 550-51 includes greater detail on the role of the lawyer in the Agreement Process, including required legal review at several stages. These stages are: (1) prior to the initiation of the Agreement Process, (2) prior to entering negotiations, (3) before any proposed language may be tendered to a foreign counterpart, and (4) before concluding the Agreement Process.[16] Further, DA field agencies, Army Commands (ACOMs), Army Service Component Commands (ASCC) and Direct Reporting Units (DRU) may request advisory opinions from the U.S. Army, Office of the Judge Advocate General (DAJA-IO) regarding their authority to initiate the Agreement Process, or to conduct an activity related thereto.[17]

Under the revised AR 550-51, commanders must obtain concurrence from their servicing legal office before initiating the Agreement Process.[18] The former AR 550-51 only required such concurrence prior to initialing the agreement.[19] By having the servicing legal office involved prior to the initiation of the Agreement Process, the Regulation ensures that time and resources are not expended on agreements for which the commander requires additional legal authority to negotiate or conclude.

As with prior versions of the regulation, the revised AR 550-51 further delegates authority granted to the Secretary of the Army to negotiate and conclude certain agreements. In any Agreement Process based on this redelegation of authority, the party to whom the authority has been delegated must ensure, in consultation with legal counsel, that it has both the substantive and procedural authority to perform the U.S. obligations that will be assumed under the proposed agreement.[20]

The redelegation of authority to negotiate and conclude an International Agreement is set forth in paragraph 5 of the revised AR 550-51;[21] however, primarily as the result of restrictions dictated by DOD Dir. 5530.3, specific limitations are imposed on this redelegated authority.[22] For example, paragraph 6a(1) of AR 550-51[23] specifically withholds authority to negotiate and conclude International Agreements having "policy significance" and as required by DOD Dir. 5530.3.[24] If a party wants to initiate the Agreement Process for an International Agreement which is limited by paragraph 6 of the revised AR 550-51, the party must first submit a request to HQDA (DAJA-IO), who will forward the request through the Army General Counsel (SAGC) to the office in the DOD or the DOD agency having approval authority for the proposed agreement.

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[16] AR 550-51, *supra* note 1, app. A, terms, para. 6.

[17] *Id.* para. 4c(1).

[18] *Id*. para. 4a(5).

[19] 1998 AR 550-51, *supra* note 4, para. 4a(7).

[20] AR 550-51, *supra* note 1, para. 5b(5).

[21] *Id.* para. 5.

[22] *Id.*

[23] AR 550-51, *supra* note 1, para. 6a(1).

[24] DOD DIR. 5530.3, *supra* note 6, para 8-4.

The SAGC will then coordinate the request with the appropriate offices within DA.[25] Such a request must include a legal memorandum stating the substantive and procedural authorities the command is relying upon, as well as other relevant legal considerations.[26] By requiring the command to submit such a request through DAJA-IO to DA and the DOD, the revised AR 550-51 ensures not only that the agreements of greatest sensitivity receive appropriate policy and technical review, but also that such agreements will get at least two levels of legal review. The first level of review occurs at the servicing legal office during the preparation of the legal memorandum, and the second level of review occurs at DAJA-IO prior to forwarding the request to SAGC.[27]

If the request is approved by the proper authority, the Agreement Process may continue; however, SAGC may designate a legal advisor to serve on the negotiation team.[28] This provision allows for the Agreement Process to move forward, while also working to ensure the command does not overstep its approved authority (which could be to the detriment of the Army and the United States).

As noted above, heads of DA Staff agencies, and commanders of ACOMs, ASCCs and DRUs must obtain a written opinion from their servicing legal office prior to commencing negotiations.[29] This legal review must be obtained regardless of whether paragraph 6 of the revised AR 550-51 applies to a proposed agreement. This opinion must, at a minimum, address four issues: (1) is the proposed agreement an International Agreement or an Other International Arrangement (as those terms are defined in AR 550-51); (2) does the proponent of the agreement have the proper procedural and substantive authority to continue the Agreement Process; (3) is there an adequate legal and factual basis for the proponent's position regarding whether or not the proposed agreement involves a Predominately DA Matter[30] or is Policy Significant (as defined in the regulation):[31] and (4) what intra-agency, and, if applicable, inter-agency, coordination is required?[32] By requiring this legal opinion prior to the start of negotiations, the commander will be able to determine upfront whether he or she has the authority to negotiate such an agreement as well as what procedural steps must be taken in connection with negotiation and conclusion of such an agreement.

The revised AR 550-51 requires the command to request its servicing legal office to detail a qualified attorney to the negotiations once they commence.[33] All proposed commitments, draft agreements, and changes to any draft must be submitted to the legal office for review, regardless of whether such an attorney is present during the negotiations.[34] The legal review must be completed before the proposed commitment, draft, or change may be tendered to a foreign counterpart. The legal review shall, at a minimum, cover the same four issues as the opinion obtained prior to the commencement of negotiations.[35] Although, this legal review may be very similar to the one obtained prior to negotiation, the requirement to obtain additional review during the Agreement Process is essential to ensure the draft language of an agreement does not overstep the authority granted to the command as the negotiations proceed.

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[25] AR 550-51, *supra* note 1, para. 6b.

[26] *Id*. para. 6b(1)(b).

[27] *Id.* paras. 4a, 4c.

[28] *Id*. para. 6d.

[29] *Id.* para. 4a(5).

[30] The concept of "Predominantly DA Matter" is discussed, *infra*, in Section V.

[31] AR 550-51, *supra* note 1, app. A, terms, para. 7.

[32] *Id*. para. 4a(2).

[33] *Id*. para. 4a(3).

[34] *Id*. para. 4a(4).

[35] *Id*. para. 4a(2) (1). As a practical matter, it may make more sense to include legal counsel in the negotiation so as to avoid the need to defer negotiations at intervals in order to refer back to counsel to secure legal opinions.

Finally, the proponent of the agreement must receive the concurrence of the servicing legal office prior to concluding the Agreement Process.[36] This final review allows the legal office to look over the entire agreement one last time and to ensure all required approvals and coordinations were secured, as well as ensure that all legal requirements were met.

Section III. Procedural Authority

As in prior versions of the regulation, the revised AR 550-51 expressly limits the procedural authority to negotiating and concluding International Agreements and Other International Arrangements. In earlier versions, the regulation indicated that substantive authority must be derived from another source.[37] These earlier versions also required that those delegated authority to negotiate and conclude an international agreement "must determine, in each case, in consultation with their legal counsel, whether they have substantive responsibility for a particular agreement."[38] In practice, the reference to "substantive responsibility" did not provide sufficient guidance for users of the regulation to understand what was required. The revised AR 550-51 not only clearly restricts the procedural authority for negotiating and concluding agreements, but it also unambiguously states that the substantive authority for each proposed U.S. obligation in the international agreement must be found in another source of law:

> This Regulation is of a procedural nature only (meaning that it only indicates who may Negotiate an International Agreement and how such agreements are Negotiated) and does not constitute substantive legal authority to Negotiate or Conclude any International Agreement. Substantive legal authority for each obligation proposed to be assumed by the United States in any International Agreement must be found in other law or regulation applicable to the relevant subject matter.[39]

Further, the revised AR 550-51 also defines both procedural and substantive authority in order to ensure the clarity of their meanings. Procedural authority is defined as:

> The delegated authority for the proposed Negotiating organization to Negotiate an International Agreement, and the delegated authority for the proposed signer to execute the International Agreement on behalf of the Army. These are separate authorities and each must be identified prior to Negotiation of an International Agreement. Typically, both authorities are granted in this regulation, but it is possible that SA may grant an organization authority to Negotiate a particular agreement, but withhold signing authority until HQDA reviews the final draft.[40]

As the name implies, procedural authority is only the authority to negotiate and possibly sign an agreement. This authority is based on a specific delegation of authority from the Secretary of the Army that is set out in AR 550-51.[41] On the other hand, substantive authority is the authority required to actually perform the obligations of the agreement. Substantive authority is defined as:

> The authority of the Negotiating organization to perform the US obligations being agreed to in the International Agreement. This authority is separate from Procedural Authority. Both Substantive Authority and Procedural Authority must be identified before an International Agreement is Negotiated.[42]

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[36] *Id*. para. 4a(5).

[37] 1998 AR 550-51, *supra* note 4, para. 5c ("Substantive legal authority for each obligation proposed to be assumed by the United States in any international agreement must be found in the law applicable to the relevant subject matter.").

[38] *Id*. para. 5b(4).

[39] *See* AR 550-51, *supra* note 1, para. 5b, 5c.

[40] *Id.* app. A, terms, para. 8.

[41] *Id.* para.5.

[42] *Id*. app. A, terms, para. 9.

By providing clear definitions of what constitutes procedural and substantive authority, and by explicitly requiring the proponent of an agreement to identify the source of their substantive authority (as opposed to "substantive responsibility," as under previous AR 550-51), the revised regulation is less ambiguous than its predecessor on the issue of what legal authority is required to support the negotiation and execution of an International Agreement.

Section IV. Proper Restraints

Many International Agreements concluded by Army units and agencies are not controlled by AR 550-51, but rather by other regulations, directives, and laws. As such, the revised AR 550-51 identifies such agreements and the sources which must be relied upon when making them. For example, the revised AR 550-51 notes that the negotiation of Defense Research, Development, Test and Evaluation (RDT&E) Information Exchange Program (IEP) annexes are covered by DOD Instr. 2015.4.[43]

Further, the Army's ability to unilaterally enter into International Agreements is limited in scope by DOD Dir. 5530.3 and, like former AR 550-51, the revised AR 550-51 is written to include all limitations imposed under this directive. In essence, the authority delegated to the Army under DOD Dir. 5530.3, and then redelegated under AR 550-51, is generally limited to the negotiation and conclusion of agreements that relate to "Predominantly DA Matters," as discussed in Section V below. Additionally, in connection with the legal reviews discussed in Section II, the revised AR 550-51 requires the proponent of an International Agreement to obtain concurrence from their servicing legal office, certifying that the proposed agreement fully complies with DOD Dir. 5530.3, before the Agreement Process can be initiated or concluded.[44]

Section V. Joint and Inter-Agency Issues

As noted above, the revised AR 550-51 expressly states that it is intended to provide guidance only for agreements and arrangements that deal with "Predominantly DA Matters." However, the expeditionary and coalition nature of today's military operations is leading to a decrease in the number of International Agreements or Other International Arrangements which fit exclusively under the Army's purview. The revised AR 550-51 has been written to take into account emerging joint and inter-agency issues in two ways; first, by clarifying that agreements implicating Combatant and other Unified Commands fall under authorities other than AR 550-51,[45] and second, by creating an obligation for Army commanders and DA Staff agencies to consider the nature and extent of inter-agency coordination required before commencing negotiation, and before concluding agreements that implicate these interests.[46]

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[43] *Id.* para. 1(a). Paragraph 1 also lists: (a) "Contracts made under the Federal Acquisition Regulation (FAR)"; (b) "Foreign Military Sales Credit Agreements"; (c) "Foreign Military Sales Letters of Offer and Acceptance and Letters of Intent"; (d) "Standardization Agreements" (e.g., STANAGs, ABCA Standards, ASCC Air Standards and NAVSTAGs) that (i) record the adoption of like or similar military equipment, ammunition, supplies, and stores or operational, logistic, and administrative procedures and (ii) do not provide for mutual support or cross-servicing of military equipment, ammunition, supplies, and stores or for mutual rendering of defense services, including training; (e) "Leases under 10 U.S.C. § 2667, 2675 and 22 U.S.C. § 2796"; (f) "Acquisitions or orders pursuant to cross-servicing agreements made under the authority of the North Atlantic Treaty Organization (NATO) Mutual Support Act (10 U.S.C. § 2341 and DODD 2010.9)" (note, however, that umbrella agreements, implementing arrangements, and cross-servicing agreements under the NATO Mutual Support Act do fall under the regulation); and (g) "International Agreements and Other International Arrangements Negotiated or Concluded by Army elements under express authority granted to that Army element by Unified Commands or Subordinate Unified Commands." In the case of agreements and arrangements under item (g) in the preceding sentence, the procedures set forth in CJCSI 2300.01C, "International Agreements," and in the applicable Combatant Command regulation or instruction apply. *See also id*. para. 4a(9) ("Acquisition-related International Agreements shall use the procedures set forth in DOD Instruction 5000.2, Enclosure 9, Section 4, and Defense Acquisition Guidebook, Chapter 11, Section 11.2.2."); para. 6a(9) ("Military and industrial security agreements under the provisions of DOD Directive 5230.11, paragraph 6.1."); and para. 6a(10) ("International Agreements relating to on-base financial institutions (for example, military banking facilities and credit unions) and international financial agreements requiring coordination with the Treasury Department under DOD 7000.14-R, Vol. 5 .").

[44] AR 550-51, *supra* note 1, para. 4a(5). The certification must also indicate that the proposed agreement complies with the Case Act to the extent Case Act compliance is possible at the time the certification is made. *Id.*

[45] *Id.* para. 1h ("International Agreements and Other International Arrangements Negotiated or Concluded by Army elements under express authority granted to that Army element by Unified Commands or Subordinate Unified Commands. In the case of such agreements and arrangements, the procedures set forth in CJCSI 2300.01C, "International Agreements," and in the applicable Combatant Command regulation or instruction apply.").

[46] For example, *id.* para. 4a(2)(d) ("Heads of DA staff agencies and the commanders of each ACOM, ASCC, and DRU shall secure a written opinion from their respective servicing legal office that addresses what inter-agency coordination is required prior to commencing negotiation of a proposed agreement or arrangement."). *See also id.* para. 4a(2)(e) ("Heads of DA staff agencies and the commanders of each ACOM, ASCC, and DRU shall secure a written opinion from their respective servicing legal office that addresses what inter-agency coordination is required prior to Concluding a proposed agreement or

Agreements that do not address a "Predominantly DA Matter" fall outside the scope of AR 550-51. Thus, any International Agreement or Other International Arrangement affecting the Army and other military components, would likely be negotiated or concluded by Army elements under the express authority granted to that Army element by a Combatant or other Unified Command. Such procedures are governed and set forth in CJCSI 2300.01C.[47] By requiring Army elements to follow CJCSI 2300.01C in these situations, the negotiation and conclusion of agreements made under the authority of Combatant and other Unified Commands will follow a common procedure and the resulting agreements will also be filed in a common office of record.

As discussed in Section II, the revised AR 550-51 also requires that all Army commanders or DA agencies obtain a written opinion from their respective servicing legal office prior to the commencement of negotiations and prior to the conclusion of any agreement.[48] At both times, these opinions must address what inter-agency coordination is required. This requirement forces the proponent to consider what inter-agency coordination may be required both at the earliest stages in the Agreement Process, as well as just prior to the end of the Agreement Process. Further, the revised AR 550-51 expressly states that nothing in the regulation eliminates or replaces the interagency coordination or consultation requirements with respect to International Agreements established in 22 C.F.R. pt. 181.[49] This provision again stresses the importance of considering all applicable authorities in determining what type of interagency coordination will be required in order to negotiate and conclude an agreement.[50]

Conclusion

The Army's increased operational tempo, combined with its world-wide missions, made it necessary to revise AR 550-51 in order to update the Army policy, responsibilities, and procedures for the negotiation, conclusion, forwarding, and depositing of International Agreements and Other International Arrangements. This revision places a heavier emphasis on the role of civilian and military JAG personnel in ensuring that agreements and arrangements are made under the proper authority, following the proper procedures, while at the same time working to fulfill the needs of the Army and protecting the interests of the United States. As judge advocates will play such a vital role in this process, it is important that all JAG personnel be aware of the revisions to AR 550-51, so they are able to better fulfill their required roles in the Agreement Process.

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arrangement."); *see also id.* para. 5c ("This Regulation does not eliminate or replace interagency coordination or consultation requirements with respect to International Agreements established in 22 CFR pt. 181.").

[47] CJCSI 2300.01C, *supra* note 9.

[48] AR 550-51, *supra* note 1, para. 4a.

[49] *Id.* para. 5c. For example, 22 C.F.R. § 181.4(e) (2007) ("If a proposed agreement embodies a commitment to furnish funds, goods, or services that are beyond or in addition to those authorized in an approved budget, the agency proposing the agreement shall state what arrangements have been planned or carried out concerning consultation with the Office of Management and Budget for such commitment."). *See also* 22 C.F.R. § 181.4(f) ("Consultation may encompass a specific class of agreements rather than a particular agreement where a series of agreements of the same general type is contemplated; that is, where a number of agreements are to be negotiated according to a more or less standard formula, such as, for example, Pub. L. 480 Agricultural Commodities Agreements. Any agency wishing to conclude a particular agreement within a specific class of agreements about which consultations have previously been held pursuant to this section shall transmit a draft text of the proposed agreement to the Office of the Legal Adviser as early as possible."); *see also* 22 C.F.R. §. 181.4(g) ("The consultation requirement shall be deemed to be satisfied with respect to proposed international agreements of the United States about which the Secretary of State (or his designee) has been consulted in his capacity as a member of an interagency committee or council established for the purpose of approving such proposed agreements.").

[50] AR 550-51, *supra* note 1, para. 5c. This paragraph also "does not eliminate or replace intra-agency coordination requirements with respect to International Agreements established in chapter 1, AR 11-31, DOD Dir. 5530.3, or other applicable DOD or Army guidance, such as DOD Instruction 5000.2, AR 70-41 or AR 70-57." *Id.*

The Law of War and the Academy*

*Richard B. Jackson***

The law of war is a hot topic in public discourse and academic circles. Topics such as interrogation, treatment of unlawful combatants and targeting of insurgents in Iraq and elsewhere seemingly dominate the headlines. Furthermore, the proliferation of writing in scholarly journals on these subjects and many others compete with more traditional discussions of constitutional law or criminal law.

In the midst of the very public debates over the laws of war, America's application of those laws to the Global War on Terror, and its manifestations in Afghanistan and Iraq, there has been a little-noticed discussion between military legal experts and the academic community, as well as some public dialogue between politicians and military lawyers. These two dialogues should continue and expand in order to benefit the academic community and the public at large. In addition, the discussions benefit the military legal community as we develop the law (through customary international law, doctrine, treaty negotiation and drafting of legislation or administrative regulations) and discuss its development within the Executive Branch and with the Legislature.

What does a military lawyer bring to the table? How can he or she contribute to the discussion? I would like to mention at least three reasons that a military lawyer is uniquely suited to address these issues and, in turn, ways that discussion can benefit the academy and the public at large. First, the law of war has been developed by warriors, for warriors. Second, the military perspective provides some balance to the debate by explaining the importance of military objectives and military necessity, both of which need to be weighed in the balancing of interests that is reflected in the law of war. And finally, a discussion of the current practice of the law of war can dispel many of the myths about military conduct in war and connect the people of the country and its academic conscience to the Soldiers, Sailors, Marines and Airmen that represent them. One of my favorite aphorisms about the law is that "you can't practice law in a vacuum." Practitioners of the law must discuss these issues with those that influence the development of the law. The both are better for it.

I. The Law of War by Warriors, for Warriors

Imagine the following scenario: two factions, both with deep religious roots, are feuding across the wide river that divides their two camps. The political discussion is at a stalemate. There is a constitutional crisis in the legislature about the degree of power each faction will control; whether there should be a federal form of government with power decentralized in constituent states or a more centralized government controlled by the people's representatives in the capital. Although the politicians seemingly reached a compromise that allowed for the sharing of power, fanatics on both sides turn to armed force to impose their will on each other. The fanatics conduct symbolic kidnappings and murders to try to foment civil war. Both sides develop and arm powerful militias, and some even infiltrate the official armed forces of the nation. Houses are burned or bombed out, civilians become the target of attacks and terror reigns. Baghdad, Iraq, 2007? No, Bloody Kansas, 1856-1863. It was out of that maelstrom, which spawned John Brown, "General" James H. Lane and his Kansas Jayhawkers and Quantrill and his Raiders, including the James and the Younger brothers, that the modern law of war was born.[1] The internecine warfare in Kansas and Missouri then was as bloody and vicious as any sectarian warfare of today.

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[1] Kansas State Historical Society, *Willing to Die for Freedom*, http://www.kshs.org/exhibits/territorial/territorial4.htm (last visited Nov. 3, 2007).

General Halleck, an international law expert and commander of the Western Department at the time, later, as the Chief of Staff of the Army, decided that the lawlessness of the Western frontier could not and should not apply to the Civil War. Halleck commissioned Francis Lieber, a law professor at the University of South Carolina and Columbia University, to write the rules for land warfare. Lieber was also no stranger to war; he fought in the Napoleonic wars as a young man, and his sons were on opposite sides during the Civil War. The Lieber Code, also known by its official title, General Order 100, became the basis for the law of armed conflict, and much of it is preserved in the substance of the current law of war.[2] Lieber applied the concept of "unlawful combatants" to men like Quantrill and the James and Younger brothers calling them "brigands" and bandits and denying them the status of prisoners of war.[3] He contrasted partisans, who were treated as prisoners of war when captured,[4] like John Singleton Mosby, who acted as a detached corps of the Confederate Army in Northern Virginia. Lieber's code was much more comprehensive and preceded the International Committee of the Red Cross's (ICRC) work on treatment of wounded on the battlefield[5] by a year, demonstrating that "Bloody Kansas" and Francis Lieber spawned the modern law of war, not the Battle of Solferino and Henry Dunant.[6]

There is a long history of cross-fertilization between the military and academic communities. I already mentioned Halleck, who contributed a treatise on international law.[7] Lieber founded the International Law studies at Columbia University. More recently, Bill Baxter, Howard Levie, and Wally Solf left the military to become prominent experts in the law of war and professors at prestigious universities. Professor Bassiouni, the renowned scholar on International Criminal Law, including the use of international tribunals to enforce the law of war, learned much from his time as a soldier in the Egyptian Army and applied his knowledge to a career as an academic. And Telford Taylor, one of the architects of Nuremberg trials and a scholar on this area of the law, contributed to the development of the law since World War II. Taylor, in his seminal work on war crimes, explained why the law of war is so important to warriors:

> [T]hey are necessary to diminish the corrosive effect of mortal combat on the participants. War does not confer a license to kill for personal reasons – to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of the state; it does not countenance the infliction of suffering for its own sake or for revenge. Unless troops are trained and required to draw the distinction between military and non-military killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives. The consequence would be that many returning soldiers would be potential murderers. As Francis Lieber put the matter in his 1863 army regulations: 'Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.'[8]

There is much more room for development of the law of war, an area of the law that was designed by warriors, for warriors, to maintain their humanity in the midst of the inhumanity of war.

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[2] Adjutant Gen.'s Off., U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field, Gen. Ord. No. 100 (Apr. 24, 1863) [hereinafter Lieber Code].

[3] Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, *in* THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER 289 (1881), *available at* http://books.google.com/books?id=oKMFAAAAMAAJ&pg=PA277&dq=lieber+guerrilla+parties.

[4] *Id*. at 290.

[5] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]. The current GC I represents the fourth version of the Geneva Convention on the wounded and sick after those adopted in 1864.

[6] Lieber Code, *supra* note 2; HENRY DUNANT, A MEMORY OF SOLFERINO (ICRC English ed. 1986) (1862) (signed by President Lincoln in 1863, the Lieber Code was a product of the lessons learned from the bloody violence in Kansas from 1854 - 1858 that directly presaged the American Civil War. The Code dictated how U.S. Soldiers should conduct themselves in wartime. In contrast, the ICRC movement originated with *A Memory of Solferino*, written by Henry Dunant of Geneva, Switzerland between 1859 and 1862 following his experience during the aftermath of the 1859 Battle of Solferino between France and Austria).

[7] *See generally* H. W. HALLECK, INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR (San Francisco, H.H. Bancroft & Co. 1861).

[8] Telford Taylor, *War Crimes*, *in* WAR, MORALITY AND THE MILITARY PROFESSION 378 (Malham M. Wakin, ed. 1986).

II. Balanced Perspectives

Several examples of recent issues that would benefit from the discourse and the unique view that military practitioners bring to the table include: (1) an analysis of *Hamdan v. Rumsfeld*[9] and the Military Commissions Act[10] from a law of war[11] perspective; (2) a discussion of the efforts underway to use the law of war to protect civilians from the impact of cluster munitions; and (3) an analysis of Army interrogation policies from a law of armed conflict perspective.

The nation, the academy and the military would all benefit from a discussion about *Hamdan* from a law of war perspective. I have been to several seminars like this one over the last eight months, and each has looked at the case through a domestic lens, overlooking or negating the international law or law of war aspects of the case. The President had several choices when he chose to try the perpetrators of September 11th: to use a purely domestic criminal law paradigm under federal criminal law; to seek an international tribunal, along the lines of the International Criminal Tribunal for the former Yugoslavia (ICTY)[12] or the International Criminal Tribunal for Rwanda (ICTR);[13] to use the Uniform Code of Military Justice (UCMJ),[14] as we would for a captured enemy prisoner of war or one of our own soldiers who commits a war crime; or to create a military commission, along the lines of Nuremberg,[15] the Tokyo War Crimes Trials[16] or the *Ex parte Quirin*[17] case. It is well known that he chose the last option. All of the discussion that took place in the months following the *Hamdan* decision has focused on the domestic criminal law alternative and the UCMJ, rather than the international law standards for criminal tribunals and the standards laid out in Common Article 3 to the Geneva Conventions,[18] and illuminated by Article 75 of Additional Protocol I[19] and Articles 4-6 of Additional Protocol II.[20] If the military commission approach is legitimate, as the Supreme Court has indicated, it should be judged by the standard of the applicable law, the *lex speciales* of the law of war, not constitutional law or some domestic human rights standard.[21] The academy and the American public would benefit from a discussion that analyzes this issue from that perspective, and I dare say that the Military Commissions Act and Rules for Military Commissions will stand up to that scrutiny.

Another issue I have examined in the last year that would benefit from some dialogue and rational, objective discussion is the developing law on the use of cluster munitions on the battlefield. First, there have been some developments in treaty law in this area. The Explosive Remnants of War (ERW) Protocol V to the Convention on Conventional Weapons (CCW) went into effect in November 2006.[22] The ERW Protocol provides guidance to the manufacturing states so that they may

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[9] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

[10] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.) [hereinafter MCA].

[11] The law of war is also known as the law of armed conflict (LOAC) or international humanitarian law (IHL). The law of war (LOW), however, is a more succinct and descriptive term of the disciplined application of law to the very undisciplined profession of arms.

[12] *See generally* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), *amended by* S.C. Res. 1660, U.N. Doc. S/RES/1660 (Feb. 28, 2006). The ICTY was established by the Security Council in the face of serious violations of international law committed in the territory of the former Yugoslavia since 1991.

[13] *See generally* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), *amended by* S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004). Recognizing that serious violations of international law were committed in Rwanda in 1994, ,the Security Council created the ICTR.

[14] *See generally* Uniform Code of Military Justice, 10 U.S.C. § 802(a) (2006).

[15] *See generally* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The Nuremberg Trials were a series of trials from 1945 to 1949, most notable for the prosecution of prominent members of the leadership of Nazi Germany. The August 8, 1945 London Charter of the International Military Tribunal established the laws and procedures of the tribunal.

[16] *See generally* Charter of the International Military Tribunal for the Far East (1946), *reprinted in* U.S. DEP'T OF STATE, TRIAL OF JAPANESE WAR CRIMINALS 39-44 (Pub. No. 2613, Far Eastern Series No. 12, 1946). The International Military Tribunal for the Far East (IMTFE) was convened from May 3, 1946 to November 12, 1948 to try the leaders of Japan for war crimes committed during World War II.

[17] *See generally Ex Parte* Quirin, 317 U.S. 1 (1942).

[18] *See* GC I, *supra* note 5; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. "Common Article 3" refers to the fact that this article is common to all four of the Geneva Conventions.

[19] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

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

[21] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794 (2006).

[22] *See* Protocol on Explosive Remnants of War, U.N. Doc. CCW/MSP/2003/2 (Nov. 27, 2003).

improve the reliability of all munitions, including cluster munitions, in an attempt to prevent them from becoming explosive remnants.[23] It also includes obligations both for the states using the weapons and for the states upon whose territory they are used such as the duty to record the locations of unexploded munitions, to protect civilians who are re-entering the area and to clean up the battlefield after the war is over.[24] The ERW Protocol hardly had the chance to work before the often shrill voices of non-governmental organizations (NGOs) began demanding that such weapons be banned.[25] At the same time, extensive studies about the application of the law of war to this problem, led by academics from Australia and assisted by most state parties to the CCW, fell on deaf ears.[26] Those studies concluded that the existing law of war on proportionality, distinction and protection of civilian objects, applied by both the attacker and defender, amply provide for humanitarian concerns.[27] Likewise, the military analysis concluded that reliable cluster munitions have extensive military utility.[28] These aspects of the law have been untouched in a public forum.

The third area where some public discussion, academic analysis and military expertise would be of value is in the analysis of current military interrogation standards. Unfortunately for the military, the new interrogation Field Manual,[29] which the Detainee Treatment Act proclaimed to be the law of the land was announced on the same day that the President transferred the fourteen "high-value detainees" to Guantanamo Bay, Cuba. As a result, there has been little or no discussion about the field manual, the Department of Defense detainee treatment policy, or any other significant changes in the law and regulations pertaining to detainees. The new field manual essentially maintains a Geneva Convention III,[30] Prisoner of War approach to military interrogation, and it frequently reinforces the Geneva Convention training standard, while also re-emphasizing the minimum treatment standards derived from Common Article 3 to the Geneva Conventions.[31] In sum, re-establishing the clear standards of the Geneva Conventions in military policy and doctrine is a credible topic that deserves critical, objective analysis.

III. Continuing Dialogue

How can we continue the discussion? Seminars, joint education and writing are all tried-and-true means of exchanging ideas. In addition to these approaches, public diplomacy and public-private discussions are a more novel and potentially fruitful means of discussion in the international law and law of war communities. Seminars such as this Symposium are an excellent opportunity to hear from military practitioners and academic experts in international law and the law of war. But they are more than lectures and seminar discussions; they are also an excellent opportunity to meet and exchange views informally. We will not always agree on the ends, ways or means of our legal strategies, but we can certainly understand each other better by exchanging views informally.

Joint education is a little-used method of discourse. To be sure, however, military experts have long been a part of academia. Gary Solis, Gary Sharp, Hays Parks and my colleague Jim Schoettler have taught as adjunct professors in the Washington, D.C. area for years; Gary Solis just returned to teach at Georgetown. Military experts have also come to establish a tradition of former professors from the Army Judge Advocate General's School (JAG School) in Charlottesville, Virginia, accepting teaching positions in law schools across the country. Dave Crane at Syracuse, Jeff Addicott at Saint Mary's, Mike Newton at Vanderbilt, Geoff Corn at Southwestern, Charlie Rose at Stetson and Victor Hansen at New

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[23] *Id*. at pmbl.

[24] *Id*. at arts. 3-5.

[25] *See* Memorandum, from Human Rights Watch, subject: States Parties' Responses to "International Humanitarian Law and ERW" Questionnaire, to CCW Delegates (Mar. 2006), *available at* http://hrw.org/backgrounder/arms/arms1105.pdf.

[26] *See* Convention on Conventional Weapons, *Group of Governmental Experts of the State Parties to the Convention on Prohibitions or Restrictions on the Certain Use of Conventional Weapons which May Be Deemed to Be Excessively Injurious Or to Have Indiscriminate Effects*, CCW/GGE/X/WG.1/WP.2 (Mar. 16, 2005).

[27] *See id*.

[28] *See* Convention on Conventional Weapons, *Group of Governmental Experts of the State Parties to the Convention on Prohibitions Or Restrictions on the Certain Use of Conventional Weapons Which May Be Deemed to be Excessively Injurious Or to Have Indiscriminate Effects*, CCW/GGE/X/WG.1/WP.1 (Feb. 21, 2005).

[29] U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006).

[30] *See* GC III, *supra* note 18.

[31] *See also Ex parte* Quirin, 317 U.S. 1 (1942).

England School of Law, all come to mind, and Sean Watts, a current professor at the JAG School just accepted a position at Creighton. Likewise, military academic institutions have included civilian experts on their faculty for many years. The most prestigious is the Stockton Chair at the Naval War College, which has included such visiting luminaries as Theodore Meron, Yoram Dinstein and Wolff von Heinegg. West Point, though an undergraduate institution, has had visiting professors of law for several years, including, most recently, Gary Solis. And, in an exciting development for the law of war, West Point is establishing a law of war center of excellence within its department of law that will probably include an endowed chair in the near future. Finally, the Army JAG School has established a reputation as a premier educational institution over the last twenty years, beginning with its recognition as an LL.M. degree-granting institution in 1986. The International and Operational Law Department of the Army JAG School has developed teaching materials in the law of war and national security law and has worked very closely with the University of Virginia School of Law. The International Law LL.M. program that the services support has provided students of the law of war to the academy. Lieutenant Colonel Eric Jensen, who will speak later during this program, recently graduated with an LL.M. from Yale in International Law.

Joint training, however, is much more than exchanging professors or students and conducting seminars. Geoff Corn and others have suggested that the JAG School open some of its courses to professors and students from outside the military. This is an excellent idea, worth pursuing with the Army JAG School, and capable of adding to the discourse and increased understanding of the military perspective on the law of war.

Professional writing is another way that the discourse can be expanded and ideas can be shared. Professional military journals, such as the *Military Law Review* or the *Naval War College Papers*, invite scholars to contribute to the law of war debate within military circles. The Lieber Society of the American Society of International Law has an annual writing competition on the laws of armed conflict. And, increasingly, military writers are being asked to contribute to law reviews throughout the country, particularly given the timely and fascinating topic we are discussing at this symposium. I regret not writing more, as a young Judge Advocate but I have certainly encouraged it among my subordinates and colleagues over the last ten or fifteen years as a leader and mentor of younger JAGs. There is no better way to share practical experience than with rigorous, scholarly articles.

Finally, public diplomacy has recently been added to the discourse. John Bellinger, the State Department Legal Advisor, has given public lectures in London and several other European capitals, as well as participated in national security law seminars at the Naval War College and in the Washington, D.C. area. The subject of his discussions has largely consisted of law of war topics and the U.S. position on the myriad of law of armed conflict issues that have arisen in recent conflicts. Bellinger continued in this vein in January 2007, as he agreed to participate in a series of *Opinio Juris* blogs; his participation extended from one week to two weeks, as the discussion gained fervor and examined many of these issues in great depth. The Office of the Army Judge Advocate General will continue the discourse in a public fashion, as we believe there is merit in explaining why we think we have the most disciplined and law-of-war-conscious military in the world. Discussions between private and governmental entities also serve the law and the nation. An excellent example is the recent series of discussions between Department of Defense lawyers and the ICRC on detention standards and customary international law, among other subjects. This dialogue has become more public with the publishing of the U.S. government's critique of the ICRC's Customary International Law Study.[32]

It is clear that we have a lot to learn from one another. I am sure Mark Bridges will give a great deal of credit to those from the academy, like Neal Katyal of Georgetown, who contributed to the defense of the Guantanamo detainees. Less known and unheralded are the contributions of military defense attorneys (like Bridges) who zealously represented the interests of their clients and laid the foundations for justice being done in the military commissions process. It is the nature of a professional soldier to be a "quiet professional," to do his job, to serve his country. It is also of value to the country to help the people of the country, and their brain trust in academic circles, to better understand where the law of war is going and where military legal professionals are going with it. It is important to continue and to further that dialogue.

[32] Letter from John Bellinger, State Dep't Legal Adviser & William Haynes, State Dep't Gen. Counsel, to Jakob Kellenberger, President, ICRC (Nov. 3, 2006), *available at* http://www.state.gov/s/l/rls/82630.htm.

The Law of War after the DTA, *Hamdan* and the MCA

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"The rumors of [its] death are greatly exaggerated."[2]

During the early days of the Global War on Terrorism (GWOT), the Department of Justice's Office of Legal Counsel (OLC) provided a number of legal opinions regarding international law and the law of war (LOW), and its application to the current Long War against terrorism.[3] In Alberto Gonzales' memorandum to President Bush, dated 25 January, 2002, entitled "Decision re: Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban," then White House Legal Counsel Gonzales referred to the LOW as an "obsolete" and "quaint" anachronism, with the implication that it was unsuited to this new form of conflict.[4] But over the last year, the tide of opposition to application of international law standards has turned; in public statements and policy developments, the U.S. government has increasingly applied the LOW, as a matter of law and policy, in military operations. The rumors of the demise of the LOW have been greatly exaggerated.

Current efforts in public diplomacy have emphasized the continued vitality of international law and the LOW. In a very recent speech at The Hague, Netherlands, U.S. Department of State Legal Advisor John B. Bellinger III emphasized the continuing importance and influence of international law to the United States in confronting the deep and difficult problems facing the international community. According to Mr. Bellinger, the U.S. government has always recognized that "international law has a critical role in world affairs, and is vital to the resolution of conflicts and the coordination of cooperation."[5]

In addition, several recent developments in the law have reinvigorated the application of international law and the LOW to the war on terror. On 17 October 2006, President Bush signed into law the Military Commissions Act of 2006 (MCA).[6] The Act's purpose is to "establish[] procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commissions."[7] The MCA is the most recent measure in a line of governmental actions, including the Detainee Treatment Act (DTA)[8] and the Supreme Court's ruling in *Hamdan v. Rumsfeld*,[9] that speak to the application of the law of

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[2] Apologies to Mark Twain.

[3] *See* Draft Memorandum, John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice & Robert J. Delahunty, Special Counsel, U.S. Department of Justice, to William J. Haynes II, General Counsel, U.S. Department of Defense, subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees, (Jan. 9, 2002), *available at http://www2.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB127/02.01.09.pdf* [hereinafter Yoo Draft Memorandum]. *See also* Memorandum, Jay Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, (Aug. 1, 2002), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf#search=%22bybee%20memo%20pdf%22. (The OLC is charged with developing legal positions for the Executive branch. These memoranda were prepared to establish the administration positions on the status of captured enemy combatants in the fight against the Taliban and Al Qaeda, as well as their treatment. They served the basis for the President's statement of 7 February 2002, which declared the Taliban and Al Qaeda as "enemy combatants," not entitled to treatment of prisoners of war, but nonetheless subject to "humane treatment, subject to requirements of military necessity.").

[4] Memorandum, Alberto R. Gonzales, White House Legal Counsel, to President George W. Bush, subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, at 2 (Jan 25, 2002).

[5] John B. Bellinger III, Legal Advisor, U.S. Dep't of State, Remarks at the Hague, Netherlands: The United States and International Law (June 6, 2007), *available at* http://www.state.gov/s/l/rls/86123.htm. *See also* William H. Taft, IV, *A View from the Top: American Perspectives on International Law After the Cold War*, 31 YALE J. INT'L L. 503 (Summer 2006).

[6] Military Commissions Act of 2006 § 3, 10 U.S.C. § 948b(a) (2006) [hereinafter MCA].

[7] *Id.*

[8] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680.

armed conflict in the GWOT. Though these measures engender discussions on far broader topics than the LOW (such as separation of powers), the principles and procedures shaped by these actions have potentially far-reaching impact on the LOW in U.S. military operations.[10]

There are four particular aspects of recent events that have potentially profound impacts on the LOW. First, the Supreme Court's ruling in *Hamdan*[11] discounts the idea of a "no law" zone by holding that Common Article 3 (CA3)[12] of the 1949 Geneva Conventions applies to all conflicts that are not between states, as referred to in Common Article 2 (CA2).[13] Second, the amendment to the War Crimes Act (WCA) details the particular acts under CA3 that are "serious crimes," and will be prosecuted as violations of that Act.[14] Third, the establishment of humane treatment as the minimum standard for treatment of detainees on the battlefield by the DTA and *Hamdan* clarifies what some had argued was an unclear area of the law. Finally, the publication of Department of Defense Directive (DOD Dir.) 2311.01E reinforces the proposition that the primary standard of conduct for military operations is established by the law of armed conflict applied to international armed conflicts, including customary international law, in all military operations.[15]

The Supreme Court's decision in *Hamdan*, the DTA, the MCA, and the publication of the DOD Dir. 2311.01E on the LOW Program have all reinforced the proposition that the military is guided by an immutable set of legal principles that establish the rules of conduct for our profession. Collectively they have reinforced two bedrock principles of the LOW: (1) that minimum standards of conduct of civilized peoples are set by CA3; and (2) that U.S. military conduct on the battlefield is guided, as a matter of policy, by the law applicable to international armed conflict in any armed conflict or military operation, no matter how characterized. This article discusses each of these four aspects of recent events, briefly outlining the issue prior to governmental action and then analyzing the effects of the governmental action, both on domestic law and on the LOW.

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[9] *See* Hamdam v. Rumsfeld, 126 S. Ct. 2749 (2006).

[10] The LOW is also known as the law of armed conflict and international humanitarian law.

[11] *Hamdan*, 126 S. Ct. 2749.

[12] The provision is referred to as "common" article 3 because it is found identically in each of the four Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I], *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 373, 376 (3d ed. 1988); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II], *reprinted in* SCHINDLER & TOMAN, *supra*, at 404; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III), *reprinted in* SCHINDLER & TOMAN, *supra*, at 429-30; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287 [hereinafter GC IV], *reprinted in* SCHINDLER & TOMAN, *supra*, at 501.

The text of Common Article 3 states:

> Art 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Id.

[13] GC I, *supra* note 12, art. 2; GC II, *supra* note 12, art. 2; GC III, *supra* note 12, art. 2; GC IV, *supra* note 12, art. 2.

[14] War Crimes Act, 18 U.S.C. § 2441 (LEXIS 2007) [hereinafter WCA].

[15] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (May 9, 2006) [hereinafter DOD DIR. 2311.01E].

A "No Law Zone"?

In the years leading up to and following the adoption of the Geneva Conventions, government officials and academics debated the application of the LOW, including the Geneva Conventions, to the entire spectrum of conflict,[16] as a matter of law. To whom does the LOW apply and in what circumstances? Are there circumstances where the LOW does not apply? Does the LOW even apply to "non-state actors," like Al Qaeda? The terms of CA2 and CA3 to the Geneva Conventions have invited considerable debate concerning their coverage. Common Article 2 clearly established the application of the Conventions to international armed conflict—that is an armed conflict between two states, or "high contracting parties." And in international armed conflicts, the provisions of the entire Geneva Conventions apply to the individuals protected by the conventions, including the sick and wounded, prisoners of war, and civilians. The debate on the application of CA3 was more diffuse, however.

The two most difficult issues debated during the Geneva Conventions were the application of the LOW to "partisans" and the treatment of "civil wars."[17] Article 4 to Geneva Convention III set the standard to obtain prisoner of war (POW) status for militias and irregular forces that are answerable to the government of a high contacting party.[18] The only mention in the Conventions of "irregular combatants" of any other form, however, is in Article 5 of Geneva Convention IV, which authorizes derogations from the Civilians Convention for the security requirements of an occupying power in detaining spies, saboteurs, and other security threats.[19] The arguable gap between lawful and unlawful combatants has been the subject of academic debate, over the years.[20] As early as 1951, Richard Baxter argued that unprivileged belligerents received no protections under the Conventions but were "virtually at the power of the enemy."[21] Professor Yoram Dinstein, of Tel Aviv University, posited that "unlawful combatants" are subject to the law of the capturing state, not the law of armed conflict.[22] And the U.S. position has been that human rights law, including the Constitution, does not govern the treatment of detainees abroad.[23] The result was a gap in the law, a "no law zone," where irregular belligerents, or unlawful combatants reside.

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[16] The "spectrum of conflict" is a term of art, referring to the full range of military operations, from international armed conflict, through peacekeeping operations, internal armed conflict, and internal disturbances where military forces may by employed.

[17] COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 49-50 (O. Uhler & H. Coursier eds. 1958), *available at* http://www.icrc.org/ihl.nsf/COM/375-590007?OpenDocument.

> During the preparatory work for the Conference, and even during the Conference itself, two schools of thought were observed. Some delegates considered that partisans should have to fulfill conditions even stricter than those laid down by the Hague Regulations in order to benefit by the provisions of the Convention. On the other hand, other experts or delegates held the view that resistance movements should be given more latitude. The problem was finally solved by the assimilation of resistance movements to militias and corps of volunteers "not forming part of the armed forces" of a Party to the conflict.

Id. *See generally* DIPLOMATIC CONFERENCE FOR THE ESTABLISHMENT OF THE INTERNATIONAL CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 (1949) [hereinafter TRAVAUX]. *See also* United States v. Wilhelm von Leeb et al. (The High Command Case), UNITED NATIONS WAR CRIMES COMMISSION, 12, LAW REPORTS OF TRIALS OF WAR CRIMINALS 462 (1948) (The partisan debate was informed by the delegates recent experience in World War II, where partisans were treated with impunity by Germans in Russia. The need to protect civilians in civil wars was apparent from the recent experience of the Spanish Civil War.).

[18] GC III, *supra* note 12,art. 4. Article 4 reads as follows:

> Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.

[19] GC IV, *supra* note 12, art. 5.

[20] *See generally* Official Statement, International Committee of the Red Cross, The Relevance of IHL in the Context of Terrorism (July 21, 2005), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705 ("Unlawful combatants" and "unprivileged belligerents" are used interchangeably in this article to designate individuals who are not entitled to combatant immunity; in other words, they are subject to criminal sanction for their warlike acts, unlike "lawful combatants.").

[21] Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 343 (1951).

[22] Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, *in* Y. DINSTEIN, INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOR OF SHABTAI ROSENNE 103, 112 (1989).

[23] Brief for Respondents Donald H. Rumsfeld, et al., at 43, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/05-184/05-184.mer.resp.pdf (Government respondents' reply brief in support of motion to dismiss for

Common Article 3's application was an equally complex question. When CA3 was initially discussed in the preparatory conference, the Swiss delegation offered CA3 [which had been originally developed as a preface to the Civilians Convention] as a compromise to settle the debate on how internal armed conflicts were to be regulated.[24] This appears to unite the two threads of the debate in Geneva, the "partisan" and "civil war" issues, by addressing minimum standards of treatment for all the victims of conflict, even those subject to "non-international armed conflict." In his authoritative *Commentaries* on the Geneva Conventions, Swiss author Jean Pictet cited CA3 as a minimum standard of conduct:

> [T]he scope of application of [CA3] must be as wide as possible . . . [CA3] 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. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages? No Government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, when dealing with common criminals.[25]

Statements by the U.S. delegation, however, reflect the belief of many delegates to the conference that CA3 was intended to apply only to "civil wars."[26] The U.S. delegation asserted such a position in committee discussions at Geneva and in documents prepared for the Senate ratification debate.[27] And when the Additional Protocols to the Geneva Conventions were negotiated in 1977, the threshold for a non-international armed conflict was set even higher.[28] Recently, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) seemed to lower the standard, once again, applying non-international armed conflict rules to conflicts between armed groups or between armed groups and the armed forces within a state.[29]

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lack of jurisdiction contended that, "[a]s an alien enemy combatant detained outside the United States, petitioner does not enjoy the protections of [the U.S.] Constitution."); *see also* Matthew Waxman, Head of U.S. Delegation, Principal Deputy Director of Policy Planning, Department of State, Opening Statement to U.N. Human Rights Committee (July 17, 2006), *available at* http://www.usmission.ch/Press2006/0717Waxman.html (speaking on the extraterritorial application of human rights law, in this instance the ICCPR, the State Department has said:

> I[]t is the long-standing view of the United States that the [ICCPR human rights treaty] by its very terms does not apply outside of the territory of a State Party. . . . [T]he United States has a principled and long-held view that the [ICCPR human rights treaty] applies only to a State Party's territory.

*Id.*at 2.

[24] 2B TRAVAUX, *supra* note 16, at 335.

[25] 1 JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 36 (ICRC 1960), *available at* http://www.icrc.org/ihl.nsf/COM/375-590006?OpenDocument. *See also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 218 (June 27), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=66&case=70&code=nus&p3=90 (The ICJ in Nicaragua said "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international armed conflicts. . . .").

[26] 2B TRAVAUX, *supra* note 15, at 12.

[27] Memorandum for Record, Lieutenant Colonel Robert F. Grubb, Army Int'l Affairs Division, DOD Geneva Conventions Working Group, subject: Analysis of the Geneva Conventions 3-2 (1955) (memorandum prepared by the DOD Geneva Conventions Working Group in anticipation of Senate hearings) (on file with author).

[28] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609,, *available at* http://www.icrc.org/ihl.nsf/FULL/475 ?OpenDocument. Article 1 of Additional Protocol states:

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Id.

[29] Prosecutor v. Du[Ko Tadi], Case Nos. IT-94-1-A, IT-94-1-A*bis*, Judgement in Sentencing Appeals (Jan. 26, 2000), *available at* http://www.un.org/icty/

The Bush Administration adopted the most conservative approach to the "civil war" and "unlawful combatant" issues and consistently asserted that CA3 did not apply to detainees in the GWOT.[30] Rather than adopting CA3 as a "minimum yardstick," the President's declaration of 7 February 2002 said neither CA3 nor CA2 applied to the War on Terror.[31] He was supported by his advisors in this matter, who regarded notions such as the application of customary international law to "not bind the President, or restrict the actions of the United States military."[32] Additionally, the President's advisors felt that any possible attempt by Congress to restrict the executive's authority by subjecting U.S. forces to the Geneva Conventions, including CA3 and CA2, would be a possible infringement of the President's Commander in Chief duties.[33]

This issue of the application of CA3 to illegal combatants came to a head as the Supreme Court was hearing the arguments in *Hamdan*, as evidenced by the court submissions,[34] as well as the DC Circuit opinion.[35] How the Court viewed the potential "no law zone" would have a significant effect on Hamdan's treatment and the resolution of the case.

The Impact of *Hamdan*

With the decision in *Hamdan*, it is now clear that CA3's coverage is broad enough to cover unlawful combatants in the GWOT and that a "no law zone" does not exist. The Supreme Court held:

> The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "international in scope," does not qualify as a "'conflict not of an international character.'" 415 F.3d at 41. That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." *Id.*, at 44 (Williams, J., concurring). Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U.S.T., at 3318 (Art. 2, P 1). High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-a-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-a-vis the nonsignatory if "the latter accepts and applies" those terms. *Ibid.* (Art. 2, P 3). Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. See, *e.g.*, J. Bentham, Introduction to the Principles of Morals and Legislation 6, 296 (J. Burns & H. Hart eds. 1970) (using the term "international law" as a "new

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tadic/appeal/judgement/tad-asj000126e.pdf. *See* Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66 (Spring 2005) (providing an in-depth discussion of this issue). *See also* Major Julie Long, *What Remedy for Abused Iraqi Detainees?*, 187 MIL L. REV. 43, 60 (Spring 2006) (Regarding CA3 triggers Long states,

> Pursuant to Common Article 3 of the Geneva Conventions, when armed conflict not of an international nature occurs in the territory of a High Contracting Party, such as Iraq, only the provisions of Common Article 3 apply. Accordingly, even if the United States is no longer fighting an international armed conflict in or occupying Iraq, the United States must afford the protections contained in Common Article 3 to any detainees under its control.

Id.

[30] *See generally* David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L L. 61 (Fall 2005).

[31] Memorandum, President George W. Bush, to Vice President et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (7 Feb. 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf.

[32] Yoo Draft Memorandum, *supra* note 3, at 2.

[33] *Id*. at 11.

[34] *See* Brief for Respondents Donald H. Rumsfeld, et al., at 43, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184).

[35] *See* Hamdan v. Rumsfeld, 415 F.3d 33, 39 (D.C. Cir. 2005), *rev'd* 126 S. Ct. 2749 (2006) (stating that "the 1949 Geneva Convention cannot be judicially enforced.").

> though not inexpressive appellation" meaning "betwixt nation and nation"; defining "international" to include "mutual transactions between sovereigns as such"); Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1351 (1987) ("[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other").[36]

As a result of this holding, every armed conflict that U.S. armed forces are involved in invokes the protections of CA3. A "no law" zone where people can be excluded from receiving humane treatment does not exist. Rather, the reach of international law covers all persons on the battlefield during an armed conflict. Even in this strange but deadly war against terrorism, that isn't against another state but crosses multiple international boundaries, there is international law that guarantees all persons will be treated humanely.

Serious Crimes under the War Crimes Act

As a result of the ruling in *Hamdan*, President Bush sought legislation from Congress to authorize military commissions for unlawful combatants in the GWOT. Congress responded with the MCA.[37] In passing the MCA, Congress amended the WCA. When initially enacted in 1996, the WCA did not criminalize any violation of Common Article 3.[38] It was amended in 1997 to include all violations of CA3 as a war crime.[39] This blanket coverage was, at least in part, in response to a request by the DOD.[40] This coverage was too broad for fair and meaningful application, because not all violations of CA3 will be criminal in nature. Some of the more serious crimes, such as murder, mutilation, and torture, are clearly criminal and should be treated as war crimes.[41] Other violations, such as some forms of cruel treatment or humiliating and degrading treatment may not deserve to be considered a war crime but should be dealt with in other ways.

This rationale is similar to that established to deal with grave breaches of the Geneva Conventions. Articles 129 of the GPW[42] and 146 of the GCC[43] establish a bifurcated system for responding to violations of the LOW. In the case of grave

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[36] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795-96 (2006).

[37] MCA, *supra* note 6.

[38] Prior to the enactment of the MCA, 18 U.S.C. § 2441 read:

> **(a) Offense.—** Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
> **(b) Circumstances.—** The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).
> **(c) Definition.—** As used in this section the term "war crime" means any conduct—
> **(1)** defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
> **(2)** prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
> **(3)** which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
> **(4)** of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Id.

[39] WCA *supra* note 14, a*vailable at* http://140.147.249.9/cgi-bin/cpquery/?&dbname=cp105&id=cp105yTZnE&refer=&r_n=hr204.105&item=&sel=TOC_2780&.

[40] Letter, from Judith Miller, Dep't of Def. Gen. Counsel, to Honorable Bill McCollum, Committee on the Judiciary, House of Representatives (May 22, 1996).

[41] Mr. John Bellinger, State Department Briefing (Oct. 19, 2006), *available in* LEXIS, News File.

[42] Article 129 of GC III states:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed,

breaches, signatories accepted the obligation to pass laws that criminalized violations, search for alleged offenders, and prosecute alleged offenders or turn them over to another country that will prosecute them.[44] For non-grave breaches, the obligation is "to take measures necessary for the suppression of all acts contrary to the provisions of the present Convention."[45]

The MCA establishes a similar system, which criminalizes as war crimes the serious crimes from CA3 and allows other violations of CA3 to be remedied through suppression, retraining, non-judicial punishment, or some other appropriate method.[46] While much of the publicity over the MCA focused on the establishment of military commissions, the amendment of the WCA and the bifurcation of serious crimes and other violations will almost certainly have a broader impact on military operations and have a greater effect on LOW compliance and appropriate treatment of detainees.

The Humane Treatment Standard

As briefly mentioned above, the recent passage of the DTA and decision in *Hamdan* have also focused the international law lens on CA3 and the standards of treatment for detainees. The DTA prohibits cruel, inhuman, or degrading treatment or punishment as defined by the 5th, 8th, and 14th Amendments' jurisprudence on cruel, unusual, and inhumane treatment or punishment.[47] This prohibition is sweeping and covers anyone "under the physical control of the United States Government."[48] In *Hamdan*, the Supreme Court provided additional affirmation of the humane treatment standard by applying CA3 to all non-international armed conflicts, including the GWOT.[49]

In conjunction with the DTA's and *Hamdan*'s establishment of a minimum standard of treatment for battlefield detainees, Deputy Secretary of Defense Gordon England instructed all military units to verify that "all DOD personnel adhere

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> such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

GC III, *supra* note 11, art. 129.

[43] Article 146 of GCC states:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

GC IV, *supra* note 12, art. 146.

[44] GC I, *supra* note 12, art. 50 (defining grave breaches); GC II, *supra* note 12, art.51; GC III, *supra* note 12. art. 130; GC IV, *supra* note 12, art.147.

[45] GC I, *supra* note 12, art. 49; GC II, *supra* note 12, art.50; GC III, *supra* note 12. art. 129; GC IV, *supra* note 12, art.146.

[46] MCA, *supra* note 6.

[47] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.

[48] *Id*.

[49] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

to [Common Article 3]."[50] However, this was unnecessary as the military has consistently applied CA3 as the minimum humane treatment standard as a matter of law and policy.[51]

The standard of humane treatment has recently been confirmed in the promulgation of DOD Directive 2310.1E, *DOD Detainee Program*,[52] and Field Manual (FM) 2-22.3, *Human Intelligence Collector Operations*.[53] The DOD Dir. and the FM require all detainees to be treated consistent with the requirements of CA3.[54] They also reiterate the GC III standards for POWs, applying these standards to the interrogation of all detainees.[55] The DOD Dir. further enumerates specifically prohibited acts such as murder, torture, corporal punishment, mutilation, the taking of hostages, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment, in accordance with and as defined in U.S. law; threats or acts of violence, including rape, forced prostitution, assault and theft, public curiosity, bodily injury, and reprisals; being subjected to medical or scientific experiments; and protects against being subjected to sensory deprivation.[56]

The reiteration of the humane treatment standard, especially through the open publication of DOD directives and Army field manuals, sends a clear signal that the proper treatment of detainees is, as it has always been, a foundational principle of the modern LOW.

Department of Defense Directive 2311.01E

The requirement to apply the Geneva Conventions, as a matter of law, has been in a state of flux over the last several years. However, the application of the LOW, as a matter of policy, has stayed relatively constant.[57] The publication of DOD Dir. 2311.01E,[58] and its companion Chairman of the Joint Chiefs of Staff Instruction, on the DOD LOW Program,[59] has reaffirmed the intent of the U.S. military to apply the LOW across the conflict spectrum. Both policy documents require "[m]embers of DOD Components [to] comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[60] This approach provides the flexibility (through coordination with

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[50] Memorandum, Gordon England, Deputy Sec'y of Defense, Office of the Sec'y of Defense, to, Sec'ys of Military Dep'ts et al., subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (7 July 2006), *available at* http://www.fas.org/sgp/othergov/dod/geneva070606.pdf.

[51] *See Hearing on the Future of Military Commissions to Try Enemy Combatants Before the Senate Armed Services Committee*, 109th Cong. (2006) (statement of Major General Scott C. Black, The Judge Advocate General, U.S. Army). *See also* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) (stating: "5.3. The Heads of the DOD Components shall: 5.3.1. Ensure that the members of their DOD components comply with the LOW during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations;"). This directive was in effect at the beginning of the GWOT but has since been superseded by DOD Dir. 2311.01E, 9 May 2006. *See also* CHAIRMAN JOINT CHIEFS OF STAFF INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LOW PROGRAM (25 Mar. 2002) ("The Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the U.S. Armed Forces will comply with the principles and spirit of the law of war during all other operations."). This instruction was in effect at the beginning of the GWOT but has since been superseded by JCSCI 5810.01C, 31 Jan. 2007. *Compare* DOD DIR. 2311.01E, s*upra* note 54

[52] *See* U.S. DEP'T OF DEFENSE, DIR. 2310.1E, DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept. 2006) [hereinafter DOD DIR. 2310.1E].

[53] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3 (FM 34-52), HUMAN INTELLIGENCE COLLECTOR OPERATIONS (Sept. 2006) [hereinafter FM 22-22.3].

[54] DOD DIR. 2310.1E, *supra* note 54, para. 4.2; FM 22-22.3, supra note 55, p. vii.

[55] DOD DIR. 2310.1E, supra note 54, para. 4.2; FM 22-22.3, supra note 55, p. vii.

[56] *See generally* DOD DIR. 2310.1E, *supra* note 54.

[57] *See supra* note 53.

[58] DOD DIR. 2311.01E, *supra* note 15.

[59] CHAIRMAN JOINT CHIEFS OF STAFF INSTR. 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (31 Jan. 2007) [hereinafter JSCSI 5810.01C].

[60] DOD DIR. 2311.01E, *supra* note 15, para. 4.1; JSCSI 5810.01C, supra note 61, para. 4.a. The concern, or confusion, regarding the meaning of applying "the law of war during all armed conflicts, however such conflicts are characterized," is understandable. *See* Major John T. Rawcliffe, *Changes to the Department of Defense Law of War Program*, ARMY LAW., Aug. 2006, at 23. The intent behind the policy has been clarified in numerous DOD LOW Working Group sessions over the last two years, including drafting sessions for the forthcoming DOD LOW Manual. The authors endorse Major Rawcliffe's conclusion that practitioners should "assume that Common Article 2 and similar triggers have been satisfied, to apply the law of war broadly, and to seek active involvement and consent from higher echelons of command when appropriate." *Id*. at 32.

higher headquarters for "exceptions to policy," if necessary) and the certainty (of a single training standard that can be applied in all military operations) that makes the DOD policy a lode star for the commanders and military attorneys to apply the LOW on the battlefield. It is also consistent with the general trend in U.S. treaty negotiations to extend the LOW for international armed conflicts into all armed conflicts, however characterized.[61]

Conclusion

In conclusion, there should be no doubt as to the commitment of the Army to abide by the appropriate laws and standards in all armed conflicts. *Hamdan*, the DTA, the MCA, and DOD Directive 2311.01E are all very public pronouncements on the commitment of the United States to abide by the law of armed conflict. The Supreme Court's discrediting the idea of a "no law" zone, the amendment to the WCA, the establishment of humane treatment as the minimum legal standard for treatment of detainees on the battlefield, and the publication of DOD Directive 2311.01E reinforce the foundational principles of conduct among Soldiers and the military's commitment to maintain the highest rules of conduct for our profession.

These actions reinforce the principle that CA3 is the minimum standard of conduct for treatment in armed conflicts and that U.S. military conduct during armed conflict or other military operations is guided, as a matter of policy, by the law applicable to international armed conflict. In addition, they provide clear standards that Judge Advocate General officers can teach and inject in training. It is through the training and subsequent internalization of these doctrines and principles that the true effect of *Hamdan*, the DTA, and the MCA on the LOW will be demonstrated.

[61] *See, e.g.*, Amendment to Article I of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), Dec. 21, 2001, 19 I.L.M. 1823, *available at* http://www.ccwtreaty.com/KeyDocs/MainDocs/Amended-Article-1.pdf; *see also* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as amended on 3 May 1996) Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Annex B, May 3, 1996, 1342 U.N.T.S. 168; 19 I.L.M. 1529, *available at* http://www.ccwtreaty.com/KeyDocs/MainDocs/Amended-Protocol-II-E.pdf.

A Treaty We Can Live with: The Overlooked Strategic Value of Protocol II

Colonel Michael W. Meier[1]

Introduction

The Global War on Terror (GWOT) has dominated the consciousness of the United States and the world since the horrific attacks on September 11, 2001. Many aspects of this war have been the subject of vigorous debate, but the status and treatment of detainees has been a lightning rod for controversy since the arrival of the first detainees in Guantanamo Bay, Cuba (GTMO) in early 2002. Legal scholars, pundits, and human rights groups have all struggled with the following questions: What rights, if any, should detainees receive? Are they prisoners of war? How long can the United States hold them? Can the detainees challenge their detention in federal court? These questions have been transformed into numerous legal challenges in U.S. courts, including the recent U.S. Supreme Court decision in *Hamdan v. Rumsfeld*.[2]

Not surprisingly, the *Hamdan* ruling did not resolve the debate, but merely advanced it to the next step. The Supreme Court determined, in part, that Common Article 3 to the Geneva Conventions[3] is applicable to the armed conflict with al Qaeda and the GWOT.[4] However, the Court left unclear the standard of treatment required to satisfy this "humane treatment" obligation. A plurality of the Court did, however, look to Article 75 of Protocol I to the Geneva Conventions to illuminate the meaning of "fundamental guarantees" required by the law of armed conflict.[5] The meaningful guidance with respect to military commission trial procedures did little to clarify treatment standards outside the courtroom and neither has the subsequent response by the Bush Administration and Congress.[6]

In spite of this apparent vacuum of guidance on detainee treatment standards, there is one law of armed conflict treaty that, thus far, all parties appear to have overlooked: Protocol II to the Geneva Conventions.[7] This treaty provides expanded guidance on the implementation of the "humane treatment" mandate found in Common Article 3. Protocol II, unlike its counterpart Protocol I, was forwarded to the Senate for advice and consent by President Reagan.[8] President Clinton also requested action on it.[9] Ironically, the only significant objection the United States raised to this treaty—the restrictive scope provision[10]—actually supports application of Protocol II to the GWOT. The Senate's failure to act and enable U.S.

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[2] 126 S. Ct. 2749 (2006).

[3] *See* Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field art. 3, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter CG III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[4] Hamden v. Rumsfeld, 126 S. Ct. 2749, 2796-97 (2006).

[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3, 37-38 [hereinafter Protocol I].

[6] In response to the *Hamdan* decision, Congress enacted the Military Commission Act and the Department of Defense published its Detainee Program directive. Both will be discussed in detail later in this article. *See* Military Commission Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) [hereinafter MCA]; U.S. DEP'T OF DEFENSE. DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept. 2006) [hereinafter DOD DIR. 2310.01E].

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

[8] *See* PRESIDENT RONALD REAGAN, LETTER OF TRANSMITTAL, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, CONCLUDED AT GENEVA ON 10 JUNE 1977, S. TREATY DOC. NO. 2, 100th Cong., at 7 (1987) [hereinafter REAGAN LETTER OF TRANSMITTAL].

[9] *See* PRESIDENT WILLIAM CLINTON, LETTER OF TRANSMITTAL, 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., at iii-v, xi [hereinafter CLINTON LETTER OF TRANSMITTAL].

[10] Protocol II, *supra* note 7, art. 1.

ratification seems an insufficient justification for omitting analysis of the treaty in relation to the ongoing detainee treatment debate.

This article examines the development of the current U.S. detainee policy and the existing policy toward treatment of detainees since the *Hamdan* decision, including the recently enacted Military Commission Act of 2006 (MCA).[11] The article then analyzes the relevance of Protocol II to this legal and policy landscape, ultimately concluding with three recommendations. First, that the Bush Administration should immediately apply the provisions of Protocol II, even though not legally required because of its narrow applicability,[12] to all detainees including those al Qaeda terrorists and supporters captured during the GWOT. Second, that the Bush Administration should move to obtain Senate advice and consent for Protocol II and ratify the treaty with the understanding it will apply to all non-international armed conflicts covered by Common Article 3. Finally, that the Bush Administration should, while working with U.S. allies, propose that the Protocol be amended to explicitly expand the scope of application to all non-international armed conflicts, regardless of geographic location. Implementing these recommendations would advance U.S. national strategic objectives by providing an international law foundation for detainee treatment that will be supported and understood by our allies. Advocating an expanded application of Protocol II will also go a long way in restoring the U.S. role as a leader with respect to international law in the international community.

Background

The United States is engaged in a war against al Qaeda, the Taliban, and their affiliates and supporters. Though the events of September 11, 2001, brought the war to the American public, the United States has been engaged in this conflict for over the past decade and, arguably, for the past twenty-five years.[13] The facts surrounding the attacks on September 11, 2001, are well known and undisputed. Nineteen al Qaeda terrorists collaborated on an attack with four planes. Three of the planes crashed into the World Trade Center and the Pentagon. The fourth plane, allegedly headed for Washington, D.C., was brought down in a field in Shanksville, Pennsylvania due to the heroic actions of passengers to retake the plane. The four attacks resulted in the death of over 3000 people of seventy-eight different nationalities.[14]

On 7 October 2001, President George W. Bush announced that "the United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan."[15] These actions were undertaken to "disrupt the use of Afghanistan as a terrorist base of operations" and "designed to clear the way for sustained, comprehensive and relentless operations to drive them out and bring them to justice."[16] On 13 November 2001, the President issued his military order regarding the detention, treatment, and trial of individuals detained in the war on terrorism. The order determined that the attack of September 11 had "created a state of armed conflict."[17] It authorized the detention and prosecution of detainees by military tribunals,[18] and set forth the minimum standards of treatment for detainees.[19]

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[11] MCA, *supra* note 6.

[12] Protocol II will be discussed in further detail later in this article. Essentially, Protocol II applies to only those non-international armed conflicts in which an organized armed group, "under responsible command, exercise . . . control over part of its territory" to carry out sustained military operations. The narrow "scope" of Article effectively excludes from the scope of the treaty many non-international armed conflicts, to include the conflict with al Qaeda. The United States objects to this narrow view and has stated that if it ratifies the treaty, it will apply this Protocol to those conflicts covered by Common Article 3 and will encourage other states to do so as well. *See* REAGAN LETTER OF TRANSMITTAL, *supra* note 8, at 11.

[13] *See* MidEast Web.org, *Osama Bin Laden's Jihad and Text of Fatwahs and Declaration of War*, *available at* www.mideastweb.org/osamabinladen1.htm (last visited Oct. 17, 2007). In 1996, Osama bin Laden issued a fatwa declaring war on the United States. Further, in 1998, he reiterated the fatwa calling on Muslims worldwide to kill Americans, whether military or civilian, wherever they could be found. *Id.*

[14] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, May 6, 2005, Comm. Against Torture, *Consideration of Reports submitted by States Parties under Article 19 of the Convention, Addendum, United States of America*, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005), *available at* http://www.state.gov/documents/organization/62175.pdf [hereinafter CAT].

[15] President George W. Bush, Address to the Nation (Oct. 7, 2001), *available at* www.johnstonsarchive.net/terrorism/bush911d.html.

[16] *Id.*

[17] Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[18] *Id.* § 1(e).

[19] *Id.* § 3. According to Section 3

> Any individual subject to this order shall be—

With the initiation of military operations in Afghanistan, the United States and allied forces immediately began capturing members of al Qaeda and the Taliban. Their capture and detention touched off a heated debate within the U.S. government on whether the Geneva Conventions applied and how detainees should be classified and treated. The Department of Justice (DOJ), acting on behalf of the Attorney General—the official responsible for making definitive legal interpretations on behalf of the executive branch—concluded that the Geneva Conventions, in particular the Geneva Convention Relative to the Treatment of Prisoners of War (GC IV), did not apply to the conflict in Afghanistan. Regarding al Qaeda, the DOJ reached two conclusions. First, the Geneva Convention applies only between state actors, and not between a state and non-state actors like al Qaeda. Accordingly, al Qaeda detainees could not qualify for prisoner of war status under any circumstances. Second, because the conflict with al Qaeda was "one of an international character" and not "internal," it fell outside the scope of Common Article 3.[20]

The Department of State (DOS) countered that the President should apply the Geneva Conventions to the conflict in Afghanistan. By applying the Geneva Conventions, it would reaffirm United States practice over the past fifty years. Additionally, it would be consistent with existing UN Security Council resolutions.[21] Secretary of State Colin Powell and his legal advisor, Mr. William H. Taft IV, argued that applying the conventions would demonstrate that the U.S. bases its conduct on its legal obligations, not just its policy preferences. The DOS emphasized that any small benefit for the United States resulting from the DOJ interpretation would be outweighed by the cost to the U.S. armed forces in combat, negative international reaction with adverse consequences on U.S. foreign policy, and public support.[22] Nevertheless, on 7 February 2002, President Bush, acting on the advice of his legal counsel, Mr. Alberto Gonzales, accepted the interpretation provided by the DOJ. Accordingly, he determined that none of the provisions of the Geneva Conventions applied to the conflict with al Qaeda in "Afghanistan or elsewhere throughout the world," since al Qaeda is not a "High Contracting Party" to the conventions.[23] However, President Bush found that the provisions of the Geneva Convention would apply to the Taliban. In determining the conflict was one of international scope, President Bush explicitly rejected the application of Common Article 3 to either the Taliban or members of al Qaeda. Specifically, he determined:

> I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."[24]

Since military operations began in 2001, the United States and its allies have captured or detained thousands of individuals. Because most of these captured personnel did not qualify as enemy prisoners of war (EPWs), the United States characterized them as "unlawful enemy combatants." This term has frequently been used in the past to apply to actors such as spies and saboteurs who are not entitled to prisoner of war status if detained during conflict.[25] Many of those captured have been released; others remain detained in Afghanistan and Iraq. The "worst of the worst" of those detainees were selected for detention at GTMO.[26] The first group of enemy combatants arrived at GTMO in January 2002.[27] Since 2002,

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(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;
(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
(d) allowed the free exercise of religion consistent with the requirements of such detention; and
(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

[20] 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 Jan. 2002), *available at* http://news.findlaw.com/hdocs/docs/torture/powtorturememos.html.

[21] Memorandum, William H. Taft IV, Legal Advisor, Department of State, to Alberto R. Gonzales, Counsel to the President, subject: Comments on Your Paper on the Geneva Convention (2 Feb. 2002); Memorandum, Colin L. Powell, Secretary of State, to Counsel to the President and Assistant to the President for National Security Affairs, subject: Draft Decision Memorandum for the President on the Applicability of the Geneva Conventions to the Conflict in Afghanistan (26 Jan. 2002), *available at* www.slate.com/features/whatistorture/legalmemos.html.

[22] *Id*.

[23] Memorandum, President George W. Bush, to Vice President et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* www.slate.com/features/whatistorture/legalmemos.html.

[24] *Id*. at 2.

[25] *See* John B. Bellinger, III, State Dep't Legal Advisor, Opino Juris, *Unlawful Enemy Combatants*, Jan. 17, 2007, http://www.opiniojuris.org/posts/1169000173.shtml.

[26] *See* Bill Dedman, MSNBC.com, *GITMO Interrogations Spark Battle over Tactics*, Oct. 23, 2006, http://www.msnbc.msn.com/id/15361458.

[27] CAT, *supra* note 14, at 50.

many detainees have been released or transferred to their home country or another country that has agreed to accept them. Currently, the United States holds approximately 375 detainees at GTMO.[28]

Hamdan v. Rumsfeld[29]

One of the principal reasons GTMO was selected as the location to detain enemy combatants was to ensure that they would not be entitled to U.S. judicial review of their status. In spite of the Bush Administration position that GTMO is outside the jurisdiction of U.S. courts, the stream of litigation has been non-stop. As of December 2006, approximately 350 of the current detainees at GTMO have habeas corpus cases pending in federal court.[30] Four cases have been decided by the Supreme Court.[31] The most recent case was the June 2006 decision in *Hamdan v. Rumsfeld*.[32]

Salim Ahmed Hamdan, a Yemeni national, is in custody at GTMO. He was captured in November 2001 in Afghanistan by militia forces and turned over to the U.S. military. He was sent to GTMO in June 2002 and selected by President Bush for trial by military commission in 2003 on one count of conspiracy "to commit . . . offenses triable by military commission."[33] Hamdan filed petitions for writs of habeas corpus and mandamus to challenge his detention and the charges against him.

There are many interesting aspects of the *Hamdan* decision, to include the Court's invalidation of the military commissions.[34] However, the most militarily significant impact of the decision was the Court's interpretation of Common Article 3 with respect to al Qaeda.

The text of Common Article 3, in part, reads as follows:

> In the case of an *armed conflict not of an international character* occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . . .[35]

The Court accepted the Administration's position that Hamdan was captured in connection with the conflict against al Qaeda, but disagreed with the President's determination that this conflict was beyond the "reach of the Geneva Conventions."[36] The Court specifically rejected the narrow view taken by the Administration that the conflict was international in scope and, that therefore, Common Article 3 was inapplicable.[37] In rejecting the Bush Administration's interpretation that the conflict was not one of an international character, the Court held that the term "non-international" was used in contradistinction to a conflict between nations. Common Article 2 to the Geneva Conventions provides that the conventions will apply to all cases of conflict; however, they are characterized by the parties, between "two or more High Contracting Parties,"[38] an international legal synonym for states. In contrast, according to the Court, Common Article 3 was developed to provide baseline humanitarian protections to persons involved in any armed conflict not falling within the scope of Common Article 2. Though the Administration was correct in asserting that the drafters of Common Article 3 were motivated by concerns over purely internal armed conflicts, such as a civil war, the Court noted that the commentaries

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[28] Global Security.org, *Military: Guantanamo Bay Detainees*, June 19, 2007, http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm.

[29] 126 S. Ct. 2749 (2006).

[30] E-mail from Ms. Karen Hecker, Department of Defense Office of General Counsel, to author (Dec. 19, 2006, 12:14PM) (on file with author).

[31] *See* Rasul v. Bush, 542 U.S. 466 (2004) (the Supreme Court found that enemy combatants could challenge their detention); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); and, Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2650 (2004) (Justice O'Connor wrote that a "state of war is not a blank check for the President . . . .").

[32] 126 S. Ct. 2749 (2006).

[33] *Id.* at 2759.

[34] Geoffrey S. Corn, Hamdan, *Fundamental Fairness, and the Significance of Additional Protocol II*, ARMY LAW., Aug. 2006, at 1. As explained by Professor Corn, the decision focuses on three primary areas: "scope of executive power, the 'way ahead' for dealing with al Qaeda detainees, and the impact of the decision on the legal regulation of the conflict with al Qaeda." *Id*. at 1.

[35] GCs I-IV, *supra* note 3, art. 3 (emphasis added).

[36] *Hamdan*, 126 S. Ct. at 2794-95.

[37] Corn, *supra* note 34, at 2.

[38] *Hamdan*, 126 S. Ct. at 2796; GC I, *supra* note 3, art. 2; GC II, *supra* note 3, art. 2; GC III, *supra* note 3, art 2; GC IV, *supra* note 3, art. 2.

explaining the conventions also emphasized that the "scope of the Article must be as wide as possible."[39] Having determined that Common Article 3 was applicable to the conflict with al Qaeda, the Court ruled that Common Article 3 required Hamdan to be tried by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[40]

A plurality of the Court then analyzed the meaning of a "regularly constituted court," relying on the text of Article 75 of Protocol I.[41] This article is best viewed as an extension of the humane treatment standards of Common Article 3. Its primary purpose was to ensure that the humane treatment standard set forth in Common Article 3 was applicable to international armed conflicts (a response to the anomaly that Common Article 3 was not made explicitly applicable to such conflicts). In addition, Article 75 expands and provides more detailed guidance than the general provisions of Common Article 3.[42]

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[39] *Hamdan*, 126 S. Ct. at 2796.

[40] *Id.* at 2797.

[41] Corn, *supra* note 34, at 2.

[42] Article 75 provides the following fundamental guarantees:

> 1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
>
> 2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
>
> (a) Violence to the life, health, or physical or mental well-being of persons, in particular:
>
> (i) Murder;
>
> (ii) Torture of all kinds, whether physical or mental;
>
> (iii) Corporal punishment ; and
>
> (iv) Mutilation;
>
> (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
>
> (c) The taking of hostages;
>
> (d) Collective punishments; and
>
> (e) Threats to commit any of the foregoing acts.
>
> 3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
>
> 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
>
> (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
>
> (b) No one shall be convicted of an offence except on the basis of individual penal responsibility;
>
> (c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
>
> (d) Anyone charged with an offence is presumed innocent until proved guilt according to law;

This relationship between Common Article 3 and Article 75 certainly explains why the Court would look to Article 75 to illuminate the meaning of Common Article 3. However, the reliance by the plurality on Article 75 is problematic for two reasons. First, the provisions of Protocol I specifically apply to international armed conflicts, the type of conflict the Court determined was contradistinct from a Common Article 3 conflict.[43] Second, Protocol I has been rejected by the United States for well defined policy reasons. It was therefore unsurprising that the plurality's reliance on Article 75 triggered substantial criticism as an unjustified act of judicial interference with Executive decision making.[44]

The decision in *Hamdan* posed two problems for the Bush Administration. First, the Department of Defense (DOD) needed to evaluate the existing detainee policies to ensure that they complied with Common Article 3. Second, President Bush would need to work with Congress to correct the deficiencies in the military commission process.

Administration Actions after *Hamdan*

DOD Directive 2310.01E, *The Department of Defense Detainee Program*

The DOD took prompt action to ensure its policies complied with the determination that Common Article 3 applied to the conflict with al Qaeda. In July 2006, Deputy Secretary of Defense Gordon England issued a memorandum to ensure that

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(e) Anyone charged with an offence shall have the right to be tried in his presence;

(f) No one shall be compelled to testify against himself or to confess guilt;

(g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
(j) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases
where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

Protocol I, *supra* note 5, art. 75.

[43] *See Hamdan*, 126 S. Ct. at 2795; Corn, *supra* note 34, at 6.

[44] Rich Lowery, *Judicial Interference: The Supreme Court Goes to War*, NAT'L REV. ONLINE, June 30, 2006, *available at* http://article.nationalreview.com/print/?q=ZjU3OTUyY2JhYWQ2MDhjYTEyZTBjZmY4YjgxZTM2OTE; *see* Corn, *supra* note 34, at 6; *see also* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

all DOD personnel would adhere to those standards of Common Article 3. He also called for a prompt review of all "relevant directives, regulations, policies, practices and procedures" to ensure that they complied with Common Article 3.[45]

In September 2006, the DOD published DOD Directive 2310.01E, *The Department of Defense Detainee Program*, its long-awaited directive on detainee treatment.[46] This directive provides the overarching DOD policy with respect to detainee operations. The revision sets out policy guidance not only for detention operations in traditional conflicts, but now includes treatment standards for individuals detained in the GWOT by incorporating the numerous lessons learned and taking into account the recommendations in the twelve major investigations conducted by the DOD of its detention operations.[47]

This directive specifically incorporates references to Common Article 3 and provides that all detainees will be treated humanely and in accordance with U.S. law, policy and the laws of war. Paragraph 4.2 of the directive specifically provides:

> All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3 to the Geneva Conventions of 1949 [. . .], as construed and applied by U.S. law, and those found in Enclosure 4, in the treatment of detainees, until their final release, transfer out of DOD control, or repatriation. Note that certain categories of detainees, such as enemy prisoners of war, enjoy protections under the law of war in addition to the minimum standards prescribed in Common Article 3 . . . .[48]

In addition to the treatment standards of Common Article 3, enclosure 4 of the directive contains many other requirements, some which exceed the standards articulated in Common Article 3, that the DOD considered essential to ensure the humane care and treatment of detainees.[49] For example, detainees will also be entitled to "adequate food, drinking water, shelter, clothing, and medical treatment."[50] They will also be free to "exercise their religion, consistent with the requirements of detention."[51] Finally, paragraph E4.1.1.3 provides:

> All detainees will be respected as human beings. They will be protected against threats or acts of violence including rape, forced prostitution, assault and theft, public curiosity, bodily injury, and reprisals. They will not be subjected to medical or scientific experiments. They will not be subjected to sensory deprivation. This list is not exclusive.[52]

The release of this directive was an important step in ensuring that DOD detention policies complied with Common Article 3. It provided a baseline standard of treatment for all detainees. Its release, especially in combination with the new manual on interrogation,[53] was widely perceived as a repudiation of the harsh interrogation tactics and treatment standards approved subsequent to the attacks of September 11.[54]

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[45] Memorandum, Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (July 7, 2006), *available at* http://www.defenselink.mil/news/Aug 2006/d20060814comm3.pdf.

[46] DOD DIR. 2310.01E, *supra* note 6.

[47] Charles "Cully" Stimson et al., *Department of Defense Directive on Detainee Operations, the Release of the Army Field Manual for Human Intelligence Collection and an Update on Military Commissions*, Foreign Press Center Briefing, Sept. 7, 2006, *available at* http://fpc.state.gov/fpc/71958.htm.

[48] DOD DIR. 2310.01E, *supra* note 6, para 4.2, at 2.

[49] Stimson, et al., *supra* note 47, encl. 4, at 2.

[50] DOD DIR. 2310.01E, *supra* note 6, para. E4.1.1.3, at 11.

[51] *Id.*

[52] *Id.* para. E4.1.1.3.

[53] U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3 (FM 34-52), HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006) [hereinafter FM 2-22.3]. The new field manual replaced FM 34-52. It incorporates many of the lessons learned from the GWOT and is broader than FM 34-52. It incorporates a single standard of treatment for detainees regardless of their status, prohibits torture and cruel, inhuman, or degrading treatment. It authorizes eighteen interrogation techniques which, consistent with the Detainee Treatment Act of 2005, are the only interrogation techniques authorized for any detainee, whether lawful or unlawful combatants. *See* Stimson et al., *supra* note 47, at 4.

[54] Josh White, *New Rules of Interrogation Forbid Use of Harsh Tactics*, WASH. POST, Sept. 7, 2006, at A1.

Military Commission Act of 2006

With the Supreme Court's invalidation of the existing military commissions, President Bush moved quickly to correct the deficiencies identified by the Court. In *Hamdan*, the Court did not specifically decide whether the President had the authority to convene military commissions without Congressional approval. It found instead that even if he did have such powers, the military commissions did not comply with minimum legal requirements, either under the Uniform Code of Military Justice or the Geneva Conventions.[55] In so holding, the Court essentially invited the President to work with Congress to provide the legislative framework and structure necessary for bringing the military commissions into compliance with domestic and international law.[56]

The response to this invitation was swift and decisive. On 17 October 2006, the President signed into law the Military Commission Act of 2006 (MCA),[57] at which time he stated:

> [T]he legality of the system I established was challenged in court, and the Supreme Court ruled that military commissions needed to be explicitly authorized by the United States Congress.
>
> And so I asked Congress for that authority, and they have provided it. With the Military Commission Act, the legislative and executive branches have agreed upon a system that meets our national security needs. These military commissions will provide a fair trial, in which the accused are presumed innocent, have access to an attorney, and can hear all the evidence against them.[58]

This law authorized the President to establish military commissions, and empowers these commissions to try "alien unlawful enemy combatants" who engaged in hostilities against the United States for violations of the law of war and other offenses.[59] The MCA also addressed some of the other concerns raised by the *Hamdan* decision: it entitles a defendant to access to exculpatory evidence; prohibits government use of evidence not provided to the defense (although it does not require disclosure of evidence not used at trial that is not exculpatory); provides a defendant a right to counsel; and prohibits the use of evidence that may have been obtained by torture.[60]

In addition to establishing the procedures for trial by military commissions, the MCA also addressed the treatment of detainees under Common Article 3. Since the Administration viewed the provisions of Common Article 3 as being vague, the MCA purports to specify treatment standards required to comply with this treaty provision. First, it set out nine violations of Common Article 3 that trigger criminal liability under U.S. law, including torture, inhumane treatment, rape, medical experimentation, taking of hostages, and kidnapping.[61] For treatment not falling into one of these categories, the MCA created a "catch-all" prohibition against any conduct that amounts to "cruel, inhuman, or degrading treatment or punishment" as the United States has defined in its reservations and understanding of the Convention Against Torture.[62]

In spite of this effort to provide necessary meaning to Common Article 3, the enactment of the MCA did not end the international debate over the treatment of detainees. As Mr. John Bellinger, Legal Adviser to the Secretary of State, acknowledged in a briefing:

> But, I do think that while I don't see a greater support for U.S. policies, that there is a better understanding of the difficult legal framework and the difficulties in treating international terrorists and that we're beginning to see more and more statements coming out of European officials acknowledging that without a

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[55] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2790-98 (2006).

[56] John B. Bellinger, III, State Dep't Legal Advisor, Foreign Press Center Briefing, The Military Commission Act of 2006, Oct. 19, 2006, *available at* http://fpc.state.gov/fpc/74786.htm.

[57] MCA, *supra* note 6.

[58] Office of the President of the United States, *President Bush Signs Military Commissions Act of 2006*, Oct. 17, 2006, *available at* http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html.

[59] *See* MCA, *supra* note 6, § 948b, 120 Stat. at 2602.

[60] *See* Bellinger, *supra* note 56, at 2; MCA, *supra* note 6, §§ 948r, 949a, 949a(c), 949j, 120 Stat. at 2606-09, 2615.

[61] *See* Bellinger, *supra* note 56, at 1-2; MCA, *supra* note 6, § 6, 120 Stat. at 2633-34.

[62] *See* Bellinger, *supra* note 56, at 2; MCA, *supra* note 6, § 6(c), 120 Stat. at 2635.

> doubt the legal framework applicable to dealing with international terrorists who are outside of our borders, not people who are inside our own countries, but who attack our countries from outside our borders is quite a difficult one and a difficult public policy problem for all of us.[63]

Nor has the enactment of the MCA silenced domestic criticism of detainee treatment policies. After the November 2006 elections, Congress has attempted to revisit the Act in order to address some of the more contentious provisions, such as the provision stripping detainees of the right to habeas corpus review.[64]

This continued criticism of U.S. detainee treatment policies is not without merit and reflects the compromise nature of much of the MCA. The basic dilemma confronted by the Bush Administration in the early days following the attacks of September 11 has not been eliminated. There remains a need to develop a policy framework for detainee treatment that satisfies the legitimate security interests of the United States while protecting the basic fundamental right of humane treatment for individual detainees. Without such a framework, the United States will risk continued diminishing domestic and international credibility for the GWOT. Although the MCA was a step in the right direction, a broader approach remains necessary, in part because Common Article 3 provides a relatively limited framework for detainee treatment. Ironically, a treaty that has been pending ratification by the United States for nearly two decades may provide that framework. That treaty is Protocol II.[65]

Protocol II to the Geneva Conventions

Protocol II was drafted at the same time as Protocol I. It was negotiated over a period of four years and finally signed on 10 June 1977.[66] The purpose of the Protocol was to expand the basic humanitarian provisions of Common Article 3 applicable to non-international armed conflicts by providing more comprehensive and specific guarantees for detainees and others.[67] The International Committee of the Red Cross (ICRC) notes in its commentaries that the entire purpose of the treaty was to "reinforce and increase the protections granted to victims of non-international armed conflict—the 'raison d'etre' of Protocol II—it develops and supplements the brief rules contained in Common Article 3 . . . ."[68]

The humane treatment standards set forth in Articles 4, 5, and 6 provide the primary protections for detainees. Article 4 sets out fundamental guarantees for everyone affected by armed conflict, whether combatant or civilian.[69] It ensures humane treatment for detainees and others and protection from violence, such as murder, torture, mutilation, or corporal punishment; the taking of hostages; acts of terrorism; slavery; and outrages upon personal dignity, in particular humiliating and degrading treatment, rape, prostitution, or indecent assault.[70] Article 5 deals specifically with persons who are detained and provides that detainees shall receive appropriate medical care, food and drinking water, and free exercise of religion.[71] Further, women shall be held separately from men, unless they are accommodated together as a family.[72] Detainees must be allowed to receive and send mail, except when limited as necessary.[73] Finally, detention facilities must be located away from the battlefield.[74] Article 6 provides fundamental due process and penal protections for persons who may be prosecuted and

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[63] *See* Bellinger, *supra* note 56, at 4.

[64] *See* The Habeas Corpus Restoration Act of 2007, S. 185, 110th Cong. (2007); *see also Treatment of Detainees on Democrats' Agenda*, WASH. TIMES, Dec. 29, 2006, at A6.

[65] Protocol II, *supra* note 7.

[66] *Id.* Protocol II was negotiated by a diplomatic conference convened by the Swiss Government in Geneva, which met in four annual sessions from 1974–77. *See* REAGAN LETTER OF TRANSMITTAL, *supra* note 8, at 7

[67] *See* REAGAN LETTER OF TRANSMITTAL, *supra* note 8, at 7.

[68] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1350 (1987) [hereinafter PROTOCOL COMMENTARY]; *see* Corn, *supra* note 34, at 8.

[69] Protocol II, *supra* note 7, art. 4.

[70] *Id.*

[71] *Id.* art. 5.

[72] *Id.*

[73] *Id.*

[74] *Id.*

punished for offenses related to the armed conflict.[75] According to this article, an accused must be informed of the charges against him; presumed innocent; be tried in his presence; not be compelled to testify against himself; and be advised of the judicial or other remedies that are available to him.[76]

Even though the Treaty was concluded in 1977, it has not been ratified by the United States. However, unlike Protocol I, this is not the result of a conclusion that the treaty is fatally flawed. Nonetheless, while this treaty has been submitted to the Senate for advice and consent, one aspect was considered particularly troubling: its limited scope of application. According to Article 1(1) of Protocol II,

> This Protocol, which develops and supplements Article 3 Common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed group which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[77]

By requiring a State party to apply the Protocol to only those non-international armed conflicts in which an organized armed group, "under responsible command, exercise[s] . . . control over part of [that State's] territory" to carry out sustained military operations, Article 1 excluded from the scope of the treaty many non-international armed conflicts. It was this narrow application of the treaty that triggered the primary U.S. concern.[78] Both President Reagan, in 1986, and President Clinton, in 1999, recommended ratification of the treaty subject to the understanding that the United States would apply the Protocol to all conflicts covered by Common Article 3.[79] This would appear to include any non-international armed conflict involving armed groups that do not control territory, but conduct sporadic operations over a wide area.

Interestingly, it is the narrow scope to which the United States objected that would ostensibly exclude the conflict with al Qaeda from application of the Protocol.[80] Accordingly, and particularly in light of the Supreme Court conclusion that conflict with al Qaeda falls under the scope of Common Article 3, the application of Protocol II to the GWOT seems logically derived from the longstanding U.S. view of that treaty.

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[75] *Id.* art. 6.

[76] *Id.*

[77] *Id.* art. 1.

[78] Memorandum, Major General Wilton B. Persons, Jr., The Judge Advocate General of the Army, to The Secretary of the Army, subject: Adoption of Protocols Updating Law of War—Information Memorandum (1 July 1977). Tab B of this memorandum includes the statement by Ambassador George H. Aldrich, United States Representative to the Fourth Session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Ambassador Aldrich expressed the United States' disappointment at the high threshold for applicability of Protocol II as follows:

> [M]y Government sought a Protocol II with a low threshold of violence to bring it into effect. We are disappointed that the Conference adopted a Protocol II with a relatively high threshold. We fear that, while the Protocol should not in any significant way infringe upon the sovereignty of any state, and therefore should be widely accepted, the high threshold of violence required by Article 1 will serve as a convenient excuse to refuse to admit its applicability except in very limited situations. Accordingly, while welcoming Protocol II, we are forced to question the extent to which it advances the cause of humanitarianism in non-international armed conflicts beyond that already embodied in Article 3 common to the Geneva Conventions of 1949.
>
> Nevertheless, we can hope that Protocol II will prove to be a significant force for greater humanity in civil wars. Only time will tell. My Government, in any event, will support this protocol and hopes it will be broadly supported by the nations of the world.

Id. Tab B.

[79] *See* REAGAN LETTER OF TRANSMITTAL, *supra* note 8, at 2-3, 8, 36-37, 48; CLINTON LETTER OF TRANSMITTAL, *supra* note 9, at iii-v, xi.

[80] *See* Protocol II, *supra* note 7, art. 1(1); Corn, *supra* note 34, at 7.

Recommendations for Retooling the Current Detainee Strategy

Protocol II provides the logical legal framework for dealing with individuals detained in the non-international armed conflict with al Qaeda, and will provide a framework that protects U.S. national security interests while complementing the strategic goal of preserving U.S. credibility. Therefore, the Bush Administration should take the following three steps: (1) Immediately announce that the United States will treat all detainees, including al Qaeda terrorists and its supporters, in accordance with Protocol II; (2) Ensure ratification of Protocol II to the Geneva Conventions; and (3) Propose a modification of the scope provision of Article 1(1) to ensure that all other nations can not avoid application of this treaty.

Immediately Announce that the United States Will Treat All Detainees, Including al Qaeda Terrorists and Supporters, in Accordance with Protocol II

Protocol II, like Article 75 of Protocol I, includes a "fundamental guarantees" provision that addresses humane treatment. However, unlike Article 75, Protocol II was developed to specifically supplement Common Article 3; and includes a specific provision, Article 6, establishing the standards for the prosecution and punishment of offenses related to non-international armed conflict. [81]

Article 6 does not prohibit the use of military commissions. It provides that a detainee must be tried by "a court offering the essential guarantees of independence and impartiality."[82] In fact, according to the commentary, the drafters contemplated the use of military commissions.

> Just like Common Article 3, Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict; however, such a situation often entails the suspension of constitutional guarantees, the promulgation of special laws and the creation of special jurisdictions. Article 6 lays down some principles of universal application which every responsible organized body must, and can, respect . . . .[83]

Use of such tribunals is permissible contingent upon respect for basic procedural safeguards. Article 6 sets out these safeguards, all of which are implemented by the MCA.[84] For example, in both, a defendant is presumed innocent; has the right to be present throughout the trial and to see all the evidence admitted in trial; the right to cross-examine witnesses; access to counsel, to include the right to represent himself; and, a defendant may not be compelled to incriminate himself or testify.[85] However, by invoking the authority of Protocol II, the United States will substantially bolster the international credibility of the MCA.

Adherence to Protocol II also would add international legal credibility to the humane treatment standards already implemented by the DOD. Because DOD Directive 2310.01E, enclosure 4, sets out standards for detainee treatment that either meet or exceed the standards set forth in Protocol II, applying this treaty to the GWOT will result in virtually no new requirements.[86] For example, pursuant to this directive, detainees at GTMO receive medical and dental care comparable to what U.S. Soldiers receive.[87] They are also provided three meals a day that meet cultural dietary requirements, adequate shelter, and outside recreation. Plans are underway for expanded communal living and exercise opportunities, such as soccer, volleyball, and ping-pong.[88] These are the same requirements of Article 5(1) of Protocol II.[89]

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[81] *See* Corn, *supra* note 34, at 9.

[82] Protocol II, *supra* note 7, art. 6(2).

[83] PROTOCOL COMMENTARY, *supra* note 68, at 1396-97; *see* Corn, *supra* note 34, at 11.

[84] MCA, *supra* note 6, §§ 948b(f), 948j, 948k, 948l, 948q, 948r.

[85] *See* PROTOCOL COMMENTARY, *supra* note 68, at 1398-1400; MCA, *supra* note 6, §§ 948r, 949a, 949a(c), 949j, 120 Stat. at 2606-09, 2615.

[86] DOD DIR. 2310.01E, *supra* note 6, para. E.4.1.1.1.

[87] *See* Dep't of State Cable, *Detainee Talking Points* (Oct. 24, 2006) (on file with author) [hereinafter Dep't of State Cable].

[88] *See id.* at 8.

[89] Protocol II, *supra* note 7, art. 5(1).

Another analogous provision ensures detainees the right to freely exercise their religion, consistent with the requirements of detention.[90] At GTMO, detainees each receive a copy of the Koran in one of five languages, as well as prayer beads and a rug.[91] Once the call to prayer is played over loud speakers, detainees are provided twenty minutes of time to worship and an arrow showing the direction to Mecca is stenciled on the floors.[92]

The similarity between the obligations of Protocol II and current DOD policies indicate the wisdom of invoking this treaty in a formal manner as the legal framework for U.S. detainee policies. Doing so will have the double effect of validating existing policy and enhancing the international credibility of future actions.

Ensure Ratification of Protocol II to the Geneva Conventions

The 2006 U.S. National Security Strategy is founded upon two pillars: (1) promoting freedom, justice, and human dignity; and (2) confronting the challenges of our time by leading a growing community of democracies.[93] As part of this strategy, the President recognizes that the United States must strengthen alliances to defeat global terrorism.[94] If the United States is to be successful, it must demonstrate those values to the world at large. Ratifying Protocol II will substantially contribute to this objective.

The United States has historically been in the forefront of advances in international law. As a superpower, the United States is often held to a higher standard by many in the world when it comes to the laws of war or human rights. Protocol II was seen as a humanitarian advancement with respect to non-international armed conflicts. As stated by President Reagan, ratification would "assist us in continuing to exercise leadership in the international community."[95] It was this consideration that motivated President Reagan to seek Senate authorization to bind the United States to this treaty, even in light of his objection regarding the unjustifiably narrow scope of applicability.

It is unlikely that the Reagan Administration contemplated the type of armed conflict characterized by the conflict with al Qaeda when considering the benefits of Protocol II. However, it remains significant that both President Reagan and President Clinton advocated a broad application of the principles of humane treatment set out in the treaty. Both of these administrations clearly believed Protocol II must apply coextensively with Common Article 3.[96] By concluding that Common Article 3 is not territorially limited, the Supreme Court has effectively endorsed this logic and provided an additional rationale for supplementing Common Article 3 with the provisions of Protocol II.[97]

The National Security Strategy recognizes that terrorism, especially that of militant Islamic radicalism, is the "great ideological conflict" of the early 21st Century.[98] While the United States continues to encourage "our partners to expand liberty, and to respect the rule of law and the dignity of the individual," the United States recognizes it "must lead by deed as well as by example."[99] By ratifying Protocol II with the understanding that it will be applied to al Qaeda detainees (as well as other similar non-state actors in future conflicts), the United States will capitalize on accepted international law to bolster its policies, and in so doing demonstrate its commitment to the rule of law.

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[90] *See* DOD DIR. 2310.01E, *supra* note 6, para. E4.1.1.2.

[91] *See* Dep't of State Cable, *supra* note 87, at 8. Copies of the *Koran* are provided in Arabic, Dari, Pashtu, Russian, and Farsi.

[92] *Id.*

[93] OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA ii (2006) [hereinafter NATIONAL SECURITY STRATEGY].

[94] *Id.*

[95] *See* REAGAN LETTER OF TRANSMITTAL, *supra* note 8, at 2.

[96] *Id.* at 2, 7; *see* CLINTON LETTER OF TRANSMITTAL, *supra* note 9, at iv, xi.

[97] Corn, *supra* note 34, at 9.

[98] NATIONAL SECURITY STRATEGY, *supra* note 93, at 36.

[99] *Id.* at 36, 49.

Propose a Modification of the Scope Provision of Article 1(1) to Ensure That All Other Nations Cannot Avoid Application of This Treaty

Even if the United States does ratify Protocol II with the understanding that it will apply the provisions of the treaty to al Qaeda, other nations are not legally bound to apply these principles. The United States should therefore take the lead in amending the remaining textual impediment to allow a more logical and comprehensive application of the treaty to all non-international armed conflicts.[100]

Considering a revision to the Geneva Conventions and their Protocols is not an outrageous idea. During his confirmation hearing for the office of Attorney General, Alberto Gonzales acknowledged that it was appropriate to "revisit whether or not Geneva should be revisited."[101] Though the critics may argue that the Bush Administration would seek to weaken these treaties, making Protocol II coextensive with Common Article 3 could only enhance humanitarian protections. While it is unclear whether the current political realities would make such a revision possible,[102] one thing seems certain: the United States would be better positioned to pursue such a change only after it ratifies Protocol II and sets the example for other nations by applying Protocol II to the GWOT.

Conclusion

The treatment of detainees is a critical component in the war on terrorism. By all accounts, this issue has had a significant negative impact on international perceptions of the United States. Despite domestic opposition and pleas from allies, the Bush Administration has consistently resisted recommendations to apply even the baseline protections of the Geneva Conventions to al Qaeda detainees. The recent Supreme Court decision in *Hamdan* provides the Bush Administration a perfect opportunity to change this approach. The decision affirmed the right of the United States to detain enemy combatants in the war on terror and upheld the ability, when properly constituted, to prosecute those detainees for violations of the law of war. It also, however, made avoiding the international legal mandate of humane treatment for these detainees legally impossible.

The Detainee Treatment Act of 2005, the MCA of 2006, and DOD Directive 2310.01E are all important components in establishing detainee treatment standards. However, while these authorities collectively provide most of the treatment standards set forth in Protocol II, they do not have the same international standing. Further, they do not overcome the perception, domestically and internationally, that the United States is failing to comply with the laws of war. The Bush Administration should announce that it will immediately apply the humane treatment standards set forth in Protocol II to all detainees. Doing so would require few modifications to existing policy, but would contribute immensely to the credibility of that policy. This should be followed by an effort to obtain immediate action by the Senate to enable ratification of the treaty. With the Democrats assuming control of Congress and already stating they are going to revisit some of the aspects of the MCA, obtaining advice and consent seems particularly feasible.

Ratification of Protocol II will contribute to the success of the U.S. National Security Strategy. The defeat of terrorism necessitates close cooperation among all democratic nations. The detainee policy for the past five years has impeded this

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[100] In amending Article 1, the United States should propose the following language:

> Article 1
>
> *Material field of application*
>
> 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are covered by Article 3 common to the Geneva Conventions of 12 August 1949.
>
> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

This language would eliminate the restrictions of requiring the conflict to occur within the territory of a High Contracting Party, responsible command, and exercising control over part of its territory and carrying out sustained and concerted military operations. It does not, however, address the United States' concern over "wars of national liberation" from Protocol I. Unfortunately, attempting to achieve international agreement that these types of conflicts are non-international conflicts would almost prove impossible, just as it did in 1977.

[101] Peter Wallsten, *Geneva Convention Overhaul Considered*, L.A. TIMES, Jan. 7, 2005, *available at* http://www.commondreams.org/headlines05/0107-08.htm.

[102] *Id*.

cooperation. Many countries in Europe and around the world have an unfavorable impression of the United States' handling of detainees. The Bush Administration has been expending tremendous effort in trying to explain how its policies comply with the law of war. By adopting the recommendations of this article, the United States can bolster its policies using a standard most countries have accepted and all will understand. As stated in the National Security Strategy, "America must lead by deed as well as example."[103] Ratifying Protocol II will allow the United States to once again reassert its rightful and expected place as a leader in international law.

[103] NATIONAL SECURITY STRATEGY, *supra* note 93, at 54.

JUST AMERICANS: HOW JAPANESE AMERICANS WON A WAR AT HOME AND ABROAD[1]

REVIEWED BY MAJOR JASON S. WRACHFORD[2]

The original volunteers for the 442d from the camps in 1943 had sometimes chosen to serve their country against the wishes of their parents and the pressure of their peers. They had stepped forward under extreme duress. At some level, they knew that being forced to prove their loyalty made a mockery of the very notion of loyalty. If it is demanded, not earned, it is a fealty, the tribute due a lord, not loyalty as properly understood in a liberal democracy. Yet somehow the volunteers for the 442d had refused to let the coercion they faced rob them of their dignity of choice. They were expressing allegiance to a higher understanding of what it meant to be an American, and a citizen, than their own government's debased notion of loyalty.[3]

Over sixty-five years have passed since pilots from the Empire of Japan bombed Pearl Harbor, destroying or damaging scores of ships and planes and killing thousands. Yet, the memories and pictures of that terrible morning still reverberate in the minds of many Americans. As President Franklin D. Roosevelt described in his speech to a Joint Session of Congress and the Nation following the attacks, "December 7, 1941, [is] a date which will live in infamy . . . ."[4] This date is still one of the most infamous dates in American history, perhaps only recently surpassed by September 11, 2001.

The call to arms after the surprise attack on Pearl Harbor engendered not only a sense of patriotism, but also created a sense of fear, and in some cases, prejudice. In *Just Americans*, Robert Asahina[5] attempts to portray the interplay among these seemingly competing interests, and how men of Japanese descent living in America overcame their ill treatment and proved their true sense of self-sacrifice and loyalty to their country during World War II.

Asahina frames *Just Americans* with a modern-day account of a Japanese American[6] lady, Ms. Sandra Tanamachi, who noticed a road in Texas called "Jap Road."[7] Taking offense to this racial slur, Ms. Tanamachi sought to have the name of the road changed, but with no initial success.[8] Ms. Tanamachi found it ironic that Texans failed to fully appreciate the struggles that Japanese Americans, including those from the 442d Regimental Combat Team, had faced for years.[9] She had four uncles who had served in the 442d during World War II.[10] The 442d was primarily drawn from men of Japanese descent from Hawaii and relocation centers on the mainland.[11] She knew these brave men from the 442d had risked their lives in one of the bloodiest battles of World War II, to save hundreds of men, many from Texas, from certain death after the "Texas Battalion" (often later referred to as the "Lost Battalion") was surrounded for days by German military forces.[12] In addition, she was aware that the 442d was one of the most decorated units of World War II, despite the prejudice they faced in the

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[1] ROBERT ASAHINA, JUST AMERICANS: HOW JAPANESE AMERICANS WON A WAR AT HOME AND ABROAD (2006).

[2] U.S. Air Force. Presently assigned as Chief of International Agreements, United States Forces Korea (USFK/JA). Written while assigned as a student, 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia. The reviewer brings a unique perspective to the issues involved in the book. He is married to a Japanese citizen, and together, he and his wife have two children who are dual citizens of the United States and Japan.

[3] ASAHINA, *supra* note 1, at 87.

[4] President Franklin D. Roosevelt, Speech at a Joint Session of Congress and Radio Address to the Nation (Dec. 8, 1941).

[5] Robert Asahina, an American of Japanese descent, is a well-respected editor, publisher, and film critic. His articles have appeared in many well-known newspapers and periodicals throughout the world. *See* ASAHINA, *supra* note 1, at 340.

[6] This book review will follow Mr. Asahina's lead and will not hyphenate the term "Japanese American," regardless of whether the term is used as a noun or an adjective. Whether Mr. Asahina was intending to make a point on this issue is unknown. However, there may be some symbolic purpose to this usage which highlights that these individuals are Americans of Japanese descent rather than both Japanese and American, as the hyphenated term might imply.

[7] ASAHINA, *supra* note 1, at 1-2.

[8] *Id.* at 2-4.

[9] *Id.* at 5-8.

[10] *Id.* at 6.

[11] *Id.*

[12] *Id.* at 5-6.

decoration process.[13] At the end of the book, Asahina brings this backdrop full circle and details all of the support Ms. Tanamachi received in her ultimately successful effort to have the road name changed.[14]

Within this framework, Asahina goes back to a troubling time following the devastating attack at Pearl Harbor and describes the difficult circumstances faced by Japanese Americans. With tremendous skill and in great detail, perhaps too much at times, Asahina provides a meticulous narrative of many individual men of Japanese descent who faced seemingly overwhelming prejudice, even from the highest levels of American government, yet still volunteered to fight for their country. In short, Asahina attempts to contrast the moral and physical courage displayed by Japanese Americans with the perceived lack of moral courage on the part of American leadership.

With this thesis in mind, Asahina chronicles the genesis of the "relocation" program. On February 19, 1942, President Roosevelt issued Executive Order 9066, which in effect gave the Secretary of War or the "appropriate Military Commander" the authority to detain persons and exclude them from certain areas.[15] As Asahina notes, "[p]ut simply, the president had given the Army the power to wage war on American soil—against American citizens and the U.S. Constitution."[16]

Asahina did an excellent job of laying out the arguments both for and against the relocation of approximately 110,000 Japanese Americans in the continental United States.[17] He profoundly demonstrated the illogical argument of "military necessity," especially since there was no relocation of people of Japanese descent from the Hawaiian Islands, which were far more susceptible to Japanese attack and strategic sabotage.[18]

Asahina also craftily pointed out the flaws in the administrative procedures during the relocation process. For example, the federal government prepared a questionnaire that ostensibly would allow internees to be on "leave."[19] To be granted leave, the internees were required to foreswear any form of allegiance to the Japanese government or any Japanese organization.[20] At the same time, earlier legislation had forbidden many of them from becoming citizens.[21] In essence, "they would have to choose statelessness in order to prove their loyalty to a country that would not grant them citizenship."[22] By researching administrative procedures to this level of detail, Asahina effectively supported his thesis that Japanese Americans were willing to fight and die for a country that had consistently denied many of them the right to become a citizen or, at a minimum, the privileges that are normally associated with such a status.

Asahina provided a fascinating account of the contrasting backgrounds of the Japanese American Soldiers drawn from the Hawaiian Islands with those Soldiers from the continental United States who were "relocated" or "interned,"[23] depending on which "side of the fence" the individual stood.[24] Asahina chronicled the initial conflicts and struggles that these distinct groups had with each other, despite their ethnic and racial ties. He shrewdly detailed the irony that what brought the mainland Japanese American Soldiers and the Hawaiian Japanese American Soldiers together, before they went to Europe to fight alongside each other, was the visitation of a relocation center by the Hawaiians.[25] The Hawaiians learned for the first

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[13] *Id.* For a more thorough analysis of the decoration process involving the 442d Regimental Combat Team, *see id*. at 7-9, 199-201, 259-60.

[14] *Id.* at 251-56.

[15] *Id*. at 17-18 (citing Exec. Order No. 9066, 7 Fed. Reg. 1,407 (Feb. 25, 1942)).

[16] *Id.* at 18.

[17] *Id.* at 16-46.

[18] *Id*. at 28-46. Japanese Americans in Hawaii accounted for more than one third of the total population and were the largest ethnic group on the islands. This made their relocation not only politically difficult, but economically impractical. Due to the perceived continual threat of attack, martial law was instituted on the islands. *Id*. at 28-31.

[19] *Id*. at 46-47.

[20] *Id.*

[21] *Id*.

[22] *Id*. at 47.

[23] *Id*. at 13-18 (noting that the government administration preferred to use the term "relocation" rather than "internment," as internment connotes imprisonment).

[24] *Id*. at 13-69.

[25] *Id*. at 37-69.

time of the ill treatment mainland Japanese Americans were facing.[26] It was at this point that all Soldiers of Japanese descent, whether mainlanders or Hawaiians, knew that they were fighting for more than just their country.[27] They were fighting to prove they were true Americans who deserved to be treated as Americans.

While Asahina is critical of several individuals for their role in the relocation process, including Secretary of War Henry Stimson and Lieutenant General John L. DeWitt, head of the Western Defense Command,[28] he primarily places the onus of responsibility squarely on the shoulders of President Franklin D. Roosevelt.[29] The author argues that in February 1942, there seemed to be a consensus among civilian and military leaders against relocating Japanese Americans.[30] Asahina then contends that "[n]onetheless, on February 11, Roosevelt prevailed over the doubts of his advisors. Or rather the [P]resident washed his hands of the matter in what amounted to a stunning denial of responsibility."[31] On another occasion, Asahina asserts that "[e]xercising power without responsibility, authority without leadership, Roosevelt had tried to keep his hands clean by passing the matter to the War Department in the first place . . . ."[32]

Asahina describes the relocation and internment of Japanese Americans as Roosevelt's "grotesque experiment in social engineering" and as being politically motivated in an effort to alleviate the fears and appease the prejudice of his nationwide supporters.[33] In support of this proposition, Asahina notes that even when the decision was finally made to release the Japanese Americans from the relocation centers (during the 1944 election season), Roosevelt seemed to be more concerned about what effect the reintegration of the "relocated" Japanese Americans would have on the "internal quiet" of various communities rather than the propriety of "releasing" the internees.[34] Therefore, this political concern delayed the release of the Japanese Americans for several weeks.[35]

Throughout the entire book, this harsh criticism of President Roosevelt, perhaps warranted, began to detract from the overarching theme of the heroic efforts of the men who overcame their lack of support to accomplish incredible feats of bravery and courage. While the author certainly wanted to contrast the courage of Japanese Americans with the perceived lack of moral courage on the part of President Roosevelt, Asahina took it too far. In his overzealous attempt to paint President Roosevelt as a two-faced, insincere figure, Asahina began to lose some credibility. In an Oliver Stone-like conspiracy theory, Asahina posits that Supreme Court Justice Felix Frankfurter leaked the results of two Supreme Court cases challenging the "detention camps" to Roosevelt well before their formal release, so "the administration could announce the closing of the camps without appearing to have had its hand forced by the Supreme Court."[36] This theory is flawed for a number of reasons. The key flaw is that the two Supreme Court cases, namely *Korematsu*[37] and *Endo*,[38] essentially upheld the government's authority to detain the Japanese Americans.[39] Asahina should not have posited this conspiracy theory. It was unnecessary and internally inconsistent, especially since he later condemns the results of the decisions.[40] In addition, it challenged the author's entire credibility in raising unsubstantiated attacks against President Roosevelt.

On another occasion, Asahina stated that "prejudice can be found in all corners of America. Not just in the boondocks of East Texas but in the White House . . . , [t]he one that was occupied in World War II by a revered president whose face is

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[26] *Id.* at 62-64.

[27] *Id.*

[28] *Id.* at 16-24.

[29] *Id.*

[30] *Id.* at 21.

[31] *Id.*

[32] *Id.* at 24.

[33] *Id.* at 24, 76-82.

[34] *Id.* at 76-82.

[35] *Id.*

[36] *Id.* at 207-08.

[37] Korematsu v. United States, 323 U.S. 214 (1944).

[38] *Ex parte* Endo, 323 U.S. 283 (1944).

[39] ASAHINA, *supra* note 1, at 207-13.

[40] *Id.* at 208-13.

atop Mount Rushmore . . . ."[41] As most of us learned in elementary school, President *Teddy* Roosevelt's face is on Mount Rushmore, not President *Franklin* Roosevelt's. An obvious inaccuracy like this certainly undermined the credibility of the argument, in addition to calling the validity of Asahina's "facts" into question.

This inaccuracy was very disappointing, for throughout the rest of the book, Asahina meticulously drew his research materials from a variety of sources that included archives from federal, state, and foreign governments. He also conducted an extensive series of interviews with survivors of the 442d Regimental Combat Team and military personnel from other units that had served with them.[42] These firsthand accounts, coupled with documentary primary source material, maps, and photos, added an authenticity that brought the book to life, especially from a military perspective. In addition, despite the fact that Asahina chronicled several battles in great detail, readers were not required to have an in-depth knowledge of military history or tactics in order to fully appreciate the military challenges the Japanese Americans overcame, which made the book fascinating to read.

Just Americans attempted to demonstrate the human nature of war through the eyes of Japanese American Soldiers fighting for their country and the honor of their families at home. Unfortunately, in an attempt to make individual Soldiers come to life, Asahina tended to bounce back and forth between the horrors of war and the reality of life before, during, and following the internment periods. Asahina introduced many Soldiers from the 442d early on, and then the reader would not hear about them again until many pages or chapters later. By that time, the reader had forgotten the background of the individual soldier, especially in the middle of fascinating details of the military campaigns. The author apparently recognized this issue and in certain places attempted to provide the reader with a short sentence reminding the reader of the background of the individual fighting soldier. This "fix," however, still made connectivity among the sections of the book very difficult.

Furthermore, many chapters did not seem to have a logical flow. For example, at the end of the book, the author created an afterword, an epilogue, and an appendix that each contained various topics with no sense of unity. In short, without an index, the reader would have extreme difficulty trying to find passages on a particular topic, as the author continuously bounced around from topic to topic.

On the whole, feedback concerning *Just Americans* has been very positive.[43] One notable exception occurred when Stephen Fox, a noted author on the plight of German and Italian Americans during World War II,[44] commented on Jonathan Mahler's review of the book.[45] Fox disagreed with Mahler's comment (and thus part of Asahina's thesis) that other ethnic groups did not face the same fate as that of Japanese Americans.[46] While it is unknown whether Fox ever actually read *Just Americans*, or just Mahler's review, this criticism does have some merit. On several occasions throughout *Just Americans*, Asahina mentions that other ethnic groups, mainly Germans and Italians, were subject to some scrutiny.[47] However, he fails to mention that many German and Italian Americans were rounded up and interned for significant periods of time (although perhaps not to the same extent as Japanese Americans), as Fox details in two lengthy books.[48] While Asahina's book was certainly written to discuss the plight of Japanese Americans and their heroic efforts during World War II, he could have provided a more accurate description of the plight of the various ethnic groups without detracting from the overall purpose of his book.

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[41] *Id*. at 256.

[42] *Id.* at 281-82.

[43] *See, e.g.*, Don DeNevi, *From Camp to Combat: For Japanese-Americans, WWII Was a Two-Front War*, ARMY TIMES, July 3, 2006, § 7, at 37 (reviewing ASAHINA, *supra* note 1) (asserting that *Just Americans* is "history as it should be published: an exceptionally well-written narrative that has a certainty to it, if not outright passionate, unblushing partisanship for the Japanese-American GI, viewed against the backdrop of prejudice and racial injustice"); Jonathan Mahler, *G.I. Japanese*, N.Y. TIMES, June 18, 2006, at 17 (reviewing ASAHINA, *supra* note 1) (describing *Just Americans* as "timely, thoughtful and meticulously researched").

[44] *See, e.g.*, STEPHEN FOX, *UN*CIVIL LIBERTIES: ITALIAN AMERICANS UNDER SIEGE DURING WORLD WAR II (2000) [hereinafter FOX, *UN*CIVIL LIBERTIES] STEPHEN FOX, FEAR ITSELF: INSIDE THE FBI ROUNDUP OF GERMAN AMERICANS DURING WORLD WAR II (2005) [hereinafter FOX, FEAR ITSELF].

[45] *See* Mahler, *supra* note 43.

[46] Stephen Fox, Letter to the Editor, *Never Any Doubt*, N.Y. TIMES, July 2, 2006, at 4 (commenting on Mahler, *supra* note 43).

[47] *See, e.g.*, ASAHINA, *supra* note 1, at 17-19, 79.

[48] *See* FOX, *UN*CIVIL LIBERTIES, *supra* note 44; FOX, FEAR ITSELF, *supra* note 44.

The book's usefulness in bringing the story of these brave Japanese Americans to the public eye can not be underestimated. Not many of the original members of the 442d are still alive, and it was extremely important to read their firsthand accounts of the relocation and of their wartime experiences. In addition, Asahina attempted to draw some comparison between the aftermath of Pearl Harbor and the aftermath of 9/11.[49] While this issue could have been more fully developed, perhaps even in a separate book, it serves as a constant reminder that we must learn lessons from the past and be willing to do what is right, despite the initial emotional response to a devastating tragedy.

Asahina accomplished his purpose of bringing the story of these brave Japanese Americans to light. He clearly demonstrated that true courage, leadership, and patriotism are not necessarily found at the highest levels of government, but can be found in those individuals who have been mistreated. These Soldiers should serve as an example to all of us both in the military profession and in the civilian arena. In sum, Asahina's book serves as a tribute to Japanese Americans who deserve the right to be called just "Americans."

[49] ASAHINA, *supra* note 1, at 257-80.

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	56th Judge Advocate Officer Graduate Course	13 Aug 07 – 22 May 08
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C20 (Ph 2)	174th JAOBC/BOLC III	9-Nov 07 – 6-Feb 08
5-27-C20 (Ph 2)	175th JAOBC/BOLC III	22 Feb – 7 May 08
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F1	200th Senior Officers Legal Orientation Course	28 Jan – 1 Feb 08
5F-F1	201st Senior Officers Legal Orientation Course	24 – 28 Mar 08
5F-F1	202d Senior Officers Legal Orientation Course	9 – 13 Jun 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08
5F-F3	14th RC General Officer Legal Orientation Course	13 – 15 Feb 08
5F-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08

5F-F55	2008 JAOAC (Phase II)	7 – 18 Jan 08
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	2d BNCOC Common Core	4 – 25 Jan 08
600-BNCOC	3d BNCOC Common Core	10 – 28 Mar 08
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	1st Paralegal Specialist BNCOC	2 Nov – 7 Dec 07
512-27D30 (Ph 2)	2d Paralegal Specialist BNCOC	29 Jan – 29 Feb 08
512-27D30 (Ph 2)	3d Paralegal Specialist BNCOC	2 Apr – 2 May 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08
512-27D40 (Ph 2)	1st Paralegal Specialist ANCOC	2 Nov – 7 Dec 07
512-27D40 (Ph 2)	2d Paralegal Specialist ANCOC	29 Jan – 29 Feb 08
512-27D40 (Ph 2)	3d Paralegal Specialist ANCOC	2 Apr – 2 May 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08
WARRANT OFFICER COURSES		
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	16 – 20 Jun 08
7A270A3	2008 Senior Warrant Officer Symposium	4 – 8 Feb 08
ENLISTED COURSES		
512-27D/20/30	19th Law for Paralegal Course	24 – 28 Mar 08
512-27DC5	25th Court Reporter Course	28 Jan – 28 Mar 08
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC7	8th Redictation Course	7 – 18 Jan 08
512-27DC7	9th Redictation Course	31 Mar – 11 Apr 08
512-27D-CLNCO	10th Chief Paralegal BCT NCO Course	16 – 20 Jun 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08
5F-F58	2008 27 D Command Paralegal Course	4 – 8 Feb 08

ADMINISTRATIVE AND CIVIL LAW		
5F-F23	62d Legal Assistance Course	5 – 9 May 08
5F-F202	6th Ethics Counselors Course	14 – 18 Apr 08
5F-F24	32d Administrative Law for Military Installations Course	17 – 21 Mar 08
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F28	2007 Income Tax Law Course	10 – 14 Dec 07
5F-F28E	2007 USAREUR Income Tax CLE	3 – 7 Dec 07
5F-28H	2008 Hawaii Income Tax CLE	14 – 18 Jan 08
5F-F28P	2008 PACOM Income Tax CLE	7 – 11 Jan 08
5F-F29	26th Federal Litigation Course	4 – 8 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	159th Contract Attorneys Course	3 – 11 Mar 08
5F-F10	160th Contract Attorneys Course	23 Jul – 1 Aug 08
5F-F101	2008 Procurement Fraud Course	26 – 30 May 08
5F-F103	2008 Advanced Contract Law Course	7 – 11 Apr 08
5F-F11	2007 Contract & Fiscal Law Symposium	4 – 7 Dec 07
5F-F12	78th Fiscal Law Course	28 Apr – 2 May 08
5F-F13	4th Operational Contracting	12 – 14 Mar 08
5F-F14	26th Comptrollers Fiscal Law Accreditation Course	15 – 18 Jan 08
5F-F15E	USAREUR Contract Law/Fiscal Law Course	12 – 15 Feb 08
8F-DL12	2d Distance Learning Fiscal Law Course	4 – 8 Feb 08
CRIMINAL LAW		
5F-F33	51st Military Judge Course	21 Apr – 9 May 08
5F-F34	29th Criminal Law Advocacy Course	4 – 15 Feb 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08
5F-F35E	2008 USAREUR Criminal Law CLE	15 – 18 Jan 08

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08

5F-F42	89th Law of War Course	11 – 15 Feb 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08
5F-F45	7th Domestic Operations Law Course	26 – 30 Nov 07
5F-F47	49th Operational Law Course	25 Feb – 7 Mar 08
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47E	2008 USAREUR Operational Law CLE	28 Apr – 2 May 08
5F-F48	1st Rule of Law Course	9 – 13 Jun 08

3. Naval Justice School and FY 2008 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	15 Oct – 14 Dec 07 22 Jan – 21 Mar 08 2 Jun – 1 Aug 08 4 Aug – 3 Oct 08
BOLT	BOLT (020) BOLT (020) BOLT (030) BOLT (030)	24 – 28 Mar 08 (USMC) 24 – 28 Mar 08 (USN 4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	10 – 14 Mar 08 22 – 26 Sep 08
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	12 – 23 May 08 28 Jul – 8 Aug 08
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	24 – 28 Mar 08 (San Diego) 14 – 18 Apr (Norfolk)
850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operational Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	10 – 14 Mar 08 (Newport) 5 – 9 May 08 (Newport) 9 – 13 Jun 08 (Newport) 21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22– 26 Sep 08 (Newport)
4048	Estate Planning (010)	21 – 25 Jul 08

961M	Effective Courtroom Communications (020)	28 Jan – 1 Feb 08 (Bremerton)
748A	Law of Naval Operations (010) Law of Naval Operations (020)	3 – 7 Mar 08 15 – 19 Sep 08
7485	Litigating National Security (010)	29 Apr – 1 May 08 (Andrews AFB)
748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	12 – 16 May 08 (Okinawa) 19 – 23 May 08 (Pearl Harbor) 15 – 19 Sep 08 (San Diego)
2205	Defense Trial Enhancement (010)	12 – 16 May 08
3938	Computer Crimes (010)	19 – 23 May 08 (Newport)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020)	TBD TBD
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	14 – 18 Jan 08 (Pensacola) 14 Jan – 18 Feb 08 (Bahrain) 3 – 7 Mar 08 (Pensacola) 14 – 18 Apr 08 (Pensacola) 28 Apr – 2 May 08 (Naples, Italy) 9 – 13 Jun 08 (Pensacola) 16 – 20 Jun 08 (Quantico) 23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	4 – 5 Feb 08 (Yokosuka) 1 – 2 May 08 (Naples)
7878	Legal Assistance Paralegal Course (010)	31 Mar – 5 Apr 08
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	1 Oct – 14 Dec 07 22 Jan – 4 Apr 08 9 Jun – 22 Aug 08
846L	Senior Legalman Leadership Course (010) Senior Legalman Leadership Course (010)	18 – 22 Aug 08
049N	Reserve Legalman Course (Phase I) (010)	21 Apr – 2 May 08
056L	Reserve Legalman Course (Phase II) (010)	5 – 16 May 08
846M	Reserve Legalman Course (Phase III) (010)	19 – 30 May 08
5764	LN/Legal Specialist Mid-Career Course (020)	5 – 16 May 08
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD

4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	21 Apr – 2 May 08 16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
4046	SJA Legalman (010) SJA Legalman (020)	25 Feb – 7 Mar 08 (San Diego) 12 – 23 May 08 (Norfolk)
Pending	Prosecution Trial Enhancement (010)	4 – 8 Feb 08
7487	Family Law/Consumer Law (010)	31 Mar – 4 Apr 08
627S	Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	6 – 8 Nov 08 (San Diego) 7 – 9 Jan 08 (Jacksonville) 14 – 16 Jan 08 (Bahrain) 4 – 6 Feb 08 (Yokosuka 11 – 13 Feb 08 (Okinawa 20 – 22 Feb 08 (Norfolk) 18 – 20 Mar 08 (San Diego) 31 Mar – 2 Apr 08 (Norfolk) 14 – 16 Apr 08 (Bremerton) 22 – 24 Apr 08 (San Diego) 28 – 30 Apr 08 (Naples) 19 – 21 May 08 (Norfolk) 8 – 10 Jul 08 (San Diego) 4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	26 Nov – 14 Dec 07 28 Jan – 15 Feb 08 10 – 28 Mar 08 28 Apr – 16 May 08 2 – 20 Jun 08 7 – 25 Jul 08 8 – 26 Sep 08
0379	Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	26 Nov – 7 Dec 07 4 – 15 Feb 08 10 – 21 Mar 08 21 Apr – 2 May 08 7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	7 – 11 Jan 08 (Jacksonville) 25 – 29 Feb 08 7 – 11 Apr 08 23 – 27 Jun 08 4 – 8 Aug 08 (Millington) 25 – 29 Aug 08
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalman (020)	16 – 27 Jun 08

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	26 Nov – 14 Dec 07 7 – 25 Jan 08 25 Feb – 14 Mar 08 5 – 23 May 08 9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08

947J	Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	26 Nov – 7 Dec 07 7 Jan – 18 Jan 08 31 Mar – 11 Apr 08 5 – 16 May 08 9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08

3759	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	4 – 8 Feb 08 (Yokosuka) 11 – 15 Feb 08 (Okinawa) 31 Mar – 4 Apr 08 (San Diego) 14 – 18 Apr 08 (Bremerton) 28 Apr – 2 May 08 (San Diego) 2 – 6 Jun 08 (San Diego) 25 – 29 Aug 08 (Pendleton)
2205	CA Legal Assistance Course (010)	TBD
4046	Military Justice Course for Staff Judge Advocate/ Convening Authority/Shipboard Legalmen (010)	25 Feb – 7 Mar 08

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445, for information about attending the listed courses.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Judge Advocate Staff Officer Course, Class 08-A	9 Oct – 13 Dec 2007
Paralegal Apprentice Course, Class 08-01	10 Oct – 30 Nov 2007
Paralegal Craftsman Course, Class 08-01	24 Oct – 7 Dec 2007
Deployed Fiscal Law & Contingency Contracting Course, Class 08-A	27 – 30 Nov 2007
Federal Employee Labor Law Course, Class 08-A	10 – 14 Dec 2007
Paralegal Apprentice Course, Class 08-02	3 Jan – 22 Feb 2008
Trial & Defense Advocacy Course, Class 08-A	7 – 18 Jan 2008

Air National Guard Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 2008
Air Force Reserve Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 2008
Military Justice Administration Course, Class 08-A	28 Jan – 1 Feb 2008
Legal & Administrative Investigations Course, Class 08-A	4 – 8 Feb 2008
Total Air Force Operations Law Course, Class 08-A	8 – 10 Feb 2008
Homeland Defense/Homeland Security Course, Class 08-A	11 – 13 Feb 2008
Legal Aspects of Information Operations Law Course, Class 08-A	14 – 15 Feb 2008
Judge Advocate Staff Officer Course, Class 08-B	19 Feb – 18 Apr 2008
Paralegal Apprentice Course, Class 08-03	25 Feb – 11 Apr 2008
Paralegal Craftsman Course, Class 08-02	3 Mar – 11 Apr 2008
Pacific Trial Advocacy Course, Class 08-A (Off-site, Yokota AB, Japan)	10 – 14 Mar 2008
Senior Defense Counsel Course , Class 08-A	14 – 18 Apr 2008
CONUS Trial Advocacy Course, Class 08-A	7 – 11 Apr 2008
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 2008
Reserve Forces Judge Advocate Course, Class 08-B	19 – 20 Apr 2008
Area Defense Counsel Orientation Course, Class 08-B	21 – 25 Apr 2008
Environmental Law Course, Class 08-A	28 Apr – 2 May 2008
Defense Paralegal Orientation Course, Class 08-B	21 – 25 Apr 2008
Advanced Trial Advocacy Course, Class 08-A	29 Apr – 2 May 2008
Advanced Labor & Employment Law Course, Class 08-A	5 – 9 May 2008
Operations Law Course, Class 08-A	12 – 22 May 2008
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 2008
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 2008
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 2008
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 2008
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 2008
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 2008
Law Office Management Course, Class 08-A	16 – 27 Jun 2008
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 2008
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 2008

Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 2008
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 2008

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

APRI American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837

MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 ((703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900

UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2008

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2008*** , for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2008, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

State	**Local Official**	**CLE Requirements**
Alabama**	Director of CLE AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515 http://www.alabar.org/	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona	Administrative Assistant State Bar of AZ 111 W. Monroe St., Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7328 http://www.azbar.org/AttorneyResources/mcle.asp	-Fifteen hours per year, three hours must be in legal ethics. -Reporting date: 15 September.

Arkansas	Secretary Arkansas CLE Board Supreme Court of AR 120 Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1855 http://courts.state.ar.us/clerules/htm	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.
California*	Director Office of Certification The State Bar of CA 180 Howard Street San Francisco, CA 94102 (415) 538-2133 http://calbar.org	-Twenty-five hours over three years, four hours required in ethics, one hour required in substance abuse and emotional distress, one hour required in elimination of bias. -Reporting date/period: Group 1 (Last Name A-G) 1 Feb 01-31 Jan 04 and every thirty-six months thereafter) Group 2 (Last Name H-M) 1 Feb 00 - 31 Jan 03 and every thirty-six months thereafter) Group 3 (Last Name N-Z) 1 Feb 02 - 31 Jan 05 and every thirty-six months thereafter).
Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094 http:// www.courts.state.co.us/cle/ cle.htm	-Forty-five hours over three year period, seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.
Delaware	Executive Director Commission on CLE 200 W. 9th St., Ste. 300-B Wilmington, DE 19801 (302) 577-7040 http://courts.state.de.us/cle/ rules.htm	-Twenty-four hours over two years including at least four hours in Enhanced Ethics. See website for specific requirements for newly admitted attorneys. -Reporting date: Period ends 31 December.
Florida**	Course Approval Specialist Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5842 http://www.flabar.org/newflabar/memberservices/certify/blse600.html	-Thirty hours over a three year period, five hours must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys, and out-of-state attorneys are exempt. -Reporting date: Every three years during month designated by the Bar.

Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8712 http://www.gabar.org/ ga_bar/frame7.htm	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January.
Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500 http://www.state.id.us/isb/ mcle_rules.htm	-Thirty hours over a three year period, two hours must be in legal ethics. -Reporting date: 31 December. Every third year determined by year of admission.
Indiana	Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943 http://www.state.in.us/judiciary/courtrules/admiss.pdf	-Thirty-six hours overa three year period (minimum of six hours per year), of which three hours must be legal ethics over three years. -Reporting date: 31 December.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076	-Fifteen hours per year, two hours in legal ethics every two years. -Reporting date: 1 March.
Kansas	Executive Director CLE Commission 400 S. Kansas Ave., Suite 202 Topeka, KS 66603 (785) 357-6510 http://www.kscle.org	-Twelve hours per year, two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program, hours must be completed in compliance period 1 July to 30 June.
Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795 http://www.kybar.org/clerules.htm	-Twelve and one-half hours per year, two hours must be in legal ethics, mandatory new lawyer skills training to be taken within twelve months of admissions. -Reporting date: June 30.

Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 619-0140 http://www.lsba.org/html/ rule_xxx.html	-Fifteen hours per year, one hour must be in legal ethics and one hour of professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.
Maine	Administrative Director P.O. Box 527 August, ME 04332-1820 (207) 623-1121 http://www.mainebar.org/cle.html	-Eleven hours per year, at least one hour in the area of professional responsibility is recommended but not required. -Members of the armed forces of the United States on active duty; unless they are practicing law in Maine. -Report date: July.
Minnesota	Director MN State Board of CLE 25 Constitution Ave., Ste. 110 St. Paul, MN 55155 (651) 297-7100 http://www.mbcle.state.mn.us/	-Forty-five hours over a three-year period, three hours must be in ethics, every three years and two hours in elimination of bias. -Reporting date: 30 August.
Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056 http://www.msbar.org/ meet.html	-Twelve hours per year, one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt. -Reporting date: 31 July.
Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128 http://www.mobar.org/ mobarcle/index.htm	-Fifteen hours per year, three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5 http://www.montana.org	-Fifteen hours per year. -Reporting date: 1 March.

Nevada	Executive Director Board of CLE 295 Holcomb Ave., Ste. A Reno, NV 89502 (775) 329-4443 http://www.nvbar.org	-Twelve hours per year, two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.
New Hampshire**	Asst to NH MCLE Board MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942, ext. 122 http://www.nhbar.org	-Twelve hours per year, two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client dispute, six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 1 August.
New Mexico	Administrator of Court Regulated Programs P.O. Box 87125 Albuquerque, NM 87125 (505) 797-6056 http://www.nmbar.org/ mclerules.htm	-Fifteen hours per year, one hour must be in legal ethics. -Reporting period: January 1 - December 31; due April 30.
New York*	Counsel The NY State Continuing Legal Education Board 25 Beaver Street, Floor 8 New York, NY 10004 (212) 428-2105 or 1-877-697-4353 http:// www.courts.state.ny.us	-Newly admitted: sixteen credits each year over a two-year period following admission to the NY Bar, three credits in Ethics, six credits in Skills, seven credits in Professional Practice/Practice Management each year. -Experienced attorneys: Twelve credits in any category, if registering in 2000, twenty-four credits (four in Ethics) per biennial reporting period, if registering in 2001 and thereafter. -Full-time active members of the U.S. Armed Forces are exempt from compliance. -Reporting date: every two years within thirty days after the attorney's birthday.

North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 (919) 733-0123 http://www.ncbar.org/CLE/ MCLE.html	-Twelve hours per year including two hours in ethics/or professionalism; three hours block course every three years devoted to ethics/professionalism. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.
North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404 No web site available	-Forty-five hours over three year period, three hours must be in legal ethics. -Reporting date: Reporting period ends 30 June. Report must be received by 31 July.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St., FL 35 Columbus, OH 43266-0419 (614) 644-5470 http://www.sconet.state.oh.us/	-Twenty-four hours every two years, including one hour ethics, one hour professionalism and thirty minutes substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.
Oklahoma**	MCLE Administrator OK Bar Association P.O. Box 53036 Oklahoma City, OK 73152 (405) 416-7009 http://www.okbar.org/mcle/	-Twelve hours per year, one hour must be in ethics. -Active duty military attorneys are exempt. -Reporting date: 15 February.
Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 359 http://www.osbar.org/	-Forty-five hours over three year period, six hours must be in ethics. -Reporting date: Compliance report filed every three years, except new admittees and reinstated members - an initial one year period.
Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd., Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253 http://www.pacle.org/	-Twelve hours per year, including a minimum one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA may defer their requirement. -Reporting date: annual deadlines: Group 1-30 Apr. Group 2-31 Aug.

Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 222-4942 http:// www.courts.state.ri.us/	-Ten hours each year, two hours must be in legal ethics. -Active duty military attorneys are exempt. -Reporting date: 30 June.
South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578 http://www.commcle.org/	-Fourteen hours per year, at least two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt. -Reporting date: 15 January.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096 http://www.cletn.com/	-Fifteen hours per year, three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106 http:// www.courts.state.tx.us/	-Fifteen hours per year, three hours must be in legal ethics. -Full-time law school faculty are exempt (except ethics requirement). -Reporting date: Last day of birth month each year.
Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Salt Lake City, UT 84111-3834 (801) 531-9095 http://www.utahbar.org/	-Twenty-four hours, plus three hours in legal ethics every two years. -Non-residents if not practicing in state. -Reporting date: 31 January.
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281 http://www.state.vt.us/ courts/	-Twenty hours over two year period, two hours in ethics each reporting period. -Reporting date: 2 July.
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St., Ste. 1500 Richmond, VA 23219-2803 (804) 775-0577 http://www.vsb.org/	-Twelve hours per year, two hours must be in legal ethics. -Reporting date: 31 October.

Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL 4 Seattle, WA 98121-2330 (206) 733-5912 http://www.wsba.org/	-Forty-five hours over a three-year period, including six hours ethics. -Reporting date: 31 January.
West Virginia	MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992 http://www.wvbar.org/	-Twenty-four hours over two year period, three hours must be in legal ethics, office management, and/or substance abuse. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July.
Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Tenney Bldg., Suite 715 110 East Main Street Madison, WI 53703-3328 (608) 266-9760 http:// www.courts.state.wi.us/	-Thirty hours over two year period, three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be received by 1 February.
Wyoming	CLE Program Director WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-9061 http://www.wyoming.bar.org	-Fifteen hours per year, one hour in ethics. -Reporting date: 30 January.

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

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2007-2008).

Date	Unit/Location	ATTRS Course Number	Topic	POC
17-18 Nov 2007	77th RRC New York City, NY	001	Administrative & Civil Law, Criminal Law	LTC John Petosa, (718) 352-5079, John.Petosa@us.army.mil
17-18 Nov 2007	12th LSO, 174th LSO, 213th LSO, & 139th LSO Columbia, SC	002	Administrative & Civil Law International & Operational Law	MAJ Lake Summers (803) 254-5322 summers@mtsolawfirm.com LTC Jim Hardin James.E.Hardin@nccourts.org 919 219-3860
16-18 Nov 2007	LSO/SJA Conf. Columbia, SC	003	Administrative & Civil Law, International & Operational Law	MAJ Lake Summers (803) 254-5322 summers@mtsolawfirm.com
26-27 Jan 2008	6th LSO/70th RRC Seattle, WA	004	Administrative & Civil Law, Contract & Fiscal Law	LTC Marianne Jones 206-550-0346 Marianne.Jones@us.army.mil Bryan Carnes 206 301-2347 Brian.H.Carnes@us.army.mil
1-2 Mar 2008	75th LSO Burlingame (San Francisco, CA)	005	Lessons Learned International & Operational Law	CPT Steven Wang 916-642-2102 steven.wang1@us.army.mil COL Roger Matzkind Roger.Matzkind@us.army.mil LTC Ronald Rallis
1-2 Mar 2008	151st LSO Ft. Belvoir, VA	006	International & Operational Law, Criminal Law	LTC Anthony Ricci, 151st LSO, 508-982-1628, tpricci@hotmail.com MAJ Jen Connelly 571-272-7003 Jennifer.Santiago@us.army.mil
29-30 Mar 2008	WIA&ARNG Ft. McCoy, WI	NA	Air Force JAG School	Lt Col Julio R. Barron 608-242-3077 / DSN 724-3077 julio.barron2@us.army.mil
18-20 Apr 2008	1st LSO/90th RRC Oklahoma City, OK	008	International & Operational Law, Contract & Fiscal Law	LTC Randy Fluke, 409-981-7950; randall.fluke@us.army.mil
26-27 Apr 2008	91st LSO/9th LSO Oak Brook, IL	009	Administrative & Civil Law, Contract & Fiscal Law	SFC Eric Dahl eric.dahl@usar.army.mil 847.266.2523
25-27 Apr 2008	8th LSO/89th RRC Kansas City	010	Administrative & Civil Law, Contract & Fiscal Law	LTC Tracy Diel & SFC Larry Barker tracy.t.diel@us.army.mil SFC Larry Barker Larry.R.Barker@us.army.mil 816-836-0005 ext 2155/2156
26-27 Apr 2008	Indiana ARNG Indianapolis, IN	011	Administrative & Civil Law, International & Operational Law	1LT Kevin Leslie, (317) 247-3491, kevin.leslie@us.army.mil

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

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

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

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

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

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

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

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

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

Contract Law

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

Legal Assistance

A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).
AD A350513	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

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

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

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

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

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

Administrative and Civil Law

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

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

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

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

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

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

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

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

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

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

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

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

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

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

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

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

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

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

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

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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

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

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. t is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. TJAGLCS Legal Technology Management Office (LTMO)

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

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

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6. The Army Law Library Service

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

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

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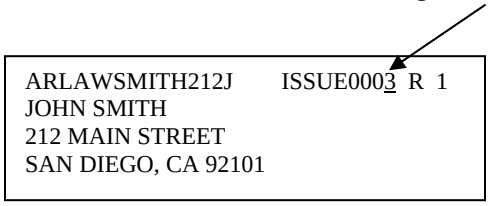

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