View from the Legal Frontlines

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Cicero said, "silent enim leges inter arma," which means in times of war the law falls silent.\(^1\) A judge advocate's primary mission is to prevent this from occurring. To accomplish this objective, the judge advocate performs a variety of functions including participating in the development of the operational plan, drafting rules of engagement ("ROE"), and reviewing target nominations. Inevitably, the operational law attorney\(^2\) faces unique and challenging legal issues that surface during conflict and require immediate resolution. Furthermore, the judge advocate often must provide legal guidance to soldiers on the ground while strategic policy decisions are being debated and finalized.

I have been assigned to the Coalition Forces Land Component Command ("CFLCC") since July 2001. After September 11, 2001, CFLCC became responsible for land operations in Afghanistan against al Qaeda and the Taliban during Operation Enduring Freedom ("OEF"). Concurrently, CFLCC began planning Operation Iraqi Freedom ("OIF"). When I arrived at CFLCC, I had recently returned from a deployment to Bosnia, and I anticipated a relaxed, slower paced position as a contract attorney at Fort McPherson, Georgia. Instead, since September 12, 2001, I have spent the majority of my days in the Middle East participating in two high-tempo military campaigns. In this article, I will describe in broad-brush strokes rather than in fine detail my role as a judge advocate during OEF and OIF while discussing the most poignant and interesting legal issues.
I. OPERATION ENDURING FREEDOM

After a federal investigation concluded that al Qaeda was responsible for the terrorist attacks of September 11, 2001, CFLCC began developing the land component campaign plan for OEF. The campaign raised complicated legal and policy issues that do not exist in traditional armed conflicts between nations. The US, a nation that complies with the law of war, had to fight against an unconventional terrorist force that does not comply with the law of war. Consequently, processes such as drafting ROE became infinitely more difficult and required significant creativity to ensure compliance with international and domestic requirements without hindering or endangering the ability of US forces to destroy al Qaeda and the Taliban.

Military attorneys quickly recognized that the characterization of captured enemy soldiers as either prisoners of war (“POWs”) or unlawful combatants would be a critical issue. While the issue was debated at the national level, Central Command (“CENTCOM”) and CFLCC needed to issue guidance to the soldiers on the ground in Afghanistan. Until the final decision was made in late January 2002, military attorneys advised soldiers that al Qaeda and Taliban fighters were not to be afforded POW status; they were, however, to be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner compatible with the principles of the Geneva Conventions of 1949. This was not the only time that events on the ground outpaced policy decisions.

On November 13, 2001, the President issued a military order concerning the detention, treatment, and trial of certain non-citizens in the war against terrorism. Immediately, CFLCC began planning for detainees and proposed various sites where the detainees could be held. After a legal and policy review, the Department of Defense (“DoD”) selected Guantánamo Bay, which gave the US control without placing the detainees on US soil. In December, CFLCC had the task of preserving and gathering evidence until the DoD established a tribunal team. Marine Major Bryan Hopkins and I were the two original members of the tribunal team. We quickly instituted requirements to establish a chain of custody for evidence. This was difficult because we were asking soldiers involved in combat operations to perform additional tasks so that evidence would be admissible in future trials. Fortunately, the soldiers recognized the importance of this requirement, and they did a great job of cataloging and documenting the evidence. In addition, we began creating case files against the detainees being held at the Bagram and Kandahar airfields in Afghanistan.

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Furthermore, we advised Criminal Investigation Division ("CID") agents as they investigated cases in Afghanistan. One of our first acts was to obtain statements from the Special Forces soldiers who had captured John Walker Lindh, an American citizen who fought with the Taliban. In addition, we directed that all of the detainees at the Qala-i-Jangi prison complex near Mazar-e-Sharif be shown a photograph of John Walker Lindh and asked if they had any knowledge about the recent murder of CIA agent Johnny Spann.

To provide guidance to the CID agents, I drafted a detainee interview guide for military investigators. It contained the November 13, 2001 military order establishing military commissions and included an interrogation model for detainees. The guide, which listed potential offenses and sample questions, was forwarded to the DoD and used as a basis for subsequent publications.

In addition to the new procedures developed to collect evidence and interview detainees, OEF was probably the first military conflict in American history that involved an intense debate over uniforms. The Taliban fighters would sometimes wear clothing that resembled uniforms, al Qaeda would not. Their failure to do so was a factor in the decision to brand them as unlawful combatants.

Under the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), a distinctive insignia is required to enable soldiers to discriminate between enemy forces and civilians. Since the enemy did not wear uniforms, the US was faced with a policy choice with major legal implications. If US service members wore uniforms, they would be placed at a tactical disadvantage because they could be easily spotted and targeted. This was a major concern for the civil affairs soldiers who were providing humanitarian assistance and not participating in combat operations. If US soldiers violated GPW by not wearing uniforms in order to increase their force protection, as many special operations and civil affairs soldiers advocated, then the argument condemning al Qaeda and the Taliban for not complying with the distinctive insignia requirement of GPW would be undermined. After all, soldiers wear uniforms precisely so they can be identified in order to protect civilians. In addition, this could set a precedent impacting the US objection to Article 44 of Protocol I Additional to the Geneva Conventions, which relaxes the requirement to wear a fixed distinctive insignia recognizable at a distance and expands the definition of combatants beyond Article 4 of GPW.

CFLCC attorneys wrestled with the issue but ultimately recommended that all soldiers, including those engaged in civil affairs missions, should wear uniforms. At a minimum, we suggested a modification of the uniform satisfying the requirement to display a distinctive insignia. Lieutenant General Paul T.

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Mikolashek, the CFLCC Commander, initially rejected the recommendation for civil affairs soldiers because, on balance, he thought doing so would save the lives of soldiers performing humanitarian assistance missions. In addition, since the enemy did not comply with the law of war, any soldier who was captured was unlikely to receive treatment as a POW, regardless of his or her attire. Once again, the policy decision arrived after the operational decision. The DoD and CENTCOM, after reading media reports detailing US soldiers operating in civilian attire, decided that the wiser policy was to require a distinctive insignia. All personnel were then required to wear either a uniform or, at a minimum, a distinctive symbol recognizable at a distance such as a US flag on the shoulder. When GPW undergoes its next revision, it may be worth considering amending the requirement for a fixed insignia with regards to civil affairs forces who work primarily with international aid organizations and do not participate in combat operations.

II. OPERATION IRAQI FREEDOM

CENTCOM directed CFLCC to initiate planning for OIF in February 2002. The initial planning group was very small and access to the plan was limited to those with a strict need to know. I distinctly remember Lieutenant General Mikolashek turning to us and saying, "We're going to do this. Get the plan ready." The general concept was to eliminate the regime to remove the threat posed by its possession of weapons of mass destruction and its support of international terrorism. In the execution, Coalition forces would seek to prevent as much collateral damage as possible to minimize loss of life and preserve critical infrastructure that would be needed to distribute humanitarian aid and jump-start the post-regime government and economy. The plan also sought to encourage Iraqi soldiers to abandon the fight to save lives and equipment for the post-regime Iraqi military. It is unlikely that military planners have ever dedicated as much time, thought, and energy to winning a war while causing the absolute minimal amount of damage to the enemy, including to their army, as Coalition forces did during OIF.

A. RULES OF ENGAGEMENT

One of the critical roles of an operational law attorney is to assist the commander and his staff with writing clear, coherent, and concise ROE. ROE are "[d]irectives issued by [a] competent military authority that delineate the circumstances and limitations under which United States forces will initiate
and/or continue combat engagement with other forces encountered." That is the technical definition. Practically, ROE tell a soldier whom and what to engage. Unlike the ROE for OEF, which were drafted and issued within four weeks of the September 11th attacks, the ROE for OIF were the result of months of an inclusive process of collaboration, refinement, and testing. CENTCOM set the standard for the development of ROE during OIF. In a deliberate, thorough process, CENTCOM sought and accepted input from subordinate commands to ensure that the ROE accomplished the commander's intent to defeat the enemy while preserving critical infrastructure. The ROE were then tested and validated during numerous exercises from November 2002 until February 2003. Once the ROE were approved, attorneys took the lead on preparing training briefs and ROE pocket cards that serve as a reference and training aid for the soldiers in the field. For an operation to be successful, soldiers must instinctively know when they can use force and to what degree. On the battlefield, a soldier cannot stop and check the rules; he must know them and be able to apply them. The judge advocates deployed in support of OIF were primarily responsible for ensuring that occurred.

B. PLANNING: CAPITULATION

Military doctrine requires that a judge advocate participate in and review all operational plans to ensure compliance with international and domestic law. As OIF developed, there were a number of legal issues that merited attention. First, the initial plan from CENTCOM included a concept of "co-opting" Iraqi forces. This term was not defined, but it was understood to mean that Coalition forces would convince Iraqis to, at a minimum, not fight, and at best, to assist the Coalition. The prospect of such assistance raised a number of legal concerns. At a briefing in the spring of 2002, a general mentioned the possibility of an Iraqi unit "switching sides" to join Coalition forces on the march to Baghdad. At the time, I did not know if this was illegal, but I knew that I had to find out.

Fortunately, I only had to read the first seven articles of GPW to learn the answer. Under Article 4, a soldier becomes a POW after falling under the power of the enemy, either by capture or by surrender. Article 7 then prohibits POWs from renouncing their rights. As a result, I drafted a memorandum to the planning staff that recommended using leaflets and radio broadcasts to encourage Iraqi soldiers to defect before the war and go home. CENTCOM planners rejected this proposal because they wanted to preserve a post-regime military force by keeping Iraqi units in their garrison locations. Many of the CENTCOM and CFLCC planners had helped to establish the Afghan National

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Army and knew all too well how difficult it is to establish a foreign army after a war. With that experience fresh in our minds, we wanted to preserve as much personnel and equipment as possible. Since the intelligence community believed that many soldiers only followed Saddam Hussein out of fear and not personal loyalty, the planners thought it would be possible to encourage entire units of the Iraqi Army not to fight.

In August 2002, I met with Commander Kenneth O'Rourke, the Chief of Operational Law at CENTCOM, and Lieutenant Commander Gregory Bart, the Special Operations Command Central (“SOCCENT”) Staff Judge Advocate to develop legally supportable concepts that would achieve the commander's intent to either have Iraqi units assist Coalition forces or indicate a desire not to fight and remain in place, preferably in their barracks.

After much study, debate, and deliberation, we agreed on a definition of the term “co-opt.” Co-opt would be defined as enemy forces that changed allegiance to a government-in-waiting or exiled government to become an opposition group prior to becoming enemy prisoners of war (“EPWs”). Opposition groups were groups or forces that joined in the fight against the Iraqi regime, similar to the Northern Alliance fighting against the Taliban in Afghanistan. We saw little possibility of any forces being co-opted because DoD forces would not be co-opting enemy units and no viable government-in-waiting existed. Ultimately, no units were co-opted during OIF; however, this may be a viable concept for future military campaigns.

Reading a copy of a 1956 Army Field Manual titled, The Law of Land Warfare, we noted a passage on capitulation and began pursuing it as a possible course of action.\(^7\) A capitulation is an agreement between commanders of opposing forces for the surrender of a body of troops or a fortress.\(^8\) “Once settled, they must be scrupulously observed by both parties.”\(^9\) The field manual states that capitulations are appropriate in “special circumstances, such as inability of the victor to guard, evacuate, and maintain large numbers of prisoners of war or to occupy the area in which enemy military forces are present.”\(^10\) In these limited circumstances, the victorious commander could allow “the defeated force to remain in its present positions, to withdraw, or to disperse.”\(^11\) This was precisely what we were looking to achieve.

Consequently, we sketched an outline for an operational plan to encourage units to capitulate. Coalition forces would contact Iraqi units through various

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\(^8\) Id ¶ 470 at 169.
\(^9\) Hague Convention (IV) Respecting the Laws and Customs of War on Land art XXXV (1907), 36 Stat 2277 (hereinafter Hague Convention IV).
\(^11\) Id.
means including leaflet drops, radio broadcasts, and surrogates who would inform the commander of his opportunity to surrender with honor and preserve his unit. Iraqi units would receive these messages shortly before the air campaign started to give them time to perform the required actions, but not so much time that they would be subject to regime reprisals. If the unit performed certain observable actions, such as forming their vehicles in a square, then Special Forces would approach the unit and offer articles of capitulation for the surrender of the unit.

The capitulating Iraqi unit would then be monitored for compliance. Once the military attorneys agreed that this was legally supportable, we briefed the operational planners. SOCCENT planners then took the idea and produced a plan, calling for the Iraqi units to marshal their vehicles in identifiable formations, place white flags over their equipment, and move one kilometer from their equipment to protect them from air strikes. Commander O’Rourke, Lieutenant Commander Bart and I then drafted the written articles of capitulation. The intent was to encourage Iraqi units to surrender either before, or concurrently with, the start of the war to preserve Iraqi units, save US resources, and facilitate the approach to Baghdad, which was the center of gravity. If that did not work, then Iraqi units would still have the opportunity to capitulate as a form of surrender on the battlefield.

As the Prussian Field Marshal Count Helmuth von Moltke said, “No plan of operations extends with any degree of certainty beyond the first encounter with the main enemy force.”12 The major goal of obtaining capitulations before hostilities was thwarted because Saddam took countermeasures and the ground campaign preceded the air campaign, which limited the opportunities to contact units via airdropped leaflets. A few days before the war started, news reports indicated that Coalition forces intended to encourage units to capitulate. Releasing the plan was necessary for it to work since no unit would capitulate unless they knew that they could. The problem, however, was that Saddam was listening, and he sent his paramilitary loyalists to compel his army to fight. Saddam’s henchmen threatened the Iraqi soldiers with death if they surrendered, and Coalition forces later recovered the remains of Iraqi soldiers who had been executed by Saddam’s paramilitary forces. The ground war, which was supposed to follow a short air campaign that would include leaflet drops to encourage units to capitulate, actually preceded the air campaign. Consequently, the Iraqi units either did not receive the message, did not have time to perform the necessary actions, or were prevented from doing so by the paramilitary forces.13

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As of this writing, at the end of April 2003, only a few capitulation agreements have been signed. All of them were entered into after combat began, instead of before. Most noteworthy, Colonel Curtis Potts, Commander of the Fourth Brigade of the Third Infantry Division, entered into a capitulation agreement with Iraqi General Mohamad Jarawi for the surrender of the Iraqi Army’s Anbar sector command, which encompassed sixteen thousand soldiers.

C. TARGET REVIEW

The judge advocate also helps the commander comply with the law of war during the targeting process. The extent of participation varies with the level of command, but the general role remains the same. The legal advisor ensures that proposed targets are valid military objectives and raises collateral damage concerns. The judge advocate reviews the target sets with the assistance of various tools including computer programs, imagery, and intelligence data. The purpose of the review is to note any nearby protected civilian structures, such as schools, mosques, or hospitals. The legal advisor then highlights this information for the commander, and the commander considers the information as he decides whether or not to order a strike.

The importance of selective targeting, highlighted by the need to protect capitulated units from air strikes, was a major focus during the planning process. In September 2002, Commander O’Rourke and I met to review the targeting plan. We wanted to ensure that the target nominations were consistent with the campaign plan as well as with the law of war. We reviewed the targets with an eye towards preserving infrastructure, especially the bridges and roads that, while potentially valid military targets, would be vital to the delivery of humanitarian assistance goods to the Iraqi people.

During combat operations, attorneys reviewed targets at all command levels on the battlefield. At CFLCC, we reviewed every pre-planned strike and time-sensitive target, and we never had to raise an objection regarding a target’s legitimacy. We did, however, raise numerous concerns about collateral damage, and some targets were removed from the nomination list. The judge advocate’s role is to provide advice, but the commander makes the decision. The commander must determine if a strike is proportional, which requires that the anticipated loss of life and damage to property incidental to attacks is not excessive in relation to the concrete and direct military advantage expected to be gained.

III. CONCLUSION

Judge advocates play an important role during war. From reviewing plans to drafting ROE and analyzing targets, the operational law attorney is a key player on the commander’s staff. As war becomes more complex and media
coverage becomes more immediate and intense, it is likely that the judge advocate’s role will increase in significance. Complying with the law of war facilitates mission success because violating the law can have a devastating impact, resulting in reduced international and domestic support as well as negative media coverage. The law may have fallen silent in past wars, but now the judge advocate ensures that it is heard.