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Legal Support in War: The Role of Military Lawyers

Rear Admiral Michael F. Lohr* and Commander Steve Gallotta**

War has existed since time immemorial. . . . When war was fought with stones and clubs, few rules were necessary and, of course, none existed. Nevertheless, the law of war is probably the oldest facet of international law¹

Today, of course, we are beyond stones and clubs. To impose humanity into the conduct of war, the international community has slowly but inexorably evolved a code for warfighting.

Earlier advancements in mitigating the effects of war have moved forward to where, today, we have a full, and growing, body of law known as the law of war (“LOW”) or the law of armed conflict (“LOAC”).² The purpose of the LOW is to make possible the successful accomplishment of the military mission while limiting the effects of war by protecting both combatants and noncombatants from unnecessary suffering, safeguarding the fundamental human rights of those who fall into the hands of the enemy, and facilitating the restoration of peace.

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¹ Howard S. Levie, *The Laws of War and Neutrality*, in John Norton Moore, Frederick S. Tipson, and Robert F. Turner, eds, *National Security Law* 307 (Carolina 1990).

² Law of war: “That part of international law that regulates the conduct of armed hostilities. Also called the law of armed conflict.” The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law. See *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02, 301 (Apr 12, 2001), available online at <<http://www.dtic.mil/doctrine/jel/doddict/index.html>> (visited Sept 16, 2003).

I. INTRODUCTION

This essay discusses the role of military lawyers (judge advocates) in war. It will explore the role of military lawyers at all levels of command³ and will center on the development of the “operational lawyer.” Operational law (“OPLAW”) advisors are distinguished by their practice: they support the commander’s conduct of warfare.⁴

The discussion about the role of military lawyers in war starts with the LOW and the commitment of the United States to conduct military operations within the bounds of this body of international law. After decades of steady development in humanitarian law, the war crimes tribunals following World War II sped the development of the LOW, providing for the first time an accepted body of precedent associated with the enforcement of the LOW.

Efforts to enforce the LOW have been complemented by international instruments that have served to contain the cruelty of war. From the Lieber Code of the US Civil War to the 1907 Hague Resolutions and 1949 Geneva Conventions, and on to international efforts to outlaw chemical and biological weapons, numerous international declarations and conventions have had the purpose of limiting or otherwise shaping the conduct of warfare.⁵ These norms have generally centered on the proposition that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.”⁶ From this proposition flow the commonly accepted principles of war: distinction,⁷ military necessity,⁸

³ While this essay focuses on the Department of Defense, it is recognized that there are other lawyers, particularly in the intelligence services, the Department of State, and the Department of Justice, who are also important contributors to the nation’s conduct of warfare. Moreover, there are legal advisors at any number of non-governmental organizations whose work shapes debates about international law. None of these lawyers, however, directly support use of force decisions.

⁴ Although this essay discusses the lawyer’s role in war, it should be recognized that OPLAW attorneys provide support to the commander’s preparation, training, exercises, and planning before the war; indeed, much of the work of a commander is intended to prevent the outbreak of war.

⁵ For a description of many, but not all, such international instruments, see Levie, *The Laws of War and Neutrality* (cited in note 1).

⁶ Hague Convention (IV) Respecting the Laws and Customs of War on Land art XXII (1907), 36 Stat 2277 (hereinafter Hague Convention IV).

⁷ The principle of distinction “requires that combatants be distinguished from non-combatants, and that military objectives be distinguished from [civilian property]. Parties to a conflict shall direct their operations only against combatants and military objectives.” Both sides to a conflict have the obligation to respect this principle and, thus, it is a violation of this principle of war to use human shields to “guard” a valid military objective. Capt. Jeanne M. Meyer and Cdr. Brian J. Bill, eds, *Operational Law Handbook* 10 (Center for Military Law and Operations and International Law Division, Judge Advocate General’s School, United States Army 2002).

⁸ Military necessity posits that “a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not

proportionality,⁹ and avoidance of unnecessary suffering or inhumanity.¹⁰ Today, any debate about the LOW relates to its overall scope or application in particular conflicts. The importance and widespread nature of these principles has been demonstrated by the international debates engendered by the 1998 conflict surrounding Kosovo, the global war on terrorism, and, most recently, the war in Iraq.

The expansion of humanitarian law, the international commitment to enforce the law of war, the pressure to minimize civilian casualties in military operations, the effect of domestic law on military operations, and the flow of information and images from battlefields to every corner of the world have inevitably increased the role and importance of legal advisors in war. Indeed, the commander, knowing that the way he or she fights and the consequences of such decisions are subject to public scrutiny, looks to the military lawyer to ensure that the desired use of force is legal. As Brigadier General Charles Dunlap succinctly puts it, knowing the legal challenges they will face, “savvy American commanders seldom go to war without their attorneys.”¹¹ In the end, “[lawyers] provide harried decision-makers with a critical guarantee of legal coverage, turning complex issues of morality into technical issues of legality, so that whatever moral or operational doubts a commander may have, he can at least be sure he will not face legal consequences.”¹²

Today, however, the role of military lawyers has itself come under scrutiny, with some concerned that legal advisors wield too much influence in the conduct of military operations. Brigadier General Dunlap captured this point when, discussing the role of judge advocates in war, he drew upon comments from Professor Richard Betts¹³ regarding the role of lawyers in the Kosovo

forbidden by the laws of war.” Related to the principle of distinction, this principle states that attacks may be made only against those targets that are valid military objectives. See *Department of Defense Dictionary of Military and Associated Terms* at 334 (cited in note 2).

⁹ See Meyer and Bill, eds, *Operational Law Handbook* at 9 (cited in note 7). Proportionality posits that “[t]he anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.” (emphasis in original).

¹⁰ “[I]t is especially forbidden . . . (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion . . . [and] (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering.” Hague Convention IV art XXIII (cited in note 6).

¹¹ Col. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 6 (Nov 2001), available online at <<http://www.ksg.harvard.edu/cchrp/UseofForcePapers.shtml>> (visited Oct 8, 2003) (Colonel Dunlap has since been promoted to Brigadier General and now serves as the Staff Judge Advocate for the Air Combat Command).

¹² Id, citing Michael Ignatieff, *Virtual War: Kosovo and Beyond* 199 (Metropolitan Books 2000).

¹³ Richard K. Betts, *Compromised Command*, 80 *Foreign Affairs* 126 (July/Aug 2001) (review of Wesley K. Clark’s *Waging Modern War: Bosnia, Kosovo, and the Future of Combat*).

campaign. Professor Betts alleges that lawyers “constrained even the preparations for decisive combat” and declares:

One of the most striking features of the Kosovo campaign, in fact, was the remarkably direct role lawyers played in managing combat operations—to a degree unprecedented in previous wars The role played by lawyers in this war should also be sobering—indeed alarming—for devotees of power politics who denigrate the impact of law on international conflict. . . . NATO's lawyers . . . became in effect, its tactical commanders.¹⁴

Professor Betts' general proposition—that lawyers are too influential in war-making—is not our experience. At the essential level, lawyers are members of staffs, bringing to the staff process certain skills and competencies. Like all other staff members, the attorney is subject to staff dynamics and organizational frameworks. Moreover, the senior officials and uniformed commanders within the Department of Defense (“DoD” or “the Department”) are some of the most accomplished individuals in government. They are vastly experienced, demonstrate sound judgment, and are of high intelligence. They are successful leaders and warfighters who require little, if any, encouragement to make tough decisions. They make their own decisions based on their own experience and the information presented to them. The staff attorney¹⁵ is one among many assistants to whom the commander may turn for guidance and information to contribute to the overall facts that he or she must take into account. Even in situations where legal issues dominate the discussion, the attorney's role is still that of an advisor. In the end, military lawyers properly placed do not “manage combat operations” in completing their tasks. Their advice contributes to operational success throughout the conflict. This is the critical point: military lawyers advising national leaders and commanders are not decisionmakers. They are counselors to their commanders.

II. JUDGE ADVOCATES IN THE MILITARY: THE TRADITIONAL PRACTICE

Judge advocates have been a part of the armed services since the beginning of the republic¹⁶ and have, over the years, developed a military legal practice encompassing several core competencies:

¹⁴ Dunlap, *Law and Military Interventions* at 1 (cited in note 11), citing Betts, 80 *Foreign Affairs* at 129–30 (cited in note 13). For a discussion of the role of lawyers in the Kosovo War, see Ignatieff, *Virtual War* (cited in note 12).

¹⁵ As a member of the commander's personal staff, the attorney is often a trusted member of the commander's “inner circle” of advisors who provide the commander with counsel on matters of law and legal policy.

¹⁶ George Washington established The Judge Advocate General Corps of the Army in 1775. See US Army Judge Advocate General website, available online at <<http://jag.goarmy.com/index03.htm>> (visited Oct 8, 2003). “In November 1779 the Congress authorized the [Naval] Committee to appoint ‘advocates’ from time to time ‘for the purpose of taking care

- Military justice and other personnel disciplinary actions.
- Personnel issues such as promotion of military and civilian personnel, physical disability adjudications, retirement benefits, dependent support, and other employee rights under statute or regulation.
- Legal assistance for sailors, Marines, soldiers, and airmen such as the execution of wills and powers-of-attorney. This also includes personal representation in a variety of settings.
- Litigation representing the government in civil claims seeking damages for wrongs to the US, defending the US in civil courts for the alleged torts of military personnel, and defending the US in other civil actions seeking non-monetary redress.
- International law including US obligations under treaties and status of forces agreements for US armed forces based or located abroad and implementation of arms control agreements. For the US Navy judge advocate, the practice of international law includes a focus on freedom of navigation on, under, and over the world's oceans.
- Administrative law, including review of investigations, DoD obligations under the Freedom of Information Act and the Privacy Act, standards of conduct/ethics for employees, the impact of federal fiscal or other domestic law/regulation on the operations of the services, review of legislation before Congress, and the entry into and enforcement of contracts by the United States. Administrative law also encompasses questions arising out of civil-military relations, including issues related to homeland security and defense.¹⁷

These are the traditional peacetime legal functions of military legal advisors. When war starts, these legal responsibilities continue. But the onset of war brings entirely new concerns, for which military lawyers had to develop additional expertise.

III. THE OPERATIONAL LAWYER: DOCTRINE

Prior to Vietnam, the role of military lawyers in wartime was to provide the same assistance as during peacetime.¹⁸ Their role in law of war matters was

of and managing the maritime causes in which the United States are or may be concerned.”
 Capt. Jay M. Siegel, *Origins of the Navy Judge Advocate General's Corps* 25 (GPO 1997).

¹⁷ *Office of the Judge Advocate General (OJAG) Organization Manual*, JAG Instruction 5400.1A, 1-1 (July 6, 1992), available online at <http://neds.nebt.daps.mil/jag/5400_1a.pdf> (visited Oct 8, 2003).

¹⁸ See Frederic L. Borch, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* vii, 51 (GPO 2001).

typically limited to the prosecution of war crimes, which was, in effect, an extension of one of their traditional core missions, the administration of military justice. Lawyers rarely penetrated operations centers. In Vietnam, however, individual initiatives of various judge advocates in international law issues, particularly prisoner of war and war crimes concerns, began to transform the legal practice in wartime.¹⁹ For example, their efforts led the South Vietnamese government to accept that the conflict was an international armed conflict to which the Geneva Conventions applied and to conform the treatment of enemy prisoners accordingly.²⁰ This led to the creation of prisoner of war (“POW”) camps monitored by the International Committee of the Red Cross and a POW maintenance regime consistent with international law.²¹ At the same time, the war also saw suspected and, in some cases confirmed, LOW violations by American forces.²²

Lessons learned in Vietnam caused the military leadership to recognize that US compliance with the LOW required training for all members of the armed forces, and a cadre of persons responsible for that training and monitoring of compliance with the LOW during military operations. In 1974 the Secretary of Defense issued a Department of Defense Directive establishing the DoD Law of War Program (“DODLOW”).²³ The directive created, within the Office of General Counsel for the Department of Defense, the responsibility to establish and oversee a department-wide Law of War program. The program’s purposes are to ensure that the armed forces of the United States conduct all military operations in compliance with the international law of war and to prevent violations of the laws of war. The directive assigned overall responsibility to coordinate and monitor LOW training and compliance to lawyers within the department.

Since 1974, every member of the armed forces has been required to obtain LOW training. Commanders are required to “[e]nsure that qualified legal advisers are immediately available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and

¹⁹ Id at 3–52.

²⁰ Id at 11–12.

²¹ This significant success would have been even more notable if the enemy had given our soldiers the same protections.

²² The most well known incident, of course, was the killing of civilians at the village of My Lai, Vietnam, in 1968 by members of the US Army.

²³ Department of Defense Directive 5100.77 (Dec 9, 1998), available online at <<http://www.dtic.mil/whs/directives/corres/html/510077.htm>> (visited July 7, 2003) (non-military domains are no longer able to access this website) (on file with CJIL). The first iteration of DoD Directive 5100.77 was published on November 5, 1974. It has been periodically reviewed and revised. Within the Department of Defense, the General Counsel is responsible for the maintenance of the directive.

operations.”²⁴ Equally important, the directive requires that legal advisors review all operational plans, policies, directives, and rules of engagement (“ROE”) to ensure “their consistency with the law of war obligations of the United States.”²⁵ To meet these requirements, lawyers must have the appropriate security clearance and access to the war plans and rules of engagement. In short, this puts the lawyer in the command center. The responsibility to ensure compliance with the laws of war, more than any other responsibility, accounts for the emergence of the lawyer as an advisor on the conduct of military operations.

Related to LOW training and planning support is LOW enforcement. The DODLOW program gives legal advisors a primary role in supporting Department enforcement efforts. Combatant commanders are required to designate their legal advisors to supervise the administration of that part of the LOW program “dealing with possible, suspected, or alleged enemy violations of the law of war.”²⁶ These requirements, when supplemented by the implementing instructions of the Chairman of the Joint Chiefs of Staff, make legal advisors the primary actors in LOW enforcement, both in the investigation effort and the subsequent prosecution. Consistent with this doctrine, in the event military commissions are convened with respect to members of al Qaeda, military lawyers will be key advisors and participants implementing the creation, development, and eventual conduct of the proceedings.

Law of war compliance requires more than pre-battle participation in the planning process. During hostilities, planning and staffing for upcoming actions is continuous. Legal advisors are embedded in all phases of the targeting process, including the intelligence collection apparatus, where they examine photos and other information regarding potential targets. In this arena the legal advisor provides guidance on LOW principles such as military necessity and proportionality. Other staff planning efforts also require legal review to ensure that international sovereignty issues are recognized, use-of-force standards are followed, operations are conducted within the bounds of domestic law, and international mandates under which US forces might be operating are observed.

The intent of the DODLOW program can be seen in the doctrine publications known as Joint Publications (“JPs”).²⁷ Two examples demonstrate the role of lawyers in US military operations. “[A]ll actions of the joint force . . . are accomplished in accordance with international law and the ROE Military commanders, planners, and legal advisors must consider the desired end

²⁴ Id at 5.3.3.

²⁵ Id at 5.7.3.

²⁶ Id at 5.8.3.

²⁷ Joint Publications can be accessed through the Joint Electronic Library in the Joint Chiefs of Staff website, available online at <<http://www.dtic.mil/doctrine>> (visited Oct 5, 2003).

state, political goals, and legal constraints when making targeting decisions.”²⁸ Similarly, joint doctrine²⁹ requires a role for the judge advocate in the targeting process:

Due to complexity and extent of international law considerations involved in the joint targeting process, a judge advocate (JA) must be immediately available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations. Early involvement by the JA will improve the targeting process and can prevent possible violations of international or domestic law.³⁰

IV. A NEW PRACTICE FOR OPERATIONAL LAWYERS

The DODLOW program changed the role of the military attorney. Early on, legal advisors had to overcome skepticism about their presence in the command center and earn the trust of commanders. Once this trust was earned, legal advisors began to be invited to planning groups, to participate in exercises, and to attend the commander’s briefings.³¹ This development of trust and a place for the attorney was the origin of the “operational lawyer”: the attorney who supports the warfighting commander through expertise in those parts of international and operational law relevant to accomplishing the military mission (including the international law on the use of force). OPLAW is that body of:

[d]omestic and international law associated with the planning and execution of military operations in peacetime or hostilities. It includes, but is not limited to, Law of War, law related to security assistance, training, mobilization, predeployment preparation, deployment, overseas procurement, the conduct of military combat operations, anti- and counter-terrorist activities, status of forces agreements, operations against hostile forces, and civil affairs operations.³²

During hostilities military legal advisors still perform traditional legal functions—crimes are prosecuted under the Uniform Code of Military Justice,

²⁸ Joint Publication 3-0, *Doctrine for Joint Operations* (Sept 10, 2002), available online at <http://www.dtic.mil/doctrine/jel/new_pubs/jp3_0.pdf> (visited Oct 5, 2003) (emphasis omitted).

²⁹ Joint doctrine sets forth military guidance for joint operations. The movement toward joint operations within the military will ensure that our military will be, in the words of President Eisenhower, “singly led and prepared to fight as one regardless of service.” Ronald H. Cole, et al, *The Chairmanship of the Joint Chiefs of Staff* 14 (GPO 1995). The joint force will continue to be the key to success in future operations because of its flexibility and responsiveness.

³⁰ Joint Publication 3-60, *Joint Doctrine for Targeting* A-6 (Jan 17, 2002), available online at <http://www.dtic.mil/doctrine/jel/new_pubs/jp3_60.pdf> (visited Oct 8, 2003).

³¹ Interview with Capt. Jane Dalton, JAGC, USN (Jan 24, 2003). Captain Dalton was Legal Counsel to the Chairman of the Joint Chiefs of Staff.

³² Lt. Col. David E. Graham, *Operational Law—A Concept Comes of Age*, Army Law 9, 10 (July 1987). See also US Army Field Manual 27-100, *Legal Support to Operations* 3.2 (Mar 1, 2000), available online at <<http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-100/toc.htm>> (visited Oct 8, 2003).

powers-of-attorney are drafted (legal assistance), equipment and services are purchased (fiscal and contract), and investigations into accidents are conducted (administrative law). However, it is the laws of war, such as rules for targeting, rules of engagement, international law in addition to LOW, domestic law limitations, and war crimes, that distinguish the OPLAW practice.³³

To provide the required support, the judge advocate participates in the commander's (and staff's) decisionmaking processes by performing mission analysis; preparing analysis of the potential legal issues (legal estimates); communicating and consulting with lawyers up and down the chain of command; providing training to the commander, the staff, and subordinate commanders/units/judge advocates; participating in war games; writing legal annexes to plans; assisting in the development and training of ROE; participating in the targeting process; and reviewing plans and orders. The ability to develop the situational awareness gained by these duties (attendance at meetings, study of staff products, and presence within the operations arena) is among the most important skills the judge advocate must master.

Legal advisors whose portfolio includes international and operational law issues are found at all levels of command. Of course, within different organizations the staffs are organized differently and have different missions. The number and skill sets of assigned attorneys will reflect those differences. Thus, while the Office of the Secretary of Defense ("OSD") has an extensive staff of legal advisors (almost all civilian), providing counsel on all matters under the Secretary's cognizance, a combatant commander will have approximately six to eight legal advisors (almost all uniformed) to handle the legal issues—including OPLAW—relevant to such a staff. The common feature to all is that they provide legal and, when asked, policy counsel to a commander or other official.

The Legal Counsel to the Chairman of the Joint Chiefs of Staff ("CJCS") is an O-6 military officer (Navy Captain or Army, Air Force, or Marine Corps Colonel) selected by the CJCS from among military service nominations. Eight attorneys, representing each of the services, comprise the staff of the legal office. The legal office carries its own substantive legal portfolio in many of the areas mentioned above, though one of the most important is providing OPLAW advice to the 1,400 members of the Joint Staff. Just as important, however, is the Legal Counsel's role as the legal spokesperson or liaison for the Combatant Commander Staff Judge Advocates in interdepartmental and interagency discussions with the DoD General Counsel, Office of Legal Advisor,

³³ In Iraq, judge advocates are "sorting out Iraqi prisoners" to identify captured persons as non-combatants, lawful combatants, or unlawful combatants. Toni Locy, *Military Lawyers Begin Sorting Out Iraqi Prisoners, Deciding Their Fates*, USA Today A5 (Apr 10, 2003). Known as Article V tribunals, these hearings are a traditional attorney responsibility.

Department of State, Department of Justice, and lawyers at the National Security Council.

OPLAW legal advisors are also found in the armed forces of countries around the world. Like the US, several countries include judge advocates on the staffs of their commanders.³⁴ The US organization is similar to that found in British and Australian commands.³⁵ Canada and France, among others, also deploy judge advocates to the field. Many other countries dedicate legal advisors to their forces, albeit from a greater distance. This network of lawyers helps bridge the gaps between individual national interests and the interests of the coalition by working to clarify ROE and other use of force issues so that commanders at all levels are aware of the capabilities of all the available forces.

A. WAR IN KOSOVO

As discussed above, the need for operational international law advice arises in many contexts, including the formulation and drafting of rules of engagement, implementation of the law of armed conflict and the Geneva Conventions, targeting, use of force in domestic situations, arms control, and the law of the sea. CJCS, members of the Joint Staff, and other operational commanders value and rely in particular on such legal advice because military lawyers know and understand them, their weapons systems and operational capabilities, and, most importantly, their mission. In addition, much of life, including the conduct of armed conflict, has become more complex and interwoven with the law. All one has to do is recall the headlines from the recent conflict with Iraq and the almost daily discussion by US officials and allies concerning the legal (as well as operational, political, and moral) imperative to avoid injury or death to innocent civilians and the destruction of civilian property. Also, difficult issues concerning accountability for Iraqi war crimes and Iraq's violation of the law of war in using false flags of surrender, clothing military personnel in civilian dress while firing on coalition forces, launching attacks from protected places (such as hospitals, schools, and mosques), and the mistreatment of American prisoners of war greatly increased the need for legal analysis and advice.

Recalling the criticism of some of the military lawyer involvement in the Kosovo conflict, it is instructive to focus on one prominent aspect of that operation: targeting. The targeting process is a complex one involving many participants (operational, intelligence, and judge advocate) at virtually every level of the chain of command. There are, however, three key levels of

³⁴ Interview with Capt. Shelley Young, JAGC, USN (Jan 18, 2003). Captain Young was the Staff Judge Advocate to the United States Central Command.

³⁵ In absolute numbers, the US fields more legal advisors. There is, however, little difference in the LOW responsibilities, and no difference in the expertise, of the legal advisors from coalition partners.

decisionmaking: the President and the Secretary of Defense; the operational military commanders and their subordinates responsible for prosecuting the war; and the pilots in the cockpit, soldiers on the ground, and sailors at sea that employ the weapons used in war.³⁶ Military lawyers provide legal advice at each of these levels but so too do many other advisors and staff members.

During the Kosovo conflict the target nomination process began in the theater of operations at the US European Command (“EUCOM”) as a joint effort undertaken by operations and intelligence personnel. NATO planners also were involved at various levels. Operational and intelligence planners developed and recommended targets based on a variety of factors, including the individual and cumulative effects on the enemy’s war-making and war-sustaining capability and whether those effects ultimately would contribute to the commander’s mission objectives. At the early stages of target planning, military lawyers played an important role in helping to inform the determination of what were, or were not, lawful targets. Lawyers in EUCOM and throughout the chain of command looked to the relevant sources of international law, including treaty law and customary international law, in preparing their advice to commanders. Numerous treaty provisions were specifically relevant: for example, the Geneva Convention provisions on protected persons and places³⁷ and Hague Convention provisions on the means and methods of warfare.³⁸

Most targets were reviewed and approved in theater, though some were forwarded to the Pentagon for review. Those that were reviewed and approved in theater included targets that were plainly military targets; for example, military equipment and forces, military infrastructure, air defense facilities, and various command, control, and communication nodes. Targets that were “dual-use” (infrastructure that served military as well as civilian purposes, such as bridges and certain industrial targets) or targets that had the potential for significant civilian casualties were forwarded to the Pentagon. In the Pentagon a team comprised of operations, intelligence, and judge advocate personnel reviewed the targets. Many factors went into the evaluation of each target, including: the military necessity for striking the target; the military advantage or benefit of striking the target balanced against the assessed potential for death or injury to innocent civilians or damage to civilian property; and the risk posed by

³⁶ Obviously there are many others—intelligence, communications, and logistics personnel—but for purposes of this discussion these three are of primary importance.

³⁷ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 6 UST 3114 (1950); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (1949), 6 UST 3316 (1950); Convention Relative to the Treatment of Prisoners of War (1949), 6 UST 3316 (1950); Convention Relative to the Protection of Civilian Persons in Time of War (1949), 6 UST 3516 (1950).

³⁸ Hague Convention IV (cited in note 6).

“outliers” (a weapon that for mechanical or other reasons might not strike its intended target) if a target was in proximity to a civilian or protected place or object—for example, a hospital or school.

Each target was assessed carefully against these and other factors. Occasionally, the chain of command was asked to provide more information about a particular target or more detailed analysis was sought regarding possible collateral damage. Once the Pentagon team completed its review, the CJCS was briefed on the target and associated analysis and, if satisfied with the analysis, carried the recommended target to the Secretary of Defense and the President for their review and approval. Despite some of the post-war commentary, the CJCS recommended disapproval of very few targets, but sometimes did request more information when it was felt that such information would aid the Secretary of Defense or the President in their decisionmaking. Some proposed targets raised difficult issues (for example, several potential targets were of historical or cultural significance), but throughout the conflict, commanders, working closely with their operations, intelligence, and judge advocate personnel, achieved their strategic and operational objectives, consistent with the law of war.

B. WAR ON TERRORISM

If Kosovo represented a traditional military action, the international law of war paradigm has been challenged by the appearance of organized, worldwide terrorist networks and the sometimes-associated threat of weapons of mass destruction. This development has enhanced the role of the attorney. Responding to the threat of terrorism has required an evolving understanding of the scope of the LOW. Legal advisors have grappled with issues such as the status of the terrorists (civilians or soldiers, lawful or unlawful combatants); applicability of the Geneva Conventions to this sort of conflict and to those captured; the rights of a state to enter another state to seek and kill ostensibly private persons within it; the rights of a nation fighting an enemy dispersed into small bands of individual cells scattered among the civilian population; and the application of the principles of proportionality and military necessity in attacking these small cells, or even individual actors who are capable of great destruction and who hide among the civilian population. On the sea, searches of foreign-flagged vessels in an exercise of a nation’s own self-defense raise challenging issues. These questions and issues have tested legal advisors counseling the Secretary of Defense, the CJCS, the other members of the JCS, and operational commanders. These lawyers, both civilian and uniformed, have built the legal framework within which the war is fought. It is their job to advise their clients on the sound legal bases for military operations against the terrorist networks. But in some circumstances, the traditional LOW (or domestic law) has not provided a clear set of rules to follow, and lawyers have had to “think outside

the box” in support of the war effort. These legal analyses and conclusions contribute directly to national security by providing the leadership with the legal tools to plan the nation’s response to the aggression. This legal “preparation of the battlefield” is critical to legitimacy and credibility in the international arena. This is important, moreover, because these legal conclusions, when turned into policy by decisionmakers, are evidence of state practice and may, over time, become international law. Legal advisors throughout DoD are very cognizant of the fact that their advice is contributing to state practice in fighting the scourge of terrorism.

Perhaps the clearest example of this new legal framework and state practice is the determination that the al Qaeda detainees are not prisoners of war as defined in the Geneva Conventions.³⁹ The Red Cross is willing to agree that al Qaeda personnel are not automatically covered by the terms of the Third Convention.⁴⁰ This emerging state practice is important to ensuring that countries have adequate measures for detaining terrorists who threaten their population or territory while maintaining the distinction between civilian and combatant that the LOW has painstakingly developed.

Another example is the issue of maritime interception. If terrorists use civilian merchant vessels, flagged in various nations, to transport themselves, their equipment, or weapons of mass destruction, is it sound national practice to allow them to use the power of someone else’s flag to evade capture or destruction? No, but the rights of the flag state are important in the law of the sea. Legal analysis of the rights of a belligerent and self-defense is crucial to the formation of an acceptable maritime interception policy currently being developed with other nations.

What is important to note about these examples and other decisions regarding the war on terrorism are the implications for international law. Coalition acceptance of these interpretations is evidence that they represent permissible actions under international law. Indeed, lawyers within the US understand that the legal framework they have developed for the war on terrorism is creating state practice. Ultimately, today’s legal analyses and policy determinations about the terrorists shape the battlefield for tomorrow’s battles against them.

³⁹ There is clearly legal authority for denying the detainees status as prisoners of war.

⁴⁰ The Red Cross believes that the legal status of each of the detainees needs to be determined on an individual basis. However, it acknowledges that the United States has the absolute right to legally prosecute any detainee suspected of having committed war crimes or any other criminal offense. International Committee of the Red Cross, *Guantanamo Bay: The Work Continues*, (July 18, 2003), available online at <<http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList454/5C867C1D85AA2BE541256C94006000EE>> (visited Oct 8, 2003).

V. CONCLUSION

The role of the military lawyer in war has clearly expanded in the last generation, but their underlying role has not changed—military lawyers are advisors. The OPLAW lawyer provides a legal framework for the conduct of military operations. That lawyer is, by regulation, a participant in the planning and execution of military operations. Legal advisors are primary players in the investigation and prosecution of potential war crimes. Similarly, legal advisors have a central role in ensuring that the LOW is taught to all personnel. Bringing this expertise to commanders and the rest of the armed forces has heightened awareness of the basic principles and specific provisions of international law underlying the military profession. Moreover, the challenges posed by the war on terrorism have increased the importance of understanding international law, a task in which the legal advisor has an important role. The increased involvement of lawyers is a good thing. US adherence to the LOW, through the training of its forces and consideration of the LOW during planning and execution, establishes a baseline for others to emulate.

Many countries around the world share the US commitment to compliance with the LOW and many of them utilize legal advisors, both at headquarters and in the field, in ways similar to the US approach. The legal advisors brought to the coalition headquarters are, like their US counterparts, experienced, knowledgeable, and operationally savvy.

The participation of military lawyers in the world of warfare has influenced the choice of means and methods of warfare by putting the principles of the LOW into the planning process. That is the general intent of the DODLOW program—to bring the legal advisor's international law and LOW expertise to bear in planning the use of military force. The fact that the legal advisor brings the principles of war to the planning cell, or the targeting board, is an important part of the US commitment to comply with the LOW.