

## **A Brush With The New Reality The Law of Armed Conflict and Rules of Engagement in the Theatre of the New War**

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*War is tough, uncompromising, and unforgiving. For soldiers, the rigors of battle demand mental and physical toughness and close-knit teamwork. ...In war, the potential for breakdown in discipline is always present. The Army operates with applicable rules of engagement (ROE), conducting warfare in compliance with international laws and within the conditions specified by the higher commander. Army forces apply the combat power necessary to ensure victory through appropriate and disciplined use of force*

--- Dept. of the Army, Field Manual 100-5, Operations  
(Department of the Army 2000).

*I watched [fellow Marines] shoot up this car, and they killed the driver and passenger. It was an attack, I can tell you that for a fact. But when we looked into the car there were no guns and no bombs. Just two dead bodies. How do you figure?*

--- A Marine manning a checkpoint in "post-war" Iraq (Willis  
2004, 157)

*I never expect a soldier to think.*

--- George Bernard Shaw (Shaw 1990, 72)

### **Introduction**

Unlike George Bernard Shaw (1990), today's US Armed Forces *do* expect their soldiers to think. This expectation extends to the most hostile conditions in the theatre of operations, where the window of opportunity to make the right decision closes in the fraction of a second. While individual lives hang in the balance during that infinitesimal sliver of time, the impact of an individual soldier's decision may, and frequently does, play out on a global scale, the ripples extending to unintended

political shores.<sup>1</sup> This reality is explicitly acknowledged in Joint Publication 3-07, the US Army's Joint Doctrine for Military Operations Other than War (MOOTW). JP 3-07 states that "it is not uncommon in MOOTW, for example peacemaking, for junior leaders to make decisions which have significant political implications" (US Army, 1). In MOOTW and conventional armed conflicts, the laws and rules that govern nations' and soldiers' behavior deeply inform these decisions.

The purpose of this article is to explore the relationship between the Law of Armed Conflict (LOAC), and Rules of Engagement (ROE), and the increase in unconventional warfare. Part One is a brief overview of the laws and rules that govern force behavior. Part Two is a critical exploration of the issues faced by today's US armed forces relative to LOAC and ROE. In conclusion, Part Three examines the question of whether LOAC, in particular, should be recalibrated to better reflect and address issues facing today's military. This question is currently the subject of much debate, from international policy makers to those officers charged with spearheading the assault into Iraq during Operation Enduring Freedom (Darmer 2004, 303-315; Wright 2004, 32-34).<sup>2</sup> The questions being asked include whether LOAC, as they currently exist, are adequate to address present day issues or whether, instead, they require changes. Some commentators suggest simply tweaking the existing laws while others insist on a complete overhaul. Regardless of what one feels is the right and proper answer to this query, that there

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<sup>1</sup> By way of example, one may look to the Abu Ghraib prison scandal, where, to date, at least three US soldiers have been convicted for their part in abuse of prisoners at the facility. The soldiers have been convicted under the Uniform Code of Military Justice ("UCMJ"). The UCMJ, in turn, is the primary charging mechanism by which active members of the US armed forces are prosecuted for violating LOAC. It should be noted that, ironically, the defense waged by the convicted men consisted, in large part, of inferring that they were operating within the ROE given through orders from commanding officers. For example, Staff Sgt. Ivan Frederick, the highest ranking officer to be convicted thus far, stated that military intelligence soldiers and civilian interrogators told the guards how to treat the prisoners and that appropriate methods included stripping them, depriving them of sleep, and not allowing them to have cigarettes. He testified that his orders were to "stress[] out the" detainees. Furthermore, an email from the US command in Baghdad was introduced into evidence which stated that "[t]he gloves are coming off, gentlemen, regarding these detainees" and that the command wanted "the detainees broken" (CNN 2004)

<sup>2</sup> For a redacted version of Jay S. Bybee's Memorandum for Alberto R. Gonzalez "Re: Standards of Conduct for Interrogation Under 18 U.S.C. § § 2340-2340A" (FindLaw 2004).

is a debate at all suggests, perhaps, the importance of LOAC is observed more in the breach than in the observance. Nonetheless, how we deal with one another during conflict is one of the questions of our time. This article proposes to be but one voice among many in addressing the issue.

## **Overview of Legal Obligations**

Across the globe, we have seen a sharp rise in the level of unconventional warfare, and the ambiguous and messy conflicts that this new reality entails. As a result of the increased US involvement in unconventional conflicts, frequently referred to as the “New War,” it is necessary for US national security planners to review the laws and rules that guide force behavior. While the type of warfare and operations in which the US military finds itself has changed significantly since the end of the Cold War, the rules and laws that govern the duties and behavior of the armed forces have remained, for the most part, static. The resulting confusion is a disservice to the whole of the world community. As U.S. armed forces experience new pressures, the laws and rules that govern that experience face an equal measure of stress. The confusion and frustration of line soldiers who must think *and act* upon their legal duties and obligations, usually while in circumstances of extreme jeopardy, only increases the likelihood of failure in waging war and protecting the peace.

For the US armed forces, legal obligations fall into two categories. The LOAC are the international laws that the US has a legal duty to observe. The ROE are the rules the US military imposes upon itself.

### ***The Law of Armed Conflict (LOAC)***

It is the stated policy of the United States that its armed forces will comply with the LOAC (Department of Defense).<sup>3</sup> These laws include “that part of international law that regulates the conduct of armed hostilities.... [A]ll 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” (Chairman of the Joint Chiefs of Staff 1999, 4a).

The most important and well known international law is commonly referred to as the Hague Convention of 1907 and the Geneva Convention of 1949.

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<sup>3</sup> The term “law of war” is synonymous with “law of armed conflict.” For purposes of this paper, the latter term, and its acronym, LOAC, will be used.

US policy also respects and reflects what is commonly referred to as customary practices of nations conducting war, or “international norms.” Both the Hague and Geneva Conventions are, in actuality, a collection of conventions to which states became parties.<sup>4</sup> In the US, these conventions must undergo a particular process in order to be legally binding. This process is completed by enacting legislation that gives force to the convention. For example, the Geneva Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (Convention Against Torture) is made applicable to US service personnel pursuant to Title 18 of the US Code, Sections 2340-2340A (U.S.C., 18: 2340-2340A).

To illustrate, in order to prosecute a service member for violating elements of the Convention Against Torture, the soldier will, in all likelihood, be charged under the UCMJ for violations of federal law (*i.e.* for having violating some portion of 18 U.S.C. 2340).<sup>5</sup> Or, the individual might be charged for dereliction of duty, the elements of which would likely include that behavior which constitutes the alleged violations of the Convention Against Torture (CNN 2004).

As a starting point, it should be noted that Article 1 of the Hague Convention IV of 1907 requires parties to the Convention to “issue instructions to their armed forces which shall be in conformity with the regulations respecting the laws and customs of war on land” (Schindler and Toman 1981). The majority of applicable conventions have a comparable mandate. In the US this obligation is fulfilled, in part, by Department of Defense Directive No. 5100.77. This Directive is frequently referred to as the “Law of War Program.” Section 4.2 of the Directive

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<sup>4</sup> For purposes of this article, the applicable Hague Conventions are numbers three (3), four (4), five (5), and nine (9) of 1907. The most significant Geneva Conventions to which the US is a party are as follows. 1) the Geneva Convention for the Protection of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; 2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; 3) Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949; and 4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

<sup>5</sup> Of course, there are other legal mechanisms, not involving the UCMJ, by which a service members may be prosecuted, including but not limited to, extradition to the country where the alleged torture was committed for the purpose of charging and trying the individual under that country’s domestic law or submitting the accused to an international tribunal charged with prosecuting war crimes. These alternatives only serve as one of several possibilities. For an in depth examination, one should consult the literature on international law as it relates to human rights violations (Bassiouni, 1999).

requires, in relevant part, that “[a]n effective program to prevent violations of the law of war is implemented by the DoD components” (Schindler and Toman 1981). This same basic requirement to satisfy Article 1 of the Hague Convention of 1907 is reflected in various manuals, codes of conduct, and ROE.

The second, and more recent, LOAC are embodied in the 1949 Geneva Conventions. These Conventions serve to “reaffirm[] and develop[] customary law and conventions on the ‘methods and means’ of warfare; the protection of victims of war (including prisoners of war) and the rules concerning the protection of civilians in occupied territory” (Geneva Convention for Security Policy, 2003). The Geneva Conventions focus, in almost all respects, on inter-state conflict.<sup>6</sup> It is important to note that in order for LOAC to apply pursuant to Hague and Geneva Convention obligations, a formal declaration of war is not strictly required. Rather, the actions of the belligerents are the determining factor (Schindler and Toman 1981).

At the heart of LOAC is a belief that armed conflict must proscribe to the Just War tradition. By way of a brief overview, let us quickly examine the Just War theories. Just War tradition has two elements. *Jus ad bellum* holds that states are morally and legally bound not to war against one another unless certain criteria are met.<sup>7</sup> In sum, *jus ad bellum* criteria are to guide *nations* in determining *when* it is just to participate in war. *Jus in bello* tradition, on the other hand, is concerned with just conduct *during* war. The basic tenets of the *jus in bello* tradition are *discrimination*, which obligates parties to discriminate between an enemy’s armed forces and its civilian population (*i.e.*, non-combatant immunity), and *proportionality*, which is concerned with the amount and type of force to be utilized in a conflict (*i.e.*, the bad things that might result from military action, such as damage to infrastructure

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<sup>6</sup> As a side note, two additional laws, Protocol I and Protocol II to the Geneva Conventions do attempt to address issues resulting from the existence of non-state actors during hostilities. Specifically, the Geneva Center for Security Policy notes that, Protocol II “extended the law dealing with non-international (internal) armed conflict. This additional protocol provided for the first time explicit rules for the inclusion of ‘non-state’ armed groups, who, provided they complied with the laws of war, received recognition under the protocol.” (Schindler and Toman 1981, 15). However, to date, for a multitude of reasons both procedural and practical, the US has not taken the necessary steps to make these Protocols binding upon its forces. Because they are not technically applicable to US forces, they are not properly addressed in this article.

<sup>7</sup> The basic *jus ad bellum* criteria are just cause, lawful authority, just intent, last resort, and reasonable hope of success (Elshtain 2003; The Pew Forum Foundation 2003).

or civilian casualties, cannot outweigh the benefits that might be achieved).

Soldiers, on the whole, are more concerned with *jus in bello* principles than they are with *jus ad bellum*. Why a soldier's nation wages war tends to be of less concern to them than how they are to behave during that war for practical purposes that should be fairly obvious. When bullets and mortar rounds are flying in a soldier's general direction, most report being less concerned with political reasons that placed them in the zone of fire and more concerned with how much firepower they may use in return and in which direction they may aim it.<sup>8</sup> For that reason, the focus of this article is properly on the issues arising out of *jus in bello* tradition as reflected in the relevant LOAC that impact US service members.

As stated previously, the US military has embodied its commitment to LOAC vis-à-vis any number of orders, codes, and directives. This program is embodied in the DoD Law of War Program as it is painstakingly laid out in DoD Directive 5100.77 of December 1998. Directive 5100.77 applies to "all personnel of the Armed Forces, including civilians, regardless of assignment or attachment" (DoD 1998, n.7). As such, LOAC are applicable to all members of the service and civilian contractors, as well. Furthermore, the Directive requires that "[a]n effective program [will be] designed to prevent violations of the law of war" and that the program will be implemented throughout the US Armed Force. Finally, the Directive states that "[l]egal advisors will, at all appropriate levels of command during all stages of operational planning and execution of joint and combined operations, provide advice concerning law of war compliance. Advice on law of war compliance will address not only legal constraints on operations but also legal rights to employ force" (DoD 1998, n.7). Constraints on operations relative to the use of force are typically governed by ROE, which, in turn, must reflect and comply with LOAC. In this way, the two are inextricably linked at both the strategic and the tactical level.

### ***The Rules of Engagement (ROE)***

While LOAC are external obligations to which the US obligates itself, setting the rules for how the US will conduct their operations during conflicts, ROE are internal obligations which the US imposes upon its military forces. ROE proscribe the employment of firepower to be used in any given situation. Or, as stated in

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<sup>8</sup> For a sampling of what soldiers think about, for instance, the Iraq War, one should visit some of the blogs written by active duty soldiers. One such blog discussing a soldier's view on the issue is found at <http://soldeirlife.blogspot.com/>. See also Goodman (2004, 49-55) for an article examining a handful of Operation Enduring Freedom veterans who oppose the Iraq War.

Field Manual 27-100 (“FM 27-100”), “ROE are commanders’ rules for the use of force” (FM 27-100).<sup>9</sup> FM 27-100 also states that “all ROE must conform to international law,” and for this reason Operational Law Judge Advocates (OPLAW JAs) are tasked with assisting commanders in the interpretation, drafting, dissemination, and training relative to ROE. Furthermore, as stated in FM 27-100, both the Hague and the Geneva Conventions include distribution requirements encouraging the involvement of JAs in ROE matters (JCSI).

It would be easy to see ROE as limiting measures that may tend to interfere with a soldier’s ability to effectively complete his or her mission. In fact, FM 27-100 makes explicitly clear that “ROE must evolve with mission requirements and be tailored to mission realities. ROE should be a flexible instrument designed to best support the mission through various operational phases and should reflect changes in the threat” (JCSI). As we will discuss later, while ROE may look simple on paper, in the field of operations, they can become difficult to apply.

Perhaps it is this concern that has led to a highly evolved system for drafting ROE. As a general matter, the Standing Rules of Engagement (SROE),<sup>10</sup> as administered by the Joint Chiefs of Staff, aim to provide baseline guidance and procedures for supplementing ROE designed for specific operations (JCSI, § 8.2.3). For instance, there is a distinction between wartime ROE and SROE, which are considered peacetime ROE. It is especially important to note ROE that are applicable to MOOTW place a special emphasis on “principles of necessity and proportionality” in order to “help define the peacetime justification to use force in

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<sup>9</sup> A more explicit, and somewhat tortured, definition of ROE is available in Joint Publication 1-02, defining ROE as “directives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.” Additionally, FM 27-100 gives examples of ROE, such as “requiring an F-111 crew to confirm that all target acquisition systems are operable to bomb a Libyan barracks abutting a civilian population center; prohibiting entry by U.S. Navy ships into territorial seas or internal waters of a neutral nation; or authorizing an infantryman at a guard post to use deadly force against saboteurs of mission-essential equipment” (JCSI § 8.2.5).

<sup>10</sup> SROE are set forth in *Joint Chiefs of Staff Instruction 3121.01, Standing Rules of Engagement for U.S. Forces (SROE)*. The SROE apply to all US forces, with some carve outs for operations involving Multinational Force and disaster relief operations. The SROE’s are aimed at giving guidance to CINCs on issues related to “the inherent right of self-defense and the application of force for mission accomplishment” (JCSI, § 8.3).

self-defense” (JCSI, § 8.2.5).

Specifically, “[t]he necessity principle permits friendly forces to engage only those forces committing hostile acts or clearly demonstrating hostile intent” (JCSI). Furthermore, the rule of necessity is applicable to individuals, military units, and sovereign states (JCSI). Likewise, the principle of proportionality requires that any force used be “reasonable in intensity, duration, and magnitude, based on all facts known to the commander at the time” as the commander takes measures to combat hostilities and to safeguard US forces (JCSI). Obviously, the key to both understanding and applying MOOTW ROE lies in determining what a hostile act is or when hostile intent is manifest in a given scenario.<sup>11</sup> One can’t help but think that while these principles may seem clear enough on paper, they surely take on a more opaque character in the theatre of operations, when lives are on the line.

Wartime ROE, on the other hand, are usually more “familiar to units and soldiers because battle focused training concentrates on wartime tasks” (JCSI, § 8.2.5). In other words, soldiers and officers are trained at length on the applicable ROE because “[I] individual Army privates and officer trainees in all occupational specialties receive instruction and undergo evaluation on basic wartime rules” (JCSI). But, as we shall in Part Three, there are some questions regarding the extent to which soldiers are trained on proper ROE in given situations.

The US military command, in recognition of the complicated circumstances that might face soldiers trying to properly follow ROE in any given situation, has designated a fairly comprehensive list of “types” of ROE. These ROE types are frequently found in ROE annexes and soldier cards. Furthermore, OPLAW JAs, tasked with training officers in the ROE for each conflict, further categorize ROE by type, dictating precise terms of restrictions that are not derived from international law but which must, nonetheless comply with LOAC. As a result, ROE may actually be more restrictive than required by LOAC. ROE may not, in any event, violate LOAC. While this “typing” of ROE sounds quite complicated and cumbersome, in fact, wartime ROE for a particular engagement may be as simple as instructing a platoon in a particularly hostile environment to “shoot anything that moves.” Counterinsurgency and guerrilla warfare, however, create special problems for applying ROE, even if they seem simple enough on the outside. Part Two, below, considers some of these problems as they exist within the context of the New War.

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<sup>11</sup> FM 27-100 defines “hostile acts” as an “attack or other use of force.” “Hostile intent” is defined as “the threat of imminent use of force.”

## **Recent Issues Faced By US Military With Respect To LOAC & ROE**

### ***Intelligence Gathering & Prisoner Detention***

In May of 2004, the Center for Army Lessons Learned at Fort Leavenworth issued a study which found, among other things that US soldiers in Iraq had:

- Detained wives and children of insurgents in an attempt to compel the insurgents to turn themselves in or talk while in US custody; and
- Collectively detained all males, or in some cases entire families, in a given area or village for weeks, sometimes months, in an effort to acquire intelligence (Carter 2004).

In October of 2004, the Army's Judge Advocate General School issued a report on the Abu Ghraib prison scandal, criticizing decisions to delay the deployment of the 800<sup>th</sup> Military Police Brigade. Deployment of the 800<sup>th</sup> MP Brigade, the unit responsible for Abu Ghraib, did not occur until well after combat had begun. The JAG School report concluded that "the practical questions about how to treat detainees in Afghanistan and Iraq were overwhelmingly confusing. Soldiers didn't know what they were supposed to do with detainees and what they were forbidden to do" (CNN 2004).

These reports are only two among many, made public over the last year, which explored the various alleged violations of LOAC said to have taken place in the most recent conflicts involving the US military (Afghanistan and Iraq). One thing that all of the reports agree upon, however, is that a fairly serious break down occurred in communicating LOAC to many of the troops in the theatre of operations.

For example, Staff Sgt. Ivan Frederick, the highest-ranking US soldier charged in the Abu Ghraib prisoner abuse scandal thus far, stated that, while he knew what he did was "wrong" and a "form of abuse," he was given no training in supervising detainees and only learned of regulations against mistreatment after many of the more egregious abuses had already occurred (CNN 2004). At his sentencing hearing, he admitted that prisoners were forced to submit to public nudity and were degraded for the purpose of gathering military intelligence (CNN 2004). He testified that military intelligence soldiers and civilian interrogators

instructed the guards in how to treat detainees (CNN 2004).<sup>12</sup> Another soldier

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<sup>12</sup> This assertion, of course, contradicts the earlier assertion that he was given no instruction in how to treat the detainees. The assertion that he was “only following orders” is not new to military law. This defense, called the Defense of Superior Orders, has a bumpy history in both international law and US law. It is not mentioned in either the Hague Conventions or the Geneva Conventions, though it is recognized in the Rome Statute of the International Criminal Court where certain conditions are met. It was explicitly rejected by the International Tribunal at Nuremberg in trying war criminals from WWII. The earliest known assertion of this defense in the US is the case of *Little v. Barreme*, a United States Supreme Court case from 1804. The Defendant, Capt. George Little, a US Navy officer, raised the defense of obedience to superior orders when he was sued for trespass in US maritime court. Capt. Little, acting in compliance with President John Adams’ military authorization to seize vessels traveling both *to and from* French ports, seized the *Flying Fish*, a Danish ship en route *from* a French port. While Congress had, in fact, passed an act permitting the seizure and forfeit of ships traveling *to* a French port, it had not authorized seizures of ships traveling *from* French ports. Chief Justice Marshall, writing for the court, adopted an absolute liability approach, holding that naval commanders act at their peril in obeying presidential instructions at variance with the language of the underlying law and Capt. Little was liable for damages under this theory. *Little v. Barreme*, 6 US (1 Cranch) 170 (180). The defense was also used by Major Henry Wirz, commandant of the infamous Andersonville POW camp during the US Civil War. Wirz, the only soldier on either side of the Civil War executed for a war crime, would eventually hang because the military commission to which he was subjected refused to accept the defense that he was following standard military procedures and various orders. The commission held that his behavior was clearly illegal by any standard. Likewise, post-WW II and post-creation of the UCMJ, an Air Force Board of Review found an Airman named Kinder guilty of premeditated murder and conspiracy to commit murder. Kinder captured a Korean intruder while on sentry duty at an ammunition dump 300 miles south of the battle line. Kinder transferred custody of his prisoner to Corporal Toth, who pistol-whipped the captive until he lost consciousness. The officer in charge, Lieutenant Schreiber, then ordered Kinder to shoot the Korean captive while he lay unconscious. Kinder carried out this order while Toth waited in a jeep. On appeal, Kinder’s counsel contended that obedience to a superior order was a defense, regardless of the underlying illegality of the order. The Air Force Board of Review disagreed, holding that obedience to superior orders was not an excuse when a man of common understanding would know an order was unlawful. The Board stated that “of controlling significance in the instant case is

testified that he witnessed Staff Sgt. Frederick punch an inmate in the chest with such force that they feared the man was having a heart attack and had to call a medic to attend the man. Staff Sgt. Frederick pled guilty to conspiracy, dereliction of duty, maltreatment of detainees, assault, and committing an indecent act. He was sentenced to eight (8) years in prison (CNN 2004).

The case of Staff Sgt. Frederick is a sad example of what happens when clear ROE are not in place. Command structure falls into disrepair and LOAC are violated. In such situations, when soldiers are tasked with gaining intelligence from detainees, they are left with a dangerous uncertainty about how far they may go and where lines are drawn between intense questioning and torture. Complicating this, more likely than not, is the soldier's strong desire to please his commanding officers and accomplish the mission.

The JAG School report addresses this issue exactly.

In Afghanistan, issues concerning detainee interrogation proved among the most sensitive and difficult questions JAs faced. Detainees are a potential source of valuable information, and the motivation to extract that information through interrogation may sometimes create strong temptation to test the limits of LOAC. Questions often concerned the legality of specific proposed interrogation techniques (CNN 2004).

The various reports on the detainee scandals and allegations of inappropriate behavior during intelligence gathering missions show a clear failure in LOAC and ROE training in Afghanistan and Iraq. Taken at face value, there should have been no confusion. The 4<sup>th</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War absolutely prohibits the practice of detaining family members of accused or suspected insurgents for the purpose of gathering intelligence. The Convention prohibits "physical or moral coercion" to obtain intelligence from citizens of an occupied state. Detaining an insurgent's family certainly falls within this proscription. It also strictly prohibits the use of collective punishment, such as rounding up an entire village and detaining them (Schindler and Toman 1981). Even if these actions were within the scope of any

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the manifest and unmistakable illegality of the order." 14 C.M.R. 742, 753-774 (1953). Overall, a number of doctrinal approaches are allowed around the globe, and no clear standard or rule is yet in place. All the more reason to make ROE that reflect LOAC as clearly as possible, in an effort to give US soldiers insight into the proper application of the law. This does not, of course, address the issue of the soldier who refuses to follow the order of a commanding officer, where that soldier believes the order to be unlawful.

ROE, they were, nonetheless, not in compliance with LOAC.

Some of the best legal minds in the US are struggling with the question of how to apply LOAC. The recent legal opinions sought out by the Bush administration are indications of this struggle. The Bush administration sought legal opinions from various internal counsels (White House General Counsel and lawyers at both the Justice Department and the Department of Defense) on the issue of LOAC. In the now infamous legal opinion drafted by the Justice Department (DOJ) in 2002 and addressed to White House Counsel Alberto R. Gonzales, Assistant Attorney General Jay S. Bybee undertook an exhaustive analysis of US law reflecting the Geneva Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment. This law, 18 U.S.C. § 2340-2340A, is the legislation that gives force to the US treaty obligations as embodied in the Convention Against Torture.

The legal opinion analyzes “standards of conduct” under the Convention. The opinion makes the following findings.

(1) After an examination of the statute’s text and history, the DOJ found that “for an act to constitute torture [ ], it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under [the law], it must result in serious psychological harm of significant duration, for example, lasting months or even years....”

(2) After examining international decisions with respect to the use of sensory deprivation techniques, DOJ concluded that “there is a wide range of such techniques that will not rise to the level of torture.” This finding is based, in part, on a decision from the European Court of Human Rights (“ECHR”). In *Ireland v. the United Kingdom* (1978), the ECHR concluded that the following activities did not constitute “the particular level [of severity] inherent in the notion of torture.” It was not torture within the purview of the relevant Convention standards where “four detainees were severally beaten and forced to stand spread eagle against a wall. Other detainees were forced to stand spread eagle while an interrogator kicked them ‘continuously on the inside of the legs.’ Those detainees were beaten, some receiving injuries that were ‘substantial,’ and others received ‘massive’ injuries. Another detainee was ‘subjected to... comparatively trivial beatings’ that resulted in a perforation of the detainee’s eardrum and some ‘minor bruising.’”

(3) On the issue of whether Section 2340A might be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander in Chief powers, the DOJ found that "in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A maybe barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war."

(4) The DOJ also examined possible defenses to allegations that an interrogation method might violate the statute. They concluded that "under the current circumstances, necessity or self-defense may justify interrogation methods that might [otherwise] violate [the law]" (Darmer 2004).<sup>13</sup>

This particular legal opinion set off a flurry of responses in the form of articles and essays, including opinions on the subject from well-known US lawyers and judges. Alan Dershowitz's essay on the subject was, perhaps, the most discussed among these responses (Darmer 2004, 189-217). The ACLU weighed in on the debate, as well (ACLU 2004).<sup>14</sup> While it is rumored that the legal opinion was drafted for the purpose of giving legal guidance to the CIA so that they could craft more aggressive interrogation techniques, no documents have been made public supporting this position, and the CIA has not commented either way (Washington Post 2004). Regardless of one's personal views, the clear result of this lack of consensus is that LOAC begin to exist in a type of murky twilight, with no clear meaning and ROE under which US soldiers operate become increasingly difficult to draft, to train in, and to understand. The Abu Ghraib prison abuse is a reflection of this confusion.

As stated previously, soldiers, including National Guard personnel and Reservists, are instructed to undergo LOAC training pursuant to the DoD Law of War program. ROE are an extension of this program. However, clearly, some individuals either slip through the cracks or decide that they are not interested in following LOAC. If ROE are the conduit by which LOAC are communicated for

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<sup>13</sup> For a redacted version of Jay S. Bybee's Memorandum for Alberto R. Gonzalez (FindLaw 2004).

<sup>14</sup> The memo, signed by several well-known individuals, including Senators and members of Congress, stated that the signors were "appalled by the conduct of armed forces personnel" and stated that the "clear abuse resulted from policies approved at high levels."

everyday application, the ROE in these cases were either never communicated, ignored, or they were misunderstood. This is not a problem unique to military intelligence gathering operations and the Abu Ghraib prison scandal, by any means.

### ***Boots On The Ground***

A look at mandatory minimum training requirements for ROE training procedure is, perhaps, in order. We know, for instance, that FM 27-100, the OPLAW JA training manual, states that “ROE must be disseminated throughout the force and reinforced by training and rehearsal” (JCSI 2004). This is based on the belief that “[s]oldiers execute in the manner they train; they will carry out their tasks in compliance with the ROE when trained to do so” (JCSI). As is the case in much of life, this may be easier said than done. The obvious disconnect between what is expected and what is accomplished pursuant to ROE training is further exacerbated by the fact that soldiers in both Afghanistan and Iraq are faced, in many instances, with conflicts that are unconventional in character.

While FM 27-100 advises “individual and unit preparation for specific missions” for the purpose of “incorporating training that challenges soldiers to apply mission-specific ROE,” (JCSI) the reality of today’s conflict spectrum is that soldiers are facing a more fluid threat environment that changes from day to day, and in some instances, from hour to hour, on a block by block basis (MSNBC 2004).<sup>15</sup> Even the “experts” cannot agree on how to address the challenges faced by US soldiers engaged in the New War. For instance, General Abizaid has characterized the Iraq War as a “classic guerilla-type campaign” (Newsweek 2004). Bruce Hoffman, the author of a recent RAND study, disagrees. He asserts that, “unlike classic insurgencies, there is no center of gravity, no headquarters to the operation” (Newsweek, 2004). In such a war, says Middle East expert Fareed Zakaria, “military victory plays an important but small part” (Newsweek 2004). Now the US military is tasked with the overwhelming goal of engaging in a conflict where the “primary struggle is political: to win the support of the local population, defang the ideology that fuels the insurgency, win over militants to the government’s side and slowly drain the rebel movement of its strength”

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<sup>15</sup> Sites, embedded with a Marine unit as it fought to take back the town of Fallujah, Iraq, reported that ROE for the operation had just changed to “weapons open,” meaning “anything that moves can be shot.” Sites then noted that only an hour before, the same unit, patrolling only a few blocks West, were under ROE that required them not to fire until fired upon. The ROE also instructed them to give humanitarian aid to civilians “where possible.” This wild change in ROE, swinging from one extreme to the other, only confuses matters, and undercuts the mission.

(Newsweek 2004). How does one design ROE that assists soldiers in using “the proper calibration of force”<sup>16</sup> to win hearts and minds (as the saying goes) while also stamping out the insurgency with as little loss of military and civilian life as possible? The task is daunting.

While intellectual debates on the subject may someday lead to consensus, these mental exercises are of little help to line soldiers in, for example, Iraq. It is easy to condemn the Staff Sgt. Fredericks of the world from the comfortable confines of college campuses and the halls of Congress. But how do we lessen the likelihood of creating more Staff Sgt. Fredericks in the future?

The dauntless nature of this task is reflected by many of the stories coming, most recently, from the theatre of operations in Iraq. Checkpoint ROE seem to be especially problematic. For example, on March 30, 2003, at a checkpoint outside of Najaf, four American soldiers were killed as a car ran a checkpoint in a suicide bombing attack. Directly following this incident, American soldiers were put on alert, and told to engage any vehicle that failed to stop at the checkpoint. Two days later, a mini-van full of women and children failed to abide by the checkpoint warnings to slow down and stop. It was engaged by a whole platoon that proceeded to fire at the mini-van until it came to a halt. The platoon killed seven women and two children, and wounded two other occupants. The Army captain, addressing his platoon leader, said, “You just killed a family because you didn’t fire a warning shot soon enough” (ABC Online 2003). In this case, there were ROE in place, which nonetheless failed to aid the soldiers in this tragic exchange. Fear, anxious young men toting powerful weapons, and a complete inability to understand one another’s language, make for an unsavory end result, even where ROE seem clear as day on paper.

Applying ROE in a world where the bad guys mix, increasingly and purposefully, with the civilian population, complicates how soldiers are able to effectively follow ROE. Former Marine John Koopman, embedded with a group of Marines in Iraq, told the following story.

[Other journalists] tell me later that Iraqi cars keep driving toward the checkpoint only to get shot up by nervous, trigger-happy Marines. They say men fire on cars before the snipers fire warning shots. They say officers and snipers keep shouting at the Marines to hold their fire, but some do not. And civilians die because of it.

But Marines tell a different story. Crazy, suicidal Iraqis drive cars and trucks straight at the checkpoints, or at Marines, or tanks. They ignore

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<sup>16</sup> *Id.* at n. 34.

orders to stop and they ignore warning shots. The only thing to do, the Marines say, is to kill them.

The Marines have been warned constantly about suicide attacks. On the way to Baghdad, the 5<sup>th</sup> Marines lost a tank to a suicide truck bomb. The men of Three-Four saw the M1 Abrams vehicle burning fiercely as they drove past it to the city.

The day of the bridge assault, word comes over the radio that Iraqis are using ambulances with explosives to make suicide runs. The order comes down: You see an ambulance driving fast toward you, shoot it.

A black Mercedes Benz drives straight at a checkpoint. The Marines shoot it up. They look inside to find a man and woman dead in the front seats. In the backseat is a young girl, maybe 5 years old. She's alive and clutching a stuffed bear (Willis 2004, 166-167).

Confusion over how to apply ROE in an unconventional conflict environment is not limited to checkpoints. The 82<sup>nd</sup> Airborne, controlling Fallujah prior to the counterinsurgency recapturing the town in the summer of 2004, were frequently accused of acting with extreme force that was not necessary to combat the conditions on the ground. With this in mind, Jen Banbury, a writer for Salon.com, accompanied another unit, which replaced the 82<sup>nd</sup> Airborne, on a raid of an Iraqi home in that city. She reported that:

Rules of engagement have been changing, the soldiers said. No one's supposed to fire his weapon unless an Iraqi is pointing a gun right at him. (A few months ago, soldiers were told to shoot any car approaching a checkpoint too fast. A lot of innocent Iraqis- sometimes whole families- got killed that way.) Another change: the soldiers go on fewer dismounted patrols now. This isn't good they told me. It means losing personal relationships with the Iraqi people. Mostly the soldiers do drive-around patrolling or traffic stops. 'It's all gonna get worse if we have no working relationship with the people- talking with them,' one soldier said (Willis 2004, 270).

The unnamed soldier's words proved prophetic, as the US and their Iraqi security force counterparts eventually lost control of the city to counterinsurgents until mid-November of 2004. One cannot help but wonder if the change in ROE did not add to the eventual loss of the city, and the subsequent bloody campaign to

win it back. Thus, we see that even when ROE are understood and properly applied, the result may be that they are nonetheless inadequate for the mission. Again, this could be complicated by an entirely proper desire to better insure the safety of the civilian population and the armed forces. As a result, ROE are crafted that reflect the complicated nature of the unconventional conflict but, even so, fail to properly address the reality on the ground.

The difficulty in interpreting ROE is surely not new to warfare, whether conventional or unconventional. The “fog of war,” has long been acknowledged and memorialized. However, it is without a doubt complicated by the increased engagement in unconventional conflict *a la* the New War and the constant shifting from humanitarian concerns to purely military concerns. Of course, there is also always the strong desire for soldiers to make it home in one piece. Officers and the enlisted struggle with maintaining some type of balance between these competing interests.

Reporter Evan Wright recorded a particularly telling episode when he accompanied the First Marine Recon Battalion as it spearheaded the invasion into Iraq. Wright witnessed First Recon’s Bravo company struggle with new ROE as they began planning for taking a pivotal bridge over the Euphrates. At one point, the officer in charge gathered his team leaders and explained that there was a change in the ROE. The officer, Fick, outlined the new ROE, explaining that:

[a]nyone with a weapon is declared hostile. If it’s a woman walking away from you with a weapon on her back, shoot her. If there is an armed Iraqi out there, shoot him. I don’t care if you hit them with a forty-millimeter grenade in the chest (Wright 2004, 84).

One of his team leaders, Espera, is distressed at this order and says so.

“Sir, we’re going to go home to a mess after we start wasting these villages. People aren’t going to like that.”

“I know,” Fick says. “We now risk losing the PR war. Fighting in the urban terrain is exactly what Saddam wanted us to do” (Wright 2004, 84).

Espera, in turn, had to translate the new ROE to his team. He summarized the briefing thusly. “You see a motherfucker through a window with an AK, cap his ass.’ But then he warns the men, ‘Don’t get buck fever [...]. You cap an old lady sweeping a porch, ‘cause you think her broom is a weapon, it’s on all of us” (Wright 2004, 84-85). If Bruce Hoffman and Fareed Zakaria’s opinions on the Iraq War are correct, and the prospect of success hinges on a combination

political/“hearts and minds” and military victory, ROE like the ones given to the Marines of First Recon make that prospect look exceedingly unlikely.

First Recon would also face situations for which there were no ROE. Patterson’s Alpha Company snipers on the riverfront are dealing with the ambiguities of guerilla war, not covered in the Marine Rules of Engagement. The ROE under which the Marines operate are quite naturally based on the assumption that legitimate targets are people armed with weapons. The problem is Iraqis dressed in civilian clothes who are armed not with guns but with cell phones, walkie-talkies and binoculars. These men, it is believed by the Marines, are serving as forward observers for the mortars being dropped on their positions (Wright 2004, 102).

After an hour of waiting for a new ROE regarding this specific issue, the Marine snipers were finally “cleared hot” to shoot the suspected forward observers. They eventually killed at last three such forward observers. Within that hour, as they awaited the ROE, Iraqi insurgents continued to pound their position with deadly mortars (Wright 2004, 103-104).

The First Recon Marines also had to deal with the difficult issue of putting the aggressive ROE within the context of their own moral qualms. The strangest, most unsettling spectacle Marines see, however, is that of armed men who dart across alleys, moving from building to building, clutching women in front of them for cover. The first time it happens, Marines shout, “Man with a weapon!”

Despite the newly aggressive ROEs, Marines down the line shout, “I’m not shooting! There’s a woman!” (Wright 2004, 93)

As we can see from this example, no matter how imaginative and perspicacious OPLAW JAs are in drafting mission specific ROE and training their charges in the same, the enemy will inevitably stay one step ahead of the lawyers. By doing so, they will also continue to tie soldiers up in knots as they deal with scenarios not covered by existing ROE. The result is that both innocent civilians and soldiers face increased exposure to danger and death. In any event, enemy combatants whose uniforms include street clothes and whose weapons are cell phones and binoculars are not contemplated by existing LOAC. *This* is the ever-changing nature of unconventional warfare and the hard reality of the New War.<sup>17</sup>

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<sup>17</sup> Evan Wright, after spending over a month with the Marines of Force Recon,

## Conclusion

Proponents of the existing LOAC insist that the problem is not with LOAC themselves, but rather, in their current application. In large part, these individuals are not members of the armed forces. Experts, scholars, and pundits continue to debate the issue of the efficacy of LOAC and, as is ever the case, soldiers march off to war and some of them will not make it back despite their best efforts. Some of the soldiers, either through mistake or by design, will kill innocent civilians. JAs, as is their lot in life, will continue to scramble, drafting ROE on the fly, in order to address newer and deadlier unconventional tactics undertaken by enemy soldiers, noncombatants, terrorists, guerillas, and insurgents. They will not be able to draft these ROE fast enough to meet the soldiers' needs, as many of the stories herein reflect. The experts, scholars, and pundits will continue to discuss the matter in the halls of the White House and the UN, on cable news programs, and at campus teach ins. While the soldiers fight on, the endless debate continues.

As of the writing of this article, not one institution has undertaken, in an affirmative manner, the difficult task of asking *and answering* the hard questions presented by the relationship between the rise in unconventional conflicts and existing LOAC.<sup>18</sup>

Michael Ignatieff, the noted historian and military analyst, has observed:

Legal constraints are necessary if wars are to preserve public support. The real problem with the entry of lawyers into the prosecution of warfare is that it encourages the illusion that war is clean if the lawyers say so. A

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would summarize his observation of ROE, as follows. "However admirable the military's attempt are to create ROE, they basically create an illusion of moral order where there is none. The Marines operate in chaos. It doesn't matter if a Marine is following orders and ROE, or disregarding them. The fact is, as soon as a Marine pulls the trigger on his rifle, he's on his own. He's entered a game of moral chance. When it's over, he's as likely to go down as a hero or as a baby killer. The only difference between [a soldier in the unit under investigation for shooting a child] and any number of other Marines who've shot or killed people they shouldn't have is that he got caught" (Wright 2004, 176).

<sup>18</sup> One possible exception to this assertion is a DoD program entitled "The Principles of War." The purpose of the program is to bring together experts in the field of conflict and national security in order to answer the question, "Have the principles of war changed? Do we need new principles?" No plan to translate these theoretical answers into action has yet been proposed by the DoD.

further illusion is that if we play by the same rules, the enemy will too.... The lesson is clear: it is a form of hubris to suppose that the way we choose to wage war will determine how the other side fights. Our choice to wage 'clean' war may result in wars of exceptional dirtiness (Shearer, 2001).

The one solid conclusion that one may draw from all of these intellectual contortions is that LOAC drafted in the 20<sup>th</sup> century, and reflective of state-to-state conflicts contemplated by Clausewitz, are under extreme stress in the 21<sup>st</sup> century, where we see a marked and continued increase in unconventional conflict. In the New War, where state actors are the exception, and non-state actors utilizing unconventional and asymmetric tactics are the primary force in opposition, existing LOAC will be pressed to their broadest possible boundaries and the corresponding ROE will reflect these interpretations. Bright lines that may have once existed in international law and LOAC, will continue to dim.

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