

# Law and Military Interventions: Preserving Humanitarian Values in 21<sup>st</sup> Conflicts

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## Introduction

Is lawfare turning warfare into unfair? In other words, is international law undercutting the ability of the U.S. to conduct effective military interventions? Is it becoming a vehicle to exploit American values in ways that actually increase risks to civilians? In short, is law becoming more of the problem in modern war instead of part of the solution?

Some experts seem to think so. In his Foreign Affairs review of General Wesley Clark's fascinating book on the Balkan war, Professor Richard K. Betts laments the role law and lawyers played in that campaign as well as military interventions generally.<sup>1</sup> He asserts that the "hyperlegalism applied to NATO's campaign made the conflict reminiscent of the quaint norms of premodern war." Further, he 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.<sup>2</sup>

International lawyers David Riviken and Lee Casey express a somewhat different but darker view in a recent issue of The National Interest.<sup>3</sup> They contend that a "new" kind of international law is emerging that is "profoundly undemocratic at its core" and "has the potential to undermine American leadership in the post-Cold War global system." With respect to armed interventions, Riviken and Casey insist that the "American military is particularly vulnerable" because of the "unrealistic norms" – especially in relation to collateral damage - propounded by the advocates of this new international law. "If the trends of international law are allowed to mature into binding rules," they say, "international law may become one of the most potent weapons ever deployed against the United States."

Professor Betts, and perhaps to a lesser extent Messers Riviken and Casey, might find comfort in my conclusion about Operation Allied Force.<sup>4</sup> I believe the air campaign against Kosovo and Serbia may represent something of a high-water mark of

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\* ***The views and opinions expressed are those of the author alone, and do not necessarily represent those of the U.S. Government or any of its components.***

the influence of international law in military interventions, at least in the near term. The aftermath of that conflict, along with the repercussions of the terrible events of September 11<sup>th</sup>, seem to have set in motion forces that will diminish the role of law (if not lawyers themselves) much beyond the hyperlegalisms to which Betts objects. Explaining why I make this prediction is a prime purpose of the following discussion.

Initially, the essay will briefly examine the rise of law as a prime feature of modern military interventions. Next, it will contend that “lawfare,” that is, the use of law as a weapon of war, is the newest feature of 21<sup>st</sup> century combat.<sup>5</sup> The paper will then outline how law and lawyers are integrated into the planning and execution of air operations conducted by the United States. The essay will survey legal issues that typically arise in air campaigns, as well as those that could flow from trends already in place. Following that discussion, the paper will provide a uniformed lawyer’s perspective on the operational impact of selected international agreements. It concludes by making some observations about the future of law and war in the new millennium.

Although academic fashion favors the term “international humanitarian law” (IHL), this paper will not adopt it. There is really no universally accepted definition of the phrase, and in practice it too often appears to embrace not just treaties with specific obligations and accepted norms of customary international law, but also a collage of other (often amorphous) agreements, non-binding resolutions, unilateral declarations, and political statements. Instead of IHL, the paper will rely upon the descriptor “law of armed conflict” (LOAC). While many of the same objections might be raised about it as with IHL, far greater consensus exists as to its scope - if not its interpretation - in specific situations.

This essay will offer several broad themes for consideration: 1) law is not – and can never be – the vehicle to ameliorate the horror of war to the extent its advocates hope and, indeed, seem to expect; 2) although not yet fully institutionalized, the role of law and lawyers in American military interventions is surprisingly pervasive for practical, warfighting reasons as much as altruistic, human rights-oriented ones; 3) issues of international law that affect armed conflict are often ill-informed by the realities of military strategy and technologies; and 4) there is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.

### The Rise of International Law

How did international law become so important in military interventions? Actually, a number of rather disparate factors coalesce to give it the prominence it enjoys today. Basic to them is the long-standing desire of the world community (and especially the West<sup>6</sup>) to use law to prevent conflict altogether or, failing that, to make the conduct of war as humane as possible. The appalling experience of World War II gave new impetus to the latter idea, resulting in the Geneva Conventions of 1949 that today form LOAC’s nucleus.<sup>7</sup>

A principle focus of that effort – and one that is very prominent today – was to spare noncombatants the adverse effects of war. Parenthetically, however, the record shows that the ratio of civilians to military personnel killed in armed conflicts has, in fact, *increased* since the Conventions of 1949.<sup>8</sup> It is a mistake, of course, to conclude that the Conventions themselves are to blame (the remorseless civil wars and internal

conflicts of the postwar period are likely the cause). Still, it does make a melancholy point as to the limits of law as a mitigator of the suffering intrinsic to war.

More recently, LOAC indirectly benefited from a much larger international phenomenon: globalization. Globalization heightened the status of law generally if for no other reason than the need for certainty in international commercial transactions. Likewise, worldwide trade requires international administrative and judicial forums to resolve contract, claims, intellectual property, and similar disputes. Where law is absent, so are investors and others needed for economic development. Even otherwise repressive societies recognize that they must embrace law in their relations with other countries if they hope to gain the benefits of modernity.

The effect of globalization is especially felt in Europe where, coincidentally, many LOAC initiatives originate. In order to obtain the economies of scale needed to succeed in an extremely competitive business environment, Europeans progressively abandoned elements of their sovereignty in ways unthinkable to Americans. They are acculturated to binding themselves in their everyday life (as Americans have *not* consciously done) to a multitude of rules and regulations imposed from without.

Herein, perhaps, lies the genesis of some of the division we see in LOAC interpretations with our European colleagues. Europeans are comfortable, for example, with obeying the dictates of the European Parliament, essentially a foreign legislature vis-à-vis the citizens of any individual country; Americans fought a revolution so as never to do so. For this and other reasons the respective mindsets are different, and this is reflected in contrasting approaches to international law.<sup>9</sup>

One result is an acceptance of international law and nongovernmental organizations (NGOs) on the Continent far exceeding that on this side of the Atlantic. In particular, NGOs often enjoy more influence in LOAC matters in Europe than in the U.S. Many NGOs are wonderful, philanthropic groups who do selfless, difficult work in dangerous places. However, Americans are inclined to be wary those NGOs who purport to speak – literally – for the “world” on political issues, to include LOAC ones. Too often NGO positions look like political agendas. With respect to LOAC issues, it must always be kept in mind that NGOs are not political entities equivalent to a sovereign nation; rather, they are no more than self-selected, idiosyncratic *interest groups* who are not accountable to any ballot box. In my opinion these facts get lost at times - to the detriment of LOAC development and interpretation.

The pacifist and leftist leanings of a lot of NGOs, along with organizational practices that unabashedly discriminate on the basis of national origin, do not popularize the groups in the United States.<sup>10</sup> Along this line we also must frankly acknowledge there is an undeniable element of anti-Americanism in international law as it is developing today. Riviken and Casey argue quite persuasively that “the impetus in international law today stems from both our allies and our adversaries, who have chosen to use it as a means to check, or at least harness, American power.”<sup>11</sup> This may be the real reason for the incessant criticism of U.S. positions that marks so much of the debate in the international legal community.

Another factor influential to the rise of LOAC is the Information Revolution. It spawned high-tech global news organizations that rapidly deliver information – to include graphic images of war - to publics everywhere. This is particularly important when

considered in conjunction with another attribute of the information age: the spread of democracy.<sup>12</sup> Shaped by raw news footage, public perceptions of how conflicts are being fought significantly affect military interventions. Professors W. Michael Reisman and Chris T. Antoniou insist:

In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people *believe* that the war is being conducted in an unfair, inhumane, or iniquitous way.<sup>13</sup>

The velocity of today's communications' capabilities presents real challenges to democracies as well as those governments that if not democratic in a Western sense, nevertheless depend upon support from constituencies having access to globalized information sources.<sup>14</sup> When television airs unfiltered, near real-time film of what appears to be LOAC violations, complications result.<sup>15</sup>

General Clark found during the Kosovo operation that “[t]he new technologies impacted powerfully at the political levels. The instantaneous flow of news and especially imagery could overwhelm the ability of governments to explain, investigate, coordinate, and confirm.” What is essential to understand is that increasingly foes of the United States see this development as a *vulnerability* to be exploited. No longer able to seriously confront - let alone defeat - America militarily, they resort to a strategy that can be labeled “lawfare.”

### Lawfare

Lawfare describes a method of warfare where law is used as a means of realizing a military objective.<sup>16</sup> Though at first blush one might assume lawfare would result in less suffering in war (and sometimes it does<sup>17</sup>), in practice it too often produces behaviors that jeopardize the protection of the truly innocent. There are many dimensions to lawfare, but the one ever more frequently embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather seeking battlefield victories, *per se*, challengers try to destroy the *will* to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions. A principle way of bringing about that end is to make it appear that the U.S. is waging war in violation of the letter or spirit of LOAC.

In this sense lawfare has a firm basis in Clausewitzian analysis. Carl von Clausewitz, the great military theorist, spoke of a “remarkable trinity” of the people, the government, and the military whose combined energies produce victory in war.<sup>18</sup> Belligerents attempt to impose the converse on their adversaries, that is, the deconstruction of Clausewitz's trinity. The traditional U.S. approach to accomplishing that – and the one LOAC endorses – focuses on the *military* element and seeks to diminish the enemy's armed strength. America's challengers focus on the *people* element and seek to diminish the strength of their support for the military effort.

Evidence shows this technique can work. The Vietnam War – where U.S. forces never suffered a true *military* defeat - is the archetype that today's adversaries repeatedly try to replicate. Of course, they hope to use the vastly accelerated news cycle to achieve success far more rapidly and at much less cost than did the

Vietnamese. If they can make the American electorate *believe*, as Reisman and Antoniou put it, that the “war is being conducted in an unfair, inhumane, or iniquitous way” necessary public backing might collapse. Even if U.S. public opinion is unwavering – as it appears to be with respect to the current war on terrorism<sup>19</sup> – the cooperation of coalition governments nevertheless might weaken if their people become disenchanted with the way armed force is being used.<sup>20</sup> This is especially problematic for the Air Force if it results in the denial of vital basing and overflight rights.<sup>21</sup>

As Reisman and Antoniou indicate, the mere *perception* of LOAC violations can significantly impact operations. The Gulf War provides two examples of situations where LOAC was not violated yet the perception that it may have been had clear military consequences. The first concerned the attack on the Al Firdos bunker in Baghdad that was believed by the allies to be a command and control node. Some experts concluded that the post-attack pictures of the bodies of family members of high Iraqi officials (who evidently used the bunker as a bomb shelter) being excavated from the wreckage achieved politically what the Iraqi air defenses could not do militarily: rendering downtown Baghdad immune from attack.<sup>22</sup>

Worried coalition leaders put the city virtually off-limits to avoid a repetition of like scenes reaching their peoples. Similarly, fears about the impact on coalition constituencies of the images of hundreds of burnt out vehicles along the so-called “Highway of Death” following an air attack on retreating Iraqi forces was a significant factor in the early termination of hostilities.<sup>23</sup> That result left the Republican Guard intact to slaughter Kurds and to help keep Saddam Hussein in power to this day.

America’s enemies, who study such cases, may draw from them a lesson to emulate, that is, to callously capitalize on collateral damage incidents. As already suggested, their goal is to gain political leverage by portraying U.S. forces as insensitive to LOAC and human rights. To be candid, I personally think that by overselling precision weapons and other high-tech capabilities, the U.S. Air Force unwittingly made itself vulnerable to this very strategy. Unfortunately, opponents unconstrained by humanitarian ethics now take the strategy to the next level, that of *orchestrating* situations that deliberately endanger noncombatants.

One technique is to use civilians as involuntary (and sometimes voluntary<sup>24</sup>) human shields. In addition, adversaries collocate military assets with noncombatant facilities such as religious structures and NGO compounds in the hopes of either deterring attacks, or if attacks do take place, producing collateral damage media events that serve their cause. The Taliban, according to media reports, employed this tactic. Specifically, U.S. News & World Report says, “[h]eavy weaponry is being sheltered in several mosques to deter attacks. The Taliban has even placed a tank and two large anti-aircraft guns under trees in front of the office of CARE International....”<sup>25</sup>

The use of NGO facilities to deter legitimate air attacks creates the potential for tension between the organizations and the armed forces. If an NGO area is surreptitiously employed to hide military equipment, should we expect that it would be reported immediately? If the NGOs fail to do so, do they become culpable as aiders and abettors of perfidious conduct, itself a war crime?

In any event, I have found that most senior U.S. military leaders, and certainly those in the Air Force, accept that the fact or perception of LOAC violations can frustrate

mission accomplishment. They are also aware of the rising number of post-conflict investigations – both formal ones like the International Criminal Tribunal for the Former Yugoslavia's (ICTY) examination of the Kosovo operation,<sup>26</sup> as well as those conducted by NGOs, academics, and others. Consequently, savvy American commanders seldom go to war without their attorneys. Unsurprisingly, therefore, a significant number of military lawyers and paralegals deployed for Operation Enduring Freedom<sup>27</sup> to supplement those already serving in the region.<sup>28</sup>

Michael Ignatieff, who has written extensively about the role of law and lawyers in the Balkan conflict, provides real insight into the thinking of many senior officers. He maintains: “[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.”<sup>29</sup> In short, the predominance of law and lawyers in U.S. military interventions is as much a concession to the verities of modern war as it is an altruistic commitment to human rights.

### Integrating LOAC into Military Interventions: An Air Force Perspective

Until Operation Just Cause, the successful 1989 intervention that dethroned Panamanian strongman Manuel Noriega, compliance with international law wholly depended upon the knowledge and disposition of commanders and their planners. Military lawyers taught LOAC classes – which rarely progressed much beyond the basics – and prosecuted those who violated it,<sup>30</sup> but were rarely found advising commanders on the legal aspects of combat operations.

Beginning with Just Cause, however, that changed - perhaps in recognition that after-the-fact prosecutions would not undo the political damage LOAC violations could inflict. During the Gulf War judge advocates (JAGs) vetted targets, worked rules of engagement (ROE) matters, and advised on other warfighting issues, all to favorable comment from senior military leaders.<sup>31</sup> Since then military lawyers regularly have made their way into command posts and planning cells in an effort to avoid the kind of incidents that could derail a military operation.

In U.S. operations the requirement for legal advice is embedded in specific military instructions. For example, the Chairman of the Joint Chiefs of Staff directs that “all operation plans...concept plans, rules of engagement, execute orders, deployment orders, policies, and directives are [to be] reviewed by the command legal advisor to ensure compliance with domestic and international law.”<sup>32</sup> This provides the formal authority for JAGs to insert themselves into the planning and execution processes of combat operations. In practice this is done in a rather *ad hoc* fashion with the precise methodology much dependent upon the individual personalities involved.

Although this system has worked reasonably well over the years, the Air Force is now engaged in developing specific doctrine to institutionalize and standardize the role of lawyers<sup>33</sup> in the air operations center (AOC) - the nerve center for the application of airpower in military interventions.<sup>34</sup> This effort builds upon the lessons learned since 1989, the most critical being the importance of involving JAGs in each stage of the air tasking order (ATO) cycle that produces the master air attack plan (MAAP). Knowing exactly when and how to most productively provide legal advice is essential to a JAG's success in an AOC.

For example, raising legal objections after the MAAP is built is problematic because it is very difficult to re-target or re-weaponeer a particular sortie at that late stage.<sup>35</sup> If the legal objection is serious enough, the sortie may be lost entirely. To avoid such situations, JAGs in the AOC work around the clock with action officers as they develop strategy and select targets, weapons, and employment tactics, all of which can play into the overall legal assessment. Military lawyers also help write the ROE chapter of the Special Instructions (or SPINS in Air Force parlance) that become the aircrews' operational 'bible.'

Pre-planned targets in the MAAP ordinarily have a "BE" number that reflects its designation in what is called the "bomb encyclopedia." JAGs review the target folders associated with each BE. They evaluate the imagery and other intelligence products that show the target's military purpose as well as its potential for collateral damage. The quality and quantity of the intelligence can vary, but usually there is enough to make an informed judgment. The folder's data is used to apply what is known as a "tiered" analysis technique that results in an assessment of the collateral damage risk. The technical process takes into account specific weapons' characteristics to include their precision capabilities and fragmentation patterns. The analysis for certain targets – especially in cities - may include elaborate evaluations of the blast effects on the kind of buildings found near the weapon's estimated impact point. The results are interpolated with known population distributions to make casualty projections.

Computerized decision-support systems exist to help make collateral damage assessments.<sup>36</sup> While useful tools, they cannot (and should not) substitute for the considered judgment of lawyers or, for that matter, commanders. Warfighting remains an art, not a science reducible to the sterile algorithms of electronic data processing. Military history is littered with examples – Doolittle's Raid on Tokyo, McArthur's landing at Inchon, and, indeed, the American Revolution itself – for which no computer would predict success.

However, when applied to collateral damage forecasts, automated assessments produce what might be considered "evidence." In other words, if a commander chooses to pursue an attack in a way a machine tabulates as possibly causing unnecessary noncombatant losses, he or she may some day be called to account. Commanders are wise, therefore, to make some sort of contemporaneous record of the thinking that led to their decisions. Admittedly, it could be difficult to articulate the rationale (especially if the reason is mainly the commander's instinct honed by years of experience) but increasingly it may be necessary to try – and the JAG can assist in that process.

Computerized systems notwithstanding, much of the intellectual heavy lifting remains subjective and fact-specific. In my experience, JAGs very rarely are presented with issues that have straightforward answers in the law. The targeteers and planners are too well trained anymore to even think about proposing obviously illegal options. More often JAGs are dealing with 'gray' areas, just like the commanders they serve. How certain is the intelligence? Exactly how many civilians do we think might be hurt? How critical is the target? Do we have the right weapons available? These are the questions that are hashed out during the long hours of ATO development.

Some of the thorniest issues entail dual-use targets, that is, those involving assets – mainly infrastructure elements - that both civilians and military forces draw upon.<sup>37</sup> Dual-use targets can be contentious for two reasons:

First, determining the extent that they make a “concrete and direct military contribution”<sup>38</sup> to the enemy’s war effort as required by LOAC is sometimes difficult and controversial. This is another area where U.S. practice is not always coterminous with that of coalition partners. Americans tend to take a more holistic approach to an enemy’s war-making capability than do many other countries. The U.S. view readily appreciates that seemingly disparate parts of the civilian infrastructure collectively form indispensable components to the ability to conduct modern, high-tech war.

Second, assuming the proposed target does make the direct contribution LOAC requires, it still must be demonstrated that the anticipated military gain from the bombing outweighs the expected collateral damage.<sup>39</sup> Complicating the calculations is the fact that often there are few *immediate* casualties from an attack on a dual-use target. The adverse effect on civilians of infrastructure loss may only manifest itself over time.<sup>40</sup>

Electrical grids are an oft-cited example of a dual-use target. Contemporary societies, especially in urbanized settings, are as much - or more - dependent upon supplies of electricity as are their militaries. An Air Force study shows that because of the availability of alternate electricity sources for military sites, the utility of attacking the grid itself is often less than many airmen assume.<sup>41</sup> The issue is very fact-specific, and can vary widely from operation to operation. Nevertheless, interrupting the electrical flow despite the existence of backup systems can still yield significant military benefits. Doing so injects friction into the adversary’s military machine as he frantically tries to switch, at a critical moment, to temporary power sources that themselves may be of uncertain reliability. When possible the Air Force employs means that disrupt electrical supplies (and other dual-use assets) without permanently destroying infrastructure.

An ancillary problem arises when the inherent ambiguity of dual-use targets is combined with the need to protect intelligence sources and methods. Although not an Air Force operation, the 1998 cruise missile attack on a Sudanese pharmaceutical factory illustrates the hazards. This facility was alleged to have been involved in the manufacture of compounds intended for terrorists’ chemical weapons. Initially, there was a reluctance to disclose the intelligence information supporting the strike.<sup>42</sup> Unfortunately, this led to a questioning of the attack’s legitimacy by many nations, including some of America’s strongest allies. The lesson is that the U.S. must be prepared to prove its case in the ‘court of world opinion’ in addition to more conventional forums.<sup>43</sup> Thus, if the intelligence information is so sensitive that it cannot be disclosed, decisionmakers must carefully consider whether the target should be struck at all, especially if the purpose is mainly a psychological one.

Psychological or “message” targets sometimes present perplexing challenges. These are strikes aimed at bona fide military objectives but whose intended effect is primarily psychological. Legally, they are subject to the same analysis as any other target; nevertheless, they raise some interesting issues. For example, following the Gulf War, Air Force lawyers were criticized (unfairly in my view) for questioning the propriety of a proposal to strike a statue of Saddam Hussein.<sup>44</sup> That case aside, the real sticking point in these situations is whether or not enough objective data exists to conclude that the desired psychological effect will result. The evaluation becomes skewed when an



American bias is applied to the psychology of another culture. General Charles Horner, the air commander during the Gulf War, discussed this problem in the context of the bombing of the Baath Party headquarters:

In terms of bombing the Baath Party headquarters, we looked at Saddam Hussein and the Baath Party as one. We wanted to show weakness in the Baath Party and thus weakness in Saddam Hussein. We wanted to embarrass him in front of his people as well as limit the loss of life. But what we didn't realize was that it doesn't matter what the people think. In the final analysis, we looked at it through American eyes, which was wrong.<sup>45</sup>

Somewhat ironically, JAGs spend a great deal of time not, as one might expect, trying to prevent LOAC violations, but rather explaining to targeteers, planners, and even commanders that the law is not the warfighting impediment they tend to think it is. In some instances this is the result of an incomplete understanding of LOAC. For example, during Desert Fox's 1998 strikes against Iraq,<sup>46</sup> a young targeteer expressed concern that bombing a Republican Guard barracks at night (when it presumably would be occupied) somehow violated the concept of proportionality.<sup>47</sup> Of course, proportionality in a LOAC sense seeks to weigh the military advantage against potential *noncombatant* casualties, *not* combatants like the Republican Guard. Indeed, killing them was the military basis for the strike in the first place.

A related issue engages the whole notion of collateral damage. Some military people believe that a prediction of high collateral damage *ipso facto* makes an attack unlawful. This is simply wrong. Anticipating high collateral damage merely means that the military value of the target must be great enough to justify the unintended losses. Savvy political reasoning might counsel against hitting a particular target solely out of fear of high civilian casualties, but that is altogether different from saying the *law* prohibits the attack.

A more debatable proposition relates to the status of *voluntary* human shields such as those Serb civilians who deliberately occupied bridges in Belgrade during the Balkan war. They hoped to deter NATO attacks by presenting a vexing quandary for military planners: how to attack the bridges without killing the "noncombatant" protesters. This issue is politically complex, but not - in my view - legally difficult. In attempting to defend an otherwise legitimate target from attack – albeit by creating a psychological conundrum for NATO – the bridge occupiers lost their noncombatant immunity. In essence, they made themselves part of the bridges' defense system. As such, they were subject to attack to the same degree as any other combatant so long as they remained on the spans.

As convoluted as these issues may appear, "time critical targeting" (TCT) presents a markedly more difficult challenge. This process relates to targets of opportunity (usually mobile ones). In certain cases this can require re-directing ("reflowing") a sortie from a preplanned target to an unplanned one. Because of growing pressure to minimize the sensor-to-shooter time,<sup>48</sup> TCT is the part of the air operations' process that probably is most vulnerable to incurring unintended collateral damage. By its very nature, the TCT dynamics do not allow for the studied examination of target folders that the preplanned process permits. This is yet another reason JAGs must be

physically present in the AOC at all times to be available to work with the controllers when these “opportunities” arise.

TCT sometimes allows the JAG only a split-second to formulate advice involving life and death. He or she may be obliged to do so based on much less than perfect data. Mistakes can happen, both in terms of unexpected collateral damage as well as – conversely - missed opportunities to damage the enemy. Indeed, TCT issues in Enduring Freedom generated media reports critical of JAGs.<sup>49</sup> It is impossible at this time to verify the accuracy of those stories,<sup>50</sup> but they do highlight an important issue applicable to all operations. What, exactly, is the JAG’s authority? Does the JAG sit as some kind of legal satrap with ultimate power over a commander’s actions?

The short answer is “no.” A good JAG asks the hard questions, plays devil’s advocate, and demands the best of the intelligence assets and operational processes. In the end, however, the decision to attack belongs to the commander. If the commander directs what appears to be a LOAC violation despite clear legal advice – something, incidentally, I have never seen – the JAG is obliged to report the incident to a superior command who, in turn, must conduct an inquiry.<sup>51</sup> If that avenue is unavailable or inappropriate under the circumstances, by law a JAG can bypass the chain of command and communicate directly with any supervising JAG to include The Judge Advocate General of the Air Force.<sup>52</sup> In short, there are multiple ways of ensuring that an alleged LOAC violation is surfaced and investigated.

Concluding that a command action amounts to a breach of LOAC responsibilities is an extremely serious matter, and very different from merely disagreeing with the wisdom of a particular decision. It is important, therefore, that the JAG carefully and explicitly distinguish between an opinion as to prudent warfighting, and his or her formal, *legal* judgment on a LOAC matter, that is, one to be followed under pain of otherwise being considered (and reported as) a war criminal. Along this line, legal assessments of particular targets are generally the province of the JAGs in the AOC, not that of military or civilian lawyers at higher levels. In the usual course, lawyers in the upper chain of command do review the overall operations plan, rules of engagement, broad target categories, and even certain highly sensitive sites. However, those attorneys would not ordinarily provide real-time advice about targets of opportunity.

That said, Information Age capabilities present challenges for everyone involved in air operations, the legal function being only one of those affected. The technology now exists for persons far from the area of operations to receive much of the same data as is available in the AOC. This may suggest to some that the viewpoint of those distant from the battlefield is equally valid – especially in air operations – as those deployed forward. In my judgment this is a mistake. As I argued previously, warfighting is an art, and one that still very much depends upon human interaction. Even the most advanced communications systems do not replicate the intangible value of direct human interface. Person-to-person contact injects an important element of humanity into what can easily become an impersonal and potentially inhumane enterprise.

Serving in command centers does require the assigned JAG to acquire and maintain technical proficiency with the AOC’s specialized communications and computer systems. Most AOCs employ the Theater Battle Management Core Systems (TBMCS). JAGs - like everyone else working in the AOC - must complete a specified course of study in order to master it. JAGs also receive focused instruction in operations law, and

many have advanced (post-law school) degrees in international law from the nation's premier civilian institutions.

Equally important is the lawyer's knowledge of purely military matters. Access to decisionmakers is ephemeral and can be instantly forfeited if credibility is lost for any reason. For the JAG this means he or she must maintain an in-depth understanding of military history, equipment, strategy, and more. Senior Air Force leaders have high expectations in this regard, as General Hal M. Hornburg, a veteran of many combat operations and currently the Commander of Air Combat Command, noted in a June 2001 address:

[JAGs] need to understand the big picture. I was in the CAOC during Desert Fox. Who do you think was standing right behind me? It was my JAG. That person needs to know the law and the rules of engagement, but he or she also needs to understand things bigger than just the law. They've got to understand combat.<sup>53</sup>

To ensure they do "understand combat" JAGs selected to work in AOCs are all uniformed officers who, by and large, are graduates of exactly the same staff schools and war colleges as any other officer. In fact, JAGs are routinely top graduates of professional military education (PME) institutions, and they are known to garner a disproportionate share of the academic prizes.

In my experience, the U.S. practice of deploying military lawyers as advisors for combat operations is not widely shared by coalition partners. Except for a smattering of British, Canadian, and Australian JAGs, non-U.S. lawyers of any kind are rarely found in command centers. In their absence, some contingents simply accept the legal interpretations given by American JAGs. Of course, this can present problems – to include ethical ones – where, for example, the U.S. is not a party to a LOAC-related treaty that a coalition partner has ratified.

When a coalition partner does deploy a JAG to work with his or her American counterparts, productive synergies can result. During Bright Star 99/00, a multinational exercise that took place in Egypt in 1999, the AOC legal cadre included a British JAG. Working together from the desert command post, the coalition JAG team used legal research software and U.S. communications capabilities to obtain the actual text of British law related to anti-personnel landmines.<sup>54</sup> Properly interpreted, this allowed U.K. forces to play a tangential but useful role in an operation involving American air-delivered munitions that contained anti-personnel mines.

Unhappily, such productive exchanges are all too uncommon. Many contingents look for legal guidance from civilian lawyers in their ministries of defense hundreds or thousands of miles away. (Protocol I of the Geneva Conventions does require legal advisors to be available at all levels of command,<sup>55</sup> although it does not specify what "available" means in physical terms.) This creates practical problems in terms of delays, as well as more substantive ones. The inability to communicate directly with legal advisor counterparts makes it extremely difficult to insure that all the facts and circumstances so critical to legal assessments are properly conveyed. In my judgment, more nations need to develop a trained cadre of *military* lawyers to support combat operations in the field. The emphasis on "military" is purposeful and is based on two key factors:

First, in addition to attendance at PME described above, it takes years of full-time immersion in the military environment at the tactical level to have the necessary familiarity with the weapons and their delivery systems to properly advise the commander-client. Successful lawyering in the AOC requires the ability to offer operational alternatives when LOAC issues arise, and few civilian lawyers have the right background to do that. In addition, legal issues should be couched whenever possible in operational terms that are meaningful to the military commander, and this requires first-hand military experience. In my opinion, professional warrior-lawyers working side-by-side with fellow officers are the best means to ensure legal considerations are taken into account during military interventions.

Second, there is an aspect to dealing with military leaders that is subtle but very real. Specifically, it is unlikely that *any* civilian lawyer (and especially one distant from the area of operation), can really penetrate the culture of the armed forces, however well trained and knowledgeable he or she may be. In my view, to have the necessary access, credibility, and trust the lawyer *must* be part of the officer corps. It is a mistake, as historian John Keegan observes, to assume a connection between a civilian and a military occupation (in this instance lawyering) equates to “identity or even similarity” with members of the military caste.<sup>56</sup> Frankly, it is difficult enough for a commissioned officer who is a member of a profession as unpopular as law to gain the acceptance and confidence of the operators; it would be near impossible for a civilian to do so.

#### Informing International Law with the Military Perspective

The differing military and civilian outlooks enlighten recent trends in international law. Too often it seems that initiatives suffer from an insufficient understanding of the direct military impact and a lack of adequate analysis of the *unintended* military consequences. This produces situations that do not make common sense to many in uniform, and serve to make the law an object of disdain. Consider the desire among international law activists to eliminate or control the emerging technologies of war. Many military people view technological change as inevitable and, regardless of efforts to limit or ban it, believe it will eventually appear on the battlefield.

U.S. military thinking is keenly aware of the axiom that “technology has permitted the division of mankind into ruler and ruled.”<sup>57</sup> Indeed, the American way of war is *characterized* by technology. The U.S. is always looking for ways to substitute machines for manpower – and has enjoyed great success in doing so.<sup>58</sup> As Harry Truman once remarked, “we have won the battle of the laboratories.”<sup>59</sup> Importantly, compared to allied populaces, U.S. taxpayers have borne more than their share of the cost of the development of expensive technology (e.g., precision weapons) that reduces casualties on both sides.<sup>60</sup> Accordingly, no one should be surprised that Americans and their armed forces are reluctant to welcome proposals that seem to limit the development and use of technology in warfighting.

Focusing LOAC efforts on technology seems more than a little ironic given the history of recent conflicts. Most people consider the machete-based slaughters in Rwanda, the deliberate amputation of the limbs of children in Sierra Leone, as well as the horrific genocide and rape that took place in the Balkans, as examples of the worst atrocities of late twentieth-century conflicts.<sup>61</sup> Each case employed decidedly low-tech means; in fact, it is generally the intervention of high-tech forces of the U.S. and the

West that finally brought a halt to such appalling behavior. Technology-empowered militaries are the ones more often than not that are trying to impose some measure of accountability for the inhumane crimes. Why take steps that that could compromise their effectiveness?

Nevertheless, well-funded efforts to limit or ban altogether certain technologies persist, and they often catch the fancy of international celebrities. The classic illustration is the campaign to ban antipersonnel landmines. The tragic death of Britain's Princess Diana, one of the movement's most enthusiastic supporters, served to propel the adoption of what is known as the Ottawa Convention.<sup>62</sup> Virtually every major nation has ratified the Convention, the U.S. being one of the conspicuous exceptions. It is true that landmines caused death and injury to thousands of innocent persons. It is equally true, however, that landmines *used as they should have been* under *pre-existing* agreements have *not* caused many casualties. Nor were many innocent people victimized by any of the new generation of self-neutralizing devices now available.

The Ottawa Convention illustrates two nagging issues in international law: 1) What is to be gained by expanding the scope of prohibitions when there is every expectation that existing bans are – and will be - ignored by those most responsible for the problem the new agreement is supposed to remedy?; and 2) What are the unintended consequences of trying to limit high-tech implements of war in an era when rapid technological change creates uses that were not (and could not be) envisioned or accounted for when the agreement was drafted?

Regarding the first concern, one must reject out of hand the argument that because some break the law there is no point to law in the first place. Nonetheless, very often – as in the case of landmines – the key causes of noncombatant suffering are already prohibited. For example, Protocol II to the 1980 Conventional Weapons Treaty (the U.S. and most other nations are parties to the relevant provisions)<sup>63</sup> bans the indiscriminate use of mines, and requires the marking of minefields and their post-hostilities removal so as to limit noncombatant casualties. If a party were disposed to ignore the requirements of the 1980 agreement, how would the Ottawa Convention deter them? Moreover, by prohibiting the production of advanced self-neutralizing mines, those fixated upon using the weapons – and they do and *will* exist - must resort to crude varieties instead of ones that render themselves harmless over time.

With respect to the second issue, is it possible the ban could produce unintended consequences that result in more, not less, human suffering? Is there a legitimate – and humane - military use today? I believe so. For example, I have never seen any consideration of the ban in the context of the complicated military problem occasioned by weapons-of-mass-destruction (WMD) facilities. How do you attack a WMD site? Do you use a high explosive that might scatter pollutants into the atmosphere? Must you resort to a weapon infinitely more ferocious than any landmine but that can achieve the extremely high temperatures needed to destroy certain contagions? In my opinion the objective of neutralizing a WMD capability might be more safely undertaken simply by dousing the installation with hundreds if not thousands of highly sophisticated landmines. Rendering it unusable until it can be brought under control by friendly forces would seem to be in keeping with humanitarian values.

Another similarly practical use of mines is against infrastructure targets. Consider airfields. From the military perspective, all that is often needed is to block the

enemy from using the site, sometimes only temporarily. One way is to blow up the aircraft, tower, runway, support buildings, and so forth. Another way would be to shower the runway with a variety of landmines that make it impossible for aircraft to land or takeoff.<sup>64</sup> The advantage of the latter course is that once you enter the post-conflict stage, instead of a hopelessly destroyed asset you have recoverable infrastructure upon which to build the necessary postwar economy. This is the kind of real world problem that military and civilian decisionmakers face today.

Some organizations<sup>65</sup> want to apply the landmine ban to cluster munitions.<sup>66</sup> Although not designed as landmines, the failure rate of a cluster bomb's submunitions can leave some unexploded ordinance in enemy territory. Unwary noncombatants are in peril (in the same way as they are when treading upon any site where combat has taken place) if they come in contact with the devices. However, this relatively rare situation does not explain the weapon's humanitarian *virtues*. Specifically, because each bomblet contains only a small amount of explosive, they are not as destructive as other weapons, and this can save lives. For example, where an enemy places military equipment such as an anti-aircraft system on something like a dam, cluster munitions can attack the site without risking the catastrophic destruction of the dam itself.

It is easy to conjure up similar examples. Furthermore, banning cluster munitions invites adversaries to wage lawfare by placing military objects on or near facilities whose destruction by *other* weapons (e.g., high-explosives) puts civilians and their property at risk. This is especially a problem with the European Union's proposal to prohibit the use in what it defines as urban areas.<sup>67</sup> The EU policy could suggest to adversaries that they should locate themselves in urban areas to escape the weapon. Experience shows that fighting in cities inevitably causes far more adverse effects on more civilians than any cluster bomb submunition. Furthermore, the law should not be indifferent to the specific context of - and rationale for - the weapon's proposed use. Deputy Secretary of Defense Paul Wolfowitz responded to criticisms of cluster bomb use in Enduring Freedom by pointing out that the U.S. had lost thousands of civilians in a single day, and would "use the weapons we need to win this war."<sup>68</sup>

What makes bans on technology so problematic is the sheer unpredictability of future applications. Weapons expert and retired Army colonel John B. Alexander makes this point quite forcefully in the summer 2001 issue of the Harvard International Review.<sup>69</sup> Alexander contends that nonlethal technologies have great potential to minimize combatant and noncombatant casualties alike, but their development is blocked by what he charges are "emotionally based and broadly worded treaties."<sup>70</sup> Essentially, he contends that the agreements were established at a time when no one envisioned that various chemical and biological agents "could actually be used to reduce casualties."<sup>71</sup> Although he overstates his case somewhat (nonlethal riot control agents were *consciously* banned as a method of warfare in the 1993 Chemical Weapons Convention<sup>72</sup>) his essential point is correct: "Technologies do not cause bad behavior. It is people who use technologies for evil purposes that demonstrate bad behavior."<sup>73</sup>

Even the most horrific weapons can have humanitarian value depending upon how they are (or, perhaps more properly, are *not*) used. Nuclear weapons – probably the subject of more intense international negotiation than any other weapons' technology in the history of man – have a remarkable record that supports Alexander's thesis. Military historian Martin Van Creveld makes the interesting observation that "in every region where [nuclear weapons] have been introduced, large-scale interstate war has as

good as disappeared.”<sup>74</sup> The idea is not to advocate the spread of nuclear weaponry, but just to point out that limiting the technologies of war is not an unqualified virtue.

In any event, it is true that the development of nonlethal or low-lethality technologies is impeded by chemical, biological, and other weapons conventions.<sup>75</sup> While the limitations law places on nonlethal technologies are troubling to military professionals, real frustration arises when international lawyers assert as irrefutable truths principles that are unmistakably wrong. A good example is one of the most controversial air attacks of the Kosovo conflict. On 23 April 1999, Radio Television Serbia - or RTS, - the state-run media station in central Belgrade, was bombed by coalition aircraft. As a result of this attack, 16 people were killed, and another 16 injured. International lawyers, news organizations, and NGOs criticized the attack.<sup>76</sup> Typical of the rationale for the complaints is the Human Rights Watch report that asserted that RTS made “no direct contribution to the military effort” and that the “risks involved...grossly outweigh any perceived military benefit.”<sup>77</sup>

Apparently relying on evidence that indicates the broadcasts whipped up ethnic hatreds for years,<sup>78</sup> Air Commodore David Wilby, a NATO spokesman, insisted, “Serb radio and TV is an instrument of propaganda and repression.... It is...a legitimate target in this campaign.”<sup>79</sup> His statement, as a matter of fact, is consistent with U.S. legal thinking.<sup>80</sup> The RTS strike was subsequently the subject of a review by the ICTY<sup>81</sup> (and a lawsuit before the European Court of Human Rights<sup>82</sup>). Although the ICTY accepted the NATO’s later explanation that the facility was being used for military communications, it made it clear that but for that circumstance, strikes against the broadcasting stations were likely unlawful. Specifically, the ICTY contended:

While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government’s political support, it is unlikely that either of these purposes would offer the “concrete and direct” military advantage necessary to make them a legitimate military objective.<sup>83</sup>

This is a rather startling statement in a military sense because even a passing familiarity with Clausewitz and other strategists - not to mention America’s own experience in Vietnam - make it plain that “undermin[ing] the government’s political support” *does* offer a *very* “direct and concrete” military advantage especially in today’s world.<sup>84</sup> As already discussed, the people’s support is clearly a “center of gravity”<sup>85</sup> in contemporary military interventions, and information age technologies like radio and television are instrumental in shaping that support. It appears that international lawyers fail to appreciate that even repressive regimes with powerful internal security mechanisms will fall if political support turns against them.

No less an authority than Pulitzer Prize winning historian and Librarian of Congress Emeritus Daniel Boorstin makes that case. Noting the almost bloodless collapse of the Soviet Union, he contends, “history proves that ruthless rulers can be removed by popular will.”<sup>86</sup> In fact, a recent RAND study confirms that concerns about Serb popular will were a key reason Milosevic decided to settle when he did.<sup>87</sup> When interpretations of LOAC look as if they are disconnected to humanitarian values, support for the law inevitably wanes. To military professionals it is absurd – and even duplicitous – to contend, as the ICTY report seems to do, that it is somehow preferable to slaughter masses of enemy troops to achieve victory - in lieu of merely destroying a propaganda

organ propping up a perverse regime (at the price of small, albeit regrettable, numbers of civilian casualties).

Another interesting “values” issue is raised by the international campaign against blinding lasers as a means of warfare.<sup>88</sup> No one would debate seriously the proposition that blindness is a gravely debilitating affliction. It is still difficult to understand why it is a more unfortunate condition than traumatic amputation, paralysis, or any other similar injury that occurs in war. Assuming a laser is used under circumstances where one could lawfully kill an opponent, it seems indisputably more humane to blind him than slay him. In advocating the ban, however, the International Committee of the Red Cross (ICRC) appears to draw a different conclusion.<sup>89</sup> The ICRC, evidently unaware of the philosophical implications of what it was saying, in essence argued that adversaries would just use other weapons to finish off blinded combatants. Again, this is the illogical argument that presumes that since a belligerent will break existing law (i.e., kill wounded *hors de combat*) enacting more law will somehow improve the situation.

The other part of the ICRC argument is rather profound, and illustrates the contrast between the European view of humanitarian values and that of the U.S. According to the ICRC, “blinding renders a person virtually unable to work or to function independently [resulting in] severe psychological depression.” This simply is not true; millions of visually handicapped persons live happy, independent, and productive lives. Moreover, the obvious question remains: is blindness worse than being killed by “approved” weapons? I can only conclude that in Europe, where assisted-suicide and euthanasia have taken root, death is preferable to life with a disability. Regardless, the ICRC position hardly represents a universal value and its thinking should not be the rationale for banning a technology, especially one that by its very nature does not kill its targets.

Looking ahead, it will be interesting to see how the international legal community approaches the issue of unmanned and other robotic combat systems. These technologies are rapidly gaining acceptance in high-tech militaries like that of the U.S.<sup>90</sup> There are issues, however, as to how they should be employed. As one analyst notes, “[p]eople are generally more comfortable with somebody being in the loop when things are being shot and decisions are being made.”<sup>91</sup> Nevertheless, as these weapons are considered, the focus should not be on *how* they achieve their effect, but rather the degree to which that effect honors LOAC and human rights. A more difficult and problematic issue is presented by the military challenges occasioned by Operation Enduring Freedom. The safest and most effective means, for example, of rooting enemy fighters out of caves may be to employ flamethrowers. This controversial weapon is not currently in the U.S. inventory, but press reports are now discussing its possible use.<sup>92</sup>

Operation Enduring Freedom raised other legal issues that may themselves stimulate technological development that, in turn, will generate debate in international law circles. Specifically, the U.S. was obliged to engage in extensive negotiation and diplomatic strategies to obtain legal rights for the basing and overflight of military aircraft. The difficulty in accomplishing that task, as well as the threat that lawfare will make obtaining like commitments even more troublesome in the future, militates towards permanent solutions. In my view one of these could be a greater militarization – indeed *weaponization* - of space.<sup>93</sup> Among other things, orbiting armed space systems would obviate the need for foreign basing or overflight permissions.<sup>94</sup> This would provide the U.S. with greater flexibility for unilateral military intervention if required. Of course, the



weaponization of space will produce a host of legal and policy issues.<sup>95</sup> Nevertheless, as the leading spacepower the U.S. has the technological potential to bypass those adversaries who might pressure area nations to deny basing and overflight rights, as well as those who might be tempted to extract concessions in exchange for them in some future contingency.

Many of the emerging LOAC issues involve, as I have mentioned before, the American preference to use technology to avoid casualties.<sup>96</sup> This raises another apparent difference between the U.S. and European view: the relative perspectives on the profession of arms.<sup>97</sup> Despite the existence of an all-volunteer force, Americans in and out of uniform generally do not consider those who serve as anything other than citizens of equal or more value as any enemy combatant or noncombatant. Europeans, however, have a history of populating their militaries with long-term professionals and legions of hired foreigners.<sup>98</sup> This seems to create a certain sense that the armed forces are more tools of the state than citizenry in uniform. To me, this produces a collective societal ethic that gives the impression that military personnel are expendable assets. Of course, nowhere in LOAC is there an explicit assertion that the life of a soldier is of lesser value than any other. This may be another situation where a view acceptable in Europe is nevertheless insufficiently universal to make it a bona fide basis for initiatives in international law.

The affection of Americans towards those of its citizens who serve in the armed forces in large measure explains why resistance to proposals like the International Criminal Court (ICC)<sup>99</sup> continues to grow.<sup>100</sup> The spurious allegations of LOAC violations after the Balkan War all but guaranteed that the U.S. would not ratify the ICC treaty any time soon.<sup>101</sup> Concerns had already surfaced about the notion of trying American troops before a forum that fails to meet the minimum standards of an American court-martial.<sup>102</sup> The concerns are good ones: It is unwise, in my opinion, for a democracy obliged to maintain a large military establishment to suggest that those who defend it are somehow unworthy of the rights they serve to protect.

I do not see any inconsistency, incidentally, with opposing the ICC yet endorsing the President's recent order permitting military commissions (which bear no relationship to the U.S. court-martial system) for the trial of foreign terrorists.<sup>103</sup> In my opinion, because the ICC involves the possible trial of U.S. citizens it is understandably determined by domestic, civil-military relations' considerations. The military commissions are best analyzed from an international law perspective because they would only apply to foreign nationals. I believe the proposed commissions are fully consonant with international law.

As the widespread support for the ICC outside the U.S. proves, most nations are quite happy to have their nationals subject to a court that does not afford the rights that a U.S. court-martial or civilian proceeding provides. Foreign nationals would be subject to a process that meets or exceeds *international* standards; the point is that international standards are not necessarily the same as the domestic ones Americans want for their fellow citizens. Of course, it is somewhat ironic that European nations, who frequently badgered the U.S. about its refusal to ratify the ICC treaty, are now resisting the extradition of terrorists because they may be subject to trial before a military commission,<sup>104</sup> despite the striking similarities between that forum and the ICC.

## Concluding Observations

As I offered earlier, I believe that the events of September 11<sup>th</sup> will have a profound effect on the role of law in military interventions. The psychological impact of savage attacks on the American homeland, along with fears raised by the anthrax incidents, radically diminishes the public's desire for what Professor Betts might describe as hyperlegalistic processes. Recognizing the dimensions of the new threat, Americans supported legislation giving law enforcement authorities vastly greater powers at the expense of what heretofore were accepted individual rights.<sup>105</sup> Considering Americans' willingness to sacrifice their own legal protections, they are unlikely to be overly demanding about the supposed legal rights of foreign belligerents.

Americans are much more concerned about finding and stopping the perpetrators of violence than they are about the niceties of international law. Despite the President's statements to the contrary, many pundits called for the outright killing of those responsible, and derided the notion of trying to bring the perpetrators to justice in a criminal court.<sup>106</sup> Unlike international law devotees, many Americans are exasperated with the law, especially when traditional applications of it proved to be an inadequate guarantor of basic security on September 11th. Stewart Baker, the former general counsel of the National Security Agency, concludes "[w]e have judicialized more aspects of human behavior than any civilization in history, and we may have come to the limit of that."<sup>107</sup> Consequently, in security matters contemporary American discourse is pervaded by the notion that "[t]he time for legal maneuverings, extraditions and trials is past."<sup>108</sup>

All of this affects Americans' perceptions of LOAC. While reports of civilian casualties in Enduring Freedom cause disturbances among allied populaces, the support of the U.S. electorate for the military intervention remains strong.<sup>109</sup> This is not a sign of callous indifference, but rather a growing acceptance among the body politic that war inevitably causes unintended tragedies. Additionally, the public is becoming better educated as to how adversaries are manipulating civilian casualties to wage lawfare. I believe they are much less prone to assume from media reports that U.S. forces are waging war "in an unfair, inhumane, or iniquitous way."<sup>110</sup> I also sense that the continued public support is an expression of the people's conviction that the U.S. military – which for years has topped the polls as the institution in which Americans have the most confidence<sup>111</sup> - is doing everything it can to minimize the impact on noncombatants.

Along these lines, I think the persistent criticisms of some international lawyers,<sup>112</sup> NGOs,<sup>113</sup> academics, and others regarding U.S. and coalition air operations in Iraq,<sup>114</sup> the Balkans, and Afghanistan have been extremely counter-productive in terms of enhancing the acceptance of LOAC in the minds of military people. In too many instances the criticisms appear alternately uninformed or patently politicized. Following Operation Allied Force the allegations that the altitudes flown during combat sorties caused unnecessary civilian casualties were especially infuriating to airmen.<sup>115</sup> The accusations did not seem to appreciate that the armed forces of democracies at war are properly guided by and subordinate to policies set by elected leaders, not the desires of those in uniform. That is the way the rule of law is supposed to work in free countries. Furthermore, some reports were wildly inaccurate - even Human Rights Watch could point to only one instance where high-altitude attacks *might* have caused unnecessary civilian injuries.<sup>116</sup>

Actually, it is impossible to find examples in human history where so much combat power was applied as discreetly as in the aforementioned air operations.<sup>117</sup> With respect to Operation Enduring Freedom, White House spokesman Ari Fleischer observed – quite accurately in my opinion – that “I don’t think you’ll ever witness a nation that has worked so hard to avoid civilian casualties as the United States has.”<sup>118</sup> That is exactly what military leaders at every level believe. They are convinced that they are doing everything they can to comply with LOAC.

While one would always hope for perfection in any human endeavor, in real terms I cannot see how the adherence to LOAC and the humanitarian values it represents can significantly improve in future military interventions. It should be kept in mind that the recent conflicts took place under circumstances where U.S. forces were not *in extremis*. This allowed time for comparatively extensive and systematic evaluations of targets and strategies. We may not have that relative “luxury” in rapidly evolving future conflicts, and the warfighters know it.

By demeaning the sincere efforts of those tasked to use armed force in pursuit of national objectives, the critics put respect for the law itself in jeopardy. They unnecessarily alienate the very audience LOAC most needs to prosper in the proverbial ‘real world.’ I do not mean to imply that the armed forces are disposed to act in an illegal or immoral fashion, but rather to suggest that the seeming impossibility to satisfy the self-styled legal authorities encourages military leaders to pursue a more politically-oriented approach that searches for legal loopholes and technical compliance as opposed to a more expansive philosophical commitment. Put concisely, subjective measures of public tolerance might tend to replace reliance upon rigorous readings of LOAC as the principal guide. As much as popular support is critical to a democracy’s ability to fight, the transient and often emotionally charged politics of a nation at war do not always reflect the enduring human rights principles that underlay LOAC. All too easily, this approach can devolve into *Kriegsraison* writ large.<sup>119</sup>

Will international law, and specifically LOAC, become – as Riviken and Casey predict, “one of the most potent weapons ever deployed against the United States?” Perhaps their hyperbole goes too far, but the point is an important one. It is not in the interest of anyone concerned with humanitarian values to *unnecessarily* handcuff the United States - or any democracy – when force is required to restore and safeguard human rights generally. We must remind ourselves that our opponents are more than ready to exploit our values to defeat us, and they will do so without any concern about LOAC. Consider this disquieting statement from Chinese military leaders: “War has rules, but those rules are set by the West...if you use those rules, then weak countries have no chance...We are a weak country, so do we need to fight according to your rules? No.”<sup>120</sup>

We should expect to see unscrupulous antagonists engage in ever more sophisticated versions of lawfare. In Colombia, insurgents use sensitivity to human rights abuses to attempt to decapitate the nation’s military leadership, thus jeopardizing South America’s oldest democracy. The Wall Street Journal reports that “by intimidation and bribery” rebels force peasants to use the “courts to press false charges – anonymously – against the most capable military leaders.”<sup>121</sup> At the same time the guerrillas are blaming others for human rights abuses, they commit them themselves. Even Human Rights Watch is disillusioned: “We’ve come to the conclusion that they’re using international humanitarian law as just part of a P.R. campaign.”<sup>122</sup> It is vital for the

preservation of human rights to be concerned about developments such as this. If international law is to remain a viable force for good in military interventions, lawfare practitioners cannot be permitted to commandeer it for malevolent purposes.

This essay critiques aspects of LOAC as currently practiced, but it is not meant to denigrate its fundamental importance. Americans would not be Americans if they waged war unconstrained by the ethical values LOAC represents.<sup>123</sup> Rather, this paper is intended as a reminder that those interested in promoting law as an ameliorator of the misery of war are obliged to ensure it does not become bogged down with interpretations that are at odds with legitimate military concerns. LOAC must remain receptive to new developments, especially technological ones that can save lives – even if that means breaking old paradigms.<sup>124</sup>

We also must have a better linkage between those knowledgeable of military affairs and those civilian specialists expert in LOAC. Only productive cooperation can achieve the critical mass necessary to sustain international law as a guiding element in military interventions. We should encourage other nations to develop a robust cadre of uniformed lawyers ready to provide insightful advice to commanders in the field. Finally, we must not allow thoughtless, ill-informed, and politically motivated accusations to trivialize LOAC's fundamental principles. If it does, LOAC will lose its credibility with the very people – and the very nation - it most needs to make certain it is observed and, more importantly, preserved.

## Notes

<sup>1</sup> Richard K. Betts, *Compromised Command*, *Foreign Affairs*, July/August 2001, at 126, (review of Wesley Clark's, *Waging Modern War: Bosnia, Kosovo, and the Future of Combat*).

<sup>2</sup> *Id.* At 129, 130.

<sup>3</sup> David B. Rivkin, Jr. & Lee A Casey, *The Rocky Shoals of International Law*, *The National Interest*, Winter 2000/01, at 35.

<sup>4</sup> For information about Operation Allied Force, see Dep't of Defense, *Operation Allied Force*, June 21, 1999 accessible at <http://www.defenselink.mil/specials/kosovo/> (last visited 23 November 2001).

<sup>5</sup> The term "lawfare" seems to have first appeared in a manuscript by John Carlson and Neville Yeomans entitled *Whither Goeth the Law - Humanity or Barbarity*, in *The Way Out - Radical Alternatives in Australia* (M. Smith & D. Crossley, eds., 1975), accessible at <http://www.laceweb.org.au/whi.htm> (last visited 24 November 2001). Although their thesis is not entirely clear, they do assert that "lawfare replaces warfare and the duel is with words rather than swords" and this capture a key theme of lawfare as used in this essay.

<sup>6</sup> But see note 120, *supra*, and accompanying text.

<sup>7</sup> There were four main agreements concluded in 1949: the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949; the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949; the *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949; and the *Geneva Convention Relative to the Protection of Civilians in Time of War*, 12 August 1949. See Department of the Army Pamphlet 27-1, *Treaties Governing Land Warfare* (7 December 1956). Texts of the treaties are accessible at <http://www.icrc.org/ihl.nsf/WebCONVPRES?OpenView> (last visited 20 November 2001).

<sup>8</sup> Geoffrey Parker, *Cambridge Illustrated History of Warfare* (Cambridge University Press, 1995), p. 369 ("the majority of the approximately fifty million people killed in war [since 1945] have been civilians").

<sup>9</sup> See generally, Roger Cohen, *To European Eyes, It's America the Ugly*, *New York Times*, May 7, 2001, at 1 (discussing European reaction to the U.S. position on various international agreements and policies) and Jessica T. Mathews, *Estranged Partners*, *Foreign Policy*, November/December 2001, at 48.

<sup>10</sup> See e.g., Statutes of the International Committee of the Red Cross, 24 June 1998, art. 7 accessible at <http://www.icrc.org/eng/icrc> (last visited 20 November 2001) (limiting membership to Swiss citizens).

<sup>11</sup> Rivkin and Casey, note 3, *supra*.

<sup>12</sup> See Mark Malloch Brown, *Democracy and the Information Revolution*, *Choices Magazine*, September 2001 accessible at <http://www.undp.org/dpa/choices/2001/september/commentary.pdf> (last visited 25 November 2001).

<sup>13</sup> W. Michael Reisman and Chris T. Antoniou, *The Laws of War* xxiv (1994) (emphasis added).

<sup>14</sup> "The free flow of broadcast information in open societies has always had an impact on public opinion and the formulation of foreign policy. But now the flow has increased in volume and shortened news cycles have reduced the time for deliberation." Joseph Nye, *Redefining the National Interest*, *Foreign Affairs*, July/August 1999, at 22, 26.

<sup>15</sup> "Real-time television [puts] pressure on officials to respond rapidly." Toni Marshall, *Media Don't Make Foreign Policy*, *Washington Times*, June 9, 1997, at 16 (quoting Walter Strobel).

<sup>16</sup> See note 5, *supra*.

<sup>17</sup> For example, the U.S. used law to deny hostile uses of commercial satellite imagery. See Michael R. Gordon, *Pentagon Corners Output of Special Afghan Images*, *New York Times*, October 19, 2001 reprinted in Dep't of Defense, *Current News Early Bird*, 19 October 2001 (discussing the U.S. strategy of "buying all the rights to picture of Afghanistan taken by the world's best commercial satellites").

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<sup>18</sup> Carl von Clausewitz, *On War* (Michael Howard and Peter Paret, ed., and trans. 1976) (1832), at 89.

<sup>19</sup> See The Gallup Organization, *No Wavering in Public Support for War Effort*, November 9, 2001 accessible at <http://www.gallup.com/poll/releases/pr011109.asp> (last visited 20 November 2001).

<sup>20</sup> See e.g., Kevin Sullivan, *War Support Falls Worldwide*, Washington Post, November 7, 2001, at A1.

<sup>21</sup> See note 93 *supra* and accompanying text.

<sup>22</sup> See Michael Gordon and Bernard E. Trainor, *The Generals' War* (1995), at 324-326.

<sup>23</sup> *Id.*, at 476-477. See also Colin Powell, *My American Journey* (Random House, 1995), at 520 ("The television coverage... was starting to make it look as if we were engaged in slaughter for slaughter's sake.").

<sup>24</sup> See, *Libyans to Form Shield at Suspected Arms Plant*, Baltimore Sun, May 17, 1996, at 14 (reporting a Libyan threat to surround a suspected chemical weapons plant with a human shield composed of millions of Muslims).

<sup>25</sup> See e.g., Mark Mazzetti and Kevin Whitelaw, *Into the Thick of Things*, U.S. News & World Report, November 5, 2001, at 24. Additionally, the Washington Post reports:

By shifting soldiers and military equipment into civilian neighborhoods and taking refuge in mosques, archeological sites and other nonmilitary facilities, Taliban forces are confronting U.S. authorities with the choice of risking civilian casualties and destruction of treasured Afghan assets or forgoing attacks.

Bradley Graham and Vernon Loeb, *Taliban Dispersal Slows U.S.*, Washington Post, November 6, 2001, at 1.

<sup>26</sup> See e.g., International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (13 June 2000) accessible at <http://www.un.org/icty/pressreal/nato061300.htm> (last accessed 12 June 2001).

<sup>27</sup> For general information on the Air Force's role in Operation Enduring Freedom see Air Force Link, *Enduring Freedom*, accessible at <http://www.af.mil/news/efreedom/index.shtml> (last accessed 12 November 2001).

<sup>28</sup> See Vanessa Blum, *JAG Goes to War*, Legal Times, November 15, 2001 at <http://www.law.com> (last visited 23 November 2001).

<sup>29</sup> Michael Ignatieff, *Virtual War* (Metropolitan Books, 2000), at 199.

<sup>30</sup> The most famous case involves the My Lai massacre. See *United States v. Calley*, 48 C.M.R. 19 (C.M.A. 1973). However, there were many other trials of American troops that though charged as traditional offenses (e.g., murder) they amounted to what would likely be considered "war crimes." See e.g., Gary D. Solis, *Song Thang: An American War Crime* (1997).

<sup>31</sup> See Lt Col Terrie M. Gent, *The Role of Judge Advocates in a Joint Air Operations Center*, Airpower Journal, September 1999, at 40-55 accessible at <http://www.airpower.maxwell.af.mil/airchronicles/apj/apj99/spr99/gent.html> (last accessed 27 October 2001).

<sup>32</sup> Chairman, Joint Chiefs of Staff Instr. (CJCSI) 5810.01A, *Implementation of the DoD Law of War Program*, para. 6(c)(5) (27 August 1999)

<sup>33</sup> The draft doctrine is Air Force Doctrine Document 2-4.5 *Doctrine for Legal Support of Aerospace Operations* (draft). This effort is underway at the Air Force Doctrine Center see <http://www.doctrine.af.mil/>.

<sup>34</sup> For a general discussion of the role of air operations centers and the doctrinal architecture for the application of airpower, see Dep't of the Air Force, *Air Force Doctrine Document 2, Organization and Employment of Aerospace Power*, 17 February 2000 accessible at <http://www.doctrine.af.mil/>.

<sup>35</sup> A "sortie" is "an operational flight by a single military aircraft." See The Oxford Essential Dictionary of the U.S. Military (Elizabeth J. Jewell, et al., eds., 2001), at 405.

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<sup>36</sup> Such systems even exist for nuclear targeting. See Charles J. Dunlap, Jr., *Taming Shiva: Applying International Law to Nuclear Operations*, 47 A.F. L. Rev. 157, 162 (1997) (describing U.S. Strategic Command's Strategic War Planning System (SWPS)).

<sup>37</sup> For example, 90% of the U.S. military's communications flow through civilian systems. John T. Correll, *Warfare in the Information Age*, *Air Force Magazine*, December 1996, at 3.

<sup>38</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* [Protocol I], art. art. 51.5(b). The U.S. is not, however, a Party to Protocol I but accepts this portion as reflecting customary international law.

<sup>39</sup> The principle of "proportionality" requires that the "collateral damage" to noncombatants or their property not be disproportionate in relation to the "concrete and direct military advantage anticipated." The concept was codified in arts. 51.5(b) and 57.2(iii) of Protocol I, note 38, *supra*. While the U.S. has not ratified Additional Protocol I, this portion is considered part of customary international law.

<sup>40</sup> See Commander James W. Crawford, *The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems*, 21 *Fletcher Forum of World Affairs* 101 (Summer/Fall 1997) (discussing secondary and reverberating effects).

<sup>41</sup> Major Thomas E. Griffith, Jr., USAF, *Strategic Attack of National Electrical Systems*, U.S. Air Force's School for Advanced Aerospace Studies, Air University, Maxwell Air Force Base, AL (October 1994).

<sup>42</sup> The Department of Defense would only say that there was "high confidence" that the factory was used to make a precursor compound for a chemical agent. See Dep't of Defense, Background Briefing, *Terrorist Camp Strikes*, 20 August 1998 accessible at [http://www.defenselink.mil/news/Aug1998/x08201998\\_x820bomb.html](http://www.defenselink.mil/news/Aug1998/x08201998_x820bomb.html) (last visited 20 November 2001).

<sup>43</sup> The attack is the subject of on-going litigation in U.S. courts by the plant's owners. See Otis Bilodeau, *When Bombs Miss their Mark*, *Legal Times*, November 28, 2001 at <http://www.law.com> (last visited 28 November 2001).

<sup>44</sup> See e.g., Williamson Murray, *Air War in the Persian Gulf* (1995), at 224-226 (criticizing the alleged role of Air Force lawyers with respect to a proposed bombing of a statue of Saddam Hussein). Murray's version of events is disputed by Colonel Scott L. Silliman, USAF (Ret.), the former Staff Judge Advocate of what was then known as Tactical Air Command (TAC) (Murray contends that TAC legal advice that the statue was a protected cultural monument "was simply wrong."). Silliman contends that no lawyer ever concluded that bombing the statue was illegal; lawyers only recommended that the target be carefully screened for conformance with existing legal standards. He believes the statue was removed from the target lists for unrelated reasons. E-mail from Scott L. Silliman to Colonel Charles Dunlap, Staff Judge Advocate, U.S. Strategic Command (19 Feb. 1998) (on file with author).

<sup>45</sup> Interview, General Charles Horner, *Washingtonpost.com* (1998), accessible at <http://www.washingtonpost.com/wp-srv/inatl/longterm/fogofwar/hornertext.htm> (last visited 1 May 2001).

<sup>46</sup> For information about Operation Desert Fox, see generally, Dep't of Defense, *Operation Desert Fox*, accessible at [http://www.defenselink.mil/specials/desert\\_fox/](http://www.defenselink.mil/specials/desert_fox/) (last visited 20 November 2001).

<sup>47</sup> See note 39, *supra*.

<sup>48</sup> See e.g., Elaine M. Grossman, *Air Force Chief Launches Major Effort To Improve Targeting Speed*, *Inside the Pentagon*, November 8, 2001, at 3.

<sup>49</sup> The media reports allege that opportunities to attack purported terrorists were lost due to overly cautious advice from a JAG. See Seymour M. Hersh, *King's Ransom*, *The New Yorker*, October 22, 2001 accessible at [http://www.newyorker.com/FACT/?011022fa\\_FACT1](http://www.newyorker.com/FACT/?011022fa_FACT1) (last accessed 12 November 2001) and Thomas E. Ricks, *Target Approval Delays Irk Air Force Officers*, *Washington Post*, November 18, 2001, at A01.

<sup>50</sup> Both the Secretary of Defense and the Deputy Secretary of Defense refuted aspects of the Washington Post story, but neither specifically addressed the JAG issue. See Dep't of Defense, *News Briefing – Secretary Rumsfeld* (19 November 2001) accessible at



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[http://www.defenselink.mil/news/Nov2001/t11192001\\_t1119sd.html](http://www.defenselink.mil/news/Nov2001/t11192001_t1119sd.html) (last visited 19 November 2001); and Dep't of Defense, *Deputy Secretary Wolfowitz Interview with CBS Face the Nation* (transcript of 18 November 2001) accessible at [http://www.defenselink.mil/news/Nov2001/t11182001\\_t1118wol.html](http://www.defenselink.mil/news/Nov2001/t11182001_t1118wol.html) (last accessed 19 November 2001).

<sup>51</sup> Dep't of the Air Force Policy Directive 51-4, 26 April 1993 (describing the reporting and investigation of any apparent violation of LOAC).

<sup>52</sup> See e.g., 10 U.S.C § 806(b)

<sup>53</sup> General Hal M. Hornburg, *The Importance of Legal Professionals in the Air Force*, (June 27, 2001), available at <http://www.aetc.randolph.af.mil/pa/Library/speeches/cc06.htm> (last accessed 22 October 2001).

<sup>54</sup> Cf. note 62 and 63, *supra*, and accompanying discussion.

<sup>55</sup> Protocol I, note 38, *supra*, at art. 82.

<sup>56</sup> John Keegan, *A History of Warfare* (1993), at xvi.

<sup>57</sup> Ronald Haycock and Keith Neilson, *Men, Machines, and War* (1988) at xii.

<sup>58</sup> This success continues in the current war on terrorism. See e.g., Paul Richter, *Despite Grim Predictions, U.S. Battle Toll Still Zero*, *Los Angeles Times*, November 24, 2001, accessible at <http://www.latimes.com/news/nationworld/nation/la-112401nodead.story>, (last visited 24 November 2001) reprinted *sub nom*, *In a Strange Kind of War, U.S. Casualties Are Few*, *San Antonio Express-News*, November 24 2001, at 17A ("The casualty rate reported by the Pentagon attests to the continuing technological advances that the U.S. military has made in developing an arm's-length, precision style of attack.").

<sup>59</sup> As quoted by Matthew Cooper in *Making the World Safer*, *Time*, November 26, 2001, at 83.

<sup>60</sup> The relative weight of the defense burden is yet another area where U.S. and European approaches diverge. See e.g., Jeffrey Gedmin, *A Yawning Gap on Defense*, *Washington Times*, December 8, 1999, at 15. ("The United States currently spends 3.2 percent of its GDP on defense. The European allies in average 2.1%."). See also John Keegan, *The U.S. Is Not Amused By Our Redundant Military Gestures*, *London Daily Telegraph*, December 6, 1999 reprinted in Dep't of Defense, *Current News Early Bird*, 6 December 1999 ("The United States] has...continued to devote a larger proportion of its budgetary spending on defense - particularly defense research – than any European government ever has, to the great benefit of all its allies.").

<sup>61</sup> For a relatively dispassionate and comprehensive examination of war crimes in the modern context see Crimes of War Project accessible at <http://www.crimesofwar.org/> (last visited 20 November 2001).

<sup>62</sup> The technical title of the Ottawa Convention is *The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction*, 18 September 1997, accessible at <http://www.icrc.org/ihl> (last visited 20 November 2001).

<sup>63</sup> *Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, October 10, 1980; *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices* (hereinafter CCW Protocol II). Geneva, 10 October 1980, accessible at <http://www.icrc.org/ihl> (last visited 20 November 2001).

<sup>64</sup> One such munition in the U.S. inventory is the CBU 89, "Gator" mine system. For a description of it, see Federation of American Scientists, *CBU 89 Gator Mine*, accessible at <http://www.fas.org/man/dod-101/sys/dumb/cbu-89.htm> (last visited 23 November 2001).

<sup>65</sup> See e.g., Brooks Tigner, *EU United on Restricting Cluster Bombs' Use*, *Defense News*, July 22, 2001, at 18; and Human Rights Watch, *Cluster Bombs in Afghanistan*, (October 2001), accessible at <http://www.hrw.org/backgrounders/arms/cluster-bck1031.htm> (last visited 23 November 2001).

<sup>66</sup> For a description of a cluster munition see Federation of American Scientists, *CBU-87/B Combined Effects Munitions (CEM)*, accessible at <http://www.fas.org/man/dod-101/sys/dumb/cbu-87.htm> (last visited 23 November 2001).

<sup>67</sup> See Tigner, note 65 *supra*.

<sup>68</sup> See Dep't of Defense, News Transcript, *Deputy Secretary Wolfowitz Interview with the London Sunday Telegraph*, October 26, 2001 accessible at



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[http://www.defenselink.mil/news/Oct2001/t10282001\\_t1026dsd.html](http://www.defenselink.mil/news/Oct2001/t10282001_t1026dsd.html) (last visited 23 November 2001).

<sup>69</sup> John B. Alexander, *Optional Lethality: Evolving Attitudes Toward Nonlethal Weaponry*, Harvard International Review, Summer 2001, at 64.

<sup>70</sup> *Id.*, at 69. Presumably, Alexander is referring to such widely-accepted agreements as the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, April 10, 1972, 26 U.S.T. 583, and the *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare*, June 17, 1925, 26 U.S.T. 571. See also note 72 *supra*.

<sup>71</sup> Alexander, *Id.*, at 69.

<sup>72</sup> *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, Paris, 13 January 1993, accessible at <http://www.icrc.org/ihl> (last visited 20 November 2001).

<sup>73</sup> Alexander, note 69, *supra*.

<sup>74</sup> Martin Van Creveld, *Technology and War (II)*, in *The Oxford Illustrated History of Modern War* (Charles Townsend, ed., 1997), at 304 (emphasis in original).

<sup>75</sup> For example, rubber ball and paintball munitions were found to violate the antipersonnel landmine provision of CCW Protocol II. See Memorandum, Dep't of the Army, Office of the Judge Advocate General, to AMSTA-AR-CC, Picatinny Arsenal, New Jersey, subject: Bounding Non-Lethal Munition (BNLM) Legal Review (7 January 2000).

<sup>76</sup> See Walter J. Rockler, *War Crimes Law Applies to the U.S. Too*, Chicago Tribune, May 23, 1999 accessed 25 May 1999 at <http://ebird.dtic.mil/May1999/e19990525warcrimes.htm>.

<sup>77</sup> Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, Vol. 12, No. 1, (February 2000) accessible at <http://www.hrw.org/reports/2000/nato/index.htm#TopOfPage> (last accessed 25 November 2001).

<sup>78</sup> See e.g., Jamie F. Metzler, *Information Intervention*, *Foreign Affairs*, November/December 1997, at 15.

<sup>79</sup> As quoted by William M. Arkin in *Changing the Channel in Belgrade*, *Washington Post* (online edition) May 25, 1990 accessible at <http://www.washingtonpost.com/wp-srv/national/dotmil/arkin052499.htm> (last visited 6 September 1999).

<sup>80</sup> According to the DoD General Counsel, "[w]hen it is determined that civilian media broadcasts are directly interfering with the accomplishment of the military force's mission, there is no law of war objection to using minimum force to shut it down." See Dep't of Defense, Office of General Counsel, *An Assessment of International Legal Issues in Information Operations*, May 1999, at 9.

<sup>81</sup> See note 26, *supra*, at para IV, B. iii.

<sup>82</sup> *Bankovic and others v. 17 NATO States*, Application No. 52207/99, European Court of Human Rights, *Pending Cases Before a Grand Chamber*, accessible at <http://www.echr.coe.int/BilingualDocuments/PendCase.htm> (last visited 25 November 2001) (The U.S. is not a party to this lawsuit.).

<sup>83</sup> *Id.*

<sup>84</sup> See note 18, *supra*, and accompanying text.

<sup>85</sup> Centers of gravity are "[t]hose characteristics, capabilities, or localities from which military forces derive freedom of action, physical strength, or will to fight." See Chairman of the Joint Chiefs of Staff, Joint Publication (Joint Pub) 1-02, *DoD Dictionary of Military and Associated Terms* 23 March 1994 as amended 29 June 1999 accessed 6 September 1999 at <http://www.dtic.mil/doctrine/jel/doddict/data/c/01075.html>.

<sup>86</sup> Daniel J. Boorstin, *Myths of Popular Innocence*, *U.S. News & World Report*, March 4, 1991, at 41.

<sup>87</sup> See Stephen T. Hosmer, *Why Milosevic Decided to Settle When He Did* (Rand, 2001).

<sup>88</sup> *Protocol on Blinding Laser Weapons*, 13 October 1995, CCW Protocol IV see note 63 *supra*. The U.S. is not a party to this Protocol.

<sup>89</sup> International Committee of the Red Cross, *Blinding Laser Weapons: Questions and Answers*, 16 November 1994, accessible at <http://www.icrc.org/icrceng.nsf/5cacfd48ca698b641256242003b3295/f0e784905f1686784125620004c5ae1?OpenDocument> (last visited 23 November 2001).

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- <sup>90</sup> See e.g., Thomas E. Ricks, *U.S. Arms Unmanned Aircraft*, Washington Post, October 18, 2001, at 1.
- <sup>91</sup> See Gail Kaufman, *Attack Robots 'Kind of Frightening'*, Defense News, June 4-10, 2001, at 10.
- <sup>92</sup> See Vince Crawley, *Flamethrowers: A Necessary Evil?*, Air Force Times, November 26, 2001, at 16.
- <sup>93</sup> See generally, Donald G. Rumsfeld, et al., *Report of the Commission to Assess United States National Security Space Management and Organization*, January 11, 2001 accessible at <https://www.space.gov/> (last visited 25 November 2001) (advocating greater U.S. military involvement in space)
- <sup>94</sup> For a thorough discussion of LOAC in the space environment see generally Major Robert A. Ramey, USAF, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. Rev. 1 (2000).
- <sup>95</sup> *Id.* See also Vernon Loeb, *Air Force's Chief Backs Space Weapons*, Washington Post, August 2, 2001, at 17 (discussing the Air Force Chief of Staffs support for space weapons but acknowledging that the policy decision to weaponize space has not yet been made).
- <sup>96</sup> See notes 57 to 59, *supra*, and accompanying text.
- <sup>97</sup> See note 115 and accompanying text.
- <sup>98</sup> See e.g., Embassy of France, The French Foreign Legion, accessible at <http://www.info-france-usa.org/america/embassy/legion/legion.htm> (last visited 24 November 2001); Ministry of Defense, British Army, *Brigade of Gurkhas*, accessible at <http://www.army.mod.uk/army/organise/infan/gurkha/> (last visited 24 November 2001); Holy See, *Swiss Guard*, accessible at [http://www.vatican.va/roman\\_curia/swiss\\_guard/](http://www.vatican.va/roman_curia/swiss_guard/) (last visited 24 November 2001).
- <sup>99</sup> For information about the ICC see United Nations, *Rome Statute of the International Criminal Court*, (updated 5 November 2001) accessible at <http://www.un.org/law/icc/index.html> (last visited 24 November 2001).
- <sup>100</sup> See e.g., Dan Morgan, *Lawmakers Accept Provision Against World Court*, Washington Post, November 9, 2001, at 24.
- <sup>101</sup> See e.g., Steven Lee Meyers, *Kosovo Inquiry Confirms U.S. Fears of War Crimes Court*, New York Times, January 3, 2000, reprinted in Dep't of Defense, Current News Early Bird, 3 January 2001.
- <sup>102</sup> Helle Bering, *International Criminal Circus*, Washington Times, April 5, 2000 (discussing the "American Servicemembers Protection Act of 2000) reprinted in Dep't of Defense, Current News Early Bird, 5 April 2001.
- <sup>103</sup> See White House, *Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, November 13, 2001 accessible at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (last visited 24 November 2001).
- <sup>104</sup> See e.g., Sam Dillion with Donald McNeill, *Spain Sets Hurdle for Extraditions*, The New York Times, November 24, 2001, at A1, accessible at <http://www.nytimes.com/2001/11/24/international/europe/24SPAI.html> (last visited 24 November 2001).
- <sup>105</sup> See e.g., *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. \_\_ (October 26, 2001) accessible at <http://www.ins.gov/graphics/lawsregs/patriot.pdf> (last visited 23 November 2001).
- <sup>106</sup> See e.g., Charles Krauthammer, *To War, Not to Court*, Washington Post, September 12, 2001, at 29 ("An open act of war demands a military response, not a judicial one")
- <sup>107</sup> As quoted by John Lancaster and Susan Schmidt in *U.S. Rethinks Strategy for Coping with Terrorists*, Washington Post, September 14, 2001, at 9.
- <sup>108</sup> Wayne Minami, *Attack is an Act of War; Treat it as such with quick Overwhelming Revenge*, Air Force Times, September 24, 2001, at 78.
- <sup>109</sup> See note 19, *supra*.
- <sup>110</sup> See note 13, *supra*.

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<sup>111</sup> See The Gallup Organization, *Military Retains Top Position in Americans' Confidence Ratings*, June 25, 2001 accessible at <http://www.gallup.com/poll/releases/pr010625.asp> (last visited 20 November 2001).

<sup>112</sup> See e.g., Ramsey Clark, et al., *War Crimes: A Report on United States Crimes Against Iraq to the Commission of Inquiry for the International War Crimes Tribunal*, 1992, accessible at <http://www.deoxy.org/wc/> (last visited 24 November 2001).

<sup>113</sup> See e.g., Amnesty International, *NATO/Federal Republic of Yugoslavia "Collateral Damage" or Unlawful Killings: Violations of the Laws of War by NATO During Operation Allied Force*, June 2000 accessible at <http://www.amnesty.org/> (last visited 23 November 2001), and International Action Center, *Independent Commission of Inquiry: Hearing to Investigate U.S./NATO War Crimes Against the People of Yugoslavia*, June 2000, accessible at <http://www.iacenter.org/warcrime/html> (last visited 24 November 2001).

<sup>114</sup> See e.g., Joseph Fitchett, *Bombing of Iraq 'Illegal' Paris Says*, *International Herald Tribune*, February 20, 2001, at 1.

<sup>115</sup> The author has previously discussed this issue in some detail. See Charles J. Dunlap, Jr. *Kosovo, Casualty Aversion, and the American Military Ethos: A Perspective*, *J. of Legal Studies*, Vol. 10, 1999/2000, at 95.

<sup>116</sup> See note 77, *supra*.

<sup>117</sup> See e.g., Dep't of Defense, *Report to Congress: Kosovo/Allied Force After-Action Report*, 31 January 2000, at xvii, available at <http://www.defenselink.mil/pubs/kaar02072000.pdf> (last visited March 15, 2000) (noting that over 38,000 sorties were flown in the Balkan air operation).

<sup>118</sup> As quoted by Rowan Scarborough in *Change of Target Saved Hundreds of Taliban Soldiers*, *Washington Times*, November 21, 2001, at 10.

<sup>119</sup> *Kriegsraison* is a 19<sup>th</sup> Century German doctrine that asserts that military necessity could justify any measures – even violations of the laws of war – when the necessities of the situation purportedly justified it. It is rejected as a principle of international law. See Dep't of the Air Force Pamphlet 110-31, *International Law – The Conduct of Armed Conflict and Air Operations* (19 November 1976) at paragraph 1-3a(1).

<sup>120</sup> Col Wang Xiangsui, Chinese Air Force, as quoted by John Pomfret in *China Ponders New Rules Of 'Unrestricted War'*, *Washington Post*, 9 Aug 1999, at 1, accessible at [http://www.infowar.com/class\\_3/99/class3\\_081699a\\_j.shtml](http://www.infowar.com/class_3/99/class3_081699a_j.shtml) (last visited 23 November 2001). See also Qiao Liang and Wang Xiangsui, *Unrestricted Warfare* (1999) accessible at <http://www.terrorism.com/documents/unrestricted.pdf> (last visited 23 November 2001)

<sup>121</sup> Mary Anastasia O'Grady, *What About Colombia's Terrorists?*, *Wall Street Journal*, October 5, 2001, reprinted in Dep't of Defense, *Current News Early Bird*, 5 October 2001.

<sup>122</sup> Jose Miguel Vivanco, as quoted by Juan Forero in *Rights Group Lists Abuses By Guerrillas in Colombia*, *New York Times*, July 10, 2001, reprinted in Dep't of Defense, *Current News Early Bird*, 10 July 2001.

<sup>123</sup> See Geoffrey Best, *Law and War Since 1945*, at 289 (1994) (“[I]t must never be forgotten that the law of war, wherever it began at all, began mainly as a matter of religion and ethics...It began in ethics and it has kept one foot in ethics ever since”).

<sup>124</sup> Although beyond the scope of this paper, one such paradigm needing re-thinking may be the whole notion of noncombatancy with respect to the sentient, adult population of democratic and quasi-democratic states. See Charles J. Dunlap, Jr., *End of Innocence: Re-Thinking Noncombatancy in the Post-Kosovo Era*, *Strategic Review*, Summer 2000, at 9.