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## The "Fog of Law": The Law of Armed Conflict in Operation Iraqi Freedom

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**T**he "fog of war" is a well-known combat experience. It is also an apt descriptor for how ambiguity in wartime can thwart the best military plans.<sup>1</sup> While the "fog of law"<sup>2</sup> is less documented, its effects may be just as profound. The "fog of law" is the ambiguity caused in wartime by the failure to clearly identify and follow established legal principles. It can frustrate deliberate planning, create confusion and lead to bad decisions that imperil mission accomplishment. When coupled with poor and inadequate planning, its effect can be near catastrophic. This article briefly explores the "fog of law" in Operation Iraqi Freedom (OIF) from before the war until the dissolution of the Coalition Provisional Authority (CPA) on June 28, 2004.

In OIF, the "fog of law" was created by positions taken at the strategic level that put conventional military forces in Iraq at needless disadvantage. Pejorative statements about the 1949 Geneva Conventions caused some soldiers to question their applicability in Iraq and gave credence to the false notion that the Conventions were deliberately disregarded by the military as a whole. Enhanced interrogation techniques used in Afghanistan and Guantanamo, and by some special operations and non-military forces in Iraq, contributed to a small number of detainee abuse cases and to the hyperbole that abuse was systematic. Reluctance to embrace the

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law of occupation and dedicate sufficient resources to its effective execution almost squandered a military victory.

Despite the effect of the “fog of law,” conventional military forces in Iraq kept remarkable faith to the law of armed conflict. In general, this occurred in spite of, rather than because of, actions at the strategic level. In no small measure, this was due to the efforts of judge advocates who accompanied the forces into combat.<sup>3</sup> Judge advocates strove to overcome the “fog of law” in at least five areas: the application of the law of armed conflict, prisoners and detainees, interrogation policies, occupation and the rule of law.

The lesson of OIF is that legal ambiguity at the strategic level can imperil mission success. Conversely, legal clarity and compliance enhance military effectiveness, which in turn leads to more rapid mission success and reduced adverse impact on the civilian population in the combat zone. Old law is good law; the Geneva Conventions and the law of armed conflict in general are grounded in practicality and have retained remarkable vitality and utility. They should be embraced, not dismissed, and followed, not avoided. They must be explained to the media and to the civilian population generally. Failure to take and hold the legal high ground makes taking and holding the high ground on the battlefield much more difficult.

### *The Application of the Law of Armed Conflict in Iraq*

The war in Iraq was an international armed conflict between two high contracting parties, followed by a state of belligerent occupation.<sup>4</sup> The law of armed conflict, including the Geneva Conventions, applied as a matter of law. The law of armed conflict and the Geneva Conventions were referenced in numerous operations plans, orders, policies and procedures issued by United States Central Command (USCENTCOM), the Combined Forces Land Component Command (CFLCC), V Corps and Combined Joint Task Force–7 (CJTF-7).<sup>5</sup> In his September 6, 2003 letter to the International Committee of the Red Cross (ICRC), the CJTF-7 commander wrote, “Coalition Forces remain committed to adherence to the spirit and letter of the Geneva Conventions.”<sup>6</sup> Periodically, starting in September 2003, the CJTF-7 commander would issue by order specific policy memoranda reiterating the requirement for law of armed conflict compliance.

By contrast, US forces in Afghanistan were to “treat detainees humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva,” a much less rigorous standard than adherence to the Conventions.<sup>7</sup> Moreover, some special operations and non-military forces engaged in the Global War on Terrorism (GWOT) operated under relaxed rules

for detention, interrogation and prisoner transfer that were incompatible with the Geneva Conventions.<sup>8</sup> When units that had operated in Afghanistan were transferred to Iraq, some brought with them the less rigorous standards and relaxed rules, unfortunately reinforced by field application and standard operating procedures that they perceived had been validated in combat in Afghanistan. Countering the migration of these less rigorous standards and relaxed rules, once recognized, required constant vigilance and considerable effort. Unfortunately, the scope of the problem was not understood until months into OIF.<sup>9</sup>

Compounding the problem were muddled pronouncements at the operational and strategic levels about the characterization of the conflict (“we are liberators, not occupiers”),<sup>10</sup> a predisposition to view OIF as part of the larger GWOT, a reluctance to embrace the traditional and legitimate role of the military in occupation, and a tendency to apply policies developed for non-international military operations to an international armed conflict.<sup>11</sup>

Governments were not solely to blame for creating an ambiguous legal environment. Human rights and special interest groups further contributed to the “fog of law” during the occupation by declaring the illegality or immorality of the war, exaggerating and distorting breaches of discipline by coalition forces, and asserting the co-applicability of human rights law and the law of armed conflict.<sup>12</sup> The assertion of co-applicability diluted both and contributed, in part, to the lack of unity of effort between coalition forces and the CPA. While security deteriorated, the CPA expended its efforts to mandate changes to the Iraqi legal system, advance women’s issues and influence other modest improvements to vague human rights.

Despite—or perhaps because of—the “fog of law,” the principles of the Geneva Conventions are the bedrock of mandatory training for all soldiers and Marines, and they are the basis of “The Soldier’s Rules” that are taught in basic training.<sup>13</sup> All of the training emphasizes practical application of the Conventions; it is not realistic to expect soldiers to follow the law of armed conflict simply because they are ordered to do so. Law of armed conflict refresher training was required as part of pre-combat training for Iraq. Several times during OIF, practical law of armed conflict refresher training was mandated down to the platoon level to address observed areas of concern, such as overzealous detention of civilians, and more nuanced law of armed conflict topics were briefed and discussed at commander’s conferences held periodically in Baghdad.<sup>14</sup> In 2004, the ICRC’s “Rules for Behavior in Combat” were incorporated into training packages for CJTF-7 soldiers.<sup>15</sup>

In exercises conducted before the war, considerable effort was put into training to apply the law of armed conflict in targeting decisions and in the rules of engagement (ROE). In January 2003, V Corps held a legal conference in Heidelberg to examine the ROE and to discuss targeting, prisoners of war and occupation. V Corps

would be the coalition’s main offensive effort in the ground campaign against Iraq. The V Corps commander spoke to the assembled judge advocates, including the staff judge advocates (SJAs) of the corps’ subordinate wartime divisions, about the importance of adherence to the ROE and to the law of armed conflict.

Development of ROE extracts and pocket cards, and of ROE training vignettes, was a major focus of judge advocates assigned to forces staged in Kuwait before the start of the war. During February and March 2003, the draft ROE changed several times to add higher-level approval authorities for certain categories of targets and to require the use of complex collateral damage methodologies (CDM) for pre-planned targets. The unclassified ROE pocket cards issued to all US coalition personnel were replete with references to the law of armed conflict (the “law of war”). In fact, the first rule authorizing the attack of enemy military and paramilitary forces lists five constraints.<sup>16</sup>

While the ROE are not “law” per se, they must comply with the law of armed conflict as the commander’s standards for the use of force.<sup>17</sup> Starting with the ROE development conference in London in November 2002, planners developed means to try to minimize collateral damage. The control of long-range fires was a large part of exercises in Poland in October 2002 and in Kuwait in November and December 2002. Judge advocates were placed in all corps- and division-level (and many brigade-level) fires centers to assist in the clearance of fires by ensuring compliance with the CDM, ROE and law of armed conflict. Within V Corps, judge advocates were placed down to the military police battalion level to help resolve prisoner of war and detainee issues.

Starting before hostilities commenced, V Corps and several of its subordinate divisions used ROE working groups composed of operators, intelligence officers and judge advocates to assess the ROE, recommend changes in their application and produce vignettes to train staffs and soldiers on how to apply the ROE on a dynamic battlefield. The ROE working group methodology continued at CJTF-7. Although the ROE remained unchanged until April 2004,<sup>18</sup> enemy tactics and other factors did change, necessitating more sophisticated discrimination in the application of force. For example, recognizing and targeting persons, none of whom wore uniforms or other identifying insignia, who were emplacing, watching over or detonating improvised explosive devices (IEDs) became a key part of ROE training.

Throughout the war, several targeting and ROE issues were recurrent vexing problems. First was the concept of “positive identification” (PID) of targets. The term “PID” had come into the ground ROE vernacular from air operations, to which it was far better suited. In an environment like Iraq, it implied a degree of precision impossible to attain as a matter of course, at least for conventional forces. Even though PID was defined to soldiers as a reasonable certainty that the

target to be engaged was a legitimate military target,<sup>19</sup> it was often mischaracterized by commentators as requiring the pristine attack of military objects only, without mistake or collateral damage.<sup>20</sup>

Second, the fixation on discrimination led to the imposition of CDM on pre-planned fires, including those supporting ground movements and affording suppression of enemy air defenses for rotary-wing operations. CDM was another concept better suited for air operations and it was added late to the ground ROE. Not only did it require conclusions not supported by adequate modeling tools available in ground unit headquarters, it contributed to the illusion that the effect of fires could be computed with precision. Operating forces made repeated requests to relieve fires supporting ground forces from the CDM or to exclude fires between the forward line of troops and the fire support coordination line from the CDM requirement, but the requests were denied by USCENTCOM or higher. The control measures to limit deliberate and shaping fires continued to masquerade as ROE, although fires in self-defense or in support of forces in contact were eventually exempted from the CDM burden.

Taken together, PID and CDM often required intellectual analysis in fires centers that presupposed that the reality on the ground comported with templates or with electronic means of surveillance. While there was certainly a good-faith analysis based on the best information available, it should not be confused with absolute certainty or precision. The analysis and clearance of fires are only as good as the information supporting the decision. This is particularly true with high-value and fleeting targets, where time is of the essence. While having judge advocates help review the information and provide advice on the legality of the fire mission adds rigor to the process, it seldom adds any degree of certainty or precision. Particularly with indirect fire from, and in support of, ground forces, precision is relative in any event.

The emphasis on discrimination had an insidious effect on interpretations of proportionality. Increasingly, proportionality was viewed as requiring a near-mathematical or ratio analysis of each particular target, rather than a balancing of the damage relative to the military advantage from a larger perspective. This played out for the most part in preplanned strikes from fixed-wing aircraft. After the march to Baghdad, an inordinate amount of command and staff activity was expended in convincing the combined air operations center that a strike was appropriate and that the ground commander would take responsibility for any unintended damage (i.e., “own the bomb”), even in cases where the strike was merely a bomb dropped in the desert nowhere near civilians as part of a show of force.

A third issue was created by the very nature of the enemy. Insurgents and terrorists don't wear uniforms or other distinctive insignia recognizable at a distance.

The ROE would allow engagement of persons who were members of certain specified groups or who were supporting those groups. Determining whether a person was a member of a specified group—and thus a member of a declared hostile force—relied on the quality of information and intelligence, particularly if the person was to be targeted at a time other than while directly participating in hostilities. Targeting a supporter could be even more problematic, as it required a determination as to the degree and materiality of support provided by the potential target, again based on information and intelligence.

Conventional forces are particularly likely to have difficulty in the deliberate targeting of members of specified groups and their supporters who are not wearing uniforms or otherwise recognizable at a distance. Typically, these difficulties exist because of missions executed at too low a level of command with insufficient intelligence analysis and inadequate decision-making processes. Put another way, if conventional forces are expected to conduct a raid against insurgents or terrorists, or their supporters, they must be supported by a reasoned intelligence-based decision made at an appropriately senior level of command. This point was not fully understood until well into the war. For too long, decisions on raids were made locally and individual engagement decisions were situational, essentially based on self-defense. This put lower-level commanders at risk of being second-guessed and soldiers at risk of being shot.

Fourth, coalition ROE in OIF were always a matter of frustration. As most coalition partners deployed to Iraq, their commanders and staffs would participate in ROE conferences, attended by CJTF-7 judge advocates, where they nearly uniformly expressed satisfaction with adopting the CJTF-7 ROE. However, once in country most coalition commanders were prohibited by their national leadership from employing their forces so as to fully apply the ROE. (British and Australian forces, committed in Iraq since the beginning of the war, were exceptions and had ROE that were compatible with the CJTF-7 ROE.) These “national red lines” lay dormant until April 2004, when Muqtada al-Sadr began attacking coalition forces and his Mahdi Army was designated as a declared hostile force.<sup>21</sup> Some coalition forces commanders simply refused to participate in offensive operations or even to maneuver their units in a way that might require them to use force in self-defense.<sup>22</sup>

### *Prisoners and Detainees*

In 2002 and early 2003, planning for Iraqi prisoners of war occurred mostly at the USCENTCOM and CFLCC levels. At V Corps, enemy prisoners of war were generally viewed as a CFLCC responsibility, but there was detailed planning for handling capitulated forces. Although the assumption that Iraqi forces would capitulate

*en masse* never became a reality, a key point in the planning was that these forces would enjoy the legal status of prisoners of war. Accordingly, the intricacies of the Third Geneva Convention were a frequently briefed and well-understood topic in the headquarters.

There was no meaningful planning at higher headquarters concerning prisoners other than enemy prisoners of war. In the absence of guidance, V Corps issued orders unilaterally. At the start of the war, one of the first fragmentary orders (FRAGO) issued by V Corps, Order Number 007, dealt with prisoners and detainees.<sup>23</sup> It cited the Third and Fourth Geneva Conventions and established a review and release mechanism for detainees that exceeded the requirements of the Fourth Convention, and adopted best practices from Haiti and Kosovo, including a review by a judge advocate of all detentions of civilians.<sup>24</sup> Of course, this was the first large-scale implementation by the United States of the Fourth Geneva Convention, new in 1949, and the sheer number of detainees would overwhelm the process. Regardless, in frequent interaction with the ICRC, there was never any dispute over the legal applicability of the Geneva Conventions, only in the ability of US forces to implement them completely.

Soon after closing on Baghdad in April 2003, one of the first organizational tasks was to separate common law criminals, prisoners of war and persons who had attacked coalition forces. In the crush of combat, prisoners had been commingled. Incredibly, coalition forces had not anticipated the impact of Saddam's general amnesty in November 2002 that had emptied the prisons and jails.<sup>25</sup> Thousands of criminals had been freed to prey upon the civilian population, and prisons and jails had been systematically looted. This caused countless problems as coalition troops not only captured prisoners of war and what were later called insurgents, but also detained thousands of common criminals. Some were detained in the act of committing violent crimes, some were turned in after the acts by local civilians, some were convicted criminals who had been granted amnesty, some were probably innocent of any wrongdoing and unjustly accused by a person holding a grudge; the result was a huge influx of prisoners, later termed criminal detainees, with precious few places to hold them, soldiers to guard them or courts to try them. The problem was compounded by soldiers using prisoner of war capture tags to document the apprehension of these persons; there were tags with "murderer" or "rapist" written on them and no more information.

In May 2003, US forces implemented CPA apprehension forms that required sworn statements from soldiers and witnesses on the circumstances of capture. This was met with some pushback from commanders and soldiers, but it helped ameliorate the situation and set conditions for future prosecutions. Using the model of the Fourth Geneva Convention, prisoners were classified into two

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categories: security internee and criminal detainee. The former were those who had engaged in hostilities and who would be held until the conclusion of hostilities or otherwise earlier released, perhaps through a parole or release guarantor agreement;<sup>26</sup> the latter were criminals who were held for trial or other disposition by the emerging Iraqi criminal justice system. The ICRC modified its capture cards in Iraq to recognize the two categories of prisoner.

For those whose status was in doubt, V Corps conducted tribunals under Article 5 of the Third Geneva Convention.<sup>27</sup> Commencing in June 2003, tribunals were held for all of the high-value detainees (HVDs), people like Deputy Prime Minister Tariq Aziz. The tribunals consisted of three judge advocates and determined whether the prisoners were prisoners of war, security internees or innocent civilians. None of the HVDs were deemed innocent civilians, but some were accorded prisoner of war status.

Despite these efforts, and the release of thousands of prisoners of war, the number of criminal detainees and security internees rose precipitously. On August 24, 2003, judge advocates from commands all over the country came to Baghdad for Operation Clean Sweep. Joined by a former Iraqi judge, judge advocates reviewed every single criminal detainee’s file to determine who could be released outright or turned over to the emerging Iraqi courts for at least an investigative hearing. Nevertheless, the number of criminal detainees continued to grow. Iraqi courts were slow to open and Iraqi judges were reluctant to release prisoners once detained by coalition forces. Transporting prisoners from US detention facilities to Iraqi courthouses was a security, logistics, resource and accountability nightmare. CJTF-7 began holding criminal detainee review and release boards and simply released hundreds of prisoners, but most were bound over for disposition by the Iraqi criminal justice system.

In August 2003, CJTF-7 issued an order, nicknamed “The Mother of All FRAGOs” because of its size and sophistication, which established a review and appeal board as required by Article 78 of the Fourth Geneva Convention.<sup>28</sup> The process was initiated unilaterally, without orders or guidance from any headquarters above the level of CJTF-7 in Iraq. The new Article 78 review and appeal board could not keep pace with the volume of prisoners. It began to meet more frequently and soon expanded in size, eventually to be composed of permanent members whose full-time duty was board service.

The board struggled with commanders’ opposition to release decisions, particularly from 4th Infantry Division, and with its own uncertainty over the meaning of the “imperative reasons of security” standard for internment under Article 78.<sup>29</sup> Over the year of OIF, the standard became more refined and the board required more detailed information concerning the threat posed by the prisoner. Early on, an



imperative threat was presumed if the prisoner had been identified in post-capture screening as possessing intelligence information of value to coalition forces, which under the CFLCC ROE was a basis for detention. The shortage of skilled interrogators meant that the prisoner could remain under “intelligence hold” for weeks or months awaiting meaningful interrogation.<sup>30</sup> Later, the “intelligence hold” was prohibited as a means to establish the “imperative reasons of security” standard. Nevertheless, pressure from commanders not to release prisoners continued, despite briefings to the contrary at commander’s conferences. On the other hand, the CPA frequently demanded the release of prisoners for political or public relations reasons, or based on anecdotal (and often inaccurate) humanitarian bases. The entire Article 78 review and appeal process was under constant tension.

Faced with the reality of continued detention of thousands of criminal detainees and security internees, the CJTF-7 SJA established and chaired the Detention Working Group in July 2003, which brought together legal, military police, military intelligence, medical, engineering and CPA assets in order to try to bring fusion and order to the chaotic situation. The first “Detainee Summit,” held in August 2003 and chaired by the CJTF-7 SJA, identified serious shortfalls in detention operations expertise and recommended requesting additional subject matter experts and the establishment of a Detention and Interrogations Task Force, commanded by a brigadier general. These requests were transmitted to CFLCC and USCENTCOM in August 2003, but were not fully addressed until the creation of Task Force 134 in the spring of 2004.<sup>31</sup> Recognizing that the command was about to be overwhelmed by detainee operations, CJTF-7 requested additional legal support for the detention and interrogation mission in the summer of 2003,<sup>32</sup> as well as changes to the headquarters structure to provide judge advocates to the Joint Interrogation and Debriefing Center at the Abu Ghraib Central Detention Facility.<sup>33</sup> These requirements were not met until the formation of Multinational Forces–Iraq (MNF-I) and Multinational Corps–Iraq (MNC-I) in May 2004.<sup>34</sup>

In the interim, CJTF-7 created an additional legal support cell at Abu Ghraib, using attorneys and paralegals cobbled together from various sources. This cell provided general legal support to the detention mission and specific support to the internment process, including serving internment orders. Instead of sending the experts requested by CJTF-7, USCENTCOM sent an assessment team headed by the Provost Marshal General of the Army to study the situation.<sup>35</sup> The team ultimately produced a report in November 2003 that essentially corroborated and restated the issues and shortfalls previously identified by CJTF-7 months earlier.<sup>36</sup> Also in the fall of 2003, a team led by Major General Geoffrey Miller, former commander of the Guantanamo detention facility, came to Iraq to assess interrogation activities. The team recommended that military police soldiers take a more active

role in setting conditions for interrogations and that experienced interrogators from Guantanamo train the interrogators at Abu Ghraib, many of whom were inexperienced reservists.<sup>37</sup>

In September 2003, judge advocates in Iraq envisioned and championed Operation Wolverine, which proposed the trial of captured Iraqi insurgents by military commission.<sup>38</sup> In October 2003, the proposal was modified to recommend a two-tiered approach, using the newly established Central Criminal Court of Iraq as the forum for most cases and general courts-martial where the cases involved attacks against US victims.<sup>39</sup> The proposal was not endorsed by USCENTCOM; the Secretary of Defense nevertheless approved the concept, but directed that all trials would be held in the Central Criminal Court of Iraq. A CPA order expanded the Court’s jurisdiction and established case referral procedures.<sup>40</sup> Judge advocates and detailed Department of Justice attorneys reviewed case files to identify cases amenable to prosecution. Many files were classified or incomplete. There was real difficulty in turning classified intelligence information into prosecutable evidence, and there was often a paucity of significant information in the first place. However, by November 2003 the process had begun and convictions were eventually obtained for the murder of coalition soldiers and Iraqi civilians.<sup>41</sup>

This great demonstration of the law of armed conflict has been misrepresented by some as operating “beyond the confines” of the Geneva Conventions, because, they claim, CJTF-7 characterized those prosecuted as “unlawful combatants” in the manner of the Guantanamo prisoners.<sup>42</sup> Nothing could be more wrong. CJTF-7 never classified anyone in the manner of the Guantanamo prisoners. It developed and fielded a means to hold insurgents criminally accountable for their warlike acts violating Iraqi law or CPA ordinances committed without benefit of combatant immunity. Those insurgents prosecuted were still “protected persons” under the Fourth Geneva Convention, but they could be prosecuted because they had committed criminal offenses and were not lawful or privileged combatants. They did not meet the criteria of Article 4 of the Third Geneva Convention.<sup>43</sup> This result is not only clearly contemplated by the law of armed conflict, but a result reached only by strict adherence to the Third and Fourth Geneva Conventions, and with the approval of the US Department of Defense and the CPA.

Despite the trials, significant problems with detention continued. Military police support was limited and military police leadership in Iraq was junior and sporadic. Until several months into the occupation, the senior military police officer on the V Corps and CJTF-7 staff was a major. Even when the position of provost marshal was filled by a reserve colonel, his staff was inadequate.

In the summer and fall of 2003, troops dedicated to the detention and internment task were simply overwhelmed. The CJTF-7 SJA chaired a weekly meeting of

military police, military intelligence, engineer, medical, legal and CPA representatives that attempted to synchronize and improve detention activities. Judge advocates did everything in their power to ensure that all prisoners were treated humanely and in accordance with the law. In many cases, judge advocates personally intervened to ensure that military authorities provided prisoners with adequate food, water, hygiene and shelter.<sup>44</sup>

Accountability of prisoners and transparency of the detention and internment system were continuing issues, even with assistance from the CPA. In cooperation with the CPA senior advisor to the Iraqi Ministry of Justice, CJTF-7 provided lists in Arabic of detainees and internees to civil-military operations centers and, in Baghdad, to courts and police stations.<sup>45</sup> Names of detainees and internees were provided to the ICRC through capture cards. However, routine delivery of the cards, as well as frequent interaction with the ICRC, was suspended after the ICRC moved its operations to Jordan in response to safety concerns stemming from the bombing of the United Nations headquarters building in Baghdad on August 19, 2003.

Also in the summer of 2003, the 800th Military Police Brigade, an Army reserve unit trained and validated to perform the detention and internment mission, and commanded by a brigadier general, deployed into Iraq and slowly established its headquarters in Baghdad. The unit was placed under the tactical control of CJTF-7, but remained under the command of CFLCC.<sup>46</sup> Initially viewed as the salvation of CJTF-7 in the areas of detention and internment, it quickly proved to be a disappointment. With few exceptions, the unit seemed unable to actually perform its mission, and breaches in accountability, discipline and standards were frequent.

In part, this was due to the status and composition of the unit. When its reserve component soldiers reached the end of their two-year mobilization commitment, they left the theater for deactivation and were not replaced. Soon after arriving in Baghdad, the experienced deputy commander of the brigade went home without a successor. The brigade command sergeant major, responsible for setting and enforcing soldier standards, was relieved and never replaced. This left the brigade without key senior leaders.

Assigned responsibility to run all larger detention facilities, including Abu Ghraib, and to provide support to the CPA in reestablishing prisons and jails throughout the country, the brigade was also assigned the mission to guard and administer Camp Ashraf, the cantonment area for the Mujahedin-e Khalq organization (MEK). The MEK was a military force of several thousand Iranians who had operated against Iran from bases in Iraq. The MEK was the only large-scale capitulation of the war—and its members weren't even Iraqis! They were, however, on the US list of designated foreign terrorist organizations<sup>47</sup> and CJTF-7 was directed not to process them under the Article 78 review and appeal process. After

a year of interagency wrangling and debate, it was decided that they were simply “protected persons” under the Fourth Convention. During this year, the MEK members were kept under the control of the military police for screening, accountability and protection, a task that would have tested the capability of the 800th Military Police Brigade (or any other brigade) had that been its only mission.

The brigade struggled to maintain basic accountability of detainees and internees, to transport criminal detainees to court hearings and to guard prisoners generally without incident. Brigade soldiers shot several prisoners who had threatened them in crowded temporary detention facilities. In fact, the major reason Abu Ghraib was chosen as a detention facility despite its awful history under the Saddam regime was that it offered the only location in the Baghdad area to safely house prisoners. Judge advocates had been instrumental in locating and assessing the Abu Ghraib prison, and advocating its use for humanitarian reasons.<sup>48</sup>

The impact of special operations and non-military forces on detention operations was neither largely known nor understood at the time. In hindsight, some of the record-keeping and accountability problems experienced by the 800th Military Police Brigade were probably caused by special operations and non-military forces requesting that their prisoners held in conventional forces detention facilities be kept “off the books” and not reported to the ICRC. This problem was discovered by CJTF-7 during preparations for an ICRC visit to Abu Ghraib in January 2004.

After discovering prisoners who were not recorded, the CTJF-7 SJA went to the 205th Military Intelligence Brigade commander, who immediately directed that the prisoners be released from his custody, or properly recorded and reported to the ICRC. This was done the next day. The prisoners remaining in custody were deemed HVDs in a critical phase of interrogation. Accordingly, through the limited partial invocation of that portion of Article 143 of the Fourth Geneva Convention pertaining to imperative military necessity, the ICRC was precluded from conducting private interviews of the internees, but was given their names and allowed to observe them and the conditions of their captivity.<sup>49</sup> Additionally, the ICRC was informed that its delegates would be free to hold private meetings with the internees on any future visit, including a surprise visit.<sup>50</sup> Incredibly, even though the ICRC acknowledged the right of coalition forces to temporarily limit private interviews, this approach has been recklessly characterized by some as a “new plan to restrict” ICRC access to Abu Ghraib.<sup>51</sup>

Some special operations forces not under the command and control of CJTF-7 had their own long-term detention facilities.<sup>52</sup> USCENTCOM remained responsible for technical supervision, including legal supervision, of some special operations activities in Iraq. In almost all areas, CJTF-7 personnel, including judge advocates, were not even “read on” to their activities.

In at least two meetings with Central Intelligence Agency (CIA) representatives, including visiting CIA attorneys, the CJTF-7 SJA informed them of the applicability of the Geneva Conventions in Iraq (“this is not Afghanistan”) and of the CJTF-7 order establishing the detention and internment process.<sup>53</sup> The representatives agreed to abide by the rules. The CJTF-7 legal staff strove to meet with all of the special operations legal advisors who rotated frequently in and out of the country, in order to brief them on the applicability of the Geneva Conventions and CJTF-7 orders in Iraq.

Removal of prisoners from Iraq to other countries was an occasional, but significant, point of friction with the CIA. CJTF-7’s insistence that Article 49 of the Fourth Geneva Convention generally prohibited removing prisoners from Iraq was met with derision and skepticism.<sup>54</sup> On at least two occasions, USCENTCOM issued orders directing CJTF-7 to turn over non-Iraqi HVDs for transport to locations outside Iraq; the written orders were insisted upon by the command after judge advocates identified the issue. Despite its inapplicability in a belligerent occupation regulated by the Geneva Conventions, USCENTCOM continued to invoke the GWOT “global screening criteria” as authority to classify prisoners and to remove them from Iraq.<sup>55</sup> Direct requests from CIA representatives in Iraq were repeatedly declined by CJTF-7, but then renewed with the CPA. On May 2, 2004, the CJTF-7 SJA was summoned to the CIA station in Baghdad and shown a cable recounting standing interagency concurrence with transfers from Iraq as derogations under Article 5 of the Fourth Geneva Convention.<sup>56</sup> CJTF-7 nevertheless refused to alter its position that it would have to be ordered by USCENTCOM to turn over any prisoner for removal from Iraq.

When Saddam Hussein was captured on December 13, 2003, CJTF-7 took the position that he was a prisoner of war, which meant, among other things, that the command was obligated to report his capture to the ICRC and allow the ICRC to visit him. This characterization was met with reluctance, if not resistance, at higher levels, at least in part because of the mistaken notion that his status as a prisoner of war might accord him immunity from prosecution for his pre-capture criminal offenses. Ultimately, CJTF-7 prevailed in its position. Saddam’s status as a prisoner of war was publicly acknowledged and the ICRC visited him in accordance with elaborate security precautions on numerous occasions, as did judge advocates.

Judge advocates helped the command reconcile the juxtaposition of Saddam’s status as a prisoner of war with his status as the war’s most high-profile captive. He was segregated for his own safety and security (as were other HVDs), but information about his capture, physical condition and demeanor was released to the public. As had been done with the bodies of his sons Uday and Qusay on July 24, 2003, a small number of Iraqi political leaders were allowed to observe Saddam under

controlled circumstances in order to corroborate his identity. The public and military advantage to be gained from the observation was weighed against the general admonition of Article 13 of the Third Geneva Convention not to expose prisoners of war to public curiosity.<sup>57</sup> The balance tipped in favor of the observation; if Saddam’s identity had not been confirmed to the satisfaction of the Iraqi people, he would have continued to be a shadow rallying point for the insurgency and his capture would have been dismissed as a hoax. Conversely, the CPA’s insistence that “foreign fighters” should be placed on public display was rebuffed as a violation of the principles of Article 13.<sup>58</sup>

Not all significant prisoner issues were satisfactorily resolved. For example, a prisoner code-named “XXX” was held incommunicado on orders from USCENTCOM and he was neither reported to the ICRC nor subject to its observation. Judge advocates raised the issue of “XXX” early on and CJTF-7 demanded written orders from USCENTCOM to hold him in the specified manner. Periodically, CJTF-7 would request reissuance of the USCENTCOM order. The CJTF-7 SJA requested and received from the Joint Staff and the Department of Defense General Counsel’s Office the authority and rationale for the USCENTCOM order: invocation of the derogation clause in Article 5 of the Fourth Convention concerning forfeiture of the rights of communication.<sup>59</sup> Although attorneys could disagree on the propriety of applying the derogation clause in this case, CJTF-7 had raised the issue and it had been determined at the highest level.

### *Interrogation Policies*

A great deal of criticism has been leveled at the interrogation policies of conventional forces in Iraq.<sup>60</sup> Some of it is justified; most is not. One of the persistent assertions is that CJTF-7 promulgated many confusing and inconsistent interrogation policies.<sup>61</sup> Here are the facts: in 2003 there were two.<sup>62</sup> The first was developed in September 2003 in response to recommendations from Major General Miller’s assessment team, as well as to regulate the interrogation approaches and techniques flowing in from Afghanistan and Guantanamo, and from non-military forces.<sup>63</sup> Many of these techniques appeared to be of the type used to teach interrogation resistance in survival, evasion, resistance and escape (SERE) programs.

The policy was transmitted to the USCENTCOM commander by memorandum stating that, unless otherwise directed, the CJTF-7 commander’s intent was to implement it immediately.<sup>64</sup> Contrary to published reports, USCENTCOM did not direct otherwise.<sup>65</sup> Rather, the judge advocates at USCENTCOM and CJTF-7 engaged in a legal technical channel discourse, during which USCENTCOM (and CJTF-7)

judge advocates raised concerns about the policy. This resulted in CJTF-7's rescission of the policy less than a month after it was issued.<sup>66</sup> This coordination was a great example of legal technical channel coordination concerning an extraordinarily difficult issue, accomplished amid the stress of combat by judge advocates working with inadequate rest under enormous pressure. In less than a month, judge advocates at USCENTCOM and CJTF-7 had worked through and resolved issues that continued to plague the military—and the US government—for several more years, at least until the passage of the Detainee Treatment Act<sup>67</sup> and publication of the new Army field manual on intelligence interrogations.<sup>68</sup>

On October 12, 2003, CJTF-7 implemented a second interrogation policy,<sup>69</sup> which essentially mirrored the interrogation approaches in Army *Field Manual 34-52*<sup>70</sup> and added additional safeguards, approvals and oversight mechanisms. The additions made the CJTF-7 interrogation policy more restrictive than that set forth in the *Field Manual*, which left much more to the judgment and discretion of the interrogator. The October 12 policy actually authorized two fewer techniques than did the *Field Manual*, although it did allow segregation in some instances.<sup>71</sup>

The facts have not prevented the media from exaggerated reporting and essentially blurring Iraq, Afghanistan and Guantanamo, and merging the actions of military and non-military forces. Conventional forces in general, and CJTF-7 in particular, have become, in the words of the old Iraqi saying, “the coat-hanger on which all the dirty laundry is hung.” For example, a *Washington Post* editorial claimed that General Sanchez issued policies authorizing interrogation techniques “violating the Geneva Conventions, including painful shackling, sleep deprivation, and nudity.”<sup>72</sup> This is false. The CJTF-7 policies authorized none of those techniques and did not violate the Geneva Conventions when used with the safeguards and oversight required by the policies.<sup>73</sup>

That said, the September policy, in effect for less than a month, was overbroad and made naive assumptions about some techniques based on assurances from the intelligence community.<sup>74</sup> These deficiencies were corrected in the October policy. Regardless, none of the CJTF-7 interrogation policies ever authorized, and would not allow, the use of shackling, sleep deprivation or nudity (or water boarding or the use of dogs<sup>75</sup> for that matter) as interrogation techniques. In fact, as was concluded by the Army's Chief Trial Judge in her exhaustive analysis of legal support to CJTF-7, had the CJTF-7 interrogation policies been followed, there would have been no abuses at Abu Ghraib.<sup>76</sup>

As an aside, while the entire Abu Ghraib incident is shameful and reprehensible, a point not commonly appreciated is that the individuals depicted being abused in the Abu Ghraib photographs were not security internees; they were criminal detainees—common criminals—who were not being (and would not be)

interrogated in any event. Nevertheless, the Abu Ghraib scandal engulfed CJTF-7 in the late spring of 2004, diluting the command’s focus and sapping its strength. This happened at the same time that al-Sadr’s Shia militia attacked coalition forces; the Sunni insurgency exploded; Al Qaeda in Iraq emerged; Iranian adventurism increased; and key actions had to be taken to end the occupation, disestablish the CPA and enable the interim Iraqi government.

The scandal was a catastrophe.<sup>77</sup> It fueled propaganda for the enemy and was used to give credence to the myth of ambiguity about the applicability of the Geneva Conventions in Iraq. The myth was advanced by soldiers who, facing courts-martial for detainee abuse, asserted that they were confused over the rules (or, for that matter, who tried to raise the defense of superior orders or command policy to justify their actions).<sup>78</sup> Their assertions have been extensively covered and amplified in the media; they are the stuff of books and movies.<sup>79</sup> That the assertions have been spectacularly unsuccessful, despite the opportunity of extensive pretrial discovery to uncover any supporting evidence, has been much less widely reported.

But in fairness there is a point to be made concerning the possibility of confusion at the soldiers’ level. There were soldiers who served in Afghanistan, where rules and principles were relaxed, and then redeployed to Iraq, where the Geneva Conventions fully applied.<sup>80</sup> There were also soldiers who interacted with special operations and non-military forces which operated under relaxed rules and principles, even in Iraq. So, it is possible that some soldiers at the junior level might have been confused about the applicability of the Geneva Conventions, at least until they received the refresher training on the law of armed conflict that was mandated by CJTF-7. But none of those soldiers should have reasonably believed that detainee abuse was ever authorized, and any who had questions should have sought clarification from a responsible leader.

Unfortunately, incidents of detainee abuse fueled inaccurate perceptions that US forces were ill disciplined and that the abuse of detainees was systematic or the norm.<sup>81</sup> The truth is that US forces were disciplined and detainee abuse cases were few.<sup>82</sup> Abu Ghraib was an awful and aberrant exception. It demonstrated the power of pictures<sup>83</sup> and the negative impact of the “strategic corporal.”<sup>84</sup> Most detainee abuse cases occurred at point of capture, where tempers run high, frequently after an IED detonation or a firefight. The thresholds for classifying, reporting and documenting cases as detainee abuse were for a significant time very low in Iraq.<sup>85</sup> This led to an exaggeration of numbers.

Detainee abuse in Iraq, including the abuse at Abu Ghraib, occurred despite, and certainly not because of, military command policies and orders. There were huge problems caused by the sheer numbers of detainees and the unexpected crush of common law criminals. But the real root causes of the problem were the lack of



relevant doctrine and training afforded to military intelligence interrogators; the absence of sufficient capable military police corps detention and correction expertise during the first year in Iraq; the failure of USCENTCOM to plan for, resource, and execute detention and interrogation operations in Iraq, even after previous experience in Afghanistan portended many of the same problems that were later repeated in Iraq;<sup>86</sup> and the broad interrogation authorities granted to non-military forces and to some special operations forces not under the command and control of CJTF-7, some of which were adopted by conventional forces in spite of orders and policies to the contrary.

### *Occupation*

Worse than the inadequate planning and mixed messages on detention and interrogation was the utter confusion caused by the “fog of law” in the occupation of Iraq. The occupation was anticipated at the level of the operating forces. However, higher-level planning was inadequate or did not occur, strategic policy decisions were not made in a timely fashion and the requirements for occupation were not adequately resourced. The problem was not in failing to forecast the occupation as governed by the Fourth Geneva Convention; it was in failing to set the conditions for its meaningful execution. The situation was analogous to the dog chasing the car—the real difficulty comes when he catches it.

In January 2003, US Army, Europe hosted a legal conference in Heidelberg, at which an Israeli judge advocate who had experience in the administration of occupied territory talked about problems likely to face occupation forces. The conference augmented research on occupation law, including the study of materials from the US Army War College and the Center for Military History on US experiences after World War II. Also in early 2003, V Corps conducted an exercise named Victory Scrimmage in Grafenwöhr, Germany. In the exercise and its follow-on, V Corps war gamed what were termed “transitional occupation” issues, problems such as riots, criminal misconduct, looting, humanitarian relief requirements and civilian population movement that would impede offensive operations as coalition forces moved through Iraqi territory. These issues so concerned the V Corps commander, General Scott Wallace, that he directed an immediate follow-on exercise in Grafenwöhr to try to develop responses to the problems.

The result was stunning in several respects. First, it was clear that transitional occupation issues could appreciably slow offensive forces and potentially require substantial additional forces to deal with them. Unfortunately, it was also clear that these additional forces did not exist. V Corps had developed a time-phased force deployment list (TPFDL) over the past year of exercises and mission analyses. The

TPFDL identified the amount and flow of forces necessary to accomplish the mission. In Grafenwöhr, V Corps learned that the corps TPFDL had been scrapped and replaced by a much smaller force. The V Corps commander was deeply concerned about the reduction in combat power. The reduction meant that the V Corps commander had to do a “rolling start” of the ground offensive with forces available and with the expectation that additional divisions would arrive over time, instead of being able to mass all of his forces at once. The V Corps commander was also concerned about the cuts in combat support and combat service support forces, particularly military police units.

Second, Victory Scrimmage and its follow-on demonstrated a potentially huge planning and capability deficit if the assumptions concerning what was called Phase IV, the phase of the operation after decisive combat operations, proved to be invalid. These assumptions were premised on the belief that many Iraqi military forces would capitulate—that is, surrender *en masse* without a fight—and would be available to serve as a constabulary or security force; that Iraqi physical and social infrastructure would remain intact; and that a capable interim Iraqi government, probably under Ahmed Chalabi, would quickly emerge. If these assumptions were invalid (and, of course, every one of them proved to be invalid), and if US forces encountered problems like those identified in Victory Scrimmage (as they did), it was clear that there had to be a plan and resources for a sustained occupation. With regard to assumptions, it seems that the worst was assumed about Iraq’s capabilities and intentions in deciding whether to go to war, and the best case was assumed as to what would happen once coalition forces crossed the Iraqi border.

Accordingly, V Corps dutifully identified numerous issues and requirements pertaining to occupation, and sent them up to higher headquarters. Some of V Corps’ subordinate divisions, particularly 3d Infantry Division, did the same. In the legal arena, these included questions on the content of the occupation proclamation and ordinances, whether some Iraqi judges should be removed from the bench,<sup>87</sup> whether occupation courts with military judges could be convened by commanders and whether parts of the Iraqi Penal Code were to be suspended.<sup>88</sup> On a basic level, V Corps asked for an Iraq country law study and a translated copy of the Iraqi Penal Code. These questions and requests were received sympathetically by CFLCC in Kuwait, and the CFLCC SJA vigorously raised similar issues and questions, and joined in the requests until the war began. Unfortunately, the answer was that there were dedicated Phase IV planning cells at CFLCC and USCENTCOM, and in Washington, D.C., and that all of these matters were being addressed at “the national and coalition level.”

The V Corps commander became so concerned about what was—or wasn’t—being done at the Washington level that he sent the V Corps civilian political

advisor to Washington to sit in on the meetings. Her report was that interagency planning for Phase IV was under way, but that it would not be called an “occupation.” We would not be occupiers but “liberators,” and “the ‘O’ word” was not to be used at all. Of course, this was ludicrous, as occupation is a fact, and the Fourth Geneva Convention and the older Hague Regulations establish the rights and obligations of an occupier as a matter of law.<sup>89</sup> This fact cannot be wished away or dismissed by using the euphemism of “liberator.”

To make matters worse, the Corps’ G-5, the civil affairs officer, had a heart attack in Grafenwöhr and could neither continue in the exercise nor deploy to Kuwait or on to Iraq. He was not replaced by a civil affairs officer. The position of G-5 was instead filled by the G-1, the personnel officer, who was a very competent officer, but a personnel specialist unschooled and inexperienced in civil affairs.

As coalition forces staged in Kuwait, planning for the occupation continued, albeit in a vacuum. In February 2003, the V Corps SJA section gave the corps commander a lengthy briefing on the rights and responsibilities of an occupier. The briefing concluded with the identification of numerous issues about which the operating forces required information and decisions. The V Corps commander directed the staff to coordinate with the Office of Reconstruction and Humanitarian Assistance (ORHA), which had recently established an element in Kuwait city. ORHA was the predecessor to the CPA.

The coordination revealed that ORHA had done little analysis and had devoted few resources to the effort. Not only did the organization not have any answers for V Corps, its staff had little awareness of many of the questions. In fairness, ORHA was designed for consequence management, not for the administration of occupied territory. ORHA assumed that the policy decisions so desperately needed would be issued from Washington.

At the start of combat operations and in the absence of guidance, but based on war-gaming and exercise experience, V Corps issued orders during the march to Baghdad regarding procedures and warnings at checkpoints (after a tragic incident early on in which an entire family had been killed as their van approached a checkpoint without slowing down, despite warning shots);<sup>90</sup> cordon and search operations; curfews; weapons, explosives and fuel possession controls; and the use of force against looters. The problem was that these were all issued as necessary at the tactical level and not as part of any cohesive plan. Efforts to try to address the problem in a comprehensive way were thwarted by a lack of fundamental policy decisions at a higher level. For example, an occupation proclamation and orders to civilians had been staffed, drafted, printed and prepositioned, but no order was ever given to release them.<sup>91</sup>

In Baghdad, there was inadequate troop strength to effectively control the city. The 3d Infantry Division had reached its culminating point. It had fought all the way to Baghdad and was exhausted; it just had little energy left to detain looters or guard key infrastructure. Orders were issued to protect museums, courthouses, police stations, power and water plants, and public records holding areas, but there were simply not enough troops to go around.<sup>92</sup> Even when troops were available, they frankly did not always follow through with their assigned tasks.<sup>93</sup>

For the first few weeks in Baghdad, ORHA was looked to as the occupation authority, although it was clear that only the military had the potential to exercise effective control. Despite its lack of a clear charter and sufficient resources, ORHA had two attributes: it did not interfere with the military and it trusted the judgment of military commanders. During the few weeks of ORHA’s existence, the corps and division commanders were afforded freedom of action to engage the civilian population and restore security. The 101st Airborne Division (Air Assault), commanded by then–major general David Petraeus, was among the most successful in its initiatives to reestablish order and a semblance of normalcy in its assigned area of operations. Significant challenges continued in Baghdad, however.

The military recognized the importance of quickly addressing the issue of Ba’ath Party membership, which included most government workers, as well as teachers. V Corps suggested to ORHA that adopting a status-based policy that would disqualify Ba’ath Party members from government (and coalition forces) employment would cause massive practical problems and be counterproductive to efforts to quickly get the policeman back on the beat, the teacher back in the classroom and the municipal worker back on the street. Instead, V Corps advocated a conduct-based policy that would not prohibit employment of persons solely based on their membership in the Ba’ath Party, but would bar those persons who were suspected of crimes or other misconduct.

The policy required Iraqi government workers to sign an agreement renouncing and denouncing the Ba’ath Party, Saddam Hussein and his regime; promise to obey Iraqi law and military and CPA orders; and get back to work. Vetting of employees would take place over time. Judge advocates authored the conduct-based policy, implemented through an “Agreement to Disavow Party Affiliation.”<sup>94</sup> General Wallace discussed it with retired Lieutenant General Jay Garner at ORHA, and the conduct-based approach with implementing renunciation agreement was approved. Thousands of agreements were printed and distributed, and the policy was implemented.

Less than ten days later, the CPA announced its de-Ba’athification policy, which took exactly the opposite tack.<sup>95</sup> The CPA policy was purely status-based and took thousands of people out of the work force, leaving them essentially unemployable

and disaffected. Like the CPA order dissolving the Iraqi military, it was implemented with absolutely no coordination with the commanders on the ground and no consideration of what was already being done by the military, despite the fact that this decision would have a huge impact on law and order, security and stability, and reconciliation.<sup>96</sup>

The obligations of an occupier exist as a matter of law regardless of what the situation is called or what instrument is used to administer the territory. In this regard, the utility of the CPA is questionable as a matter of fact and suspect as a matter of law (at least until its authority was ratified by the UN Security Council).<sup>97</sup> Occupation is a military duty and the military has historical competence in occupation. The law of occupation is focused on the activities of the military and military government, and on the responsibilities of commanders. This law has developed for good reason.

When the CPA was established as a civilian entity, military commanders suffered a diminution of their authority to administer and exercise the rights of occupation, with no reduction in their legal responsibilities. As a practical matter, placing CJTF-7 in direct support of the CPA violated the military maxims of unity of command and unity of effort.<sup>98</sup> It was not clear who was in charge in Iraq, nor were the relative roles and responsibilities of the CPA and CJTF-7 clear.<sup>99</sup> What was obvious was that there was a diffusion of effort and the squandering of several golden months after a decisive military victory within which time most of the Iraqi population craved firm direction and before any insurgency could meaningfully develop.

The CPA concentrated on transformation outside the historical bounds of occupation: economic reform, developing the Iraqi stock market, reestablishing symphony orchestras and arts programs, judicial reform, building a criminal defense bar and promoting women's rights.<sup>100</sup> Many of these were nice things to do, but most did not contribute to stability and security. At best, many of the CPA's activities, even if successful, were irrelevant; many were setbacks. The CPA's effort to rebuild the Iraqi police force and army was haphazard and handicapped by its earlier dissolution of the Iraqi military. CJTF-7 had to bolster the CPA effort and establish parallel training programs and organizations, such as the Iraqi Civil Defense Corps, in order to field Iraqi security forces.<sup>101</sup>

Worse, some of the CPA's directives were a blatant interference with the military's warfighting mission. These included orders to release dangerous internees because of political considerations and extensive involvement in events in Fallujah in April 2004, including mandating peace talks, which culminated in CPA Administrator Bremer directing the CJTF-7 commander and the USCENTCOM commander, who was then present in Baghdad, to call off the attack on the city.<sup>102</sup> From

the beginning, the CPA took an active role in military matters. On the day Administrator Bremer arrived in Iraq, he announced that US forces would shoot to kill all looters. This announcement was made without any coordination with the military in Iraq and no consideration of the ROE. Of course, the ROE rightly would not allow this and considerable time and effort had to be expended to issue clarifying orders and guidance to put this genie back in the bottle.<sup>103</sup>

The end of the CPA was as confused as its beginning. Its “transfer of sovereignty” to the interim Iraqi government was a complete mischaracterization of the authority the CPA held during the occupation. Occupation does not affect sovereignty and there was no sovereignty, only possession, to transfer back to the Iraqi government.<sup>104</sup>

There were bright spots in the CPA (its legal staff was brilliant). In general, however, it was a policy- and politics-laden bureaucracy that was a drain and distraction to the war effort. It contributed to both the “fog of law” and the “fog of war” in Iraq. In sum, the CPA was more hurtful than helpful.

### *Rule of Law*

Although these were not termed rule of law activities at first, judge advocates began efforts to restore Iraqi judicial capability almost as soon as coalition forces entered the country. Judge advocates assigned to civil affairs units assessed courthouses in Basra and southern Iraq and assessments continued as the war progressed northward. Many court buildings had been looted. In some cases, however, judges and other court personnel had literally (and physically) protected their courthouses by remaining in the structures continuously.

In Baghdad, judge advocates unilaterally “deputized” court personnel as armed court police to guard many buildings and records. Not all buildings could be protected. In the main public records repository building in Baghdad where property and other records were stored, fires had been set in the document storage stacks. Courthouses, public records repositories and police stations were prime targets for arsonists.

Prior to the arrival of the first CPA senior advisor to the Ministry of Justice, there was no cohesive plan for interaction with the Iraqi judicial system. Until the establishment of the CPA, no questions about Iraqi law or the Iraqi legal system had been answered. One of the CPA’s first decisions on the topic was to direct the application of the 1969 Iraqi Penal Code, with some suspended provisions.<sup>105</sup> The CPA also set priorities by directing that US forces were not to convene occupation courts, but would instead concentrate on revitalizing the Iraqi judicial system. On the topic of the Iraqi Penal Code, V Corps did not obtain an official version until it

was in Iraq, and that thanks to the Center for Law and Military Operations at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. In the interim, one of V Corps' judge advocates, who happened to have been an Arabic linguist, had checked out a copy from the Kuwait city public library and began the tedious task of translating the code into English.

Without guidance, immediate actions were taken in accordance with the commander's intent using the Fourth Geneva Convention as a guide. The V Corps SJA went on the radio in Baghdad to order judges and court personnel to return to work. Maneuver unit judge advocates and civil affairs soldiers went all over the country to meet with judges, coax them to the bench and reestablish regular court sessions. This effort, a rudimentary rule of law program, was enthusiastically supported by commanders who saw the reopening of the courts as an essential aspect of restoring security, stability and public confidence.

Judge advocates and civilian attorneys working for the CPA routinely went to Iraqi courts, and even arranged for and executed payroll payments for judges and other Ministry of Justice personnel; they were under fire on a number of occasions as they did so. Later, judge advocates at the corps, division and brigade levels created and staffed Judicial Reconstruction Assistance Teams (called JRATs) and Ministry of Justice Offices (called MOJOs), and for almost a year managed the Baghdad and Mosul court dockets.

Despite these initiatives, rule of law activities in general remained disjointed, with responsibility shared by the CPA, civil affairs units and judge advocates assigned to maneuver units. Locally, rule of law efforts focused on opening Iraqi courthouses and increasing the pace of cases moving through them. Higher-level efforts concentrated on combating judicial corruption and improving the criminal justice system.<sup>106</sup> The CPA and military attorneys expended Herculean efforts and made progress, but synchronization of their efforts was uneven and clear rule of law performance measures and objectives were not defined.<sup>107</sup> Directive authority for overall rule of law activities was not fixed, and SJAs and CPA attorneys engaged in the activities commanded no assets. In the first year in Iraq, there were four CPA senior advisors to the Iraqi Ministry of Justice, not counting acting advisors who filled the gaps. This meant new philosophies, new approaches and redevelopment of personal bonds among all involved parties, including Iraqi ministers and judges.<sup>108</sup>

The lack of a coherent plan for rule of law activities is demonstrated by the arrival in the summer of 2003 of a distinguished team of judicial mentors from the United States. The team traveled around Iraq at great personal risk and presented a security and logistical burden to the military. Frequently unable to meet with Iraqi judges who were in hiding, or to travel to locations because of security concerns,

the team returned to the United States having been frustrated in its mentoring mission. Fundamentally, the team should not have been in Iraq while security conditions were unstable and when Iraqi judges needed to hear one clear message from a single firm voice: return to the bench and move cases. Mentoring and other nuanced activities caused a confusion of message, complicated relationships and did not contribute to the most important task at hand, restoring security.

### *Conclusion*

The “fog of law” is a needless and largely avoidable phenomenon. Soldiers deserve a clear and unambiguous legal framework. While their training and values will in most cases lead to soldiers doing the right thing at the tactical level of combat, they can be negatively impacted by the “fog of law” created at the operational and strategic levels. Its effects can undermine public support, provide propaganda to the enemy, create distractions, and contribute to false assumptions and bad decisions.

The “fog of law” can be lifted by applying these principles:

1. Follow the law. The law of armed conflict, including the Geneva Conventions, has developed over time for reasons of humanity and necessity and is grounded in pragmatism. Old law is still good law; the Geneva Conventions are neither quaint nor obsolete.<sup>109</sup> At a minimum, they can serve as guiding principles even when not applicable as a matter of law. When they do apply as a matter of law, as in Iraq, they have demonstrated their utility and ability to be meaningfully implemented in the new millennium.
2. The viability of the law of armed conflict must be demonstrated and explained to the media and to the civilian population generally. This necessitates public education programs, as well as timely and informed public briefings and reports when incidents occur. In this regard, the military has a practice of thorough investigation while striving to safeguard classified information, with the result being that the facts, as well as the military’s perspective, are not made available to the public until long after the incident’s notoriety has disappeared from public attention. In the interim, the enemy and special interest groups have had unimpeded freedom to manipulate the incident and control the public debate. The military simply must respond more quickly, definitively and publicly to suspected violations of the law of armed conflict or ROE, and to alleged breaches of discipline. There is a stable of pseudo-experts who



are immediately available to provide commentary—often wrong—on such matters. Distinguished outside experts should also be available to explain the law and principles at issue, and the military’s perspective, to the media and public.<sup>110</sup> In appropriate cases, those experts should participate in investigations of high-profile incidents.

3. Disregard history at your peril. Decision makers would have benefited from a thorough study of occupation history, particularly the history of occupation in Germany and the Far East after World War II. It would have informed them greatly and potentially led them to avoid missteps about de-Ba’athification, restoration of law and order, and the resources and decisions necessary to implement an effective occupation. They would have also benefited from an analysis of past counterinsurgency and “nation-building” operations, such as the US occupation of the Philippines after the Spanish-American War, British counterinsurgency operations in Malaya, US military operations generally in Central America in the last century and British operations in Northern Ireland. Study of Israeli warfighting and occupation experience would have been particularly helpful. Among the things they would have discovered is that patience and adaptability are essential, and that missteps and mistakes are inevitable but recoverable.
4. Attempts to conflate the law of armed conflict, particularly the law of belligerent occupation, with human rights law are misguided, as they dilute both and erode the clarity of the well-developed law of armed conflict on which commanders and soldiers are trained. The interjection of human rights law into the wartime legal mix as a separate body of law causes confusion. However, it is equally misguided to completely dismiss the existence of overlaps between human rights law and the law of armed conflict, especially when including the aspects of Additional Protocol I that are customary international law.<sup>111</sup> The overlaps include those non-derogable human rights that are germane to wartime.<sup>112</sup> In those unusual cases where there are conflicts between overlapping human rights law and the law of armed conflict, the latter must prevail under the *lex specialis* rule.<sup>113</sup> In even rarer and more sophisticated cases, there may be gaps between human rights law and the law of armed conflict to which human rights law might apply. However, the application of human rights law in wartime should be a clear exception and occur only where justice necessitates that it address a gap such as when, for example, “the norms

governing belligerent occupation are silent or incomplete.”<sup>114</sup> Otherwise, applying human rights law in wartime creates friction and confusion, while adding little except affording a means to obtain pecuniary damages and publicity. Nations—and legal theorists and politicians—would do well to concentrate on efforts to advance adherence to the law of armed conflict, particularly among non-State actors, before advocating the co-applicability of human rights law in wartime.

5. The principles of war and command, military doctrine, force ratios, troop-to-task ratios, and the military decision-making and orders processes all exist for a reason. Put another way, ignoring these things, whether done by senior military or civilian officials, is asking for trouble. In the legal arena, the long-developed concept of legal technical channels is important. Every SJA needs an SJA, and no attorney involved in military operations should be a solo practitioner.
6. The military must be responsible for occupation and, if necessary, administer occupied territory through a military government. The three most important legal, moral and military objectives in occupation are security, security and security.<sup>115</sup> Conventional wisdom now accepts that there should have been more interagency involvement in Iraq in the first year. This is wrong; in fact, there should have been less non-military presence in Iraq in the first year. There should have been more interagency planning before the war and a more responsive and cohesive interagency decision-making process before and during the war. But in Iraq the situation would have been drastically better had the military simply established a military government in order to stabilize the country, restore security, and reestablish infrastructure and institutions, and allow for the infusion of civilian experts and the re-emergence of an Iraqi government as conditions permitted. If it existed at all, the CPA should have been in support of the military, not vice versa, and the overall coalition occupation authority in Iraq should have been a military commander, perhaps with a civilian deputy or civilian senior advisor. Coalition forces would have had to endure the propaganda that they were occupiers, but how was this avoided by virtue of the CPA?
7. Modest rule of law activities are an essential and immediate instrument for the military to use to help reestablish security, order and public confidence.<sup>116</sup> Rule of law is a vague and relative term that requires clear

definition, assignment of responsibility and resources, and establishment of objectives and performance measures. There is no simple template for rule of law activities; the objectives and performance measures must be relative to the history, culture and reality on the ground.<sup>117</sup> The focus must be on the “Three Ps”: police, prisons and prosecutors (courts). In an occupation, the Fourth Geneva Convention properly limits the scope of rule of law activities. More transformative and sophisticated rule of law activities, such as judicial mentoring, building a public defender system or helping to improve substantive law and procedure, should be delayed until security, legal and practical conditions permit.<sup>118</sup>

8. You play as you practice. For the military, this means that exercises must not end with the defeat of the enemy’s military forces and intelligence preparation of the battlefield must include an analysis of the capability of the systems of government and public administration, as well as the enemy’s order of battle. As much intellectual effort must go into planning for activities after decisive combat operations as is put into planning for fires and maneuver. This would include updating military doctrine and expanding the resources and capabilities for civil administration, military government and civil affairs in general.
9. There is a random spotlight of accountability for mistakes and misjudgments—whether real, exaggerated or even fabricated. The “fog of war” in battle is nothing compared to the fog of politics on Capitol Hill. This is unfair and capricious, particularly to professional soldiers who are political agnostics. In the legal arena, there has developed an unforeseen dark underbelly to operational law, and that is the notion that the SJA in the field is the “Guarantor General,” the one person in the command who is somehow expected to have total awareness and perfect knowledge, to be read in to all activities, and to have the duty to identify, resolve and report all problems.<sup>119</sup> In general, conventional forces will continue to be held to account for the misconduct of special operations and non-military forces.
10. There cannot be different legal standards for soldiers and non-military forces, or even for soldiers operating in different operations or campaigns. It is too easy for the standards to be blurred and, as was the

case with interrogation policies between Afghanistan and Iraq, to migrate (perhaps a better term is to metastasize).

11. Some unified command SJAs should be general or flag officers, and selected judge advocate general and flag officers assigned to posts in the United States should be reassigned as legal advisors to commands in Iraq and Afghanistan. Most unified command SJA offices should be substantially larger and more capable. Despite some simply wrong assertions to the contrary,<sup>120</sup> judge advocates are a respected and proper source for legal and policy advice at all levels, and their presence and role with the operating forces sends a powerful message about a nation’s commitment to the law of armed conflict.<sup>121</sup>
12. National leaders set a tone that can reach the individual soldier in the field. Whether in the executive or legislative branch, leaders should consider the impact of their words. It is as reckless for a politician to suggest that the law of armed conflict is no longer relevant as it is to suggest that torture and detainee abuse were pervasive in Iraq. Those responsible for setting national legal policies and tone would do well to hold themselves to the standard set for all coalition forces personnel in Iraq in 2003: “Respect for others, humane treatment of persons not taking part in hostilities, and adherence to the law of war and rules of engagement is a matter of discipline and values. It is what separates us from our enemies. I expect all leaders to reinforce this message.”<sup>122</sup>

### *Notes*

1. “The great uncertainty of all data in war is a particular difficulty, because all action must, to a certain extent, be planned in a mere twilight, which in addition not infrequently—like the effect of a fog or moonshine—gives to things exaggerated dimensions and unnatural appearance.” CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret eds. & trans., Princeton University Press 1989) (1832).

2. The “fog of law” has been identified in other contexts, but application of the term to Iraq, and its corrosive effect in combat, was also noted by Professor Yoram Dinstein at the US Naval War College’s 2009 International Law Conference, from which this “Blue Book” derives.

3. In November 2003, 154 officers (mostly judge advocates) and 180 paralegal non-commissioned officers (NCOs) and soldiers of the US Army’s Judge Advocate General’s Corps alone served in Iraq. Forty-one of the judge advocates and fifteen of the paralegal NCOs and soldiers were reservists. Briefing to The Judge Advocate General, US Army, CJTF-7 Legal Operations (Nov. 5, 2003).

4. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003), *reprinted in* 42 INTERNATIONAL LEGAL MATERIALS 1016; *see also* YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 12 (2009).

5. The law of armed conflict, including the Geneva Conventions and Hague Regulations, was cited in the legal annexes or appendices to the base operations plans and orders (Cobra II, most prominently), as well as in fragmentary orders that instructed soldiers to comply with the law of armed conflict. Representative of the orders were

(1) Fragmentary Order 946 (S) to CJTF-7 OPORD 03-036, dated 080425 OCT 03, which distributed the CJTF-7 Policy Memorandum to All Coalition Forces Personnel, Proper Treatment of the Iraqi People During Combat Operations (Oct. 5, 2003) [hereinafter Proper Treatment of the Iraqi People]. The order reemphasized adherence to the law of armed conflict (“the law of war”), directed that all coalition forces personnel would treat persons under their control with dignity and respect, and required dissemination of the memorandum down to the platoon level.

(2) Fragmentary Order 70 (S) to CJTF-7 OPORD 04-01, dated 160205 JAN 04, which reissued the October 5 memorandum and directed that all leaders reinforce its message.

(3) Fragmentary Order 388 (S) to CJTF-7 OPORD 04-01, dated 062325 MAR 04, which issued the “Rules for Proper Conduct During Combat Operations,” reemphasized the responsibility of all coalition forces personnel to treat all persons with dignity and respect, reiterated the obligation of all coalition forces personnel to follow the law of armed conflict (“the law of war”), and directed that commanders and leaders use published training vignettes to train all personnel on these topics.

6. Letter from CJTF-7 Commander to Mr. Jean-Daniel Tauxe, Head of Delegation, ICRC Baghdad (Sept. 6, 2003) [hereinafter CJTF-7 Letter].

7. Memorandum from President George W. Bush to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* [http://www.aclu.org/files/assets/02072002\\_bushmemo\\_1.pdf](http://www.aclu.org/files/assets/02072002_bushmemo_1.pdf).

8. Report of Senate Committee on Armed Services, Inquiry into the Treatment of Detainees in U.S. Custody, 110th Cong., 2d Sess. (Nov. 20, 2008).

9. The first indication was an August 2003 request from Alpha Company, 519th Military Intelligence Battalion for a review of interrogation techniques that were similar to those used in US survival, evasion, resistance and escape training. They were subsequently discovered to have been used by that unit with higher command approval in Afghanistan. The second indication was reporting from the ICRC which, unfortunately and for a number of reasons, was not given sufficient credence or attention.

10. *See, e.g.*, General Tommy Franks, Freedom Message to the Iraqi People (Apr. 16, 2003) (“Coalition Forces in Iraq have come as liberators, not as conquerors . . .”).

11. US Deputy Secretary of Defense Memorandum, Global Screening Criteria for Detainees (Feb. 20, 2004) [hereinafter Global Screening Criteria].

12. Co-applicability of human rights law and the law of armed conflict is not an assertion limited to legal activists. It is a conclusion that has been reached by courts, including the International Court of Justice and the European Court of Human Rights. *See* DINSTEIN, *supra* note 4, at 69–71.

13. “The Soldier’s Rules” are restated in Headquarters, Department of the Army, AR 350-1, Army Training and Leader Development para. G-21 (2009):

(1) Soldiers fight only enemy combatants.

(2) Soldiers do not harm enemies who surrender. They disarm them and turn them over to their superior.

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- (3) Soldiers do not kill or torture any personnel in their custody.
- (4) Soldiers collect and care for the wounded, whether friend or foe.
- (5) Soldiers do not attack medical personnel, facilities, or equipment.
- (6) Soldiers destroy no more than the mission requires.
- (7) Soldiers treat civilians humanely.
- (8) Soldiers do not steal. Soldiers respect private property and possessions.
- (9) Soldiers should do their best to prevent violations of the law of war.
- (10) Soldiers report all violations of the law of war to their superior.

14. The law of armed conflict was an express or implied topic at all V Corps and CJTF-7 commander’s conferences in Iraq during OIF, starting with the first one at Camp Victory in Baghdad in May 2004. All division and separate brigade commanders attended the conferences, along with the V Corps, then CJTF-7, senior staff. The March 27, 2004 conference, for example, included a presentation and discussion on “proper conduct during combat operations.”

15. The training package was informally coordinated with the ICRC in Baghdad and issued by Fragmentary Order 388 to CJTF-7 OPOD 04-01, dated 062325 Mar 04. The order redistributed CJTF-7 Policy Memorandum Number 18, Proper Conduct During Combat Operations (Mar. 4, 2004), and added mandatory vignette-driven training on specific rules, including

- (1) Follow the law of war.
- (2) Use discipline in the use of force.
- (3) Treat all persons with humanity, dignity and respect.
- (4) Use judgment and discretion in detaining civilians.
- (5) Respect private property.
- (6) Treat journalists with dignity and respect.

16. CFLCC ROE Pocket Card, 252030 Nov 03. The pocket card, required to be carried at all times by US coalition forces personnel, states the following general rules:

- (1) Treat all persons with respect and dignity.
- (2) Conduct yourself with dignity and honor.
- (3) Comply with the law of war. If you see a violation, report it.

17. Marc L. Warren, *Operational Law: A Concept Matures*, 152 MILITARY LAW REVIEW 33, 52 (1996).

18. The change in April 2004 was to make the Mahdi Army a declared hostile force. However, new CFLCC pocket cards were not issued, since the unclassified cards referred generically to “enemy military and paramilitary forces.” (On April 29, 2003, USCENTCOM issued Supplemental ROE Measures that changed the combat ROE to the Phase IV (Civil-Military Operations) ROE; the order was rescinded the same day.)

19. CFLCC ROE Pocket Card, *supra* note 16.

20. Consider, e.g., the case of the Palestine Hotel in Baghdad, where two civilian cameramen were killed in an explosion caused by a round from the main gun of a US Abrams tank on April 8, 2003. The unit of which the tank was a part had been engaged in significant urban fighting, including repulsing an enemy counterattack on the day of the incident, and had received reports of enemy forward observers in high-rise buildings on the east side of the Tigris River. As the tank crossed the Al Jumhuriya Bridge, its crew spotted, and fired one round at, what appeared to be an enemy forward observer, but was in fact a civilian cameraman. The explosion killed Spanish cameraman Jose Couso and Reuters cameraman Taras Protsyuk, and wounded

three other journalists. US forces conducted an investigation and determined that the Palestine Hotel had been fortified by the enemy and was occupied by the enemy. The cameraman had been misidentified as an enemy forward observer, which was a reasonable mistake under the circumstances. The single round that killed the cameraman was thus fired with a reasonable certainty that the target was a legitimate military target, satisfying the requirements of the ROE, PID, and law of armed conflict. Nevertheless, the incident garnered criticism (*see, e.g.,* Committee to Protect Journalists, *Five years after deadly Palestine Hotel and Al-Jazeera strikes, unanswered questions linger* (Apr. 7, 2008), <http://cpj.org/2008/04/five-years-after-deadly-palestine-hotel-and-aljaze.php>) and led to criminal action by Spanish authorities seeking to hold the tank crew criminally accountable for the death of the Spanish cameraman.

21. The Mahdi Army was declared a hostile force on April 6, 2004. DONALD P. WRIGHT & TIMOTHY R. REESE, ON POINT II: TRANSITION TO THE NEW CAMPAIGN, THE UNITED STATES ARMY IN OPERATION IRAQI FREEDOM MAY 2003–JANUARY 2005, at 324 (2008), *available at* <http://www.globalsecurity.org/military/library/report/2008/onpoint/index.html> [hereinafter ON POINT II].

22. The US Army’s history of OIF deals with the issue deftly and diplomatically: “The multinational units that had responsibility for the southern Shia cities—the Spanish, Salvadorans, and Ukrainians—were few and not prepared to act quickly against the uprising.” *Id.*

23. *Id.* at 249.

24. Initially a five-day standard, review of detentions by a judge advocate magistrate was accelerated to seventy-two hours in the summer of 2003. Neither standard was required by law and both exceeded the standards imposed by Article 78 of the Fourth Geneva Convention, which requires only that decisions regarding internment shall be made according to a regular procedure that affords a right of appeal, to be decided with the least possible delay and, if denied, to be subject to periodic review conducted, if possible, every six months by a competent body. Convention Relative to the Protection of Civilian Persons in Time of War art. 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 301 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter GC]. US forces should have stressed that the reviews were neither required by law nor intended to be viewed as a right or as customary. The requirements of Article 78 were satisfied by the process specified in the “Mother of All FRAGOs.” ON POINT II, *supra* note 21, at 249.

25. ON POINT II, *supra* note 21, at 248.

26. Parole agreements and guarantor agreements were used with mixed success as a means to release internees who were thought to present a continuing, but manageable, threat. The former would be signed by the internee at release; the latter would be signed by a person who was willing to assume responsibility for the released internee, usually a tribal elder. Significantly, while many prominent Iraqis would advocate for an internee’s release, few would be willing to serve as a guarantor.

27. Article 5 states, in pertinent part:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 24, at 244 [hereinafter GPW].

28. The FRAGO was issued on August 25, 2003 and replaced an earlier version issued on June 28, 2003. ON POINT II, *supra* note 21, at 248, 249.

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29. The “imperative reasons of security” standard is not elaborated upon or defined in the article itself or in the official commentary to the Fourth Geneva Convention. COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 367 (Jean S. Pictet ed., 1958) [hereinafter ICRC COMMENTARY]. See also DINSTEIN, *supra* note 4, at 172–76.

30. The “intelligence hold” was not a category of detainee, but a descriptive term often used to satisfy the Article 78 “imperative reasons of security” requirement. Because of the accelerated pace of detentions and the shortage of interrogators, the number of detainees on intelligence hold grew from fewer than one hundred in July 2003 to more than twelve hundred in January 2004. ON POINT II, *supra* note 21, at 208.

31. *Id.* at 265.

32. In the summer of 2003, USCENCOM denied requests for additional judge advocates. Meanwhile, mobilized reservists and CFLCC legal assets flowed out of Iraq, despite a burgeoning need for legal support. The CJTF-7 headquarters in general was chronically under-resourced. *Id.* at 157–61.

33. The fall 2003 proposal to make judge advocates part of the JIDC Joint Manning Document was not addressed until the spring of 2004.

34. ON POINT II, *supra* note 21, at 176.

35. Major General Donald Ryder, Assessment of Corrections and Detention Operations in Iraq (Nov. 6, 2003).

36. “A report that merely documents the problem will not be helpful.” Memorandum from CJTF-7 Commander to Commander, USCENCOM, Detention and Corrections Operations, Request for Assistance (Aug. 11, 2003).

37. ON POINT II, *supra* note 21, at 209, 210.

38. The genesis was an incident in which two soldiers of the US Army’s 4th Infantry Division had been captured by insurgents at a checkpoint and then executed, their bodies dumped by the side of the road. The author flew to the scene with Lieutenant General Sanchez and there concluded that the command had to develop a legal process that could hold the perpetrators criminally accountable.

39. Memorandum from CJTF-7 SJA through Commander, CJTF-7, to Commander, USCENCOM, on Prosecuting Iraqis for Security Offenses Against Coalition (Oct. 21, 2003).

40. CPA Order Number 13 (Revised) (Amended), The Central Criminal Court of Iraq, CPA/ORD/X2004/13 (Apr. 22, 2004), available at <http://www.cpa-iraq.org/regulations/> (then The Central Criminal Court of Iraq (Revised) (Amended) hyperlink). The revised amended order contains the following language at section 19(1): “Prior to 1 July 2004, the Administrator retains the authority to refer cases to the CCCI [Central Criminal Court of Iraq]. . . . Cases referred by the Administrator will have priority.”

41. Court sessions began in the late fall of 2003, but were hampered by a shortage of resources available to review and process cases. The pace quickened with the arrival of attorneys, paralegals and investigators of the Joint Services Law Enforcement Team in the spring of 2004. By July 2004, the CCCI had held thirty-seven trials for fifty-five defendants. ON POINT II, *supra* note 21, at 265.

42. JAMES R. SCHLESINGER, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 82, 83 (2004) [hereinafter Schlesinger Report]. The report confused the term “unlawful combatant” used by CJTF-7 with the term “enemy combatant” used at Guantanamo. It is simply wrong when it states that “CJTF-7 concluded it had individuals in custody who met the criteria for unlawful combatants set out by the President and extended it in



Iraq to those who were not protected as combatants under the Geneva Conventions, based on [Office of Legal Counsel] opinions.” *Id.* at 83.

43. Article 4 of the Third Geneva Convention establishes the criteria for prisoner of war status. The portion of Article 4A relevant to operations in Iraq after May 2003 states that prisoners of war include

(2) [m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

GPW, *supra* note 27, art. 4A(2).

44. ON POINT II, *supra* note 21, at 244. Judge advocates led the efforts to improve the Camp Cropper detention facility at the Baghdad International Airport and wrote orders to get tents, generators and other equipment for detention facilities throughout Iraq.

45. CJTF-7 Letter, *supra* note 6. By February 2004, the CPA had fielded an English and Arabic website, available to the public, that listed names and other key information pertaining to internees and detainees. ON POINT II, *supra* note 21, at 204.

46. ON POINT II, *supra* note 21, at 243.

47. The MEK remains on the list six years later. US Department of State, List of Designated Foreign Terrorist Organizations, July 7, 2009, <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

48. Abu Ghraib was the only sizeable prison in the Baghdad area that remained largely intact, the rest having been looted to their bare foundations.

49. Article 143 of the Fourth Geneva Convention provides that representatives or delegates of the protecting powers “shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter. Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.” GC, *supra* note 24, art. 143.

50. The ICRC delegates accepted these conditions and made a return surprise visit in March 2004, when they were allowed to conduct private interviews with all of the detainees, except for one individual to whom access was erroneously denied. After the ICRC rightfully complained to the CJTF-7 SJA, the CJTF-7 C-2 directed that the ICRC be given unimpeded private access to the detainee. Department of the Army, Preliminary Screening Inquiry Report, Investigation of Legal Operations in CJTF-7, at 8 (Jan. 25, 2005) [hereinafter Preliminary Screening Inquiry Report].

51. Attachment A, paragraph (u) to congressional subpoena proposed by Senators Leahy and Feinstein, “Memorandum for MP and MI Personnel at Abu Ghraib from Colonel Marc Warren, the top legal advisor to Lt. General Ricardo Sanchez, New Plan to Restrict Access to Abu Ghraib (Jan. 2, 2004).” (The subpoena was defeated by the Senate Judiciary Committee on June 17, 2004.) There was no such document. In fact, every effort was being made in January 2004 to support and enable the ICRC’s pending visit to Abu Ghraib after the disastrous visit in November 2003 (at which no judge advocates were present).

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52. In December 2003, Colonel (retired) Stuart Herrington visited Iraq at the request of the US Department of Defense and gave a report to CJTF-7 that contained firsthand observations of abuse of detainees in a special operations detention facility. CJTF-7 sent the report to USCENTCOM, with the reminder that neither the command nor the facility at issue was under the command and control of CJTF-7. After some delay, USCENTCOM directed that CJTF-7 investigate the matter. This was done over protest. CJTF-7 had no superior command authority and its investigating officer was neither “read on” to the activities nor given full access to the facilities. The predictable (and predicted) result was that the investigation was inconclusive. The facility merited investigation and oversight. See Eric Schmitt & Carolyn Marshall, *Task Force 6-26: Before and After Abu Ghraib, a U.S. Unit Abused Detainees*, NEW YORK TIMES, Mar. 19, 2006, at A1.

53. These meetings took place in August 2003 and on January 21, 2004.

54. The first paragraph of Article 49 states: “Individual or mass forcible transfers, as well as *deportations of protected persons* from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, *are prohibited, regardless of motive*” (emphasis added). This appears to be a total prohibition. This conclusion is reinforced in the official commentary to the Fourth Geneva Convention: “The prohibition is absolute and allows of no exceptions . . .” ICRC COMMENTARY, *supra* note 29, at 279. However, persons may leave voluntarily or may be excluded. Exclusions occur most prominently in the case of infiltrators, such as persons who had entered Iraq unlawfully to take part in a *jihād* against coalition forces. “Infiltrators are simply not shielded by the Convention as protected persons.” DINSTEIN, *supra* note 4, at 167. Exclusion could also be argued for persons such as the Palestinian terrorist Abu Abbas, who hijacked the cruise ship *Achille Lauro* and murdered US citizen Leon Klinghoffer in 1985. Abbas had been given sanctuary by Saddam Hussein and was living in Baghdad when captured by US forces. Had he not died of a heart attack while in custody in Iraq, he should have been amenable to removal from Iraq to face trial in the United States. A strong argument can be made that Article 49 could not have been intended to insulate criminals from the process of law in the manner of an extradition, especially where the crime occurred outside of the occupied territory and before the occupation. For a discussion of deportations and exclusions generally and the Israeli practice specifically, see *id.* at 160–68.

55. Global Screening Criteria, *supra* note 11.

56. Reliance in this circumstance on the broad derogation contained in the first paragraph of Article 5 appears to be misplaced. The first paragraph reads, “Where in the territory of a Party to the conflict . . .” The next paragraph begins, “Where in occupied territory . . .” The first paragraph thus refers to the territory of the occupying power, the second to occupied territory. Accordingly, the broad derogation resulting in the forfeiture of rights does not apply in occupied territory. Rather, only the more limited forfeiture of the “rights of communication under the present Convention” applies in occupied territory, and then only to “spies and saboteurs” and persons “under definite suspicion of activity hostile to the security of the Occupying Power.” These categories certainly include insurgents captured in Iraq. Even still, the limited forfeiture was used sparingly by US coalition forces, and is still subject to the admonitions and requirements of the third paragraph of Article 5. GC, *supra* note 24, art. 5. See also DINSTEIN, *supra* note 4, at 63. A more accurate position would have been that the removal was the exclusion of a person not protected by the Fourth Geneva Convention, rather than of a protected person subject to derogation under Article 5. See *supra* note 54.

57. GPW, *supra* note 27, art. 13.

58. *But see* DINSTEIN, *supra* note 4, at 167: “Infiltrators are simply not shielded by the Convention as protected persons.” Moreover, the foreign fighters were not accorded prisoner of war status.

59. The derogation is in the second paragraph of Article 5, which states:

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

GC, *supra* note 24, art. 5.

60. *See, e.g.*, Schlesinger Report, *supra* note 42, at 61.

61. Major General George Fay & Lieutenant General Anthony R. Jones, Article 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade (2004), *available at* [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf).

62. There was a third CJTF-7 memorandum on interrogation and counter-resistance policy issued on May 13, 2004. That memorandum remains classified as of the date of this writing.

63. Memorandum from Commander, CJTF-7, on Interrogation and Counter-Resistance Policy to Commander, US Central Command (Sept. 14, 2003), *available at* <http://cup.columbia.edu/media/3738/jaffer-blog.pdf>.

64. *Id.*

65. *See, e.g.*, Schlesinger Report, *supra* note 42, at 37; Senate Armed Services Committee Report, *supra* note 8.

66. Preliminary Screening Inquiry Report, *supra* note 50, at Tab 43 (Statement of Major Ricci-Smith).

67. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005). The Act is no panacea, however, as it continues to sanction “a parallel U.S. standard of detainee treatment and interrogation.” David E. Graham, *The Dual U.S. Standard for the Treatment and Interrogation of Detainees: Unlawful and Unworkable*, 48 WASHBURN LAW JOURNAL 325, 346 (2009).

68. Headquarters, Department of the Army, FM 2-22.3, Human Intelligence Collector Operations (2006), *available at* [http://www.fcml.org/pdfs/civ\\_liberties/Field\\_Manual\\_Sept06.pdf](http://www.fcml.org/pdfs/civ_liberties/Field_Manual_Sept06.pdf).

69. Memorandum from Commander, CJTF-7, on CJTF-7 Interrogation and Counter-Resistance Policy to CJTF-7, C-2 et al. (Oct. 12, 2003), *available at* <http://www1.umn.edu/humanrts/OathBetrayed/Taguba%20Annex%2028-A.pdf>.

70. Headquarters, Department of the Army, FM 34-52, Intelligence Interrogation (1992), *available at* <http://www.fas.org/irp/doddir/army/fm34-52.pdf>. Although the 1992 version of the manual was in effect in 2003, judge advocates in Iraq used the 1987 version that was furnished to them by the CJTF-7 C-2 (Military Intelligence) section. Headquarters, Department of the Army, FM 34-52, Intelligence Interrogation (1987), *available at* [http://www.loc.gov/rr/frd/Military\\_Law/pdf/intel\\_interrogation\\_may-1987.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/intel_interrogation_may-1987.pdf). It was that version that was posted at the time on the official US Army publications website. Some investigators have concluded that the difference between the two versions was significant because the 1987 manual advised interrogators to “appear to be the one who controls all aspects of an interrogation, to include the lighting, heating and configuration of the interrogation room, as well as food, shelter, and clothing” given to detainees. *Id.* at 3-5. This language was omitted from the 1992 version and its inclusion in the CJTF-7 interrogation policy “clearly led to confusion on what practices were acceptable.” Schlesinger Report, *supra* note 42, at 38. The conclusion is highly debatable, however, for at least two reasons. First, to assume that interrogators would study the text of a referenced manual presupposes an unlikely level of research and scholarship on their part. Second, since the 1987

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manual applied to prisoner of war interrogations fully regulated by the Geneva Conventions, either the language was legally objectionable when promulgated (which is unlikely) or it refers only to the perception of the person being interrogated (“the interrogator should *appear* to be the one who controls all aspects of the interrogation”) and it applies only to the control of aspects of the interrogation *above those required to satisfy the Geneva Conventions*.

71. Segregation in excess of 30 days required the approval of the CJTF-7 commander, after concurrence by the C-2 and legal review by the SJA. Legal Advisor to Chairman, Joint Chiefs of Staff, Interrogation Techniques Comparison Chart, May 2004.

72. Editorial, *A General’s Dishonor*, WASHINGTON POST, Jan. 15, 2006, at B6.

73. “Neither the 14 September nor the 12 October CJTF-7 interrogation policies violated the Geneva Conventions.” Preliminary Screening Inquiry Report, *supra* note 50, at 5.

74. The September (and subsequent) policies were staffed in the headquarters and with subordinate commands. In the staffing process, the term “stress positions” was discussed and was understood to have a different meaning in Iraq than elsewhere because of the application of the Geneva Conventions. Specifically, the example cited for the term was ordering a detainee to stand at attention or to remain sitting during an interrogation. During one staff discussion, a judge advocate asked a senior interrogator what would happen if a detainee refused the order. The interrogator answered, “Nothing. We can’t touch a detainee.” In fact, the September policy limited a “stress position” to one hour in duration and mandated that any technique must be “always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators.”

75. Military working dogs were authorized to provide security only, and had to be muzzled and under the positive control of a dog handler at all times. The infamous photographs of dogs snarling at a kneeling detainee at Abu Ghraib depicted military working dogs being used to quell a prison riot, not being used in an interrogation session.

76. “The CJTF-7 written interrogation policies did not cause or contribute to the abuse of detainees at Abu Ghraib. Had the policies been followed, the abuse would not have occurred. Abuse occurred in spite of the policies.” Preliminary Screening Inquiry Report, *supra* note 50, at 6.

77. Charles J. Dunlap Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?*, 54 JOINT FORCE QUARTERLY, 3d Quarter 2009, at 34.

78. See, e.g., Eric Schmitt, *Iraq Abuse Trial Is Again Limited to Lower Ranks*, NEW YORK TIMES, Mar. 23, 2006, at A1.

79. See, e.g., GHOSTS OF ABU GHRAIB (Roxie Firecracker Film, HBO Documentary Film, 2007); and PHILIP GOUREVITCH & ERROL MORRIS, STANDARD OPERATING PROCEDURE (2008).

80. Ian Fishback, Editorial, *A Matter of Honor*, WASHINGTON POST, Sept. 28, 2005, at A21.

81. Although there was much exaggeration about detainee abuse, there were confirmed incidents and one case is too many. Perhaps the most disturbing—and extreme—case was the death of Iraqi Major General Abed Hamed Mowhoush during interrogation in November 2003, for which a US Army warrant officer was later convicted of negligent homicide. Josh White, *U.S. Army Officer Convicted in Death of Iraqi Detainee*, WASHINGTON POST, Jan. 23, 2006, at A2.

82. Through the first year of OIF, there were ninety-four “confirmed or possible” cases of prisoner abuse out of more than fifty thousand prisoners; 48 percent had occurred at point of capture. Inspector General, Department of the Army, Detainee Operations Inspection, at iv (July 21, 2004), available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20040721.pdf>. In all operations throughout the world, for calendar years 2002 through 2005, a total of 223 US Army soldiers had received adverse action (court-martial, non-judicial punishment, reprimand, separation or relief) for misconduct related to prisoner abuse. Department of the Army, Briefing, Detainee Abuse Disposition by Year Abuse Reported (2006).

83. In January 2004, after the Abu Ghraib photographs were turned over to the command, and before they were publicly known, the author informed ICRC delegates in Baghdad of the existence of the photographs, that the circumstances would be investigated and those responsible would be prosecuted, and that the command would tell the media about the abuse and about the existence of the photographs. (CJTF-7 informed the media in Baghdad about the abuse and the photographs in January 2004, some three months before the media frenzy ignited by the airing of the photographs on CBS's *60 Minutes II*.)

84. The term "strategic corporal" refers to "the devolution of command responsibility to lower rank levels in an era of instant communications and pervasive media images." Lynda Liddy, *The Strategic Corporal – Some Requirements in Training and Education*, AUSTRALIAN ARMY JOURNAL, Autumn 2005, at 139, 139, available at <http://smallwarsjournal.com/documents/liddy.pdf>. Of course, this responsibility may be exercised in a positive or negative fashion, each with magnified implications.

85. For a time, the reporting included all reported and suspected cases of detainee abuse, which meant that any complaint by a detainee was entered into the database, without regard to any legal or law enforcement threshold. During the period when the author participated in the weekly briefing to the Secretary of the Army concerning the topic of "detainee abuse," this low standard meant that cases tracked included complaints by detainees that the air conditioning had broken on a bus transporting them from Camp Bucca in southern Iraq to Baghdad. Moreover, some special interest groups would often jump to the conclusion that all detainee deaths in US custody were attributable to abuse or that all cases listed as "homicide" on criminal case reports were murders by US forces. (In fact, a "homicide" could be murder by another detainee or justifiable self-defense by a US soldier.)

86. After two detainees died in US forces custody at the Bagram, Afghanistan detention facility in December 2002, an investigation was conducted that found, among other problems, that the relationship between military intelligence interrogators and military police guards was blurred, that command and control of detention operations was not adequately defined, and that interrogation and disciplinary rules were not clear. These were exactly the problems repeated a year later in Iraq. Although the report of the investigation was known at USCENTCOM, it was not passed on to CJTF-7 and apparently no steps were taken to guard against recurrence in Iraq of the problems it documented.

87. Removal of judges is a prickly area, governed by Article 54 of the Fourth Geneva Convention, which affords special protection to public officials and judges by prohibiting the imposition of sanctions or other coercive measures against judges who "abstain from fulfilling their functions for reasons of conscience." GC, *supra* note 24, art. 54. However, Article 54 is tempered by its second paragraph reserving the right of the occupying power to remove public officials from their posts and by its explicit reference to Article 51, which accords the occupying power the right to order adult public servants to return to work. That the term "public officials" in Article 54 includes judges is clearly stated in the official commentary to the Fourth Geneva Convention. ICRC COMMENTARY, *supra* note 29, at 308.

88. Article 43 of the Hague Regulations states, in pertinent part, that the occupying power shall take measures to restore and ensure public order and safety, "while respecting, unless absolutely prevented, the laws in force in the country." Regulations Respecting the Laws and Customs of War on Land, Annexed to Convention No. II with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803; and Regulations Respecting the Laws and Customs of War on Land, annex to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 24, at 69. This rule is repeated in Article 64 of the Fourth Geneva Convention: "The penal laws of the occupied

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territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.” GC, *supra* note 24, art. 64. In June 2003, the CPA suspended certain provisions of the 1969 Iraqi Penal Code “that the former regime used . . . as a tool of repression in violation of internationally recognized human rights standards” and suspended capital punishment. CPA Order Number 7, Penal Code, CPA/ORD/9 June 2003/07 (June 10, 2003), *available at* <http://www.cpa-iraq.org/regulations/> (then Penal Code hyperlink).

89. Headquarters, Department of the Army, FM 27-10, The Law of Land Warfare para. 355 (1956) (“Occupation is a question of fact”).

90. Checkpoint shootings plagued coalition forces. Judge advocates worked hard to find innovative ways to compensate civilians who had been inadvertently injured by US troops. The US Foreign Claims Act would not allow the payment of claims arising from broadly construed combat activities, such as most checkpoint shootings. Judge advocates convinced USCENTCOM to reverse its position prohibiting *solatia* or gratuitous payments, and helped draft the enabling language for the newly created Commanders’ Emergency Response Program so as to allow payments for unintended combat damage. Judge advocates also established a meaningful foreign claims program after advocating that the Army, not the Air Force with its limited resources in country, should have single-service claims responsibility for Iraq.

91. An occupation proclamation is declaratory only and not legally necessary. DINSTEIN, *supra* note 4, at 48. In CPA Regulation 1 the CPA announced that it “shall exercise powers of government temporarily . . . . The CPA is vested with all executive, legislative, and judicial authority necessary to achieve its objectives.” CPA Regulation 1, The Coalition Provisional Authority, CPA/REG/16 May 2003/01 (May 16, 2003), *available at* <http://www.cpa-iraq.org/regulations/> (then The Coalition Provisional Authority hyperlink).

92. The commanding general of the US Army’s 3d Infantry Division reported to the CFLCC deputy commander that he had too few troops to guard the specified facilities that he had been ordered to protect from looters. ON POINT II, *supra* note 21, at 148.

93. In April and May 2003, the author would often travel into central Baghdad to key facilities, particularly courthouses and police stations. There would often be no soldiers there, despite orders having been issued to secure the buildings.

94. ON POINT II, *supra* note 21, at 93.

95. CPA Order Number 1, De-Ba’athification of Iraqi Society and Government, CPA/ORD/16 May 2003/01 (May 16, 2003), *available at* <http://www.cpa-iraq.org/regulations/> (then De-Ba’athification of Iraqi Society and Government hyperlink).

96. When combined with the order dissolving the Iraqi military (CPA Order Number 2, Dissolution of Entities, CPA/ORD/23 May 2003/02 (May 23, 2003), *available at* <http://www.cpa-iraq.org/regulations/> (then Dissolution of Entities hyperlink)), the CPA’s de-Ba’athification policy left hundreds of thousands of Sunni Arabs unemployed, while decapitating Iraq’s governmental, security and education infrastructure.

97. In the case of the CPA, by S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004), *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS 1459, which followed S.C. Res. 1483, *supra* note 4, which had recognized the United States and United Kingdom as occupying powers in Iraq.

98. The CJTF-7 mission statement read, in pertinent part: “Conduct offensive operations . . . in direct support of the Coalition Provisional Authority.” ON POINT II, *supra* note 21, at 30.

99. An example of the chafing between CJTF-7 and the CPA was the inability to agree that USCENTCOM General Order Number 1, which among other things banned alcohol use and

possession in Iraq, applied to the CPA. This seems like a small issue, but it is a symptom of the lack of unity of, and confusion over, the chain of command. The CPA took the consistent position that the General Order was not applicable to either its civilian employees or its military personnel because it was effectively an embassy. Of course, it was not. The CPA was established as an instrument of the US Department of Defense (DoD), although its chain of command did switch from DoD to the National Security Council in November 2003. *Id.* at 181.

100. See K.H. Kaikobad, *Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003–June 2004*, 54 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 253 (2005).

101. ON POINT II, *supra* note 21, ch. 11.

102. *Id.* at 39.

103. There was much debate about whether US forces should have shot and killed civilian looters. Aside from the fact that most US troopers simply would not shoot an unarmed civilian who was not threatening them, the ROE would not allow it. The CFLCC ROE allowed soldiers and Marines to use deadly force to accomplish the mission against lawful targets (combatants), to protect themselves and others, and to protect designated property—but not to shoot a civilian walking down the street carrying a TV set. CFLCC ROE Pocket Card, *supra* note 16.

104. DINSTEIN, *supra* note 4, at 49.

105. CPA Order Number 7, *supra* note 88.

106. For an excellent primer on the CPA's rule of law activities, see Daniel L. Rubini, *Justice in Waiting: Developing Rule of Law in Iraq*, THE OFFICER, July–Aug. 2009, at 45.

107. Preliminary Screening Inquiry Report, *supra* note 50, at Tab 60 (End of Mission Report of Clint Williamson to the Administrator, CPA).

108. Also contributing was the secure video-teleconference, or SVTC. This technology allowed for personal communication between Iraq and Washington. The unfortunate reality was that it did not contribute much to common situational awareness or informed decision making; rather, it led to confusion as it sometimes trumped the military orders process and led to decisions that were not analyzed or thought through, and not coordinated with the military units that would have to implement them. The SVTC enabled policy from within the Beltway to be instantaneously injected into a theater of war—and that is normally not a good thing.

109. Memorandum to the President from Alberto R. Gonzales, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), available at <http://www.slate.com/features/whatistorture/LegalMemos.html>. In fairness to Mr. Gonzales, his references to the Geneva Conventions having been rendered quaint and obsolete were made in the context of the “new paradigm” of the war against terrorism and applied only to certain aspects of the Conventions, not to the Conventions as a whole.

110. This would also be in furtherance of the admonition to educate the civilian population on the principles of the Geneva Conventions.

The High Contracting Parties undertake, in time of peace and in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

GPW, *supra* note 27, art. 127.

111. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 24, at 422 [hereinafter Additional Protocol I]. While the United States is not a party to Protocol I, it regards many of its provisions as customary

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and binding international law. See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 419, 425 (1987).

112. DINSTEIN, *supra* note 4, at 81, 82.

113. *Lex specialis derogate lex generali* (“The *Lex Specialis* Rule”). *Id.* at 85.

114. *Id.* at 84.

115. The point was made by Professor Yoram Dinstein—“the three most important duties of the occupier are security, security and security”—in his closing remarks at the Naval War College’s June 2009 conference.

116. Rebuilding the rule of law is a task too enthusiastically embraced in the US counterinsurgency field manual. Field Manual 3-24, Counterinsurgency (2006). A more realistic view of rule of law activities is found in CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, RULE OF LAW HANDBOOK, A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES (2009).

117. See Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICHIGAN LAW REVIEW 2275 (2003).

118. See Dan E. Stigall, *Comparative Law and State-Building: The “Organic Minimalist” Approach to Legal Reconstruction*, 29 LOYOLA OF LOS ANGELES INTERNATIONAL & COMPARATIVE LAW REVIEW 1, 30–31 (2007).

119. The term “Guarantor General” to describe the unrealistic expectations for the SJA was coined by Major General Mike Marchand when he was the Deputy Judge Advocate General, US Army, from 2001 to 2005.

120. See John Yoo & Glenn Sulmasy, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA LAW REVIEW 1815 (2007).

121. Article 82, Legal advisers in armed forces, of Additional Protocol I states:

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

Additional Protocol I, *supra* note 111, art. 82.

122. Proper Treatment of the Iraqi People, *supra* note 5.