Modern Military Necessity:
The Role & Relevance of Military Lawyers

Michael A. Newton

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I. INTRODUCTION

Modern warfare presents an array of legalistic overtones that require the presence and participation of attorneys of exceptional courage and breadth of expertise in demanding and austere conditions. Military lawyers today must confront complex missions and competing operational demands in representing the needs of operational commanders. The legal dimension of conflict has at times overshadowed the armed struggle between adversaries as the nature of conflict itself has changed. The overall mission will often be intertwined with political, legal, and strategic imperatives that cannot accomplished in a legal vacuum or by undermining the threads of legality that bind diverse aspects of a complex operation together. The newly promulgated United States doctrine for counterinsurgency operations makes this clear in its opening section:[1]

Insurgency and counterinsurgency (COIN) are complex subsets of warfare. Globalization, technological advancement,

* Acting Associate Clinical Professor of Law, Vanderbilt University Law School. http://law.vanderbilt.edu/faculty/clinical-faculty/michael-a-newton/index.aspx. This paper is dedicated to the spirit, dedication, and determination of uniformed and civilian lawyers scattered across the face of the globe who serve America's sons and daughters every day. Their sacrifices and fidelity to the law in the midst of incredible demands are emblematic of the very highest ideals of the legal profession as well as the profession of arms.

[1] DEP'T OF THE ARMY, FIELD MANUAL NO. 3-24, MARINE CORPS WARFIGHTING PUBLICATION NO. 3-33.5, COUNTERINSURGENCY 1-1 (DEC. 15 2006), *available at* http://usacac.army.mil/CAC/Repository/Materials/COIN-FM3-24.pdf.

urbanization, and extremists who conduct suicide attacks for their cause have certainly influenced contemporary conflict; however, warfare in the 21st century retains many of the characteristics it has exhibited since ancient times. Warfare remains a violent clash of interests between organized groups characterized by the use of force. Achieving victory still depends on a group's ability to mobilize support for its political interests (often religiously or ethnically based) and to generate enough violence to achieve political consequences. Means to achieve these goals are not limited to conventional forces employed by nation-states.

The United States doctrine for counterinsurgency refers to legal considerations in numerous places as it describes the current framework for accomplishing our strategic objectives.[2] In contrast, writing some two decades after the Civil War, General William Tecumseh Sherman sought to capture the key military lessons of the war for posterity. In the midst of his astute observations regarding, *inter alia*, the best composition of regiments, the effects of good officership, and the support and supply of great armies, he expressed a decidedly acerbic view of the lawyers' role during operations. As the commander of a disciplined fighting force, General Sherman's observation that excessive "courts-martial in any command are evidence of poor discipline and inefficient officers" rings as true today as it did in 1885.[3] The worldwide censure in the wake of Abu Ghraib embodies the enduring truth of General Sherman's observation. General Sherman conceded that "there are statutory offenses which demand a general court-martial, and these must be ordered by the division or corps commander," but followed this concession with the strong caveat that "the presence of one of our regular civilian-judge advocates in an army in the field would be a first class nuisance, for technical courts always work mischief."[4]

Though this sentiment might be ignored as the quaint remnant of an archaic era when law was an afterthought and the developed corpus of developed international law of war yet glimmered on the horizon, those of us who have trained soldiers know that its echoes remain in the sub-conscious attitudes of

2. *See id.* at D-1.

3. WILLIAM TECUMSEH SHERMAN, MEMOIRS OF GENERAL W.T. SHERMAN 888 (The Library of America 1990) (1875).

4. *Id.*

many military members around the world. General Sherman recognized the enduring truth that any good commander must direct every operation towards a defined, decisive, and attainable objective. The principle of "Objective" derives from the basic principles of war recognized across the globe, and this principle is refined for the purposes of military operations into the "mission statement." [5] Even today, there is an undercurrent of opinion amongst the rank and file that immediate operational or situational dependent convenience can and should serve as a valid excuse for deviating from established legal standards and innate training. General Sherman's perception regarding the utility of legal expertise, and its modern incarnation in pockets of military personnel, reflects a shortsighted, superficial assessment that the lawyers intermingled with a deployed force would distract from the overall operational objectives.[6]

In truth, the success or failure of the mission provides the yardstick for measuring the commander's success. Combat readiness can thus be achieved only by melding individuals from

5. The Principles of War crystallized as military doctrine around the world around 1800. The accepted principles are: Objective, Offensive, Mass, Economy of Forces, Maneuver, Unity of Command, Security, Surprise, and Simplicity. THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 557 (John Whiteclay Chambers II, ed., 1999). In unilateral operations, the mission statement reflects a relatively linear process of decision-making from the civilian command authorities through military command channels to the tactical force in the field. In multilateral operations, however, achieving consensus on an agreed and refined mission statement is much more difficult and complex. Reflecting this reality, U.S. Army doctrine warns that:

> [c]ommanders must focus significant energy on ensuring that all multinational operations are directed toward clearly defined and commonly understood objectives that contribute to the attainment of the desired end state. No two nations share exactly the same reasons for entering into a coalition or alliance. Furthermore, each nation's motivation tends to change during the situation. National goals can be harmonized with an agreed-upon strategy, but often the words used in expressing goals and objectives intentionally gloss over differences. Even in the best of circumstances, nations act according to their own national interests. Differing goals, often unspoken, cause each nation to measure progress differently. Thus, participating nations must agree to clearly defined and mutually attainable objectives.

DEP'T OF THE ARMY, FIELD MANUAL 100-8, THE ARMY IN MULTINATIONAL OPERATIONS 1-2 (Nov. 24 1997), *available at* http://www.aschq.army.mil/gc/files/FM100-8.pdf.

6. *See* SHERMAN, *supra* note 3, at 888.

disparate backgrounds into a disciplined unit with a fine-edged warrior ethos focused on overcoming any obstacle in order to accomplish the mission. Even in light of the nonnegotiable necessity for accomplishing the mission and the culture that correspondingly prizes the selfless pursuit of duty, lawyers have a vital role that supports rather than impedes the effort to create and sustain combat ready forces.

This Article will address the range of responsibilities incumbent on lawyers in the military and their necessity to the functioning of the military. Though the phrase is most commonly associated with the jus in bello principle that governs the conduct of conflict, Part II addresses lawyers as a military necessity. Military legal expertise provides an irreplaceable source of guidance and insight to military commanders during times of armed conflict. Part III addresses the law of lawyers regarding the implementation of humanitarian law along with the military lawyer's challenge in making legal aspects integral to the actions of military commanders. In Part IV, the continued necessity of military lawyers is discussed due to the military lawyer's ongoing roles as trainers, negotiators, enforcers and reporters.

II. LAWYERS AS A MILITARY NECESSITY

Military commanders and their lawyers do not approach the law of armed conflict as an esoteric intellectual exercise. The necessity for military lawyers grew from the requirements of commanders across the world for legal guidance. The foundational principle of military necessity is at the core of the lawful application of force in pursuit of the military mission, but it cannot concurrently serve as a convenient rationale for any level of unrestrained violence in the midst of an operation.[7] The law of armed conflict developed as a restraining and humanizing necessity to facilitate commanders' ability to accomplish the military mission even in the midst of fear, moral ambiguity, and horrific scenes of violence.[8] Far from the nuisance that General

7. *See* INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Government Printing Office 1898) (1863), *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 6, art. 16 (Dietrich Schindler & Jiri Toman eds., 1988)[hereinafter Lieber Code].

8. *See* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS,

Sherman postulated, commanders have relied on sound legal advice precisely *because* of their need to accomplish the mission rather than as an unfortunate impediment. Military lawyers and good commanders develop a very special relationship of trust precisely because the lawyer provides necessary technical advice that the commander relies upon in solving some of the most complex problems posed by the military mission itself. At the time of this writing, an active duty military attorney is facing court-martial for the first time in American military history for his alleged failure to "ensure accurate reporting and a thorough investigation into a possible, suspected, or alleged violation of the law of war."[9] If convicted, Captain Randy Stone's failure to properly investigate allegations of war crimes would represent a professional dereliction, but would be emblematic of a larger failure to the commanders and soldiers who relied on his expertise and professional perspective.

Even during General Sherman's war, the tactical uncertainty faced by Union forces in waging a campaign against the rebel forces thrust lawyers and the importance of sound legal analysis into the spotlight. For example, the first comprehensive effort to describe the law of war in a written code, the Lieber Code, began as a request from the General-in-Chief of the Union Armies, based on his confusion over the distinction between lawful and unlawful combatants.[10] General Henry Wager Halleck recognized that the law of armed conflict never accorded combatant immunity to every person who conducted hostilities, but could provide no pragmatic command response to the changing tactics of war.[11] He knew, however, that the war could not be won without clear delineation to the forces in the field regarding the proper targeting of combatants and a correlative standard for the treatment of persons captured on the battlefield based on the legal characterization of their status. On August 6, 1862, General Halleck wrote to Dr. Francis Lieber, a highly regarded law

RESOLUTIONS, AND OTHER DOCUMENTS vii (Dietrich Schindler & Jiri Toman eds., 1988).

9. http://www.usmc.mil/lapa/Iraq/Haditha/Haditha-Preferred-Charges-061221.htm

10. *See* RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 2 (1983) (Letter from General Halleck to Dr. Francis Lieber, Aug. 6, 1862).

11. *See id.*

professor at the then Columbia College in New York, to request his assistance in defining guerrilla warfare.[12] This request, which can justly be described as the catalyst that precipitated more than one hundred years of legal effort resulting in the modern web of international agreements regulating the conduct of hostilities, read as follows:

My Dear Doctor: Having heard that you have given much attention to the usages and customs of war as practiced in the present age, and especially to the matter of guerrilla war, I hope you may find it convenient to give to the public your views on that subject. The rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses and to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents, and that when captured they have extended to them the same rights as other prisoners of war; they also threaten that if such persons be punished as marauders and spies they will retaliate by executing our prisoners of war in their possession. I particularly request your views on these questions.[13]

Based on the stimulus of Confederate conduct, the Union Army issued a disciplinary code governing the conduct of hostilities, known worldwide as the Lieber Code, as "General Orders 100 Instructions for the Government of the Armies of the United States in the Field" in April 1863.[14] General Orders 100 was the first comprehensive military code of discipline that sought to define the precise parameters of permissible conduct during conflict.[15] From this baseline, the principle endures in the law today that persons who do not enjoy lawful combatant status are not entitled to the benefits of legal protections derived from the laws of war, including prisoner of war status,[16] and are subject to

12. *Id.*

13. *Id.*

14. Lieber Code, *supra* note 7, at 3. For descriptions of the process leading to General Orders 100 and the legal effect it had on subsequent efforts, see *generally* Grant R. Dot*y, The United States and the Development of the Laws of Land Warfar*e, 156 MIL. L. REV. 224 (1998), and George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Fiel*d, 1 AM. J. INT'L L. 13 (1907).

15. Lieber Code, *supra* note 7, at 3.

16. This statement is true subject to the linguistic oddity introduced by Article 3 of the 1907 Hague Regulations, which makes clear that the armed

punishment for their warlike acts. The law of war is therefore integral to the very notion of military professionalism because it defines the class of persons against whom professional military forces can lawfully apply violence based on principles of military necessity and reciprocity.[17]

As an aside, Lieber's description of unlawful combatancy is notable in light of the current legal context and the operational debates that have played such a central role in the global war on terror. Though this language is dated, it describes the tactics of Al Qaeda in evocative terms:

> Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.[18]

In the modern era, the White House press spokesman took pains to explain that the United States is treating all unlawful combatants in its custody "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949."[19] Thus in its modern formulation, the linkage between

forces of a state can include both combatants and non-combatants (meaning chaplains and medical personnel), and that both classes of military personnel are entitled to prisoner of war status if captured. *See* Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, art. 3 1907 ("[t]he armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war"), *entered into force* Jan. 26, 1910, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 73 (Adam Roberts & Richard Guelff eds., 3d ed. 2000)[hereinafter 1907 Hague Regulations].

17. *See generally* LESLIE C. GREEN, *What is – Why is There – The Law of War?, in* ESSAYS ON THE MODERN LAW OF WAR 1 (2d. ed. 1999).

18. Lieber Code, *supra* note 7, at 14, art. 82

19. The White House Fact Sheet, Status of Detainees at Guantanamo

operational necessity and legality cannot be underemphasized. In the context of the ongoing investigation and pending courts-martial assessing the actions and attitudes of the Marines involved in the Haditha incident, Major General Eldon Bargewell recommended that his investigation be used to inform the refinement and promulgation of Rules of Engagement (ROE) in counterinsurgency operations "against an unscrupulous enemy employing hit and run tactics designed to provoke indiscriminate, disproportionate, or simply misdirected responses from coalition forces. The lessons for staff procedures and reporting are basic, but the case study will illustrate how simple failures can lead to disastrous results."[20]

Though the detailed prescriptions of the law of armed conflict evolved in response to the demands of military pragmatism and the impetus of changing technology, lawyers were also a necessary ingredient in developing the norms that have come to define the very essence of professionalism. Commanders must balance the need to accomplish the mission against an internal awareness of the larger legal and ethical context for their actions. As a consequence, military professionals developed legal codes in order to increase military efficiency by defining appropriate bounds to facilitate the accomplishment of the mission.[21] Gustavus Adolphus' Articles of War, for example, mandated that "no Colonel or Captain shall command his soldiers to do any unlawful thing; which so does, shall be punished according to the discretion of the Judge."[22] Any unit that is ripped apart by allegations of illegality and indiscipline cannot be combat effective simply because its

(Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

20. *See* http:www.washingtonpost.com/wp-dyn/content/article/2007/04/20/AR2 007042002309.html (providing excerpts of the previously undisclosed report which found no specific coverup but a command climate that tended to minimize the casualties suffered by Iraqi civilians and the creation of attitudes in which the death of noncombatants was accepted as "the price of doing business.")

21. *See* HARTIGAN, *supra* note 10, at 3.

22. GUSTAVUS ADOLPHUS, ARTICLES OF MILITARY LAWS TO BE OBSERVED IN THE WARS (1621), *quoted in* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 59 (2d ed. 1999). The 150 Articles regulating military conduct were a groundbreaking attempt to establish a professional code grounded in legal formulations and were promulgated as Swedish forces moved toward battle with Russian forces.

members are focused on the details of sworn statements, self preservation, and self interest rather than the overall accomplishment of operational goals.[23] Lawyers who are enforcing the law through comprehensive investigations and appropriate prosecutions will likely affect the unit's mission posture, but the underlying indiscipline can be justly blamed for undercutting the mission-first focus of a good, cohesive military organization. The Marines based at Camp Pendleton are rediscovering this truism at the time of this writing in the context of the courts-martial for offenses charged in Haditha as well as a number of other incidents.

Furthermore, as the backbone of military professionalism, the implementation of legal norms in an operational setting became an indispensable aspect of military legitimacy. International humanitarian law is not a beast that is kept chained and fed with words, conference, and good intentions. Quite the contrary, though humanitarian law is grounded in the principles of necessity, humanity, and reciprocity, those ideals are all achieved in the context of facilitating the accomplishment of military missions.[24] Those missions are, almost by definition, conducted in the midst of fear, adrenaline, instinctive responses, and almost instantaneous reaction to life threatening exigencies. The modern law of armed conflict is really nothing more than a web of interlocking protections and specific legal obligations held together by the thread of respect for humankind and a reciprocal expectation that other participants in armed conflict are bound by the same normative constraints.[25] In short, the law serves as the firebreak between being a hero in the service of your nation and a criminal who brings disgrace to your nation, dishonor to the unit, and disruption to the military mission.

In the wake of the Lieber Code, other states issued similar manuals: Prussia, 1870; The Netherlands, 1871; France, 1877; Russia, 1877 and 1904; Serbia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893.[26] Over time, military codes and the more thorough military manuals that followed

23. *Id.*
24. *Id.*
25. Doty, *supra* note 14, at 225.
26. *Id.* at 230.

served to communicate the "gravity and importance" of behavioral norms to commanders and soldiers.[27] Legal norms continue to form the rallying point of moral and professional clarity that guides soldiers in the midst of incredibly nuanced missions, regardless of fatigue or adrenaline in the impetus of the moment.

Indeed, the increased complexity of the law and the need to ensure its effective implementation within the military structure led to a specific obligation for the High Contracting to the 1907 Hague Regulations to "issue instructions to their armed land forces . . . in conformity with the Regulations respecting the laws and customs of war on land."[28] This incremental development from the baseline of foundational principles prompted one of the Nuremberg prosecutors to muse that "the law of war owes more to Darwin than to Newton."[29] Because military lawyers played an indispensable role in the effort to instill professional discipline by defining the boundaries of acceptable conduct, they helped safeguard the legitimacy of the military force in the eyes of the nation and the ranks of military colleagues around the world.

III. THE LAW OF LAWYERS

As the law became more complex, and its implementation on the battlefield more problematic, it is unsurprising and perhaps inevitable that the role for lawyers became embedded in the law itself. Over time, the laws of warfare have become the lodestone of professionalism and the guiding point for professional military forces the world over. The law of armed conflict provides the standards that separate trained professionals from a lawless rabble. International humanitarian law balances its laudable goals with the perfectly legitimate need to accomplish the mission. The law explicitly embeds the latitude for military commanders and lawyers to balance the requirements of the mission against the humanitarian imperative of the law itself. Thus, legal duties are predicated in many instances by such words as "to the fullest

27. W. Michael Reisman & William K. Lietzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Laws of Armed Conflic*t, *in* THE LAW OF NAVAL OPERATIONS, 64 NAVAL WAR COL. INT'L. L. STUD., 1, 5-6 (Horace B. Robertson, Jr. ed., 1991).

28. 1907 Hague Regulations, *supra* note 16, art. 1.

29. Thomas F. Lambert, *Recalling the War Crimes Trials of World War II*, 149 MIL. L. REV. 15, 23 (1995).

extent practicable."[30]

Among many other examples, legal duties are described in terminology such as "unjustified act or omission"[31] or conditioned as follows: "unless circumstances do not permit"[32]

The imperatives for balancing operational needs against the mandates of the law are complicated by the growing interconnection between previously discrete bodies of law. The degree to which states are bound by their obligations flowing from human rights law is "one of most controversial and politically charged issues in current human rights discourse."[33] The lawyer serves a vital purpose within the command by helping to ensure that the obligations of the law are not seen as a hindrance, but as an essential component of a professional military balancing the legitimate use of power against the terror and pain that conflict causes.[34] The welter of legally intensive tasks accompanied by the imperative for clear, concise, and understandable guidance that can be understood and implemented by deployed forces is one of the most pressing problems in modern military operations.

To that end, the International Court of Justice noted in the Nuclear Weapons case that the law of war is *lex specialis* that takes precedence over some otherwise applicable legal norms in the context of armed conflict.[35] The *lex specialis* principle helps to clarify the most appropriate source for deriving legal norms and interpreting otherwise unclear application of binding norms. Numerous domestic courts have accordingly rejected claims of combatant immunity that are unwarranted under existing

30. 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims Of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, 23, art. 10(2) [hereinafter Protocol I].

31. *Id*. at art. 11.

32. *Id*. at art. 57(2)(c).

33. John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 VAND. J. TRANS'L L. 1447 (2006).

34. *Id.*

35. *See* Michael J. Matheson, *The Opinion of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L. L. 417, 422 (1997) ("the test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.").

international law.[36] On the other hand, there are some international law scholars who would argue that lawyers interpreting and applying the treaties governing the conduct of hostilities must extrapolate from the text to fashion legal advice that focuses on the "higher purposes which are the *raison d'etre* of the convention."[37]

The corollary to the *lex specialis* principle is that a cadre of specialists in the details and nuances of the legal fabric are as necessary to the lawful conduct of hostilities as the forces and equipment. These principles form the practical foundation which warrants the textual mandate of Protocol I, Article 82:

> The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisors 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 the armed forces on this subject.[38]

For those states party to the Protocol, Article 82 imposes an affirmative obligation to provide legal advisors to military forces.[39]

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36. *See, e.g.*, The Military Prosecutor v. Omar Mahmud Kassem and Others, Israeli Military Court, Ramallah, April 13, 1969, 41 I.L.R. 470 (1971), *reprinted in* HOWARD LEVIE, DOCUMENTS ON PRISONERS OF WAR, 60 NAVAL WAR COL. INT. L. STUD. 771 (1979) (rejecting the claim of combatant immunity raised by a member of the "Organization of the Popular Front for the Liberation of Palestine"); House of Lords (Privy Council), Osman Bin Haji Mohamed Ali and Another Appellant and the Public Prosecutor Respondent On Appeal From the Federal Court of Malaysia, 1 Law Rep. 430 (1969), *reprinted in* MARCO SASSOLI & ANTOINE BOUVIER, HOW DOES LAW PROTECT IN WAR? 767 (International Committee of the Red Cross 1999) (rejecting combatant status for members of the Indonesian armed forces who failed to comply with the provisions of Article 4 of the Geneva Conventions).

37. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951, p. 23, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=90&case=12&code=ppcg&p3=4 ("The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality..

38. Protocol I, *supra* note 30, art. 82.

39. *Id.*

A number of nations have relegated such functions to officials within the Ministries of Defense. However, as a logical extension of the commander's authority for promulgating and enforcing uniform rules of discipline and professionalism across the force, the concept of legal advisor for military forces should be largely synonymous with the concept of military lawyer. Who better to understand and represent both professional military obligations with the requirements of the law than a professional soldier?

The professionalism of the military lawyer is also an extremely important component in gaining the credibility and respect of both commanders and soldiers that is necessary to properly implement the constraints of the law.[40] One eminent commentator referred to the soldier/lawyer who is equipped to fill such a vital operational niche as the "lawyer-in-uniform."[41] The combination of legal, diplomatic, military, and personal skills needed to serve these ends makes the modern military lawyer a distinctive servant of the nation. Within Article 82, the caveat "when necessary" does permit flexibility and sovereign choices in the conditions for the use, allocation, and location within the military structure of those legal advisors.[42] The unstated but necessary corollary to this legal duty is that the Parties to the Protocol have an obligation to ensure that the selected legal advisors "get the appropriate training."[43] In addition, the creation of an office or section exclusively devoted to international law applicable in armed conflict is an "apparently essential prerequisite for the implementation of Article 82."[44]

The Additional Protocol expanded on earlier provisions of the law with regard to concrete obligations for its training and dissemination.[45] Article 83 included more sweeping provisions

40. GEOFFREY BEST, WAR & LAW SINCE 1945 406 (1994).

41. *Id.*

42. Protocol I, *supra* note 30, at art. 82.

43. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 949 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC Commentary on Protocol I] .

44. *Id*. at 952.

45. *See, e.g*., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114, art. 47 (replacing previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 by virtue of Article 59); Geneva Convention for the Amelioration

focused on closing the gap between the textual provisions of law and their realization in practice:

> 1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.
>
> 2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.[46]

Taken together, these provisions are intended to affect a comprehensive mechanism for training military professionals in the obligations inherent in the law of armed conflict as well as a systematic and authoritative implementation of those principles.

IV. BACK TO THE FUTURE: THE CONTINUED NECESSITY FOR MILITARY LAWYERS

A. *The Lawyer as Trainer*

Recent events in Iraq and Afghanistan serve as a stark reminder that the efforts of commanders and lawyers to achieve a well-trained and disciplined force can never be taken for granted. Unfortunately, this is not a new lesson. Lieutenant General

of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217, art. 48 (replacing Hague Convention No. X of 18 October 1907, 36 Stat. 2371); Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3316, art. 127 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021); Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, art. 144.

46. Protocol I, *supra* note 30, at art. 83.

William R. Peers reported that one of the contributing factors to the crimes committed at My Lai was that "[n]either units nor individual members of Task Forcer Barker and the 11th Brigade received the proper training in the Law of War (Hague and Geneva conventions), the safeguarding of noncombatants, or the Rules of Engagement."[47] Proper training in the legal requirements that inhere in the conduct of hostilities and the interactions of military with non-combatants should be seen merely as a necessary foundational step for the accomplishment of those obligations. Thus, United States military doctrine requires that military lawyers are always available to assist commanders in applying international humanitarian law "at all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations."[48]

In order to actualize this commitment to implementing legal obligations, U.S. military doctrine further specifies that advice on law of war compliance should address not only legal constraints on operations but also legal rights to employ force.[49] This formal doctrine is entirely appropriate in light of the need for lawyers to successfully facilitate the transfer of the intellectual knowledge gained in the classroom into the reality of the military operation. In practice, the lawyer must have a hand in the drafting, training, dissemination, inspection, and enforcement of the Rules of Engagement and command policies that provide the linkage from the classroom to the field.[50] This, in turn, requires that lawyers work closely with commanders and staffs to ensure proper targeting in the deliberate process. The Rules of Engagement must be disseminated to every corner of the command; equally important, the lawyer must be constantly on the move to reinforce

47. WILLIAM R. PEERS, THE MY LAI INQUIRY 230 (1979).

48. JOINT CHIEFS OF STAFF MEMORANDUM, MJCS 5810.01B, SUBJECT: IMPLEMENTATION OF DOD LAW OF WAR PROGRAM, para. 4b. (March 25, 2002), *available at* http://www.dtic.mil/cjcs_directives/cdata/unlimit/5810_01.pdf.

49. *See generally id*.

50. *Id.* at Enclosure A. para 3e. The Bargewell report into the Haditha Incident noted, inter alia, that the Rules of Engagement in place for the deployed Marine unit did not prevent a unit climate in which "Iraqi civilian lives are not as important as U.S. lives, their deaths are just the cost of doing business, and that the Marines need to get 'the job done' no matter what it takes." *See* http://www.washingtonpost.com/wp-dyn/content/article/2007/04/20/AR2007042002309.html

the legal component of the Rules of Engagement, answer questions, and fill the gaps in soldiers' minds regarding the interface of law and tactics.[51]

Some soldiers from the Vietnam era reported that a lackadaisical approach to legal training caused them to take the otherwise sound command guidance they received on pocket cards and put the cards into their pockets unread and hence ignored.[52] The United States Army continues to develop and disseminate such cards, as do many of our allies. The card is not an end in itself, but serves as the commander's tool to help instill compliance with legal norms, which is in turn reinforced by the active role of military lawyers.[53] In the modern era, successful operations require that young warriors at all levels are educated and empowered to make important and accurate decisions since their actions often have strategic consequences. United States counterinsurgency doctrine specifies that:

Senior leaders set the proper direction and climate with thorough training and clear guidance; then they trust their subordinates to do the right thing. Preparation for tactical-level leaders requires more than just mastering Service doctrine; they must also be trained and educated to adapt to their local situations, understand the legal and ethical implications of their actions, and exercise initiative and sound judgment in accordance with their senior commanders' intent.[54]

In contrast to simply preparing a card for distribution to soldiers, lawyers with the Third Infantry Division during Operation Iraqi Freedom developed a matrix that was disseminated and used at command levels down to the smallest tactical force. The matrix (*see Figure 1 below*) gave commanders and soldiers a quick and ready reference with which to consider and implement the obligations of international humanitarian law. Lawyers had inculcated commanders and soldiers with the concepts drawn from the laws and customs of war and notably

51. *Id.* at Enclosure A, para 3g; *see also* ICRC Commentary on Protocol I, *supra* note 43, at 953.

52. Peers, *supra* note 47, at 230.

53. *See generally* JOINT CHIEFS OF STAFF MEMORANDUM, MJCS 5810.01B, SUBJECT: IMPLEMENTATION OF DOD LAW OF WAR PROGRAM, para. 4b. (March 25, 2002), *available at* http://www.dtic.mil/cjcs_directives/cdata/unlimit/5810_01.pdf.

54. COUNTERINSURGENCY, *supra* note 1, Para 1-157

were required to sign the form along with the relevant commanders. Anecdotal evidence shows that the Third Infantry Division filled out these cards and kept records of their efforts to comply with the law as long as it was physically possible given the demands of the battle.

B. *The Lawyer as Negotiator*

Military lawyers must continue to play a central role in the negotiation of new legal norms. The Official ICRC Commentary on Protocol I notes with significant understatement, "a good military legal advisor should have some knowledge of military problems."[55] In a similar vein, the law cannot be allowed to drift into an atrophied state in which its objectives are seen as romanticized and unattainable in the operational context. If humanitarian law becomes separated from the everyday experience and practice of professional military forces around the world, it is in danger of being relegated to the remote pursuit of ethereal goals. As the Third Infantry Division matrix illustrates so well, the law takes form and shape in the practice of soldiers and the thinking of commanders on the ground rather than in the textbooks and scholarly opinions.

Military lawyers need to be involved in the negotiation and discussion of emerging legal norms precisely because it is so vital to maintain ownership in the field of humanitarian law. Continued ownership of the legal regime by military professionals, in turn, sustains the core professional identity system of military forces.[56] Failure to keep the legal norms anchored in the real world of practice would create a great risk of superimposing the

55. ICRC Commentary on Protocol I, *supra* note 40, at 951 ¶ 3347.

56. *See generally* JOINT CHIEFS OF STAFF MEMORANDUM, MJCS 5810.01B, SUBJECT: IMPLEMENTATION OF DOD LAW OF WAR PROGRAM, para. 4b. (March 25, 2002), *available at* http://www.dtic.mil/cjcs_directives/cdata/unlimit/5810_01.pdf.

Commanders are responsible for assessing proportionality before authorizing indirect fire into a populated area or protected place (NFA/RFA). Refer to ROE; seek legal advice; copy SJA, G5 and FSE.

POPULATED AREA TARGETING RECORD
(Military Necessity – Collateral Damage – Proportionality Assessment)

I. MILITARY NECESSITY – What are we shooting at and why?

1. DTG of mission: _____
2. Location – Grid Coordinates: _____
3. Enemy Target (WMD, CHEM, SCUD, ARTY, ARMOR, C2, LOG)
a. Type and Unit: _____
b. Importance to Mission:_____
4. Target Intel:
a. How Observed: UAV, FIST, SOF, other: _____
b. Unobserved: Q36, Q37, ELINT, other: _____
c. Last Known DTG of Observation or Detection:_____
5. Other Concerns as applicable:
a. US Casualties: Number: _____ Location:_____
b. Receiving Enemy Fire: Unit: _____ Location

II. COLLATERAL DAMAGE – Who or what is there now?

6. City: _____ Original Population:_____
7. Estimated Population Now in Target Area (if known):_____
8. Cultural, Economic, or Other Significance and Effects:
_____

III. MUNITIONS SELECTION – Mitigate civilian casualties and civilian property destruction

9. Available Delivery Systems Within Range:
155, MLRS, ATACMS, AH64, CAS, other:_____
10. Munitions: DPICM, Precision-Guided Munitions (PGM),
other:_____

IV. COMMANDER'S AUTHORIZATION TO FIRE – Proportionality analysis

11. Legal Advisor's Rank and Name: _____
12. Civil Affairs/G5 Advisor: _____
13.Is the anticipated loss of life and damage to civilian property acceptable in relation to the military advantage expected to be gained? Yes/No
14. Commander or Representative's Rank, Name, and Position:
_____
15.Optional Comments:_____
16. DTG of Decision: _____
17. TARGET NUMBER: _____

FIGURE 1

humanitarian goals of the law as the dominant and perhaps only legitimate objective in times of conflict.[57] This trend could result in principles and documents that would become increasingly divorced from military practice and, therefore, increasingly irrelevant to the actual conduct of operations.

For example, Article 23 of the 1899 Hague II Convention stated that it was forbidden "[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[58] This same language showed up in Article 8(2)(b)(xiii) and 8(2)(e)(xii) of the Rome Statute of the International Criminal Court.[59] Some civilian delegates sought to introduce a totally subjective threshold by which to second-guess military operations based on their belief that the concept of military necessity ought to be an unacceptable component of military decision-making. In addition, they

57. The International Court of Justice (in dicta and in an Advisory Opinion) has hinted at precisely such an evolutionary approach that would quite possibly erode the clear text of a treaty in favor of subsequent humanitarian and societal developments. [Emphasis added] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports 1971, para. 53, *available at* http://www.icj-cij.org/docket/files/53/5595.pdf

53. All these considerations are germane to the Court's evaluation of the present case. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant-"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned-were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. ***That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law***. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.

58. Convention (II) with Respect to Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art 23, The Hague, July 29, 1899, 32 Stat. 1803, 1899 U.S.T. LEXIS 31.

59. Rome Statute of the International Criminal Court, July 1, 2002, art. 8(2)(b).

proposed a verbal formula for the Elements that any seizure of civilian property would be valid only if based on imperative military necessity.[60] Such an element would have been contrary to the entire history of armed conflict law. The concept of military necessity is ingrained into the law of armed conflict already; introducing such a gradation would have built a doubly high wall having a paralyzing effect on military action that would have been perfectly permissible under existing law prior to the 1998 Rome Statute.[61] Moreover, a double threshold for the established concept of military necessity would have clouded the decision-making of commanders and soldiers who must balance the legitimate need to accomplish the mission against the mandates of the law.[62]

Of course, any responsible commander and lawyer recognizes that because the corpus of humanitarian law enshrines the principle of military necessity in appropriate areas, the rules governing the conduct of hostilities cannot be violated based on an *ad hoc* rationalization of a perpetrator who argues military necessity where the law does not permit it. Such a subjective and unworkable formulation would have exposed military commanders to after the fact personal criminal liability for their good faith judgments based only on a after-the fact subjective assessments. The ultimate formulation translated the 1899 phrase into the simple modern formulation "military necessity" that every commander and military attorney understands.[63] The military lawyers among the delegates were among the most vocal in defeating the suggestion to change the law precisely because the elements for such a crime would have been unworkable in practice.[64] The military officers participating in the Elements discussions were focused on maintaining the law of armed conflict as a functional body of law practicable in the field by well-

60. KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 249 (2002).

61. Rome Statute of the International Criminal Court, July 1, 2002, art. 8(2)(b).

62. *See* DÖRMANN, s*upra* note 66, at 249-250.

63. *Id.*

64. *See* Michael A. Newton, *The International Criminal Court Preparatory Commission: The Way It Is & The Way Ahead*, 41 VA. J. INT'L L. 204, 211-212 (2000).

intentioned and well-trained forces.[65] The importance of this role will not diminish in the foreseeable future.

C. *The Lawyer as Enforcer*

The importance of enforcing the substantive body of norms through criminal investigations and prosecutions when appropriate cannot be overstated. As early as 1842, Secretary of State Daniel Webster articulated the idea that a nation's sovereignty also entails "the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war."[66] The enforcement of humanitarian norms and the creation of post-conflict justice mechanisms within the broader civilian society are an increasingly common operational component.[67] Military lawyers are at the forefront of such efforts precisely because they are in the best position to evaluate the culpability of commanders in light of the "reasonable commander" standard that is built into the law of armed conflict.[68] Moreover, the same experts who advise

65. *Id.*; *See also* Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 4 CHI. J. INT'L L. 445, 454 (2003).

66. JOHN BASSETT MOORE, 1 A DIGEST OF INTERNATIONAL LAW 5-6 (1906).

67. *See generally* Michael A. Newton, *Harmony or Hegemony? The American Military Role in the Pursuit of Justice*, 19 CONN. J. INT'L LAW, 231 (2004).

68. The ICTY Report concluded that criminal investigations were not warranted by the actions of NATO during the bombing campaign during which only an estimated 500 civilian deaths resulted from 38,400 sorties that released 23,614 air munitions. *See* International Criminal Tribunal for the Former Yugoslavia *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign*, paras. 53-54, *reprinted in* 39 I.L.M. 1257, 1272 (2000) *available at* http://www.un.org/icty/pressreal/nato061300.htm; *see also id.* at para. 50 ("The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the 'reasonable military commander'.").

commanders on the proper implementation of the law should find a great deal of professional satisfaction in helping to ensure that the law retains its influence and credibility. Their expertise forms the basis of effective prosecutions that are legally sound, but fair and credible from the perspective of soldiers in the field.

The events at Abu Ghraib have served to remind military professionals of the visceral linkage between their actions and the achievement of the mission. At the time of this writing, there have been some 330 credible accounts of detainee mistreatment, and of the 600 or so personnel implicated in subsequent investigations, there are more than 40 serving custodial sentences.[69] The military lawyer plays a critical role in developing criminal cases and making recommendations for the appropriate disposition of cases in light of the evidence and the wide range of disciplinary tools available to the commanders.[70] Abu Ghraib represents a sharp departure from American ideals precisely because some soldiers forgot about their overarching mission to defend justice and human dignity. At the same time, it is worth recalling that the crimes were made public because one young soldier, Specialist Joseph Darby, alerted appropriate authorities when he became aware of the activities inside Abu Ghraib.[71] The investigation and administration of appropriate discipline against culpable individuals serves an important deterrent purpose in the legal regime by helping to strengthen the resolve of the next Joseph Darby who may be forced to choose between loyalty to his comrade-in-arms and the principles of law and professionalism.

Legal advisors play another, more subtle, role in successful enforcement of the law of armed conflict. In one case from Iraq, an officer of the 101st Airborne Division was prosecuted for lying about the conduct of his soldiers after they stole a vehicle from an

69. Human Rights Watch, Human Rights First, and NYU Center for Human Rights and Global Justice, *By the Numbers: Findings of the Detainee Abuse and Accountability Project* at 6 (Apr. 2006), *available at* http://hrw.org/reports/2006/ct0406/ ct0406webwcover.pdf (last visited Apr. 5, 2007).

70. *See* Rear Admiral Michael F. Lohr & Commander Steve Gallotta, *Legal Support in War: The Role of Military Lawyers*, 4 CHI. J. INT'L L. 465, 468-469 (2003).

71. *See* Seymour Hersh, *The Gray Zone*, NEW YORKER, May 24, 2004, at 80.

Iraqi man.[72] Testimony at trial showed that although the soldiers had a right to take the vehicle based on military necessity,[73] they failed to provide a receipt as mandated by the Division policy that was crafted to comply with the law.[74] The legal advisor had trained the unit on the appropriate legal procedures, but had also ensured that the receipts needed to comply with the law were printed and distributed.[75] It is only appropriate that those soldiers who knowingly disregarded their professional and legal obligations be prosecuted by the same attorney who had gone to such lengths to train and equip them for compliance. Similarly, many of the prosecutions of those who strayed so far from accepted professional norms in Iraq are based on the principle of dereliction of duty. Reflecting a concept of military law recognized around the world, Article 92 of the Uniform Code of Military Justice makes it a crime to fail to perform a known duty, either willfully or through neglect.[76] The necessary base of knowledge that supports subsequent enforcement efforts was built by the military lawyers who taught the units, rehearsed them, and integrated legal considerations into the operational flow as well as the Rules of Engagement.

D. *The Lawyer as Reporter*

Lawyers who advise commanders on the proper application of humanitarian law have a vested interest in helping to ensure that those norms are respected and implemented in the future. In order to achieve that fundamental objective, legal advisors must be engaged at all levels to bring the light of truth and proper legal analysis to allegations of war crimes.[77] Humanitarian law belongs to the armed forces of the world; it is not a media tool to be manipulated and sensationalized. The passivity of trained lawyers in the face of misleading media reports could permit humanitarian law to be seen as nothing more than a mass of

72. *See Army Jury Recommends 1-Month Sentence, Also Recommends Dismissal for Lying in Iraq SUV Case*, LEXINGTON HERALD-LEADER, Aug. 14, 2004, at B4, *available at* 2004 WLNR 19124585 [hereinafter *Army Jury*].

73. *See* 1907 Hague Regulations, *supra* note 15, art. 23(g).

74. *See Army Jury, supra* note 78.

75. *Id.*

76. 10 U.S.C. § 892 (2000).

77. *See* Lohr & Gallotta, *supra* note 76, at 471.

indeterminate subjectivity that can be used as another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant accomplices in the media.

Lawyers must be proactive in responding to allegations that humanitarian norms have been violated by collecting the relevant facts and eyewitness accounts, then analyzing them in light of their particular expertise in the law. There is a very real danger that the media can be manipulated and used to mask genuine violations of the law with spurious allegations and misrepresentations of the actual state of the law. Failure to articulate the correct state of the law in turn feeds into an undercurrent of suspicion and politicization that could erode the very foundations of humanitarian law. This in turn can lead to a cycle of cynicism and second guessing that could weaken the commitment of some military forces to actually follow the law.

For example, no responsible commander intentionally targets civilian populations, and the law on this matter is clear and fundamental.[78] In the era of mass communications, the media often creates a perception that the normative content of the law is meaningless by conveying an automatic presumption that any instance of collateral damage is based on illegal conduct by military commanders. This perception is, of course, completely without foundation in humanitarian law. Left unchecked by the law and the facts, however, it can erode the acceptance of the law in the minds of military professionals who may begin to feel that their good faith efforts to comply with the complex provisions of the law are meaningless and counterproductive in terms of gaining legitimacy and public trust. Indeed, nothing would erode compliance with humanitarian law faster than false reports of what the other side has done, or distorted allegations that permissible conduct in fact represents willful defiance of international norms.

Secondly, lawyers should never accept a moral or legal equivalence between an enemy that deliberately and repeatedly violates the basic norms of international law because a professional military is required to comply with the principles of

78. Protocol I, *supra* note 30, at art. 48.

the law of war at all times.[79] Accurate and timely documentation of illegal conduct on the part of non-state actors may represent the most effective way to enforce the law on a reciprocal basis. Professional soldiers are often confronted with circumstances in which the enemy forces disregard applicable legal principles by deliberately endangering civilians and waging war with no regard for the norms of humanity. In contrast, American soldiers in Iraq have risked their lives on many occasions and constrained themselves because of their own professional obligations and discipline even when it complicates their missions or made the loss of American lives more likely.

Professional soldiers who are guided by the norms of humanitarian law are immediately concerned with ameliorating the suffering of the civilian population and providing assistance for the innocent victims of conflict when they are caught in the vortex of combat, unlike those who exult in the intentional murder of unarmed civilians. The kindness of individual American soldiers towards those civilians unfortunate enough to be caught in the vortex of combat has been one of the truest measures of their training and humanity. If the exposure of illegal acts on the part of the adversary helps sway social and political opinion away from supporting lawless thugs, they may in turn recognize that their unlawful actions are a barrier to achieving their ends. Some Non-Governmental Organizations (NGOS) and Intergovernmental Organizations (IGOS) have been able to use media outlets as an effective tool for buttressing humanitarian norms.[80] The legal advisor plays a critical role in getting to the scene quickly at the behest of the commander and ensuring that the facts are accurate so that the legal analysis is correct and timely.

79. *See, e.g.*, DEP'T OF DEFENSE, DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM, para. 4.1 (May 9, 2006) [hereinafter DOD. Dir. 2311.01E] (requiring that United States Armed Forces "shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized"), *available at* http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf.

80. *See* John King Gamble et al., *Human-Centric International Law: A Model and a Search for Empirical Indicators*, 14 TUL. J. INT'L & COMP. L. 61, 64 (2005).

V. CONCLUSION

Lawyers who serve the interests of the law as honest brokers have a critical role in implementing humanitarian law.The law of armed conflict emerged as the benchmark for military professionalism because its precepts restrain the application of raw power and bloodlust even in the midst of chaos, mind-numbing fear, and overwhelming uncertainty. The law of war is integral to the very notion of professionalism because it defines the class of persons against whom professional military forces can lawfully apply violence based on principles of military necessity and reciprocity.[81] The current context of the global war on terror has confronted military commanders with the challenge of implementing humanitarian restraints in an environment marked by the utter disregard for the bounds of international law on the part of the adversary. The two essential strands that professional military forces must reexamine and apply in this new style of conflict are: How may we properly apply military force? If lawful means of conducting conflict are available, against whom may we properly apply military force? These two strands are the essential foundation of the professional military ethos, even against a lawless enemy.

Despite their own obligations to comply with the "law of war during all armed conflicts, however such conflicts are characterized," [82] the global war on terror has confronted American soldiers with an adversary that intentionally targets civilians and participates in armed conflict without legal authority to do so. Nevertheless, if the law is to fulfill its intended purpose as the normative benchmark, military commanders and lawyers must implement it in good faith. The only guarantee is that the task is difficult and the progress slow, but their role is nonetheless essential. The creator of the Hague Peace Conference, Czar Nicholas cautioned that "[o]ne must wait longer when planting an oak than when planting a flower."[83] The balance between the mandates of the mission and the obligations of the law make the

81. *See generally* LESLIE C. GREEN, *What is – Why is There – The Law of War, in* ESSAYS ON THE MODERN LAW OF WAR 1 (2d. ed. 1999).

82. *See, e.g.*, DOD. Dir. 2311.01E, para. 4.1.

83. JAMES BROWN SCOTT, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 xiv (1915).

services of the lawyer an operational necessity.