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Panel II

Commentary—Jus in Bello

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The principle of distinction is a fundamental component of the law of armed conflict. Attackers must adhere to this principle in selecting targets for destruction. What is not appropriately stressed in the literature and commentary is that this same principle applies to the defender as well as to the attacker. Routinely, the enemies of the United States—the Saddam Husseins, the Slobodan Milosevics, and the Taliban—place military equipment in the middle of protected areas containing civilians. As is well known, this is a violation of the law of armed conflict yet the United States constantly finds itself struggling with such difficult targeting issues because of these illegal acts by the enemy.²

Cloaking such targets behind civilians and in protected places does not, however, deprive the target of its military utility. Greater discussion of the responsibility of the defender to segregate such military targets from civilians

1. Lieutenant Colonel Tony Montgomery is the Deputy Staff Judge Advocate for the US Special Operations Command.

2. See 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 1, art. 51(7), *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts and Richard Guelff eds., 3rd ed., 2000) [hereinafter DOCUMENTS ON THE LAWS OF WAR] at 419.

and protected places would be helpful to those who engage in the business of targeting.

On September 11th, I was a member of the Office of the Staff Judge Advocate for the US Special Operations Command. Recognizing that the terrorist acts perpetrated on September 11th would quickly elicit a response from our nation, my office began searching for use of force parallels that might apply. One we found that proved to be of great utility was an article dealing with the use of force in guerilla warfare.³ Many might denounce any sort of similarity between guerilla war and the Global War on Terrorism. I suggest, however, that the concepts are far more similar than dissimilar.

From an application of force perspective, my office came to several conclusions. Our first conclusion was that our forces should apply the law of armed conflict in the face of the events of September 11th. United States forces have familiarity with these laws; they train using these laws and are comfortable adhering to them. Secondly, US public support of military operations is stronger when our forces adhere to the law of armed conflict. Lastly, US adherence to the law of armed conflict also helps ensure the support of US allies. These were provided to our commander explaining why the US response to the attacks should comply with the law of armed conflict.

Another controversial area we have been facing is the requirement to wear uniforms while conducting military operations in Afghanistan. A critical component of receiving the privileges accorded a lawful combatant by the Geneva Conventions is that, amongst other things, the individual wears a “fixed distinctive sign recognizable at a distance.”⁴

The mission of US special operations forces is to plan, prepare for, and when directed, deploy to conduct unconventional warfare, foreign internal defense, special reconnaissance and direct actions in support of US national policy objectives within designated areas of responsibility.⁵ There are many types of forces within the US Special Operations Command and each force has a different focus and mission. Some of our forces are designed for large scale operations and will always be in uniform while conducting operations. Others, however, have mission profiles that require smaller groups to conduct

3. Ken Brown, *Counter-Guerilla Operations: Does the Law of War Proscribe Success?*, 44 NAV. L. REV. 123 (1997).

4. See Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, art. 4(2)(b), reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 234.

5. 10 U.S.C. § 167 (2000).

more unconventional types of warfare. These sorts of operations often will require our forces to live with the indigenous force conducting the campaign.

In Afghanistan, this was the Northern Alliance. As was made clear in the photographs broadcast by the media, many US forces, to blend in and to gain credibility, adopted at least some parts of the uniform worn by members of the Northern Alliance. Our office provided advice within our command on the requirement for our forces to wear a fixed, distinctive insignia in compliance with the Geneva Conventions. Our advice was that although for good operational reasons our forces might need to adopt some of the uniform of the Northern Alliance, they must still have some type of insignia distinctive to the United States. Judging from the photographs displayed by the media, this is still an issue needing resolution. Our office continues to believe that wearing this fixed distinctive insignia is required by the Third Geneva Convention and operates to protect our forces more than it does to identify them as targets.

One final thought based on comments I have read and heard today has to do with the relevancy of the existing laws of armed conflict and the US commitment to comply with those laws. The United States has recently withdrawn from the Anti-Ballistic Missile Treaty; will not ratify the Rome Statute enacting the International Criminal Court; has interpreted the Third Geneva Convention to not require Article 5 tribunals for determining the status of detainees currently confined in Guantanamo Bay, Cuba; is reviewing our policy on the use of nuclear weapons; and has announced a policy of preemptive response to threats to our security. The events of September 11th truly did change things. And, I for one do not believe we yet understand the magnitude of that change. The basis for the modern laws of war was after a time of great horror and reflect the thinking of that time. Have times changed to the point that those rules, restrictions, inhibitions are no longer sufficient? Or, is it simply that the United States needs a set of rules for its activities, with everyone else following the old rules? Whatever the case, the United States will continue to protect its citizens and sovereignty.