Over the past several years, U.S. Army Europe (USAREUR) judge advocates and paralegals have participated in exercises that tested the ability of combatant commands and service component commands to respond to crisis scenarios in the U.S. European Command Area of Responsibility (EUCOM AOR). These exercises have been illuminating in many respects, but particularly demonstrative of how a counter terrorism (CT) mindset continues to dominate many aspects of relevant U.S. policies and practices and the outlook of many commanders, staff, and legal advisors charged with planning and executing operations. This has significant implications when encountered in a decisive action, high intensity conflict scenario (HIC) because many relevant policies and the concrete CT experiences most service members are laden with are based on assumptions that do not exist in a highly contested environment, such as conflict with a peer or near peer enemy in densely populated Europe. This article will discuss lessons learned in navigating through CT-centric policies and practices in a HIC environment and will highlight how senior commanders and policy makers need to recognize the problem and become more comfortable with assuming higher risk to effectively execute HIC operations.

The CT mindset is based on the operational realities of nearly two decades of counter-insurgency operations in Iraq and Afghanistan. It assumes U.S. forces own the skies and have perfect situational awareness of activities on the ground. It also assumes commanders are able to precisely control the manner in which targets are
engaged and the timing of those engagements. Moreover, it assumes it is feasible to delay engagement against high value targets until, in many cases, approval is received from the highest levels of government. It is reliant on an assumption of unlimited supply of precision munitions and delivery platforms, and on complete dominance of the electromagnetic spectrum and cyber domains. Finally, the CT mindset assumes that the area of operations is tightly controlled and that most detainees would not qualify for Enemy Prisoner of War (EPW) status.

The USAREUR legal team has found the CT mindset prevalent in three major areas: rules of engagement (RoE) and targeting guidance; munitions shortfalls and policy restrictions; and detainee policies. There are serious implications for mission accomplishment and compliance with the laws of armed conflict (LOAC) when CT-based policies and practices are applied in a decisive action offensive environment, where the primary tasks are to seize the initiative and dominate the enemy.

I. ROE & Targeting Guidance.

A. Positive Identification (PID).

1. Judge advocates have repeatedly encountered the use of restrictive positive identification requirements, applied by commanders,
operators, and lawyers, based on their CT experiences in Iraq and Afghanistan, even when exercise targeting guidance had no constraints or restraints other than baseline positive identification requirements contained in the notional ROE. This was particularly the case for targets that needed to be engaged by the Joint Force Air Component Commander (JFACC). The experience of restrictive positive identification was so ingrained in Air Force operators and lawyers that, in some cases, they refused to engage multiple targets for fear of violating the ROE or the LOAC. This resulted in unnecessary delays in engaging lawful targets and required extensive coordination to overcome.

2. Restrictive positive identification policies assumes U.S. forces own the sky, which is not realistic in a HIC, particularly against a peer or near peer enemy that possesses credible offensive air, defensive air, space, and cyber capabilities. Positive identification is not defined in the U.S. Standing Rules of Engagement, but does relate directly to the LOAC requirement to target only legitimate “military objectives.” Laws of armed conflict do not impose a requirement for 100 percent certainty before engaging a target nor does U.S. policy, which has generally, with some limited exceptions, clung to the “reasonable certainty” standard. While judge advocates at USAREUR have yet to completely flush out appropriate thresholds for determining positive identification, and whether it is even necessary beyond a baseline “reasonable certainty” standard, one thing is clear—that commanders, operators, and legal advisors need a mindset change to become more comfortable with the concept of employing force when they do not possess perfect or near perfect information about a target
which would most certainly be the predominant scenario in a HIC.

**B. Noncombatant Casualty Cut-Off Values (NCV).**

1. In past exercises, other CT peculiarities, like low-tolerance NCV, have also been an issue when applied in a HIC environment. The term has recently been removed from doctrine and eliminated from the collateral damage methodology process, but engagement authority is still tied to tolerances for civilian and noncombatant casualties built into the respective ROE.\(^5\) Rather than relying on LOAC principles—Military Objective, Proportionality, Distinction, and Unnecessary Suffering—there seems to be an instinctive desire to apply extremely low civilian casualty values, which impacts Collateral Damage Estimates (CDE) and results in elevating engagement authority to unworkable levels when applied to a HIC scenario.

2. During discussions with other operational law attorneys, USAREUR’s judge advocates learned that many legal advisors and operators believe that low tolerances and high approval levels, rather than responsible commanders applying LOAC principles, are the only way to ensure protection against excessive civilian casualties and collateral damage. These are desirable goals, in any manner of conflict, but in a HIC, low-tolerance for civilian casualties would greatly limit a tactical and operational level commander’s ability to strike legitimate military objectives, and, in effect, fight. There is, and must be, a balance. The starting point in HIC, particularly in urban areas, cannot be anchored in the CT experience of the last several years, but rather
basic LOAC and the principle of distinction requiring U.S. forces to balance the military advantage and likely collateral effects and to minimize civilian casualties to the greatest extent possible. Over the span of conflict, authorities and approvals adjust, but commanders and operators need the flexibility to act decisively, within LOAC parameters, as conditions require.

3. Exceedingly low tolerances for civilian casualties are a feature of CT operations and stem from the CT-mindset—i.e. that the U.S. owns the skies and can engage targets on its own timeline using unlimited precision munitions—but the fact is it remains a critical factor in the CDE methodology and determining the appropriate engagement authority. Aside from working to get doctrine changed, USAREUR’s judge advocates found that asking for a high civilian casualty estimate cut-off value, and delegation for exceeding those limits to the lowest possible level, was adequate short-term mitigation. The bottom line, however, is that commanders, operators, and legal advisors have to be cognizant of the fact that in a HIC, the consistent elevation of engagement authority based on casualty estimates could have catastrophic consequences for the U.S. formations involved, particularly at the start of Phase III offensive operations.

II. Munitions Shortfalls and Policy Restrictions.

In a HIC, large numbers of artillery systems will likely be employed and there will be a need to extensively use cluster munitions (CMs) in the engagement of large formations. Further, in a clash of large ground armies, the use of mines will be needed to counter enemy
movements. Most European nations are signatories to the Convention on Cluster Munitions and the Ottawa Convention on anti-personnel mines, and the United States has, by policy, also regulated employment of CMs and mines in ways that appear completely detached from the likely realities of conflict with a peer or near peer enemy in Europe.\textsuperscript{7}

\textbf{A. Cluster Munitions.}

Given the immense role that artillery has played in the conflict in the Donbas region of Ukraine, it is very likely in a HIC scenario that U.S. land forces would be embroiled in a very tough artillery fight, and will need to use CMs that do not comply with the 2017 Department of Defense (DoD) Policy on Cluster Munitions\textsuperscript{8}—which requires Combatant Commander approval for employment of all cluster munitions that exceed a one percent dud rate, and for all future procurements of CMs in the U.S. arsenal to have no more than a one percent dud rate or “that possess advanced features to minimize the risks posed by unexploded submunitions.”\textsuperscript{9} Given the likely intensity of a conventional fight, and the volume of CMs that would be needed in a HIC, policy regarding dud rates or self-destruction features should be flexible until sufficient stockpiles of compliant CMs are procured by DoD. Additionally, release authority for non-compliant CMs with a greater than one percent dud
rate should be delegated to the lowest possible levels so the land component commander has the ready ability to effectively prosecute targets.

B. Mines.

The United States has also adopted stringent rules for the employment of anti-personnel and persistent mines, in general. ¹⁰

In a ground fight with massed armor, anti-tank mines can be decisive area denial, counter-mobility tools, and effective in channelizing enemy forces. As with the PID practices discussed above, judge advocates have experienced situations where some commanders, aircrews, and legal advisors were reluctant to employ mines for fear of violating LOAC. In fact, in one scenario, the hesitation remained even after USAREUR operational law attorneys provided a favorable legal review for the proposed emplacements. Moreover, there seems to be consistent confusion and a general lack of knowledge about U.S. mine capabilities and their various delivery mechanisms. Many have assumed it is impossible to deliver anti-tank mines via a Volcano or Gator system without also delivering anti-personnel mines. The Army, however, is currently retrofitting Volcanos and Gators to deliver only “smart” (i.e. self-deactivating) anti-tank mines when circumstances require. ¹¹ As with PID, the lesson learned is that commanders, staff, operators, and legal advisors will
need to change their mindset when it comes to employment of mines if the United States engages in a HIC ground fight. They will also need to re-familiarize themselves with the capabilities of mine delivery systems.

III. Detainee Policies.

During a HIC in Europe, United States and Allied forces would likely capture large numbers of EPW. In accordance with the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), the U.S. and Allies would be required to protect and safeguard these EPWs by expeditiously evacuating them from the battlefield. While commanders, staff, operators and legal advisors have been clear on the rules and obligations in GPW, they have been hampered by current DoD detention policies that remain heavily skewed toward a CT environment. The policies, found in DoD Directive 2310.01E, if followed to the letter, could undermine U.S. obligations under GPW. For example, DoD policy restricts transfer of detainees over international borders without prior coordination with the Office of the Undersecretary of Defense for Policy—a potentially time-consuming endeavor and unworkable in an HIC environment where detainees could easily number in the thousands. Likewise, U.S. forces could be hampered in the transfer of detainees to or from an Allied force, Allied personnel, or even another United States agency. In a HIC scenario in Europe, it will likely be necessary to move EPWs expeditiously across international boundaries in order to ensure their safety. Likewise, U.S. forces, particularly those fighting in
combined NATO formations, will need the ready flexibility to accept EPWs from Allied forces.

While it is possible, and quite likely, that DoD would waive the most restrictive portions of the detention policies in a HIC scenario, the Joint Force Land Component Command legal team would have to actively pursue those exceptions to policy. In fact, the term “detainee,” which the DoD policy uses to encompass all captured persons, evoked apprehension on the part of the United States’s notional Allies during exercises. After initially referring to captured enemy soldiers as “detainees,” USAREUR judge advocates soon decided to refer to them as EPWs instead, because it allayed Allied concerns about past U.S. treatment of detainees. Since U.S. policy is to initially afford EPW treatment to all captured persons, judge advocates also found it to be a more accurate description of the initial status of captured personnel. The use of the term EPW also reassured allies that the United States would not seek to impose the death penalty, which is an issue of great concern to European Allies because of their national constitutions and the right to life provision of Article 2 of the *European Convention on Human Rights*. For the legal advisor, the clash of policy and law presents a quandary of sorts, settled, hopefully, in favor of international law. It may not be intuitive to policymakers, but U.S. obligations under law would, in effect, render some of these DoD policy restrictions meaningless.

As United States forces continue to engage in operations along the spectrum of conflict, it is important to recognize the critical value of exercises to legal
practitioners, lessons learned, and the CT stain impacting many U.S. and DoD policies, including doctrine, since 2001. For an HIC, it is imperative for policy makers and commanders to delegate more authorities to the lowest possible level and be comfortable with taking decisive action without perfect knowledge of the enemy’s activities. We are living in times that present great opportunity for legal leadership. Judge advocates obviously play an important role in helping commanders and policy makers—by identifying unrealistic policy expectations and by setting conditions for change where change is required.

Staff judge advocates and senior judge advocates also have a great responsibility in ensuring legal advisors have the tools and training they need to succeed in less regulated environments. The CT experience, and the heavy regulation of most activities, creates a certain intuitive comfort level for legal advisors—i.e. there is an answer for every problem and plenty of levels of review. In a twenty-first century HIC environment against a peer or near peer competitor, where the speed of combat and levels of violence will likely exceed anything since World War II, legal advisors will need to be comfortable in the void. So, for all leaders in the Judge Advocate General’s Corps, some reflection is in order. TAL

COL Curley and LTC Golden are currently assigned as the Judge Advocate and Deputy Judge Advocate, respectively, at Headquarters, U.S. Army Europe, in Wiesbaden, Germany.

Notes

2. See generally CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (18 June 2008).

3. See generally CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3160.01C, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY(8 April 2018) [hereinafter CJCSI 3160.01C].


5. CJCSI 3160.01C, supra note 3, Appendices E and F to Enclosure E.

6. Id.

7. Memorandum from Deputy Sec’y of Defense to Secretaries for the Mil. Departments et al., subject: DoD POLICY ON CLUSTER MUNITIONS, (30 Nov. 2017) [hereinafter DoD POLICY ON CLUSTER MUNITIONS]; G.A. Res. 52/38, (Jan. 8, 1998); PRESIDENTIAL POLICY DIRECTIVE 37, subject: U.S. LANDMINE POLICY (27 JAN 2016) [hereinafter PPD 37].


9. PPD 37, supra note 7, at 2.

10. Id.


