THE GUANTANAMO BAY DETentions: A POINT-COUNTERPOINT

The United States’ detention of suspected terrorists at Guantanamo Bay has drawn great attention in the US and worldwide. The detentions began in January, 2002. More than 600 prisoners are currently housed in a prison facility at the naval base in Guantanamo Bay. Most were captured in battlefields in Afghanistan. The prisoners, suspected of membership in terrorist organizations, have not been formally charged or been provided with access to lawyers.

Critics claim that the US is acting unlawfully and endangering international goodwill. Defenders of US policy maintain that the detentions are fully compliant with US and international law, and are necessary for national security. The issue will remain at the forefront of discussions of international law and national security for the foreseeable future. In March, the Supreme Court will hear the combined cases of Rasul v. Bush and Al Odah v. United States. The justices are preparing to decide whether the prisoners are entitled to access to civilian courts.

Below are articles by ABA Standing Committee on Law and National Security members Scott L. Silliman and John C. Yoo, along with Yoo’s colleague James C. Ho. The writers identify the complex range of issues involved in the detentions, and offer competing points of view on the Guantanamo detentions from a US and international legal perspective. —Ed.

Detaining Terrorists at Guantanamo Bay: Questions of Law and Policy
Scott L. Silliman

Just two years ago, al-Qaeda terrorists, using civilian airliners as engines of destruction, struck two of this country’s most potent symbols of power—the twin towers of New York’s World Trade Center in the heart of the financial district, and the Pentagon in Washington DC, the symbol of our military might. The visual images of that September morning remain seared in our minds. The loss of life was staggering, and our sense of security from catastrophic attacks within our borders was forever lost. Within hours of the attack, President Bush spoke not of crimes of terrorism but rather of acts of war, and the

The Status of Terrorists
John C. Yoo and James C. Ho

In February 2002, the United States government announced its determination that members of the al Qaeda terrorist network and the Taliban militia are illegal combatants under the laws of war and therefore cannot claim the legal protections and benefits that accrue to legal belligerents, such as prisoner-of-war status under the Third Geneva Convention of 1949 (GPW). The decision triggered immediate criticism from many in the international legal community, who argued that, if the laws of war apply to the conflict with al Qaeda and the Taliban, then they must be given the legal status of lawful belligerents, with all of the rights and privileges under the Geneva Conventions and the laws of war that attach.

Resolution of this matter has important implications for the war on terrorism. If al Qaeda and Taliban members are legal combatants, they could claim combat immunity for any deaths or destruction they have caused. Similarly, status as legal combatants would entitle al Qaeda and Taliban members to the legal status of prisoners of war under the Third Geneva Convention. This would require them to be housed in open barracks, where they would have, for example, the right to cook their own food and

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phrase war against terrorism was born amidst the still smoldering ashes of our grief. Congress responded quickly as well by enacting a joint resolution, which the President signed, authorizing the use of force against terrorists or those nations which harbored them.

During the ensuing conflict, suspected terrorists were captured in Afghanistan, Pakistan, and other countries and transported to Camp Delta at the U.S. Naval facility at Guantanamo Bay, Cuba, for detention of an undefined duration. Most remain there even now, never having been charged with an offense nor given the opportunity to seek legal counsel. The administration’s legal rationales for these detentions pose difficult questions and, of greater concern, there is the risk that other groups will come to use these actions as an excuse for mistreatment of American servicemen and servicewomen.

The President’s Authority under Domestic Law
On November 13, 2001, the President issued a military order entitled Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. It is a “military order,” rather than the more customary “executive order,” with the President’s authority to act clearly being predicated more under the commander in chief clause in Section 2, Article II of the Constitution, than the vestiture clause in Section 1 of that same Article. The order cites three statutory provisions, including the authorization for the use of force resolution, as further authority for the President. The other two provisions, however, Articles 21 and 36 of the Uniform Code of Military Justice, bear more on the question of the prosecution of terrorists by military commissions and are therefore outside the scope of this commentary.

As to the joint resolution, the key operative language authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” It also declares that Congress, through this resolution, is satisfying its own requirements under the War Powers Resolution of 1973 regarding the need for specific statutory authorization approving the use of our armed forces in this regard. There should be no doubt that the joint resolution, like the military order that followed, was meant to buttress and affirm the president’s right as commander-in-chief to use force in self-defense against a continuing threat, either from a state or a non-state actor. This inherent right of self-defense, clearly recognized in customary international law and codified (but not supplanted) by Article 51 of the United Nations Charter, was reiterated in United Nations Security Council resolutions 1368 of September 12th and 1373 of September 28th, both of which referred directly to the attacks of September 11th.

Many of the administration’s pronouncements with respect to both the detention and the prosecution of terrorists under the military order cite the Supreme Court’s opinion in Ex parte Quirin, a case involving eight German saboteurs who, in 1942, landed upon our shores in Florida and Long Island with intent to do damage to our defense facilities. The real issue confronting the court in Quirin, however, was President Roosevelt’s authority to use a military commission (as opposed to trial in our civil courts) to prosecute the saboteurs. “We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged,” wrote Chief Justice Stone. The court’s brief, three-sentence mention of the capture and detention of lawful and unlawful combatants, therefore, can be considered as peripheral at best. Further, Quirin was decided within the context of a formally declared war, World War II, and the Chief Justice frequently refers to the President as Commander-in-Chief in time of war. Congress has not issued a declaration of war since that time, and the September 2001 Joint Resolution cannot be construed as such, even as against terrorists. Additionally, the resolution makes no mention of detention, but rather uses the phrase “all necessary and appropriate force”, clearly signaling the use of military force. Thus, to draw authority from Quirin for the detention of terrorists under the military order of November 13th is to take the case completely out of the context of the very specific circum-
stances in which it was decided.

**The President’s Authority under International Law**

The administration declared last year that the Geneva Conventions applied to the military conflict in Afghanistan, but that they did not apply to members of al-Qaeda because they comprised a non-state terrorist group. Further, members of the Taliban were not considered prisoners of war under the third Convention because they did not meet the criteria for POW status. Therefore, members of both groups have been designated as unlawful combatants and, according to the administration, may be detained for as long as is deemed necessary in the war against terrorism.

It is clear that even if al-Qaeda were to be treated as the equivalent of a state actor, its public acceptance of responsibility for the intentional targeting of civilians on September 11th, a clear violation of the law of armed conflict, would render members of al-Qaeda as unlawful combatants outside the protections of the Convention. To that extent, I agree with the administration.

I take issue, however, with the other part of the declaration that members of the Taliban or its armed forces are, *per se*, ineligible for prisoner of war status because they fail to fit within any of the categories enumerated under Article 4 of the third Geneva Convention. Admittedly, the Taliban never received widespread recognition as the legitimate government of Afghanistan, and its armed forces could not qualify as being “members of the armed forces of a Party to the conflict... (emphasis given)”. But there is another category in Article 4 under which they might conceivably qualify: “members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.” In this regard, I can envision a young man of 17 or 18 who came late to the fray, joined the armed ranks of the Taliban Army, worked for an officer or someone else responsible for his conduct, wore a distinctive turban or other article of clothing, carried his weapon openly, and believed that there must be compliance with the laws and customs of war. He could possibly then be deemed to have met the Article’s four-fold test and qualify as a prisoner of war under the Convention, yet the administration has made its blanket determination that members of the armed forces of the Taliban are ineligible.

Interestingly, Article 5 of the Convention not only creates a presumption that its benefits and protections apply to those falling into the hands of their enemies, but also provides a mechanism for determining their actual status if there is doubt. It speaks in terms of a determination to be made by a “competent tribunal”, a totally different concept from the military commissions under the President’s military order, which are prosecutorial in nature. A competent tribunal under the Convention has the sole task of determining, on the facts, whether a particular individual is or is not a prisoner of war. These Article 5 tribunals were used by the United States during the “first” Persian Gulf War of 1991, and are again being used in Iraq with regard to the now-completed military campaign of 2003. Our refusal to employ this screening technique with regard to those being detained at Guantanamo Bay, and the administration’s continued assertion that there can be no doubt about their status, confounds even our closest allies. It is inconceivable to those in the international community who normally support us that we, a nation which touts itself as being under the rule of law, would flaunt it so flagrantly in this instance.

Quite apart from the applicability of the Geneva Conventions, there is the question of the International Covenant on Civil and Political Rights, a treaty to which both the United States and Afghanistan are parties. Article 9 of this convention provides that “No person shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” This Article also states that “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” The U.S. Senate, in a declaration taken at the time of rendering its advice and consent to ratification of the Covenant, conditioned its approval action by the statement that the United States declared the provisions of Article 1 through 27 of the Covenant to be not self-executing, meaning that those provisions would have to be implemented by legislation before they could be enforceable in our domestic courts. This does not, however, release the United States from its obligations at the international level to abide by the Convention. Further, many consider the provisions of Article 9 regarding unlawful detention to be a part of the fabric of customary international law, and they are mirrored in Article 9 of the UN’s Universal Declaration of Human Rights.

Interestingly, the Covenant’s drafters envisioned a situation when its protections might need to be suspended in the event of a “public emergency which threatens the life of the nation”, and such a limitation is contained in Article 4. The United States, which could arguably claim such a public emergency because of the continuing threat of terrorist attacks, has for some reason not availed itself of this provision in the Covenant.

**The Jurisdiction of our Article III Courts to Determine the Lawfulness of the Detention**

Although legitimate questions can be raised regarding the limits of presidential authority under domestic and international law to detain indefinitely non-resident alien terrorists at Guantanamo Bay, at least two circuit courts of appeal, the 9th Circuit and the District of Columbia Circuit, have accepted the government’s argument that there is no jurisdiction in the Article III courts to inquire into the

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matter. That argument is predicated upon the 1950 case of Johnson v. Eisentrager where the United States Supreme Court held that enemy alien petitioners who had at no time been within this country's territorial jurisdiction had no right to a writ of habeas corpus to test the legality of their detention. In the present war against terrorism, argues the government, since those alien residents being detained at Guantanamo Bay were not captured nor at any time held within the United States, and further since the naval facility there is on Cuban sovereign land, the principle established in Johnson denying jurisdiction to our federal courts is clearly applicable. On November 10th, however, the Supreme Court granted certiorari in the cases out of the District of Columbia Circuit, and it seems likely that the Court will rule one way or the other whether Johnson is truly applicable in the war on terrorism, an environment quite different from the World War II setting in which the 53 year old case was decided.

The Possible Policy Consequences
In establishing a legal framework in domestic and international law for the long-term detention of terrorists outside our borders under the rubric of the war against terrorism, I suggest a note of caution with regard to possible policy consequences. As we shape and make more elastic international law to suit our needs, whether it be in regard to detention or in the use of force in preemptive self-defense, as in Iraq, we must do so with the clear understanding that these new tools are not for us alone to use. I can conceive of a scenario a few years hence where one of our Air Force pilots is taken captive in a country that harbors widespread resentment of the U.S. and held in a detention facility perhaps even more Spartan than Camp Delta. When we complain of his illegal detention, the reply might be that the pilot being detained is an unlawful combatant because of his service to a sovereign which intentionally uses cluster bombs. When we seek to invoke the Geneva Conventions to buttress our argument for his release, our facilities at Guantanamo Bay are cited. On which side would world opinion be? Although the distinction between members of al-Qaeda, terrorists who have justifiably been coded as unlawful combatants and therefore outside of the Convention's protections, and regular combatants in a traditional state of armed conflict between states who would be covered by the Convention, is easily made and understood by legal scholars and policy makers, it may be a distinction without a difference in the eyes of much of the world which draws a perceived parallel between the two groups. In the final analysis, it may be the opinion of the latter which ends up being the most important in determining our leadership role within the global community in the decades to come.

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exercise together, rather than to be housed in the more secure individual units at Guantanamo Bay.

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We conclude that members of al Qaeda and the Taliban militia are not legally entitled to the status of prisoners of war under GPW, and are instead illegal combatants. We begin our analysis with the relatively straightforward case of al Qaeda members. Al Qaeda is not a nation-state, and as such cannot be a state party to the Geneva Conventions. Even if al Qaeda were capable of becoming a party to the treaties, it has never declared an intention to accept their terms. Naturally, al Qaeda members cannot claim the benefits of a treaty to which their organization is not a party. Thus, while the conflict with al Qaeda is governed by the laws of war, al Qaeda is not a state party to one of the specialized codifications of those laws, the Geneva Convention.

In fact, al Qaeda members fall within the category of illegal combatants. Although "illegal combatant" is mentioned nowhere in the Geneva Conventions, it is a concept that has long been recognized by state practice in the law of war area. As the U.S. Supreme Court unanimously stated over sixty years ago, "[b]y universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants." These two sets of distinctions each play a critical role in achieving the fundamental objective of the laws of war: to minimize the amount of human suffering and hardship necessitated by a state of war.

The customary laws of war minimize human suffering in wartime by limiting such hardship, to the maximum extent possible, to the participating combatants, and by keeping military hostilities away from civilians. This approach naturally requires the effective enforcement of a sharp distinction between civilians and combatants. Accordingly, customary law demands that combatants respect the distinction between civilians and themselves by imposing a variety of prohibitions and requirements. Customary law forbids the intentional targeting of civilians, and encourages combatants to take measures to avoid unnecessary harm to civilians in their own military operations. Customary law also requires combatants to distinguish themselves from the civilian population in order to help enemy soldiers avoid doing harm to civilians. Naturally, in return for these various protections from hostilities, civilians are strictly forbidden under customary law from engaging in hostilities. The former cannot exist without the latter; combatants cannot fairly be told to refrain from using
force against civilians if they regularly suffer attacks from such groups.

Al Qaeda tactics violate the very core of the laws of war. Al Qaeda members are not under the control of a nation-state that will force them to obey the laws of war. They operate covertly by intentionally concealing themselves among the civilian population; they deliberately attempt to blur the lines between civilians and combatants. Most importantly, they have attacked purely civilian targets with the aim of inflicting massive civilian casualties. Thus, even if al Qaeda were a nation-state and a party to the Geneva Conventions, its members would still qualify as illegal belligerents due to their very conduct.

One might argue, we suppose, that customary international law has made application of the Geneva Conventions universal to all combatants in an armed conflict. As many have argued, the determination of customary international law is notoriously difficult. Nonetheless, state practice by the United States does not evidence any understanding of a customary international law norm extending the Geneva Convention and prisoner-of-war treatment to combatants who fight on behalf of non-state terrorist organizations. Instead, international law regards such individuals as illegal combatants who cannot claim the protection of the laws of war that extend to legal combatants. Further, the United States, as we will see, has explicitly rejected formal treaties—which would not even be necessary if such a customary norm had developed—that have sought to extend law of war protections to irregular fighters in non-international conflicts.

Unlike al Qaeda, the Taliban militia arguably constituted the de facto government of Afghanistan. Like al Qaeda, however, the Taliban militia by its conduct did not meet the standards for legal belligerency that would have made its members legally entitled to prisoner-of-war status. GPW entitles captured members of regular and irregular armed forces the status of, and legal protections enjoyed by, POWs if they belong to units that meet the requirements of one of several applicable categories. GPW protections are available for members of militia under certain conditions. Article 4(A)(1) extends POW status to “members of militias or volunteer corps forming part of” the “armed forces of a Party to the conflict.” Article 4(A)(2) extends GPW protections to those of other militias and members of other volunteer corps... belonging to a Party to the conflict... provided that such militias or volunteer corps... 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.

At best, it appears that Taliban fighters are members of a militia. Indeed, the Central Intelligence Agency has recognized that Afghanistan has no national military, but rather a number of tribal militias factionalized among various groups. Thus, because members of the Taliban militia, like members of al Qaeda, do not comply with the four conditions of lawful combat expressly incorporated into article 4(A)(2) of GPW, they are not entitled to the protections of that convention.

Even if the Taliban were able to claim status as a “regular armed force,” rather than as a militia, it still could not qualify for POW status under GPW article 4(A)(1) or (3) without first satisfying the four customary conditions of lawful combat expressly enumerated in article 4(A)(2). Article 4(A)(1) extends POW status to “[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.” Article 4(A)(3) gives GPW protections to “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.” Unlike article 4(A)(2), the text of articles 4(A)(1) and (3) does not expressly enumerate the four traditional conditions of lawful combat. Both provisions simply extend POW status to members of the regular “armed forces” of a party to the Convention.

It has long been understood, however, that regular, professional “armed forces” must comply with the four traditional conditions of lawful combat under the customary laws of war, and that the terms of articles 4(A)(1) and (3) of GPW do not abrogate customary law. To facilitate compliance with, and enforcement of, the bedrock distinction between civilians and combatants, customary law developed these four basic conditions of lawful combatancy that all regular fighters must meet. Those conditions of customary law were later spelled out in a written text, when delegates to an 1874 Conference in Brussels drafted a declaration stating the four conditions as follows: (1) “[t]hat they have at their head a person responsible for his subordinates,” (2) “[t]hat they wear some fixed distinctive badge recognizable at a distance,” (3) “[t]hat they carry arms openly,” and (4) “[t]hat in their operations they conform to the laws and customs of war.” As recently noted by a federal district court, these “four criteria [which] an organization must meet for its members to qualify for lawful combatant status” were originally “established under customary international law” and “were first codified in large part in the Brussels Declaration of 1874.”

The four conditions under customary law play an essential role in enforcing the fundamental distinction between civilians and combatants. The second and third

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conditions are practical provisions to help soldiers recognize the distinction between members of enemy forces and civilians during the conduct of military operations. The first and fourth conditions help ensure that the substantive rules of conduct respecting this fundamental distinction, such as the prohibition on targeting of civilians and the requirement of distinguishing oneself as a combatant, are effectively enforced.

Taken together, these four conditions, aimed at facilitating the bedrock customary custom distinction between combatants and civilians, also establish a second fundamental distinction under customary law, that between lawful and unlawful combatants. Only lawful combatants—that is, members of fighting units that comply with all four conditions—are licensed to engage in military hostilities. The customary laws of war immunize only lawful combatants from prosecution for committing acts that would otherwise be criminal under domestic or international law. And only those combatants who comply with the four conditions are entitled to the protections afforded to captured prisoners of war under the laws and usages of war. Indeed, denial of protected status under the laws of war has been recognized as an effective method of encouraging combatants to comply with the four conditions. Unlike lawful combatants, unlawful combatants have no right to engage in hostilities and enjoy no immunity from prosecution for their military activities, nor do they receive the protections afforded under the laws of war to captured prisoners of war. And, of course, unlawful combatants— unlike civilians, and like combatants—are vulnerable to direct attack and targeted military hostilities, as common sense would clearly dictate.

Customary law requires combatants to respect the distinction between civilians and combatants and mandates that combatants comply with the four conditions of lawful combat as a condition of their status as legitimate belligerents entitled to engage in war on behalf of their sovereign. When various efforts were initiated, beginning in 1874, to codify customary law into written form, the drafters saw no need to enumerate the four conditions with respect to regular, professional armies; that was already provided for under customary law. Explicit reference to the four conditions was necessary only in order to achieve certain innovations in the laws of war, namely, to extend the rights and duties of lawful combatants beyond fighters in regular armies to include members of militia, volunteer corps, and other irregular forces.

To be sure, many provisions of GPW were drafted to provide more generous rights and protections to POWs than was afforded under earlier conventions governing the conduct of war and the treatment of prisoners of war. There is no indication, however, that the drafters intended GPW to abrogate the customary rule that regular armies must satisfy the four traditional conditions of lawful combat in order to enjoy the protections afforded by the laws of war. To the contrary, article 4 of GPW, governing eligibility for international legal protection, was drafted "in harmony" with customary legal principles embodied in the Hague Regulations, and was not meant to rescind or abrogate them.

Finally, subsequent international developments respecting the Geneva Conventions also reject the notion that there exists a category of combatants under GPW who are not required to comply with the four customary conditions of lawful combatancy. In 1977, delegates from various nations drafted two protocols to the 1949 Geneva Conventions. One of the primary purposes of Protocol I Additional to the 1949 Geneva Conventions was to expand the categories of individuals who would be protected under any of the four original 1949 Geneva Conventions. Article 44(3) of Protocol I, for example, would significantly dilute the traditional requirement under customary law and GPW that combatants must distinguish themselves from civilians and otherwise comply with the laws of war as a condition of protection under the Geneva Conventions. Specifically, that provision states:

Recognizing . . . that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

The Reagan Administration opposed this provision and refused to submit the first protocol to the Senate for its consideration, precisely because it opposed the idea of diluting the customary rule that combatants must comply with all four traditional conditions of lawful combatancy. As he explained to the Senate, President Reagan opposed Protocol I, in part, because it would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form. . . . [W]e must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.

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Questions and Answers with Colonel M. Tia Johnson  
Legal Advisor, Defense Reform Commission

Standing Committee on Law and National Security member Col. M. Tia Johnson has been an Army lawyer for almost twenty years. She has a LLM in International/National Security Law, and carries the skill identifier as an International/Operational Law specialist. Prior to deploying to Bosnia, she served as the Chair, International and Operational Law Department at The Judge Advocate General’s School, Charlottesville, VA. She responded to questions from the NSLR over email while deployed in Bosnia.

1. What were your major projects? What were your sources and models for creating new laws and institutions?

The goal has been to get Bosnia and Herzegovina (BiH) to become a credible candidate for NATO’s Partnership for Peace program (PPP). (I’ll explain more about that in Question 3). There were political as well as defense-related criteria. NATO required state-level command and control over the armed forces, and a means to exercise the command & control function. This also encompassed State-level Parliamentary oversight of the armed forces. For Bosnia, that meant that the Tri-Presidents had to exercise authority collectively, i.e. as an institution, over the armed forces. Two requirements flowed from this – we needed to create an “armed forces of BiH” over which the Presidency could exercise authority. Concurrently, the Entity constitutions (of Bosnia and of Herzegovina) had to be amended to divest commander-in-chief authority from the Entity presidents.

Additionally, we had to create State-level institutions: a Ministry of Defense, a senior military staff, and an operational command. Finally, there had to be democratic oversight of this new State-level defense structure, so the BiH Parliament had to establish an oversight committee. To accomplish these and other goals meant amendments to both Entity constitutions and defense laws, amendments to existing State-level laws governing ministerial and Parliamentary functions, and a brand new State defense law. In all, seven pieces of legislation were amended, as well as the new State defense law.

Our sources and models for laws were very broad. We looked to other Eastern European nations, particularly the former republics of the Former Yugoslavia (i.e. Slovenia) for the defense laws. I even used Title 10 of the US Code to draft the competencies for the military staff and the operational command.

2. What kinds of challenges did you face in sorting out the form and substance of socialist-era laws and institutions? Are there mentalities and expectations that you’ve had to work to overcome?

The legal regime for defense authorities in the Entities presented quite a challenge. The Entity Constitutions,

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one Entity in particular, were written as if they were sovereign states and not sub-political units within a State (State as used in the international law sense). As a result, these constitutions vested Entity institutions with powers generally reserved for sovereign states, i.e. the power to declare war, commander-in-chief authority over the military, authority to enter into international agreements, etc.

The defense laws were worse. They had all been enacted immediately after the war (early 1996). Despite subsequent amendments, one could plainly see that these laws had been modeled after the old Socialist laws. They were based on the Socialist concept of total mobilization of the society for defense, and were chocked full of provisions that possibly violated international norms for war, human, civil and political rights.

The defense establishment was also based on the old Socialist model. An essential element we had to build into the system was civilian control of the military. That was a concept not readily understood by the locals. Under the Socialist model, the Army answered to the President. The senior military staff was not part of the Ministry of Defense, or if it was on paper, it wasn’t subordinate to it in reality. Parliamentary oversight was practically nonexistent. So all the concepts of democratic control of the armed forces had to be created in law, and structures built to accommodate it.

Luckily, finding political consensus was the job of the Chairman and done within the Commission itself. The staff and the working groups had the freedom to create the products that were needed to effect defense reform. One of the problems we ran into was a vestige from the old socialist system – people were not empowered to make decisions. They felt very uncomfortable talking about some of these reforms if they had not been given authority to do so by their governmental or political bosses. We had to constantly remind them that the working groups were not making decisions, we were providing products for the Commission to review. The Commission would make the ultimate decisions.

3. Can you give us some background on your role and on the actions of the various international institutions in Bosnia-Herzegovina as you’ve seen them in your experience?

In June 2002, I was deployed to Bosnia to serve as the Legal Advisor to the NATO Peace Stabilization Force (SFOR). SFOR’s primary mission is the implementation of the military annex of the General Framework Agreement for Peace (GFAP), or as it is best known as the Dayton Peace Accords – the treaty that ended the war in 1995. The GFAP has eleven annexes, 10 civilian and 1 military. Various international organizations have “mandates” which flow from the GFAP, the Organization for Security and Cooperation in Europe (OSCE) for instance. The treaty created an organization named the Office of the High Representative (OHR), headed by the High Representative, who is ultimately responsible for the civil implementation of the treaty. The High Rep has supra-executive powers in Bosnia and Herzegovina (BiH). He can fire politicians and government officials who obstruct implementation of the treaty, as well as impose laws. The two organizations with enforcement authority – OHR and SFOR – work closely together.

Just a word about the GFAP. The governmental structure in BiH is somewhat complex. As the locals say, Bosnia is one country, with two Entities (sub-state political units), and three constituent peoples (Serbs, Croats, and “Bosniak,” or Muslim). The GFAP created a weak central government and nearly autonomous Entities. Before the dissolution of Yugoslavia, and the subsequent war, Bosnia was one of six Republics. Accordingly, many State-level institutions and State-level laws of certain areas did not exist. For instance, BiH got its first State-level criminal code and criminal procedure code in January 2003 – eight years after the end of the war.

Consequently, the international community in BiH is heavily into strengthening the State’s ability to govern. To this end, institution building, instilling the rule of law, and developing a single economic space has been the international community’s main focus. Many laws have been drafted to support this effort. The SFOR Legal Office reviewed and provided input to these laws where appropriate.

My first direct involvement in helping to draft laws occurred with the Weapons Import-Export Law late last year. Last October 2002, SFOR discovered that an aircraft manufacturer in the Republika Srpska (the Serb-dominated entity) – ORAO Institute - was selling aircraft engine parts to Iraq through Serbia. This violation of the UN embargo caused the High Rep to order the creation of an import-export regime at the State-level. This required a new law to empower the Ministry of Foreign Trade and Economic Relations (MoFTER). I was part of the working group drafting the law. It consisted of attorneys from the main international organizations (OHR/OSCE/SFOR), some embassies, and State-level ministries (Ministry of Foreign Affairs (MFA) and MoFTER). That effort was very successful. I had no idea that I would be working with some of these same attorneys later on.

Which brings me to defense reform. Another quirk of Dayton is that it did not disband the armies of the former warring parties. Thus it left two standing armies in the country. Each of the Entities had their own army, with little to no State-level oversight or control. The ORAO incident highlighted this deficiency and the need to pull those authorities up to the State. Simultaneously, SFOR was pushing the Entity Armed Forces to restructure, downsize and increase interoperability. On both fronts we kept hitting brick walls. Either there were no laws in place to accomplish certain things, or those authorities resided with the Entities.
In January 2003, the BiH Presidency presented its Defense Targets and Pledges, committing itself to becoming a credible candidate for NATO’s Partnership for Peace Program (PPP) by June 2004. It was clear that changes in the Entity Constitutions and laws would be necessary. In March and May 2003, OHR/OSCE/SFOR co-sponsored two legal seminars on defense. These seminars brought together State and Entity officials from the executive and legislative branches to review the legal framework of defense authorities. I was privileged to co-chair the constitutional working groups in both seminars. After the first seminar, we were tasked to draft a State-level defense law for the May seminar. Essentially five of us wrote it in a few weeks.

After the May seminar, the High Rep created the Defense Reform Commission (DRC) with the mandate to recommend legal measures necessary to reform the defense establishment in BiH thereby making it a credible candidate for NATO’s PPP Program. The Commission is a 12-member panel, primarily locals from the defense establishment, SFOR, OSCE and the OHR have representatives, as well as 4 international observers (US, Russia, Organization of Islamic States, and the EU). The Commission sought political consensus. It has a small staff, but the primary work of the Commission was performed in working groups. I was in the Legal Working Group. In August 2003, the Chair of the Commission asked the Commander, SFOR if I could come serve as the Legal Advisor to the DRC.

A cadre of attorneys – both internationals and locals – worked together on various projects and working groups, thereby developing trust and confidence in each other’s abilities.

4. How were you able to work with and build trust among the members of various ethnic groups? What kinds of language barriers did you face in working with people and drafting laws?

There were two layers of trust needed: the locals trusting you and them trusting each other. The Legal Working Group was at a marked advantage over some of the other working groups, because two of the DRC attorneys (myself and a Brit.) had been involved in the legal seminars in March and May. So the Entity MoD attorneys already knew us. Additionally, most of them knew me from my time as the SFOR Legal Advisor, so I had a lot of credibility with them. We had four local attorneys, two from the Republika Srpska (Bosnian-Serbs), and two from the Federation (one Bosnian-Croat, the other a Bosniak). To our surprise they would joke and tease each other. In many ways, both the Working Group process, and certainly the Commission process brought together all sides to discuss one of the thorniest and emotionally charged issues facing Bosnia-Herzegovina. Working together broke down the walls that had been artificially erected between people after the war.

The language issue was an incredible challenge and burden. A challenge, because many of the laws had to be translated into English. Most of the older laws were available only in hardcopy, so they first had to be retyped, then translated, so we could manipulate the documents to revise them. In some cases we had to go back to the old Yugoslav laws – so finding those laws was a challenge in itself. The other challenge with the laws is my pet peeve. Reflecting the old socialist/civil law system, the laws aren’t codified. There’s an individual law on everything, and they are published in the Official Gazette (soft-covered tissue paper pages, like pocket part updates). If a law is amended, there is a separate law on amendment. This later law doesn’t provide the revised text; it merely adds or deletes the applicable language (it’s left to you to make the revisions). To make matters worse, the laws are infrequently consolidated. As a result, I was always uneasy as to whether we had the latest version of a law.

Finally, one of the fallouts from the war was the death of Serbo-Croatian. In its place were born three different languages, Bosnian, Serbian, and Croatian. So all the products of the Commission were produced in four languages, those three plus English. This required incredible translation support. Aside from the general language challenges, were the specific challenges of drafting laws in a very specialized field. The interpreters weren’t defense specialists, so that posed some unique problems sometimes. We relied on the MoD attorneys (one of which was a military attorney) for many technical terms in the local languages.

We tried to be very conscientious, using local laws as models for format and text. To our credit, the laws made it into Parliamentary procedure with just minor technical changes.

5. Who has assisted you in this project from other countries? Are there different expectations and contributions from people who come from countries with varying legal backgrounds?

As I stated in question 3, many of the attorneys and politico-military types from the IC (international community) and embassies had worked together in the past. The DRC Staff was composed of borrowed manpower from OHR/OSCE and SFOR (me). Our first Chief of Staff was from OHR-Political; he was seconded from the Danish MFA. The first DRC Legal Advisor was American; he was formerly the OSCE Legal Advisor (I’d worked with him on the weapons export law). The DRC Staff works closely with the Department of Security Cooperation, OSCE (which is our sponsoring organization providing us office space and admin/logistical support). The DSC is primarily Europeans. The Legal Working Group of the DRC also had local attorneys from the Entity MoDs. Of course everyone had different expectations

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Q-and-A with Col. M. Tia Johnson

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which sometime mirrored their national agenda, sometimes not. Having very clear goals, i.e. the PfP criteria and OSCE commitments kept us focused. Personally, coming from the common-law tradition, and from a non-Parliamentary system of government, I appreciated the input from my European colleagues who were civil law trained and familiar with Parliamentary systems.

6. What kinds of challenges have you faced in seeing that the laws and plans you’ve helped to draw up are properly executed?

The Defense Reform Commission submitted its 250 plus page report to the High Representative on 26 September 2003. On 2 October the High Rep presented the report containing the draft legislation to the State and Entity governments. Since that time the focus of the DRC Staff has been along two axes – the legislative process and implementation. Tracking these laws through the governments to the Parliaments was like herding cats. No sooner had we tracked it down to one ministry, then you’d discover that it was with another ministry for comment. In addition to the draft legislation in the report, we’d set forth the constitutional basis for the changes as well as provided statutory analysis. This served us well, because most of the government officials were unfamiliar with the work of the Commission, so they relied heavily on the analysis contained within the report.

I created legislative teams to track the legislation through the State and Entity processes. This has worked very well because the teams can stay abreast of the legislation, and provide whatever support is needed. I head-up the State-level team. I’ve met with State parliamentarians, and briefed the leadership from both Houses and committees on the draft legislation.

This is a crucial stage for defense reform. To get these laws passed will require goodwill on all sides to build the political consensus necessary. Moreover, the laws as drafted, cannot be significantly weakened without jeopardizing Bosnia’s chance to be a credible candidate for PfP.

Keeping up with Implementation is harder. The DRC isn’t the implementer, but we maintain oversight of implementation. The implementers are the locals, and stovepipe IC organizations that deal with institutions building and the military (OSCE and SFOR). This requires synching the efforts of the IC to ensure that everyone is moving in the same direction. The Commission staff has tried to focus the IC on those tasks that can be implemented before all the legislation is in place. There are a lot of moving parts – most of which require funding from either the IMF/World Bank, or donor nations.

Also, Bosnia and the IC are working against a deadline. NATO meets to consider membership in PfP only a few times a year. The next ministerial level meetings of the North Atlantic Council take place in early December. So we’ve been pushing Bosnia to have a “deliverable” in time for those meetings – either passage of the State-level defense law, or significant progress is some other area of defense reform.

7. What lessons learned from this experience in institution building might apply to other missions?

The “lessons learned” from Bosnia has probably become one of the favorite subjects of the pundits. Although there’s no cookie-cutter approach, I do think that certain things served us well.

• We were working in a discrete field – defense.
• We had clear objectives – recommend legal changes necessary to reform the defense system to bring it in line with western standards for democratic control of the armed forces, thereby making Bosnia a credible candidate for NATO’s PfP.
• We had clear standards to guide our work, the criteria for PfP and the OSCE Commitments.
• There was consensus among the IC.
• There was an end date, and a definite goal – PfP membership.
• Extensive work had been done to identify the deficiencies and come-up with recommended fixes.
• The Commission was senior enough to achieve political consensus among the local governmental authorities. The Chairman and members of the IC (particularly Embassies) actively engaged the political elites in the country.
• Subject matter experts in Working Groups did the work, leaving the Commission free to make decisions.
• Locals were actively involved in all phases, thereby ensuring “buy-in”.
• The time was right.
On October 30, 2003, the ABA’s Standing Committee on Law and National Security welcomed Colonels Frederic Borch and Will Gunn at the University Club in Washington, D.C., as part of its series of breakfast meetings. Colonel Borch, Acting Chief Prosecutor, and Colonel Gunn, Acting Chief Defense Counsel from the Pentagon’s Office of Military Commissions, addressed their roles in the “imminent” military commissions.

Colonel Borch began the morning presentation quoting President Bush’s November 13, 2001 order which authorized the creation of the military commissions, calling for the commissions to be “full and fair.” That phrase hearkens back to President Roosevelt’s order creating the military commissions at the conclusion of World War II. Colonel Borch explained that, like those earlier commissions, the government bears the burden of proof. The accused will benefit from a presumption of innocence and the prosecution will have to prove its case beyond a reasonable doubt, just as in the due process requirements of civilian US criminal courts. Colonel Borch was unwilling to speculate as to when the proceedings will commence, but simply said that his office has to be ready to go when the President or Secretary of Defense orders their initiation.

Colonel Gunn focused on the process by which the detainees will receive counsel. He explained that each detainee will have the right to one military counsel at no cost to him or her. If a detainee is unsatisfied with the counsel that has been provided, they are free to choose another one. However, if a detainee would rather employ civilian counsel instead of military counsel, they may do so at their own expense. Colonel Gunn also stressed the idea that “the success of the commissions won’t be judged by history on the number of convictions but on whether the trials were ‘full and fair.’”

Colonel Gunn concluded his prepared remarks by describing criticism he had received, questioning his patriotism for defending these accused members of al-Qaeda and the Taliban. He referred to Thomas Payne, who wrote that only by protecting the rights of one’s enemy can anyone ensure the longevity of civil liberties for all. Colonel Gunn noted, “this is the spirit in which we operate.”

Following the remarks by Colonels Borch and Gunn, members of the audience were given the opportunity to ask questions. On the role classified information will play in the proceedings, Colonel Borch said he hopes to “maximize the amount of time the proceedings can be open to the public,” and use as little classified information as possible. A major contention with the military commissions by critics appears to be the notion that attorney/client communications may be monitored. According to Colonel Gunn, civilian attorneys who wish to represent the detainees and participate in the proceedings must sign an affidavit acknowledging they may be monitored. Colonel Gunn pointed out that any material obtained cannot be used against the client. Colonel Borch also noted that he has not experienced any difficulty because of this circumstance in accumulating a worthy pool of civilian defense counsel who are willing to participate in the military commissions.

Right now, the last hurdle in implementing the military commissions is the public’s reaction. According to Colonel Gunn this is the right thing to do and the right way to ensure the detainees receive a fair trial.

For more information on the establishment of the military commissions, visit: www.dod.gov/news/commissions.html for the Pentagon’s word on the commissions themselves, and:


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Yoo and Ho on Guantanamo
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This is not the place to discuss whether the United States had the factual basis upon which to decide whether the Taliban militia actually met the four criteria for legal belligerency. It is enough at this point to conclude that President Bush had the legal basis to conclude that the Taliban militia had to meet those four criteria in order to be legally entitled to the status of legal belligerency, and, as a result, the protections accorded to prisoners of war under the Geneva Convention.

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Breakfast Meeting Summary: Assistant Defense Secretary Peter Rodman
Jessica Salmoiraghi

On September 23, 2003, the Standing Committee on Law and National Security hosted Assistant Secretary of Defense for International Affairs, Peter Rodman. Mr. Rodman’s remarks provided an excellent view into the Defense Department’s stance on the progression of the war on terrorism, as well as a positive outlook for the future.

According to Mr. Rodman, at the heart of the conflict lies a battle between two fundamental doctrines. On the one side, the terrorists are seeking to gain adherents to their extremist, anti-democratic ideology; however, on the other side is the United States’ policy on promoting democracy abroad. And, in order to counter the strategy of the terrorists, the U.S. must take aggressive and open steps to ensure the victory. Mr. Rodman further asserted that “by staying the course” the U.S will outlast the terrorists.

The U.S. campaigns in Afghanistan and Iraq are representative steps in the Department of Defense’s strategy. Mr. Rodman cited Iraq as “a necessary pre-success to the war” on terrorism, because failure to confront the Iraqi regime would have appeased other terrorists and projected the illusion of a weak American government. Since terrorists like al-Qaeda were already convinced the U.S. will crumble in the face of a few successful attacks, failure to confront Saddam would have been a dangerous precedent.

Mr. Rodman also proposed that the reconstruction effort in Iraq is not going as badly as detractors have portrayed. He highlighted the Iraqi Governing Council and cabinet as “the embryo of self-government.”

Mr. Rodman was also optimistic about the situation in Afghanistan, where the central government maintains control, a constitution is in the planning, and democratic elections are forthcoming. Terrorists do not want these reforms to succeed because they threaten the fundamentals of their ideology, if the West installs moderate democratic government in these two countries the terrorists will lose important strongholds.

Rodman closed with a positive outlook for the war against terrorism. He suggested that an American victory is guaranteed because of the endurance of the U.S. strategy relative to the empty propositions of terrorist philosophy. However, he cautioned that the differing opinions in the U.S. political debate should stress their underlying unity in opposition to extremism. Additionally, Mr. Rodman recommended that Iran remain in everyone’s focus because it is a “regime in trouble” and “an ideology discredited in the eyes of the people.” Since Iran is “the granddaddy of radical Islamic ideology,” Mr. Rodman maintained, any changes there could have major implications for the rest of the Middle East.

For further reading on this subject see the following:
- University of Michigan, “America’s War Against Terrorism”: available at: http://www.lib.umich.edu/govdocs/usterror.html

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Silliman on Guantanamo Detentions
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Conclusion

The detention of suspected terrorists at Camp Delta at Guantanamo Bay incident to the war on terrorism might have yielded some intelligence information which, presumably, has thwarted further terrorist attacks on our country and our citizens and interests abroad. But if in the process of acquiring this intelligence, through extended and perhaps even indefinite detention of those not charged with a crime nor given access to counsel or the courts, we are perceived even by our closest allies as establishing a new legal regime which denies fundamental protections now afforded under existing international law, one has to wonder whether we will ultimately lose more than we gain. In navigating the uncharted waters of trying to defeat worldwide terrorism, the law in which we have always placed our trust should remain our surest compass.

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