

The Eighteenth Gap

Preserving the Commander's Legal Maneuver Space on "Battlefield Next"

Lt. Gen. Charles Pede, U.S. Army
Col. Peter Hayden, U.S. Army

In 2017, the Army's premier institution for the study of warfighting, the Combined Arms Center (CAC) at Fort Leavenworth, Kansas, identified seventeen conventional warfighting capability gaps that emerged in the force after years of sustained counterinsurgency (COIN) and counterterrorism (CT) warfighting in Afghanistan and Iraq.¹ These gaps emerged over time as the Army reorganized itself for COIN and CT. Doctrine changed, force structure changed, hardware changed, tactics changed—and so did the rules of engagement (ROE) to win the COIN and CT fights.

We have fought not as corps and divisions on the battlefield but as brigades and battalions. We converted infantry and artillery warfighting units into *advise and*

assist formations; we pushed river bridging units out of the active Army—or eliminated them. Even our existing

truck companies could not transport the largest vehicles or fuel-heavy formations in the quantities needed in a full-up fight—or in Army parlance, support large-scale combat operations (LSCO).

To the CAC's list of seventeen warfighting capability gaps such as these, we would add what we consider one of the greatest dangers to our future success, *our legal maneuver space*, or what we call the "eighteenth gap."

Twenty years of COIN and CT operations have created a gap in the mindset—in expectations—for commanders, soldiers, and even the public. Army forces suffer our own CT "hangover," having become accustomed to operating under highly constrained, policy-driven rules of engagement. Compounding this phenomenon is public perception. Nongovernmental organizations, academics, and critics consider "smart bombs" and CT tactics to have become normative rules in warfighting. In short, they are not. This gap—the space between what the law of war actually requires, and a growing expectation of highly constrained and surgical employment of force born of our own recent experience coupled with our critics' laudable but callow aspirations—left unchecked, threatens to unnecessarily limit a commander's legal maneuver space on the LSCO battlefield.

The popular misunderstanding of modern warfighting imagines highly precise smart bombs winning the battle, if not the war. Generations of soldiers, including

Lt. Gen. Charles Pede, U.S. Army, is the fortieth judge advocate general of the U.S. Army. He holds an LLM in military law and a master's degree in national security and strategic studies. He previously served as the commander/commandant of the Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Col. Peter Hayden, U.S. Army, is the chief of Strategic Initiatives for the Army Judge Advocate General's Corps. He holds an LLM in military law and a master's degree in national security strategy.



even our most senior leaders, have consumed a persistent diet of highly restrained policy premised on self-defense in the use of lethal force. Fighting terrorists who hide among innocent women and children has rightly demanded such restraint.

However, the next fight may not be with an asymmetric blend-into-the-market enemy. In a LSCO fight, a commander may have to confront and defeat a large enemy armored column accompanied by infantry supported by warplanes overhead, long-range fires into our rear areas, together with confusion induced by cyber and electronic warfare attacks. Commanders will need to intuitively know and confidently apply the actual rules of war, unhindered by the lingering hangover of constrained COIN ROE. Mastery of the law of war may very well mean the difference between victory and defeat.

This article is written to remind the public and the professional soldier that large-scale ground combat requires a different mindset. What is required in this warfighting world is adherence to the law of war and its fundamental principles: military necessity, distinction, proportionality, humanity, and honor.²

Soldiers from the 5th Battalion, 20th Infantry Regiment, 3rd Brigade, 2nd Infantry Division, attached to the 3rd Brigade Combat Team, 1st Cavalry Division, conduct their first mission in the Diyala Province 14 March 2007, engaging anti-Iraqi forces in Baqubah, Iraq. (Photo by Staff Sgt. Stacy L. Pearsall, U.S. Air Force)

This article reminds us that soldiers and leaders must be trained constantly on the law in order to eliminate the eighteenth capability gap to win the next fight.

The External Threat

The eighteenth gap is the lack of understanding with regard to the difference between the law of armed conflict (LOAC) as codified in custom and treaty, and the rising tide of uncoded assertions, legal commentary, and accumulated policy overlays resulting from years of precision CT warfighting. The gap has opened in two respects. It has opened between the actual content of the law as approved and enforced by sovereign states in contrast to the more aspirational “evolution” of the law championed by scholars, interest groups, and nongovernmental organizations in an *external* drumbeat of legal commentary. Such

contributions to the study of the law of war are real and growing with every new well-intentioned blog article.

Humanitarian groups, for example, advocate that explosive weapons should not be used in urban areas because of the enhanced risk of civilian casualties.³ Some recommend avoidance policies against the use of

is to win—within the bounds of the law of war. Such warfighting will look very different from the operations of the last twenty years.

For example, in a conventional conflict against a declared enemy, a commander faced with an unidentified drone overhead and indications of a heavy armored

“ We must close the eighteenth gap. We must spotlight and reject the danger of those who misrepresent the laws of war, to educate those who would consider rewriting the laws of war based on counterterrorism (CT) warfighting success. And we must reaffirm our Army commanders’ confidence to nimbly move between CT and full-up conventional warfighting on demand. ”

indirect fire weapons in urban areas.⁴ Still others have posited that some attacks may be lawful only with precision weapons, but unlawful for artillery, mortars, and “dumb bombs,” and that precision weapons, if possessed, must be used “as soon as they are part of a state’s arsenal and their use is practically possible.”⁵ Yet none of these idealized and often uninformed notions of warfighting are required by the robust rules of war.

The Internal Threat

The gap, however, is not simply the danger of a persistent mischaracterization of the existing law of war by outside critics and pundits. Our internal wiring as soldiers is an existential danger on Battlefield Next. Today’s senior commander and lawyer have been raised on a constant diet of constraining CT rules of engagement for nearly twenty years.

From the time I was a captain in Mogadishu, Somalia, to my time in Afghanistan and Iraq, the mental models soldiers have operated within have involved notions of restrained employment of force in order to win the peace amid the reestablishment of institutions of governance.

Shifting to a full-up fight against the declared hostile forces of a near-peer adversary is an entirely different kettle of fish. Use of force in warfighting is not based on self-defense. Declared hostile forces can lawfully be shot on sight, without any demonstration of hostile intent or act. Commanders will often say we do not look for a fair fight in warfighting. The goal

enemy column streaming toward his or her position cannot hesitate to consider hostile intent or hostile act constructs. On a battlefield in which an artillery strike can destroy entire mechanized battalions in a mere two minutes, seconds matter, and those seconds can mean preserving lives and possibly victory on the battlefield.⁶

We must close the eighteenth gap. We must spotlight and reject the danger of those who misrepresent the laws of war, to educate those who would consider rewriting the laws of war based on CT warfighting success. And we must reaffirm our Army commanders’ confidence to nimbly move between CT and full-up conventional warfighting on demand.

A review of the structure of the rules governing conduct in armed conflict requires a description of how the humanitarian and academic communities have drawn upon their extensive access and observations of the last twenty years of COIN and CT operations to draw incomplete conclusions about the nature of warfare and LOAC. This phenomenon presents two examples of the danger: mischaracterization of the law and an attempt to “develop” the law without regard to the character of conflict. There is danger of reinforcing a CT mindset in a decisive-action world and the accompanying practical challenges involved in retraining an Army to apply a different set of rules after twenty years of muscle memory. Finally, there is a readiness imperative to give commanders the confidence to apply the law in the most lethal environments.



We must reassure the world's premier high-stakes decision-makers—America's field commanders—where the law of war begins and ends and where policy, legitimate and prudent, begins and ends. We must close the gap between the public perception of LOAC and the actual content of the law as agreed to by the legitimate authority of the U.S. government. Our readiness demands that all Americans—commanders, soldiers, critics, and the public—understand the law.

Conflating Policy with Law Based on Success in the Last War

The law of war, also referred to as the “law of armed conflict” or “international humanitarian law,” encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.⁷ This latter category is defined as a consistent practice of states (including the United States) over time, coupled with *opinio juris*—roughly meaning that the state practice arose “out of a sense of legal obligation.”⁸ Sovereign states make the law, either through

Staff Sgt. William P. Skilling, tank commander, Company D, 3rd Brigade, 8th Battalion, 1st Cavalry Regiment, minimizes his physical presence by kneeling 15 January 2008 during a dismounted patrol in Mosul, Iraq. Company D teamed up with their Iraqi counterparts for the joint mission conducted in the Yarmook neighborhood. (Photo courtesy of the U.S. Army)

explicit agreement or through practice with the state's understanding that the practice is required by law. And while nations may differ as to which treaties or customary law are observed, the international law of war that binds a state is that to which *it has subscribed*.

Department of Defense (DOD) Directive 2311.01 requires that U.S. forces “comply with the law of war during all armed conflicts, however such conflicts are characterized.”⁹ That is, the laws of war are standards that must be obeyed in all circumstances. This directive facilitates consistency of application, enforcement, and training across the more than two million uniformed service members of all services and components. To provide clarity about the content of the law applicable to U.S. forces, the DOD published the *Law of War Manual*

“as the authoritative statement on the law of war within the Department of Defense.”¹⁰ The laws of war include such fundamental principles as “combatants may make enemy combatants and other military objectives the object of attack, but may not make the civilian population and other protected persons and objects the object of attack,” and “detainees shall in all circumstances be treated humanely and protected against any cruel, inhuman, or degrading treatment.”¹¹

Under the law, as it is, military commanders conducting an attack must take *feasible* precautions to protect civilians based on the best information they have available at the time.¹² They must always be mindful of their legal and moral obligation to minimize suffering of civilians and to avoid unnecessary damage of civilian objects. But they are not required to discard considerations of military necessity or to forget their mandate to accomplish their mission.¹³

And commanders are permitted to consider that winning swiftly through the efficient use of force may well, in the long run, be the single best way to reduce civilian casualties and incidental harm to civilian objects. In other words, under LOAC, *military and humanitarian interests are fundamentally consistent with one another. They complement each other.*

In contrast to the law of war, *policies* are implemented by ROE. This has been true since Col. William Prescott told his Minutemen to hold their fire until they saw “the whites of [the British soldiers’] eyes,” at the Battle of Bunker Hill.¹⁴ Commanders and policy makers control

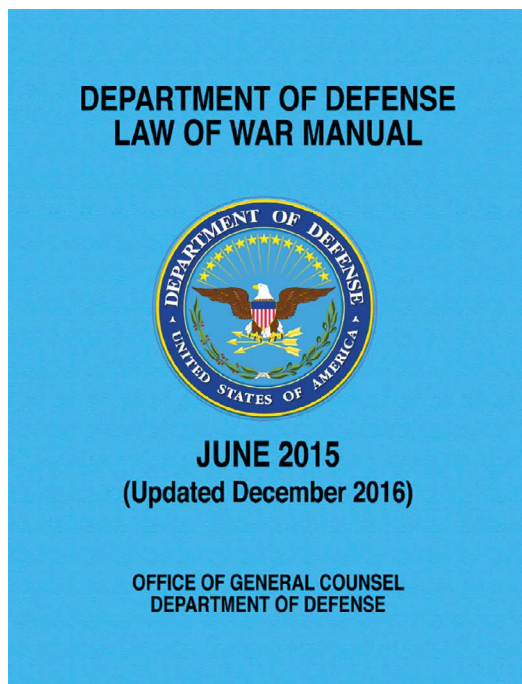
violence on the battlefield for many reasons. In most of the U.S. operations of the last twenty years, use of force is based on self-defense ROE, requiring an American soldier to perceive a threat before using force. Even with declared hostile forces, which can be shot on sight without

the need for hostile intent or act, commanders have operated under a panoply of elevated approval authorities for certain munitions, collateral damage estimation methodologies, and related mechanistic formulas. Some of these ROE and policies may have served humanitarian purposes, but the law of war itself does not dictate what process must be observed or what level a commander can approve a strike. Some ROE are standing rules, that is, they are good policy but not in and of themselves required by law. But most ROE are tailored to specific operations.¹⁵

This distinction between law and policy is fundamental to the gap between the law of war and its misperception. And

the distinction will be profoundly important on Battlefield Next, when survival and victory on the battlefield with a near-peer demands adherence to the law in a construct that recognizes the necessities of war.

The past decades of CT and COIN operations in Afghanistan, Iraq, and elsewhere have borne witness to a very specific type of warfare. Scholars and news reporters have exhaustively covered the challenges posed in fighting nonstate actors in loose organization who hide among the population and fight asymmetrically.¹⁶ Many of these challenges drew public scrutiny to both the law of war and ROE.



To view the *Department of Defense Law of War Manual*, visit <https://tjaglcspublic.army.mil/dod-low-manual>.

Right top: Military vehicles cross a pontoon bridge 19 October 2010 during the Mission Action 2010 transregional joint exercise in China. Thirty thousand personnel from the People’s Liberation Army’s Beijing, Chengdu, and Lanzhou military commands participated in the exercise at various locations. (Photo courtesy of Xinhua) **Right bottom:** Members of the People’s Liberation Army Marine Corps train at a military training base 21 January 2016 in Bayingol, Xinjiang Uighur Autonomous Region, China. To defeat large adversary formations supported by aircraft, long-range fires, and electronic/cyber warfare, commanders must know and apply the law of armed conflict together with rules of engagement tailored to the mission. (Photo by Stringer, Reuters)



However, the advantages that the U.S. and coalition forces have enjoyed received considerably less attention: operations launched from largely secure bases with secure and reliable communications, transportation, and supply. Technical overmatch. Precision weaponry. Sufficient manpower. Little to no meaningful threat to the homeland. Command of the air and seas.

and strategic direction discussed in the recent *National Defense Strategy*, the *National Military Strategy*, and the *U.S. Army in Multi-Domain Operations 2028*.²⁰

In short, there is a lot of noise in the national security law arena offering opinions on LOAC and its application. Much of the commentary is thoughtful and helpful. However, some of it is misguided, based on naïve under-



Under the law of armed conflict, military and humanitarian interests are fundamentally consistent with one another. They complement each other.



These same advantages enabled much of the policy and process to conduct precision CT targeting designed to minimize civilian harm to an exceptional degree.¹⁷ Operators could afford to wait for hours of overhead surveillance “soak” on a target to confirm an enemy’s presence, to establish “patterns of life,” and to select exactly when and where to strike with precision-guided munitions so as to minimize any possibility of collateral damage with unprecedented degrees of certainty. However, the DOD was careful to note that the rigorous processes used to protect civilians in the wars in Afghanistan and Iraq reflected operation-specific policy constraints that went well beyond the requirements of LOAC.¹⁸

This approach proved both politically and militarily sound during the conduct of stability and COIN operations, enabling the military to explain the stringent processes for minimizing civilian casualties to congressional oversight committees and the public, including the very humanitarian groups that prioritize civilian protection above all else. As a result, scholars, humanitarian actors, and policy specialists have acquired a degree of proficiency with the military’s own processes, emboldening them to advocate for new policy and legal constraints.¹⁹

Captivated by technological improvements in the relatively surgical fighting of U.S.-led COIN and CT operations, these communities formed opinions on the law and policy of warfighting based on the observations of the past twenty years. This commentary often demonstrates extensive research into recent operations and familiarity with contemporary tactics, techniques, and procedures. However, very little of it demonstrates familiarity with the study of warfare itself, or considers the environment

standings of the conduct of military operations. Some of it is misleading, and some of it is flat wrong, misstating the substance of LOAC due to a lack of understanding. Too often, these commentaries fail to carefully ensure that they accurately reflect the existing LOAC or appropriately distinguish between the law applicable to all armed conflicts and the immensely prudent policy restrictions tailored to specific operations.

Carl von Clausewitz admonished strategists in his famous dictum: “The first supreme, the most far reaching act of judgement that the statesman and commander have to make is to establish by that test the kind of war on which they are embarking; neither mistaking it for, nor trying to turn it into, something that is alien to its nature.”²¹ Yet that is precisely the trap into which some of these commentaries fall. They advocate for a ruleset based on CT and COIN, without regard to the breadth of potential threats that U.S. forces must be prepared to confront.

For that reason, it is critical for those responsible for upholding and applying the law to be vigilant, to identify and highlight misstatements of the law, to clarify the distinctions between LOAC and more restrictive policies tailored to individual operations, and to ensure that our commanders and soldiers are trained to apply the right rulesets, both law and policy, for each and every operation.

The External Threat: Legal Commentary

Mischaracterization of the law: The United Nations Assistance Mission in Afghanistan report.



A U.S. Air Force A-10 strikes a Taliban narcotics facility 3 April 2018 in Farah Province, Afghanistan. U.S. forces and Afghan National Defense and Security Forces seized and/or destroyed select narcotics production and trafficking nodes throughout the course of the conflict to reduce the insurgent forces' ability to procure financial resources. (Photo courtesy of Operation Resolute Support)

equipment, bases, and communications/ transportation nodes but also those objects that effectively contribute to an enemy's capability to sustain military operations.²⁶ Such war-sustaining objectives can include electric power stations, petroleum production and refining facilities, and in appropriate cases, objects that enable funding of adversary military operations.²⁷

From destroying the cotton of the Confederacy to destroying oil trucks used to fund Islamic State operations in Iraq and Syria in 2017, and yes, Afghan insurgent drug labs, this has long been the position of the U.S.

On 9 October 2019, Americans woke up to the headline "U.N. Report Says U.S. Air Strikes on Afghan Drug Labs Unlawful, Hit Civilians."²² Similar stories populated newsfeeds in Afghanistan, pan-Arab media, Europe, and China.²³ At issue was a United Nations Assistance Mission in Afghanistan (UNAMA) report accusing U.S. forces of violating LOAC by striking drug labs that were alleged to have been used to fund Taliban operations.²⁴ In short, the authors of the UNAMA report mischaracterized the law.

LOAC permits military forces to attack legitimate military objectives, specifically those objects, "which by [their] nature, location, purpose or use [make] an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."²⁵ Military objectives include not merely warfighting objects or facilities such as military

government.²⁸ The United States is hardly alone in this view. Several other countries, including many U.S. allies and partners, recognize that economic objects may be potential military objectives.²⁹

The UNAMA report acknowledges the U.S. position that military objectives extend to war-sustaining objects. Nevertheless, it concludes, *without citing to any legal authority*, that "[a]n object that financially contributes to a group that engages in hostilities represents an insufficient nexus to the fighting for it to be classified as a legitimate military target," and that the U.S. "position that treats 'war sustaining' industries as legitimate military targets is not supported by international humanitarian law."³⁰

War sustaining industries—or as our U.S. Supreme Court characterized them, the "sinews of war"—may be lawful targets under LOAC.³¹ A conclusion that a state violates international law as a matter of policy, broadcast to the world with the imprimatur of the

United Nations, cannot go unchecked. It is all the more imperative when that conclusion is unsupported by any legal authority whatsoever. Confronted with a mischaracterization of the law like that contained in the UNAMA report, states that actually make, apply, and uphold LOAC must call attention to such misstatements and remind our soldiers and the world what the law actually says.

Humanitarian legal creep—explosives in cities: Law, policy, and aspiration. Legal overreach is just as troubling in recent debates over the use of explosive weapons in populated areas.³² The humanitarian community is rightly concerned about recent reports of extensive urban civilian casualties in the conflicts in Syria, Yemen, and Ukraine. However, rather than question whether the existing LOAC was properly applied, several organizations instead chose to advocate for a blanket prohibition against a category of weapons, as though banning a weapon or tactic outright would compel serial violators into compliance. LOAC prohibits the bombardment of undefended towns, villages, and buildings, just as it prohibits attacks on civilians or civilian objects.³³ However, when the enemy turns an otherwise civilian object into a military objective by virtue of its location or use, it may be attacked.³⁴

As with any attack, the expected damage to civilians and civilian objects (referred to as damage “collateral” to the military advantage) *may not be excessive* in proportion to the concrete and direct military advantage expected to be gained.³⁵ Army commanders apply these time-honored principles of LOAC routinely in active operations, in exercises at our combat training centers and other warfighting exercises.³⁶

Several humanitarian organizations, in concert with the International Committee of the Red Cross (ICRC), have long advocated for change. In December 2019, ICRC President Peter Maurer noted the launch of a “diplomatic process towards a Political Declaration to address the civilian harm caused by the use of explosive weapons in populated areas” and called upon states to adopt an “avoidance policy,” with regard to the use of explosive weapons in urban areas.³⁷

Instead of starting from the premise that heavy explosive weapons can be used unless such use would violate IHL [international humanitarian law], we are asking States and conflict parties to reverse the starting point:

as a matter of policy and good practice, explosive weapons with a wide impact area should not be used in populated areas, unless sufficient mitigation measures can be taken to limit their wide area effects and the consequent risk of civilian harm. In other words, unless the risk they pose to civilians can be reduced to an acceptable level.³⁸

Notably, these organizations do not call for a change to the law itself. Rather, the ICRC and other organizations call for the adoption of “good practices,” and a new “policy.”³⁹ However, by calling for new standing policy and advocating for adoption of a political declaration, humanitarian advocates are, in fact, setting the groundwork for international law to encroach into what has always been an operation-specific set of policy constraints. Without deliberate and sustained clarification, policy will ripen into state practice, and acceptance in a political declaration could become viewed by many as an expression of legal obligation, the very *opinio juris* by which mere state practice becomes accepted as binding international law. Moreover, the proposed ICRC policy turns the LOAC standard on its head. Unlike LOAC, which was formed and negotiated with military input so as not to interfere with the conduct of war, the proposed policy explicitly restricts commanders from military options permitted by LOAC by imposing a higher standard on the decision to use a valid weapon.

Missing from these proposals is any serious discussion of the “military advantage expected to be gained,” the other critical prong of the inquiry in any proportionality analysis. Maurer dispatches the concern with a conclusory “it is possible to restrict the use of heavy firepower even in such challenging environments as urban or other populated areas, without compromising mission achievement and force protection,” supported only by reference to unspecified operations in Somalia and Afghanistan.⁴⁰ The Center for Civilians in Conflict’s recommendations include the need to equip militaries with the right munitions for mission and terrain, weaponeering and use of precision weapons, and the consideration of elimination of indirect fire weapons.⁴¹ In a nutshell, these positions seek to use their recommended policies to prescribe a limited range of options warfighters may employ. This approach suffers from flaws born of a profound failure to appreciate the nature of combat.



Iraqi security forces carry their weapons 6 July 2017 during fighting between Iraqi forces and Islamic State militants in the Old City of Mosul, Iraq. (Photo by Ahmed Saad, Reuters)

As an initial matter, it is not at all clear that a blanket rule banning a particular weapon or tactic will always prove more humane in all circumstances. This is not to deny the horrendous stories from Raqqa, Sana'a, and Aleppo in Syria; Donetsk in Ukraine; and elsewhere that prompt the humanitarian actors to advocate for civilian protection.⁴² But the Army is a learning organization, and military scholars specializing in urban combat have noted that the use of low-yield explosives and precision munitions may well actually extend and expand urban combat, leading to greater suffering and death. The battle for Mosul in 2017 is but one recent example of the dangers of writing overly prescriptive rules for the wrong war. Mosul was a highly urban operation where Islamic State tactics leveraged the urban terrain. The actual battle revealed that speed and decisive firepower, including high explosives, brings the battle to a conclusion more swiftly with less loss of civilian life or damage to civilian property than if the battle had been prolonged by different, more cautious means.⁴³

But of greater concern is that the campaign advocating for adopting an "avoidance policy" for explosive weapons in populated areas cites to the success

of restrictive policies in Somalia and Afghanistan.⁴⁴ Those operations bear little resemblance to what may well be the context for the next fight. The *National Defense Strategy* and the *National Military Strategy* admonish U.S. forces to prepare to fight in an environment in which all domains are contested, in which our adversaries will be able to disrupt our communications and security, and in which speed will be at a premium.⁴⁵ The fight might very well involve close-quarters combat in dense urban terrain.⁴⁶

Imagine Stalingrad, Berlin, Arnhem, or any of the French cities, towns, and villages as the Allies ventured off the beaches of Normandy under such constraints. Imagine, horrible though the thought might be, a modern allied city overrun or occupied by a modern near-peer enemy force. How would any friendly force retake a city under such "well-intentioned" constraints? Armored and infantry formations defending cities will

demand a level of violence that is unwelcome and hard to conceive but may well be necessary in order to win. That is the kind of conflict for which U.S. forces must be prepared. In such a conflict, against a near-peer adversary, winning matters.⁴⁷

The brutality of war in LSCO is unwelcome but real. Deceptively attractive rules borne of comparatively clinical COIN and CT operations would be disastrous on a catastrophic scale, were they to be applied

be the abused prisoners. We obey the law of war because it is the law and because it is the honorable path for a nation that holds itself out as a protector of oppressed peoples. We abide by the Geneva Conventions because it's the right thing to do.⁴⁸

And foundational to the principles of the law of war we know as military necessity, distinction, proportionality, humanity and honor, is the imperative to

“The brutality of war in large-scale combat operations is unwelcome but real. Deceptively attractive rules borne of comparatively clinical counterinsurgency and counterterrorism operations would be disastrous on a catastrophic scale, were they to be applied to near-peer war.”

to near-peer war. Simply put, such notions must be rejected. If we are to win on Battlefield Next, we must be ready to fight with the law that is, not the law as some would wish it to be. Decades of surgical strikes with precision weapons and weaponeering has its place. That place is not LSCO.

This admonition is not warmongering. The law of war clearly recognizes there must be legitimate constraints on violence. One of the more elegant expressions of why we adhere as a nation to LOAC also made the point quite simply:

Why bother with confining rules in combat, then? The answer: for reasons similar to those that dictate rules in football games; some violence is expected, but not all violence is permitted. Rules and laws that are frequently violated are not without value for that fact. In the western world, are the Ten Commandments, which are commonly disregarded, therefore of no worth? We honor the Geneva Conventions and obey the law of armed conflict because we cannot allow ourselves to become what we are fighting; because we cannot be heard to say we fight for the right while we are seen to commit wrongs. We obey the law of war if for no other reason than because reciprocity tells us that what goes around comes around; if we abuse our prisoners today, tomorrow we will

fight wars lawfully and swiftly, to bring an end to the suffering as quickly as possible.

The eighteenth gap, therefore, is partly the dangerous misunderstanding that precision warfighting is legally required under the rules of war. We must close this gap—eliminate this understanding—by reminding the well-meaning, the academic, and the critic that while surveillance “soak,” patterns of life, and precision strikes may be prudent as a policy matter when the military situation permits, they are not required by the rules of war. Our efforts to address the external influencers that continually threaten to widen the eighteenth gap must be persistent and vocal.

The Internal Threat: Twenty Years of COIN/CT Internal “Wiring”

The drawdown of combat operations in Iraq began to expose a disturbing, albeit not surprising reality. The aggressive initiative of a field commander in warfighting had atrophied under the highly constrained rules of COIN and CT. In short, training exercises revealed that some commanders hesitated when action was demanded. A momentary pause to consider what level commander had release authority for a five-hundred-pound bomb meant a missed enemy formation, or worse, a formation of dead American soldiers.

The Army recognized that the internal wiring of Army forces had become too closely associated with

self-defense paradigms—CT and COIN—and began to set the conditions to train for the threats of the future. In early 2012, the Army's National Training Center conducted its first decisive action training exercise (DATE) rotation since 2003, transitioning away from years of COIN-focused mission rehearsal exercises to incorporate near-peer threats.⁴⁹

The purpose of the new DATE rotations was to stress combat skills that appeared to have atrophied in the COIN fights of the recent past: armor clashes and combined arms maneuver, especially at division and corps level including deep fires.⁵⁰ This included a return to the baseline rules of warfighting consistent with LOAC.

The Army's concerns were well-founded. In recent interviews conducted by the Modern War Institute, senior observers at both the National Training Center and the Joint Readiness Training Center acknowledged that both leaders and soldiers continue to exhibit a mindset shaped by the past twenty years of COIN warfare, despite training scenarios specifically designed for decisive action against a near-peer declared enemy force.⁵¹ Whether the COIN mindset manifests as an instinctive hesitation to use an advanced weapon system without checking who can approve its use, or a more general aversion to collateral damage risk, the observers noted the danger that these self-imposed restrictions often come at the expense of mission accomplishment. The most successful units train leaders all the way down to the squad level to accept prudent risk but "utilize all of the systems they have to bear to reduce the threat to get after their mission."⁵² These comments in 2020 follow similar published observations from combat training center coaches and warfighter exercise observers in recent years whose training units and even their lawyers continued to exhibit a "COIN-centric targeting mindset."⁵³

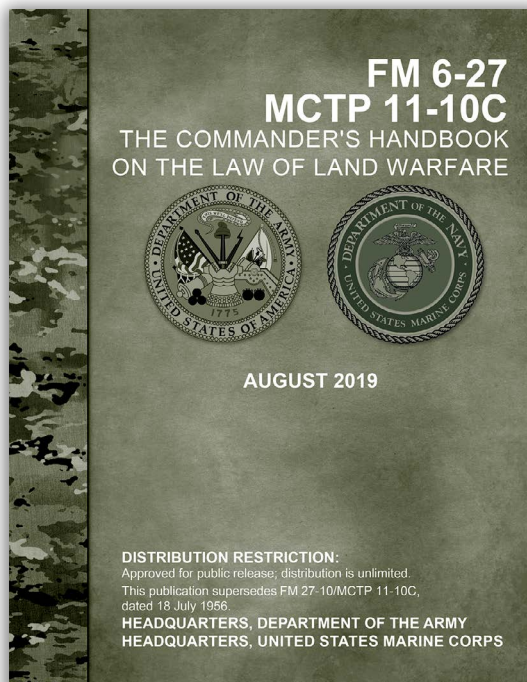
This "COIN hangover" is easing with sustained effort, but the nine-year journey of DATE training exercises illustrates the difficulty of the challenge and the ruthless preparation necessary to ensure that all aspects of the force are ready and adaptable for the potential fights of the future.⁵⁴ And it serves as a caution: we must remain

vigilant to ensure that LOAC, as actually regulated, trained, and upheld by the U.S. government, remains the training baseline for the force.

The corrupting influence of CT and COIN is present as well in the average soldier where notions of self-defense are ingrained through twenty years of training and real-world deployments. Every training environment would contain examples of policy-driven restraints on use of lethal force, and appropriately so. Thus, soldiers since 2003 have learned that hostile intent and hostile acts are predicates to pulling the trigger. Demonstrations of hostility are trained incessantly and have been so over twenty years. From generals to today's lowest-ranking soldiers, the principle of policy-restrained use of force is effectively the starting point for the combat soldier.

When we remember that in LSCO, an enemy may be shot wherever found without any showing of hostile act or hostile intent, the existential nature of the eighteenth gap becomes very real. Soldiers laboring and hesitating with a CT mindset of self-defense and zero collateral damage will lose in the moment of decision in LSCO. It is, therefore, profoundly important to identify the problem—what we call the eighteenth gap—and train it out of our formations such that soldiers can move nimbly between each construct.

To support this ongoing training, the Army and Marine Corps recently published Field Manual 6-27/ Marine Corps Tactical Publication 11-10C, *The Commander's Handbook on the Law of Land Warfare*.⁵⁵



To view Field Manual 6-27/Marine Corps Tactical Publication 11-10C, *The Commander's Handbook on the Law of Land Warfare*, visit https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN19354_FM%206-27%20C1_FINAL_WEB_v2.pdf.



Tank crewman of the 3rd Armored Division leave their M4 Sherman (*left*) to check on survivors of an accompanying Sherman tank (*right*) that was struck by fire from a German Panther tank and seek medical aid 6 March 1945 during the fight for control of Cologne, Germany. (Photo courtesy of the U.S. Army)

This manual distills the legal rigor of the detailed, three-volume *DOD Law of War Manual* into language easily understood by individual soldiers and marines. It reflects the Army and Marine Corps' interpretation of how to conduct land warfare lawfully, responsibly, and humanely. This serves as evidence of our standard. As the foreword states, "Adherence to the law of armed conflict ... must serve as the standard that we train to and apply across the entire range of military operations."⁵⁶ This manual represents our state practice and fundamentally, our national values.

When there is divergence, disagreement and the inevitable confusion with ICRC interpretive guidance, or a UNAMA report on CIVCAS [civilian casualty], for example, this FM [field manual] stands watch—with clarity and our Department's imprimatur. We simply cannot afford for our lawyers or leaders to be confused about the rules in warfighting.

Clarity in the law, in standards, is a precious commodity. Clarity in the law is exactly what this Manual delivers and as a direct consequence preserves our commanders' legal maneuver space on Battlefield Next.⁵⁷

Conclusion

The eighteenth gap exists, both internally within the Army and externally among policy makers, pundits, and the public at large. Only constant vigilance to counter misperceptions and misunderstanding will create sustained momentum to close the gap. Commanders and their lawyers alert to the dangers of seemingly convincing "experts" on the law of war must know the law as it is—and separate out the aspirations of the "convincing authorities." Military lawyers especially must master the law as it *is*. They must also assiduously understand the threat, the "influencers" of the law of war, those who would see it change through aspiration or editorial. Only total mastery

of the law *as it is* will generate the level of confidence, at the critical stress filled life-or-death moment, to give the commander the unequivocally correct legal advice.

And in the highly complex battlefield of the future, where near-peer nations leverage confusion and obfuscation of lawful targets, soldiers will have to navigate between asymmetric targets and force-on-force threats.

Of more direct concern to the humanitarian community, the law of war imperative for civilian protection is well understood. Civilian protection is fundamental to our forces' military ethos, ability to accomplish our mission, maintaining our relationships with allies and partners, and demonstrating our moral leadership.⁵⁹

We, as soldiers, must clarify and defend the legal maneuver space in which we will fight. We must ensure that our forces are ready to do the same.

Knowing the fundamentals of the law of war and the inevitable policy overlay will allow the highly trained American soldier of the future to lawfully engage targets consistent with LOAC—and without hesitation.

Let there be no mistake: Army forces will conduct themselves consistent with the law of war in all operations. The law of war is woven throughout the Army's training, doctrine, and organizational fabric like no other fighting force in history. Whether through embedded and expertly trained legal advisors throughout the force, a force-wide policy for continual education and training during the course of every soldier's career, or requiring that law of war training objectives be incorporated into major exercises, the Army's policies to inculcate the law of war into its million-strong ranks are unmatched.⁵⁸

The law of war is sufficient to enable and empower commanders to accomplish the ugly and brutal business of winning war while placing a premium on civilian protection. But the law of war—as negotiated by statesmen, as accepted by Congress, the president, and the courts, and as trained and inculcated by commanders and soldiers—is the only ruleset that applies in all military operations, regardless of how those operations are characterized. We, as soldiers, must clarify and defend the legal maneuver space in which we will fight. We must ensure that our forces are ready to do the same. ■

The views expressed in this article are the personal opinions of the authors and do not represent those of the Department of Defense, the U.S. Army, or any of their subordinate elements.

Notes

1. See Tisha Swart-Entwistle, "Rainey Takes Command of Combined Arms Center and Fort Leavenworth," Army.mil, 17 December 2019, accessed 21 January 2021, https://www.army.mil/article/231092/rainey_takes_command_of_combined_arms_center_and_fort_leavenworth. "Funk credited Lundy's efforts in identifying the Army's 17 critical capability gaps. The study quickly became the foundation for all readiness and modernization discussion across the Army, Funk said."

2. *Department of Defense (DOD) Law of War Manual* (Washington, DC: Office of General Counsel, DOD, December 2016), chap. II.

3. See "INEW Call Commentary," International Network on Explosive Weapons (INEW), accessed 21 January 2021, <http://www.inew.org/about-inew/inew-call-commentary/>. "INEW believes that states and other actors should recognize that explosive weapons with wide area effects should not be used in populated areas."

4. *Report on a Workshop Examining Military Policies and Practices on the Use of Explosive Weapons in Populated Areas*, 2-3 May 2018 (London and Washington, DC: Article 36 and Center for Civilians in Conflict, October 2018), accessed 21 January 2021, https://civilian-sinconflict.org/wp-content/uploads/2018/10/Report-on-EWIPA-policy-and-practice-workshop-2018_10.pdf.

5. "The Law of Armed Conflict, Lesson 5-Weapons" (Geneva: International Committee of the Red Cross [ICRC], June 2002), 2-5, accessed 21 January 2021, https://www.icrc.org/en/doc/assets/files/other/law5_final.pdf; Jean-Francois Queguiner, "Precautions under the Law Governing the Conduct of Hostilities," *International Review of the Red Cross* 88, no. 864 (December 2006): 802-3.

6. Liam Collins and Harrison "Brandon" Morgan, "King of Battle: Russia Breaks out the Big Guns," Association of the United States Army, 22 January 2019, accessed 21 January 2021, <https://www.ausa.org/articles/king-battle-russia-breaks-out-big-guns>. Describing a two- to

three-minute Russian rocket attack that destroyed two Ukrainian mechanized battalions near Zelenopillya, Ukraine, on 11 July 2014.

7. DOD Directive (DODD) 2311.01, *DOD Law of War Program* (Washington, DC: DOD, 2 July 2020), § G.2.

8. See, generally, *DOD Law of War Manual*, §§ 1.7–1.8.

9. DODD 2311.01, *DOD Law of War Program*, § 1.2.a.

10. *Ibid.*, § 3.1.b.; see also *DOD Law of War Manual*, § 1.1.1.

11. *DOD Law of War Manual*, §§ 5.8, 8.2.

12. *Ibid.*, §§ 5.2.3, 5.3.2.

13. *Ibid.*, § 5.2.3.2n49.

14. *The Oxford Dictionary of American Quotations*, ed. Hugh Rawson and Margaret Miner (New York: Oxford University Press, 2006), 48.

15. See, generally, *Operational Law Handbook* (Charlottesville, VA: The Judge Advocate General's Legal Center and School, 2015), chap. 5.

16. See, for example, The White House, *National Strategy for Combating Terrorism* (Washington, DC: The White House, February 2003), accessed 21 January 2021, <https://2001-2009.state.gov/s/ct/r/rm/2003/17798.htm>; ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," *International Review of the Red Cross* 89, no. 867 (September 2007): 719; Arleigh Dean, "Fighting Networks: The Defining Challenge of Irregular Warfare" (master's thesis, Naval Postgraduate School, June 2011), accessed 21 January 2021, <https://www.hsdl.org/?view&did=683182>.

17. *DOD Annual Report on Civilian Casualties in Connection with United States Military Operations in 2019* (Washington, DC: DOD, 1 May 2020), 4.

18. *Ibid.*

19. See, for example, *Report on a Workshop Examining Military Policies and Practices on the Use of Explosive Weapons in Populated Areas*.

20. DOD, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military's Competitive Edge* (Washington, DC: U.S. Government Publishing Office [GPO], 2018); *Description of the National Military Strategy 2018* (Washington, DC: The Joint Staff, 2018); U.S. Army Training and Doctrine Command (TRADOC) Pamphlet (TP) 525-3-1, *The U.S. Army in Multi-Domain Operations 2028* (Fort Eustis, VA: TRADOC, 6 December 2018).

21. Carl von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 88.

22. Rod Nickel and Abdul Qadir Sediqi, "U.N. Report Says U.S. Air Strikes on Afghan Drug Labs Unlawful, Hit Civilians," Reuters, 9 October 2019, accessed 21 January 2021, <https://www.reuters.com/article/us-afghanistan-airstrike/u-n-report-says-u-s-air-strikes-on-afghan-drug-labs-unlawful-hit-civilians-idUSKBN1WQ0PT>.

23. See, for example, "UNAMA: 30 Civilians Killed In US Airstrike On Afghan Drug Labs," TOLONews, 9 October 2019, accessed 21 January 2021, <https://tolonews.com/afghanistan/unama-report-30-civilians-killed-us-airstrike-farah-may>; "UN: Unlawful US Strikes Against Afghan Drug Labs Cause Civilian Casualties," Asharq Al-Awsat, 9 October 2019, accessed 21 January 2021, <https://aawsat.com/english/home/article/1937991/un-unlawful-us-strikes-against-afghan-drug-labs-cause-civilian-casualties>; "US Meth Lab Strikes in Afghanistan Killed at Least 30 Civilians, Says UN," BBC News, 9 October 2019, accessed 21 January 2021, <https://www.bbc.com/news/world-asia-49984804>; "39 Afghan Civilians Dead in US Airstrikes on May 5: UN Mission," Xinhua, 9 October 2019, accessed 21 January 2021, http://www.xinhuanet.com/english/2019-10/09/c_138458620.htm.

24. *Special Report: Airstrikes on Alleged Drug-Processing Facilities, Farah, 5 May 2019* (Kabul, Afghanistan: United Nations Assistance Mission in Afghanistan, October 2019), accessed 21 January 2021, <https://www.ohchr.org/Documents/Countries/AF/SpecialReportUSforAirstrikesBakwa.pdf>.

25. *DOD Law of War Manual*, § 5.6.3, citing Convention on Certain Conventional Weapons (CCW) Amended Mines Protocol, art. 2(6); CCW Protocol III on Incendiary Weapons, art. 1(3); 10 U.S.C. § 950p(a)(1) (2009); consider Additional Protocol I, art. 52(2).

26. 10 U.S.C. § 950p(a)(1). "The term 'military objective' means combatants and those objects during hostilities which, by their nature, location, purpose, or use, effectively contribute to the war-fighting or war-sustaining capability [emphasis added] of an opposing force and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of an attack." See also J. Fred Buzhardt, General Counsel of the Department of Defense, Letter to Senator Edward Kennedy, 22 September 1972, reprinted in *American Journal of International Law* 67, no. 1 (1973): 123–24; see also *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (Newport, RI: U.S. Naval War College, Center for Naval Warfare Studies, Oceans Law and Policy Department, 1997), § 8.1.2.

27. *Eritrea Ethiopia Claims Commission, Partial Award: Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶117* (New York: United Nations, 19 December 2005). "The Commission agrees with Ethiopia that electric power stations are generally recognized to be of sufficient importance to a State's capacity to meet its wartime needs of communication, transport and industry so as usually to qualify as military objectives during armed conflicts. The Commission also recognizes that not all such power stations would qualify as military objectives, for example, power stations that are known, or should be known, to be segregated from a general power grid and are limited to supplying power for humanitarian purposes, such as medical facilities, or other uses that could have no effect on the State's ability to wage war."

Report to Congress: Kosovo/Operation Allied Force, After-Action Report (Washington, DC: DOD, 31 January 2000), 82. "Following the end of Operation Allied Force, NATO released an initial assessment of their attack effectiveness against a number of targets. These targets destroyed or significantly damaged include: ... • Fifty-seven percent of petroleum reserves; • All Yugoslav oil refineries ..."

January 1993 Report of Department of Defense, United States of America, to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources during Times of War, reprinted as appendix VIII in Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)* (Paris: UNESCO, 1993), 201, 204. "Similarly, natural resources that may be of value to an enemy in his war effort are legitimate targets. The 1943 air raids on the Ploesti oil fields in Romania, and the Combined Bomber Offensive campaign against Nazi oil, were critical to allied defeat of Germany in World War II, for example. What is prohibited is unnecessary destruction, that is, destruction of natural resources that has no or limited military value."

Jennifer M. O'Connor, "Applying the Law of Targeting to the Modern Battlefield" (remarks, New York University School of Law, 28 November 2016), accessed 21 January 2021, <https://www.justsecurity.org/34977/applying-law-targeting-modern-battlefield%E2%80%8EF-ull-speech-dod-general-counsel-jennifer-oconnor/>.

28. *In re Mrs. Alexander's Cotton*, 69 U.S. 404, 419–20, 421 (1864). Holding that seventy-two bales of cotton taken from a barn by Union

naval forces could lawfully be captured as enemy property based on "the peculiar character of the property" as "one of [the rebels'] main sinews of war," but that the cotton was not a maritime prize because it had been captured on land; Jeffrey Miller and Ian Corey, "Follow the Money: Targeting Enemy War-Sustaining Activities," *Joint Force Quarterly* 87 (4th Quarter, 2017): 31; "Combined Force Finds, Destroys Drugs, Weapons Cache," International Security Assistance Force Joint Command–Afghanistan press release, 7 September 2010. Describing a patrol's destruction of a cache of opium and weapons in order to "significantly reduce[] the insurgent's ability to . . . procure financial resources"; April Campbell, "Afghan Forces Becoming Increasingly Effective against Drug Producers," Afghanistan International Security Assistance Force—News, 29 September 2011. Describing Afghan counternarcotics forces' seizure and destruction of narcotics laboratories and narcotics as "dealing a significant blow to the insurgency's ability to fund operations."

29. See IHL Database, Customary IHL, "Practice Relating to Rule 8. Definition of Military Objectives. Section G. Economic Installations," ICRC, accessed 21 January 2021, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule8_sectiong.

30. *Special Report: Airstrikes on Alleged Drug-Processing Facilities*, 13–14.

31. See *Prize Cases*, 67 U.S. (2 Black) 635, 672 (1862).

32. See Thomas Ayres, "The Use of Explosives in Cities: A Grim but Lawful Reality of War," *Joint Force Quarterly* 87 (1 October 2017): 26.

33. Regulations annexed to the Convention (Hague IV) Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, art. 25; Michael J. Matheson, "Session One: Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions," *American University Journal of International Law and Policy* 2 (1987): 419, 426. Acknowledging that the U.S. accepts certain aspects of articles 51 and 52 of Additional Protocol I as reflective of customary international law; see Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, arts. 51–52.

34. *Ibid.*

35. See *DOD Law of War Manual*, § 5.12.

36. John Spencer interview with Col. Michael Simmering, Lt. Col. Andrew Steadman, and Lt. Col. Neil Myers, "Attacking the City of Razish," 29 May 2020, in *Urban Warfare Project Podcast*, 54:07–59:06, accessed 21 January 2021, <https://mwi.usma.edu/attacking-city-razish/>; John Spencer interview with Col. David Gardner, "Attacking the City of Dara Lam," 10 July 2020, in *Urban Warfare Project Podcast*, 24:03–26:39, accessed 21 January 2021, <https://mwi.usma.edu/attacking-city-dara-lam/>.

37. Peter Maurer, "Explosive Weapons in Populated Areas, Opening Remarks by Peter Maurer at the 33rd International Conference Side Event," ICRC, 11 December 2019, accessed 21 January 2021, <https://www.icrc.org/en/document/explosive-weapons-populated-areas-opening-remarks-peter-maurer-33rd-international>.

38. *Ibid.*

39. *Ibid.*; see also *Report on a Workshop Examining Military Policies and Practices on the Use of Explosive Weapons in Populated Areas*; Katrin Geyer, "Towards a Political Declaration on the Use of Explosive Weapons in Populated Areas: States Need to Ensure That Expressed Commitments Translate into Real Impacts on the Ground," INEW, accessed 21 January 2021, <http://www.inew.org/towards-a-political-declaration-on-the-use-of-explosive-weapons-in-populated-areas>.

[states-need-to-ensure-that-expressed-commitments-translate-into-real-impacts-on-the-ground/](#).

40. Maurer, "Explosive Weapons in Populated Areas."

41. *Report on a Workshop Examining Military Policies and Practices on the Use of Explosive Weapons in Populated Areas*.

42. Maurer, "Explosive Weapons in Populated Areas."

43. Amos Fox, "What the Mosul Study Group Missed," Modern War Institute at West Point, 22 October 2019, accessed 21 January 2021, <https://mwi.usma.edu/mosul-study-group-missed/>. Discussing the Precision Paradox, in which the promise of precision strike's comparatively limited damage was counteracted by the consequent need to employ vastly greater numbers of strikes. This slowed Iraqi security forces' tempo, thereby increasing the death and destruction in the city as the Iraqis methodically moved through Mosul. An additional byproduct of the overreliance on precision strike was that it nearly depleted the stock of U.S. precision munitions.

44. *Report on a Workshop Examining Military Policies and Practices on the Use of Explosive Weapons in Populated Areas*.

45. DOD, *Summary of the 2018 National Defense Strategy*, 3.

46. TP 525-3-1, *The U.S. Army in Multi-Domain Operations* 2028, vi.

47. James McConville, quoted in Michelle Tan, "Putting People First: McConville Looks to Revolutionize How Soldiers Serve," Association of the United States Army, 3 October 2019, accessed 21 January 2021, <https://www.ausa.org/articles/putting-people-first-mcconville-looks-revolutionize-how-soldiers-serve>.

48. Gary Solis, introduction to *Geneva Conventions*, ed. Fred Borch (New York: Kaplan, 2010), 16.

49. Dennis Steele, "Decisive-Action Training Rotations: Old School Without Going Back in Time," *Army Magazine*, February 2013.

50. *Ibid.*; Michael D. Vick and William "Bill" Rierson, "Refocusing Counterinsurgency (COIN)-Centric Fire Support," News from the Front (Fort Leavenworth, KS: Center for Army Lessons Learned, September 2017), 1, 9.

51. Spencer, "Attacking the City of Razish"; Spencer, "Attacking the City of Dara Lam."

52. *Ibid.*

53. Vick and Rierson, "Refocusing Counterinsurgency (COIN)-Centric Fire Support," 3, 9, 11–12; see also Gail Curley and Paul Golden, "Back to Basics: The Law of Armed Conflict and the Corrupting Influence of the Counterterrorism Experience," *The Army Lawyer*, September/October 2018.

54. Matthew Archambault, "Putting the Fight Back in the Staff," *Military Review* 99, no. 4 (July–August 2019): 22.

55. Field Manual 6-27/Marine Corps Tactical Publication 11-10C, *The Commander's Handbook on the Law of Land Warfare* (Washington, DC: U.S. GPO, August 2019).

56. *Ibid.*

57. Charles Pede, "Remarks at the FM 6-27 Rollout" (Charlottesville, VA, 22 January 2020).

58. Army Regulation 350-1, *Army Training and Leader Development* (Washington, DC: U.S. GPO, 10 December 2017), table F-2.

59. James Anderson, Performing the Duties of Under Secretary of Defense (Policy), memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Undersecretaries of Defense, Commanders of the Combatant Commands, and General Counsel of the DOD, "Development of a DOD Instruction on Minimizing and Responding to Civilian Harm in Military Operations," 31 January 2020.