



Interview with Brigadier General Richard C. Gross

US Army Legal Counsel to the Chairman of the Joint Chiefs of Staff*

Brigadier General Richard C. “Rich” Gross is the US Army Legal Counsel to the Chairman of the Joint Chiefs of Staff. He attended the Military Academy at West Point and was commissioned in the US Army as a second lieutenant in the Infantry. He also attended the University of Virginia School of Law and the US Army Judge Advocate General’s Corps. He holds a Master’s degree in strategic studies from the US Army War College. Prior to his current position, he served as the Chief Legal Adviser for the Joint Special Operations Command, the International Security Assistance Force (ISAF), US Forces-Afghanistan (USFOR-A) and at US Central Command.

The scope of application of international humanitarian law (IHL) is a deceptively simple concept; broadly speaking, it is where, when and to whom the IHL rules apply. Although this has always been a precondition for discussing IHL issues, the outer limits of the law’s applicability remain unsettled. To open this issue on the nuances of the scope of the law’s application, Brigadier General Gross gave the following interview providing the US perspective on the circumstances in which IHL applies, and the challenges that lie ahead in light of the ongoing evolution of the way war is waged.

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* This interview was conducted at the Pentagon in Washington, DC, on 9 April 2014, by Vincent Bernard, Editor-in-Chief; Daniel Cahen, Legal Adviser, ICRC Washington; and Anne Quintin, Legal Outreach Adviser, ICRC Geneva.

What are your main responsibilities as Legal Counsel to the Chairman of the Joint Chiefs of Staff?

By the title, you would think I only advise the Chairman but, in fact, I advise the Chairman of the Joint Chiefs of Staff, the Vice Chairman of the Joint Chiefs of Staff as well as the entire Joint Staff. To understand what I do, it is probably best to start with what my main client does. The Chairman of the Joint Chiefs of Staff, by US federal law, is the principal military adviser to the President, the Secretary of Defense and the National Security Council. He provides what we call “best military advice” to the leadership of our country on matters of national security. So, I provide him with legal advice while he provides his military advice.

How much time do you spend on issues related to IHL every day?

I may spend quite a bit of time on IHL-related questions, depending on the issues of the day. For example, a large part of the portfolio of our office, on which I advise the Chairman and the Joint Staff, involves operations across the globe. As different combatant commands – Pacific Command, European Command, Central Command, Africa Command – propose military operations throughout the globe, whether those are training exercises, multilateral or bilateral training exercises, or security cooperation or military operations in Afghanistan, Iraq and elsewhere, those come up to the Chairman for his military advice and recommendations to the Secretary of Defense. I advise him and the Joint Staff on matters related to military operations, and some of my advice will concern IHL issues. Most of the *jus in bello* issues tend to be handled by legal advisers at a much more tactical and operational level, at the “pointy end of the spear”, as we say – these are the people actually involved in combat operations. At my level, I tend to work more on questions relating to the domestic and international legal bases for the use of force – *jus ad bellum*. I do, however, deal with those IHL issues that come to our level; for example, detention operations. How large a part of the portfolio really depends on what is going on in the world. Often, I will know what I am going to spend the bulk of my day on just by reading the front page of the news: what happened overnight that is going to require the President and the National Security Council and certainly the Chairman and the Secretary of Defense to be involved in issues of national security? Those issues, when they hit the front page, are going to be issues that I handle that day.

Often, many of the issues we deal with are domestic legal issues that do not involve military operations. So, for example, during the tragic shooting we had at Fort Hood, naturally questions came up about our security procedures, investigation procedures, our mental health programmes and so on.¹ As these types of issues come up to the Chairman for his input, if there are legal questions

1 Editor’s note: In recent years, there have been two mass shooting incidents at Fort Hood military base near Killean, Texas. The first, which took place on 5 November 2009, left thirteen dead and more than thirty injured. The second, referred to here, occurred on 2 April 2014, leaving four dead, including the gunman, and sixteen others injured. For more information, see Manny Fernandez and Alan Blinder, “Army

involved, I get involved. So, I am “a mile wide and an inch deep” sometimes, as we say. I have to be prepared to advise on a full range of legal issues, and not all of those will involve IHL.

What are some of the IHL-related lessons learnt from the last thirteen years and all the operations that followed 9/11?

This is an extraordinarily broad question. One of the lessons, in particular as regards IHL, is that it is very ineffective to try to train military forces on *jus in bello*, the principles of IHL and the rules of engagement in a *classroom* setting with PowerPoint slides. You have to train armed forces using vignettes and, ideally, using real-life, role-playing-type scenarios so that you engrain these ideas of what is right and wrong; what is lawful and not lawful; what is permissible under the rules of engagement and what is not.

Before 9/11, we would have dog tags or little cards with the rules of engagement on them, and soldiers would wear the dog tags or put the cards in their wallets. But when you are in a scenario where you have to use force or when you detain someone and you have to act in a particular way in accordance with the law, you do not have a lot of time to look at your dog tag or in your wallet. So, you have to train on IHL through realistic, vignette-type training, the main goal being to reinforce the lessons of IHL and other principles so that people know how to do the right thing. You are never going to be able to cover every possible scenario; however, you can certainly train on a broad range of scenarios. This was one very important lesson: you can start the training in a classroom, but IHL has to be inculcated throughout all of our other military training and it has to be constantly reinforced and trained.

Another important lesson of the last thirteen years is that we should not be afraid to examine what we are doing and constantly revisit our procedures and our tactics. We have to be willing to keep an open mind and investigate thoroughly when something goes wrong or when there are civilian casualties, or when there is an allegation of inappropriate conduct. There may have been resistance to that in the early days perhaps, but now I think we are at the point where if something goes wrong, we just investigate it. There is no question. We investigate thoroughly. We do an independent review and we see what lessons we can learn and, if necessary, we hold people accountable for actions that they should not have taken. I think we have improved in that sense.

We have also learnt, I think, the criticality of protecting civilians in combat. All of our post-Vietnam conflicts were very short. Operation Desert Storm was very short; Operation Just Cause and our actions in Grenada and in Panama were also limited in time. In Iraq and Afghanistan, however, we have been in prolonged conflict around civilian populations, where we have had to learn to protect and

safeguard civilian life and property on a day-to-day basis, over the long term. We have realized that protecting civilian life is not just a lawful imperative under the principles of IHL, and it is not just good policy and humanity – it is all of those things, but in addition, when we protect civilians, we are also more effective in a counter-insurgency environment. So, not only is it the right thing to do under the law and the right thing to do morally, but it is the right thing to do to accomplish the mission. I think when our military forces realized that, it became much easier for us to get compliance and have our people working hard to protect civilian populations. So, that would be another important lesson.

A fourth lesson, which I think is important for this interview, is that we have really learnt the importance of the relationship with the ICRC. I have said this in other interviews as well, and I am sincere about it. We have learnt that the ICRC has a critical role in making States better at doing the right thing in warfare – in complying with IHL and giving us an outside, unbiased voice which says, “Here are some things you ought to think about; here are some things you are not doing right,” and not only pointing out things, but also pointing out ways to improve. There is also a great working relationship that we have developed with the ICRC over the last thirteen years. We go to Iraq – we see you in Iraq. We go to Afghanistan – we see you in Afghanistan. We go to other places – we see you in other places. We have a very constructive confidential bilateral dialogue with the ICRC that I think is unparalleled.

What is your view of the value of that confidential relationship? Do you think it brings about results? Is it outdated?

No, not outdated at all. Part of what we learnt in the conflicts in Iraq and Afghanistan is that confidentiality gives us the trust in you and the credibility that you have. We know that we can talk through issues openly and transparently. You also come in and very openly and candidly tell us: “Here are all the things you really should think about with this particular operation; here is what we think you did wrong; here are the principles of IHL that we think you violated, and here is why.” We know that we can take that in confidence, that we can share with you what we have learnt, that we can investigate and come back to you all and say: “Here is what we did.” That confidential dialogue is critical for allowing us to improve and make changes that will prevent missteps in the future. Other humanitarian organizations may see something wrong and immediately release it to the media, or otherwise publicly denounce it. You cannot have a full, open and candid dialogue with someone if you know they are going to turn around immediately and put that information out to the public, before you have had a chance to investigate, to fix things, to improve.

Note that I am not saying that transparency is a bad thing. I think it is a good thing, but there are times when you need to conduct an investigation in a calm and unbiased way, when you cannot prejudice the facts and you need to give

the investigating officers the space and time to arrive at their own conclusions. This cannot happen when the facts are being constantly discussed in public.

So, confidential dialogue is critical, and I learnt that early on. For example, I was asking the ICRC about the detention facilities of another State and inquiring as to what their detention areas were like. My ICRC interlocutor responded: "I cannot tell you." I said: "What do you mean, you cannot tell me?" But I ultimately understood what the ICRC meant. The ICRC had to keep that information bilaterally confidential with that State so that the State could improve its detention systems without every other State knowing what was going on. I respected that the ICRC was adamant that it was not going to share that information with me. This is when I really got a sense of how strict you are with confidentiality and that in turn gave me a lot of trust that our US discussions with you would be kept the same way.

Is the "traditional" dichotomy between international armed conflict (IAC) and non-international armed conflict (NIAC) adequate to capture the types of violent scenarios we face today? Is it something that is always taken into account in the legal opinions of your office?

In one sense it is still relevant, of course, but in another sense for the US government, at least for the Department of Defense, it is not that big an issue because by policy we apply the IAC rules of IHL in all forms of military conflict. We have a Department of Defense policy which says that no matter what the classification is, we will follow the principles of IHL applicable in IAC throughout our operations. That makes it, frankly, fairly easy for me and other military operational attorneys to advise our clients, because we are not worried about what the classification is.

As a legal matter, ignoring policy, this dichotomy is very important, in particular regarding non-international armed conflicts. I think an international armed conflict is very easy to spot – a State-on-State conflict, which, frankly, our initial invasion of Iraq, I guess, was probably the last one we have seen like that. You just do not see the traditional World War II-type clashes between the armed forces of two or more States; we have not seen a large-scale conflict like that in a while. This is not to say that we will not in the future. So, it is important to have those rules.

Where the difficulty comes, I think, is when we talk about non-international armed conflicts. We are all, I think, still struggling to understand when exactly a non-international armed conflict begins. "Struggling" is maybe the wrong word, but we are all still trying to determine what to do in cases where there are non-State actors like Al Qaeda, who play such a prominent role. For example, I think the ICRC classifies the conflict in Afghanistan today as a non-international armed conflict. So, you have Afghanistan, where there are over forty-five States involved, and it is a non-international armed conflict. This is kind of hard to wrap your mind around. You have more participants in

Afghanistan right now, more international participants, than you probably had in just about any previous conflict. But by definition it is not a conflict opposing two or more States, so we apply NIAC rules. Some countries do not even apply NIAC rules as they do not consider themselves party to a NIAC. Then you get into the whole discussion of applicable rules: armed conflict versus law enforcement. So, I think it is very important to be able to classify correctly, and we will have to continue to study the interplay between the rules of NIAC and international human rights law, because that is going to continue to be a challenge. When does IHL prevail over human rights law? I think every State will have a different answer to this question, and it creates quite an interesting field to practise in.

What trends can be identified in the armed conflicts in which the US is involved today, and what relationship do these trends have with IHL?

Certainly one trend is going to be the increasing accuracy of weapon systems. As the bombs become “smarter” and weapons systems become more accurate, the question will be, will you be precluded from using less accurate systems at some point? If all of your weapons can be honed in to a single square metre with absolute pinpoint accuracy, will that become the new standard or can you still use the less accurate, “dumber” bombs, if you will?

So, as weapons systems get more accurate, and increasingly remotely controlled, will that change the nature of warfare? As those weapons become more available, will that change IHL? I think autonomous weapons are going to be a trend that we will all have to watch as it becomes less science fiction and more science fact. As artificial intelligence, computer systems and targeting systems develop, at what point will a weapon be capable of firing defensively, by itself? What law would apply? One day, weapons may even become capable of autonomously firing in offence: to identify targets and to fire based on an algorithm. Who knows how far in the future that will be – ten years, twenty-five years, or maybe less? I honestly do not know, but those will be important trends we will need to think about as weapons systems get more sophisticated. There are going to be ethical considerations going beyond IHL, but certainly IHL will factor into that.

I think we will also see a trend towards more and more protection of civilians, which is a really good thing. This will happen not only as weapons systems become more accurate but, frankly, as a result of the media, NGOs and advocacy groups showing a keen interest in conflict. For example, I just cannot imagine that the bombing campaigns that we saw in World War I and World War II would happen again. Perhaps they could, and it would be World War III, but it is hard to imagine that that would play well in today’s media and public opinion environment. So, I think we will see a trend towards more civilian protection, more means put in place to protect civilians, thinking more about how military operations are conducted while protecting the civilian population, and so forth. I think that will be a trend. Asymmetric warfare I think will also be a big trend.

Are you optimistic that an international conversation will develop over cyber in a way that will clarify the applicability of IHL in cyber-warfare?

We are all continuing to struggle with cyber and defining how cyber fits and where it fits and what is an attack, and when does a “cyber-attack” – and I put that in quotes – rise to the level of an armed attack to which I can use armed force in response? A cyber-response to a cyber-attack is one thing, but what about an armed attack? If electrons come in and threaten my power grid, can I now shoot a missile – a physical missile – at the computer server site and take it out, or am I limited to an electronic response? We will have to work through all these issues as cyber capabilities become more and more capable and more threatening. We are going to have to come to grips with how we handle that. As of now, I do not think there is consensus at all, although the Tallinn Manual was a good step.² I think it is hard getting people to have the conversations that need to be had, but I think we are all still struggling with cyber as practitioners.

Unfortunately, I think it will take some kind of event to shake people up. We saw that a little bit with cyber-activity overseas. We saw how people reacted to those kinds of events, and countries reacted in some very positive ways by building up their defences and putting up centres of excellence on cyber and so forth. You saw that in the Baltic States, for example. I hope we do not, but if we do have a big event, then I think that will galvanize some action for people.

Secretary Panetta, for example, warned about a cyber-Pearl Harbor, and others have said the same thing. I am certainly not predicting that, but if something like that were to happen, that would certainly galvanize the conversation. If something like that does not happen, what could galvanize the conversation, I think, could be an expert meeting or something like that; it would be good to have that conversation and set down what we think the State practice is, and in some cases analogize to State practice in other areas to see what would be applicable in the cyber domain. I prefer to have that conversation before we have an event and not after, so we can figure it out with deliberation.

Looking at current and future trends, how do you see the role of detention operations in modern conflicts?

Well, we are still going to have them in any kind of conflict and I think we have learnt some hard lessons, at least the United States has, but I think other countries have as well. We have learnt from some events, such as Abu Ghraib, our experiences with Guantanamo Bay and our experiences in Iraq and Afghanistan. We have learnt a lot about detention and detention operations, and how to do it the right way, including interrogation of detainees. So, we have built up this body of policy and

2 Editor’ note: The Tallinn Manual is a study of how *jus ad bellum* and IHL apply to cyber-operations and cyber-warfare, produced by a group of experts. *Tallinn Manual on the International Law Applicable to Cyber Warfare*, NATO Cooperative Cyber Defense Centre of Excellence, Cambridge University Press, Cambridge, April 2013, available at: www.ccdcoe.org/tallinn-manual.html.

lessons learnt. I think other countries have as well. From speaking to some of my counterparts around the world, they have learnt those lessons as well, and that is a good thing. Hopefully, we will not be in another conflict, but if we are, ten years from now, those lessons, that body of law and policy will still be around to help inform our operations. To a degree, after 9/11, we were learning as we went and we made some missteps along the way, but we are constantly getting better.

I think you have to have capture or detain as a part of any military operation, as an option. First of all, you never want to have a “no quarter”-type situation – in other words, killing someone because you cannot or do not have the capacity to detain them.³ That is not going to work. You also cannot have a situation where you have to choose between the use of lethal force or the release of enemy fighters because in many cases, releasing someone just means that they are going to be a threat again, whether it is to you immediately or to your forces in more the medium term. So, you have to have a capture/detention option but it has to be done the right way from the beginning. Hopefully, my successors will be able to reach into the files one day and say, “Here is what we learnt back in Iraq and Afghanistan, so we can do it right this time.”

What standards of detention would you apply in situations where the classification of the conflict is unclear?

As I said before, we always apply the IAC rules of IHL as a matter of policy. There is an extensive Department of Defense policy on detainee operations and the proper way to run those. We also have the Detainee Treatment Act that governs how we deal with detainees, which is federal law. So, we have a good body of law and policy that we look to, irrespective of how the conflict is classified.

What is the geographic scope of application of IHL? Does it apply only on the battlefield, or on the whole territory of all parties involved in an armed conflict? Does an armed conflict follow any person who is directly participating in the hostilities anywhere in the world, including in non-belligerent States?

I cannot speak for the US position, but I think you have seen in speeches from the administration and the past administration that the enemy gets a vote on where he is fighting. When Al Qaeda, as a terrorist organization, is entering into armed conflict with the United States, it does not confine itself to a particular country, and while the Westphalian Nation-State concept is still very applicable in international law,

3 Editor’s note: To give “no quarter” is to refuse to spare the lives of enemy fighters who surrender or are otherwise rendered *hors de combat* on the battlefield. Orders or threats to give no quarter are a war crime in both international and non-international armed conflicts. See Jean-Marie, Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Vol. 1: Rules*, Cambridge University Press, Cambridge, 2005, Rule 46.

transnational terrorist groups like Al Qaeda do not respect that concept. They move across borders. They are everywhere. So, carefully constrained by law and policy, we have to be able to go to the enemy, wherever the enemy may be. Now, that does not mean a global war. That does not mean we are everywhere. There are certainly principles of sovereignty. We have to respect the principles of international law, so you are not going to see a global war *per se*, but it is not just war confined to Afghanistan either.

Commentators will often say, “There is action being taken in Yemen, but we are not at war with Yemen.” Well, of course we are not at war with Yemen, but the Yemeni authorities have given permission/consent for us to partner with them in actions taken there and so the conflict is not with Yemen or Yemen’s enemies; the conflict is with Al Qaeda. Of course, geography matters in some instances. But we cannot tie ourselves to one country and say that combat will only take place in that country, and not outside. Now, the US also has a policy governing operations *outside* of what we call the “active zone of hostilities” or the “hot battlefield”, in other words Iraq and Afghanistan. So we have policy constraints for such types of operations as well, and I think those are important. They respect other countries’ sovereignty and keep the conflict limited and focused on the enemy without being overly broad.

Looking at the scope of the battlefield, in the current US view, the US can go after the enemy outside the hot battlefield without the consent of the territorial State if that State is unwilling or unable to tackle the threat. Would you elaborate on the unwilling/unable dimension, which is not something that exists currently in international law?

There is some consensus among a number of States (although not all States) that when a State faces a threat emanating from the territory of another State, and that other State is unwilling or unable to take care of the threat, the State under attack may take action in self-defence, under customary international law, to eliminate that threat (and only that threat).

Without that “unwilling or unable” analysis, an attacked State would have to just sit back and let the threat come. The “unwilling or unable” test would allow you to take action beforehand.

If it is not the territory that is the main consideration in determining the limits of the battlefield, but rather the nexus between the members of a non-State armed group and the conflict, what type of links could trigger the application of IHL? Is it a question of participation in hostilities, or is everyone who is a member of a specific armed group covered by IHL?

Let us start with the principle that there is an armed conflict between, in our case, the United States and an armed group. In this case, let us assume that

this is a terrorist group, and the US may be able to access the geographic area, or not. For example, with Al Qaeda, they launched an attack against the United States from Afghanistan. They stayed in Afghanistan, so we went to Afghanistan. They left, and then you had the Taliban in Afghanistan, so that conflict had a geographic boundary. But Al Qaeda could have just as easily launched the attacks from Afghanistan, and left before we got there. Say the lawful government of Afghanistan is now back in charge; we are not going to go to war in Afghanistan. So, where is the fight? Well, the fight is wherever Al Qaeda is. I think in that case, as it turned out, the Taliban stayed in Afghanistan, so we went there. As Al Qaeda has morphed and spread, they remain a threat to the United States, and we have continued to go to places where they are, like Yemen and Somalia.

The idea of a “hot battlefield” is valid when you have the intensity and duration of conflict in a particular place like Afghanistan, but Al Qaeda could just as easily have scattered across several States, and then you may not have had a geographic nexus.

It is a difficult problem, because we are so used to thinking of traditional conflicts. In World War II, we knew whom we were fighting and we knew where they were, which land masses they lived on. But even then, you had the war spread all over the globe to places that probably would have preferred to remain neutral, and nobody said in World War II – and I realize that was an IAC, so it was somewhat different, but nobody said, “You cannot fight them there.” In the current conflict, we have to look at where the enemy is, and not artificially stick to the boundaries of the State where the conflict began.

***Do you think the concept of “associated forces” is viable, looking ahead?
Does the concept of associated forces mean that this conflict by definition cannot end?***

If you look at how we define “associated forces”, part of the definition is that they are a co-belligerent who has entered the fight alongside Al Qaeda against the United States or its coalition partners. So, it is not just any group that shares Al Qaeda’s ideology and it is not just any group that may be fighting the US somewhere in the world. It has to be a co-belligerent; this component is critical.

If we look at an IAC scenario, where we have country A fighting country B, and country C joins B’s side, well, country C is now an enemy. Even if the fight against country B stops, country C is still an enemy. The co-belligerency is part of what keeps the “associated forces” concept from being too broad. Without looking at the actual definition we use, people tend to think we could include anybody under the concept of “associated forces”, and I just do not think that is true. It is a fairly high standard because you do have to be a co-belligerent who has joined the fight *alongside* Al Qaeda *against* the United States.

What is the US view on the extraterritorial applicability of international human rights law in times of armed conflict? Is human rights law an issue when the US works in partnership with other States, for example as part of a coalition?

The US position is that international human rights law does not apply extraterritorially. This comes up regularly when working with international partners – not so much the extraterritoriality of international human rights law but just human rights law in particular, and then more generally which law applies, which paradigm applies, which rules apply. So, anytime we participate in coalition warfare, everybody brings with them their own domestic law, their own treaties that they are parties to, their own legal obligations, as well as their own policy and regulations. Each State has a different picture of what it is doing. We see this in Afghanistan, where some States very much believe that their involvement is regulated by the law enforcement paradigm, and other States believe it is an armed conflict and IHL applies, in particular IHL of NIACs. And you have States all throughout that spectrum. For European States, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the jurisprudence of the European Court of Human Rights apply. Other States are party to other human rights treaties and have other human rights courts examining their practice. And then you have some countries that are party to the Additional Protocols to the Geneva Conventions and other countries that are not, so everybody has a slightly different picture of which law applies and which policy applies. That does create challenges.

One of the ways in which we deal with such challenges is by having a standard set of NATO ISAF rules of engagement and mission orders, policies and so forth. States come in agreeing to that, except to the extent that they make certain caveats. Caveats are important as they allow States to apply rules of engagement more narrowly. Importantly, caveats can never *expand* on the authorities NATO gives them; they can only narrow them.

The caveats are one way in which States notify NATO of their understanding of the rules under which they will be operating. Thus military planners have to plan operations knowing that, for example, a country will not want to participate in a counter-narcotics operation. Such caveats will often have to do with domestic law or policy, not IHL, but they may involve IHL components, such as the definition of “combatant”. So, when planning an operation that may be linked to a counter-narcotics mission, the commander would have to send in another State.

The other challenge in multinational operations is that you bring forty-five States together but you do not have forty-five legal advisers, one from each State. So some States either have to ask their capital for legal advice or they have to come to the ISAF Legal Office and get legal advice from an American or a British officer or whoever is there. The best one can do in that situation is to interpret in good faith what the NATO ISAF policy and rules of engagement say. One cannot really advise

another State on its own domestic law or on regional human rights treaty obligations.

What are the main legal challenges that arise from the drawdown of troops from Afghanistan? Does it affect the applicability of IHL?

There are a number of challenges. Obviously, the detainees that remain are one challenge. Afghanistan has taken over Afghan detainees and we still retain third-country detainees. How those persons are dealt with and returned to their home country is a challenge. We do not have decisions yet on whether or not there is going to be a bilateral security agreement between the US and Afghanistan.⁴ Once we have that agreement, then we should have a decision from the President about what forces remain and what missions they will conduct. NATO, of course, has to make decisions about the coalition partners: how many will remain and what missions they will conduct. So, a lot of decisions have not been made yet.

As we advise our clients on what law and policy will need to be put in place, we have to think about what possible scenarios and missions are out there. But in reality, we just do not know yet. There is little clarity on the mission, the size of the forces or the type of agreement that will be in place. This creates a challenge.

I think post-2014, once we know what the mission and size of the forces is, we are going to have to really grapple with what post-conflict Afghanistan looks like and what rules apply. This concerns rules for the US forces but also for coalition partners and for Afghan forces. This concerns detention, force protection issues, self-defence issues and so forth. We are working through them now in anticipation, but we do not know what the final scenario will look like.

We read in media today that the US is putting more emphasis on using Special Operations (or Special Forces) in strengthening or maintaining a security presence in conflict contexts around the world. What is the legal regime applicable to Special Forces involved in counter-insurgency operations? Do you see challenges in the application of IHL?

The first thing we would note is that Special Forces are military forces. To us, they are governed by the same law and policy as every other type of operations. They are required to fully comply with IHL. They come under the same rules of engagement and the same execution orders. There may be times when they have special rules of engagement, but these are not rules of engagement that do not comply with the law; they fully comply with IHL, and with US domestic law and policy.

The idea that Special Forces have a free hand and can do anything they want, I think, is a myth or urban legend. They do have a lot of rules. A Special

⁴ Editor's note: This interview took place well before the signing of the US-Afghanistan bilateral security agreement and the NATO Status of Forces Agreement on 30 September 2014.

Operations unit is just a unit that has special training. They tend to work in smaller groups. They are very, very good at the kind of operations that require a small elite group of highly trained military personnel with great support. They cannot do what a large conventional unit can do. For example, it takes a tank division or an infantry division to hold large areas of land. Special Forces cannot do that. They can do specialized missions, but they cannot hold large areas of ground. So they have different capabilities.

I think you may have seen statements, press reports and so forth about a desire that, as we draw down conventional forces, we use smaller groups of Special Forces that might be able to conduct more limited missions and special missions in places where we cannot put a tank division or an infantry division like the 82nd Airborne division. For example, if you needed to train another country's military on small arms tactics, that is part of Special Forces' bread and butter. They are very good at training forces on how to do small arms tactics. So you would not send the 82nd Airborne division into a country to do that; instead, you would send in a small Special Forces group or another small team.

Honestly, the challenges when you send in a small unit are that they do not have the same type of infrastructure, resources or oversight with them. They may not have a legal adviser to accompany them. By definition, they are smaller and more isolated. With modern communications, that is less of a problem certainly than it would have been twenty or thirty years ago. So today, if they have a legal question about their obligations under IHL or their rules of engagement, they will likely get legal advice quickly, but it may not be from somebody who is right there with them. This is one of the challenges. It means you have to do some training and briefing before Special Forces are deployed, so they know what their limits are.

What legal obligations does the US have to respect in advising, assisting and training other national and local armed forces, when establishing partnerships with them or when carrying out joint actions?

We have law and policy that covers some of the basics. We have the “Leahy provision”, which requires that if any unit has conducted gross human rights violations, it cannot receive training, equipment or other assistance.⁵ This screens out the gross human rights violators. In our interactions with other States, we take the need to train on IHL and other international obligations very seriously. We have something called the Defense Institute for International Legal Studies, based in Newport Naval Station, which is funded by the State Department and manned mostly by active or retired military personnel. They go out and train foreign militaries. A big part of what they train on is the law regulating armed conflict, including IHL and human rights law. We consider this an important

5 Editor's note: These “Leahy provisions” are codified in the Foreign Assistance Act of 1961, as amended, P. L. 87-1954, §620M, 22 USC 2378d; and Department of Defense Consolidated Appropriations Act of 2014, PL 113-76 (signed into law 17 January 2014), §8057.

component. Again, this is not just about teaching people how to fight, shoot a weapon, move a unit or communicate; it is also about how to do all of that *in compliance with the law* and the democratic principles of civilian control, which we also find important to emphasize.

In your view, what areas of IHL need to be further developed or clarified in the future?

Cyber-warfare is one area. We also ought to continue to discuss on principles of detention in NIACs. How do we deal with the NIAC that does not look like a NIAC? Is there such as thing as “transnational armed conflict”, and should there be a separate body of law regulating it, or is the NIAC legal framework sufficient to capture the scenario where forty-five-plus countries fight an enemy who is located in twenty different countries, from the Far East all the way over to Africa? Is that a NIAC? It is, in the sense that it is *not* an IAC, but is there another category? Should there be one? That is not for me to say, but it is something to think about.

Another area that needs clarification is autonomous weapon systems. We are going to have to think through the legal and ethical challenges involved. How truly autonomous are these weapon systems, and how much do we want them to be autonomous? Further, the concept of “outside the hot battlefield”, I think, is going to continue to be of interest to scholars and practitioners, in particular given the increasing autonomy and remote operation capabilities of weapon systems.

Do you believe we are now moving beyond the “9/11 era”, towards what Defense Secretary Chuck Hagel described as the “Post-War Era”? What are the next ten years likely to look like?⁶

As we draw down in Afghanistan, we will not have a major conflict in a defined geographical space anymore, so we will have to think through those issues. We often think of it as one armed conflict, but another way of thinking of it really is as one armed conflict against Al Qaeda and another armed conflict against the Taliban – two conflicts that are linked and yet not absolutely the same. So if we end the conflict in Afghanistan, is that just ending it against the Taliban only or Al Qaeda as well? If you end the conflict against the Taliban, does that affect Taliban detainees at Guantanamo only or does that affect Al Qaeda detainees as well? If you end the conflict in Afghanistan, have you now dropped below the intensity and organization criteria to even call it a non-international armed conflict? If not, who is that conflict against? Is it just the Taliban or is it the

6 Kevin Baron, “Hagel’s Plan for the Military in the Post-War Era”, *Defense One*, 5 November 2013, available at: www.defenseone.com/ideas/2013/11/hagel-plans-for-military-in-post-war-era/73203.

Taliban and Al Qaeda? Can you have areas outside an active combat zone if there is no longer an active combat zone?

We are thinking through all of these IHL-related questions but beyond that, we have our own domestic legal issues involving the Authorisation for Use of Military Force, the 2001 domestic law that is our domestic legal basis for targeting Al Qaeda, the Taliban and associated forces. The President has indicated that he wants to work with Congress to revise it and ultimately repeal it. So, we are looking at those issues as well from a domestic legal perspective. It is a challenging time right now, I think, to be a military operational attorney, but it is also very stimulating work.