

DEPARTMENT OF DEFENSE
UNITED STATES STRATEGIC COMMAND



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Partial declassification executed by:
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31 October 1995

Reply to:
J060 (Stop 6060)

MEMORANDUM FOR THE STRATCOM SENIOR STAFF

Subject: The Role of the Law of Armed Conflict (LOAC) in USSTRATCOM Operations (U)

I. Introduction

(U) The purpose of this monograph is to provide the senior staff with a very frank appraisal of the role of LOAC in STRATCOM's operations. It is intended to supplement the unclassified information concerning the general applicability of LOAC to nuclear operations that is provided under separate cover. In particular, this monograph is designed to respectfully discuss specific issues in the context of my observations since my arrival at STRATCOM in January 1995. I hope it is the kind of candid input that senior leaders should expect -- and demand -- from their supporting staffs.¹

(U) The reading of this memo and the unclassified material referenced above fulfills the annual LOAC training required by SAI 400-5 and DOD Directive 5100.77.

II. LOAC and the STRATCOM Culture

(U) Because of exceptional support at the senior level, significant progress has been made this year to integrate LOAC concepts into STRATCOM's operational mission. Despite these efforts, however, the role of law in military operations (b)(5)-Attorney Work Product USSC (b)(5)-Attorney Work Product USSC This is especially so with respect to the application of LOAC to nuclear operations.

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¹ See generally, James Kitfield, *Crisis in Conscience*, Government Executive, October 1995, at 14 (discussing, *inter alia*, the dangers to military values occasioned by failure of subordinates to tell the "boss something he doesn't want to hear").

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completion of various arms control agreements, and the restructuring of the Unified Command Plan, STRATCOM finds its responsibilities broadened and its paradigm shifting.

(U) ~~(S)~~ The paradigm shift, and especially the growth of STRATCOM's involvement in theater support operations, requires adjustments to STRATCOM's traditional way of thinking. America's nuclear forces, like the rest of the U.S. military, must be prepared to execute limited missions in support of a wide variety of contingencies. (b)(5)-Attorney Work Product USSC

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(U) Part of the answer arises from the special characteristics of post-Cold War operations. A number of factors – not the least of which are the reduction of the size of the U.S. military as well as the cutback of forward operating locations – has led policymakers to increasingly conduct military operations on a *multilateral* basis. These operations are frequently conducted outside of familiar military structures (e.g. NATO) and require extremely sensitive and often fragile political arrangements. At the same time, advances in communication technologies have made the media, and particularly television, extremely influential in forming national and world opinion.² In addition, Congress has sought to increase its oversight of military and foreign affairs matters through aggressive use of the legislative process.³

(U) All of this has served – for better or worse – to increasingly “legalize” military operations. Furthermore, the United States has promoted the rule of law as a necessary element of world order. Given such a policy, it is unsurprising that law has played such an important role in recent military operations. Coalitions cannot be built nor public support sustained if the perception exists that the U.S. is operating outside of legal norms. Such considerations caused General Colin Powell to observe following the Gulf War that “*Decisions were impacted by legal considerations at every level. Lawyers proved invaluable in the decision-making process.*”⁴

(U) Failure to abide by LOAC, and even the *perception* that LOAC is not being observed, can jeopardize contemporary military operations. For example, following the bombing of the Al Firdos bunker during the Gulf War allied attacks on targets in Baghdad virtually ended for fear that the appearance that coalition forces were killing noncombatants would jeopardize world support for the war.⁵ Likewise, it was widely reported that public reaction to the attack of retreating Iraqi forces on the so-called “Highway of Death” contributed

² See e.g., Timothy J. McNulty, *Television's Impact on Executive Decisionmaking and Diplomacy*, *Fletcher Forum of World Affairs*, Winter 1993, at 63.

³ See e.g., Jeremy D. Rosner, *Congress, the Executive Branch, and National Security: The New Tug of War*, 1995. Congress' oversight of military activities has extended to inquiries as to the compliance with LOAC. See note 27 *infra*.

⁴ As quoted by Steven Keeva in *Lawyers in the War Room*, *ABA Journal*, December 1991, at 52.

⁵ See Michael R. Gordon and Bernard Trainor, *The General's War* (1995), at 324-327.

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to the decision to end the war (even though the attack itself was consistent with LOAC⁶). Indeed, a keen sensitivity to LOAC issues continues: the Wall Street Journal recently reported that in an exercise for an Army regiment preparing to deploy to Bosnia, the precise number of shells to be used in the hypothetical bombardment of a castle had to be 'cleared' through the unit's lawyer.⁷

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III. The Myths

(U) Although I haven't taken a formal survey, anecdotally I find a number of recurring misconceptions about the role of law in STRATCOM operations. Here are a few examples of the kind of comments I've heard:

(U) "LOAC doesn't apply to nuclear operations." This is flatly wrong. The official policy of the United States, as set forth in the June 1994 submission to the International Court of Justice,⁸ is "that various principles of the law of armed conflict *would apply* to the use of

⁶ But see Jean B. Elshtain, *Just War as Politics*, in But Was It Just?: Reflections on the Morality of the Gulf War, David E. Decosse, ed., 1992) at 53. Elshtain argues that attacking soldiers with "no capacity to fight back" violates the principle of *jus in bello*. While it is violative of LOAC to attack soldiers who are *hors de combat*, the attack on the retreating soldiers in this case is completely consistent with LOAC.

⁷ See Thomas R. Ricks, *In Wake of Cold War, An Intellectual Leads Army in New Missions*, Wall Street Journal, October 2, 1995, at A1, A11.

⁸ United States Department of State, *Written Statement of the Government of the United States of America before the International Court of Justice (ICJ)*, dated June 10, 1994, at 26 (emphasis added). [Hereafter referred to as Submission I.] The ICJ case is captioned as follows: "Request by the World Health Organization for an Advisory Opinion on the Question of Legality Under International Law and the World Health Organization Constitution of the Use of Nuclear Weapons by a State in War or Other Armed Conflict." The U.S. reiterated its position concerning the applicability of LOAC in a subsequent submission to the ICJ in the same case. See United States Department of State, *Written Comments of the Government of the United States on the Submissions of Other States*, June 20, 1995, at 23 [Hereafter referred to as Submission II.]

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nuclear weapons as well as to other means and methods of warfare.”⁹ As a reflection of that long-standing position, the Secretary of Defense has included no exception for nuclear weapons in his direction that the “Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized.”¹⁰ Thus, there is actually no real question that STRATCOM is obliged to conduct its nuclear operations in compliance with LOAC.

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⁹ Citing *International Red Cross Conference Resolution XXVIII*, 20th International Red Cross Conference (1965).

¹⁰ Paragraph E.1.a., DOD Directive 5100.77, *DOD Law of War Program*, dated July 10, 1979.

¹¹ Paragraph 6c, SAI 400-5, *Law of Armed Conflict*, dated 22 Mar 95.

¹² See generally, *The History of the Unified Command Plan 1946-1993*, Joint History Office, Chairman of the Joint Chiefs of Staff, 1995, at 108-109 (discussing the formation of STRATCOM and the incorporation of the JSTPS).

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(U) An oft-heard corollary to the above comment is the widespread overestimation of Presidential powers regarding national security, e.g., "the President as Commander in Chief can do what he wants." This comes up in contexts other than strictly LOAC situations (e.g. when STRATCOM assumes the role of the NMCC), but is still worth some discussion. At one time there was a legal theory that the President, as commander in chief, had very wide latitude to take action in the interest of national defense. In 1952, however, the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁴ rejected President Truman's attempt to seize steel factories during the Korean War in the interest of national security. The Court specifically ruled that even during wartime the President could not act on a matter of national security without specific authority in either a statute or the Constitution.¹⁵

(U) Another aspect of the scope of Presidential power is the continuing debate over his authority to engage in armed conflicts absent a declaration of war by Congress. This controversy centers on the constitutionality of the War Powers Resolution.¹⁶ A subpart of that debate concerns nuclear weapons. Specifically, some experts contend that "the decision to use nuclear weapons in and of itself is a decision to broaden the conflict in ways which, because of the destructiveness of nuclear weapons, should require a formal declaration of war."¹⁷ In spite of that, I think it is evident that the President has Constitutional power to "repel sudden attacks"¹⁸ and, if necessary, use nuclear weapons to do so.

(U) Less clear, however, is Presidential authority in a situation where the U.S. territory is not under direct attack, e.g., during a Major Regional Contingency (MRC). Consider the situation where the President and Congress are deadlocked over the application of the War Powers Resolution. Each branch might direct the military to take a different course of action.

¹³ Per telecon with Colonel John Burton, USA, Legal Counsel to the Chairman, Joint Chiefs of Staff, September 1995.

¹⁴ 343 U.S. 579 (1952).

¹⁵ Congress has, however, enacted a wide variety of legislation applicable in times of war or national emergency. See generally, Digest of War and Emergency Legislation Affecting the Department of Defense, General Law Division, Office of the Judge Advocate General, United States Air Force, 1991.

¹⁶ Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified in 50 U.S.C. §§ 1541-1548 (1988)). See e.g., Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 Va. J. of Int'l L. 903 (1994) (arguing the unconstitutionality of the War Powers Resolution) and Louis Fisher, Presidential War Power (1995) (arguing the constitutionality of the War Powers Resolution). No President, including the current Commander in Chief, has ever accepted the constitutionality of the War Powers Resolution although most usually comply with it *de facto*. See Clinton Vow To Provide Troops Revives War Powers Conflict, Congressional Quarterly Weekly Report, October 14, 1995, at 3158.

¹⁷ Ronald F. Lehman II, *Nuclear Weapons: Deployment, Targeting and Deterrence in National Security Law* (John Norton Moore, et al., eds 1990), at 538.

¹⁸ See Fisher, *supra* note 16, at 12. Fisher, who is otherwise a conservative with respect to the scope of Presidential authority, concedes that this power is inherent in the President's executive authority. See U.S. Const. art. II.

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Putting a military commander in such a dilemma could do immense harm to civil-military relations as well as to our constitutional scheme for civilian control.¹⁹ Nevertheless, subject to the discussion below concerning patently illegal orders, I believe that a military commander in such a quandary could properly presume that the orders of the Commander-in-Chief are lawful and must be obeyed -- notwithstanding direction from Congress to the contrary.

(U) Another myth closely related to that of unlimited Presidential power is one that in essence considers legal considerations *irrelevant* to STRATCOM's mission, e.g., "our job is just to execute the NCA decisions." Of course, STRATCOM has the duty to execute the lawful orders of the NCA. Moreover, military personnel may ordinarily presume that the orders they receive are, in fact, lawful.²⁰ But it is equally true that military personnel must not obey *illegal* orders, and an order violating LOAC is an illegal one. The problem with the attitude reflected in the captioned phrase is it insinuates an embrace of what is known as the "Nuremberg defense." During the war crimes trials at Nuremberg following World War II German officers argued that they had an absolute duty to obey orders. Accordingly, they contended that they should not be held accountable for war crimes arising from obedience to orders given by their political leaders.²¹ The Tribunal rejected that defense because the law does not allow military personnel to act in a moral vacuum. Although obedience to orders *is* a defense in most circumstances, it does *not* apply where the order given is patently illegal. This legal concept is now an accepted part of international law.²²

(U) A practical example of the kind of orders that military personnel cannot presume to be lawful is found in the Vietnam-era case of *United States v. 1Lt William L. Calley*.²³ Calley, you may recall, was convicted of premeditated murder of 22 men, women, and children in the 1968 massacre at My Lai. Among other things, Calley argued that he was ordered to kill the people and that he was entitled to presume that this order was legal. The court found that even if Calley actually received such an order, he was, nevertheless, not entitled to presume it was legal. The court held that assuming Calley was "the most ignorant person in the United States Army in Vietnam, he must be presumed to know ... [that] an order to kill infants and unarmed civilians who were so demonstrably incapable of resistance ... is palpably illegal."²⁴ Thus, the presumption of lawfulness does not attach to orders "patently unlawful."²⁵

¹⁹ One commentator believes that if the President and Congress "are in such conflict that they defy each other, the U.S. military can be put in a position in which civilian control -- even the Constitution itself -- is in jeopardy." See Richard H. Kohn, Eagle and Sword: The Beginnings of the Military Establishment in America (1975), at 8.

²⁰ Paragraph 14d(2)(a)(i), Part IV, Manual for Courts-Martial, (M.C.M.) 1994.

²¹ See Geoffrey Best, War & Law Since 1945, 1994, at 188-192.

²² See Principle IV, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and Judgment of the Tribunal* (1950) as excerpted in The Laws of War (W. Michael Reisman and Chris T. Antoniou, eds., 1994), at 335.

²³ U.S. v. Calley, 48 C.M.R. 19 (C.M.A. 1973).

²⁴ *Id.*, at 29.

²⁵ See note 20, *supra*.

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(U) What all this means to STRATCOM is that although it is proper to presume that NCA would not intentionally issue illegal orders, the mere fact that an order is issued by the NCA does not relieve individuals of their legal and moral responsibilities. Moreover, STRATCOM bears a special responsibility with respect to nuclear operations because to a great extent this command is the author of the very employment options from which the NCA has to choose. Thus, the mere fact that STRATCOM may receive an order from the NCA cannot absolve us of the obligation to ensure that the options submitted to the NCA are themselves consonant with the law of war. (A specific illustration of how legal considerations arise in the context of theater nuclear support appears in Section V below.)

(U) Finally, there is the myth that a "legal review will delay a time-sensitive operation." Putting aside the fact that if a process is necessary to an operation – as I contend is true with respect to determining the legality of an operation – then the required time must be devoted to it, this is a myth wholly without supporting data. As General Powell's quote concerning the Gulf War indicates, time-sensitive operations in that conflict received legal reviews. Likewise, my own experiences in providing legal reviews for post-Gulf War combat operations against Iraq and in Somalia simply do not support the myth. Again, I think

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IV. LOAC and Deterrence

(U) Another little-understood aspect of the importance of LOAC to STRATCOM is the role it plays in deterrence. Among other things, compliance with LOAC helps to ensure that military personnel would obey an order given to execute a nuclear option. Absent confidence in the lawfulness of such orders, we would invite dissension at a crucial time. In this connection we should keep in mind that the lawfulness of nuclear weapons is by no means a universally accepted proposition. While some religious and moral authorities countenance possessing nuclear weapons for the purpose of deterrence, very few believe that their actual use is moral – under *any* circumstances.²⁶

(U) We should not underestimate the moral issues that might arise among our own forces if tasked to execute a nuclear option. For example, if the U.S. were to deliberately target noncombatants – an act contrary to LOAC²⁷ – we should expect many troops would not

²⁶ See e.g., Michael Walzer, Just and Unjust Wars, 2d Ed. 1992, at 283 ("Nuclear war is and will remain morally unacceptable, and there is no case for its rehabilitation." *Id.*, at 283). In 1983 U.S. Catholic Bishops issued a letter entitled *The Challenge of Peace: God's Promise and Our Response* which discussed nuclear war and nuclear deterrence. See reprint in War, Morality, and the Military Profession (Malham M. Wakin, ed., 1986), at 463. Although the bishops accept the morality of the possession of nuclear weapons for deterrence as an interim step towards disarmament, and seem to leave open the possibility that an extremely limited, other-than-first-use employment of nuclear weapons against purely military targets may be moral, they nevertheless say that "there must be no misunderstanding of our profound skepticism about the moral acceptability of any use of nuclear weapons." *Id.*, at 482. For a critique of the bishop's letter see John W. Coffey, *The American Bishops on War and Peace In The Parameters of Military Ethics* (1989) at 28.

²⁷ Such an act would be contrary to the current U.S. interpretation of international law as it applies to nuclear weapons. The U.S. considers it to be "unlawful to make civilians or civilian objects the object of attack as such." See Submission I, *supra* note 8, at 26. See also Department of Defense, *Conduct of*

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carry out such an order not only because it is unlawful, but also because the Catholic Bishops in their 1983 letter explicitly state that "[n]o Christian can rightfully carry out orders or policies deliberately aimed at killing non-combatants."²⁸ This raises the specter of a degradation in our capability if individuals find at the critical moment that they cannot or will not execute orders to employ nuclear weapons. How people will perform in the stress of combat is always problematic, and it is particularly so with respect to the wholly unique prospect of nuclear war.²⁹

the Persian Gulf War, An Interim Report to Congress Pursuant to Title V Persian Gulf Conflict Supplemental Authorization and Benefits Act of 1991 (Public Law 102-25), July 1991:

As a general principle, the law of war prohibits the destruction of civilian objects not imperatively required by military necessity and the intentional attack of civilians not taking part in the hostilities. The United States strictly observes these proscriptions in its development and acquisition of weapons systems, as well as in the employment of weapons systems in combat and the use of force.

Id., at 12-2. Professor George Bunn explains the history of this policy in the context of nuclear weapon targeting:

Air Force and Navy Manuals on the law of war recognize that nuclear weapons may be directed toward military, not civilian populations. U.S. targeting plans were revised to exclude what are called "population *per se*" targets by 1973. This was done in part because State Department lawyers thought international law so required. Earlier plans had not called for killing civilians for the sake of doing so. But until 1973, technology did not exist to permit significant discrimination between population and other targets in our near cities.

George Bunn, *US Law of Nuclear Weapons, Naval War College Review*, 1984, at 58-59 (citations omitted). However, it must be emphasized that the U.S. reserves the right to target noncombatants in reprisal. See Submission I, *supra* note 8, at 31. Reprisals are "lawful acts of retaliation in the form of conduct that would otherwise be unlawful, resorted to by one belligerent response to violations of the law of war by another belligerent." *Id.* Reprisals "may only be taken for the purpose of enforcing future compliance with that law, and must comply with certain rules limiting scope and effect." *Id.*, at 31, n.89 (citing paragraph 497 of U.S. Army Field Manual 27-10, *The Law of Land Warfare*, 1956, at 177). There are few, if any, legal authorities that support the notion that targeting noncombatants -- even in reprisal -- is still permissible under customary international law. (It was explicitly outlawed in Article 51(6) of Additional Protocol I to the Geneva Conventions of 1949.)

²⁸ *Id.*, at 470.

²⁹ One analyst of the bishops' letter notes that approximately thirty per cent of the armed forces are comprised of Catholics and further observes:

Individual soldiers who are Roman Catholic are confronted with a serious choice. If they are going to follow the Bishop's teaching, they will be compelled to disobey an order to fire a countervalue nuclear weapon. An individual may have no crisis of conscience during times of peace. If, however, he is serving in a position in which he could be ordered to launch a countervalue nuclear weapon, how would he respond if the order were issued? Until the time arrives, the answer to the question cannot be known. By the same token no Roman Catholic can morally issue an order to launch countervalue nuclear weapons. The same choices, tensions, and questions apply to those issuing the orders.

Captain Mary E. McGrath, USA, *Nuclear Weapons: A Crisis of Conscience*, 107 Mil. L. Rev. 191, 239 (1985).

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Nevertheless, we should not underestimate the effect that a moral quandary could have on adherence to discipline in a combat environment.³⁰

(U) Consequently, a key reason we pressed so hard this year on LOAC training is to create the fact and – equally important – the *perception* among the troops that STRATCOM is aware of and complies with LOAC. By creating an environment where compliance with LOAC is widely assumed, we believe that we can eliminate one more factor (i.e., questions about the lawfulness of what our troops may be asked to do) that might otherwise raise doubts at the worst possible time. As you know, readiness is an intricate mosaic of many factors which collectively demonstrate to our potential adversaries that STRATCOM is genuinely capable of employing forces if called upon to do so. Considered in this context, compliance with LOAC is another element – like exercises, systems upgrades, and so forth – of our readiness.

(U) Compliance with LOAC also enhances deterrence in another way. If, for example, the U.S. were to announce that it was deliberately targeting noncombatants, such a policy might not only raise problems within our forces as indicated above, it could also undermine the credibility of our deterrent: would Americans support an illegal and immoral deterrence policy? One commentator assesses the impact of law on international affairs and notes:

(U) Americans rightly expect their nation to act lawfully in international affairs...Even in the short run, law serves as a standard of appraisal for national actions and as a means of communicating intentions to both friend and foe, and *perceptions about lawfulness can profoundly influence both national and international support for particular actions*. In the long run only a principled policy rooted in law can ensure the international peace and justice so importantly a part of the national interest of the United States and of all nations.³¹

(U) Another expert contends that conformity with law serves to "legitimize" nuclear deterrence, a critical factor because, as he says, "Americans – Westerners generally – usually need moral justification for going to war and for the possession of the weapons of war."³² Because compliance with LOAC underpins a moral justification for deterrence, it helps to avoid tempting a potential adversary to test our national resolve to execute what otherwise might be considered a manifestly illegal and immoral targeting plan. An enemy might assume that we lack the will to do the unlawful and, therefore, conclude that our deterrent 'threat' is a bluff and proceed upon a provocative course.

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³⁰ For example, Richard Holmes reports in his book, Acts of War: The Behavior of Men in Battle (1985) that such quandaries made otherwise good officers not to obey orders during the Vietnam War: "Sometimes officers' legitimate concern for the safety of their men persuaded them that they were *morally right* in declining to go into action." *Id.*, at 318 (emphasis added). Military law, however, holds that "dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Paragraph 14c(2)(d), Part IV, M.C.M., 1994.

³¹ John Norton Moore, Law and the Grenada Mission, 1984, at 1 (emphasis added).

³² Bunn, *supra* note 27, at 47.

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V. Practical LOAC Issues in Theater Support Operations

(U) ~~(S)~~ As suggested above, the application of LOAC principles to STRATCOM operations in support of theater CINCs is especially vital. The recent controversy over the limited use of atomic weapons during World War II illustrates the kind of scrutiny any such employment would engender. We should expect intense investigations in the event nuclear weapons are used, no matter how limited such use may be or how seemingly justified.³³ Consequently, observance of international law and especially LOAC principles in the MRC situation is a major concern. As is detailed in the unclassified annex, to be consistent with LOAC the use of nuclear weapons, like other weapons, must meet the "three major criteria in international law ... the necessity to use them; the proportionality of their use; and the obligation not to cause unnecessary suffering."³⁴

(U) ~~(S)~~ STRATCOM's recent theater support demonstration/exercise presented to the CJCS highlights the very practical way these factors arise. The target in that case was a proper military objective whose destruction was required by military necessity.³⁵ The LOAC issue was the selection of the weapon and delivery platform to be employed. Please note that LOAC does not, *per se*, require that a particular weapon or platform be used in a given situation.³⁶ However, it is "unlawful to carry out any attack that may be expected to cause collateral damage or injury to civilians or civilian objects that would be excessive in relation to

³³ By way of comparison, following the Gulf War Congress required the Department of Defense to submit a report that, among other things, detailed compliance with LOAC. See *Conduct of the Gulf War, An Interim Report to Congress*, *supra* note 27.

³⁴ David Alan Rosenberg, *Nuclear War Planning*, in The Laws of War: Constraints on Warfare in the Western World (Michael Howard, et al., eds, 1994), at 164-165. We believe that the last two criteria are essentially redundant for purposes of the nuclear weapon's analysis as discussed in the unclassified annex.

³⁵ Article 52 (2) of Protocol I Additional to the Geneva Conventions of 1949 states:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to 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.

Although the U.S. never ratified Protocol I, this portion is considered part of customary international law and, therefore, applicable to U.S. forces. See *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (Naval Warfare Publication (NWP) 9 (Rev.A, 1987), paragraph 8.1.1, n. 8-9 and *International Law—The Conduct of Armed Conflict and Air Operations*, Air Force Pamphlet (AFP) 110-31, paragraph 5-3b. See also Myres S. McDougal and Florentino P. Feliciano, Law and Minimum Public Order, 1961, at 72-73 (discussing the concept of military necessity).

³⁶ Compare, Danielle L. Infeld, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm: But is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?* 26 Geo. Wash. J. Int'l L. & Econ. 109 (1992) [Note].

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the military advantage anticipated from the attack.”³⁷ (This is the principle of “proportionality” discussed in detail in the unclassified annex.)

(U) In applying the principle of proportionality LOAC requires commanders to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event, minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”³⁸ STRATCOM has the unusual capability to model CAS and FAS for a variety of weapons’ options. Thus, LOAC precepts would ordinarily compel selecting the option with the fewest CAS/FAS that still achieves the damage expectancy required by military necessity. There are, however, some additional considerations.

~~(S)~~ For example, (b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

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(b)(1) Sec 1.4(a) / (b)(5)-Attorn **We have no legal or moral obligation to limit the number of bona fide enemy combatants we kill.** (b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

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~~(S)~~ Another LOAC issue was suggested by the supported CINC’s decision. Although

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³⁷ See Submission I, *supra* note 8, at 27. See generally, Judith Gail Gardam, *Proportionality and Force in International Law*, 87 A.J.I.L. 391 (1993).

³⁸ Article 57 (2)(a)(ii) of Protocol I Additional to the Geneva Conventions of 1949. Although the U.S. never ratified Protocol I, this portion is considered part of customary international law and, therefore, applicable to U.S. forces. See NWP 9, paragraph 8.1.2.1, n.18 and AFP 110-31, paragraph 5-3c(1)(b).

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(U) Additionally, in evaluating FAS/CAS we must ensure that the rules of engagement allow attacking enemy forces wherever situated. "Rules of engagement" is terminology of great significance to geographic CINCs (b)(5)-Attorney Work Product USSC

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In any event, we should ensure that the targeted enemy forces have been declared hostile IAW with CJCS Instruction,⁴⁰ and that there are not other limiting factors contained in the ROE applicable to the particular operation STRATCOM is supporting. (By way of information, there are no longer "peacetime" ROE and "wartime" ROE; rather, the Standing Rules of Engagement are applicable across the range of conflicts.⁴¹)

(U) ~~(S)~~ During this exercise the CJCS asked how we would coordinate with the foreign governments prior to the use of nuclear weapons. I would respectfully offer a couple of observations. The management of foreign policy is, of course, the responsibility of the President acting through the Secretary of State.⁴² Obtaining the necessary coordination should be the responsibility of the supported CINC, not STRATCOM. As a practical matter, the geographic CINC would rely on his State Department-assigned political advisor (POLAD) to do the necessary legwork. STRATCOM may wish to include such coordination and permission as an assumption in the planning process.

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(U) I should emphasize that many, if not most, nations consider nuclear weapons to be unlawful. There have been, for example, four United Nations General Assembly Resolutions that have condemned nuclear weapons as unlawful.⁴³ Similarly, there is a case pending before the International Court of Justice wherein the World Health Organization (a UN entity) is

³⁹ See generally, Sidney Axinn, A Moral Military, 1989, at 163-166.

⁴⁰ See Paragraph 6 and Appendix A to Enclosure A, Chairman of the Joint Chiefs of Staff Instruction (CJCS) 3121.01 (S), *Standing Rules of Engagement for U.S. Forces*, dated 1 October 1994.

⁴¹ *Id.*, paragraph 3c.

⁴² 22 U.S.C. § 2656.

⁴³ See Submission II, *supra* note 8, at 24, n.67.

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seeking a declaratory judgment concerning the lawfulness of nuclear weapons.⁴⁴ Though the United States does not consider these resolutions or a decision by the ICJ (in this instance) as binding,⁴⁵ they are considered authoritative by many countries. The point is that the special character of nuclear weapons (e.g., their effect on the environment⁴⁶) may well lead many nations that would otherwise cooperate with the United States in a military action not to do so with respect to nuclear weapons' operation.

~~(S)~~ That said, STRATCOM

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

~~(S)~~ In any event, in either the SIOP situation or the theater support scenario the law is the same with respect

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Client Privilege USSC

⁴⁴ See *supra* note 8.

⁴⁵ The United States accepts the jurisdiction of the ICJ in only certain matters. See Restatement (Third) of the Foreign Relations Law of the United States § 903 cmt. c, at 357.

⁴⁶ See e.g. Submission II, at 10-16, *supra* note 8.

⁴⁷ Even in this situation it should be noted that while Article 51 of the United Nations Charter would authorize an armed response as a matter of self-defense, international law does not sanction violations of third country sovereignty to do so.

⁴⁸ See AFP 110-31, paragraph 2-1c and NWP 9, paragraph 2.5.1, *supra* note .

⁴⁹ Article 5, Hague Convention (V), 1907. See also AFP 110-3, paragraph 2-6c and NWP 9, paragraph 7.3.7.1.

⁵⁰ Some experts believe that if an armed action is authorized by a United Nations Security Council Resolution, then "it is doubtful that any State that is a member of the United Nations can decide to 'sit this one out' and claim neutral rights." See Reisman and Antoniou, *supra* note 22, at 134.

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VI. Conclusion

(U) It should be emphasized that when properly applied, LOAC does not diminish our capability to wage war, nuclear or otherwise. In many respects it incorporates classic military axioms such as economy of force and concentration of effort. Moreover, it is essentially Clausewitzian in nature in that it facilitates achievement of the political goals in a given circumstance by, among other things, influencing public opinion. Proper application of LOAC can also avoid the inappropriate and unnecessary restraints due to erroneous assumptions about legal restrictions. It is often erroneously assumed, for example, that the air war in Vietnam was limited by LOAC; actually, in most instances the limitations were not based on law but were instead self-imposed policy constraints.⁵¹

(U) While I believe, as I said earlier, that much progress has been made this year in raising the command's LOAC "consciousness" (primarily because of the Directors' strong support of the LOAC training program), the job is as yet incomplete. As I mentioned, I welcome your advice as to how JO60 might profitably be incorporated into the planning process. In any event, only with your support can we be fully confident that this aspect of STRATCOM's readiness is not compromised.

Very Respectfully,

CHARLES J. DUNLAP, JR.
Colonel, USAF
Staff Judge Advocate

⁵¹ See W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1 (1990).