The Law and Policy Implications of "Baited Ambushes" Utilizing Enemy Dead and Wounded

*Lieutenant Colonel Chris Jenks**

Introduction

You are the brigade judge advocate for a U.S. Army Stryker brigade combat team in the midst of a combat deployment to Afghanistan. Arriving at the tactical operations center one morning, you are accosted by the brigade executive officer who tells you that the commander, Colonel (COL) Smith, is looking for you. After you dutifully report, the commander tells you about a significant activity report that one of the battalion commanders, Lieutenant Colonel (LTC) Jones, recently submitted. The report deals with one of the infantry companies, Alpha Company, also known as "Kill Company," and its engagement with the enemy the night prior, which resulted in seven enemy killed in action and eighteen enemy wounded; there were no U.S. or coalition casualties. Colonel Smith tells you that upon seeing the report, he contacted LTC Jones to congratulate him and discuss the tactics, techniques, and procedures Kill Company had used.

"Jones told me that Kill used a baited ambush," COL Smith informs you. "When I asked him what he meant, he said that Kill had been in an engagement earlier in the day, feigned breaking contact, and left its third platoon in an overwatch position of the engagement area," he added. "The platoon kept 'eyes on' and waited for a couple of hours until the enemy returned to police up their dead and wounded. Then third platoon opened up on them." Rubbing his forehead with his hand, COL Smith closes with "I don't know whether to recommend them for an award or start an investigation. What do you think?"

This hypothetical is based, in part, on a news report that U.S. forces in Afghanistan targeted enemy forces attempting to collect their dead.[1] This note uses the hypothetical as a vehicle to draw out the law and policy implications of such targeting. Because assessments cannot be made divorced from the specifics of the battlefield at issue, this note does not attempt to answer the question of whether such targeting is permissible. It neither discourages nor extols such targeting. Instead, this note strives to inform judge advocates in the field about the issues involved, and, in so doing, seeks to better equip them to handle the challenging questions such targeting raises.

Law or Policy?

Before considering the hypothetical, the applicable law and policy that affect the issues and upon which any assessment must be based should be examined. Academics can easily descend into a legal inquiry from which extraction is difficult by attempting to characterize the conflicts in which the United States is currently engaged, the applicable law of those conflicts, and even the triggers for the law's application. However, from the military practitioner's perspective, the answers to these issues are straightforward, and they derive from policy rather than legal grounds.

Department of Defense's (DoD) policy directs that "[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[2] Under this policy, the law of war is defined as

> [t]hat part of international law that regulates the conduct of armed hostilities. . . . The law of war 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.[3]

Consequently, the full panoply of the law of armed conflict applies to the hypothetical in Afghanistan, but that answer stems from U.S. policy and not a legal determination.[4]

---

* Judge Advocate, U.S. Army. Presently serving as the Chief of the International Law Branch, Office of The Judge Advocate General, Rosslyn, Virginia.

[1] Greg Jaffe, *'Almost a Lost Cause': One of the Deadliest Attacks of the Afghan War Is a Symbol of the U.S. Military's Missteps*, WASH. POST, Oct. 4, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/10/03/AR2009100303048.html?sid=ST2009100401053. The article describes how a U.S. Army unit purportedly called in artillery fire on insurgents who returned to the battlefield to collect their dead from an engagement hours earlier. Members of the unit filmed the artillery strike and can be heard laughing and cheering, which presents additional challenges to a command. *See also* Michael Yon, *Adam Ray*, MICHAEL YON ONLINE MAG., Feb. 18, 2010, http://www.michaelyon-online.com/adam-ray.htm. In describing efforts by U.S. Army forces to counter the IED threat in Afghanistan, Yon references a tactic that also comes close to, if not enters, the law of war violation continuum discussed *infra*. The U.S. military has been taking inventory of culverts, identifying their exact locations and documenting them with photos and maps, and has also embarked on a program to place barriers on culverts regularly used by U.S. forces. Because the enemy continually tries to remove or circumvent the barriers, small kill teams (SKTs) move from place to place, day and night, watching the culverts. The SKTs frequently call for fire that kills men who have come to emplace bombs; when enemy forces arrive to collect the bodies, the SKTs engage them, too.

[2] U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM ¶ 4.1 (9 May 2006) [hereinafter DODD 2311.01E].

[3] *Id.* ¶ 3.1.

[4] The DoD policy, in addition to being required, provides a more straightforward solution than the traditional "right person, right conflict" legal analysis. As applied to the hypothetical, the right person analysis would focus on the characterization of the "enemy" to determine whether

What Is the Law?

The law most relevant to the baited ambush is the Geneva Conventions, specifically the first Geneva Convention (GC I), which protects wounded and sick soldiers on land during war. Pursuant to article 15 of GC I,

> [a]t all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled. Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield. Likewise, local arrangements may be conducted between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to the area.[5]

The Commentary to GC I describes the nature and extent of the obligation. The Commentary notes that the predecessor to the 1949 Geneva Conventions, the 1929 Convention, while listing a similar responsibility, imposed the obligation only "after each engagement" and only on "the occupant of the field of battle."[6] By contrast, article 15 of GC I imposes the obligation "at all times" and on all the parties to the engagement.

Returning to the hypothetical, the members of Kill Company did have an obligation to search for and care for the enemy wounded, as well as an obligation to search for the dead and prevent them from being despoiled.[7] But does that mean that Kill Company, by not initially conducting such a search or by leaving third platoon to attack the enemy when it returned to collect its dead and wounded, violated the Geneva Convention? Not necessarily. Although the plain language of the article requires Kill Company to take all possible measures, the obligations of article 15 are not absolute. As the Commentary notes, "there are times when military operations will make the obligation to search for the fallen impracticable."[8]

How should the practitioner distinguish what is and is not practicable? One answer is to imagine a continuum ranging from least to greatest responsibility. Information from the battlefield and unit in question would then guide placement on the continuum. This information would include the proximity, both geographical and temporal, of the unit to the engagement area, the unit's disposition, capabilities, and mission.

For example, consider two extremes. The first involves an engagement in Afghanistan. A U.S. Army unit employs indirect fire to wound or kill the enemy 5000 meters to the north, and more significantly, down the ridgeline, across an open and exposed valley, and up on another ridge line from where the under-strength third platoon of Kill Company is located. Kill Company has only been in the area a short period of time, and the area is considered "insurgent territory." Kill Company has also just received orders to immediately move south. In contrast, the second example is an urban engagement in Mosul, Iraq. The engagement involves direct fire weapons at ranges of 100–200 yards. Third platoon is at full strength, has been in the same combat outpost for some time, and is not going anywhere any time soon.

Placing the two scenarios on the same continuum, the responsibility to search for the dead under article 15 is considerably greater in the latter example. This reflects the Commentary's recognition that "[t]he search for the fallen combatants and their collection may present different aspects according to circumstances."[9] The Commentary continues by acknowledging that

---

the individuals are combatants or civilians and whether wounded or sick. The right conflict analysis would consider whether the conflict was international (Common Article 2) or noninternational (Common Article 3) in nature. The policy obviates the need for this complicated legal analysis, standardizing the United States' approach in the process.

[5] Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field art. 15, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]. The International Committee of the Red Cross, in its study of customary international law, found that "State practice establishes [art. 15] as a norm of customary international law applicable in both international and non-international armed conflicts." JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 406 (2005).

[6] COMMENTARY, I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet ed., 1958) [hereinafter ICRC COMMENTARY] (quoting Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 3, July 27 1929, 47 Stat. 2021 [hereinafter 1929 GC]). Under Article 3 of the 1929 GC,

> [a]fter each engagement the occupant of the field of battle shall take measures to search for the wounded and dead, and to and to protect them against pillage and maltreatment. Whenever circumstances permit, a local armistice or a suspension of fire shall be arranged to permit the removal of the wounded remaining between the lines.

Id.

[7] The Commentary explains that "the wounded and sick must be guarded and, if necessary, defended against all parties, whether military or civilian, who may seek to lay hands on them. *Id.* at 152.

[8] *Id.* at 151.

[9] *Id.*

> the commonest and the most important case will be that of enemy troops retiring in the face on an attack. The occupant of the battlefield must then, without delay, make a thorough search of the captured ground as to pick up all the victims. The dead must also be looked for and brought back behind the lines with as much care as the wounded.[10]

Ultimately, in the absence of an armistice or suspension of fire, engaging combatants attempting to recover their dead and wounded is not a per se violation of the law of war, but utilizing known—or even suspected—enemy wounded and dead as "bait" for such targeting enters the continuum and, at some point, will constitute a violation of article 15. The more time that passes following the engagement, the closer the engagement is to U.S. forces, and the more control U.S. forces have over the "field of battle," the more likely the failure to search for enemy wounded and dead becomes to violating the Geneva Convention.

Distinguishing Violations

Assuming arguendo that Kill Company's action (or inaction) did constitute a violation of article 15, what then? Too often, terms like "grave breach" or "war crime" are thrown around without the requisite care for their definition and application. To clarify, for the purposes of GC I, grave breaches are

> those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[11]

War crimes under the U.S. Code are

> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
> (2) prohibited by Article 23 [poison, treachery, etc], 25 [attack of undefended places], 27 [steps taken during siege or bombardment to spare cultural property], or 28 [pillage of town or place] of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
> (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or
> (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.[12]

Violating article 15 by itself[13] is neither a grave breach nor a war crime.[14] Indeed there are countless ways by which a State Party may violate the Geneva Conventions, very few of them rising to the level of grave breach or war crime. Which is not to trivialize such offenses; they are violations of the law of war for which there are ramifications.

[10] *Id.*

[11] GC I, *supra* note 5, art. 50. To that list, the Geneva Convention Relative to the Treatment of Prisoners of War (GC III) adds "compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention." Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) further adds "unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[12] 18 U.S.C. § 2441(c) (2006).

[13] A violation of article 15 that also involved willful killing of an enemy hors de combat would rise to the level of a grave breach of GC I. Similarly, an article 15 violation that included feigning a cessation of hostilities or the killing or wounding of enemy soldiers attempting to surrender would violate Hague IV. Either of those scenarios would constitute a war crime under the U.S. Code, but the additional conduct, and not just the article 15 violation, push the offense over the threshold level.

[14] *But see* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 499 (18 July 1956) (C1, 15 July1976) (stating that "[t]he term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."). This approach, adopted in the 1956 version of Field Manual 27-10, preceded the War Crimes Act and the trend of criminalizing only the most "serious crimes" or "grave breaches" evident in recent legislation. *Compare* the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. § 948a), *with* War Crimes Act of 1996, 18 U.S.C. § 2441 (2006).

Under the Geneva Conventions, "[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than . . . grave breaches."[15] This means that the United States has agreed to take action to respond to violations of the first Geneva Convention, like article 15, which do not rise to the level of a grave breach. That action, or measures, should be designed to "suppress" the prohibited behavior. While action could be taken under the Uniform Code of Military Justice, it can also be administrative, which includes reprimands, counseling, and retraining. Potentially more significant to COL Smith, a violation of article 15, and thus the law of war, is a reportable incident under the DoD law of war program.[16]

Conclusion

The purpose of this note is to remind practitioners of the law and policy relevant to ambushes which utilize enemy dead and wounded as "bait." Units are to be commended for the agile and adaptive ways in which they bring the fight to an amorphous enemy. Our job as judge advocates and as legal advisors is to inform our commanders when their means and methods of warfare tread close to the line separating permissible conduct from law of war violations. While ambushing the enemy when they are collecting their wounded or dead may not be a war crime, such targeting may incur more risk than units realize, or want, and any short-term tactical advantage may be outweighed by the ramifications of reporting and investigating a possible violation of the law of armed conflict.

---

[15] GC I, *supra* note 5, art. 50.

[16] DoDD 2311.01E, *supra* note 2, ¶ 3.2. Under the Law of War Program, a reportable incident is defined as "[a] possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict." *Id.*