Wrangling in the Shadows: The Use of United States Special Forces in Covert Military Operations in the War on Terror

Michael McAndrew

Follow this and additional works at: http://lawdigitalcommons.bc.edu/iclr

Part of the Military, War, and Peace Commons, and the National Security Law Commons

Recommended Citation
Michael McAndrew, Wrangling in the Shadows: The Use of United States Special Forces in Covert Military Operations in the War on Terror, 29 B.C. Int'l & Comp. L. Rev. 153 (2006), http://lawdigitalcommons.bc.edu/iclr/vol29/iss1/7

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
WRANGLING IN THE SHADOWS: THE USE OF UNITED STATES SPECIAL FORCES IN COVERT MILITARY OPERATIONS IN THE WAR ON TERROR

Michael McAndrew*

Abstract: Following the terrorist attacks in the United States on September 11, 2001, the United States Senate granted the use of all necessary and appropriate force to prevent any future acts of international terrorism against the country. As part of this campaign against global terrorism, the United States Department of Defense sought an expanded role for Special Forces soldiers in covert paramilitary operations, a tactical responsibility traditionally within the domain of the CIA. In this Note, the author analyzes the protocol for authorizing covert activity and the ramifications under international law of utilizing formal United States military personnel to conduct such operations. The author suggests that non-uniformed, deniable covert operations should remain with the CIA since the loss of Geneva Convention status by United States Special Forces personnel seems excessive in light of the legal means available for utilizing them in the war on terror.

Introduction

In January, 2003, Donald Rumsfeld stated that “[t]he global nature of the war [on terrorism], the nature of the enemy and the need for fast, efficient operations in hunting down and rooting out terrorist networks around the world have all contributed to the need for an expanded role for the special operations forces.” 1 Rumsfeld made no secret of his plans to thrust special forces into a greater role in the war on terrorism by using them for covert operations around the globe. 2 The justification for this plan lies in the belief that twenty-first century threats necessitate the ability to deploy teams rapidly to suppress the United States’s terrorist adversaries wherever they are located, how-

* Michael McAndrew is an Executive Editor for the Boston College International & Comparative Law Review.


ever distant. The Defense Department’s contention that our special forces are uniquely equipped to manage this undertaking has placed it at odds with the CIA, which traditionally has handled covert paramilitary operations.

This Note seeks to examine the international legal implications of authorizing United States Special Operations Forces to conduct covert paramilitary operations in the war on terror. Part I defines covert action and the protocol for its authorization and examines why covert activity typically has fallen under the purview of the CIA. Part II illustrates the ramifications under international law of utilizing formal United States military personnel for covert operations. Part III argues that non-uniformed, deniable covert operations should remain in the domain of the CIA, and not the Special Operations Forces, since the loss of Geneva Convention status by United States military personnel seems excessive in light of the legal means available for conducting the war on terror.

I. HISTORY AND BACKGROUND

The current definition of covert action, established under the Intelligence Authorization Act for fiscal year 1991, is “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.” Covert actions therefore strive to maintain the secrecy of those sponsoring them. Inherent in this goal is the plausible deniability of the act by the sponsoring party.

Under Title 50, covert action is treated as distinct from traditional military activities. While the statutory language does not define traditional military activities, the legislative history reveals an intent that they encompass activities by military personnel under the direction and control of a United States military commander. The conference committee report explained that traditional military activities are meant to include actions preceding and related to hostilities that

---

3 See Donald H. Rumsfeld, Transforming the Military, 81 FOREIGN AFF. 20, 27 (2002).
6 Kibbe, supra note 2, at 104.
7 Id.
8 50 U.S.C.A. § 413b(e).
are anticipated to involve United States military forces, meaning approval has been given by the National Command Authorities for the activities and for operational planning for hostilities.10 Furthermore, it was intended for traditional military activities also to include hostilities that involve United States military forces in an ongoing manner, where their role in the overall operation is apparent or is to be acknowledged publicly.11

Under Title 50 of the United States Code, the President may not authorize a covert action without first determining in a written finding that the action has an identifiable foreign policy or national security objective for the United States.12 Moreover, the President must specify each department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such action.13 This statutory authorization for the President demonstrates that Title 50 leaves the President wide latitude to select any agency to carry out a covert mission, including the military.14

But in order to execute a truly covert paramilitary operation—one where a premium is placed on the ability of the United States to remove its identity as sponsor—the selection of the CIA to execute the task may be, and traditionally has been, the logical choice because its paramilitary operatives are trained to accept as part of their missions that they operate without protection or help from the United States government.15 If an authorized covert action run by the CIA is compromised, the United States can still maintain plausible deniability based on this understanding among CIA operatives.16 This lack of acknowledged status nullifies any concern under international law as to an operative’s loss of international protections for operating without any identifiable affiliation with the United States.17 Furthermore, since the covert activity is being conducted without any relation back to the United States as sponsor, CIA covert paramilitary operations may run counter to international law or the local laws of the country.

10 Id.
11 Id.
13 Id.
16 See id.
17 See Kibbe, supra note 2, at 113.
in which the activity is taking place.\textsuperscript{18} Covert operations under Title 50 must comply at the very least with the laws of the United States.\textsuperscript{19} There is no statutory mandate, however, that binds the agency selected by the President to conduct a covert operation in accordance with international law.\textsuperscript{20} With respect to the laws of foreign states, covert operations do not assume the superiority of United States law over that of a foreign country.\textsuperscript{21} Rather, they assert that there are overriding national interests that have to be dealt with outside the framework of international law and normal state-to-state relations, without resort to the use of official military force.\textsuperscript{22} This implies that the United States is prepared to take direct steps to protect its concerns in a world where not all countries have respect for its interests or the norms of international society.\textsuperscript{23}

In support of its plan to engage Special Operations Forces in covert paramilitary operations, the Defense Department has cited the greater size and availability of these forces to respond to an undeniably global enemy.\textsuperscript{24} Special Forces operatives are the most elite personnel of the United States military and their exposure to the military’s most advanced training and equipment makes them more experienced and more educated than the rest of the conventional armed forces.\textsuperscript{25} These operatives engage in specialized missions that include unconventional warfare, strategic reconnaissance, direct action, and counterterrorism.\textsuperscript{26} The Defense Department thus contends that the combined Special Forces units, comprising tens of thousands of elite commandoes, may be better equipped to respond to numerous simultaneous threats around the world than the CIA’s few hundred paramilitary officers.\textsuperscript{27} While the CIA possesses expertise in espionage and intelligence analysis and has engaged in covert paramilitary activity, the belief is held that small, highly mobile Special

\textsuperscript{18} See Stone, supra note 15, at 15.
\textsuperscript{19} 50 U.S.C.A. § 413b(a) (5) (2002).
\textsuperscript{20} See Stone, supra note 15, at 15.
\textsuperscript{21} See Richard A. Best, Jr., Cong. Research Serv., Intelligence and Law Enforcement: Countering Transnational Threats to the U.S. 27 (2001).
\textsuperscript{22} Id.
\textsuperscript{23} See id. at 27–28.
\textsuperscript{24} See Robinson, supra note 4, at 50.
\textsuperscript{26} 10 U.S.C.A. § 167(j) (1994).
\textsuperscript{27} See Kibbe, supra note 2, at 112.
Operations forces may be well suited to attack the new threats in light of their own proven areas of expertise.  

The Defense Department has taken the position that the United States is in an active war and therefore any military activity, including Special Forces, would qualify as a traditional military activity that does not require a Presidential finding. The United States is relying on its inherent right of self-defense to justify the use of military force against terrorists. Senate Joint Resolution 23, which granted the use of force in response to the attacks of September 11, 2001, authorized the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

This has led some legal scholars to contend that the Resolution grants the President virtually unlimited authority to use military force in the war on terror, as long as he “determines” that a particular target has some connection to these attacks.

In conjunction with this impression of the war on terror, the Defense Department increased the authority of Special Operations Command (SOCOM), the headquarters that controls all Special Forces commando units. SOCOM authority was amended from a purely “supporting command,” which can only contribute to other combatant commands’ missions, into a “supported command,” which can plan and execute its own independent operations if authorized by the Secretary of Defense or the President. While few will deny that the new threats posed by terrorism may call for updated and creative response techniques, one cannot overlook the implications of these new rules on

28 See Bruce Berkowitz, Fighting the New War, The Hoover Digest No. 3, 2002, at 46.
30 Brigadier General Charles J. Dunlap, Jr., International Law and Terrorism: Some “Qs and As” for Operators, 2002 Army Law. 23, 24.
32 Kibbe, supra note 2, at 108.
33 Id. at 110.
34 Id.
the Special Forces, especially where non-uniformed, covert operations are involved.\(^{35}\)

II. Discussion

Under the law of armed conflict, the United States military would be bound to act not only in accordance with customary international law but also with any treaties and international agreements concerning armed hostilities to which the United States is a party.\(^{36}\) Therefore, although the war on terror is not an international armed conflict involving two or more nation-states, United States military personnel engaged in the effort must adhere to the international laws of war in the Geneva and Hague Conventions.\(^{37}\) This adherence varies significantly from the relative freedom from international constraints with which the CIA can conduct the same operations.\(^{38}\)

Regardless of the lack of a statutory mandate to conduct covert operations in accordance with international law, the selection of formal military personnel to execute such operations cannot be made without invoking international rules.\(^{39}\) The use of formal military force to conduct a covert military operation amounts to an act of war in terms of international law.\(^{40}\) Furthermore, United States policy dictates that the U.S. armed forces must “comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.”\(^{41}\) Therefore, the mere introduction of formal United States military personnel into an operation invokes under United States policy the international law of armed conflict that governs the conduct of international armed hostilities.\(^{42}\)

It follows that where United States military personnel are expected to adhere to international laws of war and the applicable treaties of armed conflict, they also would expect the protections of those same laws and treaties.\(^{43}\) Those who serve in the military accept their responsibilities with the understanding that international rules gov-

---

\(^{35}\) See Robinson, supra note 4, at 48.


\(^{38}\) See Best, supra note 21, at 27.

\(^{39}\) See Dunlap, Jr., supra note 30, at 24.

\(^{40}\) Stone, supra note 15, at 11.

\(^{41}\) Directive No. 5100.77, supra note 36, ¶ 5.3.1.

\(^{42}\) See id.

\(^{43}\) See Kibbe, supra note 2, at 113.
erning the conduct of war and the treatment of prisoners will apply to them should something go wrong, regardless of the nature of their mission.44 This expectation does not harmonize with the concept of plausible deniability inherent in covert operations.45 The United States government, if it wishes to employ its formal military personnel in covert operations, would encounter a situation it has never faced were the operation to be compromised.46 Under the policy of strict deniability surrounding covert operations, Special Forces covert operatives could no longer expect to receive protection or help from the United States government if captured, whereas traditional military personnel, engaged in open military exercises, would continue to receive protection.47

In order to remove the imprint of United States sponsorship from a covert action, Special Forces covert operatives would be required to forfeit their military identities and any other manifestation of a relationship with the United States government.48 Because the United States military is supposed to adhere to a policy of compliance with the law of war during all armed conflicts, however, the use of formal military personnel mandates a sharp distinction between civilians and combatants.49 Neither the Global War on Terrorism nor the fact that one is a member of the Special Operations Forces grants a license for military personnel to wear anything other than the full, standard uniform.50 Once United States military personnel begin to conduct missions out of uniform, they lose the protections of the Geneva conventions should they be captured.51

Furthermore, a United States military operative conducting a covert mission without any identifiable affiliation with its sponsor may be considered an illegal combatant by his captors.52 Although “illegal combatant” is not mentioned anywhere in the Geneva Conventions, it is a concept that has long been recognized by state practice in the law

---

44 See id.
45 See Stone, supra note 15, at 11.
46 See id.
47 Id. at 13.
48 See id. at 12.
51 Kibbe, supra note 2, at 113.
52 Stone, supra note 15, at 12.
of war.\textsuperscript{53} Engaging United States military personnel in true covert activity, devoid of any affiliation with the United States government, in effect frees them from the control of a nation-state that would require them to obey the laws of war.\textsuperscript{54} Such unaffiliated, intentional concealment of military personnel among the civilian population blurs the line between civilians and combatants, and a captor may classify this as unlawful activity.\textsuperscript{55}

This anonymity and resultant classification as an illegal combatant could make the covert operative culpable for acts committed on behalf of the United States.\textsuperscript{56} Illegal combatants enjoy no immunity from prosecution for their military activities.\textsuperscript{57} Also, a United States military operative engaged in a covert operation out of uniform is susceptible to being liable for the deaths or injuries that result on account of his actions.\textsuperscript{58} Conversely, a uniformed United States military operative engaged in action in accordance with the laws of war would not be liable for any actions that comply with those laws.\textsuperscript{59}

In addition to the specific international ramifications for Special Forces personnel engaged in covert activity, their participation in such acts can have heightened consequences on the United States in the international political sphere.\textsuperscript{60} In general, covert action can have diplomatic repercussions since their nature may involve sending United States agents into foreign countries against the full knowledge of the local government.\textsuperscript{61} The discovery that the agents are military personnel could cause enormous policy problems for the U.S. Government, whether the local government is an ally or an enemy.\textsuperscript{62} As a result, the United States could jeopardize its trustworthiness and credibility in the international community and hamper the willingness of the target country to cooperate with its agenda.\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{53} Yoo & Ho, supra note 49, at 216.
\item \textsuperscript{54} See id.
\item \textsuperscript{55} See id.
\item \textsuperscript{56} Stone, supra note 15, at 12.
\item \textsuperscript{57} Yoo & Ho, supra note 49, at 222.
\item \textsuperscript{58} W. Michael Reisman, Covert Action, Remarks at the International Studies Association Annual Meeting, Intelligence Section, (March 29, 1994), in 20 Yale J. Int’l L. 419, 422 (1995).
\item \textsuperscript{59} See Dunlap, Jr., supra note 30, at 30.
\item \textsuperscript{60} Kibbe, supra note 2, at 104–05.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id. at 105.
\item \textsuperscript{63} Id.
\end{itemize}
III. Analysis

Those operations that call for covert activity may best be left in
the domain of the CIA, which operates with its own set of understand-
ings regarding international protection and governmental support. Yet the Defense Department’s desire to create a role for its most
highly trained warriors in the war on terror still should be encour-
aged under existing law. Under United States statute, the Special
Forces are authorized to conduct direct action when executing their
operations. Direct action entails the use of military force to achieve
limited objectives. Utilizing Special Forces operatives for direct action
responses against terrorist targets would allow the Defense De-
partment to achieve its objectives via swift and precise uses of force.

Direct action, as a statutorily authorized activity of Special Forces
operatives, would provide greater justification for the use of Special
Forces as a “traditional military activity.” This classification as a “tra-
ditional military activity” would remove the need to obtain a President-
ial finding, as is required for covert actions. As a result, this exemp-
ition, coupled with steps already taken such as the amended authority
of SOCOM as a “supported command,” would move the Defense De-
partment closer to the objectives it advocates.

More importantly, use of direct action would mean that the United
States would openly use its Special Forces in uniform in action for
which it is not denying responsibility. Title 10 permits the use of Spe-
cial Forces to preempt terrorists or support resistance movements clan-
destinely, as long as the U.S. government does not deny involvement
when the mission is over. By executing traditional military activities in
uniform, Special Forces operatives would be called to comply with in-
ternational law and could expect its protections in accordance with the
international laws of war. Classification of such action as traditional

---

65 See Berkowitz, supra note 28, at 44–45.
67 Berkowitz, supra note 28, at 45.
68 See Rumsfeld, supra note 3, at 27.
70 Id. at § 413b(a).
71 See Robinson, supra note 4, at 49; Kibbe, supra note 2, at 108.
72 See Berkowitz, supra note 28, at 45.
73 See Shultz, Jr., supra note 14, at 50.
74 Stone, supra note 15, at 16.
military activity would further the goal of the United States to implement all necessary and appropriate means of force at its disposal.\textsuperscript{75}

It is likely that situations will arise that call for covert activity due to the political sensitivity or elevated risk level surrounding the mission.\textsuperscript{76} Unless the United States intends to impose a waiver of international protections upon Special Forces operatives called upon to conduct such operations, and deny their involvement if exposed, such a mission would never be truly covert by definition.\textsuperscript{77} The loss of Geneva Convention status for Special Forces operatives who operate out of uniform seems a disproportionate burden to attach to a mission that is only truly covert if performed successfully.\textsuperscript{78} With the legal capability of pursuing terror targets via direct action under Title 10, the United States can extend its reach in the war on terror without compromising its Special Forces.\textsuperscript{79}

Some Defense Department officials argue that the loss of Geneva Convention status may be moot when dealing with adversaries who do not honor them.\textsuperscript{80} Al Qaeda, unaffiliated with any nation state and a sworn enemy of the United States, has never declared, and likely will never declare, an intention to respect the Geneva Conventions.\textsuperscript{81} The United States is dealing with an enemy whose tactics defy the core principles of the laws of war through attacks on purely civilian targets with the aim of inflicting massive civilian casualties.\textsuperscript{82} The expectation of humane treatment of United States personnel in the event of capture seems more remote when our enemy recognizes that it will not have prisoner of war status if captured by the United States.\textsuperscript{83}

Nonetheless, it remains politically wiser for the United States military to respect international law in the event its soldiers are captured by

\textsuperscript{76} See Berkowitz, supra note 28, at 43.
\textsuperscript{77} Stone, supra note 15, at 13.
\textsuperscript{79} See Berkowitz, supra note 28, at 45.
\textsuperscript{81} See Yoo & Ho, supra note 49, at 215–16.
\textsuperscript{82} Id. at 216.
parties affiliated with a foreign state. Under such circumstances, the U.S. military member would be entitled to prisoner of war status. In addition, respecting international law through the use of the United States military entails a sense of openness and responsibility that legitimizes the goals of the United States in the war on terror. The use of military personnel in uniform and insignia in the war on terror signals a concomitant commitment by the United States to respect the laws of war. Most importantly, utilizing our troops identifiably in open military exercises aligns more readily with their expectation that they will be protected by their government as they serve it.

CONCLUSION

In June 2005, the White House rejected classified recommendations by a presidential commission that would have given the Pentagon greater authority to conduct covert action. Despite the lack of a wholesale transfer of covert operations to the Department of Defense, the President already has signed a series of findings and executive orders authorizing secret commando groups and other Special Forces units to conduct covert operations against suspected terrorist targets in as many as ten nations in the Middle East and South Asia. The war on terrorism requires swift and effective response measures to combat an enemy who is mobile and unremitting. In confronting this modern and unpredictable threat, the United States should apply all necessary and appropriate resources to eradicate the enemy.

The proposal by the Defense Department to utilize United States Special Forces operatives in combating terrorism should be encouraged in terms of direct military action to be conducted in uniform as a traditional military activity. Authorizing military activity in such a manner invokes international rules of war and the protections they tender. Covert operations that require operatives to abandon all ties to the United States should remain with the CIA due to the prospect that such operations may violate international law and, if compro-

84 See Dunlap, Jr., supra note 30, at 29.
85 Id.
86 See Berkowitz, supra note 28, at 45.
87 Directive No. 5100.77, supra note 36, ¶ 5.3.1.
88 See Kibbe, supra note 2, at 113.
mised, result in no international protections. CIA operatives accept this possibility when they accept their missions. With the ability to employ the Special Forces in a larger capacity in the war on terror under existing law, the risks they stand to face under international law during covert operations appear not to warrant their involvement in this respect. Special Operations Forces should engage in open, uniformed missions authorized through their command chain, and their training and expertise will enable the execution of operationally sensitive missions in accordance with international law.