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LAW OF WAR HANDBOOK
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MAJ Keith E. Puls

Editor

Contributing Authors

Maj Derek Grimes, USAF

Lt Col Thomas Hamilton, USMC

MAJ Eric Jensen

LCDR William O'Brien, USN

MAJ Keith Puls

MAJ Randolph Swansiger

LTC Daria Wollschlaeger

All of the faculty who have served before us
and contributed to the literature in the field of operational law.

Technical Support

CDR Brian J. Bill, USN **Ms. Janice D. Prince, Secretary**

JA 423
International and Operational Law Department
The Judge Advocate General's Legal Center and School
Charlottesville, Virginia 22903

PREFACE

The Law of War Handbook should be a start point for Judge Advocates looking for information on the Law of War. It is the second volume of a three volume set and is to be used in conjunction with the Operational Law Handbook (JA422) and the Documentary Supplement (JA424). The Operational Law Handbook covers the myriad of non-Law of War issues a deployed Judge Advocate may face and the Documentary Supplement reproduces many of the primary source documents referred to in either of the other two volumes. The Law of War Handbook is not a substitute for official references. Like operational law itself, the Handbook is a focused collection of diverse legal and practical information. The handbook is not intended to provide "the school solution" to a particular problem, but to help Judge Advocates recognize, analyze, and resolve the problems they will encounter when dealing with the Law of War.

The Handbook was designed and written for the Judge Advocates practicing the Law of War. This body of law is known by several names including the Law of War, the Law of Armed Conflict and International Humanitarian Law. While these terms may largely be used interchangeably, for historical and contextual reasons, the Law of War will be used in this publication. Unless otherwise stated, masculine pronouns apply to both men and women.

The proponent for this publication is the International and Operational Law Department, The Judge Advocate General's Legal Center and School (TJAGLCS). Send comments, suggestions, and work product from the field to TJAGLCS, International and Operational Law Department, Attention: MAJ Keith Puls, 600 Massie Road, Charlottesville, Virginia 22903-1781. To gain more detailed information or to discuss an issue with the author of a particular chapter or appendix call MAJ Puls at DSN 521-3310; Commercial (434) 971-3310; or email keith.puls@hqda.army.mil.

The 2004 Law of War Handbook is on the Internet at www.jagcnet.army.mil. After accessing this site, Enter JAGCNet, then go to the International and Operational Law sub-directory. The 2004 edition is also linked to the CLAMO General database under the keyword Law of War Handbook – 2004 edition. The digital copies are particularly valuable research tools because they contain many hypertext links to the various treaties, statutes, DoD Directives/Instructions/Manuals, CJCS Instructions, Joint Publications, Army Regulations, and Field Manuals that are referenced in the text. If you find a blue link, click on it and Lotus Notes will retrieve the cited document from the Internet for you. The hypertext linking is an ongoing project and will only get better with time. A word of caution: some Internet links require that your computer contain Adobe Acrobat software.

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CHAPTER 1

HISTORY OF THE LAW OF WAR

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I. INTRODUCTION.

A. OBJECTIVES:

1. Identify common historical themes that continue to support the validity of laws regulating warfare.

2. Identify the two "prongs" of legal regulation of warfare.

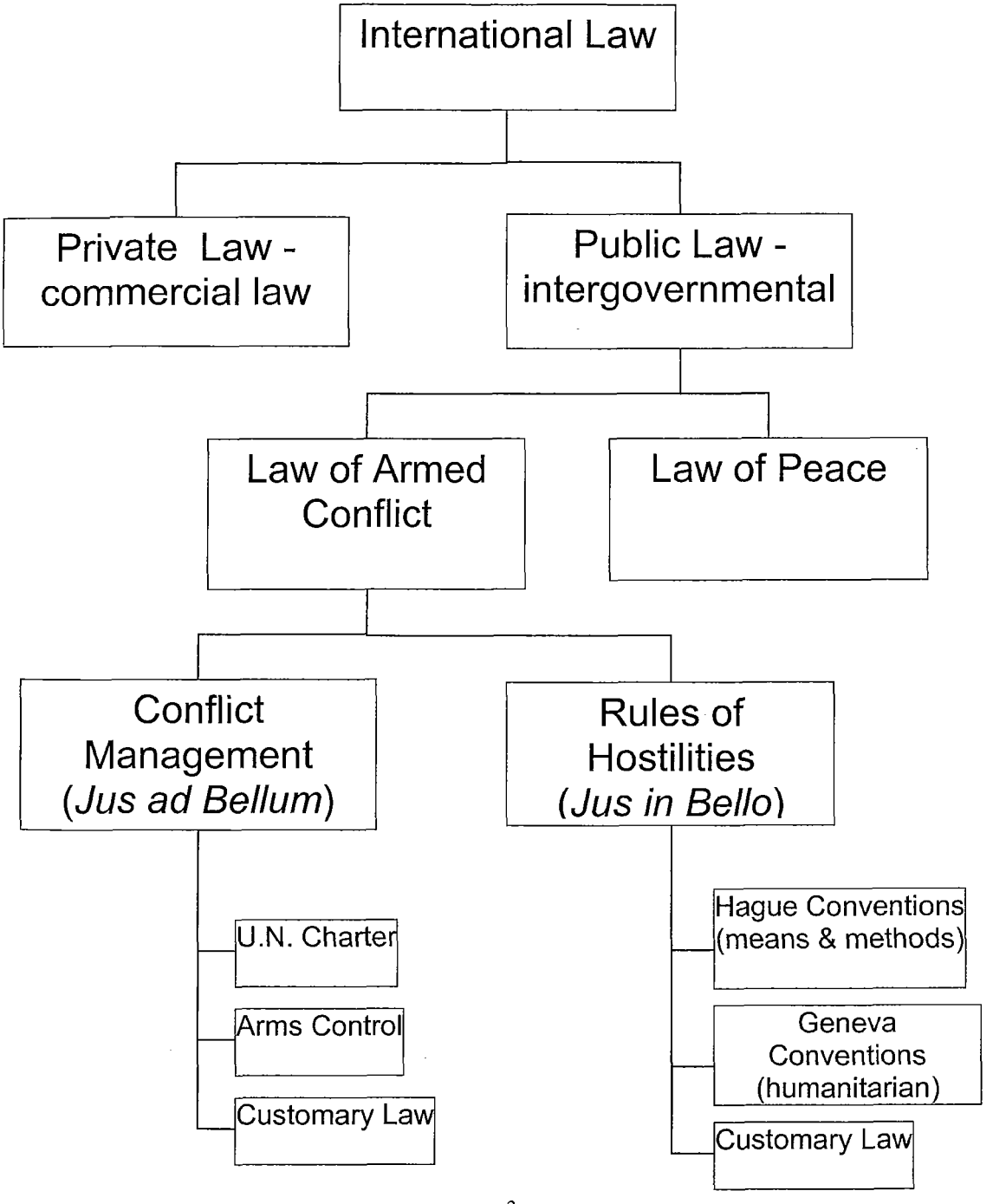
3. Trace the historical "cause and effect" evolution of laws related to the conduct of war.

4. Begin to analyze the legitimacy of injecting law into warfare.

B. The "law of war" is the "customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral states." (FM 27-10, para. 1). It "requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry." FM 27-10, para. 3. It is also referred to as the Law of Armed Conflict or Humanitarian Law, though some object to the latter reference as it is sometimes used to broaden the traditional content of the law of war.

C. As illustrated by the diagram on page 3, the law of war is a part of the broader body of law known as public international law. International law is defined as "rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as some of their relations with persons, natural or juridical." (Restatement of the Law, Third, Foreign Relations Law of the United States, § 101.) Public international law is that portion of international law that deals mainly with intergovernmental relations.

D. The law of war has evolved to its present content over millennia based on the actions and beliefs of nations. It is deeply rooted in history and an understanding of this history is necessary to understand current law of war principles.


International Law
Private Law - commercial law
Public Law - intergovernmental
Law of Armed Conflict
Law of Peace
Conflict Management (*Jus ad Bellum*)
Rules of Hostilities (*Jus in Bello*)
U.N. Charter
Arms Control
Customary Law
Hague Conventions (means & methods)
Geneva Conventions (humanitarian)
Customary Law

E. WHAT IS WAR? "It is possible to argue almost endlessly about the legal definition of "war." (Pictet, p. 32).

1. International Legal Definition: The Four Elements Test.

   a. A contention;

   b. Between at least two nation states;

   c. Wherein armed force is employed;

   d. With an intent to overwhelm.

2. War versus Armed Conflict. Historically, only conflict meeting the four elements test for "war" triggered law of war application. Accordingly, some nations asserted the law of war was not triggered by all instances of armed conflict. As a result, the applicability of the law of war depended upon the subjective national classification of a conflict.

   a. Post WW II response. Recognition of a state of war is no longer required to trigger the law of war. Instead, the law of war is applicable to any **international armed conflict:**

      (1) "Any difference arising between two States and leading to the intervention of armed forces is an armed conflict . . . [i]t makes no difference how long the conflict lasts, or how much slaughter takes place." (Pictet, p. 32).

II. THE UNIFYING THEMES OF THE LAW OF WAR.

A. Law exists to either (1) prevent conduct or, (2) control conduct. These characteristics permeate the law of war, as exemplified by the two prongs. *Jus ad Bellum* serves to prevent conduct, while *Jus in Bello* serves to regulate or control conduct.

1. Validity. Although critics of regulating warfare cite historic examples of violations of evolving laws of war, history provides the greatest evidence of the validity of this body of law.

   a. History shows that in the vast majority of instances the law of war works. Despite the fact that the rules are often violated or ignored, it is clear that mankind is better off with them than without them.

b. History demonstrates that mankind has always sought to limit the affect of conflict on the combatants and has come to regard war not as a state of anarchy justifying infliction of unlimited suffering, but as an unfortunate reality which must be governed by some rule of law.

(1) This point is exemplified by Article 22 of the Hague Convention: "the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in a case of necessity."

(2) That regulating the conduct of warfare is ironically essential to the preservation of a civilized world was exemplified by General MacArthur, when in confirming the death sentence for Japanese General Yamashita, he wrote: "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international society."

B. The trend toward regulation grew over time in scope and recognition. When considering whether these rules have validity, the student and the teacher (judge advocates teaching soldiers) must consider the objectives of the law of War.

1. The purpose of the law of war is to (1) integrate humanity into war and (2) serve as a tactical combat multiplier.

2. The validity of the law of war is best explained in terms of both objectives. For instance, many site the German massacre at Malmedy as providing American forces with the inspiration to break the German advance during World War II's Battle of the Bulge. Accordingly, observance of the law of war denies the enemy a rallying cry against difficult odds.

III. *JUS AD BELLUM* AND *JUS IN BELLO*

A. The law of armed conflict is generally divided into two major categories, *Jus ad Bellum* and *Jus in Bello*.

B. *Jus ad Bellum* is the law dealing with conflict management, of the laws regarding how states initiate armed conflict; under what circumstances was the use of military power legally and morally justified.

C. *Jus in Bello* is the law governing the actions of states once conflict has started; what legal and moral restraints apply to the conduct of waging war.

D. Both categories of the law of armed conflict have developed over time, drawing most of their guiding principles from history.

E. The concepts of *Jus ad Bellum* and *Jus in Bello* developed both unevenly and concurrently. For example, during the majority of the *Jus ad Bellum* period, most societies only dealt with rules concerning the legitimacy of using force. Once the conditions were present that justified war, there were often no limits on the methods used to wage war. At a certain point both theories began to evolve together.

IV. ORIGINS OF *JUS AD BELLUM*

A. *Jus ad Bellum:* Legitimate War. Law became an early player in the historical development of warfare. The earliest references to rules regarding war referred to the conditions that justified resort to war legally and morally.

1. Greeks: began concept of *Jus ad Bellum*, wherein a city state was justified in resorting to the use of force if a number of conditions existed (if the conditions existed the conflict was blessed by the gods and was just). In the absence of these conditions armed conflict was forbidden.

2. Romans: formalized laws and procedures that made the use of force an act of last resort. Rome dispatched envoys to the nations against whom they had grievances, and attempted to resolve differences diplomatically. The Romans also are credited with developing the requirement for declaring war. Cicero wrote that war must be declared to be just.

3. The ancient Egyptians and Sumerians (2nd millennium B.C.) generated rules defining the circumstances under which war might be initiated.

4. The ancient Hittites required a formal exchange of letters and demands before initiating war. In addition, no war could begin during planting season.

5. Deuteronomy 20. "Before attacking an enemy city make an offer of peace."

V. THE HISTORICAL PERIODS.

A. THE JUST WAR PERIOD.

1. This period ranged from 335 B.C. to about 1800 A.D. The primary tenant of the period was determination of a "just cause" as a condition precedent to the use of military force.

2. Just Conduct Valued Over Regulation of Conduct. The law during this period focused upon the first prong of the law of war (*Jus ad Bellum*). If the reason for the use of force was considered to be just, whether the war was prosecuted fairly and with humanity was not a significant issue.

3. Early Beginnings: Just War Closely Connected to Self-Defense.

   a. Aristotle (335 B.C.) wrote that war should only be employed to (1) prevent men becoming enslaved, (2) to establish leadership which is in the interests of the led, (3) or to enable men to become masters of men who naturally deserved to be enslaved.

   b. Cicero refined Aristotle's model by stating that "the only excuse for going to war is that we may live in peace unharmed...."

4. The Era of Christian Influence: Divine Justification.

   a. Early church leaders forbade Christians from employing force even in self-defense. This position became less and less tenable with the expansion of the Christian world.

   b. Church scholars later reconciled the dictates of Christianity with the need to defend individuals and the state by adopting a *Jus ad Bellum* position under which recourse to war was just in certain circumstances (6th century A.D.).

5. Middle Ages. Saint Thomas Aquinas (12th century A.D.) (within his *Summa Theologica*) refined this "just war" theory when he established the three conditions under which a just war could be initiated:

   a. with the authority of the sovereign;

   b. with a just cause (to avenge a wrong or fight in self-defense); and

c. so long as the fray is entered into with pure intentions (for the advancement of good over evil). The key element of such an intention was to achieve peace. This was the requisite "pure motive."

6. Juristic Model. Saint Thomas Aquinas' work signaled a transition of the Just War doctrine from a concept designed to explain why Christians could bear arms (apologetic) towards the beginning of a juristic model.

   a. The concept of "just war" was initially enunciated to solve the moral dilemma posed by the adversity between the Gospel and the reality of war. With the increase in the number of Christian nation-states, this concept fostered an increasing concern with regulating war for more practical reasons.

   b. The concept of just war was being passed from the hands of the theologians to the lawyers. Several great European jurists emerged to document customary laws related to warfare. Hugo Grotius (1583-1645) produced the most systematic and comprehensive work, *On the Law of War and Peace.* His work is regarded as the starting point for the development of the modern law of war.

   c. While many of the principles enunciated in this work were consistent with church doctrine, Grotius boldly asserted a non-religious basis for this law. According to Grotius, the law of war was not based on divine law, but on recognition of the true natural state of relations among nations. Thus, the law of war was based on natural, and not divine law.

7. The End of the Just War Period. By the time the next period emerged, the Just War Doctrine had generated a widely recognized set of principles that represented the early customary law of war. The most fundamental of these principles are:

   a. A decision to wage war can be reached only by legitimate authority (those who rule, e.g. the sovereign).

   b. A decision to resort to war must be based upon a need to right an actual wrong, in self-defense, or to recover wrongfully seized property.

   c. The intention must be the advancement of good or the avoidance of evil.

   d. In war, other than in self-defense, there must be a reasonable prospect of victory.

e. Every effort must be made to resolve differences by peaceful means, before resorting to force.

f. The innocent shall be immune from attack.

g. The amount of force used shall not be disproportionate to the legitimate objective.

B. THE WAR AS FACT PERIOD (1800-1918).

1. Generally. This period saw the rise of the nation state as the principle element used in foreign relations. These nation states transformed war from a tool to achieve justice to something that was a legitimate tool to use in pursuing national policy objectives.

a. Just War Notion Pushed Aside. Natural or moral law principles replaced by positivism that reflected the rights and privileges of the modern nation state. Law is based not on some philosophical speculation, but on rules emerging from the practice of states and international conventions.

b. Basic Tenets: Since each state is sovereign, and therefore entitled to wage war, there is no international legal mandate, based on morality or nature, to regulate resort to war (realpolitik replaces justice as reason to go to war). War is (based upon whatever reason) a legal and recognized right of statehood. In short, if use of military force would help a nation state achieve its policy objectives, then force may be used.

c. Clausewitz. This period was dominated by the realpolitik of Clausewitz. He characterized war as a continuation of a national policy that is directed at some desired end. Thus, a state steps from diplomacy to war, not always based upon a need to correct an injustice, but as a logical and required progression to achieve some policy end.

d. Things to Come. The War as Fact Period appeared as *a dark era for the rule of law*. Yet, a number of significant developments signaled the beginning of the next period.

2. Established the Foundation for upcoming "Treaty Period." Based on the "positivist" view, the best way to reduce the uncertainty attendant with conflict was to codify rules regulating this area.

a. Intellectual focus began shift toward minimizing resort to war and/or mitigating the consequences of war.

b. **EXAMPLE:** National leaders began to join the academics in the push to control the impact of war (Czar Nicholas and Theodore Roosevelt pushed for the two Hague Conferences that produced the Hague Conventions and Regulations).

C. JUS CONTRA BELLUM PERIOD.

1. Generally. World War I represented a significant challenge to the validity of the "war as fact" theory.

   a. In spite of the moral outrage directed towards the aggressors of that war, legal scholars unanimously rejected any assertion that initiation of the war constituted a breach of international law.

   b. World leaders struggled to give meaning to a war of unprecedented carnage and destruction. The "war to end all wars" sentiment manifested itself in a shift in intellectual direction leading to the conclusion that aggressive use of force must be outlawed.

2. *Jus ad Bellum* Changes Shape. Immediately before this period began, the Hague Conferences (1899-1907) produced the Hague Conventions, which represented the last multilateral law that recognized war as a legitimate device of national policy. While Hague law concentrates on war avoidance and limitation of suffering during war, this period saw a shift toward an absolute renunciation of aggressive war.

   a. League of Nations. First time in history that nations agreed upon an obligation under the law not to resort to war to resolve disputes or to secure national policy goals (Preamble). The League was set up as a component to the Treaty of Versailles, largely because President Wilson felt that the procedural mechanisms put in place by the Covenant of the League of Nations would force delay upon nations bent on war. During these periods of delay peaceful means of conflict management could be brought to bear.

   b. Eighth Assembly of League of Nations: banned aggressive war (questionable legal effect of resolution). However, the League did not attempt to enforce this duty (except as to Japan's invasion of Manchuria in 1931).

c. Kellogg-Briand Pact (1928). Officially referred to as the Treaty for the Renunciation of War, it banned aggressive war. This is the point in time generally thought of as the "quantum leap." For the first time, aggressive war is clearly and categorically banned. In contradistinction from the post WW I period, this treaty established an international legal basis for the post WW II prosecution of those responsible for waging aggressive war.

d. Current Status of Pact. This treaty remains in force today. Virtually all commentators agree that the provisions of the treaty banning aggressive war have ripened into customary international law.

3. Use of force in self-defense remained unregulated. No law has ever purported to deny a sovereign the right to defend itself. Some commentators stated that the use of force in the defense is not war. Thus, war has been banned altogether.

D. POST WORLD WAR II PERIOD.

1. Generally. The Procedural requirements of the Hague Conventions did not prevent World War I; just as the procedural requirements of the League of Nations and the Kellogg-Briand Pact did not prevent World War II. World powers recognized the need for a world body with greater power to prevent war, and international law that provided more specific protections for the victims of war.

2. Post-WWII War Crimes Trials (Nuremberg, Tokyo, and Manila Tribunals). The trials of those who violated international law during World War II demonstrated that another quantum leap had occurred since World War I.

   a. Reinforced tenants of *Jus ad Bellum* and *Jus in Bello,* and ushered in the era of "universality," establishing the principle that all nations are bound by the law of war based on the theory that law of war conventions largely reflect customary international law.

   b. World focused on ex post facto problem during prosecution of war crimes. The universal nature of law of war prohibitions, and the recognition that they were at the core of international legal values (*jus cogens*), resulted in the legitimate application of those laws to those tried for violations.

E. The United Nations Charter. Continues shift to outright ban on war. Extended ban to not only war, but through Article 2(4), also "the **threat** or use of force."

1. Early Charter Period. Immediately after the negotiation of the Charter in 1945, many nations and commentators assumed that the absolute language in the Charter's provisions permitted the use of force only if a nation had already suffered an armed attack.

2. Contemporary Period. Most nations now agree that a nation's ability to defend itself is much more expansive than the provisions of the Charter seem to permit based upon a literal reading. This view is based on the conclusion that the inherent right of self-defense under customary international law was **supplemented,** and not **displaced** by the Charter. This remains a controversial issue.

F. *Jus ad Bellum* continues to evolve. Current doctrines such as anticipatory self-defense and preemption are adapted to meet today's circumstances.

VI. ORIGINS OF *JUS IN BELLO*

A. *Jus in Bello:* Regulation of Conduct During War. The second body of law that began to develop dealt with rules that control conduct during the prosecution of a war to ensure that it is legal and moral.

1. Ancient China (4th century B.C.). Sun Tzu's *The Art of War* set out a number of rules that controlled what soldiers were permitted to do during war:

   a. captives must be treated well and cared for; and

   b. natives within captured cities must be spared and women and children respected.

2. Ancient India (4th century B.C.). The Hindu civilization produced a body of rules codified in the Book of Manu that regulated in great detail land warfare.

3. Ancient Babylon (7th century B.C.). The ancient Babylonians treated both captured soldiers and civilians with respect in accordance with well-established rules.

B. *Jus in Bello* received little attention until late in the Just War period. This led to the emergence of a Chivalric Code. The chivalric rules of fair play and good treatment only applied if the cause of war was "just" from the beginning.

1. Victors were entitled to spoils of war, only if war was just.

2. Forces prosecuting an unjust war were not entitled to demand *Jus in Bello* during the course of the conflict.

3. Red Banner of Total War. Signaled a party's intent to wage absolute war (Joan of Arc announced to British "no quarter will be given").

C. During the War as Fact period, the focus began to change from *Jus ad Bellum* to *Jus in Bello* also. With war a recognized and legal reality in the relations between nations, the focus on mitigating the impact of war emerged.

1. *A Memory of Solferino* (Henry Dunant's graphic depiction of the bloodiest battles of Franco-Prussian War). His work served as the impetus for the creation of the International Committee of the Red Cross and the negotiation of the First Geneva Convention in 1864.

2. Francis Lieber. Instructions To Armies in the Field (1863). First modern restatement of the law of war issued in the form of General Order 100 to the Union Army during the American Civil War.

3. International Revulsion of General Sherman's "War is Hell" Total War. Sherman was very concerned with the morality of war. His observation that war is hell demonstrates the emergence and reintroduction of morality. However, as his March to the Sea demonstrated, Sherman only thought the right to resort to war should be regulated. Once war had begun, he felt it had no natural or legal limits. In other words he only recognized the first prong (*Jus ad Bellum*) of the law of war.

4. At the end of this period, the major nations held the Hague Conferences (1899-1907) that produced the Hague Conventions. While some Hague law focuses on war avoidance, the majority of the law dealt with limitation of suffering during war.

D. Geneva Conventions (1949).

1. Generally.

a. "War" v. "Armed Conflict." Article 2 common to all four Geneva Conventions ended this debate. Article 2 asserts that the law of war applies in any instance of international armed conflict.

b. Four Conventions. A comprehensive effort to protect the victims of war.

c. Birth of the Civilian's Convention. A post war recognition of the need to specifically address this class of individuals.

2. The four conventions are considered customary international law. This means even if a particular nation has not ratified the treaties, that nation is still bound by the principles within each of the four treaties because they are merely a reflection of customary law that all nations states are already bound by.

3. Concerned with national and not international forces? In practice, forces operating under U.N. control comply with the Conventions.

4. Clear shift towards a true humanitarian motivation: "the Conventions are coming to be regarded less and less as contracts on a basis of reciprocity concluded in the national interest of each of the parties, and more and more as solemn affirmations of principles respected for their own sake . . ."

5. The 1977 Protocols.

   a. Generally. These two treaties were negotiated to supplement the four Geneva Conventions.

   b. Protocol I. Effort to supplement rules governing international armed conflicts.

   c. Protocol II. Effort to extend protections of conventions to internal conflicts.

VII. WHY REGULATE WARFARE?

A. Motivates the enemy to observe the same rules.

B. Motivates the enemy to surrender.

C. Guards against acts that violate basic tenets of civilization.

   1. Protects against unnecessary suffering.

   2. Safeguards certain fundamental human rights.

D. Provides advance notice of the accepted limits of warfare.

E. Reduces confusion and makes identification of violations more efficient.

F. Helps restore peace.

VIII. CONCLUSION.

"Wars happen. It is not *necessary* that war will continue to be viewed as an instrument of national policy, but it is likely to be the case for a very long time. Those who believe in the progress and perfectibility of human nature may continue to hope that at some future point reason will prevail and all international disputes will be resolved by nonviolent means . . . Unless and until that occurs, **our best thinkers must continue to pursue the moral issues related to war.** Those who romanticize war do not do mankind a service; those who ignore it abdicate responsibility for the future of mankind, a responsibility we all share even if we do not choose to do so."

NOTES

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Chapter 2

FRAMEWORK OF THE LAW OF WAR

REFERENCES

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, T.I.A.S. 3362. (GWS)
2. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, August 12, 1949, T.I.A.S. 3363. (GWS Sea)
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I. OBJECTIVES.

A. Become familiar with the primary sources of the law of war.

B. Become familiar with the "language" of the law.

C. Understand how the law of war is "triggered."

D. Become familiar with the role of the 1977 Protocols to the Geneva Conventions of 1949.

E. Be able to distinguish "humanitarian" law from human rights law.

II. THE LANGUAGE OF THE LAW. THE FIRST STEP IN UNDERSTANDING THE LAW OF WAR IS TO UNDERSTAND THE "LANGUAGE" OF THE LAW. THIS REFERS TO UNDERSTANDING SEVERAL KEY TERMS AND CONCEPTS THAT ARE WOVEN THROUGH THIS BODY OF LAW.

A. Sources of Law.

1. Customary International Law. This can be best understood as the "unwritten" rules that bind all members of the community of nations.

   a. Customary law is defined as that law resulting from the general and consistent practice of states followed from a sense of legal obligation. Customary international law and treaty law are equal in stature, with the later in time controlling.

   b. It is possible for a nation not to be bound by a customary norm of international law if that nation persistently objected to the norm as it was developing and continues to declare that it is not bound by that customary international law.

   c. Many principles of the law of war fall into this category of international law. Customary international law can also provide background with which to understand later codification of laws of war into treaty. Restatement of the Law, Third, Foreign Relations Law of the United States, § 102. Therefore while much of the law of war is now codified, customary international law of war is still relevant.

2. Conventional International Law. This term refers to codified rules binding on nations based on express consent. The term "treaty" best captures this concept, although other terms are used to refer to these: Convention, Protocol, and Attached Regulations.

   a. Norms of customary international law can either be codified by subsequent treaties, or emerge out of new rules created in treaties.

b. Many law of war principles are both reflected in treaties, and considered customary international law. **The significance is that once a principle attains the status of customary international law, it is binding on all nations, not just treaty signatories.**

B. While there are numerous law of war treaties in force today, most of them fall within two broad categories.

1. **The Targeting Method.** This prong of the law of war is focused on regulating the means and methods of warfare, *i.e.* tactics, weapons, and targeting decisions.

a. This method is exemplified by the Hague law, consisting of the various Hague Conventions of 1899 as revised in 1907, plus the 1954 Hague Cultural Property Convention and the 1980 Conventional Weapons Convention.

b. The rules relating to the methods and means of warfare are primarily derived from articles 22 through 41 of the Regulations Respecting the Laws and Customs of War on Land [hereinafter HR] annexed to Hague Convention IV. HR, art. 22-41. Article 22 states that the means of injuring the enemy are not unlimited.

c. Treaties. The following treaties, limiting specific aspects of warfare, are another source of targeting guidance. Several of these treaties are discussed more fully in the Means and Methods Outline section on weapons.

(1) Gas. Geneva Protocol of 1925 prohibits use in war of asphyxiating, poisonous, or other gases. The US reserved the right to respond with chemical weapons to a chemical attack by the other side. The more recent Chemical Weapons Convention (CWC), however, prohibits production, stockpiling, and use of chemical weapons (even in retaliation). The U.S. ratified the CWC in April 1997.

(2) Cultural Property. The 1954 Hague Cultural Property Convention prohibits targeting cultural property, and sets forth conditions when cultural property may be attacked or used by a defender.

(3) Biological Weapons. The 1925 Geneva Protocol prohibits biological weapons. However, the 1972 Biological Weapons Convention

prohibits their use in retaliation, as well as production, manufacture, and stockpiling.

(4) Conventional Weapons. The 1980 Conventional Weapons Treaty restricts or prohibits the use of certain weapons deemed to cause unnecessary suffering or to be indiscriminate: Protocol I – non-detectable fragments; Protocol II - mines, booby traps and other devices; Protocol III - incendiaries; and Protocol IV- laser weapons. The U.S. has ratified the treaty by ratifying Protocols I and II. The Senate is currently reviewing Protocols III and IV for its advice and consent to ratification. The treaty is often referred to as the UNCCW - United Nations Convention on Certain Conventional Weapons. As of 1 January 2003, 90 nations are now Party to the Treaty. Protocols I, II, III, and IV have entered into force.

2. **The Protect and Respect Method.** This prong of the law of war is focused on establishing non-derogable protections for the "victims of war."

   a. This method is exemplified by the 4 Geneva Conventions of 1949. Each of these four "treaties" is devoted to protecting a specific category of war victims:

      (1) GWS: Wounded and Sick in the Field.

      (2) GWS Sea: Wounded, Sick, and shipwrecked at Sea.

      (3) GPW: Prisoners of War.

      (4) GC: Civilians.

   b. The Geneva Conventions entered into force on 21 October 1950. The President transmitted the Conventions to the United States Senate on 26 April 1951. The United States Senate gave its advice and consent to the Geneva Conventions on 2 August 1955.

3. The "Intersection." In 1977, two treaties were created to "supplement" the 1949 Geneva Conventions. These treaties are called the 1977 Protocols (GPI & GPII).

   a. Motivated by International Committee of the Red Cross' belief that the four Geneva Conventions and the Hague Regulations insufficiently covered certain areas of warfare in the conflicts following WWII, specifically aerial bombardments, protection of civilians, and wars of

national liberation. While the purpose of these "treaties" was to supplement the Geneva Conventions, they in fact represent a mix of both the Respect and Protect method, and the Targeting method.

b. Status.

(1) As of December 2003, 161 nations have become Parties to GPI and 156 nations have become Parties to GPII.

(2) Unlike The Hague and Geneva Conventions, the U.S. has never ratified either of these Protocols. Portions, however, do reflect state practice and legal obligations -- the key ingredients to customary international law.

c. U.S. Position:

(1) New or expanded areas of definition and protection contained in Protocols include provisions for: medical aircraft, wounded and sick, prisoners of war, protections of the natural environment, works and installations containing dangerous forces, journalists, protections of civilians from indiscriminate attack, and legal review of weapons.

(2) US views the following Protocol I articles as either customary international law or acceptable practice though not legally binding:

(a) 5 (appointment of protecting powers);

(b) 10 (equal protection of wounded, sick, and shipwrecked);

(c) 11 (guidelines for medical procedures);

(d) 12-34 (medical units, aircraft, ships, missing and dead persons);

(e) 35(1)(2) (limiting methods and means of warfare);

(f) 37 (perfidy prohibitions);

(g) 38 (prohibition against improper use of protected emblems);

(h) 45 (prisoner of war presumption for those who participate in the hostilities);

(i) 51 (protection of the civilian population, except para. 6 -- reprisals);

(j) 52 (general protection of civilian objects);

(k) 54 (protection of objects indispensable to the survival of the civilian population);

(l) 57-60 (precautions in attack, undefended localities, and demilitarized zones);

(m) 62 (civil defense protection);

(n) 63 (civil defense in occupied territories);

(o) 70 (relief actions);

(p) 73-89 (treatment of persons in the power of a party to the conflict; women and children; and duties regarding implementation of GPI).

(3) The US specifically objects to the following articles:

(a) 1(4) (applicability to certain types of armed conflicts);

(b) 35(3) (environmental limitations on means and methods of warfare);

(c) 39(2) (use of enemy flags and insignia while engaging in attacks);

(d) 44 (combatants and prisoners of war (portions));

(e) 47 (non-protection of mercenaries);

(f) 55 (protection of the natural environment); and

(g) 56 (protection of works and installations containing dangerous forces).

See Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l & Pol'y 419, 420 (1987).

4. Regulations. Implementing targeting guidance for US Armed Forces is found in both Joint and Service publications. Joint Pub 3-60, FM 27-10 (Army), NWP 1-14M/FMFM 1-10 (Navy and Marine Corps).

C. Key Terms.

1. Part, Section, Article . . . Treaties, like any other "legislation," are broken into sub-parts. In most cases, the Article represents the specific substantive provision.

2. "Common Article." This is a critical term used in the law of war. It refers to a finite number of articles that are identical in all four of the 1949 Geneva Conventions. Normally these related to the scope of application and parties obligations under the treaties. Some of the Common Articles are identically numbered, while others are worded virtually the same, but numbered differently in various conventions. For example, the article dealing with special agreements is article 6 of the first three conventions, but article 7 of the Fourth Convention.

3. Treaty Commentaries. These are works by official recorders to the drafting conventions for these major law of war treaties (Jean Pictet for the 1949 Geneva Conventions). These "Commentaries" provide critical explanations to many treaty provisions, and are therefore similar to "legislative history" in the domestic context.

D. Army Publications. There are three primary Army sources that reflect the rules that flow from "the big three:"

1. FM 27-10: The Law of Land Warfare. This is the "MCM" for the law of war. It is organized functionally based on issues, and incorporates rules from multiple sources.

2. DA Pam 27-1. This is a verbatim reprint of The Hague and Geneva Conventions.

3. DA Pam 27-1-1. This is a verbatim reprint of the 1977 Protocols to the Geneva Conventions.

4. Because these publications are no longer available, they have been compiled, along with many other key source documents, in the Law of War Documentary Supplement.

III. HOW THE LAW OF WAR IS TRIGERRED.

A. The Barrier of Sovereignty. Whenever international law operates to regulate the conduct of a state, it must "pierce" the shield of sovereignty.

1. Normally, the concept of sovereignty protects a state from "outside interference with internal affairs." This is exemplified by the predominant role of domestic law in internal affairs.

2. However, in some circumstances, international law "pierces the shield of sovereignty, and displaces domestic law from its exclusive control over issues. The law of war is therefore applicable only after the requirements for piercing the shield of sovereignty have been satisfied.

3. The law of war is a body of international law intended to dictate the conduct of state actors (combatants) during periods of conflict.

   a. Once triggered, it therefore intrudes upon the sovereignty of the regulated state.

   b. The extent of this "intrusion" will be contingent upon the nature of the conflict.

B. The Triggering Mechanism. The law of war includes a standard for when it becomes applicable. This standard is reflected in the Four Geneva Conventions.

1. Common Article 2 -- International Armed Conflict: "[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. "

   a. This is a true *de facto* standard. The subjective intent of the belligerents is irrelevant. According to the Commentary, the law of war applies to: **"any difference arising between two States and leading to the intervention of armed forces."**

   b. Article 2 effectively requires that the law be applied broadly and automatically from the inception of the conflict. The following two facts result in application of **the entire body of the law of war:**

      (1) A dispute between states, and

      (2) Armed conflict (see FM 27-10, paras. 8 & 9).

         (a) De facto hostilities are what are required. The drafters deliberately avoided the legalistic term war in favor of the broader principle of armed conflict. According to Pictet, this article was intended to be

broadly defined in order to expand the reach of the Conventions to as many conflicts as possible.

c. Exception to the "state" requirement: Conflict between a state and a rebel movement recognized as belligerency.

(1) Concept arose as the result of the need to apply the Laws of War to situations in which rebel forces had the de facto ability to wage war.

(2) Traditional Requirements:

(a) Widespread hostilities - civil war.

(b) Rebels have control of territory and population.

(c) Rebels have de facto government.

(d) Rebel military operations are conducted under responsible authority and observe the Law of War.

(e) Recognition by the parent state or another nation.

(3) Recognition of a belligerent triggers the application of the Law of War, including The Hague and Geneva Conventions. The practice of belligerent recognition is in decline in this century. Since 1945, full diplomatic recognition is generally extended either at the beginning of the struggle or after it is successful (EX: The 1997 recognition of Mr. Kabila in Zaire).

d. Controversial expansion of Article 2 -- GPI.

(1) Expands Geneva Conventions application to conflicts previously considered internal ones: "[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination." Art 1(4), GPI.

(2) U.S. has not yet ratified this convention because of objections to article 1(4) and other articles. The draft of Protocol I submitted by the International Committee of the Red Cross to the 1974 Diplomatic Conference did not include the expansive application provisions.

e. Termination of Application (Article 5, GWS and GPW; Article 6, GC).

(1) Final repatriation (GWS, GPW).

(2) General close of military operations (GC).

(3) Occupation (GC) -- The GC applies for one year after the general close of military operations. In situations where the Occupying Power still exercises governmental functions, however, that Power is bound to apply for the duration of the occupation certain key provisions of the GC.

2. **The Conflict Classification Prong of Common Article 3** -- Conflicts which are not of an international character –internal armed conflict: "Armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .."

a. These types of conflicts make up the vast bulk of the ongoing conflicts.

b. Providing for the interjection of international regulation into a purely internal conflict was considered a monumental achievement for international law in 1949. But, the internal nature of these conflicts explains the limited scope of international regulation.

(1) Domestic law still applies - guerrillas do not receive immunity for their war-like acts, as would such actions if committed during an international armed conflict.

(2) Lack of effect on legal status of the parties. This is an essential clause without which there would be no provisions applicable to internal armed conflicts within the Conventions. Despite the clear language, states have been reluctant to apply Article 3 protections explicitly for fear of conferring a degree of international legitimacy on rebels.

c. What is an "Internal Armed Conflict?" Although no objective set of criteria exist for determining the existence of a non-international armed conflict, Pictet lists several suggested criteria:

(1) Some conflict is more like isolated acts of violence, riots or banditry.

(2) Pictet establishes non-binding criteria for determining whether any particular situation rises to the level of armed conflict:

(a) The group must have an organization,

(b) The members must be subject to some authority exercised within the organization,

(c) The group must control some territory,

(d) The group must demonstrate respect for the laws of war though this is more often accepted as the group must not demonstrate an unwillingness to abide by the laws of war, and

(e) The government must be forced to respond to the group with its own armed forces.

d. Protocol II, which was intended to supplement the substantive provisions of Common Article 3, formalized the criteria for the application of that convention to a non-international armed conflict.

(1) Under responsible command.

(2) Exercising control over a part of a nation so as to enable them to carry out sustained and concerted military operations and to implement the requirements of Protocol II.

C. How do the Protocols fit in?

1. As indicated, the 1977 Protocols to the Geneva Conventions of 1949 are supplementary treaties. Protocol I is intended to supplement the law of war related to international armed conflict, while Protocol II is intended to supplement the law of war related to internal armed conflict. Therefore:

   a. When you think of the law related to international armed conflict, also think of Protocol I;

   b. When you think of the law related to internal armed conflict, also think of Protocol II.

2. Although the U.S. has never ratified either of these Protocols, their relevance continues to grow based on several factors:

   a. The U.S. has stated it considers many provisions of Protocol I, and almost all of Protocol II (all except for the limited scope of application in article 1), to be customary international law. *See* Michael J. Matheson, *Session One: The United States Position on the Relation of Customary*

International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U. J. INT'L L. POL'Y 419, 429-431 (1987).

b. The argument that the entire body of Protocol I has attained the status of customary international law continues to gain strength.

c. These treaties bind virtually all of our coalition partners.

d. U.S. policy is to comply with Protocol I and Protocol II whenever feasible.

D. U.S. Policy is to apply the principles and spirit of the Law of War during all operations, whether international armed conflict, internal armed conflict or situations short of armed conflict.

1. DoD Directive 5100.77 requires all members of the armed forces to "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 operations."

2. CJCSI 5810.01B also states that "The Armed Forces of the U.S. . . . will comply with the law of war during all armed conflicts, however . . . characterized, and unless otherwise directed by competent authorities, principles and spirit . . . during OOTW."

E. What is the Relationship of the LOW with Human Rights?

1. Human Rights Law refers to a totally distinct body of international law, intended to protect individuals from the arbitrary or cruel treatment of their government at all times.

2. While the substance of human rights protections may be synonymous with certain law of war protections, it is critical to remember these are two distinct bodies of international law. **The law of war is triggered by conflict. No such trigger is required for human rights law.**

a. These two bodies of international law are easily confused, especially because of the use of the term "humanitarian law" to describe certain portions of the law of war.

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CHAPTER 3

THE UNITED NATIONS AND LEGAL BASES FOR THE USE OF FORCE

REFERENCES

1. U.N. Charter
2. Treaty Providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), done at Paris, August 27, 1928, 46 Stat. 2343, T.S. No. 796, 2 Bevans 732, L.N.T.S. 57
3. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal (Nuremburg Charter), done at London, August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279
4. U.N. General Assembly Resolution 337(V), Uniting for Peace, 5 U.H. GAOR Supp. (No. 20) 10 (1950)
5. U.N. General Assembly Resolution 2625, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 25 U.H. GAOR Supp. (No. 28) 121 (1970).
6. U.N. General Assembly Resolution 3314, Definition of Aggression, 29 U.H. GAOR Supp. (No 31) 142 (1974).

I. HISTORICAL BACKGROUND [1]

A. Just War Theory: 335 B.C. to 1800 A.D.

1. A moral/philosophical approach that approved of a resort to force if the cause was "just".

B. State Sovereignty ("War as Fact" Era): 1800-1918

1. War as an instrument of national policy. As sovereigns, states are free to employ force as a normal element of their foreign relations.

C. International Law (Early attempts to regulate the resort to force.)

1. Hague (1899 and 1907): Required a declaration of war.

2. League of Nations (1919): Attempt at a collective security system.

3. The Kellogg-Briand Pact (1928).

[1] See Chapter 1 "History for the Law of War" for a more in-depth discussion of the historical trends briefly touched upon in this chapter.

a. Renounced recourse to war.

b. "Art. I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."

c. Lacked any enforcement mechanism.

4. Post World War II Tribunals

a. Nuremburg Charter: "Article 6. . . . The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; . . ."

II. INTRODUCTION

A. Origin of the United Nations.

1. The name "United Nations" was devised by United States President Franklin D. Roosevelt and was first used in the "Declaration by United Nations" of 1 January 1942, during the Second World War, when representatives of 26 nations pledged their Governments to continue fighting together against the Axis Powers.

2. The United Nations Charter was drawn up by the representatives of 50 countries at the United Nations Conference on International Organization, which met at San Francisco from 25 April to 26 June 1945. Those delegates deliberated on the basis of proposals worked out by the representatives of China, the Soviet Union, the United Kingdom and the United States at Dumbarton Oaks in August-October 1944. The Charter was signed on 26 June 1945 by the representatives of the 50 countries. Poland, which was not represented at the Conference, signed it later and became one of the original 51 Member States.

3. The United Nations officially came into existence on 24 October 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of other signatories. United

Nations Day is celebrated on 24 October each year. Extracted from: Basic Facts About the United Nations, Sales No. E.95.I.31, reprinted at http://www.un.org/Overview/origin.html.

III. OVERVIEW OF THE UNITED NATIONS CHARTER

A. General Assembly.

1. Generally treated in Chapter IV of the Charter.

2. May discuss and make recommendations on any matter within the scope of the Charter.

   a. However, if the Security Council is exercising its powers over the situation, the General Assembly may not make a recommendation unless the Security Council so requests (Article 12(1)).

3. Majority vote unless an "important question," which requires a two-thirds vote. Important questions include recommendations with respect to the maintenance of international peace and security (Article 18(2)).

B. Security Council.

1. Generally treated in Chapter V of the Charter.

2. Created "to ensure prompt and effective action by the United Nations." (Article 24(1))

3. Fifteen members.

   a. Five permanent members: United States, United Kingdom, France, China, and Russia (as successor to USSR).

   b. Ten non-permanent members elected to two-year terms by the General Assembly.

   c. Decisions require nine votes, and if a non-procedural matter, requires the concurring votes of the permanent members. When North Korea invaded South Korea in 1950, the Soviet Union's delegate to the Security Council was absent (due to a dispute over China's representation in the U.N.). The Security Council authorized collective security measures under the U.N. Charter, and established the United Nations Command in Korea. The Soviet delegate returned and objected, arguing that the resolutions on

these non-procedural matters lacked their concurring vote. That argument was rejected, and subsequent practice has confirmed that abstention or absence (i.e., anything short of an affirmative veto) constitutes concurrence.

C. Secretariat.

1. Generally treated in Chapter XV of the Charter.

2. The Secretary-General is the chief administrative officer, appointed by the General Assembly upon the recommendation of the Security Council. Article 97.

D. International Court of Justice.

1. Treated generally in Chapter XIV of the Charter.

2. The ICJ is the principal judicial organ of the United Nations Article 92.

3. Fifteen judges are elected by separate vote of the General Assembly and Security Council. Judges serve for nine years, and may be re-elected.

4. The Statute of the ICJ is an annex to the U.N. Charter.

5. Jurisdiction in a contentious case depends on the consent of the parties:

   a. Consent may be express or implied in a treaty or other agreement between the parties Statute Article 36(1).

   b. States may also accept compulsory jurisdiction, either unconditionally or on the condition of reciprocity on the part of other parties. Statute Article 36(2).

      (1) The United States accepted compulsory jurisdiction, with conditions, in 1946. The acceptance was terminated in 1986.

6. "The decision of the Court has no binding force except between the parities and in respect to that particular case." Statute Article 59.

IV. USE OF FORCE

A. Charter provisions.

1. Article 2(3).

a. "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

b. This provision has not been relied upon independent of those instances in which Article 2(4) is applicable. In other words, leaving a dispute unsettled, without the use or threat of force, has not been claimed to be a violation of Article 2(3).

2. Article 2(4).

a. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

b. Has become the basic provision restricting the use of force among states.

c. Note that the prohibition refers to the "threat or use of force," not "war" or "aggression."

d. What constitutes a "use of force"? Economic pressure? Computer network attack? (Western view tends to look at the kinetic effect or impact of an action to determine whether it is a "use of force", however this view is subject to a great deal of debate.

e. The "below the threshold" argument. If an attack is not against the "territorial integrity or political independence" of another state, it is not a violation of Article 2(4). In other words if an attackers goal is not to seize territory or overthrow the government, then the attack does not violate Article 2(4). Currently not a widely held view.

(1) But can this theory be applied to a War on Terrorism?

3. Article 2(7).

a. "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

b. Recognition of state sovereignty, but still contemplates Chapter VII actions which may affect sovereign prerogatives.

B. General Assembly Resolution 2625.

1. Reaffirmed and expanded upon the general Charter principles.

2. Declared the principles stated in Article 2 of the Charter to be "basic principles," or customary, international law.

V. MAINTAINING INTERNATIONAL PEACE AND SECURITY

A. Security Council.

1. Granted "primary responsibility for the maintenance of international peace and security" (Article 24(1)). "The responsibility conferred is 'primary,' not exclusive. . . . The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security." Certain Expenses of the United Nations, 1962 I.C.J. 151, 163.

2. Article 25: " The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

3. Security Council's specific powers are contained in Chapters VI and VII.

B. Chapter VI: Pacific Settlement of Disputes.

1. Chapter focuses on "disputes" (not otherwise defined), especially those which, if unresolved, are likely to threaten international peace and security.

2. Article 33. Obligates Members to seek peaceful settlement to any dispute and authorizes the Security Council to call upon parties to settle.

3. Article 34. Authorizes the Security Council to investigate any dispute or situation to determine whether or not it is likely to endanger international peace and security.

4. Article 36. Authorizes the Security Council to make recommendations on procedures and methods for settlement of any dispute which has been referred to it by parties / Members.

5. Article 37. Authorizes the Security Council to make specific recommendations for resolution of the dispute where parties / Members have failed to do so under the provisions of Article 36.

C. Chapter VII: Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

1. This Chapter gives the Security Council the power to employ non-military or military measures to restore or maintain international peace and security.

2. Article 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

   a. Threshold issue: The existence of a "threat to the peace, breach of the peace, or act of aggression."

      (1) General Assembly Resolution 3314 recommended to the Security Council a definition of "aggression": " ... the use of armed force by a state against the sovereignty, territorial integrity, or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

         (a) Art. 2: first use of armed force by a State in contravention of the Charter is *prima facie* evidence of an act of aggression.

         (b) Art. 3: other acts constituting aggression include:

            (i) Bombardment;

            (ii) Blockade;

            (iii) Land, sea or air attack;

            (iv) Using armed forces of one state, which are located within the territory of another (receiving) state under agreement, in contravention of the terms of that agreement; or

            (v) Allowing use of state territory, which is placed at the disposal of another state, to be used by that state for perpetration of an act of aggression against a third state.

3. Article 41: Authorizes measures short of use of armed force / military intervention and allows the Security Council to call upon all Members to apply such measures. Includes, but is not limited to, "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

4. Article 42: Authorizes "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security," including "demonstrations, blockades, and other operations by air, sea or land forces, by Members of the United Nations."

5. Article 43: Provides for special agreements between Members and the U.N. to provide armed forces, assistance, and facilities necessary for the purpose of maintaining international peace and security.

D. Chapter VIII - Regional Arrangements.

1. Article 52: Recognized the existence of regional organizations (e.g., Organization of American States, Arab League, Organization of African Unity), and encourages the resolution of local disputes through such arrangements.

2. Article 53: The Security Council may utilize regional arrangements for enforcement actions; regional organizations may not undertake enforcement actions without Security Council authorization.

E. General Assembly Resolution 337(V), "Uniting for Peace."

> ". . . if the Security Council, because of a lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."

F. Examples of Claimed Chapter VII Uses of Force

1. Iraq (1990) (Desert Shield / Desert Storm) Iraq invasion of Kuwait.

a. UNSCR 660: "The Security Council ...determining that there is a breach of the peace by the Iraqi invasion of Kuwait...." (Article 39 trigger).

b. UNSCR 678: "Authorizes Member States cooperating with the government of Kuwait, unless Iraq on or before January 15, 1991 fully implements...the foregoing resolutions, to use all necessary means to uphold and implement [UNSCR] 660 and all subsequent resolutions and to restore international peace and security in the area...

2. Haiti (1994): UNSCR 940 authorized states to use all necessary means to facilitate the departure from Haiti of the military leadership...and to effect the prompt return of the legitimately elected President.

3. Kosovo (1998):

   a. Recognized as threat to international peace and security. Art 39 trigger.

   b. Demanded Serbia comply with the October 1998 peace agreement.

   c. Did not authorize "all means necessary."

   d. Did not authorize regional enforcement actions.

4. Afghanistan (2001)

   a. UNSCR 1368:

      (1) Condemned 9/11 attack,

      (2) Calls on all states to work together to bring perpetrators to justice,

      (3) Calls upon all states to redouble efforts to suppress terrorist acts, and

      (4) Expresses the Security Council's readiness to take all necessary steps to respond to the attack.

   b. UNSCR 1373: Decides that all states shall:

      (1) Prevent and suppress the financing of terrorist acts,

      (2) Take the necessary steps to prevent the commission of terrorist acts, and

      (3) Deny safe haven to terrorists.

c. No use of the "all necessary means" language.

5. Iraq (2003)

a. UNSCR 678: "Authorizes Member States cooperating with the government of Kuwait, unless Iraq on or before January 15, 1991 fully implements...the foregoing resolutions, to use all necessary means to uphold and implement [UNSCR] 660 and all subsequent resolutions and to restore international peace and security in the area... (Still in effect from Desert Storm.).

b. UNSCR 687: Established cease fire conditions. Among them a continuing obligation to eliminate and account for their WMD program. Never terminated the authority to use force established in 678.

c. UNSCR 1441: Affirmed that Iraq has been and remains in material breach of UNSCR 687. Iraq given one final opportunity to fully comply, or else face "serious consequences."

VI. SELF DEFENSE AND OTHER USES OF FORCE

A. Self Defense.

1. Article 51: " Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

2. Prerequisites / Criteria:

a. Necessity: peaceful means of resolution exhausted.

b. Proportionality: force utilized must be limited in *scope, intensity,* and *duration* to that which is reasonably necessary to counter the attack or neutralize the threat.

c. Timeliness: proximity to the hostile act.

3. With the general acceptance of the prohibition on the use or threat of force (Article 2(4)), self-defense has become the focus of contention.

   a. Those arguing for a broad or expansive right of self defense generally believe that it provides greater deterrence, international stability, and ultimately less uses of force.

   b. Those arguing for a limited right of self-defense are concerned that a broader interpretation erodes the basic prohibition against the unilateral use of force.

   c. There is a lingering issue regarding whether Article 51 completely codified the right of self-defense or if there is some remainder of the pre-existing "inherent" right outside the Charter?

   d. The definition of an "Armed attack" and whether the right of self-defense is triggered when there is something less than an armed attack is unclear. For example, in Military and Paramilitary Activities In and Around Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, the ICJ decided that Nicaragua's provision of arms to the opposition in El Salvador was not an armed attack.

   e. "Until the Security Council has taken measures": When the Security Council was stalemated during the Cold War, this was rarely an issue. Now that the Security Council is more active and effective, it is not clear what level of UN Security Council action would extinguish a State's right to continue its self-defense. The U.S. view is that the Security Council must take "effective" action.

4. Anticipatory self-defense.

   a. Refers to the concept that self defense is permissible in anticipation of an armed attack.

   b. Classic statement of the requirements for anticipatory self defense made by Secretary of State Daniel Webster in correspondence relating to the *Caroline* incident: self defense in anticipation of an actual attack should be confined to cases in which "the necessity of that self defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."

   c. State practice has not respected the restrictive Webster formulation of the right. Two cases in point: the Israeli

attack on the Iraqi reactor in 1981 (Israel contended that the reactor would give Iraq a nuclear weapons capability which would be used against Israel); the U.S. bombing of Libya in 1986 (in which part of the justification for the attack was the desire to prevent Libya from exporting terrorism in the future).

d. CJCSI 3121.01A, *Standing Rules of Engagement for U.S. Forces*, implements anticipatory self-defense in the concept of "hostile intent," by which U.S. forces may respond with force to the threat of force.

5. Examples of Claimed Article 51 Uses of Force

   a. Israel-Iraq (1981)

      (1) Iraq building a nuclear reactor at Osirak.

      (2) Israel attacked and destroyed the site 6-9 months prior to completion.

      (3) Unanimous UNSC condemnation.

      (4) Does it matter that Israel and Iraq were technically still "at war" as a result of events 8 years earlier?

   b. Libya (1986)

      (1) December 1985: Abu Nidal terrorists conducted bombings at the Rome and Vienna Airports.

      (2) 4 April 1986: Bombing at "La Belle Disco" in Berlin. (Club was frequented by American military personnel.)

      (3) 5 April 1986: Communications intercepted between the bombers and Libyan government officials in Tripoli.

      (4) 14 April: Operation El Dorado Canyon. Air and Naval assets struck targets in and around Tripoli.

      (5) President Reagan announced, "These strikes were conducted in the exercise of our right of self-defense under Article 51 of the United Nations Charter. This necessary and appropriate action was a preemptive strike...designed to deter acts of terrorism by Libya..."

c. Iraq (1993)

(1) 14 April 1993: Kuwaiti authorities thwart a plot to assassinate former President Bush when he visits Kuwait.

(2) 26 June 1993: US launches 23 Tomahawk missiles at Iraqi intelligence Headquarters from ships in the Persian Gulf and Red Sea.

(3) Secretary of State Albright: "We responded directly, as we were entitled to do under Article 51 of the U. N. Charter, which provides for the exercise of self-defense in such cases...Our response has been proportional and aimed at targets directly linked to the operation against President Bush..."

d. Afghanistan and Sudan (1998)

(1) US Embassies in Kenya and Tanzania were attacked.

(2) Approximately 10 days later, U.S. Naval forces strike terrorist training camps in Afghanistan and a chemical production facility in the Sudan.

e. Afghanistan (2001): Operation Enduring Freedom.

(1) Post 9/11 operations against the al Qaida terrorist network and the Taliban regime, which gave them safe haven.

6. Pre-emptive uses of Force

a. The National Security Strategy of the United States of America (September 2002). "The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination. The United States will not allow these efforts to succeed. We will build defense against ballistic missiles and other means of delivery. We will cooperate with other nations to deny, contain and curtail our enemies' efforts to acquire dangerous technologies. And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed."

b. "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."

c. "The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction-and more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively."

B. Humanitarian intervention. Although not universally recognized, some States contend that there exists a right to intervene within the territory of another State (without that State's consent, and without Security Council sanction) in order to prevent certain large-scale atrocities or deprivations. The argument is that such intervention does not violate Article 2(4) because the purpose is not to affect the territorial integrity or political independence of the State. The intervening State bears the heavy burden of proving its "pure motive."

C. Protection of nationals. Protection of nationals has aspects of both self-defense and humanitarian intervention. The State in which the nationals reside has the primary responsibility for providing protection within its territory, and it would only be in cases in which that State was unable or unwilling to provide protection that another State would be justified in intervening. This issue is most likely to be addressed during a Non-Combatant Evacuation Operation (NEO).

NOTES

NOTES

CHAPTER 4

GENEVA CONVENTION I: WOUNDED AND SICK IN THE FIELD

REFERENCES

1. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces of the Field, August 12, 1949, T.I.A.S. 3362. (GWS)
2. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, T.I.A.S. 3363. (GWS (Sea))
3. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1. (GP I & II)
4. Commentary on the Geneva Conventions (Pictet ed. 1960).
5. Dept. of Army, Pamphlet 27-1, Treaties Governing Land Warfare (7 December 1956).
6. Dept. of Army, Pamphlet 27-1-1, Protocols to The Geneva Conventions of 12 August 1949 (1 September 1979).
7. Dept. of Army, Pamphlet 27-161-2, International Law, Volume II (23 October 1962).
8. Dept. of Army, Field Manual 27-10, The Law of Land Warfare (18 July 1956).
9. Dept. of Army, Field Manual 4-02, Force Health Protection in a Global Environment (13 February 2003).
10. Naval Warfare Publication 1-14M/MCWP 5-2.1/COMDTPUB P5800.1 (Annotated Supplement), The Commander's Handbook on the Law of Naval Operations (15 November 1997).
11. Air Force Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operation (19 November 1976).
12. Morris Greenspan, THE MODERN LAW OF LAND WARFARE (1959).
13. Dietrich Schindler & Jiri Toman, THE LAW OF ARMED CONFLICT (1988).
14. Hilaire McCoubrey, INTERNATIONAL HUMANITARIAN LAW (1990).
15. Howard S. Levie, THE CODE OF INTERNATIONAL ARMED CONFLICT (1986).
16. Alma Baccino-Astrada, MANUAL ON THE RIGHTS AND DUTIES OF MEDICAL PERSONNEL IN ARMED CONFLICTS (1982).
17. Dept. of Army, Field Manual 8-42, Combat Health Support in Stability Operations and Support Operations (27 October 1997).

VII. INTRODUCTION.

A. Background

1. Henry Dunant: *A Memory of Solferino.*

a. 1864 Geneva Convention.

(1) 10 Articles.

(a) Military ambulances and hospitals are neutral.

(b) Personnel and Chaplains are neutral.

(i) Repatriation is the rule.

(c) Wounded.

(i) Must be cared for.

(ii) Repatriation if:

(a) Incapable of further service.

(b) Agree not to take up arms again.

B. Definition (1949 Convention).

1. The term "Wounded and Sick" is not defined in the GWS. Concerned that any definition would be misinterpreted, the drafters decided that the meaning of the words was a matter of "common sense and good faith." Pictet at 136.

2. However, Article 8(a), Protocol I, contains the following widely accepted definition: "Persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility."

3. GWS (Sea) applies same protections to those "shipwrecked" at sea - shipwrecked meaning "shipwreck from any cause and includes forced landings at sea by or from aircraft." (Art. 12). Article 8(b), Protocol I provides a more detailed definition of "shipwrecked" which is similar to the "wounded and sick" definition above. Once put ashore, "shipwrecked" forces become "wounded and sick" forces under the GWS. (GWS (Sea), Art. 4).

C. Scope of Application. For the protected persons who have fallen into the hands of the enemy, the GWS applies until their final repatriation. GWS, Art. 5.

VIII. CATEGORIES OF WOUNDED AND SICK.

A. Protected Persons (Article 13) - same as Article 4, GPW.

1. Members of armed forces of a Party to the conflict, . . . militias [and] volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict . . . provided [they] fulfill the following conditions:

   a. that of being commanded by a person responsible for his subordinates;

   b. that of having a fixed distinctive sign recognizable at a distance;

   c. that of carrying arms openly;

   d. that of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof . . . provided they have received authorization from the armed forces which they accompany. . . .

5. Members of crews . . . of the merchant marine and . . . civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces . . . provided they carry arms openly and respect the laws and customs of war.

B. Civilians.

1. Not expressly covered by GWS - but have general protection as noncombatants - may not be targeted (unless they abrogate their status by their actions.)

2. Express coverage is found, however, in the Geneva Conventions on Civilians (GC), Article 16: "The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect." *See* G.I.A.D. Draper, THE RED CROSS CONVENTIONS OF 1949 74 (1958).

3. Article 8(a), Protocol I (GP I) expressly included civilians within its definition of "wounded and sick."

4. Thus, as a practical matter, all wounded and sick, military and civilian, in the hands of the enemy must be respected and protected. FM 27-10, at para. 208; FM 4-02, para. 4-4.

IX. THE HANDLING OF THE WOUNDED AND SICK.

A. Protection (Article 12).

1. General - "Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances."

   a. Respect - to spare, not to attack.

      (1) During the Vietnam conflict there were several examples of violations of this prohibition, e.g., during the November 1965 battle in Ia Drang Valley pitting regular North Vietnamese (NVA) units against units of the 1st Cavalry Division there were several accounts of NVA personnel shooting wounded Americans lying on the battlefield. Moore, WE WERE SOLDIERS ONCE AND YOUNG (1993).

      (2) During the Falklands War, international humanitarian law was generally well followed but there was an incident where two lightly armed British helicopters accompanying a supply ship were shot down and Argentinean forces continued to fire on the helicopter crewmen as they struggled in the water. Three of the crewmen were killed, and the fourth was wounded. Soon after this incident an Argentinean flyer was shot down. British leadership ensured proper treatment despite some reprisal suggestions. Robert Higginbotham, *Case Studies in the Law of Land Warfare II: The Campaign in the Falklands*, Military Review 52-53 (Oct 1984).

   b. Protect - to come to someone's defense; to lend help and support.

      (1) An excellent example of this concept occurred in the Falklands when a British soldier came upon a gravely wounded Argentinean whose brains were leaking into to his helmet. The British soldier scooped the extruded material back into the soldier's skull and evacuated him. The Argentinean survived. Higginbotham at 50.

      (2) Extent of Obligation - It is "unlawful for an enemy to attack, kill, ill treat or in any way harm a fallen and unarmed soldier, while at the

same time . . . the enemy [has] an obligation to come to his aid and give him such care as his condition require[s]." Pictet at 135.

B. Care (Article 12).

1. Standard is one of humane treatment - "[E]ach belligerent must treat his fallen adversaries as he would the wounded of his own army." Pictet at 137.

C. Abandoning Wounded and Sick to the Enemy (Article 12).

1. If, during a retreat, a commander is forced to leave behind wounded and sick, he is required to leave behind medical personnel and material to assist in their care.

2. "[A]s far as military considerations permit" – provides a limited military necessity exception to this requirement. Thus a commander need not leave behind medical personnel if such action will leave his unit without adequate medical staff. Nor can the enemy refuse to provide medical care to abandoned enemy wounded on the grounds that the enemy failed to leave behind medical personnel. The detaining power ultimately has the absolute respect and protect obligation. Pictet at 142.

D. Order of Treatment (Article 12).

1. Determined solely by reasons of medical urgency. Designed to strengthen the principle of equal treatment articulated above.

a. Treatment is accorded using triage principles which provide the greatest medical assets to those with significant injuries who may benefit from treatment, while those wounded who will die no matter what and those whose injuries are not serious are given lesser priority.

b. The US applies this policy at the evacuation stage, as well as at the treatment stage. "Sick, injured, or wounded EPWs are treated and evacuated through normal medical channels, but are physically segregated from US or allied patients. The EPW patient is evacuated from the combat zone as soon as his medical condition permits." Dep't of Army Field Manual 8-10-6, Medical Evacuation in a Theater of Operations, appendix A-1 (31 October 1991).

c. During Operation JUST CAUSE, wounded Panamanian Defense Force personnel were evacuated on the same aircraft as US personnel and provided the same medical care as US forces. Lessons Learned:

Operation JUST CAUSE, Unclassified Executive Summary, p. 7 (24 May 1990) (on file at TJAGSA).

d. In the Falklands the quality of medical care provided by the British to the wounded, without distinction between British and Argentinean, was remarkable. More than 300 major surgeries were performed, and 100 of these were on Argentinean soldiers. Higginbotham at 50.

e. Unfortunately, as pointed out by Professor Levie citing the example of the Japanese during World War II, "this humanitarian procedure [referring to treating enemy wounded like your own] is far from being universally followed." Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT, 100 (1976).

2. Medical personnel must make the decisions regarding medical priority on the basis of their medical ethics. Baccino-Astrada at 40. This standard is reiterated in Article 10, Protocol I for emphasis.

3. Triage Categories (FM 8-42 at para. J-3):

a. Immediate. Condition demands immediate resuscitative treatment. Generally the procedures are short in duration and economical in terms of medical resources. Example: control of a hemorrhage from an extremity. (Note: NATO divides this category into two groups: Urgent: quick short duration life saving care, which is first priority; and Immediate: which require longer duration care to save a life.)

b. Delayed. Treatment can be delayed for 8-10 hours w/o undue harm. Examples: Soft tissue injuries requiring debridement; maxillofacial injuries without airway compromise; eye and central nervous system injuries.

c. Minimal (or Ambulatory). Next to last priority for medical officer care; but head of the line at the battle dressing station. (Can be patched up and returned to the lines in minutes.) (Major difference with civilian triage.)

d. Expectant. Injuries are so extensive that even if they were the sole casualty, survival would be unlikely.

4. No adverse distinctions may be established in providing care.

a. May not discriminate against wounded or sick because of "sex, race, nationality, religion, political opinions, or any other similar criteria."

b. Note the use of the term "adverse" permits favorable distinctions, e.g., taking physical attributes into account, such as in the case of children, pregnant women, the aged, etc..

5. The wounded and sick "shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created."

   a. The first prohibition stems from a recognition that wounded personnel, who had not yet received medical treatment, "were profitable subjects for interrogation." Draper at 76. Professor Draper cites the German practice during World War II at their main aircrew interrogation center. They frequently delayed medical treatment until after interrogation. Such conduct is now expressly forbidden.

   b. The second prohibition was designed to counter the German practice of sealing off Russian PW camps once typhus or tuberculosis was discovered.

E. Status of Wounded and Sick (Article 14).

1. The wounded or sick soldier enjoys the status of a PW. Actually the soldier will be protected under both the GWS and the GPW until recovery is complete, at which time the soldier is exclusively governed by the GPW.

2. While the conventions overlap, i.e., during the treatment and recovery phase, the GWS takes precedence. But, as Pictet states, this is an academic point as the protections in both are largely the same. Pictet at 147.

F. Search for Casualties (Article 15).

1. Search, Protection, and Care.

   a. "At all times, and particularly after an engagement." Parties have an ongoing obligation to search for the wounded and sick as conditions permit. The commander determines when it is possible to do so. This mandate applies to all casualties, not just friendly casualties.

      (1) The drafters recognized that there were times when military operations would make the obligation to search for the fallen impracticable. Pictet at 151.

(2) By way of example, US policy during Operation DESERT STORM was not to search for casualties in Iraqi tanks or armored personnel carriers because of concern about unexploded ordnance.

(3) Similar obligations apply to maritime operations (Article 18, GWS (Sea)). It was through this military necessity exception that HMS Conqueror did not assist the shipwrecked members of the Argentinean cruiser General Belgrano after its torpedo attack against it. The Conqueror was reasonably concerned about the threat of a destroyer attack if it lingered in the area. Admiral Sandy Woodward, ONE HUNDRED DAYS 162 (1992). Professor Draper explicitly states that "[I]t is apparent that submarines will rarely be in a position to search for and collect the wounded or shipwrecked. Neither has such a craft the facilities for ensuring their adequate care. Further, the search for shipwrecked by even larger ships is operationally a very dangerous proceeding, exposing the search vessel to the grave risk of submarine attack by day or night and to air attack by day." Draper at 87.

b. The protection requirement refers to preventing pillage of the wounded by the "hyenas of the battlefield."

c. Care refers to the requirement to render first aid.

d. Note that the search obligation also extends to searching for the dead, again, as military conditions permit. During the Falklands War the Argentineans were scrupulous in handling of the dead. A Harrier pilot was killed over Goose Green and buried with military honors. Higginbotham at 51.

2. Suspensions of Fire and Local Agreements.

a. Suspensions of fire are agreements calling for cease-fires that are sanctioned by the Convention to permit the combatants to remove, transport, or exchange the wounded, sick and the dead (note that exchanges of wounded and sick between parties did occur to a limited extent during World War II. Pictet at 155).

b. Suspensions of fire were not always possible without negotiation and, sometimes, the involvement of staffs up the chain of command. Consequently, local agreements, an innovation in the 1949 convention to broaden the practice of suspensions of fire by authorizing similar

agreements at lower command levels, are sanctioned for use by local on-scene commanders to accomplish the same function.

c. Article 15 also sanctions local agreements to remove or exchange wounded and sick from a besieged or encircled area, as well as the passage of medical and religious personnel and equipment into such areas. The GC contains similar provisions for civilian wounded and sick in such areas. It is this type of agreement that has been used to permit the passage medical supplies to the city of Sarajevo during the siege of 1992.

G. Identification of Casualties (Articles 16-17).

1. Parties are required, as soon as possible, to record the following information regarding the wounded, sick, and the dead: name, ID number, DOB, date and place of capture or death, and particulars concerning wounds, illness, or cause of death.

2. Forward information to Prisoners of War Information Bureau (*See* Article 122, GPW). Information Bureaus are established by Parties to the conflict to transmit and to receive information/articles regarding PWs to/from the ICRC's Central Tracing Agency. The US employs the National PW Information Center (NPWIC) in this role.

3. In addition, Parties are required to forward the following information and materials regarding the dead:

   a. Death certificates.

   b. ID disc.

   c. Important documents, e.g., wills, money, etc., found on the body.

   d. Personal property found on the body.

4. Handling of the Dead.

   a. Examination of bodies (a medical examination, if possible) to confirm death and to identify the body. Such examinations can play a dispositive role in refuting allegations of war crimes committed against individuals. Thus, they should be conducted with as much care as possible.

   b. No cremation (except for religious or hygienic reasons).

c. Honorable burial. Individual burial is strongly preferred; however, there is a military necessity exception which permits burial in common graves, e.g., if circumstances, such as climate or military concerns, necessitate it. Pictet at 177.

d. Mark and record grave locations.

H. Voluntary Participation of Local Population in Relief Efforts (Article 18).

1. Commanders may appeal to the charity of local inhabitants to collect and care for the wounded and sick. Such actions by the civilians must be voluntary. Similarly, commanders are not obliged to appeal to the civilians.

2. Spontaneous efforts on the part of civilians to collect and care for the wounded and sick is also permitted.

3. Ban on the punishment of civilians for participation in relief efforts. This provision arose from the fact that the Germans prohibited German civilians from aiding wounded airmen.

4. Continuing obligations of occupying power. Thus, the occupant cannot use the employment of civilians as a pretext for avoiding their own responsibilities for the wounded and sick. The contribution of civilians is only incidental. Pictet at 193.

5. Civilians must also respect the wounded and sick. This is the same principle discussed above (article 12) vis-à-vis armed forces. This is the only article of the convention that applies directly to civilians. Pictet at 191.

X. STATUS AND PROTECTION OF PERSONNEL AIDING WOUNDED AND SICK.

A. Categories of Persons Protected Based Upon Rights Possessed.

1. **The first category**: (Article 24) Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease; staff exclusively engaged in the administration of medical units and establishments; chaplains; and personnel of national Red Cross/Crescent Societies and other recognized relief organizations (Article 26).

a. Respect and protect (Article 24) - applies "in all circumstances." In Vietnam US soldiers claimed that the NVA and Vietcong targeted

medical personnel because of their importance in maintaining morale. They'd shoot medics even if they were giving care. Consequently medics often avoided wearing armbands which acted as bulls-eyes. There were even reports that the Vietcong paid an incentive for killing medics. Eric M. Bergerud, RED THUNDER, TROPIC LIGHTNING: THE WORLD OF A COMBAT DIVISION IN VIETNAM 201-03 (1993).

b. Status upon capture (Article 28) - **Retained Personnel**, not PWs.

(1) A new provision in the 1949 convention. The 1864 and 1906 conventions required immediate repatriation. The 1929 convention also required repatriation, absent an agreement to retain medical personnel. During World War II, the use of these agreements became extensive, and very few medical personnel were repatriated. Great Britain and Italy, for example, retained 2 doctors, 2 dentists, 2 chaplains, and 12 medical orderlies for every 1,000 PWs.

(2) The 1949 convention institutionalized this process. Some government experts proposed making medical personnel straight PWs, the idea being that wounded PWs prefer to be cared for by their countrymen, speaking the same language. The other camp, favoring repatriation, cited the traditional principle of inviolability—that medical personnel were non-combatants. What resulted was a compromise: medical personnel were to be repatriated, but if needed to treat PWs, they were to be retained and treated, at a minimum, as well as PWs. Pictet at 238-40.

(3) Note that medical personnel may only be retained to treat PWs. Under no circumstances may they be retained to treat enemy personnel. While the preference is for the retained persons to treat PWs of their own nationality, the language is sufficiently broad to permit retention to treat **any** PW. Pictet at 241.

c. Repatriation of Medical Personnel(Articles 30-31).

(1) Repatriation is the rule; retention the exception. Medical personnel are to be retained only so long as required by the health and spiritual needs of PWs and then are to be returned when retention is not indispensable. Pictet at 260-61.

(2) Article 31 states that selection of personnel for return should be irrespective of race, religion or political opinion, preferably according to chronological order of capture—first-in/first-out approach.

(3) Parties may enter special agreements regarding the percentage of personnel to be retained in proportion to the number of prisoners and the distribution of the said personnel in the camps. The US practice is that retained persons will be assigned to PW camps in the ratio of 2 doctors, 2 nurses, 1 chaplain, and 7 enlisted medical personnel per 1,000 PWs. Those not required will be repatriated. *See*, AR 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, 1 November 1997.

(4) Since World War II, this is one of the least honored provisions of the convention. US medical personnel in Korea and Vietnam were not only not repatriated, but were also denied retained person status. Memorandum of W. Hays Parks to Director, Health Care Operations *reprinted in* The Army Lawyer, April 1989, at 5.

d. Treatment of Medical Personnel(Article 28).

(1) May only be required to perform medical and religious duties.

(2) Receive at least all benefits conferred on PWs, e.g., pay, monthly allowances, correspondence privileges. AR 190-8.

(3) Are subject to camp discipline.

e. Relief (Article 28). Belligerents may relieve doctors retained in enemy camps with personnel from the home country. During World War II some Yugoslavian and French doctors in German camps were relieved. Pictet at 257.

f. Continuing obligation of detaining power (Article 28). The detaining power is bound to provide free of charge whatever medical attention the PWs require.

2. **The second category**: Auxiliary medical support personnel of the Armed Forces (Articles 25 & 29).

a. These are personnel who have received special training in other medical specialties, e.g., orderlies, nurses, stretcher bearers, in addition to

performing other military duties. (While only Article 25 specifically refers to nurses, nurses are Article 24 personnel if they meet the "exclusively engaged" criteria of that article.).

b. Respect and protect (Article 25) - when acting in medical capacity.

c. Status upon capture (Article 29) - PWs; however, must be employed in medical capacity insofar as a need arises.

d. Treatment (Article 29).

(1) When not performing medical duties, treat as PWs.

(2) When performing medical duties, they remain PWs, but receive treatment under Article 32, GPW, as retained personnel; however, they are not entitled to repatriation.

(3) Auxiliaries are not widely used, but see W. Hays Parks memorandum, *supra*, for discussion of certain US personnel, who *de facto*, become auxiliary personnel. *See also* FM 4-02 at para. 4-5b (discusses this same issue and points out that Article 24 personnel switching between medical and non-medical duties **at best** places such individuals in the auxiliary category.).

(4) The US Army does not have any personnel who officially fall into the category identified in Article 25. FM 4-02 at para. 4-5b. Air Force regulations do provide for these personnel. *See* Bruce T. Smith, Air Force Medical Personnel and the Law of Armed Conflict, 37 A. F. L. Rev. 242 (1994).

3. **The third category**: Personnel of aid societies of neutral countries (Articles 27 & 32).

a. Nature of assistance: procedural requirements (Article 27).

(1) Consent of neutral government.

(2) Consent of party being aided.

(3) Notification to adverse party.

b. Retention prohibited (Article 32) - must be returned "as soon as a route for their return is open and military considerations permit."

c. Treatment pending return (Article 32) - must be allowed to perform medical work.

XI. MEDICAL UNITS AND ESTABLISHMENTS.

A. Protection.

1. Fixed Establishments and Mobile Medical Units (Article 19).

a. May not be attacked, provided they do not abrogate their status.

(1) In Afghanistan, the Soviets engaged in a campaign to destroy hospitals and dispensaries operated by non-governmental organizations (Medecins sans Frontieres, Medecins du Monde, Aide Medicale Internationale - all NGOs comprised of French doctors and nurses). In September of 1980, the Soviets sacked the hospital at Yakaolang, even destroying all medical supplies and equipment. In late 1981 the Soviets systematically bombed hospitals operated by French medical organizations. At least 8 hospitals of the three NGOs above were hit. One was rebuilt with a prominent red cross, but was still bombed again by Russian helicopters. Helsinki Watch, TEARS, BLOOD, AND CRIES, HUMAN RIGHTS IN AFGHANISTAN SINCE THE INVASION 1979-1984, at 184-6.

(2) In Vietnam during the 1968 Tet offensive, communist forces attacked the 45th MASH at Tay Ninh, killing one doctor and two medics. Bergerud at 206.

b. Commanders are encouraged to situate medical units and establishments away from military objectives. See also Article 12, GP I, which states that medical units will, in no circumstances, be used to shield military objectives from attack.

c. If these units fall into the hands of an adverse party, medical personnel will be allowed to continue caring for wounded and sick.

2. Discontinuance of Protection (Article 21).

a. These units/establishments lose protection if committing "acts harmful to the enemy." Pictet cites as examples such acts as using a hospital as a shelter for combatants, as an ammunition dump, or as an observation post. Pictet at 200-01.

b. Protection ceases only after a warning has been given and it remains unheeded after a reasonable time to comply. A reasonable time varies on the circumstances, e.g., no time limit would be required if fire is being taken from the hospital. Pictet at 202.

c. Article 13, GP I, extends this same standard to civilian hospitals.

3. Conditions not depriving medical units and establishments of protection (Article 22).

a. Unit personnel armed for own defense against marauders and those violating the law of war, e.g., by attacking a medical unit. Medical personnel thus may carry small arms, such as rifles or pistols for this purpose. In contrast, placing machine guns, mines, LAAWS, etc., around a medical unit would cause a loss of protection. FM 4-02 at para. 4-8.

b. Unit guarded by sentries. Normally medical units are guarded by its own personnel. It will not lose its protection, however, if a military guard attached to a medical unit guards it. These personnel may be regular members of the armed force, but they may only use force in the same circumstances as discussed in para 3(a) above. FM 4-02 at para. 4-8.

c. Small arms taken from wounded are present in the unit.

d. Presence of personnel from the veterinary service.

e. Provision of care to civilian wounded and sick.

B. Disposition of Captured Buildings and Material of Medical Units and Establishments.

1. Mobile Medical Units (Article 33).

a. Material of mobile medical units, if captured, need not be returned. This was a significant departure from the 1929 convention which required mobile units to be returned.

b. But captured medical material must be used to care for the wounded and sick. First priority for the use of such material is the wounded and sick in the captured unit. If there are no patients in the captured unit, the material may be used for other patients. Pictet at 274; *see also* FM 4-02 at para. 4-6.

2. Fixed Medical Establishments (Article 33).

   a. The captor has no obligation to restore this property to the enemy - he can maintain possession of the building, and its material becomes his property. However, the building and the material must be used to care for wounded and sick as long as requirement exists. Greenspan at 85.

   b. Exception - "in case of urgent military necessity," they may be used for other purposes.

   c. If a fixed medical establishment is converted to other uses, prior arrangements must be made to ensure that wounded and sick are cared for.

3. Medical material and stores of both mobile and fixed establishments "shall not be intentionally destroyed." **No military necessity exception.**

XII. MEDICAL TRANSPORTATION.

A. Medical Vehicles - Ambulances (Article 35).

1. Respect and protect - may not be attacked if performing a medical function. During the Bosnian conflict, there were several reports of attacks on medical vehicles, e.g., on June 24, 1992, Bosnian Serb machine gunners fired on two ambulances killing all six occupants. Helsinki Watch, WAR CRIMES IN BOSNIA-HERCEGOVINA 115 (1992).

2. These vehicles may be employed permanently or temporarily on such duties and they need not be specially equipped for medical purposes. Pictet at 281. Professor Draper states that "[a]s ambulances are not always available, any vehicles may be adapted and used temporarily for transport of the wounded. During that time they will be entitled to protection, subject to the display of the distinctive emblem. Thus military vehicles going up to the forward areas with ammunition may bring back the wounded, with the important reservation the emblem must be detachable, e.g., a flag, so that it may be flown on the downward journey. Conversely military vehicles may take down wounded and bring up military supplies on the return journey. The flag must them be removed on the return journey." Draper at 83.

3. Key issue for these vehicles is the display of the distinctive emblem, which accords them protection.

   a. Camouflage scenario: Belligerents are only under an obligation to respect and protect medical vehicles so long as they can identify them. Consequently, absent the possession of some other intelligence regarding the identity of a camouflaged medical vehicle, belligerents would not be under any obligation to respect and protect it. FM 4-02 at para. 4-6. See *also* Draper at 80.

   b. Display the emblem only when the vehicle is being employed on medical work. Misuse of the distinctive symbol is a war crime. FM 27-10 at para. 504.

4. Upon capture, these vehicles are "subject to the laws of war."

   a. Thus, the captor may use them for any purpose.

   b. If the vehicles are used for non-medical purposes, the captor must ensure care of wounded and sick they contained, and, of course, ensure that the distinctive markings have been removed.

B. Medical Aircraft (Article 36).

1. Definition - Aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment.

2. Protection.

   a. Marked with protected emblem.

   b. However, protection ultimately depends on an agreement: medical aircraft are not to be attacked if "flying at heights, times and on routes specifically agreed upon between the belligerents." The differing treatment accorded to aircraft, as opposed to ambulances, is a function of their increased mobility and consequent heightened fears about their misuse. Also "the speed of modern aircraft makes identification by colour or markings useless. Only previous agreement could afford any real safeguard." Draper at 84.

   c. Without such an agreement, belligerents use medical aircraft at their own risk. Pictet at 288; FM 4-02 at para. 4-6.

(1) This was certainly the case in Vietnam where "any air ambulance pilot who served a full one year tour could expect to have his aircraft hit at least once by enemy fire." "Most of the Viet Cong and North Vietnamese clearly considered the air ambulances just another target." Dorland & Nanney, DUST OFF: ARMY AEROMEDICAL EVACUATION IN VIETNAM 85-86 (1982)(although the authors note the pilot error and mechanical failure accounted for more aircraft losses than did hostile fire).

(2) Medical aircraft (and vehicles) took fire from Panamanian paramilitary forces (DIGBATS) during Operation JUST CAUSE. Center for Army Lessons Learned, Operation JUST CAUSE: Lessons Learned, p. III-14, (October 1990).

(3) By contrast, in the Falklands each of the hospital ships (British had 4; Argentineans had 2) had one dedicated medical aircraft with Red Cross emblems. Radar ID was used to identify these aircraft because of visibility problems. Later it was done by the tacit agreement of the parties. Both sides also used combat helicopters extensively, flying at their own risk. No casualties occurred. Junod, PROTECTION OF THE VICTIMS OF THE ARMED CONFLICT IN THE FALKLANDS, ICRC, p. 26-27.

d. Aircraft may be used permanently or temporarily on a medical relief mission; however, to be protected it must be used "exclusively" for a medical mission during its relief mission. Pictet at 289. This raises questions as to whether the exclusivity of use refers to the aircraft's entire round trip or to simply a particular leg of the aircraft's route. The point is overshadowed, however, by the ultimate need for an agreement in order to ensure protection. Pictet also says exclusively engaged means without any armament. *See also* article 28(3) in Protocol I; and FM 8-10-6 at A-3(the mounting or use of offensive weapons on dedicated Medevac vehicles and aircraft jeopardizes the protection afforded by the conventions. Offensive weapons include, but are not limited to, machine guns, grenade launchers, hand grenades, and light anti-tank weapons).

e. Reporting information acquired incidentally to the aircraft's humanitarian mission does not cause the aircraft to lose its protection. Medical personnel are responsible for reporting information gained through casual observation of activities in plain view in the discharge of their duties. This does not violate the law of war or constitute grounds for loss of protected status. Dep't of Army Field Manual 8-10-8, Medical

Intelligence in a Theater of Operations para. 4-8 (7 July 1989). For example, a Medevac aircraft could report the presence of an enemy patrol if the patrol was observed in the course of their regular mission and was not part of an information gathering mission outside their humanitarian duties.

f. Flights over enemy or enemy-occupied territory are prohibited unless agreed otherwise.

3. Summons to land.

   a. Means by which belligerents can ensure that the enemy is not abusing its use of medical aircraft - **must be obeyed.**

   b. Aircraft must submit to inspection by the forces of the summoning Party.

   c. If not committing acts contrary to its protected status, may be allowed to continue.

4. Involuntary landing.

   a. Occurs as the result of engine trouble or bad weather. Aircraft may be used by captor for any purpose.

   b. Personnel are Retained or PWs, depending on their status.

   c. Wounded and sick must still be cared for.

5. Inadequacy of GWS Article 36 in light of growth of use of medical aircraft prompted overhaul of the regime in GP I (Articles 24 - 31).

   a. Establishes three overflight regimes:

      (1) Land controlled by friendly forces (Article 25): No agreement between the parties is required; however, the article recommends that notice be given, particularly if there is a SAM threat.

      (2) Contact Zone (disputed area) (Article 26): Agreement required for absolute protection. However, **enemy is not to attack once aircraft identified as medical aircraft**.

      (3) Land controlled by enemy (Article 27): Overflight agreement required. Similar to GWS, Article 36(3) requirement.

6. Optional distinctive signals (Protocol I, Annex I, Chapter 3), e.g. radio signals, flashing blue lights, electronic identification, are all being employed in an effort to improve identification.

XIII. DISTINCTIVE EMBLEMS.

A. Emblem of the Conventions and Authorized Exceptions (Article 38).

1. Red Cross. The distinctive emblem of the conventions.

2. Red Crescent. Authorized exception.

3. Red Lion and Sun. Authorized exception employed by Iran, although has since been replaced by the Red Crescent.

B. Unrecognized symbols. The most well-known is the red "Shield of David" of Israel. While the 1949 diplomatic conference considered adding this symbol as an exception, it was ultimately rejected. Several other nations had requested the recognition of new emblems and the conference became concerned about the danger of substituting national or religious symbols for the emblem of charity, which must be neutral. There was also concern that the proliferation of symbols would undermine the universality of the Red Cross and diminish its protective value. Pictet at 301. In the various Middle East conflicts involving Israel and Egypt, however, the "Shield of David" has been respected. FM 4-02 at para. 4-6.

C. Identification of Medical and Religious Personnel (Article 40).

1. Note the importance of these identification mechanisms. The two separate and distinct protections given to medical and religious personnel are, as a practical matter, accorded by the armband and the identification card. FM 4-02 at para. 4-5.

   a. The armband provides protection from intentional attack on the battlefield.

   b. The identification card indicates entitlement to "retained person" status.

2. Permanent medical personnel, chaplains, personnel of National Red Cross and other recognized relief organizations, and relief societies of neutral countries (Article 40).

   a. Armband displaying the distinctive emblem.

b. Identity card - U.S. uses DD Form 1934 for the ID cards of these personnel.

c. Confiscation of ID card by the captor prohibited. Confiscation renders determination of retained person extremely difficult.

3. Auxiliary personnel (Article 41).

a. Armband displaying the distinctive emblem in miniature.

b. ID documents indicating special training and temporary character of medical duties.

D. Marking of Medical Units and Establishments (Article 42).

1. Red Cross flag and national flag.

2. If captured, fly only Red Cross flag.

E. Marking of Medical Units of Neutral Countries (Article 43).

1. Red Cross flag, national flag, and flag of belligerent being assisted.

2. If captured, fly only Red Cross flag and national flag.

F. Authority over the Emblem (Article 39).

1. Article 39 makes it clear that the use of the emblem by medical personnel, transportation, and units is subject to "competent military authority." The commander may give or withhold permission to use the emblem, and the commander may order a medical unit or vehicle camouflaged. Pictet at 308.

2. While the convention does not define who is a competent military authority, it is generally recognized that this authority is held no lower than the brigade commander (generally O-6) level. FM 4-02 at para. 4-6.

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CHAPTER 5

PRISONERS OF WAR AND DETAINEES (GPW)

REFERENCES

1. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GPW), reprinted in Dep't of the Army Pamphlet 27-1, Treaties Governing Land Warfare (1956) [hereinafter DA Pam 27-1].
2. Hague Convention Number IV Respecting the Laws and Customs of War on Land, October 18, 1907, reprinted in DA Pam 27-1.
3. Protocols Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflict, reprinted in Dep't of the Army Pamphlet 27-1-1, Protocols to the Geneva Conventions of 12 August 1949 (1979).
4. Dep't of Defense Directive 5100.77, DoD Law of War Program (9 December 1998).
5. Dep't of Defense Directive 2310.1, DoD Program for Enemy Prisoners of War and Other Detainees (18 August 1994).
6. Chairman, Joint Chiefs of Staff Instruction 5810.01B (25 Mar 2002).
7. Chairman, Joint Chiefs of Staff Instruction 3290.01A, Program For Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detained Personnel (15 Oct 2000).
8. III International Committee of the Red Cross, Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War (Pictet ed. 1960)[hereinafter Pictet].
9. Dep't of the Army Field Manual 27-10, The Law of Land Warfare (1956) w/ C1 (1976)[hereinafter FM 27-10].
10. Dep't of the Army Field Manual 19-40, Enemy Prisoners of War, Civilian Internees, and Detained Persons (1976)[hereinafter FM 19-40].
11. Dep't of Army Reg. 190-8, OPNAVINST 3461.6, AFI 31-304, MCO 3461.1, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, (1 Oct 1997), [hereinafter AR 190-8].
12. Dep't of the Army Pamphlet 27-161-2, International Law, Volume II (1962).
13. JA 422, Operational Law Handbook, (2004).
14. Howard S. Levie, 59 International Law Studies, Prisoners of War in International Armed Conflict (1977)[hereinafter Levie].
15. Howard S. Levie, 60 International Law Studies, Documents on Prisoners of War (1979)[hereinafter Levie, Documents on Prisoners of War].

I. HISTORY OF PRISONERS OF WAR

A. "In ancient times, the concept of "prisoner of war"[1] was unknown and the defeated became the victor's 'chattel'"[2] Your captive was yours to kill, sell, or put to work. No one was as helpless as an enemy prisoner of war (EPW).[3]

B. Greek, Roman, and European theologians and philosophers began to write on the subject of EPW's. However, treatment of EPW's was still by and large left to military commanders.[4]

C. The American War of Independence. For the colonists, it was a revolution. For the British, it was an insurrection. To the British, the colonists were the most dangerous of criminals; traitors to the empire, and a threat to state survival, and preparations were made to try them for treason. However, British forces begrudgingly recognized the colonists as belligerents and no prisoner was tried for treason. Colonists that were captured were however subject to inhumane treatment and neglect. There were individual acts of mistreatment by American forces of the British and Hessian captives; however, General Washington appears to have been sensitive to, and to have had genuine concern for EPW's. He took steps to prevent abuse.[5]

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[1] *See* WILLIAM FLORY, PRISONERS OF WAR: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW (1942), for a more detailed account of prisoner of war treatment through antiquity.

[2] COMMENTARY, III GENEVA CONVENTION, INTERNATIONAL COMMITTEE OF THE RED CROSS 4 (1960) [hereinafter Pictet].

[3] Probably the most famous medieval prisoner of war was England's Richard I of Robin Hood fame. King Richard's ship sank in the Adriatic Sea during his return from the Third Crusade in 1192. While crossing Europe in disguise, he was captured by Leopold, Duke of Austria. Leopold and his ally the Holy Roman Emperor, Henry VI, entered into a treaty with Richard on St. Valentine's Day, 1193, whereby England would pay them £100,000 in exchange for their king. This amount then equaled England's revenues for five years. The sum was ultimately paid under the watchful eye of Richard's mother, Eleanor of Aquitaine, and he returned to English soil on March 13, 1194. *See* M. Foster Farley, *Prisoners for Profit: Medieval intrigue quite often focused upon hopes of rich ransom*, MIL. HISTORY (Apr. 1989), at 12.

Richard's confinement by Leopold did seem to ingrain some compassion for future prisoners of war he captured. Richard captured 15 French knights in 1198. He ordered all the knights blinded but one. Richard spared this knight one eye so he could lead his companions back to the French army. This was considered an act of clemency at the time. MAJOR PAT REID, PRISONER OF WAR (1984).

[4] *See generally*, Rev. Robert F. Grady, *The Evolution of Ethical and Legal Concern for the Prisoner of War*, Sacred Studies in Sacred Theology N. 218, The Catholic University of America. (On file with the TJAGSA library)

[5] John C. Miller, TRIUMPH OF FREEDOM (1948), Rev. R. Livesay, THE PRISONERS OF 1776; A RELIC OF THE REVOLUTION COMPILED FROM THE JOURNAL OF CHARLES HERBERT (1854), Sydney George Fisher, THE STRUGGLE FOR AMERICAN INDEPENDENCE (1908).

D. First agreement to establish prisoner of war (POW) treatment guidelines was probably the 1785 Treaty of Friendship between the U.S. and Prussia.[6]

E. American Civil War. At the outset, the Union forces did not view the Confederates as professional soldiers deserving protected status. They were considered nothing more than armed insurrectionists. As Southern forces began to capture large numbers of Union prisoners, it became clear to Abraham Lincoln that his only hope for securing humane treatment for his troops was to require the proper treatment of Rebel soldiers. President Lincoln issued General Order No. 100, "Instructions of the Government of Armies of the United States in the Field," known as the Lieber Code.

1. Although the Lieber Code went a long way in bringing some humanity to warfare, many traditional views regarding EPW's prevailed. For example, Article 60 of the Code provides: "a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners."[7]

2. Confederate policy called for captured black soldiers to be returned or sold into slavery and for white Union officers serving with black troops to be prosecuted for "exciting servile insurrection."[8] Captured blacks who could not prove they were free blacks were sold into slavery. Free blacks were not much better off. They were treated like slaves and forced to labor in the Confederate war effort. In response to this policy, Article 58 of the Lieber Code stated that the Union would take reprisal for any black prisoners of war sold into slavery by executing Confederate prisoners. Very few Confederate prisoners were executed in reprisal. However, Confederate soldiers were often forced into hard labor as a reprisal.

3. The Union and Confederate armies operated a "parole" or prisoner exchange system. Toward the end of the war, the Union stopped paroling southern soldiers because of its significant numerical advantage. It was fighting a war of attrition and EPW exchanges did not support that effort. This Union decision may have contributed to the poor conditions in Southern EPW camps because of the additional strain on resources at a time when the

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[6] *Accord*, Levie, at 5. *See* Levie, DOCUMENTS ON PRISONERS OF WAR, at 8, for the text of this treaty.

[7] *See* Levie, DOCUMENTS ON PRISONERS OF WAR, at 39. For a summary of who Doctor Francis Lieber was and the evolution of the Lieber Code, *see* George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field,* 1 AM. J. INT'L L. 13 (1907).

[8] VOL. V, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES at 807-808 (Gov. Printing Office 1880-1901).

Confederate army could barely sustain itself. Some historians point out that the Confederate EPW guards were living in conditions only slightly better than their Union captives.[9]

4. Captured enemy have traditionally suffered great horrors as POWs. Most Americans associate POW maltreatment during the Civil War with the Confederate camp at Andersonville. However, maltreatment was equally brutal at Union camps. In fact, in the Civil War 26,486 Southerners and 22,576 Northerners died in POW camps.[10]

5. Despite its national character and Civil War setting, the Lieber Code went a long way in influencing European efforts to create international rules dealing with the conduct of war.

F. The first international attempt to regulate the handling of EPW's occurred in 1907 with the promulgation of the Regulations Respecting the Laws and Customs of War on Land (Hague Regulations). Although the Hague Regulations gave EPW's a definite legal status and protected them against arbitrary treatment, the Regulations were primarily concerned with the methods and means of warfare rather than the care of the victims of war. Moreover, the initial primary concern was with the care of the wounded and sick rather than EPW's.[11]

G. World War I. The Hague Regulations proved insufficient to address the treatment of the nearly 8,000,000 EPW's. Germany was technically correct when it argued that the Hague Regulations were not binding because not all participants were signatories.[12] According to the Regulations, all parties to the conflict had to be signatories if the Regulations were to apply to any of the parties. If one belligerent was not a signatory then all parties were released from

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[9] Rev. J. William Jones, CONFEDERATE VIEW OF THE TREATMENT OF PRISONERS (1876).

[10] Over one-half of the Northern POWs died at Andersonville. *See* Lewis Lask and James Smith, *'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865*, 68 MIL. L. REV. 77 (1975). *See also* U.S. Sanitary Commission, Narrative of Privations and Sufferings of United States Officers and Soldiers while Prisoners of War in the Hands of the Rebel Authorities, S. RPT. NO. 68, 40th CONG., 3RD SESS. (1864), for a description of conditions suffered by POWs during the civil war. Flory, *supra*, at 19, n. 60 also cites the Confederate States of America, *Report of the Joint Select Committee Appointed to Investigate the Condition and Treatment of Prisoners of War* (1865).

[11] PICTET, *Supra* note 2.

[12] G.I.A.D. Draper, THE RED CROSS CONVENTIONS 11 (1958).

mandatory compliance. The result was the inhumane treatment of EPW's in German control.

H. Geneva Convention Relative to the Treatment of Prisoners of War in 1929. This convention supplemented the 1907 Hague Regulations and expanded safeguards for EPW's. There was no requirement that all parties to the conflict had to be signatories in order for the Convention to apply to signatories.

I. World War II. Once again, the relevant treaties were not applicable to all parties. The gross maltreatment of EPW's constituted a prominent part of the indictments preferred against Germans and Japanese in the post World War II war crimes trials.

1. The Japanese had signed but not ratified the 1929 Convention. They had reluctantly signed the treaty as a result of international pressure but ultimately refused to ratify it. The humane treatment of EPW's was largely a western concept. During the war, the Japanese were surprised at the concern for EPW's. To many Japanese, surrendering soldiers were traitors to their own countries and a disgrace to the honorable profession of arms.[13] As a result, most EPW's in the hands of the Japanese during World War II were forced to undergo extremely inhumane treatment.

2. In Europe, the Soviet Union had refused to sign the 1929 Convention and therefore the Germans did not apply it to Soviet EPW's. In Sachsenhausen alone, some 60,000 Soviet EPW's died of hunger, neglect, flogging, torture, and shooting in the winter of 1941-42. The Soviets retained German EPW's in the USSR some twelve years after the close of hostilities.[14] Generally speaking, the regular German army, the Wehrmacht, did not treat American EPW's too badly. The same cannot be said about the treatment Americans experienced at the hands of the German military.[15]

3. The post-World War II war crimes tribunals determined that the laws regarding the treatment of EPW's had become customary international law by the outset of hostilities. Therefore, individuals were held criminally liable for the mistreatment of EPW's whether or not the perpetrators or victims

[13] Grady, *supra* note 4 at 103.

[14] Draper, *supra* note12 at 49.

[15] Grady, *supra* note 4 at126.

were from states that had signed the various international agreements dealing with EPW's.[16]

J. Geneva Convention Relative to the Treatment of Prisoners of War in 1949. The experience of World War II resulted in the expansion and codification of the laws of war in four Geneva Conventions of 1949. With the exception of Common Article III, this Convention only applies to international armed conflict. In such a conflict, signatories must respect the Convention in "all circumstances." This language means that parties must adhere to the Convention unilaterally, even if not all belligerents are signatories. There are provisions that allow non-signatories to decide to be bound. Moreover, with the exception regarding reprisals, all parties must apply it even if it is not being applied reciprocally. The proper treatment of EPW's has now risen to the level of customary international law.

K. 1977 Additional Protocols to the 1949 Geneva Conventions. Protocol I, International Armed Conflicts; Protocol II, Internal Armed Conflicts. The U.S. is not a party to either Protocol. Neither Protocol creates any new protections for prisoners of war. They do, however, have the effect of expanding the definition of "status," that is, who is entitled to the GPW protections in international armed conflict, and narrowing the coverage of Common Article 3 of the GPW in internal armed conflicts.

II. PRISONER OF WAR STATUS AS A MATTER OF LAW

A. Important Terminology.

1. Prisoners of War (POWs): A detained person as defined in Articles 4 & 5, GPW (FM 27-10, ¶61).

2. Civilian Internees: A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power (Joint Pub 1-02).[17]

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[16] *Id.*

[17] DEP'T OF DEF., JOINT PUBLICATION 1 (1 June 1987). *See also* Section IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (reprinted in DA PAM. 27-1)[hereinafter GC] and the Protections of Civilians in Armed Conflict chapter of this text.

3. Retained personnel: Medical and religious personnel retained by the Detaining power with a view toward assisting POWs (Art. 33, GPW).

4. Detainees: A term used to refer to any person captured or otherwise detained by an armed force (Joint Pub 1-02). It includes those persons held during operations other than war (DoDD 2310.1). It also includes those persons that the U.S. Government has declared as an "unlawful combatant" or "unprivileged belligerent" (i.e. the Taliban and al-Qaida captured during Operation Enduring Freedom).

5. Refugees: Persons who by reason of real or imagined danger have left home to seek safety elsewhere. *See* Art. 44, GC and 1951 UN Convention Relating to the Status of Refugees.[18]

6. Dislocated civilian: A generic term that includes a refugee, a displaced person, a stateless person, an evacuee, or a war victim.[19]

7. In sum, always **begin by using the term detainee** until a more specific status is determined; it is the broadest term without legal status connotations.

B. In order to achieve the status of a prisoner of war, you have to be the right kind of person in the right kind of conflict. The question of status is enormously important. There are two primary benefits of EPW status. First, you receive immunity for warlike acts (*i.e.*, your acts of killing and breaking things are not criminal). Second, you are entitled to the rights and protections under the GPW. One of those rights is that the prisoner is no longer a lawful target.

C. The Right Kind of Conflict.

1. Common Article 2, GPW: The "Conventions shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties. . . ." (emphasis added).

a. Commonly known examples of common Article 2 conflicts include W.W.II, Korea,[20] Vietnam,[21] Falklands,[22] Grenada,[23] Panama,[24] Desert

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[18] 189 U.N.T.S. 137.

[19] *See* DEP'T OF THE ARMY, FIELD MANUAL 41-10, CIVIL AFFAIRS (11 January 1993).

[20] While few people argue whether or not the Korean War was a common Article 2 conflict, there was a question of whether the 1949 Geneva Conventions would apply. The United States did not ratify the Conventions until 1955. However, by July 1950, the United States, South Korea, and North Korea all agreed to be bound its terms. *See The Geneva Conventions in the Korean Hostilities*, DEP'T OF STATE BULLETIN, vol. 33, at 69 - 73 (1955). Unfortunately, in practice, North Korea routinely abused and killed POWs in violation

Storm[25]and Operation Iraqi Freedom (OIF). The conflict in Bosnia was both an international and internal armed conflict depending on the location and time of the combatant activities. For example, the *Tadic* court determined that the conflict was internal for the purposes of that indictment, but found the conflict to be international for the purposes of the *Celebici* indictment.

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of the agreement and the terms of the 1949 Conventions. For a discussion of mistreatment prisoners of war have faced in general at the hands of communist captors, *see* SEN. SUBCOMM. TO INVESTIGATE THE ADMIN. OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS OF THE COMM. ON THE JUDICIARY, 92ND CONG., 2D SESS., COMMUNIST TREATMENT OF PRISONERS OF WAR: A HISTORICAL SURVEY (Comm. Print 1972).

[21] *See* THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk, ed. 1968), and LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE (P. Trooboff, ed. 1975).

[22] *See* James F. Gravelle, *The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 MIL. L. REV. 5 (1985), and Sylvie-Stoyanka Junod, PROTECTION OF THE VICTIMS OF THE ARMED CONFLICT FALKLAND-MALVINAS ISLANDS (1982), (ICRC, 1984).

[23] *See* Memorandum, HQDA, DAJA-IA, subject: Geneva Conventions Status of Enemy Personnel Captured During URGENT FURY (4 Nov. 1983). *See also* JOHN NORTON MOORE, LAW AND THE GRENADA MISSION (1984).

[24] Initially, the U.S. official position was Panama was not an Article 2 conflict. A primary argument was the legitimate Government of Panama invited us to assist them in reestablishing control of Panama after General Noriega nullified the free elections where Mr. Endara was elected President. To support this position, concurrent with the invasion, Mr. Endara was sworn in as President of Panama in the U.S. Southern Command Headquarters one hour before the invasion occurred; forces were already airborne en route. *See* General Accounting Office, Panama: Issues Relating to the U.S. Invasion 4, n.2 (April 1991)[GAO/NSIAD-91-174FS]. *See generally*, Bob Woodward, THE COMMANDERS 84, 182 (1991). *See also* Thomas Donnelly, Margaret Roth, and Caleb Baker, OPERATIONS JUST CAUSE: THE STORMING OF PANAMA (1991), for details of the invasion.

After General Noriega's capture, he petitioned a federal court claiming POW status under the Geneva Conventions. While the U.S. argued General Noriega would be treated consistent with the Convention, they would not agree that he was, in fact, entitled to POW status. However, in *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992), a district court judge found Panama was an article 2 conflict as a matter of law and granted POW status to the General. Noriega was ultimately tried, convicted, and sentenced in 1992 to 40 years on drug and racketeering charges. *See generally,* Laurens Grant, *Panama outraged by Noriega's TV appearance,* REUTERS, Apr. 26, 1996, *available in* LEXIS, News Library, CURNWS File and Larry King, *Noriega pleads case for release,* USA TODAY, Apr. 22, 1996 at 2D.

See generally, John Parkerson, *United States Compliance with Humanitarian Law Respecting CiviliansDuring Operation Just Cause*, 133 MIL. L. REV. 31 (1991).

[25] *See* BARRY E. CARTER AND PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 880 - 908 (1995)[hereinafter Carter and Trimble], for copies of the United Nations Security Council Resolutions and U.S. domestic documents authorizing the coalition's actions. *See generally,* DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (1992)[hereinafter DOD PERSIAN GULF REPORT], attached as APPENDIX A, and U.S. NEW AND WORLD REPORT STAFF, TRIUMPH WITHOUT VICTORY: THE UNREPORTED HISTORY OF THE PERSIAN GULF WAR (1992).

b. Most legal scholars clearly see NATO's activities in Kosovo as amounting to international armed conflict. Although the U.S. government initially described the capture of three American soldiers as an unlawful abduction because they were non-combatants, this assertion is questionable.

(1) Had they been members of a UN mission, and had the US not been simultaneously bombing Serbia, the US position may have been justified. *See* Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, 49 U.N. GAOR Supp. (No. 49), at 299, U.N. Doc. A/49/49 (1994).

(2) However, the UN mission in Macedonia had ended in February of 1999; they were captured on 31 March 1999. Forces in Macedonia had stopped wearing the traditional UN Blue Helmets; they were now part of the NATO mission. The captives were on a reconnaissance mission, carrying small arms and had a .50 caliber machine gun fixed to their vehicle. The forces in Macedonia were poised for possible ground operations in Kosovo.

(3) There is nothing in the law of war that requires a party to a conflict to limit its combat activities to the same geographical area that another party has limited its activities to. Even if Macedonia had still been a UN mission, it is arguable that the combatant activities in Kosovo meant that all US forces capable of supporting or reinforcing those activities became legitimate targets. This means that all US forces, no matter where they were located, became potential targets on the 24th of March. If they can be targeted, they can be taken as POW's.

c. Whether or not a conflict rises to the level of common Article 2 is a question of fact.[26] Factors one should consider are:

(1) Has international recognition of the belligerents occurred?

(2) Are there *de* facto hostilities?

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[26] According to Pictet:

> Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Pictet at 23.

(3) Has the United States authorized the issuance of wartime awards and pay? (This is not dispositive. Recall: Two Special Operations Forces sergeants received the Congressional Medal of Honor in Somalia, yet it was clearly not an Article 2 conflict!)

d. Another factor to consider is whether the combatants are "parties" within the meaning of Article 2. For example, the warlord Aideed and his band in Somalia did not qualify as a "party" for purposes of the Geneva Conventions.

e. Additionally, terrorist networks and organizations do not qualify as a "party" within the meaning of Common Article 2 of the Geneva Conventions. The U.S. position is clearly stated in a 7 February 2002 White House Press Release. The official U.S. position is that the al-Qaida network is not a state party to the Geneva Conventions; it is a foreign terrorist group. On the other hand, while the U.S. and all but three other nations never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President determined that the Taliban were covered by the Geneva Convention as a "party" within the meaning of Common Article 2.[27]

f. Protocol I expands the definition of international armed conflict to include conflicts against racist regimes, colonial domination, and alien occupation. Protocol I, Art. 1(4). It is important to understand that the GC's were drafted by military powers with European heritage. Many of the drafters of the Protocols were so-called third world countries with a colonial history. They wanted to insure international law protections, primarily combatant immunity, were extended to their forces.

2. GC Common Article 3. Minimal protections provided. Does not include combatant immunity. Protections limited to internal armed conflicts. Though not defined in the article, armed conflict is something more than mere riots or banditry. There is no absolute test as to what constitutes armed conflict but a significant factor is whether the government uses its armed forces in response to the conflict.

3. Protocol II tends to narrow the scope of CA3. It defines armed conflict whereas the CA3 does not. Unlike CA3, it also requires that to receive the

[27] *See* The White House, The Office of the Press Secretary, Statement by the Press Secretary, dated 7 February 2002 [hereinafter 7 Feb 02 White House Statement].

protection of Protocol II, an armed force must be under responsible command and exercise control some territory. Protocol II, Art. 1. This narrowing has the effect of excluding some from the protections of CA3. Again, keeping in mind the drafters' perspective, a newly established state with limited armed forces and resources might be less likely to want to extend protections to revolutionary powers. Some developing nations expressed concern that the super powers of the time (1977), namely, the U.S. and USSR, might, as a subterfuge for intervention, assert that they needed to become involved in the internal conflict to come to the aid of the insurgents pursuant to CA3.

a. Protocol II as a minimum standard by analogy?

(1) United States is not a party to Protocol II.

(2) Unlike Protocol I, it may reflect customary law.

(3) Minimum standards at Article 4 (Fundamental Guarantees), Article 5 (Persons Whose Liberty Has Been Restricted), and Article 6 (Penal Prosecutions).

4. War on Terrorism. There remains great debate concerning the characterization of the conflict in Afghanistan. Clearly, the U.S. is in an armed conflict. The question is whether it is an international armed conflict (Common Article 2; State vs. State), an armed conflict not of an international character (Common Article 3; internal), a combination of the two; or some other type of armed conflict.

a. In regards to the Taliban, it seems clear that the U.S. was in an international armed conflict with the commencement of Operation Enduring Freedom (OEF) on October 7, 2001. While not recognized by 98% of the international community, arguably, the Taliban was the de facto government of the Afghanistan since 1996 including at the commencement of OEF. State recognition is not a requirement for the application of the Geneva Conventions. However, when the OEF coalition forces defeated the Taliban regime, they lost control of Afghanistan and ceased to exist as the de facto government of Afghanistan. With the new Afghan government headed by President Karzai firmly in place as the government of Afghanistan, any remaining armed conflict between the coalition forces and organized armed elements of the Taliban regime arguably should be characterized as an armed conflict of a non-international character (i.e. a Common Article 3 internal armed conflict).

b. In regards to the al-Qaida foreign terrorist group, the characterization is more complex. Prior to September 11th, operations by and against terrorists were not traditionally treated as armed conflict (neither international nor non-international armed conflict). Terrorists have been treated as criminals and responses viewed as "law enforcement." Any military involvement was traditionally viewed within the MOOTW context and therefore was treated as operations below the armed conflict spectrum. Clearly, the U.S. is in an "armed conflict" with al-Qaida, however, the armed conflict with al-Qaida does not fit neatly into the existing armed conflict paradigms. Al-Qaida is not a State and therefore any direct U.S action versus al-Qaida network lacks the requirement of two or more states actually involved in the conflict for there to be an international armed conflict. Additionally, the non-international armed conflict paradigm traditionally involved the concepts of "civil wars" or "internal conflicts." Has the military action taken against al-Qaida been absorbed into the international armed conflict (Common Article 2) with the Taliban or is the conflict with al-Qaida best described as an armed conflict not of an international character (Common Article 3)? Neither? To date, there does not seem to be an official U.S. position regarding the al-Qaida terrorist group other than that the Geneva Conventions do not apply to them since they are not a "party" within the meaning of Common Article 2 of the Conventions.[28]

D. The Right Kind of Person.

1. Once a conflict rises to the level of common Article 2, Article 4, GPW, determines who is entitled to the status of a prisoner of war. Traditionally, persons were only afforded prisoner of war status if they were members of the regular armed forces involved in an international armed conflict. The GPW also included members of militias or resistance fighters belonging to a party to an international armed conflict if they met the following criteria:

   a. Being commanded by a person responsible for their subordinates;

   b. Having fixed distinctive insignia;[29]

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[28] *Id.*

[29] For a discussion of the uniform requirement, *see In re Quirin*, 317 U.S. 1 (1942) and *Mohamadali and Another v. Public Prosecutor* (Privy Council, 28 July 1968), 42 I.L.R. 458 (1971). The first attempt to codify the uniform requirement necessary to receive POW status occurred during the Brussels Conference of 1874.

c. Carrying arms openly;[30] and,

d. Conducting their operations in accordance with the laws and customs of war.

2. One must recognize that with coalition operations one may have to apply a different standard; our coalition partners may use Protocol I's criteria. Protocol I only requires combatants to carry their arms openly in the attack and to be commanded by a person responsible for the organization's actions, comply with the laws of war, and have an internal discipline system. Art. 43 & 44, GPI. Therefore, guerrillas may be covered. Note: The United States is NOT a party to Protocol I, but 161 nations are parties to the treaty.[31]

3. In addition, numerous other persons detained by military personnel are entitled to EPW status if "they have received authorization from the armed forces which they accompany." (i.e., possess a GC identity card from a belligerent government). Specific examples include:

a. Contractors;

b. Reporters;[32]

c. Civilian members of military aircraft crews;

d. Merchant marine and civil aviation crews;

e. Persons accompanying armed forces (dependents);[33] and,

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[30] This term carrying arms openly does NOT require they be carried visibly. However, the requirement rests upon the ability to recognize a combatant as just that. Protocol I changes this requirement in a significant way. Under the 1949 Convention, a combatant is required to distinguish himself throughout military operations. Art. 44(3), GPI, only obligates a combatant to distinguish himself from the civilian population "while they are engaged in an attack or in a military operation preparatory to an attack, or in any action carried out with a view to combat." COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 527 (Y. Sandoz, C. Swinarski, and B. Zimmerman, eds. 1987).

[31] ICRC document detailing States Party to International Humanitarian Law Treaties (as of 3 June 2003)[on file at TJGSA].

[32] *See* Hans-Peter Gasser, *The Protection of Journalists Engaged in Dangerous Professional Missions*, INT'L REV. RED CROSS (Jan/Feb. 1983), at 3. *See also* KATE WEBB, ON THE OTHER SIDE (1972) (journalist held for 23 days in Cambodia by the Viet Cong).

[33] *See* Stephen Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the Field*, ARMY LAW. (July 1994), at 29. *See generally,* MEMORANDUM FOR THE ASSISTANT JUDGE ADVOCATE GENERAL (CIVIL LAW), SUBJ: Civilians in Desert Shield -- INFORMATION MEMORANDUM (26 Nov. 1992).

f. Mass Levies (Levee en Masse).[34] To qualify these civilians must:

(1) Be in non-occupied territory; and,

(2) Act spontaneously to the invasion; and,

(3) Carry their arms visibly;[35] and,

(4) Respect the laws and customs of war.

(5) Contrast this requirement with organized resistance movements.

g. This is NOT an all-inclusive list. One's status as a prisoner of war is a question of fact.

(1) The possession of a belligerent government issued identification card is weighed heavily.

(2) Prior to 1949, possession of an identification card was a prerequisite to EPW status.[36]

4. Medical and religious personnel (Retained Personnel) receive the protections of GPW plus (Art. 4C & 33, GPW).

a. Retained personnel are to be repatriated as soon as they are no longer needed to care for the prisoners of war.[37]

b. Of note, retained status is not limited to doctors, nurse, corpsman, etc. It also includes, for example, the hospital clerks, cooks, and maintenance workers.[38]

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[34] *See* III Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter GPW], Art. 4(A)(6) and *FM* 27-10, ¶ 61. Additionally, ¶ 65 says all males of military ages may be held as POWs. The GPW does not discriminate the right to detain by gender and therefore females may be detained as well.

[35] *See* Pictet, at 67.

[36] *See* Article 81, Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929, *reprinted in*, Pictet, at 683. *See also* DEP'T OF DEF., INST. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTION (30 January 1974).

[37] This is one of the most abused provisions of the Geneva Conventions. The last time this author knows of this occurring was by the United States during World War I. During hostilities we repatriated 59 medical officers, 1,783 sanitary personnel, including 333 members of the German Red Cross. FINAL REPORT OF GENERAL JOHN J. PERSHING HQ, AEF Sept. 1, 1919, *reprinted in* XVI THE STORY OF THE GREAT WAR (1920), at App., p. lvii.

5. Persons whose POW status is debatable:[39]

   a. Deserters/Defectors;[40]

   b. Saboteurs;[41]

   c. Military advisors;[42]

   d. Belligerent diplomats,[43]and

   e. Mercenaries.[44] (Art. 47, GPI); - U.S. disagrees with this view.

   f. U.N. personnel during U.N. peace missions.[45]

6. Spies are not entitled to POW status. (Art. 29, HR and Art. 46, GPI).

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[38] *See* I INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION FOR AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 218 - 258 (Pictet ed. 1952)(Articles 24 - 28). *See generally*, ALMA BACCINO-ASTRADA, MANUAL ON THE RIGHTS AND DUTIES OF MEDICAL PERSONNEL IN ARMED CONFLICTS (ICRC, 1982) and Liselotte B. Watson, *Status of Medical and Religious Personnel in International Law*, JAG J. 41 (Sep-Oct-Nov 1965).

[39] *See* Levie, at 82 - 84; Richard R. Baxter, *So-Called 'Un privileged Belligerency': Spies, Guerrillas, and Saboteurs*, MIL. L. REV. BICENTENNIAL ISSUE 487 (1975)(Special Ed.); Albert J. Esgain and Waldemar A. Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, MIL. L. REV. BICENTENNIAL ISSUE 303 (1975)(Special Ed.).

[40] *See* Memorandum, HQDA, DAJA-IA, 22 January 1991, SUBJECT: Distinction Between Defectors/Deserters and Enemy Prisoners of War. *See also* Levie, at 77 - 78; James D. Clause, *The Status of Deserters Under the 1949 Geneva Prisoner of War Convention*, 11 MIL. L. REV. 15 (1961); and, L.B. Shapiro, *Repatriation of Deserters,* 29 BRIT. YB. INT'L L. 310 (1952).

[41] Not entitled to status if at time of capture, the individual is dressed in civilian clothes and engaged in a sabotage mission behind enemy lines. *See Ex parte Quirin* U.S. at 31. *See also* Levie, Vol 59 at 36-37 and 82-83.

[42] If a neutral nation sends a military advisor or some other representative that accompanies an armed force as an observer then that person, if taken into custody of the armed forces of the adverse Party, would not be considered a PW. The military representative could be ordered out of, or removed from the theater of war. On the other hand, if the military representative takes part in the hostilities and acts as a "military advisor" and renders "military assistance to the armed forces opposing those of the belligerent Power into whose hands they have fallen, it could be argued that they fall within the ambit of Article 4(A) and that they are therefore entitled to prisoner-of-war status." Levie, Vol. 59 at 83-84.

[43] If a belligerent diplomat, in addition to his political office, is a member of the regular armed forces or is accompanying the armed forces in the field in one of the categories included in Article 4(A), GPW then he is subject to capture and to PW status. Levie, Vol 59 at 83, 342n.

[44] *See* John R. Cotton, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 144 (1977).

[45] *See* Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, 49 U.N. GAOR Supp. (No. 49), at 299, U.N. Doc. A/49/49 (1994).

7. U.S. Policy Regarding Status of Enemy Participants in Operation Enduring Freedom.[46]

   a. The White House statement released on 7 Feb 02 resolved this issue. The President decided that neither Taliban nor al-Qaida detainees are entitled to POW status.[47]

   b. Al-Qaida is not a state party to the Geneva Convention and therefore not entitled to POW status.[48]

   c. The President decided that although the Geneva Conventions apply to the Taliban detainees, they are not entitled to POW status because they do not satisfy the four conditions specified in Article 4, GPW. The White House position is that the Taliban have not distinguished themselves from the civilian population of Afghanistan and they have not conducted their operations in accordance with the laws and customs of war.[49]

E. When an EPW's Status is in Doubt.

1. Policy: Always initially treat as EPWs.[50]

2. Law: Article 5, GPW: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

3. U.S. policy is to convene a three-member panel (FM 27-10, ¶71c). Their role is to ascertain facts, not to adjudicate any type of punishment.

   a. AR 190-8/OPNAVINST 3461.6/AFI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other

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[46] 7 Feb 02 White House Statement, *supra* note 27.

[47] *Id.*

[48] *Id.*

[49] *Id. See also* 22 Jan 02 NSC statement of U.S. policy regarding al-Qaida and Taliban detainees. Taliban and al-Qaida lack some or all of the four attributes specified in Article 4, CG III and therefore do not receive POW status.

[50] AR 190-8, 1-6(a).

Detainees, para. 1-6, Tribunals, provides guidance on how to conduct an Article 5 Tribunal.

(1) There are to be three voting members, the president of which must be a field grade officer, and one nonvoting recorder, preferably a Judge Advocate.

(2) The standard of proof is "preponderance of the evidence." The regulation does not place the burden of proof or production on either party. The tribunal should not be viewed as adversarial as the recorder need not be a JA and there is no right to representation for the subject whose status is in question.

b. If a Combatant Commander has his own regulation or policy on how to conduct an Article 5 Tribunal, the Combatant Commander's regulation would control. For example, see CENTCOM Regulation 27-13 at Appendix A.

4. During Operation Desert Storm the US conducted 1,196 Article 5 tribunals.[51]

a. A Judge Advocate could serve as a non-voting member (Recorder) or as one of the voting members of an Article 5 tribunal.[52]

b. AR 190-8 calls for the GCMCA to appoint the tribunals. Remember, a Combatant Commander policy can trump AR 190-8.

5. Recall: Article 5 tribunals are not always necessary.

a. The U.S. position regarding Article 5 tribunals for the detainees held at Guantanamo Bay is that it is not necessary. Clearly, the detainees do not satisfy the four conditions specified in Article 4, GPW and therefore there is no doubt as to their status. Article 5 tribunals are only required when there is doubt.[53]

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[51] DOD PERSIAN GULF REPORT, at 578.

[52] *See, e.g.*, U.S. CENTRAL COMMAND, REGULATION 27-13, LEGAL SERVICES - CAPTURED PERSON: DETERMINATION OF ELIGIBILITY FOR ENEMY PRISONER OF WAR STATUS (7 Feb. 95), for guidance about, and procedures for, actually conducting, Article 5 tribunals. CENTCOM REG 27-13 is included as an appendix to this chapter.

[53] The provision in Article 5 regarding "persons whose status is in doubt" was first added in the 1949 convention. The official commentary states that this provision "would apply to deserters, and to those who accompany the armed forces and have lost their identity card." The commentary goes on to state that the "clarification contained in Article 4 should, of course, reduce the number of doubtful cases in any future

F. Treatment as a Matter of Policy.

1. GPW is part of the Supreme Law of the Land (Article VI, Constitution of the United States). Thus, its Articles apply unless they are inconsistent with the Constitution itself.

2. DA is Executive Agent for all EPW Matters. DoD Dir. 2310.1 provides: "U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions.[54]"

3. DoD Dir. 5100.77, Law of War Program, requires all US Forces to comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized.

4. CJCS 5810.01B, Implementation of the DoD Law of War Program, indicates that the laws of war are to be applied on MOOTW by American forces.

5. Every JA and soldier must understand that **STATUS** is a matter of law. While the United States **TREATS** all persons initially detained consistent with the provisions of the GPW, this is only a policy.[55]

6. The Phenomenon of Detainees. In operations other than war, the status of a person temporarily detained is frequently at issue. Therefore, our policy is to initially provide the greatest protections this person could receive until our government determines their legal status

   a. We train our soldiers to always treat captured persons as EPWs (Doctrine).

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conflict." Pictet at 77-78. Therefore, it seems logical that if there is no doubt that a captured individual fails to meet one of the categories of article 4, there is no need to conduct an Article 5 tribunal. Furthermore, in the case of al-Qaida, they clearly are not a party to the convention, therefore Article 5, GPW, as well as the entire GPW (except arguably CA 3), does not apply to them. However, assuming arguendo that al-Qaida could be considered a resistance movement belonging to the Taliban there is no doubt that al-Qaida members fail to meet the four criteria under Article 4(A).

[54] Note, the DoD Directive refers to the Geneva Conventions, not simply the one relating to EPWs. This supports the use of the GC when more appropriate than the GPW: certain detainees. For a thorough analysis of the rights afforded civilians along the operational continuum, *see* Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW. (Nov. 1996), at 3.

[55] *See also* Art. 4 & 27, GC.

b. We want our soldiers to receive POW treatment from our adversary (Reciprocity).

c. We may be wrong in our analysis, but one can rarely be criticized for affording persons greater protections than they are otherwise entitled (Public perception).[56]

d. Various issues regarding detainees in operations other than war occurred in Haiti,[57]Somalia,[58] and Bosnia-Herzegovina.[59]

III. PRIMARY PROTECTIONS PROVIDED TO PRISONERS OF WAR

A. Protections, "The Top Ten."[60]

1. Humane Treatment. Art. 13, GPW.[61]

2. No medical experiments. Art. 13, GPW.[62]

3. Protect from violence, intimidation, insults, and public curiosity. Art. 13, GPW.[63]

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[56] *See generally, U.S. v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992). Of note, the U.S. chose not to appeal the decision.

[57] *See* Larry Rohter, *Legal Vacuum in Haiti is Testing U.S. Policy,* N.Y. TIMES, Nov. 4, 1994, at A32. *See ALSO* LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES, 59 - 72, and App. R (11 Dec. 95)[hereinafter Haiti AAR].

[58] *See* Memorandum, CDR, Unified Task Force Somalia, to All Subordinate Unified Task Force Commanders, subj: Detainee Policy (9 Feb. 93).

[59] *See* Office of the Legal Counsel to Chairman, Joint Chiefs of Staff, Information Paper, subj: Legal status of aircrews flying in support of UNPROFOR (2 June 1995); Message, Joint Staff/SECSTATE, subj: POW Status of NATO Aircrews in Bosnia (200343Z Feb 94).

[60] For an excellent discussion regarding the "Top Ten" protections, *See* Major Geoffrey S. Corn and major Michael L. Smidt, *"To Be or Not to Be, That is the Question", Contemporary Military Operations and the Status of Captured Personnel,* The Army Lawyer, DA PAM 27-50-319, June 1999.

[61] The requirement that PWs must at all times be humanely treated is the basic theme of the Geneva Conventions. Pictet, *supra* note 2, at 140. A good rule of thumb is to follow the "golden rule". That is, to treat others in the same manner as you would expect to be treated or one of your fellow servicemembers to be treated if captured. In other words, if you would consider the treatment inhumane if imposed upon one of your fellow servicemembers, then it probably would violate this provision.

[62] Pictet, *supra* note 2, at 140-41.

[63] Trial of Lieutenant General Kurt Maelzer, Case No. 63, *reprinted in* UNITED NATIONS WAR CRIMES COMMISSION, XI LAW REPORTS OF TRIALS OF WAR CRIMINALS 53 (1949)(parading of American prisoners of war through the streets of Rome). *See* Gordon Risius and Michael A. Meyer, *The protection of prisoners of*

4. Equality of treatment. Art. 16, GPW.[64]

5. Free maintenance and medical care. Art. 15, GPW.[65]

6. Respect for person and honor (specific provision for female POWs included).[66] Art. 14, GPW.

7. No Reprisals. Art. 13, GPW.

8. No Renunciation of Rights or Status. Art. 7, GPW.

9. The Concept of the Protecting Power. Art. 8, GPW.[67]

10. Immunities for warlike acts, but not for pre-capture criminal offenses (i.e., Noriega), or violations of the law of war.[68]

B. Capture - The 5 S's (Search, Silence, Segregate, Safeguard, Speed to the rear).[69] Art. 13, 16,17,19,20 GPW.

1. Authority to detain can be expressly granted in the mission statement; implied with the type of mission; or inherent under the self defense/force protection umbrella.

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war against insults and public curiosity, INT'L REV. RED CROSS, No. 295, (July/Aug. 1993), at 288. This article focuses on the issue of photographing prisoners of war.

[64] Pictet, *supra* note 2, at 154.

[65] *Id.* at 152-53.

[66] *Id.* at 142-52.

[67] *See* Levie, at 262.

[68] The GPW does not specifically mention combatant immunity. It is considered to be customary international law. Moreover, it can be inferred from the cumulative affect of protections within the GPW. For example, Article 13 requires that prisoners not be killed, and Article 118 requires their immediate repatriation after cessation of hostilities. Although Article 85 does indicate that there are times when prisoners of war may be prosecuted for precapture violations of the laws of the detaining power, the Official Commentary accompanying Article 85 limits this jurisdiction to only two types of crimes. A prisoner may be prosecuted only for (1) war crimes, and (2) crimes that have no connection to the state of war. *See* Corn and Smidt, *supra* note 50 at n. 124.

[69] DEP'T OF ARMY, FIELD MANUAL 19-40, ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES AND DETAINED PERSON (Feb. 1976), at ¶2-4. An important component of the 5Ss often neglected is speed to the rear. EPWs can be on the move for days before they reach their final camp. According to FM 19-40, the echelon having custody of the EPW has responsibility to provide the prisoner sufficient rations during the move. *Id.*, at ¶2-9.

See John L. Della Jacono, *Desert Storm Team EPW*, MILITARY POLICE (June 1992), at 7, for a discussion of MP EPW operations during Operation Desert Storm.

2. The protection and treatment rights, as well as the obligations begin ". . .[F]rom the time they fall into the power of the enemy . . ."[70] (Art. 5, GPW).

3. EPWs can be secured with handcuffs (flex cuffs) and blindfolds, as well as shirts pulled down to the elbows, as long as it is done humanely (can't be for humiliation/intimidation purposes).

   a. Protect against public curiosity.

      (1) Art. 13 does not per se prohibit photographing an EPW. Photos may not degrade or humiliate an EPW. In addition, balance harm to an EPW and family against news media value. Bottom line: strict guidelines required.[71]

      (2) This is in stark contrast to Iraq and North Vietnam's practice of parading POWs before the news media.

   b. POW capture tags. All POWs will, at the time of capture, be tagged using DD Form 2745.[72]

4. Property of Prisoners. (Art.18, GPW)

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[70] During Desert Storm some Iraqi Commanders complained that the Coalition forces did not fight "fair" because our forces engaged them at such distances and with such overwhelming force that they did not have an opportunity to surrender. Additionally, some complained that they were merely moving into position to surrender. However, the burden is upon the surrendering party make his intentions clear, unambiguous, and unequivocal to the capturing unit. In the case of *United States v. Griffen,* 39 C.M.R. 586 (A.B.R. 1968), *pet. denied,* 39 C.M.R. 293 (C.M.A. 1968), a general court-martial convicted an Army staff sergeant of murder for killing a Vietnamese prisoner of war on the order of his platoon leader.

[71] *See* DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (April 1992), at 618. DEP'T OF ARMY, REGULATION, ENEMY PRISONERS OF WAR ADMINISTRATION, EMPLOYMENT, AND COMPENSATION ¶ 2-15 (2 Dec 85) provides:

   a. EPW will not be photographed except in support of medical documentation, for official identification, or for other purposes described in this regulation.
   b. Interviews of EPW by news media will not be permitted. For purposes of this regulation the term "interview" includes any medium whereby prisoners release information or statements for general publication. It includes, but is not limited to, the taking of still or motion pictures concerning EPW for release to the general public, and telephone, radio, or television interviews or appearances, or mailing material apparently for distribution to the general public.

Additionally, AR 190-8 provides: "Photographing, filming, and video taping of individual EPW, CI, and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Interment Facility commander's chain of command. AR-190-8 at 1-5(4)(d).

[72] AR 190-8 at 2-1.a.(1)(b)and (c).

a. Weapons, ammunition, and equipment or documents with intelligence value will be confiscated and turned over to the nearest intelligence unit. (AR 190-8)

b. EPWs and retained personnel are allowed to retain personal effects such as jewelry, helmets, canteens, protective mask and chemical protective garments, clothing, identification cards and tags, badges of rank and nationality, and Red Cross brassards, articles having personal or sentimental value and items used for eating except knives and forks. See Art. 18, GPW and AR 190-8.[73]

c. But what about captured persons not entitled to EPW status? *See* Art 97, GC.[74]

d. War trophies. It has consistently been the U.S. policy to limit the types and amounts of property taken from the battlefield and retained by the individual soldier. All enemy property captured is the property of the U.S. However, the personal property of EPWs is usually protected from confiscation and seizure.[75] Soldiers are not even supposed to barter with EPWs for personal items.[76] However, because of perceived abuses that occurred in not enforcing this policy, Congress legislated two important provisions: 10 U.S.C. §2579[77] and 50 U.S.C. §2201.[78] DoD has yet to

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[73] Ltr, HQDA, DAJA-IA 1987/8009, subj: Protective Clothing and Equipment for EPWs. *See also*, Pictet, at 166, n. 2.

[74] Art. 97 essentially allows the military to seize, but not confiscate, personal property of those civilians protected by the Fourth Convention. The difference is important. Confiscate means to take permanently. Seizing property is a temporary taking. Property seized must be receipted for and returned to the owner after the military necessity of its use has ended. If the property cannot be returned for whatever reason, the seizing force must compensate the true owner of the property. *See* Operational Law Handbook (2004) and Elyce K.K. Santerre, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 MIL L. REV. 111 (1989), for a more detailed discussion of the distinction between, requisition, seizure, and confiscation of private property and when it is lawful to do so.

[75] *See* Levie, at 110 - 118.

[76] FM 27-10, ¶94b.

[77] Despite the Congressional requirement in 1994 for DoD to establish regulations for handling war trophies within 270 days of the statute's enactment, DoD has yet to provide any DoD level guidance on how to handle these objects.

[78] Commonly called The Spoils of War Act of 1994, it limits the transfer of captured enemy movable property to the same procedures applicable to the similar military property. (i.e., Arms Export Control Act). It excludes "minor articles of personal property which have lawfully become the property of individual members of the armed forces as war trophies pursuant to public written authorization from the Department of Defense." 50 U.S.C. § 2205. The obvious intent was to exempt war trophies as outlined in 10 U.S.C. § 2579. However, the

implement regulations on the procedures for handling and retaining battlefield objects.

5. Rewards for the capture of EPWs are permissible, but they must avoid even the hint of a "wanted dead or alive" mentality.[79]

6. What can I ask an EPW? ANYTHING!!

   a. All POWs are required to give: (Art. 17, GPW)

      (1) Surname, first name;

      (2) Rank;

      (3) Date of birth; and,

      (4) Serial number.

   b. What if an EPW refuses to provide his rank? Continue to treat as POW: an E-1 POW.[80]

   c. No torture, threats, coercion in interrogation (Art. 17, GPW). **It's not what you ask but how you ask it.**[81]

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legislation is poorly written. Art. 18, GPW prohibits this. Only enemy public property may be seized. Enemy public property frequently includes property of a soldier used for his personal use (i.e. TA-50, a weapon). That type of property is different than a soldier's personal property.

[79] The U.S. issued an offer of reward for information leading to the apprehension of General Noreiga. Memorandum For Record, Dep't of Army, Office of the Judge Advocate General, DAJA-IA, subj: Panama Operations: Offer of Reward (20 Dec. 1989).This is distinct from a wanted "dead or alive" type award offer prohibited by the Hague Regulations. *See* FM 27-10, ¶31 (interpreting HR, art. 23b to prohibit "putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'").

[80] GPW, art. 17, para. 2. *See also* Pictet, at 158 - 9.

[81] 15 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 101 n. 4 (1949) *See* Stanley J. Glod and Lawrence J. Smith, *Interrogation Under the 1949 Prisoners of War Convention*, 21 Mil. L. Rev. 145 (1963); III COMMENTARY, *supra,* at 163 - 4; Levie, at 106 - 109.

There may be tensions between the military police and the military intelligence communities in this area, especially in operations other than war. The Army has charged the military police branch with responsibility for administering EPWs and Civilian Internees. *See* Chapter 1, AR 190-8; DEP'T OF THE ARMY, REGULATION 190-57, MILITARY POLICE: CIVILIAN INTERNEE - ADMINISTRATION, EMPLOYMENT, AND COMPENSATION (4 Mar. 1987); and FM 19-40. Military Police units use these regulations as their guide in MOOTW. Both regulations prohibit any physical or moral coercion. *See* AR 190-47, para. 1-5; AR 190-8, para. 1-5d. *See also* FM 19-40, para. 1-13d. However, prisoners of war provide a prime resource of intelligence information. *See* DoD PERSIAN GULF REPORT, at 585 - 586, and Haiti AAR, at 53 - 56. Consequently, military intelligence personnel use various interview techniques to acquire information. *See, e.g.*, DEP'T OF THE ARMY, FIELD

(1) What about use of truth serum? No, violates GPW.[82]

(2) North Korean water torture of feet during the winter clearly violated Art. 17.[83]

(3) Techniques such as placing the EPW at attention during interrogation, planting a cellmate, or concealing a microphone in the POW's cell do not violate Art. 17.[84]

(4) It may often be difficult to determine where lawful interrogation actions end and unlawful actions begin. Use of a common sense indicator is always helpful. One should ask themselves: if these actions were perpetrated by the enemy against American POWs, would one believe such actions violate international or U.S. law? If the answer is yes, avoid the interrogation techniques.[85]

MANUAL 34-52, INTELLIGENCE: INTERROGATION (28 Sept. 1992). These techniques may appear to be inconsistent with military police guidance. The judge advocate should become involved to ensure the interrogations comply with a detainee's rights, yet affords the intelligence officer the latitude to utilize interrogation techniques authorized under the applicable law. Additionally, as of June 2004, in light of recent events, FM 34-52, Intelligence Interrogation, is under review/revision and will be reissued as FM 2-22.3.

U.S. POWs have routinely been subjected to torture by their captors. In the Persian Gulf War, all 23 American POWs were tortured. In one technique called the "talkman," a device was wrapped around the prisoner's head and then attached to a car battery. *See* Melissa Healy, *Pentagon Details Abuse of American POWs in Iraq; Gulf War: Broken Bones, Torture, Sexual Threats are reported. It could spur further calls for War Crimes Trials*, L.A. TIMES, Aug. 2, 1991, at A1. *See also* Nora Zimchow, *Ex-POW's Tail of a Nightmare; Marine Flier Guy Hunter Endured 46 Days of Physical and Psychological Torture in Iraqi Hands. He finally made a videotape denouncing the war, believing he might not live*, L.A. TIMES, Mar. 31, 1991, at A1. The Iraqis did not limit their mistreatment to only U.S. prisoners. *See Iraqi torturers failed to crack SAS soldier's cover story*, THE HERALD (Glasgow), Oct. 13, 1993, at 9, *available in* LEXIS, Nexis Library, ARCNWS file.

For a description of the interrogation techniques used by the communists during the Korean War, *see* S. RPT. NO. 2832, COMMUNIST INTERROGATION OF AMERICAN PRISONERS, 84th Cong., 2d Sess. (1957); S. COMM. ON GOV'T OP., COMMUNIST INTERROGATION, INDOCTRINATION, AND EXPLOITATION OF AMERICAN MILITARY AND CIVILIAN PRISONERS, 83rd Cong., 2d Sess. (1956).

[82] *See* OTJAG opinion: JAGW 1961/1157, 21 June 1961.

[83] *See* Ministry of Defence, United Kingdom, *Treatment of British Prisoners of War in Korea* (HMSO, 1955), *reprinted in*, Levie, DOCUMENTS ON PRISONERS OF WAR, at 651, 662. This article provides a compelling account of the inhumane treatment provided U.N. POWs generally during the Korean War.

[84] *See* DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION 3-11 (28 Sept. 92) and Glod and Smith, *supra*, at 155.

[85] *See* FM 34-52, *supra*, at 1-9.

d. Your U.S. military ID card is your GC card. NOTE: Categories are I to V, which corresponds to respective rank. *See* Art. 60, GPW.

IV. EPW CAMP ADMINISTRATION AND DISCIPLINE[86]

A. Responsibility (Art. 12, GPW).

1. The State (Detaining Power) is responsible for the treatment of prisoners. Prisoners of war are not in the power of the individual or military unit that captured them. They are in the hands of the State itself which the individuals or military units are only agents.[87]

B. Locations.

1. Land only (Art 22, GPW). However, during the Falklands War the British temporarily housed Argentine EPWs on ship while in transit to repatriation.

2. Not near military targets (Art 23, GPW).[88] During the Falklands War, several Argentine EPWs were accidentally killed while moving ammunition away from their billets.

3. Prisoners of war must be assembled into camps based upon their nationality, language and customs (Art. 22, GPW).

   a. Generally, cannot segregate prisoners based on religion or ethnic background.[89] However, segregation by these beliefs may be required

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[86] For a historical recount of some of the most horrific treatment of conditions faced by POWs in any war, *see* GAVAN DAWS, PRISONERS OF THE JAPANESE: POWS OF WORLD WAR II IN THE PACIFIC (1994). *Compare* conditions U.S. POWs have historically suffered with the treatment U.S. forces have historically afforded their prisoners. *See, e.g.,* Jack Fincher, *By Convention, the enemy within never did without*, SMITHSONIAN (June 1995), at 126 (an account of U.S. treatment of German POWs during World War II) and Gary Marx, *Panama prison camp no Stalag 17*, CHI. TRIB., Jan. 8, 1990.

[87] Pictet, *supra* note 2, at 128-29.

[88] Iraq used U.S. and allied POWs during the Persian Gulf War as human shields in violation of Art. 19 & 23, GPW. *See Iraqi Mistreatment of POWs*, DEP'T OF STATE DISPATCH, Jan. 28, 1991, at 56 (Remarks by State Department Spokesman Margaret Tutwiler). *See also* DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (April 1992), at 619 - 620.

[89] Art. 34, GPW. One of the most tragic events of religions discrimination by a detaining power for religious reasons was the segregation by the Nazis of Jewish American Prisoners of War. Several Jewish American soldiers were segregated from their fellow Americans and sent to slave labor camps where "they were beaten, stared and many literally worked to death." MITCHELL G. BARD, FORGOTTEN VICTIMS: THE ABANDONMENT OF AMERICANS IN HITLER'S CAMPS (1994). *See also* Trial of Tanaka Chuichi and Two Others *in* UNITED NATIONS WAR CRIMES COMMISSION, XI LAW REPORTS OF WAR CRIMES TRIALS 62 (1949) (convicting Japanese prison guards, in part, for intentionally violating the religious practices of Indians of the Sikh faith).

especially when they are a basis for the conflict. Such as in Yugoslavia: Serbs, Croats, and Muslims; Rwanda: Hutus, Tutsis; and Chechnya.

b. Political beliefs. Art. 38, GPW, encourages the practice of intellectual pursuit. However, the U.N. experience in EPW camps has demonstrated that pursuit of political beliefs can cause great discipline problems within a camp. In 1952, on Koje-do Island, riots broke out at the EPW camps instigated by N. Koreans EPW communist activists. N. Korean EPW extremist groups murdered scores of prisoners sympathetic to South Korea. During the rioting, EPWs captured the camp commander, Brigadier General Dodd.[90]

C. What Must Be Provided?

1. Quarters equal to Detaining forces. Art. 25, GPW (total surface & minimum cubic feet).

2. Adequate clothing considering climate. Art. 27, GPW.

3. Canteen. Art 28, GPW.[91]

4. Tobacco. Art. 26, GPW.[92]

5. Recreation Art. 38, GPW.

6. Religious accommodation Art. 34, GPW.

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[90] DEP'T OF THE ARMY, OFFICE OF THE PROVOST MARSHALL, REPORT OF THE MILITARY POLICE BOARD NO. 53-4, COLLECTION AND DOCUMENTATION OF MATERIAL RELATING TO THE PRISONER OF WAR INTERNMENT PROGRAM IN KOREA, 1950-1953 (1954). *See also* WALTER G. HERMES, TRUCE TENT AND FIGHTING FRONT (1966), at 232-63; *The Communists War in POW Camps*, Dep't of State Bulletin, Feb 6, 1953, at 273; Harry P. Ball, *Prisoner and War Negotiations: The Korean Experience and Lesson*, in 62 INTERNATIONAL LAW STUDIES: THE USE OF FORCE, HUMAN RIGHTS AND GENERAL INTERNATIONAL LEGAL ISSUES, VOL. II, 292-322 (Lillich & Moore, eds., 1980).

[91] The U.S. does not provide EPWs with a canteen, but instead provides each EPW with a health and comfort pack. Memorandum, HQDA-IP, 29 Oct. 94, subj: Enemy Prisoner of War Health and Comfort Pack.

[92] *See* Memorandum, HQDA-IO, 12 Sept. 94, subj: Tobacco Products for Enemy Prisoners of War. During Desert Storm, the 301st Military Police EPW camp required 3500 packages of cigarettes per day. *Operation Deserts Storm: 301st Military Police EPW Camp Briefing Slides, available in* TJAGSA, ADIO POW files. *See also* WILLIAM G. PAGONIS, MOVING MOUNTAINS: LESSONS IN LEADERSHIP AND LOGISTICS FROM THE GULF WAR 10 (1992), for LTG Pagonis' views about being told he must buy tobacco for EPWs.

7. Food accommodation Art. 26 & 34, GPW.

   a. If possible, utilize enemy food stocks and let them prepare their own food. Art. 26, GPW.

8. Copy of GPW in POWs own language. Copies available at:

   ICRC
   Delegation to the UN
   801 2nd Ave, 18th Fl,
   New York, NY 10017
   (212) 599-6021
   FAX: (212) 599-6009

9. Due process. Art 99 - 108, GPW.

10. Hygiene Art. 29, GPW.

    a. Separate baths, showers and toilets must be provided for women prisoners of war. Art 29, GPW.

D. EPW Accountability. Art. 122 & 123, GPW.[93]

1. Capture notification—PWIS. This system was utilized during Operations Desert Storm and Operation Uphold Democracy.

2. EPW personal property. Art. 16, GWS; AR 190-8.

3. EPW death. Art. 120 & 121, GPW.

   a. 8 POWs died while under U.S. control during Desert Storm, 3 more died under Saudi control after transfer from U.S. custody.

   b. Any death or serious injury to a POW requires an official inquiry.

4. Reprisals against EPWs are prohibited. Art. 13, GPW.[94]

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[93] *See* Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, ARMY LAW., August 1994, at 16, for an excellent review of the United States system of tracking EPWs. *See also* Robert G. Koval, *The National Prisoner-of-War Information Center*, MILITARY POLICE (June 1992), at 25.

[94] In Vietnam, by 1965 scores of U.S. servicemen had become prisoners of war. The US argued for full protections under the GPW as by mid-1965 the hostilities had risen to the level of an armed conflict. *See*

E. Transfer of POWs. Art. 46 - 48, GPW.

1. Belligerent can only transfer EPWs to nations who are parties to the Convention.

2. Detaining Power remains responsible for POWs care.

   a. There is no such thing as a "U.N." or "coalition" EPW.[95]

   b. To ensure compliance with the GPW, U.S. Forces routinely establish liaison teams and conduct GPW training with allied forces prior to transfer EPWs to that nation.[96]

Letter from the ICRC to the Secretary of State dated 11 June 1965, 4 I.L.M. 1171 (1965); *U.S. Continues to Abide by Geneva Conventions of 1949 in Viet Nam*, DEP'T OF STATE BULLETIN, Sept. 13, 1965, p. 3. N. Vietnam argued that they were committing "acts of piracy and regard the pilots who have carried out pirate raids . . . as major criminals. . . ." *Hanoi said to Hint Trial of Americans*, N.Y. TIMES, Feb. 12, 1966, at A12. *See also Hearings on American Prisoners of War in Southeast Asia 1971 before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 92d Cong., 1st Sess., at 448 - 49 (1971).

To complicate matters, the U.S. initially transferred captured Viet Cong to South Vietnam. South Vietnam considered the V.C. insurgents subject solely to their domestic law, and routinely denied EPW status to them. Shortly after the trial and execution of several Viet Cong by the South Vietnamese government, North Vietnam retaliated by executing Captain Humbert R. (Rocky) Versace and Sergeant Kenneth Roarback in September 1965. *See* Neil Sheehan, *Reds' Execution of 2 Americans Assailed by U.S.*, N.Y. TIMES, Sept. 28, 1965, at A1. Shortly thereafter, the U.S. policy towards the Viet Cong changed. U.S. policy became, V.C. captured "on the field of battle" would be afforded POW status. *See* U.S. MILITARY ASSISTANCE COMMAND, VIETNAM, DIRECTIVE 381-11, Exploitation of Human Sources and Captured Documents, 5 August 1968. *See also* THE HISTORY OF MANAGEMENT OF POWS: A SYNOPSIS OF THE 1968 US ARMY PROVOST MARSHAL GENERAL'S STUDY ENTITLED "A REVIEW OF UNITED STATES POLICY ON TREATMENT OF PRISONERS OF WAR" (1975), at 49 - 55. Captain Versace was from Madison, Wisconsin and graduated from West Point in 1959. *See* UNITED STATES MILITARY ACADEMY, THE 1959 HOWITZER 473 (1959)(includes a picture of Captain Versace). On July 9, 2002, President G. W. Bush posthumously awarded Captain Rocky Versace the Medal of Honor for the extraordinary resistance he displayed during his brutal captivity in North Vietnam PW camps.

Acts of reprisals have not always been prohibited. In fact, during the Civil War, the War Department issued General Order 252 of 1863 whereby President Lincoln ordered that " for every soldier of the United States killed in violation of the laws of war, a rebel soldier shall be executed; and for every one enslaved by the enemy or sold into slavery . . . a rebel soldier shall be placed at hard labor on the public works, and continued at such labor until the other shall be released and receive treatment due to a prisoner of war. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 796 (2d ed. 1920).

[95] *See* Albert Esgain and Waldemar Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, MIL. L. REV. BICENT. ISSUE 303, 328-330 (1975), for a discussion of the practical problems faced with this provision.

[96] *See, e.g.*, Memorandum of Agreement Between the United States of America and the Republic of Korea on the Transfer of Prisoners of War/Civilian Internees, signed at Seoul February 12, 1982, T.I.A.S. 10406. *See*

c. Requires Assistant Secretary of Defense for International Security Affairs approval.[97]

F. Complaints and Prisoners' Representatives (PR). Art 78-81, GPW.

1. Voting for a PR conflicts with Code of Conduct SRO requirement (see discussion in Section V below).

2. SRO will take command.

3. EPWs have standing to file a Habeas Corpus action under 28 U.S.C. § 2255 to seek enforcement of their GPW rights.

G. EPW Labor.[98] Art 49 – 57, GPW; AR 190-8 - **READ IT!**).

1. Rank has its privileges.

a. Officers: can't compel them to work.

b. NCOs: you can compel them to supervise only.

c. Enlisted: you can compel them to do manual labor.

d. If they work, you must pay them.

e. Retained Personnel shall not be required to perform any work outside their medical or religious duties. This is an absolute prohibition that includes work connected to the administration and upkeep of the camp. Art. 28(c), GWS.

2. Detainee status.[99]

3. Compensation (Art. 60, GPW).[100] 8 days paid vacation annually. Art. 53, GPW.

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also UNITED STATES FORCES KOREA, REGULATION 190-6, ENEMY PRISONERS TRANSFERRED TO REPUBLIC OF KOREA CUSTODY (3 Apr. 1992). *See also* DoD PERSIAN GULF REPORT, at 583; and, Haiti AAR, *supra* note 19, 59 - 72 and App. R, for an overview of Detainee operations in Haiti.

[97] DoD DIR. 2310.1, ¶C(3).

[98] *See* Howard S. Levie, *The Employment of Prisoners of War*, 23 MIL. L. REV. 41, and Levie, at 213 - 254. *See generally*, Frank Kolar, *An Ordeal That Was Immortalized: Not all was fiction in the story of the bridge on the River Kwai*, MIL. HISTORY (Feb. 1987), at 58.

[99] *See* Art. 40 & 51, GC for an analogy. Detainee work should relate to feeding, sheltering, clothing, transport, and the health of other detainees or other nationals of the near-occupied territory.

4. Type of Work

   a. Work cannot be unhealthy or dangerous, unless prisoners of war volunteer. Work cannot be humiliating. Art. 52, GPW.

   b. Work such as camp administration, installation, and maintenance is authorized, as well as work relating to agriculture; commercial business, and arts, and crafts; and domestic service without restriction to military character or purpose.[101]

   c. Industry work (other than in the metallurgical, machinery, and chemical industries); public works and building operations; transport and handling of stores; and public utility services is authorized provided it has no military character or military purpose. Art. 50, GPW.

   d. Work in the metallurgical, machinery, and chemical industry is strictly prohibited. Art. 50, GPW.

H. Camp Discipline.

1. Disciplinary sanctions (Art. 15 type punishment).

   a. Must relate to breaches of camp discipline.

   b. Only 4 types of punishments authorized (Art. 88, GPW). Max. punishments are (Art. 90, GPW):[102]

      (1) Fine: ½ pay up to 30 days.

      (2) Withdrawal of privileges, not rights.

      (3) 2 hours of fatigue duty per day for 30 days.

      (4) Confinement for 30 days. Art. 87, 89, 90, 97, & 98, GPW.

   c. Imposed by the camp commander. Art. 96, GPW.

2. Judicial sanctions.

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[100] *See* DEP'T OF THE ARMY REGULATION 37-1, FINANCIAL ADMINISTRATION: ARMY ACCOUNTING AND FUND CONTROL (30 Apr. 1991), Chapter 36.

[101] Pictet, *supra* note 2 at 150-51.

[102] The GC provides the same maximum punishments for civilian internees. *See* Art. 119, GC.

a. EPWs pre-capture offenses v. post-capture offenses.

(1) Pre-capture: GCM or federal or state court if they have jurisdiction over U.S. soldier for same offense. Art. 82, 85, GPW.[103]

(2) Post-capture: any level court-martial allowed under UCMJ. Jurisdiction for post-capture offenses is found under Art. 2(9), UCMJ (Art. 82, 102, GPW).

(3) Court-martial or military commission (Art. 84). [BUT note effect of Art. 102, GPW is that U.S. must use a court-martial unless policy is changed to allow trial of a U.S. service members before a military commission.][104]

b. Detainees.

(1) Military Commissions.[105]

(2) Local National Court.

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[103] *See* 10 U.S.C. §802(a)(9) and 18 U.S.C. §3227.

It should be noted that at least 12 nations have made a reservation to Art. 85, GPW. The reservation in essence would deny a POW their protected status if convicted of a war crime. North Vietnam used their reservation under Art. 85 to threaten on several occasions the trial of American pilots as war criminals. *See* MARJORIE WHITEMAN, 10 DIGEST OF INTERNATIONAL LAW 231 - 234 (1968); J. Burnham, *Hanoi's Special Weapons System: threatened execution of captured American pilots as war criminals,* NAT. REV., Aug. 9, 1966; *Dangerous decision: captured American airmen up for trial?,* NEWSWEEK, July 25, 1966; *Deplorable and repulsive: North Vietnam plan to prosecute captured U.S. pilots as war criminals,* TIME, July 29, 1966, at 12 - 13. *See generally,* Joseph Kelly, *PW's as War Criminals,* MIL. REV. (Jan. 1972), at 91.

[104] *See* Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion on the Constitutional and Jurisdictional Distinctions Between the Two Courts,* The Army Lawyer, March 2002. *For* an excellent historical use of military commissions, *See* Major Michael O. Lacey, *Military Commissions: A Historical Survey,* The Army Lawyer, March 2002.

[105] The current War on Terrorism includes the possible use of Military Commissions as a tool in combating terrorism (President Bush's 13 Nov 01 Military Order). There is much speculation that military commissions will begin shortly for a limited number of terrorists, including some of the GITMO detainees. The rules and procedures have been published (SECDEF 21 Mar 02 Military Commissions Order No.1). Additionally, on 30 April 2003, SECDEF issued eight instructions (Military Commissions Instructions 1 through 8) that published the crimes and elements of possible offenses (Military Commission Instruction No. 2), as well as further guidance and procedures in preparation of any military commission. For further information regarding the use of military commissions see the above note as well as *See* Robinson O. Everett and Scott L. Silliman, *Forums For Punishing Offenses Against the Law of Nations,* 29 WAKE FOREST L. REV. 509 (1994). *See also* Major General (Ret.) Michael J. Nardotti, Jr, *Military Commissions,* The Army Lawyer, March 2002. *See also American Bar Association, Task Force on Terrorism and the Law Report and Recommendation on Military Commission* dated January 4, 2002 (republished in The Army Lawyer, March 2002).

c. Due process required.

(1) POWs: same as detaining powers military forces. Art 99 - 108, GPW.

(2) Detainees. What due process they receive depends upon status: GC, common Art. 3, or minimal human rights protection with Host Nation law.

(3) Right to appeal. Art 106, GPW.

I. Escape of Prisoners of War.

1. When is an escape successful:[106] (Art. 91, GPW).

a. Service member has rejoined his, or Allies', armed forces; or

b. Service member has left the territory of the Detaining power or its ally (i.e., entered a neutral country's territory).[107]

2. Unsuccessful escape.

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[106] Between 1942 and 1946, 2,222 German POWs escaped from American camps in the U.S. At the time of repatriation, 28 still were at large. One remained at large and unaccounted for in the U.S. until 1995! None of the German POWs ever successfully escaped. During World War II, 435,788 German POWs were held on American soil (about 17 divisions worth). Of all the Germans captured by the British in Europe, only one successfully escaped and returned to his own forces. This German POW did this by jumping a prisoner train in Canada and crossing into the U.S., which at that time was still neutral. ALBERT BIDERMAN, MARCH TO CALUMNY: THE STORY OF AMERICAN POW'S IN THE KOREAN WAR 90 (1979) Jack Fincher, *By Convention, the enemy within never did without*, SMITHSONIAN (June 1995), at 127. *See also* ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA (1994).

See, A. Porter Sweet, *From Libby to Liberty*, MIL. REV. (Apr. 1971), at 63, for an interesting recount of how 109 union soldiers escaped a Confederate POW camp during the Civil War. *See* ESCAPE AND EVASION: 17 TRUE STORIES OF DOWNED PILOTS WHO MADE IT BACK (Jimmy Kilbourne, ed. 1973), for stories of servicemen who successful avoided capture after being shot down behind enemy lines or those who successfully escaped POW camps after capture. The story covers World War I through the Vietnam War. According to this book, only 3 Air Force pilots successfully escaped from captivity in North Korea. Official Army records show that 670 soldiers captured managed to escape and return to Allied control, however, none of the successful escapees had escaped from permanent POW camps. *See* Paul Cole, I POW/MIA Issues, The Korean War 42 (Rand Corp. 1994). *See also* George Skoch, *Escape Hatch Found: Escaping from a POW camp in Italy was one thing. The next was living off a war-torn land among partisans, spies, Fascists and German Patrols*, MIL. HISTORY (Oct. 1988), at 34.

[107] *See* SWISS INTERNMENT OF PRISONERS OF WAR: AN EXPERIMENT IN INTERNATIONAL HUMANE LEGISLATION AND ADMINISTRATION (Samuel Lindsay, ed., 1917), for an account of POW internment procedures used during World War I.

a. Only disciplinary punishment for the escape itself (Art. 92, GPW). *See also* Art. 120, GC.

b. Offenses in furtherance of escape.[108]

(1) Disciplinary punishment only: if sole intent is to facilitate escape and no violence to life or limb, or self-enrichment (Art. 93, GPW). For example, a POW may wear civilian clothing during escape attempt without losing his POW status.[109]

(2) Judicial punishment: if violence to life or limb or self-enrichment. Art. 93, GPW.

3. Successful escape.

a. Some authors argue no punishment can be imposed for escape or violence to life or limb offenses committed during escape if later recaptured. Art 91, GPW; Levie.

b. However, most authors posit that judicial punishment can occur if a POW is later recaptured for his previous acts of violence.

c. Issue still debated so U.S. policy is not to return successfully escaped POW to same theater of operations.

4. Use of force against POWs during an escape attempt or camp rebellion is lawful. Use of deadly force is authorized "only when there is no other means of putting an immediate stop to the attempt."[110]

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[108] *But see* 18 U.S.C. § 757 which makes it a felony, punishable by 10 years confinement and $10,000 to procure "the escape of any prisoner of war held by the United States or any of its allies, or the escape of any person apprehended or interned as an enemy alien by the United States or any of its allies, or . . . assists in such escape . . ., or attempts to commit or conspires to commit any of the above acts. . . ."

[109] *Rex v. Krebs* (Magistrate's Court of the County of Renfrew, Ontario, Canada), 780 CAN. C.C. 279 (1943). The accused was a German POW interned in Canada. He escaped and during his escape he broke into a cabin to get food, articles of civilian clothing, and a weapon. The court held that, since these acts were done in an attempt to facilitate his escape, therefore, he committed no crime.

[110] Pictet, at 246. *See also id.*, at 246-248. *Compare Trial of Albert Wagner*, XIII THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF THE TRIAL OF WAR CRIMINALS, Case No. 75, 118 (1949), with *Trial of Erich Weiss and Wilhelm Mundo*, XIII THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF THE TRIAL OF WAR CRIMINALS, Case No. 81, 149 (1949).

Art. 42, GPW provides: "The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances."

J. Repatriation of Prisoners of War.[111]

1. Sometimes required before cessation of hostilities. Art. 109, GPW.

   a. Seriously sick and wounded POWs whose recovery is expected to take more than 1 year. Art. 110, GPW.

   b. Incurable sick and wounded. Art. 110, GPW.

   c. Permanently disabled physically or mentally. Art. 110, GPW.

   d. Used in Korean War: 6640 North Korea & Chinese for 684 UN soldiers. Operation Little Switch.

   e. This provision is routinely ignored.

2. After cessation of hostilities.

   a. Must it be done?

      (1) Art. 118 provides: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."

      (2) Rule followed through W.W.II. Result: thousands of Russian POWs executed by Stalin upon forced repatriation.

      (3) U.N. command in Korea first established principle that POWs do not have to be repatriated, if they do not so wish.[112] Logic supported by Pictet.

3. During a cease-fire or Armistice.

   a. CW2 Hall incident.[113]

      (1) Probable basis for repatriation: Art. 118.

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[111] For a thorough list of resources on this issue, *see* BIBLIOGRAPHY ON REPATRIATION OF PRISONERS OF WAR (1960), a copy of which is maintained by the TJAGSA Library.

[112] *See* R.R. Baxter, *Asylum to Prisoners of War*, BRITISH YEARBOOK INT'L L. 489 (1953).

[113] *See* Scott R. Morris, *America's Most Recent Prisoner of War: The WO Bobby Hall Incident*, ARMY LAW., Sept. 1996, at 3.

(2) Art. 117 provides: "No repatriated person may be employed on active military service." This only applies to Art. 109,110 repatriations.

b. Legally there is no problem going back to duty in S. Korea.[114]

V. CODE OF CONDUCT.

A. Department of Defense Instruction 1300.21 dated January 8, 2001 implements the policy, assigns responsibilities, and prescribes procedures under DoD Directive 1300.7, "Training and Education to Support the Code of Conduct," December 8, 2000.

1. DoDI 1330.21 also includes an outstanding outline that provides guidance to train members of the Armed Forces in support of the CoC.

B. The Commander, United States Joint Forces Command is the DoD Executive Agent. The Joint Personnel Recovery Agency (JPRA) is the Office of Primary Responsibility (OPR) for Code of Conduct training and education measures.[115]

C. History

1. Throughout our history there had been acts of POW misconduct. Some of the POW misconduct included:

a. First American POW "turncoat" occurred in Revolutionary War. Later, he was convicted of treason. *Republica v. M'Carty*, 2 U.S. 86 (1781).

b. U.S. War Dept G.O. 207 (1863) made it the duty of a soldier captured by the Confederates to escape. Union soldiers collaborated with Confederates forces in Andersonville to stop tunneling attempts.

c. In WW II, prisoners collaborated. *U.S. v. Provoo*, 124 F. Supp. 185 (S.D.N.Y. 1954), *rev'd*, 215 F. Supp. 531 (2d Cir. 1954)(mistreatment of fellow POWs and making radio broadcasts for Japanese).

d. During the Korean War, a conservative estimate is 30% of U.S. personnel collaborated to some degree with the enemy.[116]

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[114] Or was there? *See* The Korean Armistice Agreement, para. 52, *reprinted in*, DA PAM. 27-1, at 210.

[115] DoDI 1300.21, "Code of Conduct (CoC) Training and Education, January 8, 2001 [hereinafter DoDI 1300.21].

2. In 1955, President Eisenhower issued E.O. 10631 creating the modern day concept of the Code of Conduct (CoC) in response to Korean War POW conduct. The CoC provides guidance to U.S. POWs as to their responsibilities and obligations as members of the U.S. Armed Forces.

3. Between 1955 and 1979 DoD issued guidance on the Code of Conduct five times.[117]

4. Most recent change did not substantively change the Code of Conduct. It only made the Code gender neutral. *See* E.O. 12633.

5. The CoC contains six brief Articles that addresses those situations and decision areas that all personnel could encounter. It includes basic information useful to U.S. POWs in their efforts to survive honorably while resisting their captor's efforts to exploit them to the advantage of the enemy's cause and their own disadvantage.[118]

6. Code of Conduct Applies Regardless of Service member's "Status" (i.e., MOOTW).[119]

7. Code of Conduct is not a Punitive Regulation or General Order. It is a Moral Code rather than a legal code.[120] However, a violation of the Code of

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[116] The treatment of American POWs by the North Koreans was some of the worst conditions in history. Of the 6,656 Army soldiers taken prisoner during the war, only 3,323 were ultimately repatriated. Julius Segal, FACTORS RELATED TO THE COLLABORATION AND RESISTANCE BEHAVIOR OF U.S. ARMY PW'S IN KOREA 4 (Dec. 1956). *See Note: Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COL. L. REV 709 (1956), for a detailed factual and legal analysis of Korean POWs experiences.

[117] DoD issued guidance through Dep't of Def., Pamphlet 8-1, U.S. Fighting Man's Code first issued in November 1955 and revised three times. DoD also issued in July 1965, DoD Dir. 1300.7, Training and Education Measures Necessary to Support the Code of Conduct (July 8, 1964). However, this guidance left it to the individual services to develop, interpret, and train its servicemembers on the Code. This lead to interpretation problems by U.S. POWs in North Vietnam.

[118] DoDI 1300.21 at 9.

[119] Notice that the code applies to servicemembers. This can create a problem when civilians become prisoners of war. *See* Michael Kalapos, A Discussion Of The Relationship Of Military And Civilian Contractor Personnel In The Event Members Of Both Groups Become Prisoners of War (1987) (unpublished Executive Research Project, Industrial College of the Armed Forces), *available in* DTIC, ref. # AD-B115 978; James Clunan, Civilian-Military Relations Among Prisoners of War in Southeast Asia: Applications Today (1987)(unpublished Executive Research Project, Industrial College of the Armed Forces), *available in* DTIC, ref. # AD-B115 905.

[120] *See generally*, Richard E. Porter, *The Code of Conduct: A Guide to Moral Responsibility*, 32 AIR. UNIV. REV. 107 (Jan. - Feb. 1983).

Conduct may also be a violation of the UCMJ. Nothing in the CoC conflicts with the UCMJ. Some examples of possible violations include:

a. Disrespect/Disobey SRO;

b. Aiding the enemy;

c. Mutiny and sedition;

d. Cruelty and maltreatment; and,

e. Misconduct as a prisoner.[121]

f. 14 former POWs were court-martialed after Korea.[122]

g. Attempts were made after Vietnam to prosecute POWs but for "policy" reasons this did not occur.[123] Note the Garwood exception.[124]

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[121] *See* Charles L. Nichols, *Article 105, Misconduct as a Prisoner*, 11 JAG. L. REV. 393 (Fall 1969). During the Korean War, at least 24 American POWs informed on other POWs during escape attempts. "Twenty-two percent of returning PW's report being aware of outright mistreatment of prisoners by fellow prisoners -- including beatings resulting in death...." JULIUS SEGAL, FACTORS RELATED TO THE COLLABORATION AND RESISTANCE BEHAVIOR OF U.S. ARMY PW'S IN KOREA 33, 90 (Dec. 1956).

[122] *See, e.g., United States v. Floyd*, 18 C.M.R. 362 (A.B.M.R. 1954); *United States v. Dickenson*, 17 C.M.R. 438 (A.B.M.R. 1954), *aff'd* 20 C.M.R. 154 (C.M.A. 1955); *United States v. Batchelor*, 19 C.M.R. 452 (A.B.M.R. 1954). *See also* Edith Gardner, *Coerced Confessions of Prisoners of War,* 24 GEO. WASH. L. REV. 528 (1956). Eleven of the fourteen were ultimately convicted.

[123] There are four reasons presented by DoD to explain why collaborators were not prosecuted after Vietnam.

1. The Debriefers were instructed not to actively seek accusations because the emphasis was on gathering intelligence from the POWs
2. The Secretary of Defense had made a public statement saying no POWs who made propaganda statements would be prosecuted.
3. The service TJAGs said public opinion made convictions unlikely for POWs, who had already served extended periods of captivity in inhumane conditions.
4. The wording in the Manual for Courts-Martial implied that a member of one service component did not have to obey orders of superiors of a different component. [The MCM was amended on 3 Nov. 77 to correct this.]

See The Code of Conduct: A Second Look (U.S. Air Force Productions, 198_)[archive ref.# AFL 095-034-045, Pin #51190]. *See generally, Miller v. Lefman*, 801 F.2d 492 (D.C. Cir. 1986). LtCol Miller, U.S.M.C. was a POW that the SRO preferred charges against after the war.

[124] In 1965, Marine Robert Garwood was captured by the enemy in Vietnam. In October, 1973, he saw 15/20 American POW's. In March, 1975, he saw 20/22 American POW's. In July, 1975, he saw 6 American POW's. In July, 1977, he saw one American POW. In December, 1977, he saw 20/30 American POW's. In December,

D. The Six Articles

1. Article I – "I am an American fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense."

2. Article II – I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist."

3. Article III – "If I am captured, I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy."

   a. An examples of continuing to resist by all means available included the use of Box 25 (tap code) by Vietnam POWs (modified Morse Code).[125]

A	B	C	D	E
F	G	H	I	J
L	M	N	O	P
Q	R	S	T	U
V	W	X	Y	Z

   b. Is Art. III of the Code of Conduct inconsistent with POW status?[126]

      (1) No, even during escape attempt, once POW is outside detaining powers immediate control, POW retains status but detaining power can

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1978, he saw 6/7 American POW's. In 1979 Private First Class Robert Garwood, came home after 14 years as a Prisoner of War. He was charged with wartime desertion, enemy collaboration, and other crimes. He was found not guilty on all charges except collaboration. He was not debriefed on his knowledge of LIVE POW's until 1985, six years after coming home. During his trial, his lawyer said "Bobby's biggest crime was that he survived." As it is, Bobby Garwood was a major embarrassment to two governments: the Socialist Republic of Vietnam, for their claiming no living Americans remain involuntarily in their country, and to the U.S. for believing them.

[125] *See* Bobby D. Wagnor, *Communication: the key element to prisoners of war survival*, 23 AIR. UNIV. REV. 33 (May - June 1976). Box Code is also discussed in great detail in the PBS documentary "Return with Honor."

[126] *See generally,* Elizabeth R. Smith, Jr., *The Code of Conduct in Relation to International Law*, 31 MIL. L. REV. 85 (1966).

use all necessary means to prevent his successful escape, including deadly force. Art. 5 & 42, GPW.

c. Retained personnel exception: the requirement to escape does not apply to doctors/chaplains.

d. SRO can authorize temporary parole to perform acts that will materially contribute to the welfare of the prisoner or fellow prisoner. FM 27-10, para. 187b.

4. Article IV – "If I become a Prisoner of War, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way."

   a. SRO is the commander regardless of service branch.[127]

   b. By E.O. 12018, Retained Personnel cannot be SROs. Being an SRO would be inconsistent with their retained status.

5. Article V – "When questioned should I become a POW, I am required to give my name, rank, service number and date of birth. I will evade answering any further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause."

   a. POW Statements: Do they violate the Code?

      (1) *USS PUEBLO* crew detained after being seized in international waters (physical torture). No Code violation.

      (2) LT Zaun did not violate the Code of Conduct.[128]

      (3) Key words are "resist" and to the "utmost of my ability."

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[127] *See* Donald L. Manes, Jr., *Barbed Wire Command: The Legal Nature of the Command Responsibilities of the Senior Prisoner in a Prisoner of War Camp*, 10 MIL. L. REV. 1 (1960), and John R. Brancato, *Doctrinal Deficiencies in Prisoner of War Command*, AIRPOWER J. (Spr. 1988), at 40, for some of the problems the SRO faces during captivity.

[128] *See also* J. Jennings Moss, *Iraq tortured all Americans captured,*" WASH. TIMES, Aug. 2, 1991, at A1; Melissa Healy, *Pentagon Details Abuse of American POWs in Iraq; Gulf War: Broken Bones, Torture, Sexual Threats are Reported. It could spur further calls for War Crimes Trial*, L.A. TIMES, Aug. 2, 1991, at A1; and JOHN NORTON MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW 70 - 75 (1994), for accounts of the abuse U.S. POWs were subjected to during the Gulf War.

(a) Bounce back theory centered on those key words (developed by an SRO while in the "Hanoi Hilton").

(i) Resist as long as possible. The factors that effect a POWs ability to resist are:

(a) Shock of captivity;

(b) Wounds or illness;

(c) Malnutrition; and,

(d) Exploitation by captors. For example, the North Vietnamese prison guards would tell U.S. POWs of their obligations under the Code of Conduct. [129]

(e) Disease used as a means to influence.

(ii) If broken, give as little as possible. COL Rowe identifies three levels of information:[130]

(a) Information they already possess or could easily acquire from other readily available sources.

(b) Information whose value diminishes over time (perishable).

(c) Information where you "bite the bullet."[131]

(iii) Regroup and begin to resist again.

(iv) Don't be overwhelmed by guilt.

(4) I don't know" is the hardest answer for an interrogator to break.

(5) Humor is the greatest weapon – Americans laugh when they get hurt.

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[129] Experiences of a POW (TJAGSA Productions, Sept. 1985). This two hour videotape captures the incites of COL Nick Rowe. The North Vietnamese captured COL Rowe in 1964. He spent 5 1/2 years as a POW until he successfully escaped. COL Rowe's experiences and advice were instrumental in developing SERE training. Tragically, COL Rowe was assassinated in the Philippines in December 1989.

[130] *Id.*

[131] *Id.*

(6) Does a POW violate the Code if he writes a letter to his family? No. It's not in response to questioning.

(7) "Confessions" to war crimes may result in loss of POW status if later tried. See reservations to Art. 85, GPW in Pictet, at 423 - 427.

6. Article VI – "I will never forget that I am an American, responsible for my actions and dedicated to the principles which made my country free. I will trust in my God and in the United States of America."

E. Code of Conduct Training as part of LOW Training.

> *"The most consistent unsolicited statement made by Southeast Asia Prisoners of War concern the need for improved and uniform training so that future prisoners would all be working together from the same and the best ground rules."*[132]

1. Should JAs be teaching this? Why not, if no Survival, Evasion, Resistance and Escape (SERE) program.

   a. JAs are no less qualified than any other non-SERE graduate.

   b. JAs can combine and distinguish between the legal and moral obligations.

   c. Code of Conduct instruction meshes well with other POW classes we already teach.

2. "John Wayne doesn't appear at POW camps."[133]

3. "Return with Honor"[134]

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[132] The Code of Conduct: a Second Look (U.S. Air Force Productions)

[133] Experiences of a POW (TJAGSA Productions, Sept. 1985). A great tool for teaching Code of Conduct.

[134] An outstanding PBS Home Video documentary. This 102-minute videotape is available from PBS under the "The American Experience" series. Return with Honor" is hosted by Tom Hanks and it details the experiences of U.S. POWs during the Vietnam War. It is a powerful and useful tool in teaching the Code of Conduct as the U.S. POWs discuss various ways they survived their captivity with honor.

Note: This regulation has been re-formatted for this publication.

APPENDIX A

UNITED STATES CENTRAL COMMAND
7115 South Boundary Boulevard
MacDill Air Force Base, Florida 33621-5101

REGULATION
NUMBER 27-13

07 FEB 1995

Legal Services
CAPTURED PERSONS. DETERMINATION OF ELIGIBILITY
FOR ENEMY PRISONER OF WAR STATUS

1. PURPOSE. This regulation prescribes policies and procedures for determining whether persons who have committed belligerent acts and come into the power of the United States Forces are entitled to enemy prisoner of war (EPW) status under the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (GPW).

2. APPLICABILITY. This regulation is applicable to all members of the United States Forces deployed to or operating in support of operations in the US CENTCOM AOR.

3. REFERENCES.

a. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.

b. DA Pamphlet 27-1, Treaties Governing Land Warfare, December 1956.

c. FM 27-10, The Law of Land Warfare, July 1956.

d. J. Pictet, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, International Committee of the Red Cross.

4. GENERAL.

a. Persons who have committed belligerent acts and are captured or otherwise come into the power of the United States Forces shall be treated as EPWs if they fall into any of the classes of persons described in Article 4 of the GPW (Annex A).

b. Should any doubt arise as to whether a person who has committed a belligerent act falls into one of the classes of persons entitled to EPW status under GPW Article 4, he shall be treated as an EPW until such time as his status has been determined by a Tribunal under this regulation.

c. No person whose status is in doubt shall be transferred from the power of the United States to another detaining power until his status has been determined by a Tribunal convened under GPW Article 5 and this regulation.

5. DEFINITIONS.

a. Belligerent Act. Bearing arms against or engaging in other conduct hostile to United States' persons or property or to the persons or property of other nations participating as Friendly Forces in operations in the USCENTCON AOR.

b. Convening Authority. An officer designated by the Commander, U.S. Central Command (CENTCOM) to convene GPW Article 5 Tribunals.

c. Detainee. A person, not a member of the US Forces, in the custody of the United States Forces who is not free to voluntarily terminate that custody.

d. Enemy Prisoner of War (EPW). A detainee who has committed a belligerent act and falls within the one of the classes of persons described in the GPW Article 4.

e. Interpreter. A person competent in English and Arabic (or other language understood by the Detainee) who assists a Tribunal and/or Detainee by translating instructions, questions, testimony, and documents.

f. A Person Whose Status is in Doubt. A detainee who has committed a belligerent act, but whose entitlement to status as an EPW under GPW Article 4 is in doubt.

g. President of the Tribunal. The senior Voting member of each Tribunal. The President shall be a commissioned office serving in the grade of 04 or above.

h. Recorder. A commissioned officer detailed to obtain and present evidence to a Tribunal convened under this regulation and to make a record of the proceedings thereof.

i. Retained Persons. Members of the medical service and chaplains accompanying the enemy armed forces who come into the custody the US forces who are retained in the custody to administer to the needs of the personnel of their own forces.

j. Screening Officer. Any US military or civilian employee of the Department of Defense who conducts an initial screening or interrogation of persons coming into the power of the United States Forces.

k. Tribunal. A panel of three commissioned officers, at least one of who must be a judge advocate, convened to make determinations of fact, pursuant to GPW Article 5 and this regulation.

6. BACKGROUND.

a. The United States is a state-party to the four Geneva Conventions of 12 August 1949. One of these conventions is the Geneva Convention Relative to the Treatment of Prisoners of War. The text of this convention may be found in DA Pamphlet 27-1.

b. By its terms, the GPW would apply to an armed conflict between the United States and any country.

c. The GPW provides that any person who has committed a belligerent act and thereafter comes into the power of the enemy will be treated as an EPW unless a competent Tribunal determines that the person does not fall within a class of persons described in GPW Article 4.

d. Some detainees are obviously entitled to EPW status, and their cases should not be referred to a Tribunal. These include personnel of enemy armed forces taken into custody on the battlefield.

e. Medical personnel and chaplains accompanying enemy armed forces are not combatants; therefore, they are not EPWs upon capture. However, they may be retained in custody to administer to EPWs.

f. When a competent Tribunal determines that a detained person has committed a belligerent act as defined in this regulation, but that the person does not fall into one of the classes of persons described in GPW Article 4, that person will be delivered to the Provost Marshal for disposition as follows:

(1) If captured in enemy territory. In accordance with the rights and obligations of an occupying power under the Law of Armed Conflict (See reference at paragraph 7c).

(2) If captured in territory of another friendly state. For delivery to the civil authorities unless otherwise directed by competent US authority.

7. RESPONSIBILITIES.

a. All US military and civilian personnel of the Department of Defense (DoD) who take or have custody of a detainee will:

(1) Treat each detainee humanely and with respect.

(2) Apply the protections of the GPW to each EPW and to each detainee whose status has not yet been determined by a Tribunal convened under this regulation.

b. Any US military or civilian employee of the Department of Defense who fails to treat any detainee humanely, respectfully or otherwise in accordance with the GPW, may be subject to punishment under the UCMJ or as otherwise directed by competent authority.

c. Commanders will:

(1) Ensure that personnel of their commands know and comply with the responsibilities set forth above.

(2) Ensure that all detainees in the custody of their forces are promptly evacuated, processed, and accounted for.

(3) Ensure that all sick or wounded detainees are provided prompt medical care. Only urgent medical reasons will determine the priority in the order of medical treatment to be administered.

(4) Ensure that detainee's determined not to be entitled to EPW status are segregated from EPWs prior to any transfer to other authorities.

d. The Screening Officer will:

(1) Determine whether or not each detainee has committed a belligerent act as defined in this regulation.

(2) Refer the cases of detainees who have committed a belligerent act and who may not fall within one of the classes of persons entitled to EPW status under GPW Article 4 to a Tribunal convened under this regulation.

(3) Refer the cases of detainees who have not committed a belligerent act, but who may have committed an ordinary crime, to the Provost Marshal.

(4) Seek the advice of the unit's servicing judge advocate when needed.

(5) Ensure that all detainees are delivered to the appropriate US authority, e.g., Provost Marshal, for evaluation, transfer or release as appropriate.

e. The USCENTCOM SJA will:

(1) Provide legal guidance, as required to subordinate units concerning the conduct of Article 5 Tribunals.

(2) Provide judge advocates to serve on Article 5 Tribunals as required.

(3) Determine the legal sufficiency of each hearing in which a detainee who committed a belligerent act was not granted EPW status. Where a Tribunal's decision is determined not to be legally sufficient, a new hearing will be ordered.

(4) Retain the records of all Article 5 Tribunals conducted. Promulgate a Tribunal Appointment Order IAW Annex B of this regulation.

f. Tribunals will:

(1) Following substantially the procedures set forth at Annex C of this regulation, determine whether each detainee referred to that Tribunal:

(a) Did or did not commit a belligerent act as defined in this regulations and, if so, whether the detainee

(b) Falls or does not fall within one of the classes of persons entitled to EPW status under Article 4 of the GPW.

(2) Promptly report their decisions to the convening authority in writing.

g. The servicing judge advocate for each unit capturing or otherwise coming into the possession of new detainees will provide legal guidance to Screening Officers and others concerning the determination of EPW status as required.

8. PROPONENT. The proponent of this regulation is the office of the Staff Judge Advocate, CCJA. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to United States Central Command, CCJA, 7115 South Boundary Boulevard, MacDill Air Force Base, Florida 33621-5101.

FOR THE COMMANDER IN CHIEF:

R. I. NEAL
LtGen, USMC
Deputy Commander in Chief and
Chief of Staff

OFFICIAL:
ROBERT L. HENDERSON
LTC, USA
Adjutant General

DISTRIBUTION:
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ANNEX A

EXCERPT FROM THE
GENEVA CONVENTION RELATIVE TO THE TREATMENT
OF PRISONERS OF WAR, 12 AUGUST 1949

Article 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates:

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the Occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which

they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favorable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph 58-67, 92, 126 and; where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

Article 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

ANNEX B

UNITED STATES CENTRAL-COMMAND
7115 South Boundary Boulevard
MacDill Air Force Base, Florida 33621-5101

APPOINTMENT OF TRIBUNAL

A Tribunal under Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War is hereby convened. It will hear such cases as shall be brought before it pursuant to USCENTCOM Regulation 27-13 without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

Major A. B. Doe, USA, 999-99-9999; President

Captain R. C. Shaw, JAGC, USA, 999-99-9999; Judge Advocate, Member

1st Lt C. Logan, USA, 999-99-9999; Member

FOR THE COMMANDER IN CHIEF:

STAFF JUDGE ADVOCATE

ANNEX C

TRIBUNAL PROCEDURES

1. JURISDICTION. Tribunals convened pursuant to this regulation shall be limited in their deliberations to the determination of whether detained persons ordered to appear before it are entitled to EPW status under the GPW.

2. APPLICABLE LAW. In making its determination of entitlement to EPW status the Tribunal should apply the following:

a. Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex Thereto Embodying Regulations Respecting the Laws and Customs of Warfare on Land, 18 October 1907; 36 Stat. 2277; TS 539; 1 Bevans 631.

b. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 August 1949; 6 UST 3114; TIAS 3362; 75 UNTS 31.

c. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces, 12 August 1949; 6 UST 3217; TIAS 3363; 75 UNTS 85.

d. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August1949; 6 UST 3316; TIAS 3364; 75 UNTS 135.

e. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949; 6 UST 3516; TIAS 3365; 75 UNTS 287.

3. COMPOSITION.

a. Interpreter. Each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and Arabic (or other language understood by the Detainee). The interpreter shall have no vote.

b. Recorder. Each Tribunal shall have a commissioned officer appointed by the President of the Tribunal to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings. The recorder shall have no vote,

c. Tribunal. A panel of three commissioned officers, at least one of whom must be a judge advocate, convened to make determinations of fact pursuant to GPW Article 5 and this regulation. The senior member of each Tribunal shall be an officer serving in the grade of 0-4 or above and shall be its President.

4. POWERS OF THE TRIBUNAL. The Tribunal shall have the power to:

a. Determine the mental and physical capacity of the detainee to participate in the hearing.

b. Order U.S. military witnesses to appear and to request the appearance of civilian witnesses.

c. Require the production of documents and real evidence in the custody of the United States and to request host nation assistance in the production of documents and evidence not in the custody of the United States.

d. Require each witness to testify under oath. A form of oath for Muslim witnesses is attached (Annex E). The oath will be administered by the judge advocate member of the Tribunal.

5. RIGHTS OF THE DETAINEE.

a. The detainee shall have the right to be present at all open sessions of the Tribunal.

b. The detainee may not be compelled to testify.

c. The detainee shall not have the right to legal counsel, however, the detainee may have a personal representative assist him at the hearing if that personal representative is immediately available.

d. The detainee shall be informed, in Arabic (or other language understood by the Detainee) of the purpose of the Tribunal, the provisions of GPW Articles 4 and 5, and of the procedure to be followed by the Tribunal.

e. The detainee shall have the right to present evidence to the Tribunal, including the testimony of witnesses who are immediately available.

f. The detainee may examine and cross-examine witnesses, and examine evidence. Documentary evidence may be masked, as necessary, to protect sensitive sources and methods of obtaining information.

g. The detainee shall be advised of the foregoing rights at the beginning of the hearing.

6. APPLICABLE PROCCEDURE.

a. Admissibility of Evidence. All evidence, including hearsay evidence, is admissible. The Tribunal will determine the weight to be given to evidence considered.

b. Control of Case. The hearing is not adversarial, but rather is a fact-finding procedure. The President of the Tribunal, and other members of the Tribunal with the President's consent, will interrogate the detainee, witnesses, etc. Additionally, the President of the Tribunal may direct the Recorder to obtain evidence in addition to that presented.

c. Burden of Proof.

(1) Under this regulation, a matter shall be proven as fact if the fact-finder is persuaded of the truth of the matter by a preponderance of the evidence.

(2) Unless it is established by a preponderance of the evidence that the detainee is not entitled to EPW status, the detainee will be granted EPW status.

d. Voting. The decisions of the Tribunal shall be determined by a majority of the voting members of the Tribunal.

e. Legal Review. The USARCENT Staff Judge Advocate shall determine the legal sufficiency of each hearing in which a detainee who committed a belligerent act was not granted EPW status. In such cases, the detainees shall be entitled to continued EPW treatment pending completion of the legal review. Where a Tribunal's decision is determined not to be legally sufficient, a new hearing will be ordered.

7. CONDUCT OF HEARING. The Tribunal's hearing shall be substantially as follows:

a. The President upon calling the Tribunal to order should first announce the order appointing the Tribunal (See Annex F).

b. The Recorder will cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants.

c. The President should advise the detainee of his rights, the purpose of the hearing and of the consequences of the Tribunal's decision.

d. The Recorder will read the report of the Screening Officer or other interrogating officer summarizing the facts upon which the interrogating officer's referral was based and will present all other relevant evidence available.

e. The Recorder will call the witnesses, if any. Witnesses will be excluded from the hearing except while testifying. An oath or affirmation will be administered to each witness by the judge advocate member of the Tribunal.

f. The Detainee shall be permitted to present evidence. The Recorder will assist the Detainee in obtaining the production of documents and the presence of witnesses immediately available.

g. The Tribunal will deliberate in closed session. Only voting members will be present. The Tribunal will make its determination of status by a majority vote. The junior voting member will summarize the Tribunal's decision on the Report of Tribunal Decision (Annex D). The decisions will be signed by each voting member.

h. The President will announce the decision of the Tribunal in open session,

8. POST HEARING PROCEDURES.

a. The Recorder will prepare the record of the hearing.

b. In cases in which the detainee has been determined not to be entitled to EPW status, the following items will be attached to the decision:

(1) A statement of the time and place of the hearing, persons present, and their qualifications.

(2) A brief resume of the facts and circumstances upon which the decision was based.

(3) A summary or copies of all evidence presented to the Tribunal.

c. In cases in which the detainee has been determined to be entitled to EPW status no record of the proceedings is required.

d. The original and one copy of the Tribunal's decision and all supporting documents will be forwarded by the President to the convening authority within one week of the date of the announcement of the decision.

ANNEX D

REPORT OF TRIBUNAL DECISION

TRIBUNAL CONVENED BY: (ORDER NUMBER / HEADQUARTERS / DATE)

CASE NO: _____ DATE: _____

LOCATION: (UNIT, GEOGRAPHIC LOCATION)

In Re:† _____, Respondent

This Tribunal, having been directed to make a determination as to the legal status of the above-named respondent under Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, who came into the power of (UNIT) of the Armed Forces of (NATION) at (GEOGRAPHIC LOCATION) on or about (DATE) and having examined all available evidence, has determined that he (is) (is not) an Enemy Prisoner of War as defined in Article 4 of the Convention.

Additional identifying information concerning the detainee is follows.

Rank:† _____ Service Number:† _____

Date of Birth:† _____ Unit:‡ _____

Place of Birth: ‡ _____ Father's name: ‡ _____

Mother's name: ‡ _____ Spouse's name: ‡ _____

Home Town: ‡ _____ Aliases, if any: ‡ _____

IT IS ORDERED that the Respondent: (Here include the Tribunal's direction as to the disposition of the respondent, e.g., "Delivered to the Provost Marshal for Transfer to an EPW camp" or "Delivered to Civil Authorities" or "Released from Custody.")

_____
(Rank, Name), President,*
(Unit, Social Security No.)

_____
(Rank, Name, Member,*
(Unit, Social Security No.)

_____
(Rank, Name), Member,*
(Unit, Social Security No.)

The decision of the foregoing Tribunal in which the detainee was determined not to be entitled to EPW status has been determined to be legally sufficient/insufficient.

FOR THE USARCENT STAFF JUDGE ADVOCATE

_____

Rank, Name, Title

---

† An FPW is required by the GPW to provide this information.

‡ An EPW may not be compelled to provide this information.

* Judge Advocate Member will so indicate

ANNEX E

FORM OF OATH FOR A MUSLIM

In the Name of Allah, the Most Compassionate, the Most Merciful, who gave us Muhammad His Prophet and the Holy Koran, I, (NAME), swear that my testimony before this Tribunal will be the truth.

ANNEX F

ARTICLE FIVE TRIBUNAL HEARING GUIDE

RECORDER: All Rise (The Tribunal enters)

PRESIDENT: (NAME OF DETAINEE), this Tribunal is convened by order of _____ under the provisions of Article Five of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949. It will determine whether you have committed a belligerent act against the United States Armed Forces or Other Friendly Forces acting pursuant to United Nations Security Council Resolution 678 and, if so, whether you fall within one of the classes of persons entitled to treatment as a prisoner of war.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: (NAME OF DETAINEE), you have the following rights during this hearing:

You have the right to be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence.

You may not be compelled to testify. However, you may testify if you wish to do so.

You may have a personal representative assist you at the hearing if that personal representative is immediately available.

You have the right to present evidence to this Tribunal, including the testimony of witnesses who are immediately available.

You may ask questions of witnesses and examine documents offered in evidence. However, certain documents may be partially masked for security reasons.

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: Do you understand these rights?

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: Do you have any questions concerning these rights?

INTERPRETER: (TRANSLATION OF ABOVE)

RECORDER: All rise.

PRESIDENT: (DETAINEE), this Tribunal has determined:

(That you have not committed a belligerent act; therefore, you will be released.)

(That you have committed a belligerent act, but you are entitled to Prisoner of War status. You will be delivered to the Provost Marshal for evacuation to a Prisoner of War Camp.)

(That you have committed a belligerent act, but that you are NOT entitled to Prisoner of War status. This decision will be reviewed by higher authority. Until then, you will remain in American custody. If this decision is confirmed upon review by higher authority, you will be transferred to the appropriate authorities for further legal proceedings.)

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: This hearing is adjourned.

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CHAPTER 6

PROTECTION OF CIVILIANS DURING ARMED CONFLICT

REFERENCES

1. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, including the regulations thereto [hereinafter Hague IV].
2. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC].
3. The 1977 Protocols Additional to the Geneva Conventions of 1949, Dec 12, 1977, 16 I.L.M. 1391 [hereinafter GP I & II].
4. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Conv.].
5. Dept. of Army, Pamphlet 27-1, Treaties Governing Land Warfare (7 December 1956) [hereinafter DA PAM 27-1].
6. Dept. of Army, Pamphlet 27-1-1, Protocols To The Geneva Conventions of 12 August 1949 (1 September 1979) [hereinafter DA PAM 27-1-1].
7. Dept. of Army, Pamphlet 27-161-2, International Law, Volume II (23 October 1962) [hereinafter DA PAM 27-161-2].
8. Dept. of Army, Field Manual 27-10, The Law of Land Warfare (18 July 1956) [hereinafter FM 27-10].
9. Dept. of Army, Field Manual 41-10, Civil Affairs Operations (11 January 1993) [hereinafter FM 41-10].
10. Dept. of Army, Field Manual 100-21, Contractors of the Battlefield (January 2003) [hereinafter FM 100-21].
11. Dept. of Army, Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1 October 1997) [hereinafter AR 190-8].
12. Jean S. Pictet, COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1958) [hereinafter Pictet].
13. Yves Sandoz, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987) [hereinafter Protocols Commentary].
14. Dietrich Schindler & Jiri Toman, THE LAWS OF ARMED CONFLICTS, A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS (2d ed. 1988).
15. Gerhard von Glahn, LAW AMONG NATIONS (1992).
16. L. Oppenheim, INTERNATIONAL LAW (7th ed., H. Lauterpacht, 1955) [hereinafter Oppenheim].
17. UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. res. 217 A(III), December 10, 1948, U.N. Doc. A/810, at 71 (1948).

18. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, G.A. res 2200A (XXI), December 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.
19. Frank Newman and David Weissbrodt, International Human Rights (1990).
20. Frank Newman and David Weissbrodt, Selected International Human Rights Instruments (1990).
21. Frank Newman and David Weissbrodt, 1994 Supplement to International Human Rights and Selected International Human Rights Instruments (1994).
22. Memorandum: Law of War Status of Civilians Accompanying Militay Forces in the Field (6 May 1999), W. Hays Parks, Special Assistant on Law of War Matters (On file with author)
23. Department of Defense Law of War Program, DoDD 5100.77 (9 December 1998) [hereinafter DoDD 5100.77].

I. OBJECTIVES

A. Become familiar with the historic influences on the development of protections for civilians during periods of armed conflict.

B. Understand the legal definition of "civilian," and the test for determining when that status is lost.

C. Identify the law intended primarily for the benefit of:

1. All civilians, during ANY type of conflict;

2. "Special need" civilians during ONLY international armed conflict;

3. Civilians under the control of an enemy (protected persons);

4. Civilians not under enemy control, but subject to enemy lethality.

II. INTRODUCTION.

A. Historical Background. The concept of protecting civilians during conflict is ancient. Historically, three considerations motivated implementation of such protections.

1. Desire of sovereigns to protect their citizens. Based on reciprocal self-interests, ancient powers entered into agreements or followed codes of chivalry in the hope similar rules would protect their own land and people if they fell under their enemy's control.

2. Facilitation of strategic success. Military and political leaders recognized that enemy civilians who believed that they would be well treated were more likely to surrender and or cooperate with occupying forces. Therefore, sparing the vanquished from atrocities facilitated ultimate victory.

3. Desire to minimize the devastation and suffering caused by war. Throughout history, religious leaders, scholars, and military professionals advocated limitations on the devastation caused by conflict. This rationale emerged as a major trend in the development of the law of war in the mid nineteenth century and continues to be a major focus of advocates of "humanitarian law."

B. **Two Approaches To The Protection of Civilians.** Two methodologies for the protection of civilian noncombatants developed under customary international law.

1. **The Targeting Method.** Noncombatants who **are not in the hands of an enemy force** (the force employing the weapon systems restricted by the targeting method) benefit from restricting the types of lethality that may lawfully be directed at combatants. This method is governed primarily by the rules of military necessity, prevention of superfluous suffering/devastation, and proportionality (especially as these rules have been codified within the Hague Regulations and Geneva Protocol I).

2. **The Protect and Respect Method.** Establish certain imperative protections for **noncombatants that are in your hands** (physically under the control or authority of a party to the conflict).

3. Consolidated Development. Protocol I and II to the 1949 Geneva Conventions represent the convergence of both the Hague and Geneva traditions for protecting victims of warfare. These Protocols include both targeting and protect and respect based protections.

C. The Recent Historical "Cause and Effect" Process.

Post Thirty Years War - Pre World War II: Civilians were generally not targets during warfare. War waged in areas removed from civilian populations. There was no perceived need to devote legal protections to civilians exclusively. Civilians derive sufficient "gratuitous benefit" from law making destruction of enemy armed forces the sole legal object of conflict.

a. One exception: occupation. The desire of sovereigns to minimize disruption to the economic interests within occupied territories mandated a body of law directly on point. This is why an "occupation prong" to the law of war emerges as early as 1907.

2. Post World War II: Recognition that war is now "total." Nations treat enemy populations as legitimate targets because they support the war effort.

   a. Commenting on the degeneration of conflict which culminated with World War II, one scholar noted:

      "After 1914, however, a new retrogressive movement set in which reached its present climax in the terrible conduct of the second World War, threatening a new 'advance to barbarism.' We have arrived where we started, in the sixteenth century, at the threat of total, lawless war, but this time with weapons which may ruin all human civilization, and even threaten the survival of mankind on this planet."[1]

3. The international response to the suffering caused by World War II is the development of the four Geneva Conventions of 1949, each of which is devoted to protecting a certain category of non-combatants. Although the 1949 Geneva Convention Relative to the Treatment of Civilians Persons in Time of War (GC) is the first "stand alone" document exclusively dedicated to the protection of civilians, there are obvious gaps in protections for civilians which suggests the victors were not inclined to condemn their own conduct in World War II:

   a. The characterization of Allied targeting of civilian population centers as legitimate reprisal actions;

   b. Providing virtually no protection for civilians who have not fallen under enemy control.

4. The "Gap Filler." In 1977, two treaties were promulgated to supplement the four Geneva Conventions of 1949. Protocols I & II to the Geneva Conventions of 1949 were intended to fill the gaps left by the Conventions. Protocol I for international armed conflict and Protocol II for internal armed conflict. The need for a more comprehensive civilian protection regime was highlighted in the official commentary to the Protocols:

[1] Josef L. Kunz, THE LAWS OF WAR, 50 *Am. J. Int'l. L.* 313 (1950).

> The 1949 Diplomatic Conference did not have the task of revising the Hague Regulations . . . This is why the 1949 Geneva Conventions only deal with the protections to which the population is entitled against the effects of war in a brief and limited way . . The fact that the Hague Regulations were not brought up to date meant that a serious gap remained in codified humanitarian law. This has had harmful effects in many armed conflicts which have occurred since 1949 . [2]

a. Protocol I represents an intersection of both the Hague/targeting method, and the Geneva/respect and protect method.

b. Developing rules based on a combination of both these methods was deemed essential to ensure comprehensive protection for non-combatants subject to the dangers of warfare.

c. The primary focus of this treaty was to fill the void related to protecting persons and property from enemy lethality.

III. DEFINITION OF CIVILIAN.

A. The long road to a definition. Although the concept of distinction between combatants and civilians lies at the very foundation of the customary law, the Fourth Geneva Convention of 1949 contains no definition of who falls within the category of civilian. Many provisions refer to protections afforded to certain categories of civilians, but it seems the definition of civilians is left to common sense.

1. By 1977, it was apparent that this approach was inadequate, and that the lack of definition jeopardized the principle of distinction. According to Protocol I's official commentary:

> "As we have seen, the principle of the protection of the civilian population is inseparable from the principle of the distinction which should be made between military and civilian persons. In view of the latter principle, it is essential to have a clear definition of each of these categories."[3]

2. **The Protocol Method.** Article 50(1) of Protocol I adopts a "negative" method of defining civilians. It defines civilians as all persons who **do not**

[2] Protocols Commentary at 587.

[3] *Id.* at 610.

qualify for Prisoner of War status pursuant to Article 4 of the Geneva Prisoner of War Convention and Article 43 of Protocol I (except that civilians who accompany the force, and thereby qualify for PW status, fall within the definition of civilians for "protective" purposes). **Bottom Line:** Anyone not qualifying as a combatant, in the sense that they are entitled to PW status upon capture, should be regarded as a civilian.

3. **Civilian – A "fungible" status.** The immunity afforded civilians is not absolute. According to the official commentary: "The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. **Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target . . ."**[4]

   a. According to Protocol I, Article 51(3), civilians shall enjoy the protection of this section (providing general protection against dangers arising from military operations) **unless and for such time as they take a "direct" part in hostilities.**

      (1) The official commentary then explains "direct part" means "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[5]

      (2) The official commentary then excludes "general participation in the war effort" from this definition:

> "There should be a clear distinction between direct participation in hostilities and participation in the war effort . . . in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context."[6]

[4] *Id.* at 618.

[5] *Id.* at 619.

[6] *Id.*

b. **United States Position:** The Department of Defense Law of War Working Group has chosen "active part" as the more accurate term to express that point at which a civilian is at risk from intentional attack.[7]

(1) "Active" participation is characterized as, "Entering the theatre of operations in support or operation of sensitive, high value equipment, such as a weapon system."[8]

(2) Field Manual 100-21, Contractors on the Battlefield (January 2003), states that contractors cannot "take an active role in hostilities but retain there inherent right of self defense." FM 100-21, Para. 6-2.

4. GPI and US Bottom Line: Loss of civilian status for those intending to cause actual harm to the personnel and/or equipment of the enemy. No loss of status for civilian workers in industry who provide general support for the war effort. Gray Area Per US View - Civilian augmentation of military function.

IV. THE LAW WHICH OPERATES TO THE BENEFIT OF ALL CIVILIANS DURING ANY TYPE OF ARMED CONFLICT, NO MATTER WHERE THEY ARE IN THE CONFLICT AREA.

A. **Common Article 3 Standard of Basic Humanitarian Protections.** Originally intended to serve as the preface to the Geneva Conventions (it was to provide the purpose and direction statement for the four conventions), it was instead adopted as the law to regulate the controversial "non-international conflicts" (civil wars).

1. Common Article 3: Known as Common Article 3 because it appears in all four of the 1949 Geneva Conventions, Article 3 is also referred to as a "miniature convention" because its language contains both its trigger for application as well as its protections. Common Article 3 mandates the following minimum protections during internal armed conflict:

a. No adverse distinction based upon race, religion, sex, etc.;

b. No violence to life or person;

c. No taking hostages;

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[7] Hays Parks memo at 1.

[8] *Id.*

d. No degrading treatment;

e. No passing of sentences in absence of fair trial, and;

f. The wounded and sick must be cared for.

2. Application to Any Armed Conflict. In 1986, the International Court of Justice ruled that Common Article 3 serves as a "minimum yardstick of protection" in all conflicts, not just internal armed conflicts.

3. Re-affirmation of ICJ: In 1995, the International Criminal Tribunal for the Former Yugoslavia endorsed the extension of common article 3 to international armed conflict in the Appeals Chamber decision in the *Tadic* case:

> "The International Court of Justice has confirmed that these rules [common article 3] reflect 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character."[9]

4. This expanded view of Common Article 3 is consistent not only with U.S. policy (which extends its application even into non-conflict operations other than war through DoDD 5100.77), but also with the original understanding of its scope as expressed in the official commentary to the Geneva Conventions of 1949. According to Jean Pictet:

> "This minimum requirement in the case of a non-international armed conflict, is a fortiori applicable in international conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built."[10]

B. The Protocol I "safety net:" Prior to the expansion of the protections of Common Article 3 to international armed conflict by the decisions of the ICJ and ICTY, Common Article 3 could not be considered to apply, as a matter of law, to international armed conflict. Thus, there was an absence of an explicit

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[9] Prosecutor v. Dusko Tadic A/K/A "Dule", International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-94-1-AR72, (2 October 1995) (quoting Nicaragua v. United States at para 218).

[10] Pictet at 14.

guarantee of humane treatment for all civilians during international armed conflict.

1. The Response: Article 75 of Protocol I. The drafters of Protocol I included an article almost identical to Common Article 3 of the 1949 Conventions, the purpose of which was to establish an explicit mandate for humane treatment of **any and all civilians** during international armed conflict, **regardless of which party to the conflict had power over them.**

2. Article 75 is in a sense a "safety net," ensuring that no civilian falls through the "cracks" in terms of their right to humane treatment during an international armed conflict. **Note:** For those states not a party to Protocol I, the ICJ and ICTY decisions replace the Article 75 safety net with the broader application of Common Article 3.

3. Expanded due process guarantees. While Common Article 3 speaks in very general terms about the right to due process, Article 75 is much more explicit and extensive in it's enunciation of due process rights for individuals deprived of liberty during an international armed conflict.

C. Protocol II, Article 4: Reaffirming and expanding the principles set forth in Common Article 3, Article 4 prohibits the following actions in internal armed conflict:

1. Violence to life, health and physical or mental well-being;

2. Murder, cruel treatment, torture, mutilation and corporal punishment;

3. Collective punishment, taking hostages, actor of terrorism;

4. Humiliating/degrading treatment, rape, enforced prostitution and indecent assault;

5. Slavery/slave trade, pillage, and threats to commit any of the foregoing.

D. **Bottom Line:** All non-combatants, including civilians in areas involved in either internal or international armed conflict, are entitled to humane treatment when subject to the power of any party to that conflict. Although this is a very low standard of protection, its comprehensive application is a dramatic change in the law of war from its original application after the 1949 Geneva Conventions.

V. THE LAW WHICH OPERATES TO THE BENEFIT OF ALL CIVILIANS DURING INTERNATIONAL ARMED CONFLICT, NO MATTER WHERE THEY ARE IN THE CONFLICT AREA

A. **Protection of the Entire Population**: Although the Fourth Geneva Convention was the first law of war treaty devoted exclusively to the protection of civilians, **only Part II of the treaty applies to every civilian in the area of conflict.**

1. Article 15 of GC: Provides for, but does not mandate, the establishment of "neutralized zones" (temporary zones in the area of combat) to shelter from the effects of war:

   a. Wounded and sick combatants and non-combatants;

   b. Civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

2. Article 14 of GC: Provides for, but does not mandate, the establishment of "hospital/safety zones" (Permanent structures establish outside combat area) to shelter from the effects of war "Special Needs" civilians:

   a. Mothers of children under seven;

   b. Wounded, sick, and infirm;

   c. Aged;

   d. Children under the age of 15; and

   e. Expectant mothers.

B. **Further Protections of the Entire Population:** In addition to providing for the establishment of these "protected" zones, Part II also mandates the following protections:

1. The wounded, sick, infirm and expectant mothers must be "respected and protected" by all parties to the conflict at all times. GC, Art 16.

2. Agreements should be reached to allow for removal of special needs individuals from besieged areas and the passage of ministers and medical personnel to such areas. GC, Art. 17.

3. Civilian Hospitals shall not be the object of attack. GC, Art. 18.

4. Allow passage of consignments of medical supplies, foodstuffs and clothing. GC, Art. 23.

5. Protection and maintenance of orphans or those separated from their family who are under the age of 15. GC, Art. 24.

6. Rights to communicate with family via correspondence. GC, Art. 25.

VI. STATUS AND TREATMENT OF PROTECTED PERSONS

A. **Part III Protections:** The bulk of the protections (Articles 27 – 141) of the Fourth Geneva Convention are found in Part III and deal exclusively with "protected persons."

B. Key Definitions & Principles: Understanding who is classified as a protected person under the Convention is simplified by understanding the theory behind the classification. Remember, the state is the focal point of the international legal system. One of the prerogatives of a state is the ability to champion the rights of its citizens through diplomatic channels. The GC presumes that upon outbreak of armed conflict between two states, these diplomatic channels will be severed. Therefore, the civilians of each party to the conflict who find themselves under the control of their nation's enemy lose the ability to seek redress for wrongs through diplomatic channels. "Protected person" status thus steps in to fill this vacuum, and is the mechanism designed to ensure these civilians do not lose the benefit of international legal protections. Therefore, to determine the status of a civilian, the following definitions must be understood and applied:

1. **Protected Persons.** GC, Art. 4, Para. 1. "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever find themselves, in case of conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals." **Based on this definition, there are two main classes of protected persons:**

   a. Civilian enemy nationals within the national territory of each of the parties to the conflict:

      (1) Example: US oil workers in Iraq and Iraqi students in the US during the Gulf War. Note: Nationals of a neutral or co-belligerent State are not protected persons if their country has normal diplomatic relations with the State in whose territory they are.

b. The population of occupied territories, excluding nationals of the occupying power or a co-belligerent.

(1) Example: In the case of Operation Iraqi Freedom, once Iraq was occupied, all civilians in Iraq who were not nationals of the States that comprised the coalition became protected persons.

2. **Occupation**: Territory is occupied "when it is actually placed under the authority of the hostile army." Hague IV, Art. 42; FM 27-10, Para. 351.

a. **Occupation = Invasion plus taking firm possession of the enemy territory for the purpose of holding it.** FM 27-10, Para. 352a.

(1) **Invasion**: Invasion continues for as long as resistance is met. If no resistance is met, the state of invasion continues only until the invader takes firm control of the area, with an intention of holding it. Invasion is not necessarily occupation, but invasion usually precedes occupation. FM 27-10, Para. 352a. Invasion may be either resisted or unresisted.

(a) Resisted v. Unresisted Invasion. Occupation "presupposes" a hostile invasion – However, a "hostile" invasion may be either resisted or unresisted.

3. Commencement of Occupation.

a. Proclamation of occupation not necessary but advisable. FM 27-10, para. 357. General Eisenhower issued a powerful proclamation in World War II.

b. Without such a proclamation, occupation is a de facto standard. FM 27-10, Paras. 355 & 356. It is based on the following elements:

(1) Invader has rendered the invaded government incapable of exercising its authority;

(2) Invader has substituted its own authority;

(3) Must be Actual & Effective:

(a) Organized resistance has been overcome, but the existence of resistance groups does not render the occupation ineffective;

(b) Invader has taken measures to establish authority;

(c) The existence of a fort or defended place does not render the occupation of the remaining territory ineffective.

4. Termination of Occupation. FM 27-10, Paras. 353, 360, & 361. Occupation terminates when the occupying power either loses control of the territory (displacement) or asserts sovereignty over the territory (subjugation).

5. Application of Geneva Conventions:

   a. (GC, Art. 6) "In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations. In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations."

   b. (GPI, Art. 3) "The application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, at the general close of military operations and, and in the case of occupied territories, on the termination of the occupation."

C. Specific Articles Addressing Protected Persons: Before review the protections available to protected persons, it is important to note that, protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the Fourth Geneva Convention. GC, Art 8.

1. **Part III, Section I – The General Standard:** "Protected persons are entitled in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated." GC, Art. 27.

   a. "Respect For Their Persons." Intended to grant a wide array of rights to protect physical, moral, and intellectual integrities."

   b. "Respect for Honor." Acts such as slander, insults, and humiliation are prohibited."

   c. "Respect for Family Rights." Arbitrary acts which interfere with marital ties, the family dwelling, and family ties are prohibited. This is reinforced by GC, Art. 82, that requires, in the case of internment, that families be housed together."[11]

[11]In addition, if a family is divided, as a result of wartime events, they must be reunited. *See* Pictet at 202-203.

d. "Respect for Religious Convictions." Arbitrary acts which interfere with the observances, services, and rites are prohibited (only acts necessary for maintenance of public order/safety are permitted)."

e. "Respect for Custom." Intended to protect the class of behavior which defines a particular culture. This provision was introduced in response to the attempts by World War II Powers to effect "cultural genocide."

f. No insults and exposure to public curiosity.

g. No rape, enforced prostitution, and indecent assault on women.[12]

h. No using physical presence of persons to make a place immune from attack. GC, Art. 28.

i. No physical or moral coercion, particularly to obtain information. GC, Arts. 31 & 33

j. No actions causing physical suffering, intimidation, or extermination; including murder, torture, corporal punishment, mutilation, brutality, and medical/scientific experimentation. GC, Art. 32.

k. No pillaging (under any circumstances and at any location). GC, Art. 33.

l. No collective penalties. GC, Art. 33.

m. No reprisals against the person or his property. GC, Art. 33.

n. No taking of hostages. GC, Art. 34.

2. **Part III, Section II: Protections specifically for aliens within the territory of a party to the conflict.** Articles 35 through 46 are designed to protect the freedom of the alien "in so far as that freedom is not incompatible with the security of the party in whose country he is." This translates into affording these civilians many of the same rights and privileges as host nation civilians.

[12]These protections were intended as specific examples of the heightened protection that women enjoy under Geneva IV. The general protections within the Convention cover much more than the specific protections against rape, prostitution, and indecent assault. See Commission of Government Experts for the Study of the Convention for the Protection of War Victims (Geneva, Apr. 14-26); Preliminary Documents, Vol. III 47 (1947).

a. Right to Leave the Territory. GC, Art. 35. (Right is overcome by the national interests of the State (Security).

(1) Right of review by appropriate court or administrative board.

b. Right to Humane Treatment During Confinement. Protected persons are entitled to the quality of treatment recognized by the civilized world, even if it exceeds the quality of treatment that a Detaining Power grants to its own citizens. GC, Art. 37.

c. Right to receive relief packages, medical attention, and practice of their religion. GC, Art. 38.

d. Right to find gainful employment, subject to security concerns. If no employment is possible, the Party shall ensure support. GC, Art. 39.

e. Limitations on the Type and Nature of Labor. GC, Art. 40.

(1) Can only be compelled to work to the same extent as nationals.

(2) Cannot be forced to contribute to the war effort of their enemy.

3. **Part III, Section III: Protections specifically for protected persons in occupied territories.**

a. Inviolability of Rights. The occupying power does not have the authority to deprive protected persons of any rights derived from GC as a result of occupation. GC, Art. 47.

b. Right to leave if not a national of the power whose territory is occupied. GC, Art. 48.

c. No forcible transfers or deportations. GC, Art. 49.

d. Ensure care and education of children. GC, Art. 50.

e. May not be compelled to serve in armed forces. May not be forced to work unless 18 and for the benefit of public good. GC, Art. 51.

f. Must protect and respect personal property. GC, Art 53. Exceptions:

(1) The occupying power cannot destroy "real or personal property..., except where such destruction is rendered absolutely necessary. GC, Art. 53.

(2) Seizure. The temporary taking of property, with or without the authorization of the local commander.

(a) Rules for State Property. FM 27-10, paras. 402-405.

(i) Real Property Not of a Direct Military Use may not be seized (but occupant may administer such property) and must be safeguarded (public buildings, real estate, forests).

(ii) Occupying power may seize all (state owned) cash, funds, and movable property, which is capable of military use.

(b) Rules for Private Property.

(i) Permitted if the property has a direct military use.

(ii) A receipt must be given, so that restoration and compensation can be made.

(3) Confiscation. Permanent taking. Differs from seizure, which is temporary. FM 27-10, Paras. 396 & 406. Hague IV, Art. 46, Para. 2.

(a) State Owned Property. State property seized or captured becomes the property of the capturing nation (title passes).

(b) Private Property. Cannot be confiscated. In addition, threats, intimidation, or pressure cannot be used to circumvent this rule.

(4) Requisitions. The use of services and property, by the order of the local commander, for the needs of the hostile or occupation army. FM 27-10, Paras. 412-417.

(i) May only be ordered by local commander.

(ii) Must, to the greatest extent possible, be paid for in cash. If cash is not available a receipt must be given, with payment made as soon as possible.

(iii) Use of Force. Minimum amount required to secure needed services or items.

g. Ensure food and medical supplies. GC, Art. 55.

h. Permit ministers of religion to give spiritual assistance. GC, Art 58.

i. Permit receipt of individual relief supplies. GC, Art 62.

j. Presumption of Continued Use of Indigenous Laws. The local law (civil & penal) of the occupied territory "shall remain in force," except in cases where such laws "constitute a threat" to the occupying power's security. GC, Art. 64. Sources of such law included:

(1) Customary International Law Duty of Obedience. Inhabitants owe a duty of obedience to the occupant. However, this obligation does not require that a member of the local population act in a manner aimed to injure his displaced government.

k. Must provide due process rights. GC, Art. 71.

4. Depriving protected persons of their liberty: Generally, four types of liberty deprivation are permissible with regard to protected persons:

a. Imprisonment for criminal misconduct:

(1) Occupation Courts. GC, Arts. 64 – 67 The occupying power may constitute military courts (nonpolitical) to try accused citizens of an occupied territory. Limitations:

(a) The courts must sit in the occupied territory.

(b) Prosecution must be based upon laws that have been "published (in writing) and brought to the attention of the inhabitants."

(c) The laws must be published in the native language.

(d) Protecting Power shall have the right to attend the trial (must be notified of trial date).

b. Detainment: Any person captured or otherwise detained by an armed force.

c. Assigned residence: Equivalent of internment.

d. **Internment**:[13] **GC, Part III, Section IV: Most severe form of non-penal related restraint permitted** - even if the detaining Power finds that

[13] Army Regulation 190-8: Enemy Prisoner of War, Retained Personnel, Civilian Internees and other Detainees (1 October 1997), establishes policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for civilian internees.

neither internment nor assigned residence serves as an adequate measure of control, it may not use any measure of control that is more severe. GC, Art. 41. Key Components:

(1) Subject to periodic review (6 months) by competent body. GC, Art 78.

(2) Grouped as Families Whenever Possible. GC, Art. 82.

(3) Separate from PWs and Criminals. Internees "shall be accommodated separately from prisoners of war and persons deprived of liberty for any other reason." GC, Art. 84.

(4) Proper housing. GC, Art. 85.

(5) Sufficient food, water and clothes. GC, Art. 89.

(6) Adequate infirmary with qualified doctor. GC, Art. 91.

(7) Complete religious freedom. GC, Art. 93.

(8) Right to control property and money. GC, Art. 97.

(9) Must post convention in native language, right to petition for redress of grievances and elect internee committee. GC, Arts. 99 – 102.

(10) Right to notify family of location and send and receive letters. GC, Arts. 105 – 107.

(11) Laws in place continue to apply (subject to operational imperatives), internees cannot be sent to penitentiaries for disciplinary violations. GC, Art. 117.

(12) Transfers must be done safely and notice must be given to internee's family. GC, Art. 128.

(13) Must issue death certificates. Must conduct inquiry if death of internee is caused by sentry or other internee. GC, Arts. 129 – 131.

(14) Internment shall cease as soon as possible after the close of hostilities. GC, Art. 133.

D. Loss of Protected Status. A person suspected of "activities hostile to the security of the State," does not enjoy any right that might prejudice the security of the State. GC, Art. 5.

1. Spies/saboteurs given as a specific example. Such persons forfeit their rights of communication. GC, Art. 5, Para. 2.

a. Article 29 of Hague IV provides the current definition of a spy: "A person can be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intent of communicating it to the hostile party."

b. Thus, civilians seeking information in the territory of a belligerent under the circumstances described above may lose their status (in an occupied territory the civilian loses his status only if "absolute military security so requires").

VII. GRAVE BREACHES OF THE LAW OF WAR

A. Grave Breaches (GC, Art. 147): Grave breaches, if committed against persons or property protected by the Fourth Geneva Convention, are:

1. Willful killing;

2. Torture or inhumane treatment, to include biological experiments;

3. Willfully causing great suffering or serious injury to body and health;

4. Unlawful deportation or transfer or unlawful confinement of a protected person;

5. Compelling a protected person to serve in the forces of a hostile power;

6. Willfully depriving a protected person of the rights of fair and regular trial;

7. Taking of hostages;

8. Extensive destruction and appropriation of property, not justified by military necessity.

B. Prosecution (GC, Art. 146): Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of

their nationality, before it own courts. High Contracting Parties may also hand such persons over for trial to another High Contracting Party.

VIII. THE LAW FOR THE BENEFIT OF CIVILIANS NOT UNDER OUR CONTROL, BUT SUBJECT TO OUR LETHALITY.

A. Until 1977, the law that operated to the benefit of civilians under the control of their own nation, but subject to our lethality, was extremely limited. It consisted of only:

1. The general Targeting Principles codified by the Hague Convention. (For discussion of these principles, see Chapter 7 entitled "Methods and Means of Warfare").

2. The benefits provided for "special needs" individuals under Part II of the GC.

B. Recognizing that this resulted in a "gap" of coverage for civilian non-combatants not under the control of their nation's enemy, but subject to that enemy's lethality (long range weapons), Protocol I established a series of rules related to the targeting process specifically intended to protect these civilians.

1. The Protocol I Concept. Protocol I, Part IV, entitled "General protection against the effects of hostilities," is composed of a series of rules intended to ensure implementation of the principle of "distinction" between lawful and unlawful targets. According to the Official Commentary, "the principle of *protection* and *distinction* forms the basis of the entire regulation of war . . ."[14] These rules, therefore, were intended to provide protection for the **entire** civilian population in an area of conflict, **particularly those not under enemy control but subject to enemy lethality.**

2. The Basic Rule – Art. 48: "In order to ensure respect and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives."[15]

a. While this "basic rule" may sound like simple common sense, the fact that it did not exist in any treaty prior to 1977 is a manifestation of the extent

[14] Protocols Commentary at 586.

[15] *Id.* at 597.

of the "gap" in the protection afforded to civilians by the codified law of war which Protocol I sought to fill.

b. This rule explicitly requires combatants to distinguish military from civilian targets, even when employing long-range weaponry.

3. Specific Prohibitions of Art. 51. Art. 51 establishes a list of express prohibitions intended to implement the "basic rule" of Art. 48:

   a. Civilians may never be the object of attack.

   b. Attacks intended to terrorize the civilian population are prohibited.

   c. Indiscriminate attacks are prohibited. Indiscriminate is defined as:

      (1) Attacks not directed as a specific military objective, or employing a method or means of combat that cannot be so directed;

      (2) Attacks which employ a method or means of combat the effects of which cannot be controlled;

      (3) Attacks treating dispersed military objectives, located in a concentration of civilians, as one objective;

      (4) Attacks which may be expected to cause collateral damage excessive in relation to the concrete and direct military advantage to be gained ("Rule of Proportionality. For further analysis of this rule, see Chapter 7, Means and Methods.

   d. No civilian may be the object of a reprisal (GP I, Art. 51(6)). (U.S. objected to this rule on the grounds that it would eviscerate the concept of reprisal under the law of war).

   e. Civilians may not be used as "human shields" in an attempt to immunize an otherwise lawful military objective. However, violation of this rule by a party to the conflict does not relieve the opponent of the obligation to do everything feasible to implement the concept of distinction.

4. Other Protocol I provisions intended to "Fill the Gap." Protocol I contains many other provisions intended to protect civilians from the harmful effects of war when they are not under the control of their nations enemy. Some examples include:

a. Art. 54 – Rules intended to protect objects indispensable to the survival of the civilian population, such as:

(1) Prohibiting use of starvation as a method of warfare;

(2) Prohibiting attacks on foodstuffs, water facilities, etc., unless these objects are used solely to support the enemy military.

b. Art. 56 – Protection of works and installations containing dangerous forces (the U.S. objected to this provision).

c. Art. 57 – Obligation to take feasible precautions in order to minimize harm to non-military objectives.

d. Art. 58 – Obligation to take feasible measures to remove civilians from areas containing military objectives.

C. **Bottom Line.** Protocol I represents a major effort to establish comprehensive rules intended to ensure civilians are protected, as much as possible, from the dangers of warfare, **even if they are under the control of their own nation.** These rules have tremendous significance in relation to the targeting process for long-range warfare.

IX. CONCLUSION.

A. The Fourth Geneva Convention and the Protocols contain a series of detailed rules. There is no substitute for digging into them to learn the legal requirements related to treatment of civilians.

B. While the Convention and Protocols may not be technically applicable to future MOOTW, the rules serve as a critical foundation for creating solutions to civilian protections issues through application of DoDD 5100.77, The Law of War Program. Judge Advocates must recognize this, attempt to anticipate the type of issues their unit will encounter, and develop a working knowledge of these rules as far in advance of such operations as possible.

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CHAPTER 7

MEANS AND METHODS OF WARFARE

REFERENCES

1. Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereto [hereinafter H. IV].
2. Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314 [hereinafter H. IX].
3. Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 [hereinafter GWS].
4. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.S.T.S. 85 [hereinafter GWS Sea].
5. Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GPW].
6. Geneva Convention, Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter GC].
7. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1 [hereinafter GP I & II].
8. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Protocol].
9. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800 [hereinafter 1993 CWC].
10. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].
11. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583 [hereinafter 1972 Biological Weapons Convention].
12. Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523 [hereinafter 1980 Conventional Weapons Treaty].
13. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare (July 1956) [hereinafter FM 27-10].
14. Dep't of the Navy, Naval Warfare Publication 1-14M/U.S. Marine Corps MCPW 5-2.1, The Commander's Handbook on the Law of Naval Operations (October 1995) [hereinafter NWP 1-14M]; Annotated Supplement to NWP 1-14M.

15. Dep't of Defense Interim Guidance for Defense Acquisition (30 Oct 2002).

I. BACKGROUND

A. "Means and methods" is the term commonly used to refer to the area of law governing the conduct of hostilities – the *Jus in Bello*. The "justness" of the conflict or how the parties ended up at armed conflict is not addressed. Rather, this area of law deals with how the parties conduct the armed conflict once engaged.

B. Portions of this area of law overlap and intermingle with other key law of war documents, particularly the 1949 Geneva Conventions. Therefore it is important when working in this area to also read and cross-reference the related Geneva Conventions to ensure a complete picture of the relevant law.

C. This area of law addresses two interrelated areas: (1) the methods of warfare; that is, tactics or how we go about fighting; and (2) the means of warfare, that is, what instruments of war we use to fight. This outline discusses both areas.

II. PRINCIPLES

A. The four key principles of the law of war:

1. Military necessity/military objective

2. Distinction/discrimination

3. Proportionality

4. Humanity/unnecessary suffering

B. Principle of Military Necessity. That principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. FM 27-10, para. 3. Defined originally in the Lieber Code: "those measures which are indispensable for securing the ends of war, and which are lawful according to the modern laws and usages of war." Lieber Code, art. 14.

1. These definitions have two common elements:

a. A military requirement to undertake the action; and

b. The action must not be forbidden by the law of war.

2. Are there any exceptions to these elements? In other words, can the military requirement to undertake the action be so great that it can "overcome" a prohibition in international law?

   a. Criminal Defense. Military necessity has been argued as a defense to law of war violations and has generally been **rejected** as a defense for acts forbidden by customary and conventional laws of war. Rationale: laws of war were crafted to include consideration of military necessity. A distinction has been drawn, however, between acts/violations that affect people versus those that affect property.

      (1) Protected Persons. Law prohibits the intentional targeting of protected persons (as defined in the Geneva Conventions) under any circumstances. WWII Germans, under a concept called "Kreigsraison," argued that sometimes dire military circumstances allowed them to violate international law -- i.e., kill prisoners at Malmedy because they had no provisions for them and their retention would have jeopardized the German attack. This reasoning was rejected at Nuremberg: "The rules of international law must be followed even if it results in the loss of a battle or even a war."

      (2) Protected Places - The Rendulic Rule. The law of war does allow for destruction of civilian property, if military necessity "imperatively demands" such action (Hague, art. 23(g); FM 27-10, para. 56 and 58.)) The circumstances requiring destruction of protected property are those of "urgent military necessity" as they appear to the commander at the time of the decision. See IX Nuremberg Military Tribunals, *Trials of War Criminals Before the Nuremberg Military Tribunals*, 1113 (1950). Charges that General Lothar Rendulic unlawfully destroyed civilian property via a "scorched earth" policy were dismissed by the Tribunal because "the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made." Id.

3. Military objective. Military objective is a component of military necessity. Once a commander determines he or she has a military necessity to take a certain action or strike a certain target, then he or she must determine that the target is a valid military objective. The current definition of a military objective is found in GP I, article 52(2): "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." The components of this definition are discussed further in the section on targeting.

C. Principle of Discrimination or Distinction. The principle of distinction is sometimes referred to as the "grandfather of all principles," as it forms the foundation for much of the Geneva tradition of the law of war. The essence of the principle is that military attacks should be directed at combatants and military targets, and not civilians or civilian property. GP I, article 48 sets out the rule: "Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

1. GP I further defines "indiscriminate attacks" under Article 51(4) as those attacks that:

   a. are "not directed against a specific military objective" (e.g., SCUD missiles during Desert Storm);

   b. "employ a method or means of combat the effects of which cannot be directed at a specified military objective" (e.g., area bombing);

   c. "employ a method or means of combat the effects of which cannot be limited as required" (use of bacteriological weapons); and

   d. "consequently, in each case are of a nature to strike military objectives and civilians or civilian objects without distinction." *See*, A.P.V. Rodgers, *Law on the Battlefield*, 19-24 (1996).

D. Principle of Proportionality. The test to determine if an attack is proportional is found in GP I, article 51(5)(b): "An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" violates the principle of proportionality. **Note: this principle is only applicable when an attack has the possibility of affecting civilians. If the target is purely military with no known civilian personnel or property in the vicinity, no proportionality analysis need be conducted.**

1. Incidental loss of life or injury and collateral damage. This is considered unavoidable damage to civilian personnel and property incurred while attacking a military objective. Such an occurrence, however, is **not** a violation of international law. The law recognizes that there may be some death, injury and destruction during military operations. The law of war requirement is for the commander to weigh that expected death, injury, and destruction against the military advantage anticipated. The question is whether such death, injury, and destruction are **excessive** in relation to the military advantage; not whether any death, injury or destruction will occur. In other words, the prohibition is on the death, injury, and destruction being excessive; not on the attack causing such results.

2. Judging Commanders. It is be a grave breach of GP I to launch an attack that a commander *knows* will cause excessive incidental damage in relation to the military advantage gained. The requirement is for a commander to act *reasonably.*

   a. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places, but also that these objectives can be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated. FM 27-10, para. 41. In judging a commander's actions one must look at the situation as the commander saw it in light of all circumstances. *See* A.P.V. Rogers, *Law on the Battlefield* 66 (1996) and discussion of the "Rendulic Rule" above. The question of reasonableness, however, ensures an objective standard that must be met as well. In this regard, two questions seem relevant. Did the commander gather a reasonable amount of information to determine whether the target was a military objective and that the incidental damage would not be disproportionate? Second, did the commander act reasonably based on the gathered information? Of course, factors such as time, available staff, and combat conditions affecting the commander must also factor into the analysis.

   b. Example: Al Firdus Bunker. During Desert Storm, planners identified this bunker as a military objective. Barbed wire surrounded the complex, it was camouflaged, and armed sentries guarded its entrance and exit points. Unknown to coalition planners, however, Iraqi civilians used the shelter as nighttime sleeping quarters. The complex was bombed, resulting in 300 civilian casualties. Was there a violation of the law of war? No. Based on information gathered by coalition planners, the

commander made a reasonable assessment that the target was a military objective and that incidental damage would not outweigh the military advantage gained. Although the attack unfortunately resulted in numerous civilian deaths, (and that in hindsight, the attack might have been disproportionate to the military advantage gained -- had the attackers known of the civilians) there was no international law violation because the attackers, at the time of the attack, acted reasonably. *See* DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 615-616 (1992).

E. Principle of Unnecessary Suffering or Humanity. Hague, article 22 states that the right of belligerents to adopt means of injuring the enemy is not unlimited. Furthermore, "it is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering." HR, art. 23e. This concept is targeted at weaponry, and has two basic elements.

1. A prohibition on use of arms that are per se calculated to cause unnecessary suffering (e.g., projectiles filled with glass, irregular shaped bullets, dum-dum rounds, lances with barbed heads).

2. A prohibition on use of otherwise lawful arms in a manner that causes unnecessary suffering (e.g., using a flamethrower against enemy combatants with the intent to "fry those SOBs and make them suffer," even though equally effective and more humane means are available).

3. The key to both prohibitions is the *mens rea* or intent element.

III. TARGETS

A. As discussed above, only valid military objectives are legitimate targets. The current definition of a military objective is found in GP I, article 52(2): "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."

1. "Nature, location, purpose, or use"

a. Nature is defined in the Commentary as "all objects used directly by the armed forces," such as weapons, tanks, transports, etc.

b. Location is defined in the Commentary as "a site which is of special importance for military operations in view of its location," such as a bridge or a piece of ground.

c. Purpose is defined in the Commentary as "concerned with the intended future use of an object."

d. Use, on the other hand, is defined in the Commentary as "concerned with [the object's] present function," such as a school being used as a military headquarters.

2. "Make an effective contribution to military action" In theory, even if the object is clearly military in nature, such as a tank, if it does not meet this test (e.g., it is sitting out in the desert abandoned). It cannot be a valid military objective. In reality, such a target would be extremely low on the target list anyway as it would not be considered an effective use of limited resources.

3. "Offers a definite military advantage." The Commentary states that it is not legitimate to launch an attack which only offers potential or indeterminate advantages. This raises interesting questions regarding attacking enemy morale, deception operations, and strategic views of advantage versus tactical advantages of individual attacks.

B. People

1. Determining who can be a valid target is either a status based or conduct based determination.

a. Status based. The easiest situation is when you are facing an enemy that has been declared a "hostile force." If an individual falls into the group of those declared a hostile force, then he may immediately be targeted without any specific conduct on his part.

(1) Combatants are generally defined as anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless "out of combat."

(2) Combatants are often referred to as "lawful" combatants if they fall under the definition given in the Geneva Convention on Prisoners of War for those entitled to PW status:

(a) Under responsible command,

(b) Distinctive sign recognizable at a distance,

(c) Carry arms openly, and

(d) Abide by the laws of war. For a fuller discussion of these criteria, see the chapter on Geneva Convention III, Prisoners of War.

(3) Oftentimes you will also hear the phrase "unlawful combatants." There is no such term in the law of war; however it was used by the Supreme Court in the *Quirin* case to refer to those who engaged in combat but had no right to do so. The more accurate term is "unprivileged belligerent." These individuals do not meet the criteria listed above, and not only may be targeted, but will not receive the protections of prisoners of war. They may be treated as criminals under the domestic law of the captor. An unprivileged belligerent can be a civilian who is participating in the hostilities or a member of the armed forces who violates the laws of war.

b. Conduct based. As noted above, an unprivileged belligerent, by his or her conduct, can become a lawful target. Thus, although they are not a part of a group declared a hostile force, by their hostile acts they become a legitimate target.

2. Noncombatants. The law of war prohibits attacks on non-combatants, to include those sometimes referred to as those *hors de combat*, or out of combat.

a. Civilians

(1) General Rule. Civilians and civilian property may not be the subject or sole object of a military attack. Civilians are persons who are not members of the enemy's armed forces, and who do not take part in the hostilities. GP I, art. 50 and 51.

(2) Furthermore, GP I provides for expanded protections of the civilian population from "indiscriminate" attacks. Indiscriminate attacks include those where the incidental loss of civilian life, or damage to civilian objects, would be excessive in relation to the concrete and direct military advantage anticipated. GP I, art. 51 - except for para. 6, considered customary international law by US.

(3) GP I, article 51(3) states that civilians enjoy protection from targeting "unless and for such time as they take a direct part in hostilities." The Commentary states the requirement that civilians abstain from "all hostile acts," is defined as "acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces." This concept is discussed further in the chapter on Geneva Convention IV, Protection of Civilians in Armed Conflict, which includes a discussion of "direct part" versus "active part."

b. *Hors de Combat.* Prohibition against attacking enemy personnel who are "out of combat." Protected persons:

(1) Prisoners of War. GPW, art. 4, HR, art. 23c,d.

(a) Surrender may be made by any means that communicates the intent to give up. No clear rule as to what constitutes surrender. However, most agree surrender constitutes a cessation of resistance and placement of one's self at the discretion of the captor.

(b) Captors must respect (not attack) and protect (care for) those who surrender--no reprisals.

(2) Wounded and Sick in the Field and at Sea. GWS, art. 12; GWS Sea, art. 12. Those soldiers who have fallen by reason of sickness or wounds and who cease to fight are to be respected and protected. Civilians are included in definition of wounded and sick (who because of trauma, disease . . . are in need of medical assistance and care and who refrain from any act of hostility). GP I, art. 8. Shipwrecked members of the armed forces at sea are to be respected and protected. GWS Sea, art. 12, NWP 1-14M, para. 11.6. Shipwrecked includes downed passengers/crews on aircraft, ships in peril, castaways.

(3) Parachutists. FM 27-10 para. 30. Paratroopers are presumed to be on a military mission and therefore may be targeted. Parachutists who are crewmen of a disabled aircraft are presumed to be out of combat and may not be targeted unless it's apparent they are engaged on a hostile mission. Parachutists, according to GP I, Article 42, "shall be given the opportunity to surrender before being made the object of attack" and are clearly treated differently from paratroopers.

c. Medical Personnel. Considered out of combat if they are exclusively engaged in medical duties. GWS, art. 24. They may not be directly

attacked; however, accidental killing or wounding of such personnel due to their proximity to military objectives "gives no just cause for complaint" FM 27-10, para 225. Medical personnel include:

(1) Medical personnel of the armed forces. GWS, art. 24.

(a) Doctors, surgeons, nurses, chemists, stretcher-bearers, medics, corpsman, and orderlies, etc., who are "exclusively engaged" in the direct care of the wounded and sick.

(b) Administrative staffs of medical units (drivers, generator operators, cooks, etc.).

(c) Chaplains.

(2) Auxiliary Medical Personnel of the Armed Forces. GWS, art. 25. To gain the GWS protection, they must have received "special training" and be carrying out their medical duties when they come in contact with the enemy.

(3) Relief Societies. Personnel of National Red Cross Societies and other recognized relief Societies. GWS, art. 26. Personnel of relief societies of Neutral Countries. GWS, art. 27.

(4) Civilian Medical and Religious Personnel. Article 15 of GP I requires that civilian medical and religious personnel shall be respected and protected. They receive the benefits of the provisions of the Geneva Conventions and the Protocols concerning the protection and identification of medical personnel. Article 15 also dictates that any help possible shall be given to civilian medical personnel when civilian medical services are disrupted due to combat.

d. Personnel Engaged in the Protection of Cultural Property. Article 17 of the 1954 Hague Cultural Property Convention established a duty to respect (not directly attack) persons engaged in the protection of cultural property. The regulations attached to the Convention provide for specific positions as cultural protectors and for their identification.

e. Journalists. Given protection as "civilians" provided they take no action adversely affecting their status as civilians. GP I, art. 79 -considered customary international law by US.

C. Places

1. Defended Places. FM 27-10, paras. 39 & 40, change 1. As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include:

   a. a fort or fortified place;

   b. a place occupied by a combatant force or through which a force is passing; and

   c. a city or town that is surrounded by defensive positions under circumstances that the city or town is indivisible from the defensive positions. See also, GP I, Article 51(5)(a), which seems to clarify this rule. Specifically, it prohibits bombardments which treat "as a single military objective a number of clearly separated and distinct military objectives located in a city, town, or village."

2. Undefended places. The attack or bombardment of towns, villages, dwellings, or buildings which are undefended is prohibited. HR, art. 25. An inhabited place may be declared an undefended place (and open for occupation) if the following criteria are met:

   a. all combatants and mobile military equipment are removed;

   b. no hostile use made of fixed military installations or establishments;

   c. no acts of hostility shall be committed by the authorities or by the population; and

   d. no activities in support of military operations shall be undertaken (presence of enemy medical units, enemy sick and wounded, and enemy police forces are allowed). FM 27-10, art. 39b, change 1.

3. Natural environment. The environment cannot be the object of reprisals. In the course of normal military operations, care must be taken to protect the natural environment against long-term, widespread, and severe damage. GP I, art. 55 - U.S. specifically objects to this article.

4. Protected Areas. Hospital or safety zones may be established for the protection of the wounded and sick or civilians. FM 27-10, para. 45. Articles 8 and 11 of the 1954 Hague Cultural Property Convention provide that certain cultural sites may be designated in an "International Register of Cultural Property under Special Protections." The Vatican and art storage areas in Europe have been designated under the convention as "specially

protected." The U.S. asserts the special protection regime does not reflect customary international law.

D. Property

1. Protected Property

a. Civilian. Prohibition against attacking civilians or civilian property. FM 27-10, para. 246; GP I, art. 51(2). Presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, school, etc.). GP I, art. 52(3).

b. Protection of Medical Units and Establishments - Hospitals. FM 27-10, paras. 257 and 258; GWS art. 19.

(1) Fixed or mobile medical units shall be respected and protected. They shall not be intentionally attacked.

(2) Protection shall not cease, unless they are used to commit "acts harmful to the enemy."

(a) Warning requirement before attacking a hospital that is committing "acts harmful to the enemy."

(b) Reasonable time to comply with warning, before attack.

(3) When receiving fire from a hospital, there is no duty to warn before returning fire in self-defense. Example: Richmond Hills Hospital, Grenada; hospitals during combat in Operation Iraqi Freedom.

c. Medical Transport. Ground transports of the wounded and sick or of medical equipment shall not be attacked if performing a medical function. GWS, art. 35. Under the Geneva Conventions of 1949, medical aircraft were protected from direct attack only if they flew in accordance with a previous agreement between the parties as to their route, time, and altitude. GP I extends further protection to medical aircraft flying over areas controlled by friendly forces. Under this regime, identified medical aircraft are to be respected, regardless of whether a prior agreement between the parties exists. GP I, art. 25. In "contact zones", protection can only be effective by prior agreement; nevertheless medical aircraft "shall be respected after they have been recognized as such." (GP I, art. 26 - considered customary international law by US.) Medical aircraft in areas controlled by an adverse party must have a prior agreement in order

to gain protection. GP I, art. 27. See more developed discussion in the outline on the Geneva Convention on the Wounded and Sick.

d. Cultural Property. Prohibition against attacking cultural property. The 1954 Cultural Property Convention elaborates, but does not expand, the protections accorded cultural property found in other treaties. HR, art. 27; FM 27-10, para. 45, 57. The Convention has not been ratified by the US (treaty is currently under review with a view toward ratification with minor understandings). *See* GP I, art. 53, for similar prohibitions. Cultural property includes buildings dedicated to religion, art, science, charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected.

(1) Misuse will subject them to attack.

(2) Enemy has duty to indicate presence of such buildings with visible and distinctive signs.

2. Works and Installations Containing Dangerous Forces. GP I, art. 56, and GP II, art. 15. The rules are not U.S. law but should be considered because of the pervasive international acceptance of GP I and II. Under the Protocols, dams, dikes, and nuclear electrical generating stations shall not be attacked - even if they are military objectives - if the attack will cause the release of dangerous forces and cause "severe losses" among the civilian population. (U.S. objects to "severe loss" language as creating a different standard than customary proportionality test - "excessive" incidental injury or damage.)

a. Military objectives that are near these potentially dangerous forces are also immune from attack if the attack may cause release of the forces (parties also have a duty to avoid locating military objectives near such locations).

b. May attack works and installations containing dangerous forces only if they provide "significant and direct support" to military operations and attack is the only feasible way to terminate the support. The U.S. objects to this provision as creating a standard that differs from the customary definition of a military objective as an object that makes "an effective contribution to military action."

c. Parties may construct defensive weapons systems to protect works and installations containing dangerous forces. These weapons systems may

not be attacked unless they are used for purposes other than protecting the installation.

3. Objects Indispensable to the Survival of the Civilian Population. Article 54 of GP I prohibits starvation as a method of warfare. It is prohibited to attack, destroy, remove, or render useless objects indispensable for survival of the civilian population - such as foodstuffs, crops, livestock, water installations, and irrigation works.

E. Protective Emblems. FM 27-10, para. 238. Objects and personnel displaying emblems are presumed to be protected under Conventions. GWS, art 38.

1. Medical and Religious Emblems

   a. Red Cross.

   b. Red Crescent.

   c. Lion and Sun.

   d. Red Star of David: Not mentioned in the 1949 Geneva Convention, but is protected as a matter of practice.

2. Cultural Property Emblems

   a. "A shield, consisting of a royal blue square, one of the angles of which forms the point of the shield and of a royal blue triangle above the square, the space on either side being taken up by a white triangle." 1954 Cultural Property Convention, art. 16 and 17.

   b. Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War (art. 5). "[L]arge, stiff, rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white."

3. Works and Installations Containing Dangerous Forces. Three bright orange circles, of similar size, placed on the same axis, the distance between each circle being one radius. GP I, annex I, art. 16.

IV. WEAPONS

A. The regulation of use of weapons in conflict is governed by essentially two major precepts. The first is the law of war principle prohibiting unnecessary

suffering. The second is treaty law dealing with specific weapons or weapons systems.

B. Legal Review. Before discussing these areas, it is important to note first that all U.S. weapons and weapons systems must be reviewed by the service TJAG for legality under the law of war. Interim Guidance, Defense Acquisition, DEPSECDEF Memo, 30 Oct 2002, AR 27-53, AFI 51-402, and SECNAVINST 5711.8A. A review occurs before the award of the engineering and manufacturing development contract and again before the award of the initial production contract. Legal review of new weapons is also required under Article 36 of GP I.

1. The Test. Is the acquisition and procurement of the weapon consistent with all applicable treaties, customary international law, and the law of armed conflict? Interim Guidance, Defense Acquisition, para. 3.2.1. In TJAG reviews, the discussion will often focus on whether the employment of the weapon or munition for its normal or expected use inevitably would cause injury or suffering manifestly disproportionate to its military effectiveness. This test cannot be conducted in isolation, but must be weighed in light of comparable, lawful weapons in use on the modern battlefield. Weapons may be illegal:

   a. *Per se*. Those weapons calculated to cause unnecessary suffering, determined by the "usage of states." Examples: lances with barbed heads, irregular shaped bullets, projectiles filled with glass. FM 27-10, para. 34.

   b. By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: using a flamethrower against enemy troops in a bunker after dousing the bunker with gasoline; the intent being to inflict severe pain and injury on the enemy troops.

   c. By agreement or prohibited by specific treaties. Example: certain land mines, booby traps, and non-detectable fragments are prohibited under the Protocols to the 1980 Conventional Weapons Treaty.

C. As noted above, Hague, article 22 states that the right of belligerents to adopt means of injuring the enemy is not unlimited. Furthermore, "it is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering." HR, art. 23e. The following weapons and munitions are considered under this general principle.

1. Small Arms Projectiles. Must not be exploding or expanding projectiles. The Declaration of St. Petersburg of 1868 prohibits exploding rounds of less than 400 grams (14 ounces). The 1899 Hague Convention prohibits expanding rounds. US practice accedes to these prohibitions as being customary international law. State practice is to use jacketed small arms ammunition (which reduces bullet expansion on impact).

   a. Hollow point ammunition. Typically, this is semi-jacketed ammunition that is designed to expand dramatically upon impact. This ammunition is prohibited for use in armed conflict against combatants by customary international and the treaties mentioned above. There are limited situations, however, where use of this ammunition is lawful because its use will significantly reduce collateral damage to noncombatants and protected property (hostage rescue, aircraft security).

   b. High Velocity Small Caliber Arms.

      (1) Early controversy about M-16 causing unnecessary suffering.

      (2) "Matchking" ammunition. Has a hollow tip--but is not expansive on impact. Tip is designed to enhance accuracy only and does not cause unnecessary suffering.

   c. Sniper rifles, .50 caliber machine guns, and shotguns. Much "mythology" exists about the lawfulness of these weapon systems. Bottom line: they are lawful weapons, although rules of engagement (policy and tactics) may limit their use.

   d. Superfluous Injury and Unnecessary Suffering Project: (SirUS): An attempt by the ICRC to bring objectivity to the review of legality of various weapons systems. The SirUS project attempted to use casualty survival rates off the battlefield, as well as the seriousness of the inflicted injury, as the criteria for determining if a weapon causes unnecessary suffering. The U.S. position is that the project was inherently flawed because its database of casualty figures is mostly based upon wounds inflicted in domestic disturbances, civil wars, from antipersonnel mines and from bullets of undetermined type. *See* Maj Donna Verchio, *Just Say No! The SirUS Project: Well-Intentioned, but Unnecessary and Superfluous*, 51 A.F.L. Rev. 183 (2001).

2. Fragmentation. FM 27-10, para 34.

a. Legal unless used in an illegal manner (on a protected target or in a manner calculated to cause unnecessary suffering).

b. Unlawful if fragments are undetectable by X-ray (Protocol I, 1980 Conventional Weapons Treaty).

c. Distinguish R2LP rounds (reduced ricochet, limited penetration). These rounds do fragment, but only upon striking a hard surface, such as a ship's hull, and not in the body.

D. The following weapons and munitions are regulated not only by the principle prohibiting unnecessary suffering, but also by specific treaty law. Most of the applicable law is relatively new, dating from post-Geneva Protocol implementation.

1. Landmines. Lawful if properly used, however, regulated by a number of different treaties. Keep in mind that while the U.S. has not signed all the applicable treaties, many of our allies have, and therefore it is important to understand what limitations our coalition partners may be facing and the impact on U.S. operations.

a. The primary legal concern with landmines is that they violate the law of war principle of discrimination. A landmine cannot tell if it is being triggered by an enemy combatant or a member of the civilian population.

b. When considering legal restrictions on landmines, three questions must be answered:

(1) What type of mine is it? Anti-personnel (APL), anti-tank, or anti-tank with anti-handling device?

(2) How is the mine delivered? Remotely or non-remotely?

(3) Does it ever become inactive? Is it "smart" or "dumb?"

c. The primary treaty that restricts U.S. use of mines is **Amended Protocol II**. Amended Protocol II amends Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW). The Senate ratified and the President signed the amendment on 24 May 1999. Amended Protocol II:

(1) Expands the scope of the original Protocol to include internal armed conflicts;

(2) Requires that all remotely delivered APL be equipped with self-destruct devices and backup self-deactivation features (in other words, be smart);

(3) Requires that all non-remotely delivered APL not equipped with such devices (dumb mines) be used within controlled, marked, and monitored minefields;

(4) Requires that all APL be detectable using available technology;

(5) Requires that the party laying mines assume responsibility to ensure against their irresponsible or indiscriminate use;

(6) Provides for means to enforce compliance.

(7) Amended Protocol II also clarifies the use of the M18 Claymore "mine" when used in the tripwire mode (Art. 5(6)). (When used in command-detonated mode, the Protocol does not apply, as the issue of distinction is addressed.) Claymores may be used in the tripwire mode without invoking the "dumb" mine restrictions of Amended Mines Protocol II if:

(a) They are not left out longer then 72 hours;

(b) The Claymores are located in the immediate proximity of the military unit that emplaced them; and

(c) The area is monitored by military personnel to ensure civilians stay out of the area.

d. In addition to Amended Protocol II, the United States released a new policy statement on landmines in February 2004. Under this policy:

(1) The United States has committed to eliminate persistent (dumb) landmines of all types from its arsenal. Use of "dumb" mines for training purposes.

(2) Persistent anti-personnel landmines are *only* stockpiled for use by the United States in fulfillment of our treaty obligations to the Republic of Korea.

(3) Persistent anti-vehicle mines can only be employed outside the Republic of Korea when authorized by the President until the end of 2010.

(4) After 2010, the United States will not employ either persistent anti-personnel or persistent anti-vehicle landmines.

(5) Within two years, the United States will begin the destruction of those persistent landmines that are not needed for the protection of Korea.

e. Although not applicable to the U.S., many nations, including many of our allies, have signed the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-personnel Mines and on Their Destruction. This treaty is commonly referred to as the **Ottawa Treaty**. The treaty entered into force on 1 March 1999. As of 1 April 2003, 146 states had signed the treaty, and 132 had ratified it. Although the U.S. joined the Process in September of 1997, it withdrew when other countries would not allow exceptions for the use of APL mines in Korea and other uses of smart APL. **Note:** Ottawa only bans APL; therefore Ottawa does not restrict our allies in regards to anti-tank or anti-tank with anti-handling device mines.

2. Booby Traps. A device designed to kill or maim an unsuspecting person who disturbs an apparently harmless object or performs a normally safe act. Amended Protocol II of the 1980 Conventional Weapons Convention contains specific guidelines on the use of booby-traps in Article 7:

> *1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use booby-traps and other devices which in any way attached or associated with:*
> *(a) internationally recognized protective emblems, signs or signals;*
> *(b) sick, wounded or dead persons;*
> *(c) burial or cremation sites or graves;*
> *(d) medical facilities, medical equipment, medical supplies or transportation;*
> *(e) children's toys or other portable objects or products specifically designed for the feeding, health, hygiene, clothing or education of children;*
> *(f) food or drink;*
> *(g) kitchen utensils or appliances except in military establishments;*
> *(h) objects clearly of a religious nature;*
> *(i) historic monuments, works or art or places of worship which constitute the cultural or spiritual heritage of peoples;*

(j) animals or their carcasses

a. The above list is a useful "laundry list" for the operational law attorney to use when analyzing the legality of the use of a booby-trap. There is one important caveat to the above list. Sub-paragraph 1(f) of article 7 prohibits the use of booby-traps against "food or drink." Food and drink are not defined under the Protocol, and if interpreted broadly, could include such viable military targets as supply depots and logistical caches. Consequently, it was imperative to implement a reservation to the Protocol that recognized that legitimate military targets such as supply depots and logistical caches were permissible targets against which to employ booby-traps. The reservation clarifies the fact that stocks of food and drink, if judged by the United States to be of potential military utility, will not be accorded special or protected status.

3. Cluster Bombs or Combined Effects Munitions: CEM is an effective weapon against such targets as air defense radars, armor, artillery, and personnel. However, because the bomblets are dispensed over a relatively large area and a small percentage of them typically fail to detonate, there is an unexploded ordinance hazard associated with this weapon. These submunitions are not mines, are acceptable under the laws of armed conflict, and are not timed to go off as anti-personnel devices. However, if the submunitions are disturbed or disassembled, they may explode, thus, the need for early and aggressive EOD clearing efforts. (*US DoD Report to Congress: Kosovo/Operation Allied Force After Action Report*). *See* Maj. Thomas Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F.L. Rev. 229 (2001).

4. Incendiaries. FM 27-10, para. 36. Examples: Napalm, flame-throwers, tracer rounds, and white phosphorous. None of these are illegal per se or illegal by treaty. The only U.S. policy guidance is found in paragraph 36 of FM 27-10 which warns that they should "not be used in such a way as to cause unnecessary suffering."

   a. Napalm and Flamethrowers. Designed for use against armored vehicles, bunkers, and built-up emplacements.

   b. White phosphorous. Designed for igniting flammable targets such as fuel, supplies, and ammunition and for use as a smoke agent. White phosphorous (Willy Pete) artillery and mortar ammunition is often used to mark targets for aerial bombardment.

c. Protocol III of the 1980 Conventional Weapons Convention prohibits use of air-delivered incendiary weapons on military objectives located within concentrations of civilians. Has not been ratified by the U.S.

(1) The U.S. is currently considering ratifying the Protocol - with a reservation that incendiary weapons may be used within areas of civilian concentrations if their use will result in fewer civilian casualties. For example: the use of incendiary weapons against a chemical munitions factory in a city could cause fewer incidental civilian casualties. Conventional explosives would probably disperse the chemicals, where incendiary munitions would burn up the chemicals.

(2) Tracers are not incendiaries, Art 1(1)(b).

5. Lasers. US Policy (announced by SECDEF in Sep. 95) prohibits use of lasers specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. Recognizes that collateral or incidental damage may occur as the result of legitimate military use of lasers (rangefinding, targeting). This policy mirrors that found in Protocol IV of the 1980 Conventional Weapons Treaty. The Senate is reviewing Protocol IV for its advice and consent for ratification.

6. Chemical Weapons. Poison has long been outlawed battle as it was considered a treacherous means of warfare. Chemical weapons more specifically have been regulated since the early 1900s by several treaties.

a. The 1925 Geneva Protocol. FM 27-10, para 38, change 1. Applies to all international armed conflicts.

(1) Prohibits use of lethal, incapacitating, and biological agents. Protocol prohibits use of "asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . ."

(2) The U.S. considers the 1925 Geneva Protocol as applying to **both** lethal and incapacitating chemical agents.

(3) Incapacitating Agents: Those chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated. U.S. views riot control agents as having a "transient" effect -- and thus are NOT incapacitating agents. Therefore, the U.S.

position is that the treaty does not prohibit the use of RCA in war. (Other nations disagree with interpretation.) See further discussion below on riot control agents.

(4) Under the Geneva Protocol of 1925 the U.S. reserved the right to use lethal or incapacitating gases if the other side uses them first. FM 27-10, para. 38b, change 1. The reservation did not cover the right to use bacteriological methods of warfare in second use. Presidential approval is required for use. E.O. 11850, 40 Fed. Reg. 16187 (1975); FM 27-10, para. 38c, change 1. HOWEVER, THE US RATIFIED THE CHEMICAL WEAPONS CONVENTION (CWC) IN 1997. THE CWC DOES NOT ALLOW THIS "SECOND" USE.

(5) Riot Control Agents. U.S. has an understanding to the Treaty that these are not prohibited.

b. 1993 Chemical Weapons Convention (CWC). This treaty was ratified by the U.S. and came into force in April 1997.

(1) Provisions (twenty four articles). Key articles are:

(a) Article I. Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. Retaliatory use (second use) not allowed; significant departure from 1925 Geneva Protocol. Requires destruction of chemical stockpiles. Each party agrees not to use Riot Control Agents (RCAs) as a "method of warfare."

(b) Article II. Definitions of chemical weapons, toxic chemical, RCA, and purposes not prohibited by the convention.

(c) Article III. Requires parties to declare stocks of chemical weapons and facilities they possess.

(d) Articles IV and V. Procedures for destruction and verification, including routine on-site inspections.

(e) Article VIII. Establishes the Organization for the Prohibition of Chemical Weapons (OPWC).

(f) Article IX. Establishes "challenge inspection," a short notice inspection in response to another party's allegation of non-compliance.

7. Riot Control Agents (RCA). Use of riot control agents by U.S. troops is governed by four key documents. In order to determine which documents apply to the situation at hand, you must first answer one fundamental question: is the U.S. currently engaged in war? If so, use of RCA is governed by the CWC and Executive Order 11850. If not, then use of RCA is governed by CJCSI 3110.07A, and, more tangentially, by the Senate's resolution of advice and consent to the CWC.

   a. War. In determining if the U.S. is at war for purposes of use of RCA, the question is whether the international armed conflict the U.S. is involved in is of a scope, duration, and intensity to be an operation that triggers the application of the law of war (a CA 2 conflict).

      (1) CWC. As noted above, the CWC prohibits use of RCA as a "method of warfare." The President decides if a requested use of RCA qualifies as a "method of warfare." As a general rule, during war, the more it looks like the RCA is being used on enemy combatants, the more likely it will be considered a "method of warfare" and prohibited.

      (2) Executive Order 11850. Guidance also exists in EO 11850. Note that EO 11850 came into force nearly 20 years before the CWC. EO 11850 applies to use of RCA and herbicides. It requires Presidential approval before use and only allows for RCA use in armed conflicts in **defensive** military modes to save lives, such as:

         (a) controlling riots;

         (b) dispersing civilians where the enemy uses them to mask or screen an attack;

         (c) rescue missions for downed pilots, escaping PWs, etc.; and

         (d) for police actions in our rear areas.

      (3) The rationale for the prohibition against use of RCA on the battlefield - we do not want to give states the opportunity for subterfuge. Keep all chemical equipment off the battlefield, even if it is supposedly only for use with RCA. Secondly, we do not want an appearance problem - with combatants confusing RCA equipment as equipment intended for chemical warfare. EO 11850 is still in effect and RCA can be used in certain defensive modes with presidential authority. However, any use

in which "combatants" may be involved will most likely not be approved.

b. Military Operations Other Than War (MOOTW). During MOOTW operations, the CWC and EO 11850 do NOT apply. Rather, CJCSI 3110.07A applies to RCA use during MOOTW operations. The authorization for RCA use during a MOOTW may be at a lower level than the President. CJCSI 3110.07A states the United States is not restricted by the Chemical Weapons Convention in its use of RCAs, including against combatants who are a party to a conflict, in any of the following cases:

(1) The conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict.

(2) Consensual peacekeeping operations when the use of force is authorized by the receiving state including operations pursuant to Chapter VI of the UN charter.

(3) Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the UN charter.

(4) These allowable uses are drawn from the language of the Senate's resolution of advice and consent for ratification of the CWC (S. Exec. Res. 75 – Senate Report section 3373 of 24 April 1997). The Senate required that the President certify when signing the CWC that the CWC did not restrict in any way the above listed uses of RCA. In essence, then, the Senate made a determination that the listed uses were not "war," triggering the application of the CWC.

(a) The implementation section of the resolution requires that the President not modify E.O. 11850. *See* S. Exec Res. 75, section 2 (26)(b).

(b) The President's certification document of 25 April 1997 states that "the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the U.S. is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces."

(5) Thus, during peacekeeping missions (such as Bosnia, Somalia, Rwanda and Haiti) it appears U.S. policy will maintain that we are not a party to the conflict for as long as possible. Therefore, RCA would be available for all purposes. However, in armed conflicts (such as Operation Iraqi Freedom, Desert Storm, and Panama) it is unlikely that the President will approve the use of RCA in situations where "combatants" are involved due to the CWC's prohibition on the use of RCA as a "method of warfare."

8. Herbicides. EO 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. (e.g., Agent Orange in Vietnam.).

9. Biological. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The 1972 Biological Weapons Convention supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons. U.S. renounced all use of biological and toxin weapons.

10. Nuclear Weapons. FM 27-10, para. 35. Not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an advisory opinion that "There is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons." However, by a split vote, the ICJ also found that "The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict." The ICJ stated that it could not definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of the state would be at stake. 35 I.L.M. 809 (1996).

V. TACTICS

A. "Tricking" the enemy

1. Ruses. FM 27-10, para. 48. Injuring the enemy by legitimate deception (abiding by the law of war--actions are in good faith). Examples of ruses include:

a. Naval Tactics. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels.

(1) World War I - Germany: Germany often fitted her armed raiders with dummy funnels and deck cargoes and false bulwarks. The German raider *Kormoran* passed itself off as a Dutch merchant when approached by the Australian cruiser *Sydney*. Once close enough to open fire she hoisted German colors and fired, sinking Sydney with all hands. *See* C. John Colombos, *The International Law of the Sea* 454-55 (1962).

(2) World War II - Britain: British Q-ship program during WWII. The British took merchant vessels and outfitted them with concealed armaments and a cadre of Royal Navy crewmen disguised as merchant mariners. When spotted by a surfaced U-boat, the disguised merchant would allow the U-boat to fire on them, then once in range, the merchant would hoist the British battle ensign and engage the U-boat. The British sank 12 U-boats by this method. This tactic caused the Germans to shift from surfaced gun attacks to submerged torpedo attacks. LCDR Mary T. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, Nav. War. Coll. Rev., Summer 1989, at 60.

b. Land Warfare. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit. FM 27-10, para. 51.

(1) World War II - Allies: The classic example of this ruse was the Allied Operation Fortitude prior to the D-Day landings in 1944. The Allies, through the use of false radio transmissions and false references in bona fide messages, created a fictitious First US Army Group, supposedly commanded by General Patton, located in Kent, England, across the English Channel from Calais. The desire was to mislead the Germans to believe the cross-Channel invasion would be there, instead of Normandy. The ruse was largely successful. John Keegan, *The Second World War* 373-79 (1989).

(2) Gulf War - Coalition: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used deception cells to create the impression that they were going to attack near the Kuwaiti boot heel, as opposed to the "left hook" strategy actually implemented. XVIII Airborne Corps set up "Forward Operating Base Weasel" near the boot heel, consisting of a phony network of camps manned by several dozen soldiers. Using portable radio equipment, cued by computers, phony radio messages

were passed between fictitious headquarters. In addition, smoke generators and loudspeakers playing tape-recorded tank and truck noises were used, as were inflatable Humvees and helicopters. Rick Atkinson, Crusade, 331-33 (1993).

c. Use of Enemy Property. Enemy property may be used to deceive under the following conditions:

(1) Uniforms. Combatants may wear enemy uniforms but cannot fight in them. Note, however, that military personnel not wearing their uniform may lose their PW status if captured and risk being treated as spies (FM 27-10, para. 54, 74; NWP 1-14M, para. 12.5.3; AFP 110-31, 8-6).

(a) World War II - Germany: The most celebrated incident involving the use of enemy uniforms was the Otto Skorzeny trial arising from activities during the Battle of Bulge. Otto Skorzeny was brigade commander of the 150th SS Panzer Brigade. Several of his men were captured in US uniforms, their mission being to secure three critical bridges in advance of the German attack. 18 of Skorzeny's men were executed as spies following the battle. Following the war, ten of Skorzeny's officers, as well as Skorzeny himself, were accused of the improper use of enemy uniforms, among other charges. All were acquitted. The evidence did not show that they actually fought in the uniforms, consistent with their instructions. The case generally stands for the proposition that it is only the fighting in the enemy uniform that violates the law of war. (DA Pam 27-161-2 at 54). For listing of examples of the use of enemy uniforms see W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 77-78 (1990). For an argument against any use of the enemy's uniform see Valentine Jobst III, *Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?*, 35 Am. J. Int'l L. 435 (1941).

(2) Colors. The U.S. position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the U.S. interprets the "improper use" of a national flag (HR, art. 23(f).) to permit the use of national colors and insignia of enemy as a ruse as long as they are not employed during actual combat (FM 27-10, para. 54; NWP 1-14M, para 12.5).

(3) Equipment. Must remove all enemy insignia in order to fight with the equipment. Captured supplies: may seize and use if state property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made. HR, art. 53.

(4) Protocol I. GP I, Article 39(2) prohibits virtually all use of these enemy items. *See* NPW 1-14M, para 12.5.3. Article 39 prohibits the use in an armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or "to shield, favour, protect or impede military operations." The U.S. does not consider this article reflective of customary law. This article, however, expressly does not apply to naval warfare, thus the customary rule that naval vessels may fly enemy colors, but must hoist true colors prior to an attack, lives on. GP I, art 39(3); NWP 1-14M, para. 12.5.1.

2. Treachery/Perfidy. In contrast to the lawful ruses discussed above, treachery and perfidy are prohibited under the law of war. FM 27-10, para. 50; HR. art. 23b. They involve injuring the enemy by his adherence to the law of war (actions are in bad faith). As noted below, treachery/perfidy can be further broken down into feigning and misuse.

   a. Condemnation. Condemnation of perfidy is an ancient precept of the LOW, derived from principle of chivalry. Perfidy degrades the protections and mutual restraints developed in the mutual interest of all Parties, combatants, and civilians. In practice, combatants find it difficult to respect protected persons and objects if experience causes them to believe or suspect that the adversaries are abusing their claim to protection under the LOW to gain a military advantage. Thus, the prohibition is directly related to the protection of war victims. Practice of perfidy also inhibits restoration of peace. Michael Bothe, et. al., *New Rules for Victims of Armed Conflicts*, 202 (1982); FM 27-10, para. 50.

   b. Feigning and Misuse. Distinguish feigning from misuse. Feigning is treachery that results in killing, wounding, or capture of the enemy. Misuse is an act of treachery resulting in some other advantage to the enemy.

   c. Protocol I. According to GP I, Article 37(1), the **killing, wounding, or capture** via "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence [are perfidious, thus prohibited acts]." (U.S.

considers customary international law.) Article 37(1) does not prohibit perfidy per se; only certain perfidious acts that result in killing, wounding, or capturing, although it comes very close. The ICRC could not gain support for an absolute ban on perfidy at the diplomatic conference. Bothe at 203. Article 37 also refers only to confidence in international law (LOW), not moral obligations. The latter viewed as too abstract by certain delegations. (*Id.* at 204-05.) Note, however, that the US view includes breaches of moral, as well as legal obligation as being a violation, citing the broadcasting of an announcement to the enemy that an armistice had been agreed upon when it had not as being treacherous. FM 27-10, para 50.

d. Feigning incapacitation by wounds/sickness. GPI, art. 37(1)(b). Whiteman says HR, Article 23b also prohibits this, e.g. faking wounds and then attacking approaching soldier. Marjorie M. Whiteman, Dep't of State, 10 *Digest of International Law* 390 (1968); NWP 1-14M, para. 12.7.

e. Feigning surrender or the intent to negotiate under a flag of truce. GP I, Art 37(1)(a). Note that in order to be a violation of GP I, Article 37, the feigning of surrender or an intent to negotiate under a flag of truce must result in a killing, capture, or surrender of the enemy. Simple misuse of a flag of truce, not necessarily resulting in one of those consequences is, nonetheless, a violation of Article 38 of Protocol I, which the U.S. also considers customary law. An example of such misuse would be the use of a flag of truce to gain time for retreats or reinforcements. Morris Greenspan, *The Modern Law of Land Warfare* 320-21 (1959). Article 38 is analogous to the Hague IV Regulation prohibiting the improper use of a flag of truce, art 23(f).

(1) Falklands War - British: During the Battle for Goose Green, some Argentinean soldiers raised a white flag. A British lieutenant and 2 soldiers went forward to accept what they thought was a surrender. They were killed by enemy fire. The incident was disputed. Apparently, one group of Argentines was attempting to surrender, but not another group. The Argentine conduct was arguably treachery if those raising the white flag killed the British soldiers, but it was not treacherous if other Argentines, either unaware of the white flag or not wishing to surrender, killed them. This incident emphasizes the rule that the white flag is an indication of a desire to negotiate **only** and that its hoister has the burden to come forward. *See* Major Robert D.

Higginbotham, *Case Studies in the Law of Land Warfare II: The Campaign in the Falklands;* Mil. Rev., Oct. 1984, at 49.

(2) Desert Storm - Battle of Khafji incident was not a perfidious act. Media speculated that Iraqi tanks with turrets pointed to the rear, then turning forward to fire when action began, was perfidious act. DOD Report to Congress rejected that observation, stating that the reversed turret is not a recognized symbol of surrender *per se*. "Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage Iraqi forces only on a clear indication of hostile intent, or some hostile act." Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* 621 (1992).

(3) Desert Storm - On one occasion, however, Iraqi forces did apparently engage in perfidious behavior. In a situation analogous to the Falklands War scenario above, Iraqi soldiers waved a white flag and also laid down their arms. As Saudi forces advanced to accept the surrender, they took fire from Iraqis hidden in buildings on either side of street. Id. Similar conduct occurred during Operation Iraqi Freedom when Iraqis took some actions to indicate surrender and then opened fire on Marines moving forward to accept the surrender.

(4) Desert Storm - On another occasion an Iraqi officer approached Coalition force with hands up indicating his intent to surrender. Upon nearing the Coalition forces he drew a concealed pistol, fired, and was killed. Id.

f. Feigning civilian, noncombatant status. "Attacking enemy forces while posing as a civilian puts all civilians at hazard." GP I, art 37(1)(c); NWP 1-14M, para. 12.7.

g. Feigning protected status by using UN, neutral, or nations not party to the conflict's signs, emblems, or uniforms. GP I, art 37(1)(d).

(1) As an example, on 26 May 1995, Bosnian Serb commandos dressed in uniforms, flak jackets, helmets, weapons of the French, drove up to French position on a Sarajevo bridge in an APC with UN emblems. French forces thought all was normal. The commandos, however, then proceeded to capture French peacekeepers without firing a shot. Joel Brand, *French Units Attack Serbs in Sarajevo*, Wash. Post, May 28, 1995, at A1.

(2) It is not perfidy (a violation of Art 37) to (mis)use the emblem of the UN to try to gain protected status if the UN has member forces in the conflict as combatants (even just as peacekeepers). As in the case of the misuse of the flag of truce, misuse of a UN emblem that does not result in a killing, capture, or surrender, is nonetheless, a violation of Art 38 of GPI because that article prohibits the use of the UN emblem without authorization.

h. Misuse of Red Cross, Red Crescent, cultural property symbol.

(1) Designed to reinforce/reaffirm HR, Article 23f.

(2) GWS requires that wounded & sick, hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected. Protection lost if committing acts harmful to enemy. As an example, during the Grenada Invasion, US aircraft took fire from the Richmond Hills Hospital, and consequently engaged it. DA Pam 27-161-2, p. 53, n. 61.

(3) Cultural property symbols include 1954 Hague Cultural Property Convention, Roerich Pact, 1907 Hague Conventions symbol. Bothe at 209.

i. Misuse of internationally recognized distress signals, e.g., ICAO, IMCO distress signals.

B. Assassination. Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" is prohibited. (FM 27-10, para 31; E.O. 12333.) Targeting military leadership, however, is not assassination. See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Law. Dec. 1989, at 4.

C. Espionage. FM 27-10, para. 75; GP I, art. 46. Acting clandestinely (or on false pretenses) to obtain information for transmission back to friendly side. Gathering intelligence while in uniform is not espionage.

1. Espionage is not a law of war violation.

2. No protection, however, under Geneva Conventions for acts of espionage.

3. Tried under the laws of the capturing nation. E.g., Art. 106, UCMJ.

4. Reaching friendly lines immunizes spy for past espionage activities. Therefore, upon later capture as a lawful combatant, past spy cannot be tried for past espionage.

D. Belligerent or wartime reprisals. FM 27-10, para 497. An otherwise illegal act done in response to a prior illegal act by the enemy. The purpose of a reprisal is to get the enemy to adhere to the law of war.

1. Reprisals are authorized if the following requirements are met:

   a. it's timely;

   b. it's responsive to enemy's act that violated the law of war;

   c. it follows an unsatisfied demand to cease and desist; and

   d. it is proportionate.

2. Prisoners of war and persons "in your control" cannot be objects of reprisals. Protocol I prohibits reprisals against numerous targets such as the entire civilian population, civilian property, cultural property, objects indispensable to the survival of the civilian population (food, livestock, drinking water), the natural environment, installations containing dangerous forces (dams, dikes, nuclear power plants) (GP I, arts. 51-56). The U.S. specifically objects to Article 51(6) as not reflective of customary international law.

3. US policy is that a reprisal may be ordered only at the highest levels (President).

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CHAPTER 8

WAR CRIMES AND COMMAND RESPONSIBILITY

REFERENCES

1. Constitution, art. I, § 8, cls. 10 & 14, art. I, § 10, art. VI.
2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49-51, 6 U.S.T. 3114, 75 U.N.T.S. 31, [hereinafter GWS].
3. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50-52, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea].
4. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 102, 105-08, 129-131, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].
5. Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, arts. 146-148, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].
6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, arts. 11, 85, 86, 87, reprinted in Dep't of Army, Pamphlet 27-1-1 [hereinafter DA Pam 27-1-1, Protocol I].
7. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 3, 36 Stat. 2277, 2290, 205 Consol. T.S. 277, 284 [hereinafter H IV].
8. International Committee of the Red Cross, Commentary on I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 at 351-73 (Jean S. Pictet ed., 1952) [hereinafter I Pictet].
9. UCMJ arts. 18, 21, 92 (1998).
10. Manual for Courts-Martial, United States, pt. I, § 2, R.C.M. 201(f)(1)(B), 201(g), R.C.M. 307(c)(2), R.C.M. 916 (2000).
11. Dep't of Defense, Directive 5100.77, DoD Law of War Program, ¶¶ C.3. & E.2.e.(3) (December 9. 1998) [hereinafter DOD Dir. 5100.77].
12. Chairman of the Joint Chiefs of Staff Instruction 5810.01B (25 March 2002)
13. Dep't of Army, Field Manual 27-10, The Law of Land Warfare, ch. 8 (18 July 1956) [hereinafter FM 27-10].
14. Dep't of Army, Pamphlet 27-161-2, International Law, ch. 8 (23 Oct. 1962) [hereinafter DA Pam 27-161-2].
15. International Military Tribunal, TRIAL OF THE MAJOR WAR CRIMINALS (1947) (42 volumes).
16. TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950) (15 volumes) [hereinafter Trials of War Criminals].
17. International Japanese War Crimes Trials in the International Military Tribunal for the Far East (209 volumes).

18. United Nations War Crimes Commission, LAW REPORTS OF TRIALS OF WAR CRIMINALS (1948) (15 volumes).
19. United Nations War Crimes Commission, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION (1948).
20. Statute of the International Criminal Tribunal for the Former Yugoslavia. S.C.Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N.Doc. S/RES/808 (1993); further amended in U.N. Security Council Resolutions 1166 (13 May 1998), 1329 (30 Nov 2000) and 1411 (17 May 2002).
21. Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993) [hereinafter Rept.of Secretary-General].
22. Rules of Procedure & Evidence, International Criminal Tribunal for the Former Yugoslavia Since 1991, Seventh Session, the Hague, U.N. Doc. IT/32/Rev. 22 (Dec. 13, 2001).
23. S.C. Res, 955, U.N. SCOR, U.N. DOC. S/RES/955(1994), reprinted in 33 I.L.M. 1598, Nov.8, 1994 [hereinafter Rwanda Statute].
24. 18 U.S.C. § 2441, P.L. 104-192 (War Crimes Act of 1996, as amended).
25. http://www.un.org/icty; http://www.ictr.org; http://www.un.org/law/icc; www.sierra-leone.org/documents-specialcourt.html
26. William H. Parks, *Command Responsibility For War Crimes,* 62 MIL. L. REV. 1 (1973).
27. Michael Smidt, Yamashita, Medina, and Beyond, Command Responsibility in Contemporary Operations, 164 Mil. L. Rev. 155 (2000).
28. Matthew Lippman, Humanitarian Law: The Uncertain Contours of Command Responsibility, 9 Tulsa J. Comp. & Int'l L. 1 (2001).
29. SUN TZU, THE ART OF WAR (Samuel B. Griffith trans., Oxford Univ. Press 1963).
30. LYNN MONTROSS, WAR THROUGH THE AGES 105, 164 (Third Edition, 1960).
31. Theodor Meron, *Crimes and Accountability in Shakespeare,* 92 Am. J. Int'l L. 1 (1998).
32. Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War,* 86 Am. J. Int'l L. 1 (1992).
33. YORAM DINSTEIN & MALA TABROY, WAR CRIMES IN INTERNATIONAL LAW (1996).
34. Henry T. King, Jr., *The Meaning of Nuremberg,* 30 Case W. Res. J. Int'l L. 143 (1998).

I. OBJECTIVES:

A. The history of the law of war as it pertains to war crimes and war crimes prosecutions, focusing on the enforcement mechanisms.

B. The definition of war crimes.

C. The doctrine of command responsibility.

D. Under what jurisdiction and in what forums war crimes may be prosecuted.

II. HISTORY AND DEVELOPMENT OF WAR CRIMES AND WAR CRIMES PROSECUTIONS.

A. Warfare in China, 500 B.C. The ancient Chinese were governed by certain rules of war. For example, it was forbidden in combat to strike elderly men or further injure an enemy previously wounded. SUN TZU, THE ART OF WAR (Samuel B. Griffith trans., Oxford Univ. Press 1963).

B. Byzantine Empire, 527 - 1071 A.D. Even when surrounded by numerous and savage enemies, the Byzantine Horse-Archers' creed included immunity for women and other non-combatants. LYNN MONTROSS, WAR THROUGH THE AGES 105, 164 (Third Edition, 1960).

C. Middle Ages. Warriors developed a code of conduct that became known as chivalry and the forerunner to modern laws of war. The code was a result of the notion that those that bore arms were honorable and those that did not lacked honor. The focus was on the preservation of honor between combatants, not on humanitarian protections for non-combatants. For example, although outlawed in many codes of chivalry, rape was considered a proper incentive in some armies for soldiers involved in siege warfare. *Jus Armorum* or *Jus Militare,* the Law of Arms, was not a body of law between nations; but rather, a body of norms which governed the conduct of military professionals. These rules regulated the conduct of soldiers within Christendom, but not those outside such as Muslims or non-Christians. Theodor Meron, *Crimes and Accountability in Shakespeare*, 92 Am. J. Int'l L. 1 1998); Theodore Meron, *Shakespeare's Henry the Fifth and the Law of War,* 86 Am. J. Int'l L. 1 (1992); YORAM DINSTEIN & MALA TABORY, WAR CRIMES IN INTERNATIONAL LAW (1996).

D. The Scottish Wars of Independence From England. Scottish national hero Sir William Wallace was tried in England in 1305 for the wartime murder of civilians. G.W.S. BARROW, ROBERT BRUCE 203 (1965) (reporting that Sir Wallace allegedly spared "neither age nor sex nor nun").

E. The Trial of Peter Von Hagenbach, 1439. An international tribunal of judges from 28 states stripped Hagenbach of his knighthood and sentenced him to death for murder, rape, perjury and other crimes against "the laws of God and man," what today would be described as Crimes Against Humanity. William H. Parks, *Command Responsibility For War Crimes,* 62 MIL. L. REV. 1 (1973).

F. The American War of Independence. The most frequently punished violations were those committed by forces of the two armies against the persons and property of civilian inhabitants. Trials consisted of courts-martial convened by commanders of the offenders. George L. Coil, *War Crimes of the American Revolution*, 82 MIL. L. REV. 171, 173-81 (1978).

G. The American Civil War. In 1865, Captain Henry Wirz, a former Confederate officer and commandant of the Andersonville, Georgia prisoner of war camp, was tried and convicted and sentenced to death by a Federal military tribunal for murdering and conspiring to ill-treat Federal prisoners of war. J. MCELROY, ANDERSONVILLE (1879); W.B. HESSELTINE, CIVIL WAR PRISONS (1930); LAW OF WAR: A DOCUMENTARY HISTORY. VOL. 1 783 – 798 (Leon Friedman, ed.) (1972).

H. The Anglo-Boer War. In 1902, British courts-martial tried Boers for acts contrary to the usages of war. THE MILNER PAPERS: SOUTH AFRICA, 1897-1899, 1899-1905 (1933).

I. Counter-insurgency operations in the Philippines. Brigadier General Jacob H. Smith, US Army, was tried and convicted by court-martial for inciting, ordering and permitting subordinates to commit war crimes. L. C. Green, *Command Responsibility in International Humanitarian Law,* 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 326 (1995); S. DOC. 213, 57th Cong. 2nd Session, p. 5.

J. World War I. Because of German resistance to the extradition--under the 1919 Versailles peace treaty--of persons accused of war crimes, the Allies agreed to permit the cases to be tried by the supreme court of Leipzig, Germany. The accused were treated as heroes by the German press and public, and many were acquitted despite strong evidence of guilt. DA Pam 27-161-2 at 221.

K. World War II. Victorious allied nations undertook an aggressive program for the punishment of war criminals. This included the joint trial of 24 senior German leaders (in Nuremberg) and the joint trial of 28 senior Japanese leaders (in Tokyo) before specially created International Military Tribunals; twelve subsequent trials of other German leaders and organizations in Nuremberg under international authority and before panels of civilian judges; thousands of trials prosecuted in various national courts, many of these by British military courts and US military commissions. DA Pam 27-161-2 at 224-35; NORMAN E. TUTOROW, WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK 4-8 (1986).

L. Geneva Conventions. Marked the codification--beginning in 1949 when the conventions were opened for signature--of specific international rules pertaining to the trial and punishment of those committing "grave breaches" of the conventions. Pictet at 357-60.

M. U.S. soldiers committing war crimes in Vietnam were tried by US courts-martial under analogous provisions of the UCMJ. MAJOR GENERAL GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964-1973 76-77 (1975); W. Hays Parks, Crimes in Hostilities, Marine Corps Gazette, Aug. 1976, at 16-22.

N. Panama. In a much-publicized case arising in the 82d Airborne Division, a First Sergeant charged, under UCMJ, art. 118, with murdering a Panamanian prisoner, was acquitted by a general court-martial. See *US v. Bryan*, Unnumbered Record of Trial (Hdqtrs, Fort Bragg 31 Aug. 1990) [on file with the Office of the SJA, 82d Airborne Div.].

O. The Persian Gulf War. Although the United Nations Security Council (UNSC) invoked the threat of prosecutions of Iraqi violators of international humanitarian law, the post-conflict resolutions were silent on criminal responsibility. S.C. Res. 692, U.N. SCOR, 2987th mtg., U.N. Doc. S/RES/692 (1991), reprinted in 30 I.L.M. 864 (1991); see also Theodore Meron, The Case for War Crimes Trials in Yugoslavia, Foreign Affairs, Summer 1993, at 125.

P. The Former Yugoslavia. On 22 February 1993, the UNSC established the first international war crimes tribunal since the Nuremberg and Far East trials after World War II. S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993). On 25 May 1993, the Council unanimously approved a detailed report by the Secretary General recommending tribunal rules of procedure, organization, investigative proceedings and other matters. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

Q. Rwanda. On Nov. 8, 1994 the UNSC adopted a Statute creating the International Criminal Tribunal for Rwanda. S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994). Art. 14 of the Statute for Rwanda provides that the rules of procedure and evidence adopted for the Former Yugoslavia shall apply to the Rwanda Tribunal, with changes as deemed necessary.

R. Sierra Leone. On August 14, 2000 the UNSC adopted Resolution 1315, which authorized the Secretary General to enter into an agreement with Sierra Leone and thereby establish the Special Court for Sierra Leone (signed January 16, 2002). The court is a hybrid international-domestic Court to prosecute those allegedly responsible for atrocities in the Sierra Leone.

S. The International Criminal Court. The treaty entered into force on 1 July 2002. As of May04, 96 countries have ratified the Rome Statute of the International Criminal Court.

1. Although the U.S. is in favor of a standing permanent forum to address war crimes, the US does not support the treaty as written. The United States signed the Rome Treaty on 31 December 2000. Based on numerous concerns, however, President George W. Bush directed on 6 May 2002 that notification be sent to the Secretary General of the United Nations, as the depositary of the Rome Statute, that the United States does not intend to become a party to the treaty and has no legal obligations arising from its signature on 31 December 2000.

2. A brief summary of the position of the United States is in the statement made on 6 May 2002 by Marc Grossman (see Appendix A).

3. The United Nations Security Council passed Resolution 1487 on June 12, 2003 (although with abstentions by France, Germany and Syria). This requests that the ICC not commence or proceed with investigation or prosecution of any case involving current or former officials or personnel from a contributing state that is not a party to the ICC over acts or omissions relating to a UN established or authorized operation. This is to continue for 12 months with the expressed intent to renew the request each year (and it continues the same request in UNSC Resolution 1422).

4. During its session held in New York from 3 to 7 February 2003, the Assembly of States Parties elected the eighteen judges of the Court for a term of office of three, six, and nine years. The judges constitute a forum of international experts that represents the world's principal legal systems. Seven were elected from the Western European and others Group of States (WEOG), four from the Latin American and the Caribbean Group of States (GRULAC), three from the Asian Group of States, three from the African Group of States, one from the Group of Eastern Europe. Seven are female and eleven are male judges.

5. In accordance with Article 38 of the Rome Statute, the 18 judges of the Court elected the Presidency on 11 March 2003. It is composed of Judge Philippe Kirsch (Canada) as President, Judge Akua Kuenyehia (Ghana) as First Vice-President, and Judge Elizabeth Odio Benito (Costa Rica) as Second Vice-President of the Court. The Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor. However, the Presidency will coordinate and seek the concurrence of the Prosecutor on all matters of mutual concern.

6. On 26 March 2003, Luis Moreno-Ocampo became the first Chief Prosecutor for the ICC. In July 2003, he rejected requests to investigate allegations of war crimes by US forces during the war in Iraq because the ICC is not "mandated to prosecute such acts since neither Iraq nor the United States is a state party to the court." He has stated that the ICC may investigate charges of crimes against humanity for the massacre of thousands of civilians in Congo.

7. On 24 June 2003, Mr. Bruno Cathala from France was appointed first Registrar of the Court, he will hold office for a renewable term of five years and will exercise his functions under the authority of the President.

T. President George W. Bush issued an order on November 13, 2001 authorizing the trial by military commission of certain terrorists or others supporting or aiding terrorism against the United States (66 Fed. Reg. 57833).

1. This order was further refined by DoD Military Commission Order No. 1 dated March 21, 2002, eight DoD Military Commission Instructions dated April 30, 2003, and a ninth instruction dated December 26, 2003.

2. On July 3, 2003, President Bush determined that six enemy combatants currently held by the US are subjected to his Military Order of November 13, 2001.

U. With the approval of the Civilian Provisional Authority, The Iraqi Governing Council approved the creation of a Special Iraqi Court on December 9, 2003. It will be run by Iraqis to try members of former President Saddam Hussein's government on charges of genocide, crimes against humanity, war crimes and a number of specific offenses under Iraqi law, such as misappropriation of government funds and the invasion of another Arab nation.

1. The court will try the most senior members of the regime for crimes committed between July 17, 1968, when the Baath Party came to power, and May 1, 2003, the day President Bush declared an end to major combat in Iraq.

2. The court will be staffed by Iraqis, but will use international legal experts as advisors to the judges, lawyers and investigators. There is also the potential for international judges to be appointed if needed.

3. There will be 10 trial chambers, each with a five-judge panel and a nine-judge appellate level court.

III. WHAT IS A WAR CRIME?

A. Definition. The lack of a clear definition for this term stems from the fact that both "war" and "crime" themselves have multiple definitions. Some scholars assert that "war crime" means any violation of international law that is subject to punishment. However, it appears that there must be a nexus between the act and some type of armed conflict.

1. "In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders." L. OPPENHEIM, 2 INTERNATIONAL LAW § 251 (7th ed., H. Lauterpacht, 1955); accord TELFORD TAYLOR, NUREMBERG AND VIETNAM 19-20 (1970).

2. "Crimes committed by countries in violation of the international laws governing wars. At Nuremberg after World War II, crimes committed by the Nazis were so tried." BLACK'S LAW DICTIONARY 1583 (6th ed. 1990); cf. FM 27-10, para. 498 (defining a broader category of "crimes under international law" of which "war crimes" form only a subset and emphasizing personal responsibility of individuals rather than responsibility of states).

3. "The 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." FM 27-10, at para. 499.

4. As with other crimes, there is an *Actus Reus* and *Mens Rea* element.

5. Application of the principle of *nullum crimen sine lege* requires that the law to be applied in the trial be binding on the defendant at the time the offense was committed. Application of either customary international law or applicable treaty provisions is required.

6. *Nulla poena sine lege* requires that acts that may be punished as war crimes be clearly defined such that the defendant is on notice.

7. Prosecution of war crimes and difficulties arising there from:

   a. Partiality

      (1) War crimes prosecutions are subject to criticism as "Victor's Justice" vice truly principled prosecution. A primary focus must be on a

fundamentally fair system of justice with consistent application of the laws applied to all.

(2) In the trial of Admiral Donitz in part for the crime of not coming to the aid of enemy survivors of submarine attacks he argued the point that this was in fact the policy of U.S forces in the Pacific under General Nimitz. 22 I.M.T. 559 (1949).

(3) Influence of Realpolitik impacts prosecutions.

(a) Yamashita. Appearance of expedited trial with sentence (death) announced on 7DEC45. Justice Rutledge stated in his dissent that the trial was "the uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander." 327 U.S. 1, 41 (1946).

(b) War crimes prosecutions not pursued post conflict. In Korean Conflict, 23 cases were ready for trial against EPWs in US custody yet they were released under terms of the armistice. Prosecution not mentioned in First Gulf War Ceasefire agreement.

b. Legality.

(1) Ongoing issues with respect to *nullum crimen sine lege* and *ex post facto* laws and balancing gravity of offenses yielding no statute of limitations against reliability of evidence/witness testimony.

(2) Lack of a coherent system to define and enforce this criminal system presupposes a moral order superior to the states involved. This legally positivistic system requires a shared ethic that may or may not exist and is certainly disputed.

(3) Status of individuals under international law is relatively new, although arguably has now crystallized into customary international law principle. Historically states were held responsible as such, however, beginning with the Treaty of Versailles and definitely after WWII individuals were held responsible as actors for the state. In addition historically individuals were prosecuted in national courts for war crimes but now focus is moving to international tribunals.

c. Recording history. Didactic function of war crimes trials is important but may interfere with evidentiary procedures, e.g. by admitting more evidence than may otherwise be admitted.

McCormack and Simpson, eds., The Law of War Crimes: National and International Approaches (1997)

B. The Nuremberg Categories. The Charter of the International Military Tribunal defined the following crimes as falling within the Tribunal's jurisdiction:

1. Crimes Against Peace. Planning, preparation, initiation, or waging of a declared or undeclared war of aggression, or war otherwise in violation of international treaties, agreements, or assurances. This was a charge intended to be leveled against high-level policy planners, not generally at ground commanders.

2. Violation of the Laws and Customs of War. The traditional violations of the laws or customs of war. For example, targeting non-combatants.

3. Crimes Against Humanity. A collective category of major inhumane acts committed against any (internal or alien) civilian population before or during the war. See Charter of the International Military Tribunal, art. 6, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, reprinted in 1 TRIALS OF WAR CRIMINALS 9-16. See generally OPPENHEIM 257 (noting that only one accused was found guilty solely of crimes against peace and two guilty solely of crimes against humanity).

C. Grave Breaches Versus Simple Breaches of the Law of War. The codification in 1949 of crimes involving certain serious conduct gave rise to a distinction between those crimes and acts violative of other customs or rules of war. For a grave breach, there must first be an international armed conflict. Second, the victim must be a "protected person" in one of the conventions. GWS, art. 50; GWS Sea, art. 51; GPW, art. 130; GC, art. 147.

1. Grave Breaches. Serious felonies. Examples include: Willful killing; Torture or inhumane treatment; Biological experiments; Willfully causing great suffering or serious injury to body or health; Taking of hostages; Extensive destruction of property not justified by military necessity; Compelling a prisoner of war to serve in the armed forces of his enemy; Willfully depriving a prisoner of war of his rights to a fair and regular trial.

2. Simple Breaches. Examples include: Making use of poisoned or otherwise forbidden arms or ammunition; Treacherous request for quarter;

Maltreatment of dead bodies; Firing on localities which are undefended and without military significance; Abuse of or firing on the flag of truce; Misuse of the Red Cross emblem; Use of civilian clothing by troops to conceal their military character during battle; Improper use of privileged buildings for military purposes; Poisoning of wells or streams; Pillage or purposeless destruction; Compelling prisoners of war or civilians to perform prohibited labor; Killing without trial spies or other persons who have committed hostile acts; Violation of surrender terms. See FM 27-10, para. 504.

3. Protocol I of the 1949 Geneva Conventions lists additional acts that constitute a grave breach of that Protocol. Cf. Protocol I, arts. 11(4), 85.

D. Violations Charged in current tribunals.

1. International Criminal Tribunal for the Former Yugoslavia

   a. Crimes against Peace are not among listed offenses to be tried.

   b. Violations of the Laws or Customs of War (War Crimes)--traditional offenses such as murder, wanton destruction of cities, towns or villages or devastation not justified by military necessity, firing on civilians, plunder of public or private property and taking of hostages.

      (1) The Opinion & Judgment in the *Tadic* case set forth elements of proof required for finding that the Law of War had been violated:

         (a) An infringement of a rule of International humanitarian law (Hague, Geneva, other);

         (b) Rule must be customary law or treaty law;

         (c) Violation is serious; grave consequences to victim or breach of law that protects important values;

         (d) Must entail individual criminal responsibility; and

         (e) May occur in international or ***internal*** armed conflict.

   c. Crimes Against Humanity. Those inhumane acts that affront the entire international community and humanity at large. Crimes when committed as part of a widespread *or* systematic attack on civilian population.

(1) Charged in the current indictments as murder, ***rape***, torture, and persecution on political, racial, and religious grounds, extermination and deportation.

(2) In the *Tadic* Judgment, the Court cited elements as:

(a) A serious inhumane act as listed in Statute;

(b) Act committed in international or internal armed conflict;

(c) At the time accused acted there were ongoing widespread or systematic attacks directed against civilian population;

(d) Accused knew or had reason to know he/she was participating in widespread or systematic attack on population (actual knowledge);

(e) Act was discriminatory in nature; and

(f) Act had nexus to the conflict.

(3) Crimes against humanity also act as a gap filler to the crime of Genocide because a crime against humanity may exist where a *political group* becomes the target.

d. Grave Breaches. As defined by the Geneva Conventions, may occur only in the context of an international armed conflict. There are eight as listed in outline, above.

(1) Charged in indictments as willful killing, torture, inhumane treatment, and extensive destruction of property not justified by military necessity or causing great serious injury to body or health.

(2) The *Tadic* court found there was no international armed conflict during the time covered by the indictment and therefore victims were not protected persons. Therefore, the court felt it lacked jurisdiction to hear grave breaches because the court first determined that the conflict was purely internal. The court concluded that for a prosecution of a grave breach, the elements are:

(a) One of eight listed acts committed;

(b) International armed conflict; and

(c) Act committed against a protected person or property.

(3) On July 15, 1999, the Appellate Chamber reversed the Trial Chamber and found that the conflict was international. *The Appellate Chamber therefore found Tadic guilty of 9 counts of grave breaches.* The Trial Chamber had based its finding of not guilty solely on the grounds that the conflict was internal so the Appellate Chamber actually found him guilty of the counts rather than sending the case back to the Trial Chamber.

(4) In the *Celebici* case, the ICTY found that the indictment covered a period of international armed conflict. Three of the four accused were convicted of grave breaches.

e. Genocide. Any of the listed acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

(1) Has been charged as persecution, murder, torture, serious bodily injury done to ethnic groups at detention camps, and where civilians fired upon and killed due to national or ethnic affiliation. Includes preventing births within a group, transferring children of group, serious bodily injury to member of a group or killing members of a group.

(2) Genocide v. "Ethnic Cleansing." Ethnic cleansing is a subset of genocide; it is not a separate crime.

2. International Criminal Tribunal for Rwanda.

a. Genocide. Same definition as above. Charged in all indictments for acts such as torturing or killing of Tutsis.

b. Crimes against Humanity. Crimes when committed as part of widespread or systematic attack against any civil population on national, *political,* ethnic, racial or religious grounds.

(1) Charged in all indictments for acts such as extermination of all Tutsis in a village, murder, torture or rape of ethnic group (Tutsi) or liberal political supporters.

(2) Fills gap in definition of genocide. Authorizes prosecution for persecution on political grounds.

c. Article 3 Common to the Four Geneva Conventions and Additional Protocol II. There are eight acts specified in the statute, including taking of hostages; violence to life, health, and physical or mental well being; terrorism; pillage; and executions without judgment by regularly constituted court. This list is illustrative, not exhaustive.

(1) These are war crimes committed in the context of an internal armed conflict and traditionally left to domestic prosecution, but made subject to international prosecution pursuant to the Rwanda Statute.

(2) Charged in all indictments for acts in which the indictee personally participated in or directed the crime. For example, running over a person with a vehicle to induce them to "talk," burning homes, rape, and murder.

(3) *Tadic* interlocutory appellate court decision on jurisdiction held that Common Article 3 protections apply in both international and internal armed conflict. The *Tadic* judgment set out elements as follows (ICTR statute links ICTR to ICTY jurisprudence):

(a) An armed conflict whether international or internal;

(b) Victim is person taking no part in hostilities;

(c) Act against victims is one of those listed in Common Article 3 or Protocol II; and

(d) Act committed in context of armed conflict (need not be while the conflict is ongoing).

E. Special Court for Sierra Leone. Categories of crimes include:

1. Crimes Against Humanity

2. Violations of Common Article 3 and Additional Protocol II.

3. Other Serious Violations of International Humanitarian Law.

4. Certain Crimes under Sierra Leonean Law, to include offenses relating to the abuse of girls under the Prevention of Cruelty to Children Act (1926) and offenses relating to the wanton destruction of property under the Malicious Damage Act (1861).

F. International Criminal Court. The ICC has jurisdiction over the following crimes:

1. Genocide. "For the purpose of this Statute, "genocide" means ... acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group..." There does not appear to be a need to tie the crime of genocide with an armed conflict in order for the ICC to have jurisdiction. This is consistent with the Genocide convention.

2. Crimes against Humanity. "For the purpose of this Statute, "crimes against humanity" means ... acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack..." This includes acts such as murder, extermination, enslavement, deportation or forcible transfer, imprisonment or severe depravation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, persecution against any identifiable group based on **political**, racial, national ethnic, cultural, religious, gender..., enforced disappearance, apartheid, and other inhumane acts.

   a. Although arguably customary international law no longer requires it, traditionally, there had to be a link between crimes against humanity and an armed conflict, however, the ICC Statute does not specifically require such a nexus.

   b. However, jurisdiction exits only where the "attacks" are "widespread or systematic." This language suggests that there must be something akin to an armed conflict or at least a large-scale governmental abuse.

3. War Crimes. For the purposes of the ICC, war crimes means:

   a. In the case of an International Armed Conflict:

      (1) Grave Breaches of the Geneva Conventions.

      (2) Serious violations of the Laws and Customs of War applicable in international armed conflict. The statute lists what it considers to be serious violations.

   b. In the case of an Internal Armed Conflict:

      (1) Violations of Common Article 3.

(2) Other violations of the laws and customs of war "applicable ... within the established framework of international law."

(a) The Statue provides a laundry list of these crimes from various treaties.

(b) It also criminalizes the attack of personnel, equipment, installations, or vehicles involved with a UN peacekeeping or humanitarian mission.

(c) Recognizes that the Statute does not apply to situations of mere internal disturbances and tensions that do not rise to the level of a Common Article 3 conflict.

4. Crime of Aggression. Article 5(2) states that the ICC will have jurisdiction over the crime of aggression after a provision is adopted defining the crime and setting out the conditions under which the ICC will exercise this jurisdiction.

G. Statute of the Iraqi Special Tribunal

1. Genocide

2. Crimes Against Humanity

3. War Crimes

4. Certain Violations of Iraqi Law, to include Tampering with the Judiciary, War against an Arab state, and Squandering Iraqi resources.

H. Common Article 3 of the Four Geneva Conventions. Minimum standards that Parties to a conflict are bound to apply, in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting parties. Nothing in Common Article 3 discusses individual criminal liability.

1. ICTY has held that prosecutions for violations of Common Article 3 can be brought in international as well as internal armed conflicts.

2. The International Criminal Court statute provides for prosecution of violations of Common Article 3 in non-international armed conflicts. See Rome Statute, article 8(c).

3. 18 U.S.C. § 2441 now permits prosecutions for violations of Common Article 3 in the U.S. federal court system.

I. Genocide. In 1948, the U.N. General Assembly defined this crime to consist of killing and other acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, "whether committed in time of peace or in time of war." Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 11, 1948, art. 2, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). U.S. ratification was given advice and consent by Senate in the Genocide Convention Implementation (Proxmire) Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. § 1091).

J. Other Treaties. Violations of treaties to which the United States is a party also create bases for criminal liability. For example, the 1993 Chemical Weapons Convention and the 1980 Conventional Weapons Convention.

K. Conspiracy, Incitement, Attempts, and Complicity. International law allows for punishment of these forms of crime. GPW, art. 129 (subjecting to penal sanctions "persons alleged to have committed, or to have ordered to be committed" serious war crimes) (emphasis added); Allied Control Council Law No. 10, art. II, para. 2, Dec. 20, 1945, reprinted in 1 TRIALS OF WAR CRIMINALS 16; S. C. Res. 827, U.N. SCOR, U.N. DOC. S/RES/827 (1993), art.7; S. C. Res. 955, U.N. SCOR, U.N.DOC S/RES/955, art. 6; FM 27-10, ¶ 500.

L. Distinctives of Crimes against Humanity:

1. General Requirements of Crimes against Humanity:

a. There is an "attack." This is distinct from any ongoing armed conflict. An attack for these purposes does not require an ongoing internal or international armed conflict but may be conducted by a regime against its own people. This differs from the original definition in Article 6(c) of the Nuremburg Charter that required a nexus to an armed conflict and reflects a change in customary international law. *See* Antonio Cassese, *Crimes Against Humanity*, in Cassese, Gaeta and Jones, eds., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, vol. 1, at 356.

b. There is a nexus between that attack and the act(s) of the accused. Requires an act by the defendant, which by its nature or consequences is liable to further the attack AND the defendant knows that there is this broader attack and he/she is part of it.

c. The attack is directed against any civilian population. The subject civilian population must be the primary object of the attack and not just an incidental victim. This element addresses the broader attack, not the immediate victim of the defendant's action. "Any" denotes the need to identify some characteristic used to distinguish this group, i.e. a trait or location, from a more general population. This may be limited as in the ICTR Statute (only national, political, ethnic, racial, or religious discrimination), however, with the exception of persecution there is no specific discriminatory intent required. The idea of "population" requires more than just an isolated or random act against a few individuals.

d. The attack is systematic or widespread. This addresses the larger scale of the attack, i.e. the number of victims or the organized nature of the acts.

e. The defendant must know of the attack and that his/her acts are part of that attack or may further that attack. This is the key *mens rea* element that distinguishes Crimes Against Humanity.

2. In addition to these general requirements, there must be a foundational crime, likely to be identified in the courts statute, i.e. murder, enslavement, deportation, torture, rape, etc.

3. The idea that the offense is a "crime against humanity" derives from the notion that the act injures not just the victim(s), but tears at the fabric of what it means to be human.

4. Differs from war crimes because:

   a. War crimes require an armed conflict whereas Crimes Against Humanity do not.

   b. War crimes do not require a connection to a widespread or systematic attack.

   c. War crimes are a broader category of offenses, some of which could be the underlying foundational offense for a Crime Against Humanity. Note that the additional element to prove a crime against humanity overcomes problems of multiplicious charging for a single act.

5. Differs from Genocide because:

a. *Mens rea* element in genocide requires intent to destroy all or part of a group, while Crimes Against Humanity does not.

b. Genocide does not require proof of a widespread or systematic attack. It could actually be the acts of one person with requisite intent.

c. Victims of Genocide can be anyone, however, Crimes Against Humanity must be committed against a civilian population.

d. Genocide must be based upon national, ethnic, racial or religious identity and Crimes Against Humanity address broader categories.

6. "Hermann Goering was a criminal against humanity, but so was the unremarkable German citizen who denounced his Jewish neighbor to the Gestapo, knowing what his neighbor's fate would be."

   See Guenaël Mettraux, Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for The Former Yugoslavia and for Rwanda, 43 HARV. INT'L L.J. 237 (2002).

M. Defenses in a War Crimes Prosecution. Not well settled based upon the competing interests of criminal law principles and the seriousness of protecting victims from war crimes, crimes against humanity, etc. Defenses available will be specifically established in the court's constituting documents (although an argument from customary international law is always open as a possibility for a zealous defense counsel).

1. Official Capacity or Head of State Immunity. While historically this was a possible defense rooted in sovereign immunity, current jurisprudence indicates that it is likely no longer available.

2. Superior Orders. Generally, it is only a possible defense if the defendant was required to obey the order, the defendant did not know it was unlawful and the order was not manifestly unlawful.

3. Duress. May be available as a defense, however, it may also only be taken into account as a mitigating factor depending on the specific law governing the court. For example, the ICTY and ICTR only allow duress to be considered as a mitigating factor and not as a full defense. In general, duress requires that the act charged was done under an immediate threat of severe and irreparable harm to life or limb, there was no adequate means to avert the act, the act/crime committed was not disproportionate to the evil threatened (crime committed is the lesser of two evils), and the situation must not have

been brought on voluntarily by the defendant (i.e. did not join a unit known to commit such crimes routinely).

4. Lack of Mental Responsibility. Not clearly defined in customary international law. Possibly available if the defendant, due to mental disease or defect, did not know the nature and quality of the criminal act or was unable to control his/her conduct.

IV. COMMAND RESPONSIBILITY FOR THE CRIMINAL ACTS OF SUBORDINATES

A. Commanders may be held liable for the criminal acts of their subordinates even if the commander did not personally participate in the underlying offenses if certain criteria are met. Where the doctrine is applicable, the commander is accountable as if he or she was a principal.

B. As with other customary international law theories of criminal liability, the doctrine dates back almost to the beginning of organized professional armies. In his classical military treatise, Sun Tzu explained that the failure of troops in the field cannot be linked to "natural causes," but rather to poor leadership. International recognition of the concept of holding commanders liable for the criminal acts of their subordinates occurred as early as 1474 with the trial of Peter of Hagenbach. William H. Parks, *Command Responsibility for War Crimes,* 62 MIL L. REV. 1 (1973).

C. A commander is not strictly liable for all offenses committed by subordinates. The commander's personal dereliction must have contributed to or failed to prevent the offense. Japanese Army General Tomoyuki Yamashita was convicted and sentenced to hang for war crimes committed by his soldiers in the Philippines. Although there was no evidence of his direct participation in the crimes, the Military Tribunal determined that the violations were so widespread in terms of time and area, that the General either must have secretly ordered their commission or failed in his duty to discover and control them. Most commentators have concluded that *Yamashita* stands for the proposition that where a commander ***knew or should have known*** that his subordinates were involved in war crimes, the commander may be liable if he or she did not take reasonable and necessary action to prevent the crimes. *US v. Tomoyuki Yamashita,* Military Commission Appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces Western Pacific, 1 Oct. 1945.

William H. Parks, *Command Responsibility For War Crimes*, 62 MIL L. REV. 1 (1973).

D. Two cases prosecuted in Germany after WWII further helped to define the doctrine of command responsibility.

1. In the High Command case, the prosecution tried to argue a strict liability standard. The court rejected this, however, and stated: "Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility . . . A high commander cannot keep completely informed of the details of military operations of subordinates . . . He has the right to assume that details entrusted to responsible subordinates will be legally executed . . . There must be a personal dereliction. That can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations."

2. The court in the Hostage Case found that knowledge might be presumed where reports of criminal activity are generated for the relevant commander and received by that commander's headquarters.

E. Protocol I, art. 86. Represents the first attempt to codify the customary doctrine of command responsibility. The *mens rea* requirement for command responsibility is "*knew, or had information, which should have enabled them to conclude*" that war crimes were being committed and "did not take *all feasible measures* within their power to prevent or repress the breach."

F. The International Criminal Tribunals for the Former Yugoslavia & Rwanda.

1. "Individual Criminal Responsibility: The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he *knew or had reason to know* that the subordinate was about to commit such acts or had done so and the superior failed to take the *necessary and reasonable measures* to prevent such acts or to punish the perpetrators thereof." ICTY Statute, art. 7(3); ICTR Statute, art. 6(3).

2. In ICTR, the doctrine of superior responsibility is used in numerous indictments, for example those against Theoneste Bagosora (assumed official

and *defacto* control of military and political affairs in Rwanda during the 1994 genocide) and Jean Paul Akayesu (bourgmestre (mayor), responsible for executive functions and maintenance of public order within his commune), high-ranking civilian officials in the Rwandan national and local governments, respectively.

3. In ICTY, the doctrine of command responsibility is used in numerous indictments, to include those against Slobodan Milosevic (President of the FRY) (See Appendix), Radovan Karadzic (as founding member and President of Serbian Democratic Party) and Gen. Ratko Mladic (Commander of JNA Bosnian Serb Army).

G. The International Criminal Court establishes its definition of the requirements for the responsibility of Commanders and other superiors in Article 28 of the Rome Statute. Note that it denotes the responsibility for military commanders and those functioning as such (subparagraph a) differently from other superiors, i.e. civilian leaders (subparagraph b).

1. Subparagraph a states: "A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

   a. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

   b. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

2. Subparagraph b states: "With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

a. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

b. The crimes concerned activities that were within the effective responsibility and control of the superior; and

c. The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

H. Prosecution of command responsibility cases in the U.S. Military.

1. It is U.S. Army Policy that soldiers be tried in courts-martial rather than international forums. FM 27-10, para. 507.

2. No separate crime of command responsibility or theory of liability, such as conspiracy, for command responsibility in UCMJ. For a discussion of this and some proposed changes, see Michael L. Smidt, *Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations,* 164 MIL. L. REV. 155 (2000).

3. UCMJ, art. 77, Principals. For a person to be held liable for the criminal acts of others, the non-participant must share in the perpetrators purpose of design, and "assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist...." Where a person has a duty to act, such as a security guard, inaction alone may create liability. However, Art. 77 suggests that *actual knowledge*, not a lack of knowledge due to negligence, is required.

   a. At the court-martial of Captain Medina for his alleged participation in the My Lai incident in Vietnam, the military judge instructed the panel that they would have to find that Medina, the company commander, had actual knowledge in order to hold him criminally liable for the massacre. There was not enough evidence to convict Captain Medina using that standards and he was acquitted of the charges.

   b. Accordingly, it appears that in domestic courts-martial, a prosecutor must establish actual knowledge on the part of the accused. See *US v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973); *US v. Medina*, C.M. 427162 (A.C.M.R. 1971).

c. Army Policy. "The commander is responsible if he ordered the commission of the crime, has actual knowledge, or *should have knowledge*, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the *necessary and reasonable* steps to insure compliance with the law of war or to punish violators thereof." FM 27-10, ¶ 501; see also TC 27-10-3 at 19-21.

V. FORUMS FOR THE PROSECUTION OF WAR CRIMES

A. International v. Domestic Crimes

1. Built on the concept of national sovereignty, jurisdiction traditionally follows territoriality or nationality.

2. In war crimes prosecutions, the veil of sovereignty is pierced.

3. Universal international jurisdiction first appeared in Piracy cases where the goal was to protect trade and commerce on the high seas, an area generally believed to be without jurisdiction.

4. Universal jurisdiction in war crimes first came into being in the days of chivalry where the warrior class asserted its right to punish knights that had violated the honor of the profession of arms irrespective of nationality or location. The principle purpose of the law of war eventually became humanitarianism. The international community argued that crimes against "God and man" transcended the notion of sovereignty.

B. Current International Jurisdictional Bases.

1. International Criminal Court.

2. Ad hoc tribunal under the authority of UN Charter (ICTY or ICTR) or separate treaty (Sierra Leone).

3. Some states claim universal jurisdiction over all war crimes despite the lack of any nexus to the alleged crime.

a. Belgium passed a law in 1993 invoking universal jurisdiction over any war crimes which did not require either complainants or accused to have a connection to Belgium. After successfully trying four cases from Rwanda, many complaints were filed with the courts. The statute was

amended in April 2003 to state that mandatory investigation could begin only if the complaint had a direct link to Belgium. The statute was further revised effective August 1, 2003 when the previous statute was repealed and pending complaints nullified. (repeal and nullification upheld by the Belgian Supreme Court in September 2003).

C. Domestic Jurisdictional Bases. Each nation provides its own jurisdiction. The following is the current U.S. structure.

1. General Courts-Martial.

   a. In addition to the jurisdiction to try U.S. service members, the military may try by general court-martial anyone subject to trial for violations of the law of war. UCMJ, art. 18.

   b. If there is a declared war, then civilians accompanying U.S. forces may be prosecuted in the same forum as U.S. soldiers. See UCMJ, art. 2(a)(10). UCMJ jurisdiction, both personal and substantive, over civilians accompanying the force exists only during "time of war." This time of war qualifier has been interpreted to require an actual declaration of war. *US v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

2. The War Crimes Act of 1996 (18 U.S.C. § 2441) (amended in 1997). Authorizes the prosecution of individuals in federal court if the victim or the perpetrator is a US national (as defined in the Immigration and Nationality Act) or member of the armed forces of the US, whether inside or outside the US. Jurisdiction attaches if the accused commits:

   a. A Grave Breach of the 1949 Geneva Conventions.

   b. Violations of certain listed articles of the Hague Conventions.

   c. Violations of Common Article 3 of the Geneva Conventions, and of Protocol I or Protocol II of the Geneva Conventions when and if the US becomes parties to either of the Protocols.

   d. Violations of Protocol II to the Amended Conventional Weapons Treaty.

3. The Military Extraterritorial Jurisdiction Act of 2000 may also serve as a basis for prosecution for war crimes. DoD is currently working on implementing instructions (issued for comment in the Federal Register on February 2, 2004.

D. Military Commissions.

1. Military commissions, tribunals, or provost courts may try individuals for violations of the law of war. UCMJ, art. 21. This jurisdiction is concurrent with that of a general court-martial.

2. Historical use can be traced back to Gustavus Adolphus and his use of a board of officers to hear law of war violations and make recommendations on their resolution. Frequent use in British military history, which was incorporated into the U.S. Military from its beginning. Used first in U.S. to try Major John Andre for spying in conjunction with General Benedict Arnold. Later used by then General Andrew Jackson after the Battle for New Orleans in 1815, and again during the Seminole War and the Mexican-American War. Used extensively in Civil War to deal with people hostile to Union forces in "occupied" territories. Their used continued in all subsequent conflicts and culminated in World War II where military commissions prosecuted war crimes both in the United States and extensively overseas. Such use places the legitimacy of military commissions to try persons for war crimes firmly in customary international law.

3. Constitutional Authority. "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex Parte Quirin,* 317 U.S. 1, 25 (1942).

   a. Congressional authority to create military commissions derived from Article I, section 8, clauses 1, 10, 11, 14 and 18. Especially relevant is clause 10, which grants authority to define and punish . . . offenses against the Law of Nations."

   b. Presidential authority is derived from Article II, section 2, clause 1 (powers as Commander in Chief).

   c. Confirmed by the Supreme Court in *Ex parte Quirin, In re Yamashita,* and *Madsen v. Kinsella.* The first two recognized the dual authority of the Congress and President, while the third concluded that absent congressional action to the contrary, the President has authority as the Commander in Chief to create military commissions.

4. Types of Military Commissions. A key distinguishing factor regarding not only jurisdictional basis, but also crimes that may be tried and who is subject

to trial by military commission is determining which type of military commission is at issue.

a. Martial Law Courts, when used within the U.S. or its territories when replacing the civil government.

b. Military Government Courts, when used outside of the U.S. (or within the U.S. in rebel territory during the Civil War) in lieu of the civil government.

c. War Courts, when used by a military commander for the purpose of trying someone for violations of the law of war.

5. Limitations on Jurisdiction based on Location.

a. Historically, offenses within a military commission's jurisdiction (when sitting as a Military Government Court or a War Court) must have been committed (1) within a theater of war, (2) within the territory controlled by the commander ordering the trial, and (3) during a time of war.

b. In the Civil War, all three types of military commissions were used extensively, especially after Lincoln's 1862 declaration of a state of martial law throughout the country. Some thought the expansive use authorizing the trial of U.S. citizens outside of a zone of occupation or insurrection was not proper, while others accepted this stating the entire country was within a theater of war. In *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866), the Supreme Court limited the jurisdiction to areas under valid martial law or occupation, thus commissions were still valid in the occupied South.

c. World War II saw the next extensive use and due to the global nature of the war, the "theater of war" requirement lost much relevance. For example, in *Quirin,* neither the trial nor the defendants' crimes were committed in the theater of war as traditionally defined; yet the Supreme Court said the military commission had jurisdiction because the crime was committed when the defendants passed through the U.S. military lines and remained in the U.S. (U.S. briefing argued that the global nature of the war put "every foot of this country within the theater of war.").

6. Limitations on Jurisdiction based on the Person.

a. U.S. citizens.

(1) Military commissions lack jurisdiction to try U.S. civilians when the civil courts are still open. This does not apply to areas under valid martial law or areas in rebellion; however, these circumstances will be extremely limited, even during a state of war. See *Ex parte Milligan* and *Duncan v. Kahanamoku,* 327 U.S. 304 (1946).

(2) Military commissions acting as a Military Government Court may try U.S. citizens for violations in an occupied territory. *Madsen v. Kinsella,* 343 U.S. 341 (1952).

(3) Military Commissions (sitting as a War Court) may try U.S. citizens who engage in belligerent acts against the U.S. for war crimes. *Quirin,* 317 U.S. at 37 ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.").

b. Foreign Nationals.

(1) During international armed conflict, under Geneva Convention III, articles 84, 85, and 102, the U.S. can only use military commissions to try prisoners of war if they are also used to try U.S. military personnel. The U.S. does not currently use military commissions to try U.S. service members.

(2) During international armed conflict, Geneva Convention IV, articles 64, 66 and 70 authorize, but place some restrictions on, the use of military commissions to try protected civilians in occupied territories.

(3) *Habeas Corpus* Issues.

(a) May have access to U.S. court review based on territorial jurisdiction, i.e. the crimes, trial or confinement are in the U.S. or its territories.

(b) Will not have access to habeas review if they are nonresident enemy aliens whose crimes, trial, and confinement are all outside of the U.S. or its territories. *Johnson v. Eisentrager,* 339 U.S. 763 (1950).

7. Absent action by the President pursuant to art. 36, UCMJ, to set rules and procedures, and in the absence of applicable international law, military

commissions "shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial." MCM, pt. I, & 2(b)(2).

8. In theory, could provide very limited evidentiary and procedural formality; see e.g, *Yamashita,* 327 US 18, and a very streamlined appeal process. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950).

9. International treaty obligations, however, may provide a floor of procedural rights. *See* Geneva Convention III and the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 (to which the U.S. is a party). *See also* HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 321 n. 29, 335 n. 98, 383 (1976); IV Pictet at 413-14; 2 Final Record of the Diplomatic Conference of Geneva of 1949 389-90; JOHN N. MOORE, ET. AL., NATIONAL SECURITY LAW 373 (1990).

VI. CONCLUSION

APPENDIX A

American Foreign Policy and the International Criminal Court

Marc Grossman, Under Secretary for Political Affairs
Remarks to the Center for Strategic and International Studies
Washington, DC
May 6, 2002

As Prepared

Good morning. Thank you for that kind introduction.

It's an honor to be here today. I would like to thank CSIS for hosting this discussion of American foreign policy and the International Criminal Court.

Let me get right to the point. And then I'll try to make my case in detail:

Here's what America believes in:

- We believe in justice and the promotion of the rule of law.
- We believe those who commit the most serious crimes of concern to the international community should be punished.
- We believe that states, not international institutions are primarily responsible for ensuring justice in the international system.
- We believe that the best way to combat these serious offenses is to build domestic judicial systems, strengthen political will and promote human freedom.

We have concluded that the International Criminal Court does not advance these principles. Here is why:

- We believe the ICC undermines the role of the United Nations Security Council in maintaining international peace and security.
- We believe in checks and balances. The Rome Statute creates a prosecutorial system that is an unchecked power.
- We believe that in order to be bound by a treaty, a state must be party to that treaty. The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty.
- We believe that the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.

President Bush has come to the conclusion that the United States can no longer be a party to this process. In order to make our objections clear, both in principle and philosophy, and so as not to create unwarranted expectations of U.S. involvement in the Court, the President believes that he has

no choice but to inform the United Nations, as depository of the treaty, of our intention not to become a party to the Rome Statute of the International Criminal Court. This morning, at the instruction of the President, our mission to the United Nations notified the UN Secretary General in his capacity as the depository for the Rome Statute of the President's decision. These actions are consistent with the Vienna Convention on the Law of Treaties.

The decision to take this rare but not unprecedented act was not arrived at lightly. But after years of working to fix this flawed statute, and having our constructive proposals rebuffed, it is our only alternative.

Historical Perspective

Like many of the nations that gathered in Rome in 1998 for the negotiations to create a permanent International Criminal Court, the United States arrived with the firm belief that those who perpetrate genocide, crimes against humanity, and war crimes must be held accountable — and that horrendous deeds must not go unpunished.

The United States has been a world leader in promoting the rule of law. From our pioneering leadership in the creation of tribunals in Nuremberg, the Far East, and the International Criminal Tribunals for the former Yugoslavia and Rwanda, the United States has been in the forefront of promoting international justice. We believed that a properly created court could be a useful tool in promoting human rights and holding the perpetrators of the worst violations accountable before the world — and perhaps one day such a court will come into being.

A Flawed Outcome

But the International Criminal Court that emerged from the Rome negotiations, and which will begin functioning on July 1 will not effectively advance these worthy goals.

First, we believe the ICC is an institution of unchecked power. In the United States, our system of government is founded on the principle that, in the words of John Adams, "power must never be trusted without a check." Unchecked power, our founders understood, is open to abuse, even with the good intentions of those who establish it.

But in the rush to create a powerful and independent court in Rome, there was a refusal to constrain the Court's powers in any meaningful way. Proposals put forward by the United States to place what we believed were proper checks and balances on the Court were rejected. In the end, despite the best efforts of the U.S. delegation, the final treaty had so many defects that the United States simply could not vote for it.

Take one example: the role of the UN Security Council. Under the UN Charter, the UN Security Council has primary responsibility for maintaining international peace and security. But the Rome Treaty removes this existing system of checks and balances, and places enormous unchecked power in the hands of the ICC prosecutor and judges. The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself.

In Rome, the United States said that placing this kind of unchecked power in the hands of the

prosecutor would lead to controversy, politicized prosecutions, and confusion. Instead, the U.S. argued that the Security Council should maintain its responsibility to check any possible excesses of the ICC prosecutor. Our arguments were rejected; the role of the Security Council was usurped.

Second, the treaty approved in Rome dilutes the authority of the UN Security Council and departs from the system that the framers of the UN Charter envisioned.

The treaty creates an as-yet-to-be defined crime of "aggression," and again empowers the court to decide on this matter and lets the prosecutor investigate and prosecute this undefined crime. This was done despite the fact that the UN Charter empowers only the Security Council to decide when a state has committed an act of aggression. Yet the ICC, free of any oversight from the Security Council, could make this judgment.

Third, the treaty threatens the sovereignty of the United States. The Court, as constituted today, claims the authority to detain and try American citizens, even though our democratically-elected representatives have not agreed to be bound by the treaty. While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, the United States has never recognized the right of an international organization to do so absent consent or a UN Security Council mandate.

Fourth, the current structure of the International Criminal Court undermines the democratic rights of our people and could erode the fundamental elements of the United Nations Charter, specifically the right to self defense.

With the ICC prosecutor and judges presuming to sit in judgment of the security decisions of States without their assent, the ICC could have a chilling effect on the willingness of States to project power in defense of their moral and security interests.

This power must sometimes be projected. The principled projection of force by the world's democracies is critical to protecting human rights — to stopping genocide or changing regimes like the Taliban, which abuse their people and promote terror against the world.

Fifth, we believe that by putting U.S. officials, and our men and women in uniform, at risk of politicized prosecutions, the ICC will complicate U.S. military cooperation with many friends and allies who will now have a treaty obligation to hand over U.S. nationals to the Court — even over U.S. objections.

The United States has a unique role and responsibility to help preserve international peace and security. At any given time, U.S. forces are located in close to 100 nations around the world conducting peacekeeping and humanitarian operations and fighting inhumanity.

We must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions and investigations. Our President is committed to a robust American engagement in the world to defend freedom and defeat terror; we cannot permit the ICC to disrupt that vital mission.

The President did not take his decision lightly.

After the United States voted against the treaty in Rome, the U.S. remained committed and engaged—working for two years to help shape the court and to seek the necessary safeguards to prevent a politicization of the process. U.S. officials negotiated to address many of the concerns we saw in hopes of salvaging the treaty. The U.S. brought international law experts to the preparatory commissions and took a leadership role in drafting the elements of crimes and the procedures for the operation of the court.

While we were able to make some improvements during our active participation in the UN Preparatory Commission meetings in New York, we were ultimately unable obtain the remedies necessary to overcome our fundamental concerns.

On December 31, 2000, the previous administration signed the Rome Treaty. In signing President Clinton reiterated "our concerns about the significant flaws in the treaty," but hoped the U.S. signature would provide us influence in the future and assist our effort to fix this treaty. Unfortunately, this did not prove to be the case.

On April 11, 2002, the ICC was ratified by enough countries to bring it into force on July 1 of this year. Now we find ourselves at the end of the process. Today, the treaty contains the same significant flaws President Clinton highlighted.

Our Philosophy

While we oppose the ICC we share a common goal with its supporters - the promotion of the rule of law. Our differences are in approach and philosophy. In order for the rule of law to have true meaning, societies must accept their responsibilities and be able to direct their future and come to terms with their past. An unchecked international body should not be able to interfere in this delicate process.

For example: When a society makes the transition from oppression to democracy, their new government must face their collective past. The state should be allowed to choose the method. The government should decide whether to prosecute or seek national reconciliation. This decision should not be made by the ICC.

If the state chooses as a result of a democratic and legal process not to prosecute fully, and instead to grant conditional amnesty, as was done in difficult case of South Africa, this democratic decision should be respected.

Whenever a state accepts the challenges and responsibilities associated with enforcing the rule of law, the rule of law is strengthened and a barrier to impunity is erected. It is this barrier that will create the lasting goals the ICC seeks to attain. This responsibility should not be taken away from states.

International practice should promote domestic accountability and encourage sovereign states to seek reconciliation where feasible.

The existence of credible domestic legal systems is vital to ensuring conditions do not deteriorate to the point that the international community is required to intercede.

In situations where violations are grave and the political will of the sovereign state is weak, we should work, using any influence we have, to strengthen that will. In situations where violations are so grave as to amount to a breach of international peace and security, and the political will to address these violations is non-existent, the international community may, and if necessary should, intercede through the UN Security Council as we did in Bosnia and Rwanda.

Unfortunately, the current framework of the Rome treaty threatens these basic principles.

We Will Continue To Lead

Notwithstanding our disagreements with the Rome Treaty, the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court.

So, despite this difference, we must work together to promote real justice after July 1, when the Rome Statute enters into force.

The existence of a functioning ICC will not cause the United States to retreat from its leadership role in the promotion of international justice and the rule of law.

The United States will:

- Work together with countries to avoid any disruptions caused by the Treaty, particularly those complications in US military cooperation with friends and allies that are parties to the treaty.
- Continue our longstanding role as an advocate for the principle that there must be accountability for war crimes and other serious violations of international humanitarian law.
- Continue to play a leadership role to right these wrongs.
- The armed forces of the United States will obey the law of war, while our international policies are and will remain completely consistent with these norms.
- Continue to discipline our own when appropriate.
- We will remain committed to promoting the rule of law and helping to bring violators of humanitarian law to justice, wherever the violations may occur.

- We will support politically, financially, technically, and logistically any post-conflict state that seeks to credibly pursue domestic humanitarian law.

- We will support creative ad-hoc mechanisms such as the hybrid process in Sierra Leone – where there is a division of labor between the sovereign state and the international community–as well as alternative justice mechanisms such as truth and reconciliation commissions.

- We will work with Congress to obtain the necessary resources to support this global effort.

- We will seek to mobilize the private sector to see how and where they can contribute.

- We will seek to create a pool of experienced judges and prosecutors who would be willing to work on these projects on short-notice.

- We will take steps to ensure that gaps in United States' law do not allow persons wanted or indicted for genocide, war crimes, or crimes against humanity to seek safe haven on our soil in hopes of evading justice.

And when violations occur that are so grave and that they breach international peace and security, the United States will use its position in the UN Security Council to act in support of justice.

We believe that there is common ground, and ask those nations who have decided to join the Rome Treaty to meet us there. Encouraging states to come to face the past while moving into the future is a goal that no one can dispute. Enhancing the capacity of domestic judiciaries is an aim to which we can all agree. The United States believes that justice would be best served in creating an environment that will have a lasting and beneficial impact on all nations across the globe. Empowering states to address these challenges will lead us to a more just and peaceful world. Because, in the end, the best way to prevent genocide, crimes against humanity, and war crimes is through the spread of democracy, transparency and rule of law. Nations with accountable, democratic governments do not abuse their own people or wage wars of conquest and terror. A world of self-governing democracies is our best hope for a world without inhumanity.

Released on May 6, 2002

APPENDIX B

EXCERPT FROM MILOSEVIC INDICTMENT FOR WAR CRIMES IN BOSNIA AND HERZEGOVINA

IT -02-54-T 31 May 2002 277

CRIMINAL RESPONSIBILITY AS A SUPERIOR UNDER ARTICLE 7(3)
1018. The Accused is charged in all counts of the Indictment with responsibility as a superior under Article 7(3). The essential elements for superior or command responsibility are:
- the existence of a superior-subordinate relationship between the accused and the perpetrator of the offence;
- the accused knew or had reason to know that the perpetrator was about to commit the offence or had done so; and
- the accused failed to take th e necessary and reasonable measures to prevent the offence or to punish the perpetrator.2135

Superior-Subordinate Relationship
1019. The applicable test for whether the accused had superior responsibility for acts of the perpetrator is one of "effective control".2136 It is irrelevant whether the accused was a military leader, a civilian leader, or a civilian acting as a military leader by virtue of constitutional structure or self-proclaimed legitimacy.2137

1020. The accused's superior authority can be either de jure or de facto.2138 "[F]ormal designation as commander should not be considered a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's de facto [position]".2139 Evidence that the accused possessed de jure authority, however, raises a presumption of "effective control unless proof to the contrary is produced".2140 The existence of the superior-subordinate relationship, whether de facto or de jure, need not be evidenced by an official appointment or formal documentation.2141 The effective control test implies that more than one superior may be held responsible for the same crimes.2142

1021. The status of subordinates may also be de facto.2143 The relationship of subordination may be direct, or may be indirect, particularly "in situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures may be ambiguous and ill-defined".2144 A tacit or implicit understanding between the commander and his subordinate "as to their positioning vis-à-vis one another is sufficient".2145

1022. A commander need not have legal authority to prevent or punish acts of his subordinates.2146 Factors relevant to a finding of effective control by a superior over de facto subordinates may include, but are not limited to:
- the capacity to sign orders;2147
- the substance of orders;2148

- whether orders were acted upon;2149
- formal procedures for appointment to office;2150
- the position of the accused in the overall institutional, political and military organisation;2151
- the actual tasks performed;2152
- evidence that the accused has a high public profile;2153
- the accused's overall behaviour towards subordinates and his duties;2154
- the accused's use of his extant authority to prevent crimes and mistreatment; 2155
- the exercise of powers generally attached to a military command;2156
- the submitting of reports to competent authorities in order for proper measures to be taken;2157 and
- sanctioning power.2158

Knowledge

1023. The Prosecution must show that a superior "knew or had reason to know that a subordinate was about to commit a prohibited act or had done so".2159 The mental state requirement can be satisfied either by actual knowledge, i.e., "actual notice", or by "notice of the risk of such offences",2160 i.e., "inquiry notice". The same state of knowledge is required for both civilian and military commanders.2161

1024. Actual knowledge is "defined as the awareness that the relevant crimes were committed or were about to be committed",2162 and can be established through either direct or circumstantial evidence.2163 This Tribunal has used the United Nations Commission of Experts' non-exclusive list of factors to prove actual knowledge circumstantially: the number, type and scope of the illegal acts; the time during which the acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the speed of the operations; the modus operandi of similar illegal acts; the officers and staff involved; and the location of the commander at the time.2164 An individual's command position "per se is a significant indicium that he knew about the crimes committed by his subordinates".2165

1025. Alternatively, the accused "had reason to know" his subordinates were about to or had committed certain offences, if he "had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates".2166 Once he is "in some way put on notice that criminal activity is afoot", then Article 7(3) imposes a duty on the superior "to obtain information about crimes committed by subordinates".2167 For example, the "widespread nature of large-scale atrocities over a long period of time" should put an accused in a position of superior auth ority "on notice that crimes were being or had been committed by his subordinates".2168 The indicia listed by the United Nations Commission of Experts for actual notice can also be applied to inquiry notice.2169

1026. The general information putting a superior on notice "needs only to have been provided or available to the superior, or ... 'in the possession of'".2170 "It is not required that he actually acquainted himself with the information".2171 Therefore, although Article 7(3) is not a form of strict liability,2172 a superior is criminally responsible if he deliberately ignores available information that would put him on notice.2173

2173 *Celebici* Appeals Judgement, para. 238. Information available to the superior which can provide the requisite notice includes, for example, reports addressed to the superior, the tactical situation, and the training, instruction and character traits of subordinate officers and troops, *Celebici* Appeals Judgement, para. 238, **IT-02-54-T**

Necessary and Reasonable Measures

1027. A superior must take "necessary and reasonable measures" to satisfy his or her obligation to prevent offences or punish offenders under Article 7(3).2174 The adequacy of these measures is commensurate with the material ability of a superior to prevent or punish.2175 Insofar as a superior is in effective control, therefore, he or she must exercise whatever ability he or she has to prevent crimes or punish perpetrators.

1028. The Trial Chamber should consider the accused's "actual ability or effective capacity" to take action, rather than his legal or formal authority.2176 "A superior is not obliged to perform the impossible[;] [h]owever, the superior has a duty to exercise the powers he has within the confines of those limitations".2177 The duty to prevent or to punish "includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself".2178 Whether the accused's effort to prevent or punish the crimes committed by subordinates rises to the level of "necessary and reasonable measures" is for the Trial Chamber to evaluate under the facts of the particular case.2179

1029. The obligation to prevent "or" to punish "does not provide the accused with two alternative and equally satisfying options".2180 If the accused failed to prevent crimes he knew or had reason to know were about to happen, "he cannot make up for the failure to act by punishing the subordinates afterwards".2181 Similarly, an accused who lacked the opportunity to prevent crimes by assuming command after they were committed by subordinates would not be excused from the duty to punish.2182

PERTINENT ARTICLE FROM THE ICTY STATUTE:

Article 7
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

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CHAPTER 9

THE LAW OF WAR AND MILITARY OPERATIONS OTHER THAN WAR

REFERENCES

1. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, including the regulations thereto [hereinafter H.IV or HR].
2. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC].
3. The 1977 Protocols Additional to the Geneva Conventions of 1949, Dec 12, 1977, 16 I.L.M. 1391 [hereinafter GP I & II].
4. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Conv.].
5. Dept. of Army, Pamphlet 27-1, Treaties Governing Land Warfare (7 December 1956) [hereinafter DA PAM 27-1].
6. Dept. of Army, Pamphlet 27-1-1, Protocols To The Geneva Conventions of 12 August 1949 (1 September 1979) [hereinafter DA PAM 27-1-1].
7. Dept. of Army, Pamphlet 27-161-2, International Law, Volume II (23 October 1962) [hereinafter DA PAM 27-161-2].
8. Dept. of Army, Field Manual 27-10, The Law of Land Warfare (18 July 1956) [hereinafter FM 27-10].
9. Dept. of Army, Field Manual 41-10, Civil Affairs Operations (11 January 1993) [hereinafter FM 41-10].
10. Dept. of Army, Regulation 190-57, Civilian Internee--Administration, Employment, and Compensation (4 March 1987) [hereinafter AR 190-57].
11. Jean S. Pictet, Commentary To Geneva Convention IV Relative To The Protection Of Civilian Persons In Time Of War (1958) [hereinafter Pictet].
12. Yves Sandoz, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987) [hereinafter Protocols Commentary].
13. Dietrich Schindler & Jiri Toman, The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents (2d ed. 1988).
14. Gerhard von Glahn, Law Among Nations (1992).
15. L. Oppenheim, International Law (7th ed., H. Lauterpacht, 1955) [hereinafter Oppenheim].
16. Universal Declaration of Human Rights, G.A. res. 217 A(III), December 10, 1948, U.N. Doc. A/810, at 71 (1948).

17. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), December 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.
18. Frank Newman and David Weissbrodt, International Human Rights (1996).
19. Frank Newman and David Weissbrodt, Selected International Human Rights Instruments (1996).
20. U.N. Charter.

I. INTRODUCTION.

A. Military Operations Other than War (MOOTW).

1. MOOTW encompass a wide range of activities where the military instrument of national power is used for purposes other than the large-scale combat operations usually associated with war. Doctrine for Joint Operations, Joint Pub 3.0 (Feb 1995) [hereinafter JP 3.0]. *See also*, Dep't of Army, Field Manual 100-5, Operations (14 June 1993) [hereinafter FM 100-5]. While there are various types of MOOTW (*see* FM 100-5), peace operations have spawned the majority of law of war related issues.

B. Law of War.

1. Traditional law of war regimes do not technically apply to MOOTW. Examples include the following:

a. Operation Just Cause (Panama): "Inasmuch as there was a regularly constituted government in Panama in the course of JUST CAUSE, and U.S. forces were deployed in support of that government, the Geneva Conventions did not apply ... nor did the U.S. at any time assume the role of an occupying power as that term is used in the Geneva Conventions." Memorandum from W. Hays Parks to the Judge Advocate General of the Army of 10/1/90.

b. Operation Restore Hope (Somalia): The 1949 Geneva Conventions do not apply because an international "armed conflict" does not exist." Operation Restore Hope After Action Report, Office of the Staff Judge, Unified Task Force Somalia (12 Apr 1993).

c. Operation Uphold Democracy (Haiti): "The mandate of the MNF in Haiti was not military victory or occupation of hostile territory; rather it was "to establish and maintain a secure and stable environment ...." Moreover,

the Carter-Jonassaint agreement - and the Aristide government's assent to that agreement - resulted in an entry that was based on consent and not hostilities between nations. Under these circumstances, the treaties and customary legal rules constituting the law of armed conflict do not strictly apply. LAW AND MILITARY OPERATIONS IN HAITI, 1994 - 1995: LESSONS LEARNED FOR JUDGE ADVOCATES, Center for Law and Military Operations 47 (11 December 1995) (quoting Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int'l L. 78-82 (1995)).

d. Operation Joint Endeavor (Bosnia-Herzegovina). In preparation to deploy to Bosnia, the commanders of the 1st Armored Division spent a great deal of time preparing to meet the civilian challenge "posed by stability operations . . . those operations that exist outside the scope of armed conflict, but place soldiers in situations where they must simultaneously act to protect civilians and protect themselves from civilians." *See* Jim Tice, *The Busiest Major Command*, Army Times, Oct. 30, 1995, at 22-23.

2. Although not falling under the rubric of "international armed conflict," MOOTW consistently involve the potential, if not actual, employment of military force. This "disconnect" mandates that JA's search for legal standards to guide the treatment of traditional victims of conflict, e.g. wounded, detainees, and civilians.

   a. This search begins with Dep't of Def. Directive 5100.77, DOD Law of War Program, (9 December 1998), which establishes the POLICY that **"[T]he 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."** (The United Nations employs a similar standard to guide the actions of personnel deployed on its operations, discussed *infra).*

   b. Because in many cases U.S. forces simply do not have the resources to fully comply with all the requirements of the law of war, this policy has been interpreted to require U.S. forces "to apply the provisions of those treaties [the Geneva Conventions] to the extent practicable and feasible." W. Hays Parks memorandum, *supra.*

3. Recent MOOTW demonstrate that compliance with such a policy still results in "gaps" for the JA looking for standards of treatment for the various individuals encountered during such operations. What follows is a discussion of the legal standards, both international and domestic, applicable

either expressly or by analogy to the treatment of civilians, detainees, and the sick and wounded during MOOTW.

II. THE IMPACT OF THE NATURE OF OPERATIONS.

A. THE CONFLICT SPECTRUM. Contemporary military operations cover a broad spectrum of "hostilities."

1. At one extreme is invasion, MOOTW cover the rest of the spectrum, from "coerced invitation" to port calls.

2. Applicability of specific LOW Conventions is, as a result of the TRIGGERING ARTICLES of these Conventions, contingent on the nature of any given operation.

   a. INTERNATIONAL ARMED CONFLICT. According to Common Article 2 of the four Geneva Conventions, any contention between states leading to the intervention of armed force satisfies the definition of international armed conflict.

      (1) "International Armed Conflict" is the TECHNICAL TRIGGER for application of the LOW.

      (2) This is an extremely broad definition, intended to ensure expansive application of humanitarian law.

   b. UNCOERCED INVITATION. If the armed forces of one country enter another country by truly voluntary invitation, the LOW is TECHNICALLY not triggered. As a matter of Public International Law, host nation law normally governs the conduct of the visiting armed force during such operations.

      (1) U.S. practice is to employ SOFAs as a mechanism for ensuring application of host nation law does not operate to the detriment of U.S. forces.

      (2) There is no legal requirement for the application of the LOW to such situations.

   c. MOOTW (Coerced Invitation?). Many MOOTW are found at the center of the CONFLICT SPECTRUM.

(1) U.S. forces enter the host nation without invitation, but under some color of authority that serves to remove the operation from the realm of "international armed conflict." [*e.g.* a Chapter VI Peacekeeping mission].

(2) Although such operations involve the risk, and often the reality, of hostilities between U.S. forces and host nation forces, the purported authority underlying the presence of U.S. forces removes the dispute element of the "international armed conflict" definition.

(3) This situation results in a vacuum of legal authority governing the conduct of U.S. forces in such situations.

(a) The "semi-permissive" nature of the operation acts to displace host nation law;

(b) The lack of a "dispute between states" acts to prevent triggering of the LOW.

(4) This vacuum of legal authority is not accompanied by a coordinate absence of legal issues facing the force.

(a) MOOTW have consistently involved substantial legal issues which, if present in the context of an international armed conflict, would be resolved by application of the LOW.

(b) These issues generally fall under the same categories as legal issues related to traditional military operations:

(i) Targeting;

(ii) Treatment of captured personnel;

(iii) Treatment of civilians;

(iv) Treatment of the wounded and sick.

B. There is a natural tension between the law and policy which dictate the justification for a military operation and the legal standards which we apply in the context of the operations.

1. Public International Law governs the conduct of states *vis-à-vis* other states, while . . .

2. The Law of War governs the conduct of combatants in warfare and provides protections for the victims of war.

3. The result of this tension, or conflict of purpose, is that the Law of War (because of its truly humanitarian purpose) becomes a default position, or guide, for our conduct.

III. THE ANALYTICAL RESPONSE

A. The JA must craft resolutions to these legal issues using systematic and innovative analytical approach based on an amalgamation of four primary sources of law.

1. Fundamental Human Rights under International Law;

2. Host Nation Law;

3. Conventional Law - Treaty Law agreed upon by states (specific protections for specific individuals); and

4. Domestic Law and Policy (including extension "by analogy" of other sources of law not technically applicable).

IV. MOOTW AND TARGETING ISSUES.

A. As a general rule, there is no modification of general LOW targeting principles during MOOTW.

1. Rules of Engagement will normally determine the legally justified uses of force during MOOTW.

2. In accordance with DoD Instruction 5100.77, and CJCS Instruction 5810.01, **as a matter of policy, the U.S. complies with LOW principles during all conflicts and Military Operations Other Than War.**

B. What about United Nations Operations?

1. During other peace operations, e.g. peacekeeping operations, the UN position is that its forces will comply with the **"principles and spirit"** of International Humanitarian Law (Law of War). This is reflected in the model United Nations SOMA, which essentially utilizes this same law by analogy approach to regulating the conduct of the military forces executing United Nations missions.

a. The Status of Forces Agreement between the UN and Haiti for the UN Mission in Haiti is an example of this policy: "The UN will ensure that UNMIH carries out its mission in Haiti in such a manner as to respect fully the principles and spirit of the general international conventions on the conduct of military personnel. These international conventions include the four Geneva Conventions, the Additional Protocols, and the 1954 Hague Cultural Property Convention."

C. JAs must ensure that Rules of Engagement are consistent with general LOW targeting principles.

V. MOOTW AND CAPTURED PERSONNEL

A. Combatants Captured by U.S. Forces.

1. U.S. policy is to treat all captured personnel in accordance with the provisions of the Geneva Convention Relative to the Treatment of Prisoners of War.

   a. This policy is focused on ensuring such captives are "respected and protected" in accordance with the spirit of the Convention.

   b. U.S. forces will often lack the capability to comply with **every** detailed provision of the PW Convention. JAs should bear in mind that these provisions are not legally binding during MOOTW. Focus on ensuring a "respect and protect" mentality among the force. Law by analogy (application of GPW where possible) offers the solution to most MOOTW detainee issues.

2. Host nation personnel will normally be handed over to the legitimate government, once such government is established or assumes functional control of the country.

3. Host nation law may offer a guide to treatment of detainees, during a permissive or semi-permissive intervention. [*e.g.* Haiti].

B. Treatment of "Friendly" Personnel Detained by a Hostile Party: Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 34 I.L.M. 842.

1. Signed by 43 countries, including the U.S., as of May 1997. It entered into force on 15 January 1999.

2. A response to the rising casualty figures among UN personnel deployed in support of peace operations (130 killed in 1993). Evan Bloom, Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel, 89 A.J.I.L. 621 (1995).

3. UN and associated personnel and UN operations are broadly defined so as to include associated military contingents, NGOs, contractors, and others. Forces such as the NATO force in Bosnia and UNMIH qualify for protection. Statement of U.S. Ambassador Karl F. Inderfurth to the UN General Assembly of 12/9/94.

4. Scope of Application: All cases involving UN and associated personnel and UN operations outside of those Chapter VII enforcement actions in which any UN forces are engaged as combatants against organized armed forces and to which the international law of armed conflict applies.

   a. Refer to UN Security Council Resolution to determine if the operation is a Chapter VII operation.

   b. Determining whether the operation is an enforcement action that requires a review of the object and purposes of the resolution, e.g. is the use of force authorized? Is the action undertaken regardless of the Parties to conflict's consent? Bloom at 94.

   c. Finally, are UN personnel engaged as combatants? As discussed above, this is a difficult determination to make. The UN and U.S. position was that UN forces in Somalia and in Bosnia did not become combatants. No clear guidance as to when UN forces become combatants currently exists. Operation Desert Storm and traditional peacekeeping missions provide clear examples of non-applicability of the convention (i.e., LOW applies) and applicability (UN Convention applies), respectively.

5. Main goal of the Convention is to provide for universal criminal jurisdiction for those committing serious offenses against these personnel.

   a. Prosecute or extradite standard. Designed to put pressure on governments to take more responsible action in protecting UN personnel. Denies "safe haven" to the attackers. Mahnoush H. Arsanjani, Protection of United Nations Personnel (draft), speech to Duke University Conference on Strengthening Enforcement of Humanitarian Law, 3/10/95.

b. Consequently, this convention and the grave breach provisions of the Geneva conventions provide seamless protection to the participants. Inderfurth statement, *supra*.

6. Crimes enumerated in the convention include murder, kidnapping, or other attacks on the person or premises of UN and associated personnel.

7. If captured, these personnel are not to be interrogated and are to be promptly released. Pending their return, they are to be treated consistently with principles and spirit of the Geneva Convention.

8. UN and associated personnel always retain their right of self-defense.

VI. MOOTW AND THE TREATMENT OF CIVILIANS

A. **CIVILIAN PROTECTION LAW (CPL).** CPL is an "analytical template" developed to describe the process for establishing protection for civilians across the operational spectrum. The CPL analytical process rests on the four "tiers" of legal authority:

B. TIER 1: Fundamental Human Rights Recognized as Binding International Law by the United States.

1. APPLICATION. All civilians, regardless of their status, are entitled to first tier protections. This first tier provides a foundation for JAs that represents the starting point for the legal analysis involved in the protection of civilians. Because this "core of rights" never changes, it also serves as an excellent default/start point for soldier training prior to deployment.

2. COMPOSITION. This tier is composed of those basic protections for individuals amounting to fundamental rights recognized as international law. These rights are reflected within numerous international declarations and treaties which reflect customary international law.

a. The Restatement Standard. According to § 702 of the Restatement of the Foreign Relations Law of the United States, "[A] state violates international law if, as a matter of state policy, it practices, encourages, or condones

(1) Genocide,

(2) Slavery or slave trade,

(3) The murder or causing the disappearance of individuals,

(4) Torture or other cruel, inhuman, or degrading treatment of punishment,

(5) Prolonged arbitrary detention,

(6) Systematic racial discrimination, or

(7) a consistent pattern of gross violations of internationally recognized human rights[1]

b. **The Common Article 3 Standard.** Originally intended to serve as the preface to the Geneva Conventions (it was to provide the purpose and direction statement for the four conventions), it was instead adopted as the law to regulate the controversial "non-international conflicts."

(1) Common Article 3 is technically a component of humanitarian law, not human rights law. However, the international community now considers the protections established by this provision so fundamental that they have essentially "crossed over" to status as human rights.

(a) ICJ Position: In 1986, the International Court of Justice ruled that Common Article 3 serves as a "minimum yardstick of protection" in all conflicts, not just internal conflicts.[2]

(b) More expanded Common Article 3. Many experts assert Common Article 3 is applicable to any type of operation, regardless of whether or not such an operation can be described as a conflict. This mirrors U.S. practice in recent operations.

(2) Common Article 3 forbids:

(a) Torture;

(b) All violence to life or limb;

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[1] While this provision seems to open the door to limitless argument as to what falls within this category, the comment to the Restatement indicates that to trigger this category, the violations must be the result of **state policy.** The rights in this category are reflected in the Universal Declaration of Human Rights and other international covenants. However, violations must not only be in accordance with state policy, but must be **repeated and notorious**. As a practical matter, few states establish policies in violation of such rights, even if *de facto* violations occur.

[2] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27).

(c) Taking of hostages;

(d) Degrading/humiliating treatment;

(e) Punishment without fair and regular trials; and

(f) Failure to care for and protect the wounded and sick.

(3) Relationship between Humanitarian Law and Human Rights Law. Military practitioners must recognize these two terms are not interchangeable (or entirely consistent).

(a) Humanitarian Law refers to those conventions from the law of war that protect the victims of war (primarily the Geneva Conventions). Human Rights Law refers to a small core of basic individual rights embraced by the international community during the past forty years as reflected in various declarations, treaties, and other international provisions beginning with the UN Charter and Universal Declaration of Human Rights.

(b) International humanitarian law regulates the conduct of state *vis-à-vis* state, whereas human rights law regulates the conduct of state *vis-à-vis* individual. The right to protection under humanitarian law is vested not in the individual, but in the state. Under human rights law, the protection flows to the individual directly, and theoretically protects individuals from their own state, which was a radical transition of international law.

(i) Traditional View: Displacement. At the outbreak of armed conflict, human rights law, generally considered a component of The Law of Peace, is displaced by Humanitarian Law, which is generally considered a component of the Law of War.

(ii) Emerging View: Dual Application. At the outbreak of armed conflict, human rights law remains applicable and supplements humanitarian law (human rights law is said to apply to human conduct regardless of where along the peace, conflict, war continuum such conduct is found, and regardless of what state commits the violation).

c. The Amalgamated List. While there are some distinctions between the Restatement list and the Common Article 3 list, the combination results in the following well accepted human rights protected by international law:

(1) Freedom from slavery or genocide;

(2) The right to a fair and regular trial;

(3) The right to be cared for when sick;

(4) The right to humane treatment when in the hands of a state;

(5) Freedom from torture and cruel, inhuman, or degrading treatment;

(6) Freedom from murder, kidnapping, and other physical violence;

(7) Freedom from arbitrary arrest and detention;

(8) The right to be properly fed and cared for when detained or under the protection of a nation;

(9) Freedom from systematic racial discrimination (to include religious discrimination);

(10) Freedom from violation of other internationally recognized human rights if the violation occurs as a result of state policy. (Examples of such violations include systematic harassment, invasion of the privacy of the home, denial of fair trial, grossly disproportionate punishment, etc.)

d. The Statutory Reinforcement. The prohibition under international law against violation of these "Tier 1" rights is reinforced by various domestic statutes intended to ensure U.S. policy does not support nations which violate such rights. These include:

(1) United States Foreign Assistance Act: no assistance may be provided "to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of the person . . ." 22 U.S.C. § 2151n.(a);

(2) The Agricultural Trade Development and Assistance Act of 1954, as amended 7 U.S.C. § 1712 (precluding agreement to finance sale of agricultural commodities to such governments);

(3) International Financial Institutions Act of 1977, 22 U.S.C. §§ 262d and 262(1) (establishing United States policy to oppose assistance to such governments by international financial institutions).

e. Universal Declaration Reinforcement.

(1) The Universal Declaration of Human Rights, adopted unanimously by the United Nations General Assembly in 1948. It is not a treaty, however many provisions have attained the level of customary international law.

(2) U.S. position and that of most commentators is that only the core articles within the Declaration have achieved status as customary international law. These articles include:

(a) The Common Article 3 "type" protections; and

(b) Provisions that relate to prohibiting "any state policy to practice, encourage, or condone genocide; slavery; murder; torture; or cruel, inhuman or degrading treatment; prolonged arbitrary detention; [the denial of] equal treatment before the law."[3]

(c) Whether Declaration provisions which guarantee the right to private property reflect customary international law is less clear. The U.S. does recognize the customary status of at least the Declaration's "core of rights to private property."[4]

(3) Distinguish between saying we are applying Common Article 3 type protections and providing protections "consistent with" the Declaration.

(a) Less flexibility. The Declaration's core articles are reflections of customary law and must be observed. No caveat of "acting consistent with" will insulate U.S. from future obligations to comply with these provisions.

(b) Declaration provisions the U.S. does not consider reflective of customary international are technically not binding on the U.S. **However, these may nonetheless be integrated into the planning**

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[3] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 702.

[4] Id. § 702 k.

phase of operations and serve as guidance. The U.S. supports the spirit of the Declaration and acts consistent with all provisions unless doing so is wholly impractical.

C. TIER 2: Host Nation (HN) Law Providing Specific Rights to an Indigenous Population.

1. APPLICATION. U.S. policy and international law require the observance of host nation law unless such law "constitutes a threat to ... security or an obstacle to the application of [international law]."[5] Therefore, these laws must be observed **so long as they are not displaced as a result of the nature of the operation, or conflict with binding international law obligations** (in most cases such an obligation would come from Tier 1). The traditional rule is that host nation law applies unless:

   a. Waived by international agreement, SOFA, or SOMA (in which case there is conventional international law in the form of an agreement which displaces the host nation law);

   b. U.S. forces engage in combat with host nation forces (in which case international humanitarian law displaces host nation law); or

   c. U.S. forces enter under the auspices of a U.N. sanctioned security enforcement mission (a Chapter VII action without the consent of the host nation).

2. COMPOSITION. Second tier protections include any protections afforded by host nation law that retain viability after the entry of U.S. forces. The most common forms of host nation protections involve rules that regulate deprivation of property and liberty.

3. SOURCES. The host nation's (1) constitution, (2) criminal code (both substantive and procedural rules), (3) environmental protection regime, and (4) civil codes that deal with use of property. In addition, any (5) SOFAs, SOMAs, or international agreements that impact the application of host nation law.

   a. If host nation law applies to U.S. forces during a MOOTW, this includes ALL host nation law. JA's must be alert to international human rights

[5] FM 27-10, *supra* note 9, at para. 369 and GC, *supra* note 3, at art. 64.

obligations of the host nation, even if not binding under U.S. law, because such obligations become binding as host nation law.

b. JAs should seek information on host nation law and applicable international agreements from the unified command.

(1) Attempt to identify those countries whose host nation law may be applicable to our operations during OPLAN review.

(2) Attempt to gain information regarding host nation laws from sources such as Civil Affairs units and higher headquarters. Work with Civil Affairs staff elements to develop soldier guides for host nation law.

4. THE CONFLICT SPECTRUM. Applicability of host nation law may be contingent on the nature of the operation, and range from no host nation law application (armed conflict) to total control of host nation law (presence by invitation).

a. MOOTW (Coerced Invitation?). U.S. forces enter the host nation as neither invaders or guests. Therefore, the obligation to follow host nation law is questionable. The response: sensitivity to host nation law, but refusal to treat such law as absolutely binding on U.S. forces. Operations UPHOLD DEMOCRACY and JOINT ENDEAVOR are examples of this type of status. (Adherence to Tier 1 obligations should help to ensure our forces retain the moral high ground even if they are not in full compliance with host nation law).

D. TIER 3: Conventional Law (The Hard Law).

1. APPLICATION. The third tier of protections is based on international obligations imposed upon U.S. forces by treaties or functional equivalent instruments. These obligations may often depend on the circumstances that surround the operation and the particular status of the civilians.

a. Example: Third tier protections bestowed upon a person who satisfies the definitional requirements necessary to be considered a "refugee." The "refugee" is entitled to a protected status by operation of conventional law (The Refugee Protocol).

2. COMPOSITION. This tier includes protections bestowed by treaties and other international agreements imposing binding obligations on U.S. forces,

either directly or through executing legislation. Such treaties provide protections to specific groups of persons under specific circumstances. The conventions of the third tier, when triggered, are viewed to bind absolutely the conduct of the United States. During any period of armed conflict involving U.S. forces, all Law of War Conventions fall within this category.

3. SOURCES. The sources of law differ depending upon the type of operation and the status of the person. For example, the 1967 Refugee Protocol and the Refugee Act of 1980 provide protections for individuals granted that status. Third Tier law includes the various Law of War conventions. The most significant of these conventions are the Hague Regulations, the Geneva Convention Relative to the Protection of Civilian Persons, and Protocols I and II Additional to the Geneva and include the Hague Conventions.[6]

   a. Although not ratified by the U.S., we acknowledge many provisions of the Protocols reflect customary international law.

   b. Because we do not want our practice to contradict our refusal to ratify these protocols, we characterize our compliance with the principles represented therein as either compliance with customary international law, or application of law by analogy.

4. HUMAN RIGHTS TREATIES: ASPIRATION v. OBLIGATION. Not included within this group of conventions are the various human rights conventions ratified by the United States. Although the United States aspires to act in compliance with such treaties, certain domestic legal doctrines render these treaties non-obligatory during military operations outside U.S. territory.

   a. The "decade of ratification." In the past decade Presidents Reagan, Bush and Clinton have ratified a number of important human rights treaties potentially impacting the conduct of U.S. forces during future military operations.

      (1) These treaties include the International Covenant of Civil and Political Rights (ratified in 1992); the Convention on the Prevention and Punishment of the Crime of Genocide (ratified in 1988); and the

[6] These protections, however, apply only in a very narrow set of circumstances. First, hostilities that satisfy the GC, article 2 definition of armed conflict (Common Article 2) must be present. Second, the civilians must be situated under the even narrower circumstances required by each of the individual subparts of the foregoing treaties.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment (ratified in 1994).

b. Domestic Law of Treaty Obligation. The following two doctrines of treaty obligation explain why many of these human rights treaties are not binding on U.S. forces operating outside the U.S.

(1) Extraterritoriality. Although the United States has ratified a number of important human rights treaties, it has reduced the importance of these treaties by stating that these regimes do not have extraterritorial application. (The opposite view is espoused by other nations and a number of well-recognized international law authorities).

(a) Traditional presumption: human rights law is directed at regulating the way nations treat their own population. Under this view, human rights treaties do not apply extraterritorially unless the parties agree to such application.

(b) Scope articles. Many treaties include articles specifically establishing the scope of application. For instance, article 2 of the International Covenant of Civil and Political Rights states that the treaty applies to "all individuals within [a party's] territory **and subject to its jurisdiction."**

(i) These provisions do not eliminate controversy, which turns on the meaning of "subject to their jurisdiction."

(ii) U.S. position is that this term does not include civilians in areas outside the U.S. where our forces conduct MOOTW. Many experts believe, however, this language extends jurisdiction to such persons.

(iii) This interpretation might dramatically alter the U.S. treaty obligation during the course of overseas operations. (The U.S. took no reservation, and made no understanding or declaration in regard to this issue).

(2) Non-Self-Executing (NSE) Treaties. The U.S. has made a written NSE declaration during the ratification process, which it has appended to each of these treaties (interestingly, the U.S. did not take a formal NSE reservation to any of the treaties). This theoretically removes these

treaties from consideration during the course of both domestic and overseas operations.

(a) Treaties considered non-self executing do not bind U.S. forces absent executing legislation.

(b) If "executed," the legislation, and not the treaty, binds U.S. forces.

(c) Although the U.S. has not enacted legislation to execute obligations under these treaties, it does consider them during the planning and execution phases of overseas operations.

(i) This is a policy-based consideration and not a legally-obligated consideration. (Remember, however, that a provision of a treaty that reflects customary international law is binding on U.S. operations regardless of whether the treaty is self-executing).

(ii) Using non-obligatory provisions of such treaties to guide the development of policy for military operations falls under Tier 4: Law by Analogy/Extension.

E. TIER 4: U.S. Domestic Law & Policy (Including Law by Analogy/Extension).

1. APPLICATION. The 4th tier of protections emerges when JAs blend law by analogy and extension, common sense, and mission imperatives.

a. There are several sources of authority for the process of "law by analogy." Both DoD Dir. 5100.77 (DoD's Law of War Program) and the Standing Rules of Engagement (SROE) require that the Law of War and similar domestic law and policy be applied in all military operations, even where not technically triggered, to the extent such application is feasible. Additionally, any other law that logically forms the basis of an analogy should be considered.

b. Recent operations demonstrate this process. During Operations PROVIDE COMFORT, RESTORE HOPE, and UPHOLD DEMOCRACY.

c. JAs dealt with the paradox of operations not considered international armed conflict which nonetheless virtually satisfied the classical elements of formal occupation. Accordingly, many of the responsibilities, rights,

protections, and obligations established by traditional occupation law were observed by analogy and extension.

(1) This process of using analogy to other bodies of civilian protection law to develop a structure for dealing with civilian populations is essential to fill the void of authority that results from the lag time for international law to develop standards to apply to such situations.

(2) The significance of applying such a process may extend beyond any given operation. Because international law emerges from the customary practice of nations, our conduct may in fact form a foundation for future international law standards.

2. COMPOSITION. JAs familiar with the nature and likely impact on civilians of any given operation must search for third tier conventions; domestic statutes, executive orders, and directives. The objective of this process is to ascertain sources of law that will enable the force to meet mission requirements while providing civilian protection rules sufficient to maintain the legal legitimacy of the operation. Then, using third tier law as guidance, JAs synthesize lessons learned, common sense, operational realities, and mission imperatives to develop fourth tier rules.

a. These rules must then be translated into operational parameters and transmitted to the force.

b. Relative to most MOOTW, third tier protections become especially significant in this process. When policy makers and JAs begin the process of determining what rules will belong within a package of fourth tier protections, the third tier almost always provides a logical start point for conducting such an analysis.

(1) Using such law to create a "package" of rules for the protection of civilians is an example of the U.S. acting "consistent with" laws that are not technically obligatory. **This is a critical caveat that must be included in fourth tier application of such law.**

VII. MOOTW AND OBLIGATIONS TOWARD THE WOUNDED & SICK

A. Medical activities as part of the MOOTW mission.

1. Medical activities may be undertaken as a primary mission during MOOTW. For example, health service support operations may be part of, if not the

primary goal of, a larger humanitarian and civic assistance (HCA) program. In such cases, a primary mission is to seek out the sick and provide care to designated portions of the civilian population. JOINT PUB 4-02, DOCTRINE FOR HEALTH SERVICE SUPPORT IN JOINT OPERATIONS IV - 1 - IV - 2 (15 Nov. 1994). *See also* MG George A. Fisher memorandum regarding Medical-Civil Action Guidelines of 1/25/95.

2. Medical activities may also be focused primarily on supporting combat units. Law of war issues are most likely to arise under such circumstances. This raises the issue of what humanitarian standards are applicable.

   a. The following discussion of such standards is drawn from the Geneva Wounded and Sick Convention (GWS) and experiences during Operation Restore Democracy.

   b. Two excellent sources of lessons learned in this area are Memorandum from MG George A. Fisher, MNF Medical Rules of Engagement (ROE) Policy of 1/25/95, and Asbjorn Eide, Allan Rosas, Theodor Meron *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards* 89 A.J.I.L. 215 (1995) (discussing certain minimum humanitarian standards applicable to all situations).

B. Humanitarian Standards.

1. Respect and protect the wounded and sick (Article 12 GWS). The obligation not to attack the wounded and sick and to provide basic care. The type of basic care provided is discussed *infra* in terms of emergency care. The category of wounded and sick persons is generally considered to include civilians.

2. Search for and collect wounded and sick and the dead (Article 15, GWS). This standard does not translate well to MOOTW. At best it can be applied to the extent practicable and feasible. W. Hays Parks memorandum, *supra*.

   a. Note that even under the GWS, this requirement is subject to military practicability, i.e. the obligation is not absolute.

   b. Furthermore, the obligation to search for civilian wounded under GC Article 16 ("as far as military consideration allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded [civilians]) is not as strong as the obligation to search for those

protected under the GWS (primarily members of the armed forces). This language recognizes the primacy of civilian authorities in the matter of caring for civilians. *See* DEP'T OF ARMY FIELD MANUAL 8-10, HEALTH SERVICE SUPPORT IN A THEATER OF OPERATIONS, para. 3-17 (1 Mar 1991).

c. Finally, consistent with the primacy of civilian authorities mentioned above, there are also sovereignty issues at play in situations such as those encountered in Panama and Haiti. "Primary responsibility for the collection, burial, and accountability for the wounded and dead lay with the Government of Panama. U.S. assumption of any responsibility for the burial of deceased Panamanians, military or civilian, would have constituted a breach of Panama's sovereignty without its express consent." W. Hays Parks memorandum, *supra*.

d. Consequently, the U.S. policy in Haiti was to render emergency care required to save life, limb, or eyesight to Haitian civilians. Thus, on site medical personnel were permitted to provide emergency stabilization, treatment, and to arrange transportation to civilian hospitals. Additionally, in Haiti, treatment was provided to those persons injured as a result of U.S. actions. *See* MG Fisher memorandum, *supra*.

3. Medical, religious and other humanitarian personnel shall be respected and protected. U.S. forces should have no difficulty complying with this standard.

APPENDIX A

CPL AND CIVILIAN DETAINMENT

I. DEPRIVATION OF LIBERTY.

A. Four types of deprivation:

1. Detainment;

2. Internment;

3. Assigned residence;

4. Simple imprisonment (referred to as confinement in AR 190-57):[1]

   a. Includes pre/post-trial incarceration.

   b. Pretrial confinement must be deducted from any post-trial period of confinement.

   c. A sentence of to imprisonment may be converted to a period of internment.

   d. GC Arts. 68-71.

B. DETAINMENT IN MOOTW.

1. Detainment defined: Not formally defined in International Law. Although it may take on characteristics of confinement, it is more analogous to internment (which is formally defined and explained in the LOW). Within Operation JOINT ENDEAVOR detention was defined as "a person involuntarily taken into custody for murder, rape, aggravated assault, or any act or omission as specified by the IFOR Commander which could reasonably be expected to cause serious bodily harm to (1) civilians, (2) non-belligerents, or (3) IFOR personnel."[2]

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[1] The distinction between confinement and internment is that those confined are generally limited to a jail cell ("CI camp stockade"), while internees remain free to roam within the confines of an internee camp. AR 190-57, para. 2-12.

[2] See TASK FORCE EAGLE: JOINT MILITARY COMMISSION POLICY AND PLANNING GUIDANCE HANDBOOK (21 Mar. 1996).

2. Detainment is Typically Authorized (by a designated task force commander) For:

   a. Serious crimes (as described above);

   b. Posing a threat to U.S. forces (or based upon COMBATANT COMMANDER authority, the coalition force);

   c. Violating rules set out by the intervention forces. For example, the IFOR in Operation JOINT ENDEAVOR authorized detainment for persons who attempted to enter controlled areas or attack IFOR property.[3]

   d. Obstructing the forces' progress (obstructing mission accomplishment in any number of ways to include rioting, demonstrating, or encouraging others to do so).

3. While these categories have proved effective in past operations, JA's must ensure that the categories actually selected for any given operation are derived from a mission analysis, and not simply from lessons learned.

4. The LOW (and therefore, the Geneva Conventions) does (do) not technically apply to MOOTW. However, pursuant to the fourth tier methodology, the LOW should be used as guidance during MOOTW.

5. In MOOTW, JAs should:

   a. Advise their units to exhaust all appropriate non-forcible means before detaining persons who obstruct friendly forces.

   b. Look to the mission statement to determine what categories of civilians will be detained. The USCINCENT Operation Order for Unified Task Force Somalia (1992) set out detailed rules for processing civilian detainees. It stated that:

   c. In the area under his control, a commander must protect the population not only from attack by military units, but also from crimes, riots, and other forms of civil disobedience. To this end, commanders will: . . . Detain those accused of criminal acts or other violations of public safety and security.

[3] Id.

d. After determining the type of detainees that will find their way into U.S. hands, they should apply the four-tiered process of CPL to determine what protections should be afforded to each detainee.

(1) Tier 1: Detainment SOPs might provide that all detainees will be afforded rights "consistent with" with the Universal Declaration of Human Rights and Common article 3.

** The term "consistent with" is a term of art insulating the U.S. from assertions of formal recognition that we are bound to certain obligations. The U.S. does not say anyone is entitled to anything. This ties in with the confusion relative to which protections under the Universal Declaration are customary law and which are not.

(2) These protections are translated into rules such as those listed below, which were implemented by the IFOR during Operation JOINT ENDEAVOR:

(a) Take only items from detainees that pose an immediate threat to members of the force or other detainees.

(b) Use minimal force to detain or prevent escape (this may include deadly force if ROE permits).

(c) Searches must be conducted in such a way as to avoid humiliation and harassment.

(d) Detainees shall be treated humanely.

(e) Detainees shall not be physically abused.

(f) Contact with detainees may not be of a sexual nature.

(3) Detainees may not be used for manual labor or subservient tasks.

(4) Tier 2: Apply procedural protections afforded by the host nation to individuals detained under similar conditions. For example, if the host nation permits the right to a magistrate review within so many hours, attempt to replicate this right if feasible.

(5) Tier 3: No specific Conventions apply.

(6) Tier 4: JOINT ENDEAVOR SOPs provide detainees with the right to EPW treatment (EPW status is not bestowed, although a few SOPs incorrectly state that it is).

(7) Categorization and Segregation. The SOPs then go on to provide that the detainees will be categorized as either criminal or hostile (force protection threats). Those accused of crimes must be separated from those detained because they pose a threat to the force. In addition, detainees must be further separated based upon clan membership, religious beliefs, or any other factor that might pose a legitimate threat to their safety.

e. In both Somalia and Haiti, the U.S. ran extremely successful Joint Detention Facilities (JDFs). The success of these operations was based upon a simple formula.

(1) Detain people based upon clear and principled criteria.

(2) Draft a JDF SOP with clear rules that each detainee must follow and rights to which each detainee is entitled.

(3) Base the quantity and quality of the rights upon a principled approach: CPL.

6. When in the fourth tier (law by analogy) look to the GC, in addition to the GPW when dealing with civilians. The practice of JTF JAs in Operations RESTORE HOPE and RESTORE DEMOCRACY was to look only to the GPW. This caused a number of problems "because the GPW just did not provide an exact fit."

SNAPSHOT OF MOOTW DETAINMENT RULES (ANALOGIZED FROM THE GC AND OTHER APPLICABLE DOMESTIC AND INTERNATIONAL LAW).

A. Every civilian has the right to liberty and security. NO ONE SHALL BE SUBJECTED TO ARBITRARY ARREST OR DETENTION. Int'l Cov. on Civil & Pol. Rts. Art. 9. Univ. Declar. of Human Rights Art. 9. This is consistent with the GC requirement that detention be reserved as the commander's last option. GC, Art. 42.

B. Treatment will be based upon international law, without distinction based upon "race, colour, sex, language, political or other opinion, national or social origin, property, birth, or other status." Univ. Declar. of Human Rights Art. 2.

C. No detainee shall be subjected to cruel, inhuman, or degrading treatment. Univ. Declar. of Human Rights, Art. 5.

D. Detain away from dangerous areas. GC, Arts. 49 and 83.

E. The place of detainment must possess (to the greatest extent possible) every possible safeguard relative to hygiene and health. GC Art. 85.

F. Detainees must receive food (account shall be taken of their customary diet) and clothing in sufficient quantity and quality to keep them in a good state of health. GC, Art. 89.

G. Detainees must be maintained away from PWs and criminals. GC, Art. 84. In fact, U.S. commanders should establish three categories of detainees:

   1. Those detained because of suspected criminal Activity;

   2. Those detained because they have been convicted of criminal; and

   3. Those detained because they pose a serious threat to the security of the force (an expectation of future activity, whether criminal or not.

H. Detainees shall be detained in accordance with a standard procedure, to which the detainee shall have access. GC, Art. 78. Detainees have the right to appeal their detention. The appeal must be processed without delay. GC, Art. 78.

I. Adverse decisions on appeals must (if possible) be reviewed every six months. GC, Art. 78.

J. Detainees retain all the civil rights (HN due process rights), unless incompatible with the security of the Detaining Power. GC, Art. 80.

K. Detainees have a right to free medical attention. GC, Arts. 81, 91, & 92.

L. The Detaining Power must provide for the support of those dependent on the detainee. GC, Art. 81.

M. Families should be lodged together during periods of detainment. Detainees have the right to request that their children be brought to the place of detainment and maintained with them. GC, Art. 82.

N. Forwarding Correspondence.

1. In absence of operational limitations, there are no restrictions on the number or length of letters sent or received. In no circumstance, will the number sent fall below two cards and four letters. AR 190-57, para. 2-8.

2. No restriction with whom the detainee may correspond. AR 190, para. 2-8.

3. No restriction on the number or type of correspondence to either military authorities or Protecting Power (ICRC).

The foregoing rules applicable to internment, found in Section IV of Geneva IV and AR 190-57, are but an abbreviated list of the complete list of rules that apply.

APPENDIX B

CPL AND THE TREATMENT OF PROPERTY

I. TREATMENT OF PROPERTY.

A. Tier 1. Every person has the right to own property, and no one may be arbitrarily deprived of such property. Univ. Declar. of Human Rights Art. 17.

B. Tier 2. The property laws of the host nation will control to the extent appropriate under Public International Law (The Picard Spectrum).

1. Consider the entire range of host nation law, from its constitution to its property codes. For example in Operation UPHOLD DEMOCRACY the JTF discovered that the Haitian Constitution afforded Haitians the right to bear arms. This right impacted the methodology of the JTF Weapons Confiscation Program.

C. Tier 3. If a non-international armed conflict is underway, only Common Article 3 applies, which provides no protection for property. If an international armed conflict is underway, the property protections found with the fourth Geneva Convention apply. The protections found within this convention are described in chapter six as the nine commandments of property protection.

1. During an international armed conflict, any destruction not "absolutely necessary" for the conduct of military operations is a war crime (GC, art. 53). Further, if that destruction, devastation, or taking of property is "extensive" or comprehensive, the crime is considered a grave breach of the law of war (GC, art. 147). Accordingly, the "prosecute or extradite" mandate would apply to the individual/individuals responsible for such misconduct (GC, art. 146).

a. What does "extensive damage" mean? In the official commentary to the convention, Pictet states that "extensive" means more than a "single incident." However, Pictet does not discuss the possibility of a single attack that is of great scope (destruction of an entire city grid or more).

b. Is this definition limited only to property in the hands of the enemy? Pictet also notes that article 147 modifies and supplements only article 53. This is important because article 53 only applies to property within occupied territory. Accordingly, if a warring nation were to bomb a

civilian factory, and this bombing was not of absolute military necessity, one might conclude it is not a grave breach, and maybe not a breach at all (although it might violate article 23 of the Hague Regulations).

D. Tier 4 (Law by Analogy).

1. Follow the nine commandments of property use during armed conflict.

2. The occupying power cannot destroy "real or personal property . . . , except where such destruction is rendered absolutely necessary". GC Art. 53.

3. Pillage. Defined as the "the act of taking property or money by violence." Also referred to as plundering, ravaging, or looting."

   a. Forbidden in all circumstances (one of the general provision protections of Section I).

   b. Punishable as a war crime or as a violation the UCMJ.

   c. The property of a protected person may not be the object of a reprisal. GC Art. 33.

   d. Control of Property. The property within an occupied territory may be controlled by the occupying power to the extent:

      (1) Necessary to prevent its use by hostile forces.

      OR

      (2) To prevent any use that is harmful to the occupying power.

      (3) **NOTE**: As soon as the threat subsides, private property must be returned. FM 27-10, Para. 399.

E. Understand the relationship between the battlefield acquisition rules of Tier Three's conventional law property protections and the U.S. Military's Claims System. *See* Operational Law Handbook and chapter six of this deskbook.

F. Protection of Civilian Property Under the Third Convention. For persons under the control of our forces (detained persons, etc.), the United States has frequently provided protection of property provided to EPWs under the Third Geneva Convention. For instance, all effects and articles of personal use, except arms and military equipment shall be retained by an EPW (GPW, art. 18). This

same type of protection has a natural extension to civilians that fall under military control.

APPENDIX C

CPL AND DISPLACED PERSONS

I. TREATMENT OF DISPLACED PERSONS (REFUGEES).

A. Generally, nations must provide refugees with same treatment provided to aliens and in many instances to a nation's own nationals. The most basic of these protections is the right to be shielded from danger.

1. REFUGEE DEFINED. Any Person:

a. Who has a well-founded fear of being persecuted for reasons of race, religion, nationality, social group, religion, or political association;

b. Who is outside the nation of his nationality; and

c. Is without the protection of his own nation, either because:

(1) That nation is unable to provide protection, or

(2) The person is unable to seek the protection, due to the well-founded fear described above.

** Harsh conditions, general strife, or adverse economic conditions are not considered "persecution." Individuals fleeing such conditions do not fall within the category of refugee.

** The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status is an excellent source of information on this subject. However, practitioners must recognize that the standards established by the UNHCR do not always correspond with U.S. policy.

2. MIGRANT DEFINED: Those who do not necessarily qualify for refugee status and the accompanying rights. The 1967 Protocol is not self-executing and therefore does not bestow any rights upon a person claiming refugee/refuge/political asylum status. Nation states are free to apply the definitional elements found with the Protocol.

B. MAIN SOURCES OF LAW:

1. 1951 Convention Relating to the Status of Refugees (RC). The RC bestows refugee status/protection on pre-1951 refugees.

2. 1967 Protocol Relating to the Status of Refugees (RP). The RP bestows refugee status/protections on post-1951 refugees.

   a. Adopts same language as 1951 Convention.

   b. U.S. is a party (110 ratifying nations).

3. 1980 Refugee Act (8 U.S.C. § 1101). Because the RP was not self-executing, this legislation was intended to help U.S. law conform to the 1967 RP.

   a. Applies only to refugees located inside the U.S.[1]

   b. This interpretation was challenged by advocates for Haitian refugees interdicted on the high seas pursuant to Executive Order. They asserted that the international principle of "non-refoulment" (non-return) applied to refugees once they crossed an international border, and not only after they entered the territory of the U.S.

   c. The U.S. Supreme Court ratified the government interpretation of "non-refoulment" in *United States v. Sale.* This case held that the RP does not prohibit the practice of rejection of refugees at our borders. **(This holding is inconsistent with the position of the UNHCR, which considers the RP to prohibit "refoulment" once a refugee crosses any international border).**

4. Immigration and Nationality Act (8 USC §1253).

   a. Prohibits Attorney General from deporting or returning aliens to countries that would pose a threat to them based upon race, religion, nationality, membership in a particular social group, or because of a particular political opinion held.

   b. Does not limit U.S. authority outside of the U.S. (Foley Doctrine on Extraterritoriality of U.S. law).

5. Migration and Refugee Assistance Act of 1962 (22 USC §2601).

   a. Qualifies refugees for U.S. assistance.

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[1] Although the phrase "within the U.S." was removed in 1980, the courts have steadfastly interpreted this only to apply to the difference in the status of aliens already within the U.S. "Within the U.S." is a term of art used to apply to persons who have legally entered the U.S. A person who is physically within the U.S., having entered illegally, is not "within the U.S."

b. Application conditioned upon positive contribution to the foreign policy interests of U.S.

C. RETURN/EXPULSION RULE.

1. No Return Rule (RP art. 33). Parties may not return a refugee to a territory where his life or freedom would be threatened on account of his race, religion, nationality, social group, or political opinion.

2. No Expulsion Rule (RP arts. 32 & 33). Parties may not expel a refugee in absence of proper grounds and without due process of law.

3. According to the Supreme Court, these prohibitions are triggered only after an individual crosses a U.S. border. This is the critical distinction between the U.S. and UNHCR interpretation of the RP which creates the imperative that refugees be intercepted on the high seas and detained outside the U.S.

4. Grounds for Return or Expulsion.

   a. Expulsion: (1) national security, (2) public order, or (3) danger to the community.

   b. Return: (1) national security or (2) danger to the community.

5. Burden of Proof.

   a. National security or public order = reasonable grounds.

   b. Danger to community = conviction of serious crime.

   c. Public Health Risks (e.g. HIV Positives):

      (1) Excludable as a threat to national security.

      (2) Attorney General may waive medical exclusion for "humanitarian reasons."

6. Other Traditional Exclusion Grounds:

   a. Prostitution

   b. Membership in communist or other totalitarian political group.

   c. Aliens who have made previous illegal entries.

D. FREEDOMS AND RIGHTS. Generally, these rights bestow (1) better treatment than aliens receive, and (2) attach upon the entry of the refugee into the territory of the party.

1. Freedom of Religion (equal to nationals).
2. Freedom to Acquire, Own, and Convey Property (equal to aliens).
3. Freedom of Association (equal to nationals).
4. Freedom of Movement (equal to aliens).
5. Access to Courts (equal to nationals).
6. Right to Employment (equal to nationals with limitations).
7. Right to Housing (equal to aliens).
8. Public Education (equal to nationals for elementary education).
9. Right to Social Security Benefits (equal to nationals).
10. Right to Expedited Naturalization.

E. DETAINMENT (See MOOTW DETAINMENT above).

1. U.S. policy relative to Cuban Refugees (MIGRANTS) is to divert and detain.
2. General Principles of International Law forbid "prolonged & arbitrary" detention.
3. Detention that preserves national security is not arbitrary.
4. No statutory limit to the length of time for detention (4 years held not an abuse of discretion).
5. Basic Human Rights apply to detained or "rescued" refugees.

F. POLITICAL ASYLUM. Protection and sanctuary granted by a nation within its borders or on the seas, because of persecution or fear of persecution as a result of race, religion, nationality, social group, or political opinion.

G. TEMPORARY REFUGE. Protection given for humanitarian reasons to a national of any country under conditions of urgency in order to secure life or safety of the requester against imminent danger. NEITHER POLITICAL

ASYLUM NOR TEMPORARY REFUGE IS A CUSTOMARY LAW RIGHT. A number of plaintiffs have attempted to assert the right to enjoy international temporary refuge has become a peremptory right under the doctrine of *jus cogens*. The federal courts have routinely disagreed. Consistent with this view, Congress intentionally left this type of relief out of the 1980 Refugee Act.

1. U.S. POLICY.

   a. Political Asylum.

      (1) The U.S. shall give foreign nationals full opportunity to have their requests considered on their merits.

      (2) Those seeking asylum shall not be surrendered to a foreign jurisdiction except as directed by the SECARMY.

      (3) These rules apply whether the requester is a national of the country wherein the request was made or from a third nation.

      (4) The request must be coordinated with the host nation, through the appropriate American Embassy or Consulate.

      ** This means that U.S. military personnel are <u>never</u> authorized to grant asylum.

   b. Temporary Refuge. The U.S., in appropriate cases, shall grant refuge in foreign countries or on the high seas of any country.

      ** This is the most the U.S. military should ever bestow.

H. IMPACT OF LOCATION WHERE CANDIDATE IS LOCATED.

1. IN TERRITORIES UNDER EXCLUSIVE U.S. CONTROL & ON HIGH SEAS:

   a. Applicants will be received in DA facilities or on aboard DA vessels.

   b. Applicants will be afforded every reasonable protection.

   c. Refuge will end only if directed by higher authority, "through the SECARMY."

   d. Military personnel may <u>not</u> grant asylum.

e. Arrangements should be made to transfer the applicant to the DOJ INS ASAP. Transfers don't require DA approval (local approval).

f. All requests must be forwarded in accordance with AR 550-1, ¶7.

g. Inquiries from foreign authorities will be met by the senior Army official present with the response that the case has been referred to higher authorities.

h. No information relative to an asylum issue will be released to public, without HQDA approval.

(1) Immediately report all requests for political asylum/temp. refuge" to the Army Operations Center (AOC) at Commercial (703) 697-0218 or DSN 227-0218.

(2) The report will contain the information contained in AR 550-1.

(3) The report will not be delayed while gathering additional information

(4) Contact International and Operational Law Division, Army OTJAG (or service equivalent). The AOC immediately turns around and contacts the service TJAG for legal advice.

2. IN FOREIGN TERRITORIES:

a. All requests for either political asylum or temporary refuge will be treated as requests for temporary refuge.

b. The senior Army officer may grant refuge if he feels the elements are met: If individual is being pursued or is in imminent danger of death or serious bodily injury.

c. If possible, applicants will be directed to apply in person at U.S. Embassy.

d. During the application process and refuge period the refugee will be protected. Refuge will end only when directed by higher authority.

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CHAPTER 10

HUMAN RIGHTS

REFERENCES

1. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T.3516.
2. Restatement (Third) of the Foreign Relations Law of the United States.
3. Universal Declaration of Human Rights, G.A. Res. 217 A (III), UN Doc. A/810 at 71 (1948).

I. INTRODUCTION

A. To best understand human rights law, it may be useful to think in terms of obligation versus aspiration. This results from the fact that human rights law exists in two forms: treaty law and customary international law.[1] Human rights law established by treaty generally only binds the state in relation to its own residents; human rights law based on customary international law binds all states, in all circumstances. For official U.S. personnel ("state actors" in the language of human rights law) dealing with civilians outside the territory of the United States, it is customary international law that establishes the human rights considered fundamental, and therefore obligatory. Analysis of the content of this customary international law is therefore the logical start point for this discussion.

II. CUSTOMARY INTERNATIONAL LAW HUMAN RIGHTS: THE OBLIGATION

A. If a specific human right falls within the category of customary international law, it should be considered a "fundamental" human right. As such, it is binding on U.S. forces during all overseas operations. This is because customary international law is considered part of U.S. law,[2] and human rights law operates to regulate the way state actors (in this case the U.S. armed forces) treat all humans.[3] If a "human right" is considered to have risen to the status of customary international law, then it is considered binding on U.S. state actors

[1] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 701.

[2] *See* the *Paquete Habana The Lola*, 175 U.S. 677 (1900); *see also supra* note 1 at § 111.

[3] *Supra* note 1 at §701.

wherever such actors deal with human beings. According to the Restatement (Third) of Foreign Relations Law of the United States, international law is violated by any state that "practices, encourages, or condones"[4] a violation of human rights considered customary international law. The Restatement makes no qualification as to where the violation might occur, or against whom it may be directed. Therefore, it is the customary international law status of certain human rights that renders respect for such human rights a legal obligation on the part of U.S. forces conducting operations outside the United States, and not the fact that they may be reflected in treaties ratified by the United States. Of course, this is a general rule, and judge advocates must look to specific treaties, and any subsequent executing legislation, to determine if this general rule is inapplicable in a certain circumstance.[5] This is the U.S. position regarding perhaps the three most pervasive human rights treaties: the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and the Refugee Convention and Refugee Protocol.

B. Unfortunately, for the military practitioner there is no definitive "source list" of those human rights considered by the United States to fall within this category of fundamental human rights. As a result, the judge advocate must rely on a variety of sources to answer this question. Among these sources, the most informative is the Restatement (Third) of Foreign Relations Law of the United States. According to the Restatement, the United States accepts the position that certain fundamental human rights fall within the category of customary international law, and a state violates international law when, as a matter of policy, it practices, encourages, or condones any of the following:

1. Genocide,
2. Slavery or slave trade,
3. Murder or causing the disappearance of individuals,
4. Torture or other cruel, inhumane, or degrading treatment or punishment,
5. Prolonged arbitrary detention,
6. Systematic racial discrimination, or

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[4] *Supra* note 1, at §702.

[5] According to the Restatement, as of 1987, there were 18 treaties falling under the category of "Protection of Persons," and therefore considered human rights treaties. This does not include the Universal Declaration of Human Rights, or the United Nations Charter, which are considered expressions of principles, and not binding treaties.

7. A consistent pattern of gross violations of internationally recognized human rights.[6]

C. Although international agreements, declarations, and scholarly works suggest that the list of human rights binding under international law is far more expansive than this list, the Restatement's persuasiveness is reflected by the authority relied upon by the drafters of the Restatement to support their list. Through the Reporters' Notes, the Restatement details these sources, focusing primarily on U.S. court decisions enunciating the binding nature of certain human rights, and federal statutes linking international aid to respect by recipient nations for these human rights.[7] These two sources are especially relevant for the military practitioner, who must be more concerned with the official position of the United States than with the suggested conclusions of legal scholars. This list is reinforced when it is combined with the core provisions of the Universal Declaration of Human Rights[8] (one of the most significant statements of human rights law, **some portions** of which are regarded as customary international law[9]), and article 3 common to the four Geneva Conventions of 1949 (which although a component of the law of war, is used as a matter of Department of Defense Policy as both a yardstick against which to assess human rights compliance by forces we support,[10] and as the guiding source of soldier conduct across the spectrum of conflict[11]). By "cross-leveling" these sources, it is possible to construct an "amalgamated" list of those human rights judge advocates should consider customary international law. These include the prohibition against any state policy that results in the conclusion that the state practices, encourages, or condones:

1. Genocide,

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[6] *Supra* note 1, at §702.

[7] *Supra* note 1, at §702, Reporters' Notes.

[8] G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948).

[9] RICHARD B. LILLICH & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 65-67 (1979); RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE, 117-127 (2d. ed. 1991); Filartiga v. Pena-Irala, 630 F.2d 876, 882-83 (2d Cir. 1980). Other commentators assert that only the primary protections announced within the Declaration represent customary law. These protections include the prohibition of torture, violence to life or limb, arbitrary arrest and detention, and the right to a fair and just trial (fair and public hearing by an impartial tribunal), and right to equal treatment before the law. GERHARD VON GLAHN, LAW AMONG NATIONS 238 (1992) [hereinafter VON GLAHN].

[10] *See* DEP'T OF THE ARMY REG. 12-15, JOINT SECURITY ASSISTANCE TRAINING, para. 13-3.

[11] *See* DoD DIR. 5100.77; *see also* CJCS INSTR. 5810.01B.

2. Slavery or slave trade,

3. Murder of causing the disappearance of individuals,

4. Torture or other cruel, inhuman, or degrading treatment or punishment,

5. All violence to life or limb,

6. Taking of hostages,

7. Punishment without fair and regular trial,

8. Prolonged arbitrary detention,

9. Failure to care for and collect the wounded and sick,[12]

10. Systematic racial discrimination, or

11. A consistent pattern of gross violations of internationally recognized human rights.

D. A judge advocate must also recognize that "state practice" is a key component to a human rights violation. What amounts to state practice is not clearly defined by the law. However, it is relatively clear that acts which directly harm individuals, when committed by state agents, fall within this definition.[13] This results in what may best be understood as a "negative" human rights obligation—to take no action that directly harms individuals. The proposition that U.S. forces must comply with this "negative" obligation is not inconsistent with the training and practice of U.S. forces. For example, few would assert that U.S. forces should be able to implement plans and policies which result in cruel or inhumane treatment of civilians. However, the proposition that the concept of "practicing, encouraging, or condoning" human rights violations results in an affirmative obligation—to take affirmative measures to prevent such violations by host nation forces or allies—is more controversial. How aggressively, if at all, must U.S. forces endeavor to prevent violations of human rights law by third parties in areas where such forces are operating?

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[12] This provision must be understood within the context from which it derives. This is not a component of the Restatement list, but instead comes from Article 3 of the Geneva Conventions. As such, it is a "right" intended to apply to a "conflict" scenario. As such, the JA should recognize that the "essence" of this right is not to care for **every** sick and wounded person encountered during **every** military operation, but relates to wounded and sick in the context of some type of conflict. As such, it is legitimate to consider this obligation limited to those individuals whose wound or sickness is directly attributable to U.S. operations. While extending this protection further may be a legitimate policy decision, it should not be regarded as obligatory.

[13] *See supra* note 1, Reporters' Notes.

E. This is perhaps the most challenging issue related to the intersection of military operations and fundamental human rights: what constitutes "encouraging or condoning" violations of human rights? Stated differently, does the obligation not to encourage or condone violations of fundamental human rights translate into an obligation on the part of U.S. forces to intervene to protect civilians from human rights violations inflicted by third parties when U.S. forces have the means to do so? The answer to this question is probably no, despite plausible arguments to the contrary. For the military practitioner, the undeniable reality is that resolution of the question of the scope of U.S. obligations to actively protect fundamental human rights rests with the National Command Authority, as reflected in the CJCS Standing Rules of Engagement. This resolution will likely depend on a variety of factors, to include the nature of the operation, the expected likelihood of serious violations, and perhaps most importantly, the existence of a viable host nation authority.

F. Potential responses to observed violations of fundamental human rights include reporting through command channels, informing Department of State personnel in the country, increasing training of host nation forces in what human rights are and how to respond to violations, documenting incidents and notifying host nation authorities, and finally, intervening to prevent the violation. The greater the viability of the host nation authorities, the less likelihood exists for this last option. However, judge advocates preparing to conduct an operation should recognize that the need to seek guidance, in the form of the mission statement or rules of engagement, on how U.S. forces should react to such situations, is absolutely imperative when intelligence indicates a high likelihood of confronting human rights violations. This imperative increases in direct correlation to the decreasing effectiveness of host nation authority in the area of operations.

III. HUMAN RIGHTS TREATIES: THE ASPIRATION

A. The original focus of human rights law must be re-emphasized. Understanding this original focus is essential to understand why human rights treaties, even when signed and ratified by the United States, fall within the category of "aspiration" instead of "obligation." That focus was to protect individuals from the harmful acts of **their own governments.**[14] This was the "groundbreaking" aspect of human rights law: that international law could regulate the way a government treated the residents of its own state. Human rights law was not originally intended to protect individuals from the actions of **any** government

[14] *See supra* note 1 and accompanying text.

agent they encountered. This is partly explained by the fact that historically, other international law concepts provided for the protection of individuals from the cruel treatment of foreign nations.[15]

B. It is the original scope of human rights law that is applied as a matter of **policy** by the United States when analyzing the scope of human rights treaties. In short, the United States interprets human rights treaties to apply to persons living in the territory of the United States, and not to any person with whom agents of our government deal in the international community.[16] This theory of treaty interpretation is referred to as "non-extraterritoriality."[17] The result of this theory is that these international agreements do not create treaty based obligations on U.S. forces when dealing with civilians in another country during the course of a contingency operation. This distinction between the scope of application of fundamental human rights, which have attained customary international law status, versus the scope of application of non-core treaty based human rights, is a critical aspect of human rights law judge advocates must grasp.

C. While the non-extraterritorial interpretation of human rights treaties is the primary basis for the conclusion that these treaties do not bind U.S. forces outside the territory of the U.S., judge advocates must also be familiar with the concept of **treaty execution**. According to this treaty interpretation doctrine, although treaties entered into by the U.S. become part of the "supreme law of

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[15] *See supra* note 1 at Part VII, Introductory Note.

[16] While the actual language used in the scope provisions of such treaties usually makes such treaties applicable to "all individuals subject to [a states] jurisdiction" the United States interprets such scope provisions as referring to the United States and its territories and possessions, and not any area under the functional control of United States armed forces. This is consistent with the general interpretation that such treaties do not apply outside the territory of the United States. *See supra* note 1 at §322(2) and Reporters' Note 3; *see also* CLAIBORNE PELL REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. COC. NO. 102-23 (Cost Estimate) (This Congressional Budget Office Report indicated that the Covenant was designed to guarantee rights and protections to people living within the territory of the nations that ratified it).

[17] *See* Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78-82 (1995). *See also* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995--LESSONS LEARNED FOR JUDGE ADVOCATES 49 (1995) [hereinafter CLAMO HAITI REPORT], citing the human rights groups that mounted a defense for an Army captain that misinterpreted the Civil and Political Covenant to create an affirmative obligation to correct human rights violations within a Haitian Prison. Lawyers' Committee for Human Rights, Protect or Obey: The United States Army versus CPT Lawrence Rockwood 5 (1995) (reprinting an amicus brief submitted in opposition to a prosecution pretrial motion).

the land,"[18] some are not enforceable in U.S. courts absent subsequent legislation or executive order to "execute" the obligations created by such treaties.[19]

D. This "self-execution" doctrine relates primarily to the ability of a litigant to secure enforcement for a treaty provision in U.S. courts.[20] However, the impact on whether a judge advocate should conclude that a treaty creates a binding

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[18] U.S. CONST. art VI. According to the Restatement, "international agreements are law of the United States and supreme over the law of the several states." *Supra* note 1, at §111. The Restatement Commentary states the point even more emphatically: "[T]reaties made under the authority of the United States, like the Constitution itself and the laws of the United States, are expressly declared to be 'supreme Law of the Land' by Article VI of the Constitution." *Id.* at cmt. d.

[19] The Restatement Commentary indicates:

> In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and any expression by the Senate or the Congress in dealing with the agreement. After the agreement is concluded, often the President must decide in the first instance whether the agreement is self-executing, *i.e.*, whether existing law is adequate to enable the United States to carry out its obligations, or whether further legislation is required . . . Whether an agreement is to be given effect without further legislation is an issue that a court must decide when a party seeks to invoke the agreement as law . . .
>
> Some provisions of an international agreement may be self-executing and others non-self-executing. If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement.

Supra note 1, at cmt h. *See also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254 (1829). In *Foster*, the Court focused upon the Supremacy Clause of the United States Constitution and found that this clause reversed the British practice of not judicially enforcing treaties, until Parliament had enacted municipal laws to give effect to such treaties. The Court found that the Supremacy Clause declares treaties to be the supreme law of the land and directs courts to give them effect without waiting for accompanying legislative enactment. The Court, however, conditioned this rule by stating that only treaties that operate of themselves merit the right to immediate execution. This qualifying language is the source of today's great debate over whether or not treaties are self-executing; *see also* DEP'T OF ARMY, PAMPHLET 27-161-1, LAW OF PEACE, VOLUME I para. 8-23 (1 September 1979) [hereinafter DA PAM 27-161-1], which states:

> [w]here a treaty is incomplete either because it expressly calls for implementing legislation or because it calls for the performance of a particular affirmative act by the contracting states, which act or acts can only be performed through a legislative act, such a treaty is for obvious reasons not self-executing, and subsequent legislation must be enacted before such a treaty is enforceable. . . On the other hand, where a treaty is full and complete, it is generally considered to be self-executing. . .

[20] *See supra* note 1, at cmt h.

obligation on U.S. forces is potentially profound. First, there is an argument that if a treaty is considered non-self-executing, it should not be regarded as creating such an obligation.[21] More significantly, once a treaty is executed, it is the subsequent executing legislation or executive order, and not the treaty provisions, that is given effect by U.S. courts, and therefore defines the scope of U.S. obligations under our law.[22]

E. The U.S. position regarding the human rights treaties discussed above is that "the intention of the United States determines whether an agreement is to be self-executing or should await implementing legislation."[23] Thus, the United States position is that its unilateral statement of intent, made through the vehicle of a declaration during the ratification process, is determinative of the intent of the parties. Accordingly, if the United States adds such a declaration to a treaty, the declaration determines the interpretation the United States will apply to determining the nature of the obligation.[24]

F. The bottom line is that compliance with international law is not a suicide pact nor even unreasonable. Its observance, for example, does not require a military force on a humanitarian mission within the territory of another nation to immediately take on all the burdens of the host nation government. A clear example of this rule is the conduct of U.S. forces Operation UPHOLD DEMOCRACY in Haiti regarding the arrest and detention of civilian persons. The failure of the Cedras regime to adhere to the minimum human rights associated with the arrest and imprisonment of its nationals served as part of the

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[21] There are several difficulties with this argument. First, it assumes that a U.S. court has declared the treaty non-self-executing, because absent such a ruling, the non-self-executing conclusion is questionable: "[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts." *Supra* note 1, at §111, Reporters Note 5. Second, it translates a doctrine of judicial enforcement into a mechanism whereby U.S. state actors conclude that a valid treaty should not be considered to impose international obligations upon those state actors, a transformation that seems to contradict the general view that failure to enact executing legislation when such legislation is needed constitutes a breach of the relevant treaty obligation. "[A] finding that a treaty is not self-executing (when a court determines there is not executing legislation) is a finding that the United States has been and continues to be in default, and should be avoided." *Id.*

[22] "[I]t is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States." *Id.* Perhaps the best recent example of the primacy of implementing legislation over treaty text in terms of its impact on how U.S. state actors interpret our obligations under a treaty was the conclusion by the Supreme Court of the United States that the determination of refugee status for individuals fleeing Haiti was dictated not pursuant to the Refugee Protocol standing alone, but by the implementing legislation for that treaty – the Refugee Act. United States v. Haitian Centers Council, Inc. 113 S.Ct. 2549 (1993).

[23] *See supra* note 1 at § 131.

[24] *See supra* note 1 at § 111, cmt.

United Nation's justification for sanctioning the operation. Accordingly, the United States desired to do the best job it could in correcting this condition, starting by conducting its own detention operations in full compliance with international law. The United States did not, however, step into the shoes of the Haitian government, and did not become a guarantor of all the rights that international law requires a government to provide its own nationals.

G. Along this line, the Joint Task Force (JTF) lawyers first noted that the Universal Declaration of Human Rights does not prohibit detention or arrest, but simply protects civilians from the arbitrary application of these forms of liberty denial.[25] The JTF could detain civilians who posed a legitimate threat to the force, its mission, or other Haitian civilians.[26]

H. Once detained, these persons become entitled to a baseline of humanitarian and due process protections. These protections include the provision of a clean and safe holding area; rules and conduct that would prevent any form of physical maltreatment, degrading treatment, or intimidation; and rapid judicial review of their individual detention.[27] The burden associated with fully complying with the letter and spirit of the Universal Declaration of Human Rights[28] permitted the United States to safeguard its force, execute its mission, and reap the benefits of "good press."[29]

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[25] Common Article 3 does not contain a prohibition of arbitrary detention. Instead, its limitation regarding liberty deprivation deals only with the prohibition of extrajudicial sentences. Accordingly, the judge advocates involved in Operation Uphold Democracy and other recent operations looked to the customary law and the Universal Declaration of Human Rights as authority in this area. It is contrary to these sources of law and United States policy to arbitrarily detain people. Judge advocates, sophisticated in this area of practice, explained to representatives from the International Committee of the Red Cross the distinction between the international law used as guidance, and the international law that actually bound the members of the Combined Joint Task Force (CJTF). More specifically, these judge advocates understood and frequently explained that the third and fourth Geneva Conventions served as procedural guidance, but the Universal Declaration (to the extent it represents customary law) served as binding law.

[26] "The newly arrived military forces (into Haiti) had ample international legal authority to detain such persons." Deployed judge advocates relied upon Security Council Resolution 940 and article 51 of the United Nations Charter. *See* CLAMO HAITI REPORT, *supra* note 17, at 63.

[27] *See supra* note 17 at 64-65.

[28] Reprinted for reference purposes in the Appendix is the Universal Declaration of Human Rights. This is intended to serve as a resource for judge advocate to utilize as a source of law to "analogize" from when developing policies to implement the customary international law human rights obligations set out above.

[29] The judge advocates within the 10th Mountain Division found that the extension of these rights and protections served as concrete proof of the establishment of institutional enforcement of basic humanitarian considerations. This garnered "good press" by demonstrating to the Haitian people, "the human rights groups, and the International Committee of the Red Cross (ICRC) that the U.S. led force" was adhering to the

I. Accurate articulation of these doctrines of non-extraterritoriality and non-self-execution is important to ensure consistency between United States policy and practice. However, a judge advocate should bear in mind that this is background information, and that it is the list of human rights considered customary international law that is most significant in terms of policies and practices of U.S. forces. The judge advocate must be prepared to advise his or her commander and staff that many of the "rights" reflected in human rights treaties and in the Universal Declaration, although not binding as a matter of treaty obligation, are nonetheless binding on U.S. forces as a matter of customary international law.

Universal Declaration principles. *See* OPERATION UPHOLD DEMOCRACY, 10TH MOUNTAIN DIVISION, OFFICE OF THE STAFF JUDGE ADVOCATE MULTINATIONAL FORCE HAITI AFTER-ACTION REPORT 7-9 (March 1995) [10TH MOUNTAIN AAR].

APPENDIX A

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and the security of person.

Article 4

No one shall be held in slavery or servitude, slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representative.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

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