INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT
THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY
CHARLOTTESVILLE, VIRGINIA

LAW OF WAR WORKSHOP DESKBOOK

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All of the faculty who have served with and before us and contributed to the literature in the field of the Law of War

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MAJOR TREATIES GOVERNING LAND WARFARE

Abbreviated Name	Full Name
GWS/1st GC	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, DA Pam 27-1.
GWS Sea/2d GC	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, DA Pam 27-1.
GPW/3d GC	Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, DA Pam 27-1.
GC/4th GC	Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, DA Pam 27-1.
GP I/Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 10 June 1977, DA Pam 27-1-1. (Not Ratified by U.S.)
GP II/Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, 10 June 1977, DA Pam 27-1-1. (Not Ratified by U.S.)
H. III	Hague Convention No. III Relative to the Opening of Hostilities, 18 October 1907, DA Pam 27-1.
H. IV	Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 October 1907, DA Pam 27-1.

HR	Annex to Hague Convention No. IV embodying the Regulations Respecting the Laws and Customs of War on Land, 18 October 1907, DA Pam 27-1.
H. V	Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, DA Pam 27-1.
1925 Gas Protocol	Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, of Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925, 26 U.S.T. 571.
BWC/Biological Weapons Convention	Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583.
CWC/Chemical Weapons Convention	1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800.
1954 Hague CP Convention	1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216.
ENMOD Convention	The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333.
CCW/Conventional Weapons Convention	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1525.

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Appendix C. Chairman of the Joint Chiefs of Staff Instruction 5810.01A, Implementation of the DoD Law of War Program, 29 August 1999.

Chapter 5: Prisoners of War and Detainees

Appendix. U.S. Central Command, Regulation 27-13, Legal Services - Captured Persons: Determination of Eligibility for Enemy Prisoner of War Status (7 Feb. 1995).

Chapter 8: War Crimes and Command Responsibility

Appendix. War Crimes Act of 1996, P.L. 104-192, 110 Stat. 2104 (1996).

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Appendix B. Dep't of the Army, Regulation 350-41, Training in Units, Sec. 14-1 - 14-5 (19 Mar. 1993).

CHAPTER 1

HISTORY OF THE LAW OF WAR

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1. Dept. of Army, Field Manual 27-10, The Law of Land Warfare (18 July 1956).
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I. INTRODUCTION.

A. OBJECTIVES:

1. Identify common historical themes which 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. WHAT IS WAR? "[i]t is universally recognized that war is *a contention, i.e., a violent struggle through the application of armed force."*

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."

II. THE UNIFYING THEMES OF THE LAW OF WAR.

A. Law exists either to (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. "Violated or ignored as they often are, enough of the rules are observed enough of the time so that mankind is very much better off with them than without them."

      b. History demonstrates that mankind has always sought to "diminish the corrosive effect of mortal combat on the participants," 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 cite 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 fight against difficult odds.

III. THE "PRONGS" OF REGULATION

A. Throughout history, the law focused on two primary issues related to war:

1. Under what circumstances was the use of military power legally and morally justified. This is referred to as *Jus ad Bellum* (or Legal Basis for the Use of Force by contemporary military lawyers).

2. What legal and moral restraints apply to the conduct of waging war. This prong is referred to as *Jus in Bello* (the Regulation of Hostilities or Hague/Geneva Law by contemporary military lawyers).

3. 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.

B. THE TWO THEORIES.

1. *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 which justified resort to war legally and morally.

   a. 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.

   b. Romans: formalized laws and procedures which 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.

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

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

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

2. *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.

   a. 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:

      (1) Captives must be treated well and cared for; and

      (2) Natives within captured cities must be spared and women and children respected.

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

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

IV. THE HISTORICAL PERIODS.

A. THE JUST WAR PERIOD.

1. This period ranged from 335 B.C. to about 1800. The primary tenet 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, or (3) 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 AD).

5. Middle Ages. Saint Thomas Aquinas (12th century AD) (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 evolved in light of 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 an 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 were:

   a. A decision to wage war can be reached only by legitimate authority (those who rule a 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.

h. Emergence of a Chivalric Code. *Jus in Bello*. The chivalric rules of fair play and good treatment only applied if the war was just to begin with.

(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").

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

1. Generally. Arose based upon the rise of the nation state as a tool of foreign relations. Modern powers transformed war from a tool to achieve justice to a tool to pursue national policy objectives.

a. Just War Notion Pushed Aside. Natural or moral law principles replaced by positivism which 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 Tenet: 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 moves 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:

(1) With war a recognized and legal reality in the intercourse of nations, the focus on mitigating the impact of war emerged.

(a) 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.

(b) 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.

(c) 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.

(d) First Geneva Convention (1864).

2. Foundation for Treaty Period Laid. 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.**

(1) 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 (i.e., aggressive or offensive use of force) 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. The London Charter (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 tenets 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 merely 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 with 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 international law was **supplemented,** and not **displaced** by the Charter. This remains a controversial issue.

F. 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 specifically to address this class.

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 by which all nations states are already bound.

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. The United States has not yet ratified either treaty.

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

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

V. WHY REGULATE WARFARE?

1. Motivates the enemy to observe the same rules.
2. Motivates the enemy to surrender.
3. Guards against acts that violate basic tenets of civilization.
   a. Protects against unnecessary suffering.
   b. Safeguards certain fundamental human rights.
4. Provides advance notice of the accepted limits of warfare.
5. Reduces confusion and makes identification of violations more efficient.
6. Helps restore peace.

VI. 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."

CHAPTER 2

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).
7. War Powers Resolution, 50 U.S.C. §§ 1541-1548; Pub. L. No. 93-148 (1972).

I. 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.

II. 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.

      (1) 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)

III. USE OF FORCE

A. Historical Antecedents.

1. Kellogg-Briand Pact.

   a. "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."

   b. Lacked any enforcement mechanism.

2. Nuremburg Charter.

   a. "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; . . . "

B. 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."

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.

C. 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 principals," or customary, international law.

IV. MAINTAINING INTERNATIONAL PEACE AND SECURITY

A. Security Council.

1. Granted "primary responsibility for the maintenance of international peace and security." (Article 24(1))

a. "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":

         (a) 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."

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

         (c) 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.H. 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."

1. ". . . 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."

V. 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. "Inherent right" of self defense: did Article 51 completely codify the pre-existing right, or is there some remainder of the right outside the Charter?

d. "Armed attack": Is the right of self-defense triggered when there is something less than an armed attack?

(1) 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, does their action extinguish a State's right to continue its self-defense?

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.

B. Humanitarian intervention.

1. 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.

1. 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).

VI. DOMESTIC BASES FOR USE OF FORCE

A. U.S. Constitution.

1. Legislative Powers (Article I).

   a. Provide for the Common Defense;

   b. Declare war;

   c. Issue letters of marque or reprisal;

   d. Raise and support Armies;

   e. Provide and maintain a Navy;

   f. Make rules for the Government and Regulation of the land and naval forces.

2. Executive Powers (Article II).

   a. The executive power shall be vested in the President;

   b. Commander in Chief.

B. The War Powers Resolution (1973).

1. History, background and purpose.
   a. "To fulfill the intent of the framers . . ."
   b. Ensure "collective judgment" of the Executive and Legislative branches.
2. Reporting and consultation requirements.
   a. Section 3: Consultation.
      (1) "In every possible instance . . ."
      (2) *Before* introduction of armed forces into actual or imminent hostilities.
      (3) Regular consultation thereafter.
   b. Section 4: Reporting.
      (1) Absent a declaration of war, events triggering WPR report:
         (a) Introduction of troops into actual or imminent hostilities;
         (b) Introduction of troops into a foreign country, equipped for combat (with some exceptions); or
         (c) Greatly enlarging the number of troops in a foreign country, equipped for combat.
      (2) Within 48 hours of a triggering event, the President must report the following to both houses of Congress:
         (a) The circumstances necessitating introduction of armed forces;
         (b) The Constitutional and legislative authority for introduction of armed forces; and
         (c) The estimated scope and duration of hostilities or deployment.
   c. Section 5b: The 60 Day Clock.
      (1) Triggered by Section 4 report or Congressional demand for the same.
      (2) The President must terminate the use of armed forces within 60 days after the Section 4 report is submitted, unless Congress has:

(a) Declared war;

(b) Authorized the use of forces;

(c) Specifically authorized extension of the deployment / use of forces; or

(d) Been unable to meet due to an attack upon the U.S.

(3) The President may extend the 60 day period—by 30 days—if he determines and certifies in writing that "unavoidable military necessity respecting the safety of United States armed forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

d. Section 5c: The concurrent resolution.

(1) Forcing the President to withdraw.

(2) The demand for withdrawal may occur at any time; it is not tied to the "60 day clock."

3. Executive Branch implementation of the WPR.

a. CJCS review of deployment actions.

b. Referral to DoD General Counsel, if report required.

c. DoD notifies / advises State Department. If report required, DoD General Counsel notifies SECDEF.

d. Reports "consistent with" WPR.

CHAPTER 3

LEGAL 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)
3. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S. 3364. (GPW)
4. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949 T.I.A.S. 3365. (GC)
5. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, *reprinted in* 16 I.L.M. 1391, DEP'T OF ARMY, PAMPHLET 27-1-1 (GP I & II).
6. Commentary on the Geneva Conventions (Pictet ed. 1960).
7. DEP'T OF ARMY, PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE (7 December 1956).
8. DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS of 12 August 1949 (1 September 1979).
9. DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOLUME II (23 October 1962).
10. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956).
11. NAVAL WARFARE PUBLICATION 1-14/MCWP 5-2.1/COMDTPUB 5800.7 THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (October 1995).[(FORMERLY NWP 9/FMFM 1-10 (REVISION A)]
12. AIR FORCE PAMPHLET 110-31, INTERNATIONAL LAW - THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (19 November 1976).
13. Morris Greenspan, THE MODERN LAW OF LAND WARFARE (1959).
14. Dietrich Schindler & Jiri Toman, THE LAW OF ARMED CONFLICT (1988).
15. Hilaire McCoubrey, INTERNATIONAL HUMANITARIAN LAW (1990).
16. Howard S. Levie, THE CODE OF INTERNATIONAL ARMED CONFLICT (1986).

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. <u>THE LANGUAGE OF THE LAW</u>. 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. Many principles of the law of war fall into this category of international law.

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 Annexed 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. The "Big Three." While there are numerous law of war treaties in force today, the three that provide the vast majority of regulation are: the **Hague Convention of 1907 (and Annexed Regulations), the Four Geneva Conventions of 1949, and the 1977 Protocols to the 1949 Geneva Conventions.**

1. **The Targeting Method.** This prong of the law of war is focused on regulating the **methods and means** 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.

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) GW: Wounded and Sick in the Field.

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

(3) GP: 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 (I & II).

a. 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. Unlike The Hague and Geneva Conventions, the U.S. has never ratified either of these Protocols.

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 relate 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

of 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.

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.[1] 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.

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[1] HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 11 (1986). See also Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague), in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 97 (1988).

(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 the belligerency is successful (e.g., the 1997 recognition of Mr. Kabila in Zaire).

d. Controversial expansion of Article 2 -- Protocol I Additional (1977).

(1) Expands Geneva Conventions' application to conflicts previously considered exclusively internal: "[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 <u>for the duration of the occupation</u> certain key provisions of the GC.

2. **The Conflict Classification Prong of Common Article 3** -- Conflicts which are <u>not</u> of an international character: "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 they would if such actions were 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) The rebel group has an organized military force under responsible command, operates within a determinate territory, and has the means to respect the Geneva Conventions.

(2) The legal Government is obliged to have recourse to the regular military forces against the rebels, who are organized and in control of a portion of the national territory.

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. What is the Relationship 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 governments **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.

D. 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, there relevance continues to grow based on several factors:

   a. The U.S. has stated it considers many provisions of Protocol I, and all of Protocol II, to be binding customary international law.

   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.

IV. OTHER KEY LAW OF WAR CONCEPTS.

A. Protected Person. This is a legal "term of art" under the law of war. It refers to an individual vested with the maximum benefit under a given Geneva Convention. Each Convention defines which individuals fall within this category.

B. Protecting Power. This refers to an agreed upon neutral state responsible for monitoring compliance with the Geneva Conventions and Protocols. Such agreements are rarely reached.

C. Combatant Immunity. Perhaps the greatest benefit granted to combatants by the law of war, it refers to the immunity afforded by international law for warlike acts committed during international armed conflict. There are two critical caveats:

1. This immunity is not "absolute." It extends only to acts that are consistent with the law of war. Therefore, a combatant who violates the law of war receives no immunity for that conduct.

2. Combatant Immunity applies **only to international armed conflict.** The inability of international law to extend combatant immunity into internal armed conflicts is perhaps the greatest manifestation of the limited scope of law of war regulation during internal conflicts.

D. Reprisal. "[A]cts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare." [Para. 497, FM 27-10]

1. The concept of reprisal is considered the one true "self-help" mechanism built into the law of war.

2. The right of reprisal has been severely restricted by Protocol I. This was a major motivation behind the U.S. decision not to ratify this treaty.

E. War Crime. While war "legalizes" many acts that would be unlawful in peacetime, it does not "legalize" everything unlawful in peacetime. War is not a license to kill, but a limited authorization to kill. War crimes are simply those acts that are unlawful in peacetime, and remain unlawful in wartime.

F. Special Agreements. These are agreements the parties conclude during actual hostilities. The drafters of the Conventions recognized that they could not envision every circumstance that would arise regarding POWs, wounded and sick, and civilians. Thus, they sanctioned the use of special agreements.

G. Grave Breaches of the Geneva Conventions: violations of the law of war involving any of the following acts, if committed against persons or property

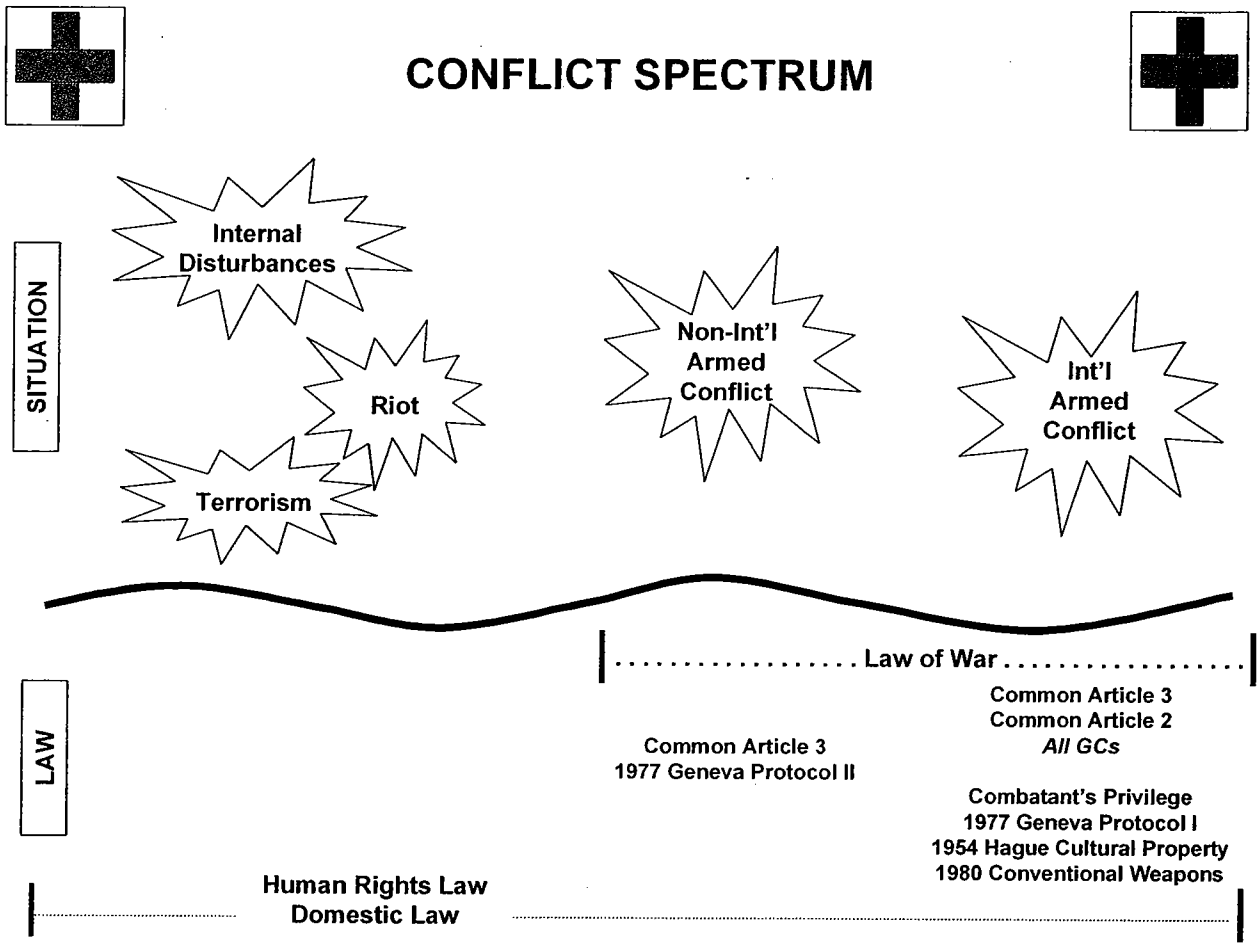
protected by the Conventions: willful killing, torture or inhumane treatment, including biological experiments; willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a POW or protected civilian to serve in the armed force of a hostile power; depriving a POW or protected civilian of the rights of fair or regular trial as prescribed in the Conventions; unlawful deportation or transfer or unlawful confinement of a protected civilian; taking hostages.

H. Respect for the Conventions (Common Article 1). Establishment of the basic obligation of signatories of the Geneva Conventions to implement the provisions. The term "respect" was intended to emphasize the humanitarian and unilateral nature of the obligation undertaken by Parties to the Conventions to comply with its provisions.

1. The drafters intended "ensure respect for" to advise the Parties of their continuing obligation to oversee the effective implementation of the Conventions. The term has also been interpreted in the Commentary to include an obligation on the Parties to see that other Parties are complying with the Conventions.[2]

[2] In May 1983, the ICRC appealed to the Parties to the Geneva Conventions to bring influence to bear on both Iran and Iraq to better comply with the Law of War during their ongoing conflict. GEOFFREY BEST, LAW AND WAR SINCE 1945 146 (1994).

APPENDIX A


CONFLICT SPECTRUM
SITUATION
Internal Disturbances
Riot
Terrorism
Non-Int'l Armed Conflict
Int'l Armed Conflict
LAW
Law of War
Common Article 3
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Common Article 3
Common Article 2
All GCs
Combatant's Privilege
1977 Geneva Protocol I
1954 Hague Cultural Property
1980 Conventional Weapons
Human Rights Law
Domestic Law

APPENDIX B

Department of Defense
DIRECTIVE

NUMBER 5100.77
December 9, 1998

GC, DoD

SUBJECT: DoD Law of War Program

References: (a) DoD Directive 5100.77, "DoD Law of War Program," July 10, 1979 (hereby canceled)
(b) DoD Directive 2310.1, "DoD Program for Enemy Prisoners of War (EPOW) and other Detainees (Short Title: DoD Enemy POW Detainee Program)," August 18, 1994
(c) DoD Directive 5000.1, "Defense Acquisition," March 15, 1996
(d) Hague Convention No. IV, "Respecting the Laws and Customs of War on Land," October 18, 1907
(e) through (l), see enclosure 1

1. REISSUANCE AND PURPOSE

This Directive:

1.1. Reissues reference (a) to update policy and responsibilities in the Department of Defense for a program to ensure DoD compliance with the law of war obligations of the United States.

1.2. Expands the responsibilities of the Secretary of the Army as the DoD Executive Agent for the investigation and reporting of reportable incidents.

1.3. Establishes the DoD Law of War Working Group.

2. APPLICABILITY AND SCOPE

2.1. This Directive applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD Components").

2.2. In implementation of this Directive, reference (b) addresses the DoD program for care and treatment of enemy prisoners of war (EPW), retained persons, and detainees. A reportable incident

(as defined in subsection 3.2., below) involving possible, suspected, or alleged violations of the protections afforded EPWs, retained persons, or detainees is included in the scope of this Directive.

2.3. In further implementation of this Directive, that part of the law of war relating to legal reviews of the development, acquisition, and procurement of weapons and weapon systems for the DoD Components is addressed in DoD Directive 5000.1 (reference (c)) and in related guidance pertaining to Special Access Programs.

3. DEFINITIONS

3.1. Law of War. That part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

3.2. Reportable Incident. A possible, suspected, or alleged violation of the law of war.

4. POLICY

It is DoD policy to ensure that:

4.1. The law of war obligations of the United States are observed and enforced by the DoD Components.

4.2. An effective program to prevent violations of the law of war is implemented by the DoD Components.

4.3. All reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

4.4. All reportable incidents committed by or against allied persons, or by or against other persons during a conflict to which the U.S. is not a party, are reported through command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities. Once it has been determined that U.S. persons are not involved in a reportable incident, an additional U.S. investigation shall be continued only at the direction of the appropriate Combatant Commander. On-scene commanders shall ensure that measures are taken to preserve evidence of reportable incidents pending turnover to U.S., allied, or other appropriate authorities.

5. RESPONSIBILITIES

5.1. The General Counsel of the Department of Defense shall:

5.1.1. Provide overall legal guidance in the Department of Defense on the Law of War Program, to include review of policies developed under or relating to the program, coordination of special legislative proposals and other legal matters with other Federal Departments and Agencies, and resolution of disagreements on questions of law.

5.1.2. Establish a DoD Law of War Working Group consisting of representatives from the General Counsel of the Department of Defense (GC, DoD), the Legal Counsel to the Chairman of the Joint Chiefs of Staff, the International and Operational Law Division of the Office of the Judge Advocate General of each Military Department, and the Operational Law Branch of the Office of the Staff Judge Advocate to the Commandant of the Marine Corps. The DoD Law of War Working Group shall develop and coordinate law of war initiatives and issues, manage other law of war matters as they arise, and provide advice to the General Counsel on legal matters covered by this Directive.

5.1.3. Coordinate and monitor the Military Departments' plans and policies for training and education in the law of war.

5.2. The Under Secretary of Defense for Policy shall:

5.2.1. Exercise primary staff responsibility for the DoD Law of War Program.

5.2.2. Ensure that the Assistant Secretary of Defense (International Security Affairs) shall provide overall development, coordination, approval, and promulgation of major DoD policies and plans, including final coordination of such proposed policies and plans with DoD Components and other Federal Departments and Agencies as necessary, and final coordination of DoD positions on international negotiations on the law of war and U.S. signature or ratification of law of war treaties.

5.3. The Heads of the DoD Components shall:

5.3.1. Ensure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.

5.3.2. Institute and implement effective programs to prevent violations of the law of war, including law of war training and dissemination, as required by references (d) through (h).

5.3.3. Ensure that qualified legal advisers are immediately available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations; and institute and implement programs to comply with the reporting requirements established in section 6., below.

5.4. The Assistant Secretary of Defense for Public Affairs shall monitor the public affairs aspects of the DoD Law of War Program and provide public affairs guidance, as appropriate, to the DoD Components.

5.5. The Secretaries of the Military Departments shall develop internal policies and procedures consistent with this Directive in support of the DoD Law of War Program to:

5.5.1. Provide directives, publications, instructions, and training so that the principles and rules of the law of war will be known to members of their respective Departments, the extent of such knowledge to be commensurate with each individual's duties and responsibilities.

5.5.2. Ensure that programs are implemented in their respective Military Departments to prevent violations of the law of war, emphasizing any types of violations that have been reported under this Directive.

5.5.3. Provide for the prompt reporting and investigation of reportable incidents committed by or against members of their respective Military Departments, or persons accompanying them, in accordance with directives issued under paragraph 5.8.4., below.

5.5.4. Where appropriate, provide for disposition, under the Uniform Code of Military Justice (reference (i)), of cases involving alleged violations of the law of war by members of their respective Military Departments who are subject to court-martial jurisdiction.

5.5.5. Provide for the central collection of reports and investigations of reportable incidents alleged to have been committed by or against members of their respective Military Departments, or persons accompanying them.

5.5.6. Ensure that all reports of reportable incidents are forwarded to the Secretary of the Army in his or her capacity as the DoD Executive Agent under subsection 5.6., below.

5.6. The Secretary of the Army, as the Executive Agent for the Secretary of Defense for reportable incidents, shall act for the Secretary of Defense in developing and coordinating plans and policies for, and in supervising the execution of, the investigation of reportable incidents and, subject to DoD 8910.1-M (reference (j)), the collection, recording, and reporting of information concerning reportable incidents. This authority is separate from and subject to the responsibilities assigned the Combatant Commanders in subsections 4.4., above, and 5.8., below, and the responsibilities assigned the Secretaries of the Military Departments in subsection 5.5., above.

5.7. The Chairman of the Joint Chiefs of Staff shall:

5.7.1. Provide appropriate guidance to the Commanders of the Combatant Commands, consistent with 10 U.S.C. 163 (a)(2) (reference (k)), conforming with the policies and procedures in this Directive. This guidance will include direction on the collection and investigation of reports of enemy violations of the law of war.

5.7.2. Designate a primary point of contact in his organization to administer activities under this Directive.

5.7.3. Issue and review appropriate plans, policies, directives, and rules of engagement, as necessary, ensuring their consistency with the law of war obligations of the United States.

5.7.4. Ensure that plans, policies, directives, and rules of engagement issued by the Commanders of the Combatant Commands are consistent with this Directive and the law of war.

5.8. The Commanders of the Combatant Commands shall:

5.8.1. Institute effective programs within their respective commands to prevent violations of the law of war and ensure that their commands' plans, policies, directives, and rules of engagement are subject to periodic review and evaluation, particularly in light of any violations reported.

5.8.2. Implement guidance from the Chairman of the Joint Chiefs of Staff for the collection and investigation of reports of enemy violations of the law of war.

5.8.3. Designate the command legal adviser to supervise the administration of those aspects of this program dealing with possible, suspected, or alleged enemy violations of the law of war.

5.8.4. Issue directives to ensure that reportable incidents involving U.S. or enemy persons are reported promptly to appropriate authorities, are thoroughly investigated, and the results of such investigations are promptly forwarded to the applicable Military Department or other appropriate authorities.

5.8.5. Determine the extent and manner in which a reportable incident not involving U.S. or enemy persons will be investigated by U.S. forces and ensure that such incidents are reported promptly to appropriate U.S. Agencies, allied governments, or other appropriate authorities.

5.8.6. Ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.

5.8.7. Ensure that law of war training and dissemination programs of subordinate commands and components are consistent with this Directive and the law of war obligations of the United States.

5.9. The Assistant Secretary of Defense for Command, Control, Communications and Intelligence shall ensure that the Director, Defense Intelligence Agency, shall provide information from the intelligence community to the Secretary of the Army and to the Commanders of the Combatant Commands, consistent with their respective obligations under subsections 5.6. and 5.8., above, concerning reportable incidents perpetrated against captured or detained U.S. persons, or committed by or against U.S. allies, or committed by or against other persons during a conflict to which the United States is not a party.

6. INFORMATION REQUIREMENTS

6.1. Reports of Incidents. All military and civilian personnel assigned to or accompanying a DoD Component shall report reportable incidents through their chain of command. Such reports also may also be made through other channels, such as the military police, a judge advocate, or an Inspector General. Reports that are made to officials other than those specified in this subsection shall, nonetheless, be accepted and immediately forwarded through the recipient's chain of command.

6.2. Initial Report. The commander of any unit that obtains information about a reportable incident shall immediately report the incident through command channels to higher authority. The initial report shall be made through the most expeditious means available.

6.3. Higher authorities receiving an initial report shall:

6.3.1. Request a formal investigation by the cognizant military investigation authority.

6.3.2. Submit a report of any reportable incident, by the most expeditious means available, through command channels, to the responsible Combatant Commander. Normally, an OPREP-3

report, established in Joint Pub 1-03.6, Joint Reporting System, Event/Incident Reports (E/IR), will be required. Copies of the E/IR shall be provided to the DoD Component officials designated by the Heads of the DoD Components concerned.

6.3.3. Submit a report, in accordance with DoD Instruction 5240.4 (reference (l)), concerning any criminal case, regardless of the allegation, that has received, is expected to receive, or which, if disclosed, could reasonably be expected to receive, significant media interest.

6.4. The Combatant Commander shall report, by the most expeditious means available, all reportable incidents to the Chairman of the Joint Chiefs of Staff, the Secretary of Defense, and the Secretary of the Army in his role as the Executive Agent under subsection 5.6., above.

6.5. DoD Notifications. Notifications of a reportable incident shall be forwarded to the Chairman of the Joint Chiefs of Staff; the GC, DoD; the Assistant Secretary of Defense for Public Affairs; and the Inspector General of the Department of Defense, who will inform their counterparts in any Military Service or Department concerned.

6.6. Information Requirements. The Event/Incident Reports referred to in this Directive and further described in reference (l) are exempt from licensing in accordance with paragraph 5.4.2. of DoD 8910.1-M (reference (j)).

7. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. Forward two copies of implementing documents to the General Counsel of the Department of Defense and the Under Secretary of Defense for Policy within 120 days.

John J. Hamre
Deputy Secretary of Defense

Enclosures - 1

E1. References, continued

E1. ENCLOSURE 1

REFERENCES, continued

(e) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949

(f) Geneva Convention for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949

(g) Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949

(h) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949

(i) Sections 801-940 of title 10, United States Code, "Uniform Code of Military Justice"

(j) DoD 8910.1-M, "DoD Procedures for Management of Information Requirements," June 1998, authorized by DoD Directive 8910.1, June 11, 1993

(k) Section 163(a)(2) of title 10, United States Code

(l) DoD Instruction 5240.4, "Reporting of Counterintelligence and Criminal Violations," September 22, 1992

APPENDIX C

CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION

J-5 CJCSI 5810.01A
DISTRIBUTION: A, B, C, J, S 27 August 1999

IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM

References:

a. DOD Directive 5100.1, 25 September 1987, "Functions of the Department of Defense and Its Major Components"
b. DOD Directive 5100.77, 9 December 1998, "DOD Law of War Program"
c. CJCS Manual 3150.03, 19 June 1998, "Joint Reporting Structure Event and Incident Reports"

1. Purpose. Pursuant to the authorities delegated in references a and b, this instruction establishes joint policy, assigns responsibilities, and provides guidance regarding the law of war obligations of the United States. Reference a assigns the Chairman of the Joint Chiefs of Staff the responsibility to develop and establish military doctrine and guidance for all aspects of the joint employment and activities of the Armed Forces. Reference b provides policy guidance and assigns responsibility within the Department of Defense for a program to ensure compliance with the law of war. This instruction implements the requirements of reference b to provide common policy for coordinated actions by the Military Services and combatant commands.

2. Cancellation. CJCSI 5810.01, 12 August 1996, is canceled.

3. Applicability. This instruction applies to all personnel of the Armed Forces, including civilians, regardless of assignment or attachment.

4. Definitions.

a. Law of War. That part of international law that regulates the conduct of armed hostilities; often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

b. Reportable Incident. A possible, suspected, or alleged violation of the law of war.

5. Policy

a. The Armed Forces of the United States will comply with the law of war during all armed conflicts; however, such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations. Specifically, reference b provides that it is the policy of the Department of Defense to ensure that:

(1) The law of war obligations of the US Government are observed and enforced by the US Armed Forces.

(2) An effective program designed to prevent violations of the law of war is implemented by the US Armed Forces.

(3) All reportable incidents committed by or against members of, or persons serving with or accompanying, the US Armed Forces are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

(4) All known reportable incidents committed by or against allied military or civilian personnel, or by or against other persons during a conflict to which the United States is not a party, are reported through appropriate command channels for ultimate transmission to appropriate US agencies, allied governments, or other appropriate authorities. See subparagraph 6c(6)(d).

b. Legal advisers will, at all appropriate levels of command during all stages of operational planning and execution of joint and combined operations, provide advice concerning law of war compliance. Advice on law of war compliance will address not only legal constraints on operations but also legal rights to employ force.

6. Responsibilities

a. The Director, Joint Staff (DJS) will:

(1) Ensure that the Joint Staff acts on policy, politico-military, and other issues involved in the execution of the DOD Law of War Program and provides necessary liaison with the Office of the Secretary of Defense, the Department of State, the Services, and the combatant commands.

(2) Ensure that Joint Staff directorates provide policy and operational guidance within their respective functional areas as noted below:

(a) The Director for Manpower and Personnel (J-1) will ensure that a copy of all investigations of reportable incidents, submitted by the combatant commanders in accordance with subparagraphs 6c(6)(b)-(d), is forwarded to appropriate Joint Staff principals (DJS/J-2/J-3/J-5/LC/PA).

(b) The Director for Intelligence (J-2) will establish priority intelligence requirements (PIR) for all law of war violations alleged to have been committed against captured or detained US persons, committed by or against US allies, or committed by or against other persons during a conflict to which the United States is not a party. The PIR will be listed as part of Appendix 1 to Annex B (Intelligence) to all operation plans.

(c) The Director for Operations (J-3) will, in coordination with the Legal Counsel to the Chairman:

1. Ensure that the Joint Operations Planning and Execution System includes appropriate guidance to ensure review of plans and rules of engagement for compliance with the law of war.

2. Review all requests from the combatant commanders for deployment orders and rules of engagement to ensure conformity with this instruction and the DOD Law of War Program, as well as domestic and international law.

(d) The Director for Strategic Plans and Policy (J-5) will:

1. Serve as the Joint Staff principal point of contact for the DOD Law of War Program and, in coordination with the Legal Counsel to the Chairman, provide necessary liaison for developing policy within the context of the DOD Law of War Program.

2. Ensure that the Joint Strategic Capabilities Plan

includes appropriate guidance to ensure compliance with the law of war.

(e) The Director for Operational Plans and Interoperability (J-7) will, in coordination with the Legal Counsel to the Chairman:

1. Review operation plans and strategic concepts issued by commanders of combatant commands to ensure conformance with domestic and international law, this instruction, and the DOD Law of War Program.

2. Ensure that operational exercises include law of war scenarios or interest items to improve evaluation, response, and reporting procedures.

(f) The Legal Counsel to the Chairman (LC) will:

1. Provide overall legal guidance to the Chairman of the Joint Chiefs of Staff on the DOD Law of War Program.

2. Review all plans, policies, directives, deployment orders, execute orders, and rules of engagement issued by the Joint Staff and/or submitted by combatant commanders to ensure their conformance with domestic and international law, this instruction, and the law of war.

3. Provide a representative to the DOD Law of War Working Group established by the DOD General Counsel pursuant to reference b.

b. The Combat Support Agencies will establish and periodically review agency-unique policies, directives, and training programs consistent with this instruction and the DOD Law of War Program to ensure that the requirements of the law of war are disseminated throughout their respective organizations.

c. The Commanders of Combatant Commands are responsible for the overall execution of the DOD Law of War Program within their respective commands. Specific responsibilities include ensuring:

(1) That an effective program is instituted within the command to prevent law of war violations.

(2) That all plans, policies, directives, and training programs are periodically reviewed for compliance with the law of war, particularly in light of any violations reported.

(3) That specific law of war scenarios or interest items are included in exercises to improve evaluation, response, and reporting procedures.

(4) That command legal advisers attend planning and operations-related conferences for military operations and exercises, as appropriate, to enable them to provide advice concerning law of war compliance during joint and combined operations.

(5) That all operation plans (including preplanned and adaptively planned strategic targets), concept plans, rules of engagement, execute orders, deployment orders, policies, and directives are reviewed by the command legal adviser to ensure compliance with domestic and inter-national law, this instruction, and the DOD Law of War Program. (6) That all appropriate policies, directives, and operation and concept plans incorporate the reporting and investigation requirements established by reference b and this instruction, and by the Secretary of the Army, who is designated by reference b as the DOD Executive Agent for the administration of the DOD Law of War Program with respect to the investigation and reporting of reportable incidents. Specifically, commanders of combatant commands will:

(a) Designate the command legal adviser to supervise the administration of the command's program for dealing with reportable incidents.

(b) Ensure, via appropriate command directives, that all reportable incidents committed by or against members of, or persons serving with or accompanying, US Armed Forces are reported promptly to appropriate authorities, are thoroughly investigated, and the results of such investigations are promptly forwarded to the applicable Military Department or other appropriate authorities. Applicable directives will include specific guidance on the collection and preservation of evidence of reportable incidents committed by enemy forces against US personnel, since such evidence may serve as the basis for a possible future trial of accused war criminals.

(c) Provide the Joint Staff/J-1 with copies of all incident reports and reports of investigation of reportable incidents committed by or against members of, or persons accompanying or serving with, US Armed Forces, or against their property. The Joint Staff/J-1 will ensure that such reports are provided to appropriate Joint Staff principals (DJS/J-2/J-3/J-5/LC/PA).

(d) Determine, with respect to known reportable incidents committed by or against allied military or civilian personnel, or by or against other persons during a conflict to which the United States is not a party, the extent and manner in which such incidents will be investigated by US forces. Specifically, combatant commanders will develop appropriate plans, policies, and directives for:

1. Conducting appropriate preliminary investigation to determine whether US personnel were involved. Once it has been determined that US personnel are not involved in a reportable incident, additional US investigation will only be conducted at the direction of the appropriate combatant commander.

2. Cooperating with appropriate allied authorities.

3. Reporting through appropriate command channels to appropriate US agencies, allied governments, or other appropriate authorities.

4. Preserving evidence of reportable incidents pending turnover to other US agencies, allied governments, or other appropriate authorities.

(7) That mobilization planning includes sufficient numbers of legal advisers and investigative personnel to support each commander's mission.

(8) That the law of war training and dissemination programs within their commands, as well as the law of war training and dissemination programs of their subordinate commands and components, are consistent with reference b, this instruction, and the law of war obligations of the United States.

7. Reporting Requirements.

a. Reports of Incidents. Commanders of combatant commands will issue directives to ensure that all military and civilian personnel assigned to or accompanying US Armed Forces will report all reportable incidents through their chain of command. The directives will indicate that such reports may also be made through other channels, such as the military police, a judge advocate, or an Inspector General. The directives will require that reports made to officials other than those specified in this paragraph will, nonetheless, be accepted and immediately forwarded through the recipient's chain of command.

b. *Initial Report.* Law of war implementing directives issued by combatant commanders will require the commander of any unit that obtains information about a reportable incident to immediately report the incident through command channels to a higher authority. The report will be made through the most expeditious means available.

c. Formal Investigation. Commanders of combatant commands will establish procedures for receiving initial reports of reportable incidents, and will ensure that their subordinate commanders:

(1) Submit a report, by the most expeditious means available, through command channels to the responsible combatant commander. Normally, an OPREP-3 report will be required in accordance with reference c.

(2) Initiate a formal investigation by an appropriate military investigative authority in accordance with subparagraphs 6c(6)(b) and 6c(6)(d) above. d. The responsible combatant commander will submit a message report, as expeditiously as possible, to the Joint Staff (JOINT STAFF WASHINGTON DC//DJS/J-1/J-2/J-3/J-5/LC/PA//) of all reportable incidents. The Office of the Secretary of Defense (SECDEF WASHINGTON DC//USDP/ISA/GC/IG/PA//) and the Secretary

of the Army (DA WASHINGTON DC//SAGC/SAIG/DAMO-ZA/DAJA//), in his capacity as Executive Agent under paragraph 5.6 of reference b, will also be addressees on such message reports.

8. Summary of Changes. This instruction reissues the canceled CJCSI 5810.01 and provides updated guidance in accordance with reference b.

9. Releasability. This instruction is approved for public release; distribution is unlimited. DOD components (to include the combatant commands), other Federal agencies, and the public may obtain copies of this instruction through the Internet from the CJCS Directives Home Page--http://www.dtic.mil/doctrine. Copies are also available through the Government Printing Office or the Joint Electronic Library CD-ROM.

10. Effective Date. This instruction is effective immediately. Forward copies of implementing directives or supplements and revisions to the Joint Staff, J-5 Global Division, Room 2E1001, Pentagon, Washington, D.C. 20318-5154, within 120 days of receipt of this instruction. The Chief, J-5 Global Division, will forward copies of such documents to the Office of the Secretary of Defense in accordance with reference b.

/Signature/

HENRY H. SHELTON

Chairman

of the Joint Chiefs of Staff

CHAPTER 4

THE 1949 GENEVA CONVENTION ON WOUNDED AND SICK IN THE FIELD

REFERENCES

1. I 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. II 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. I 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 8-10, Health Service Support in a Theater of Operations (1 March 1991).
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).

I. INTRODUCTION.

A. Definition.

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, *supra*, 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)

B. 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)

II. 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] fulfil 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.

2. Express coverage is found, however, in the Geneva Civilians Conventions (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, *supra*, at para. 208; FM 8-10, *supra*, para. 3-17.

III. 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 helos accompanying a supply ship were shot down and Argentinean forces continued to fire on the helo 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) A 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, *supra*, 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, *supra*, 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, *supra*, at 137.

2. 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..

3. 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, *supra*, 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. Best, *supra*, at 134.

C. 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, *supra*, 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, *supra*, at 40. This standard is reiterated in Article 10, Protocol I for emphasis.

D. 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, *supra*, at 142.

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, *supra*, 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, *supra*, 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, *supra*, 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, *supra*, 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, *supra*, 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, *supra*, 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, *supra*, 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, *supra*, at 191.

IV. 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. So 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, *supra*, 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, *supra*, 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, *supra*, 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 etc., *supra*.

(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, *supra*, 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.

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*, (in materials) for discussion of certain US personnel, who *de facto*, become auxiliary personnel. *See also* FM 8-10, *supra*, at para. 3-18b (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 employ any auxiliary personnel. FM 8-10, *supra*, at para. 3-18. 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.

V. MEDICAL UNITS AND ESTABLISHMENTS.

A. Protection.

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

   a. May not be attacked.

(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 helos. 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, *supra*, 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, *supra*, 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, *supra*, at 202.

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

3. Conditions <u>not</u> 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 8-10, *supra*, at para. 3-21.

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 8-10, *supra*, at para. 3-21.

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 are 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, *supra*, at 274; *see also* FM 8-10, *supra*, at para. 3-19.

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. Morris Greenspan, THE MODERN LAW OF LAND WARFARE 85 (1959).

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.**

VI. 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, *supra*, 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, *supra*, 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 8-10, *supra*, at para. 3-19. *See also* Draper, *supra*, 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, *supra*, 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 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, *supra*, at 84.

c. Without such an agreement, belligerents use medical aircraft at their own risk. Pictet, *supra*, at 288; FM 8-10, *supra*, at para. 3-19.

(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 helos 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, *supra*, 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; FM 8-10-6, *supra*, 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.

VII. 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, supra, at 301. In the various Middle East conflicts involving Israel and Egypt, however, the "Shield of David" has been respected. FM 8-10, supra, at para. 3-19.

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 8-10, supra, at para. 3-18.

   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, supra, 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 8-10, supra, at para. 3-19.

CHAPTER 5

PRISONERS OF WAR AND DETAINEES

REFERENCES

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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).
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13. Howard S. Levie, 59 INTERNATIONAL LAW STUDIES, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT (1977)[hereinafter Levie].
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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). In ancient times, the concept of "prisoner of war" was unknown.[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]

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 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, <u>all</u> parties to the conflict had to be signatories if the Regulations were to apply to <u>any</u> of the parties. If one belligerent was not a signatory then all parties were released from 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 S.S. or S.D.[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 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]

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 <u>any</u> 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).

5. Refugees: Persons who by reason of real or imagined danger have left home to seek safety elsewhere. *See* Art. 44, GCC 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 use the term detainee**; it is the broadest term without legal status connotations.

B. In order to achieve the <u>status</u> 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] and the Persian Gulf.[25] 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.

   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?

(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. 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 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).

b. The problem of Detainees.

(1) Haiti.[27]

(2) Somali.[28]

(3) Bosnia-Herzegovina.[29]

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;[30]

   c. Carrying arms openly;[31] 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 organizations actions, comply with the laws of war, and have an internal discipline system. Art. 43 & 44, PI. Therefore, guerrillas may be covered. Note: The United States is NOT a party to Protocol I, but 147 nations are parties to the treaty.

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,

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

      (1) Be in non-occupied territory;

      (2) Act spontaneously to the invasion; and,

      (3) Carry their arms visibly.[34]

      (4) Contrast this 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.[35]

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.[36]

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.[37]

5. Persons whose POW status is debatable:[38]

   a. Deserters/Defectors;[39]

   b. Saboteurs;

   c. Military advisors; and,

   d. Belligerent diplomats.

6. Persons not entitled to POW status:

   a. Spies (Art. 29, HR and Art. 46, PI);

   b. Mercenaries[40] (Art. 47, PI); - U.S. disagrees with this view.

7. What is the status of U.N. personnel during peace enforcement operations?[41]

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

1. Policy: Always initially treat as POWs.

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 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 CINC has his own regulation or policy on how to conduct an Article 5 Tribunal, the CINC's regulation would control.

4. During Operation Desert Storm we conducted 1,196 Article 5 tribunals.[42]

a. What is the JA's role?[43]

b. Who appoints the Article 5 tribunal? AR 190-8 calls for the GCMCA to appoint the tribunals. Remember, a CINC policy can trump AR 190-8.

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

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.[44]"

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 5810.01A, 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.[45]

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)

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.[46] (Public perception)

III. PRIMARY PROTECTIONS PROVIDED TO PRISONERS OF WAR

A. Protections, "The Top Ten."

1. Humane Treatment.

2. No medical experiments.

3. Protect from violence, intimidation, insults, and public curiosity.[47]

4. Equality of treatment.

5. Free maintenance and medical care.

6. Respect for person and honor (female POWs).

7. No Reprisals.

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

9. The Concept of the Protecting Power.[48]

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

B. Capture - The 5 S's (Search, Silence, Segregate, Safeguard, Speed to the rear)[49] [Art. 13,16,17,19,20 GPW].

1. Who has the authority to detain? (ROE issue?)

a. Express - mission statement.

b. Implied - type of mission.

c. Inherent - self-defense/force protection.

2. When do their treatment rights begin? ". . .[F]rom the time they fall into the power of the enemy . . ."[50] (Art. 5, GPW).

3. How do I secure them?

   a. Handcuffs (flexcuffs) and blindfolds.

   b. Shirts pulled down to the elbows.

   c. 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.[51]

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

   d. POW capture tags (DA Form 5976).

4. What do I take from an EPW?

   a. Helmet;

   b. Wallet;

   c. Protective clothing;[52]

   d. Shoes or shoe laces;

   e. Identity card; and

   f. Rucksack/luggage.

   g. Art. 18, GPW allows POWs to **retain** all of the above.[53]

   h. But what about captured persons not entitled to EPW status? *See* Art 97, GCC.[54] Does this make sense for security reasons?

i. 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.[55] Soldiers are not even supposed to barter with EPWs for personal items.[56] However, because of perceived abuses that occurred in not enforcing this policy, Congress legislated two important provisions: 10 U.S.C. §2579[57] and 50 U.S.C. §2201.[58] DoD has yet to 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.[59]

6. What can I ask a 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.[60]

   c. No torture, threats, coercion in interrogation (Art. 17, GPW). **It's not what you ask but how you ask it.**[61]

      (1) What about use of truth serum? No, violates GPW.[62]

      (2) NK water torture of feet during the winter clearly violated Art. 17.[63]

      (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.[64]

      (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.[65]

d. Your U.S. military ID card is your GC card. NOTE: Categories are I to V. What is yours? *See* Art. 60, GPW.

IV. EPW CAMP ADMINISTRATION AND DISCIPLINE[66]

A. 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).[67] During the Falklands War, several Argentine EPWs were accidentally killed while moving ammunition away from their billets.

3. Responsibility For Camps - a National Responsibility (Art. 10,12 GPW), NOT Religion, ethnic background??[68] Segregation by these beliefs may be required especially when they are a basis for the conflict.

- Yugoslavia: Serbs, Croats, and Muslims
- Rwanda: Hutus, Tutsis
- Chechnya

4. 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. Scores of prisoners sympathetic to South Korea were murdered by N. Korean EPW extremist groups. During the rioting, EPWs captured the camp commander, Brigadier General Dodd.[69]

B. 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) Does this make sense?[70]

4. What about Tobacco? Yes (Art. 26, GPW).[71]

5. Recreation (Art. 38, GPW).

6. Religious accommodation (Art. 34, GPW).

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

    - pork MREs in Muslim country?
    - use enemy food stocks.
    - let them fix their own food.

8. Copy of GPW in POWs own language. Where do I get a copy in Arabic?

    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).

    - cultural aspects
    - issues w/ women & children

C. EPW Accountability[72] (Art. 122 & 123, GPW).

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).[73]

D. 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![74]

   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.[75]

   c. Requires Assistant Secretary of Defense for International Security Affairs approval.[76]

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

1. Voting for a PR conflicts with Code of Conduct SRO requirement.

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.

F. EPW Labor[77] (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.

2. Detainee status.[78]

3. Compensation (Art. 60, GPW).[79] 8 days paid vacation annually? (Art. 53, GPW)

4. Type of Work

a. Directly aiding the armed conflict effort? No

b. Dangerous work? No, unless they volunteer. SRO volunteers his soldiers to move artillery shells from near the POW camp?

c. Work on the camp itself?

(1) Building housing.

(2) Running concertina wire around their compound (Can you vs. should you?).

G. 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):[80]

(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.

a. EPWs pre-capture v. post-capture.

(1) Pre-capture: GCM or federal or state court if they have jurisdiction over U.S. soldier for same offense (Art. 82, 85, GPW).[81]

(2) Post-capture: any level court-martial UP of Article 2(9), UCMJ (Art. 82, 102).

(3) Court-martial or military commission (Art. 84). [BUT note effect of Art. 102, GPW!]

b. Detainees.

(1) Military Commissions.[82]

(2) Local National Court.

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: GCC, common Art. 3, or minimal human rights protection with Host Nation law.

(3) Right to appeal (Art 106, GPW).

H. Escape.

1. When is an escape successful:[83] (Art. 91, GPW).

a. SM has rejoined his, or Allies', armed forces;

b. SM has left the territory of the Detaining power or its ally (i.e., entered a neutral country's territory).[84]

2. Unsuccessful escape.

a. Only disciplinary punishment for the escape itself (Art. 92, GPW). *See also* Art. 120, GCC.

b. Offenses in furtherance of escape.[85]

(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.[86]

(2) Judicial punishment: if violence to life or limb or self-enrichment (Art. 93, GPW).

3. Successful escape: 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). However, most authors posit that judicial punishment can occur if a POW is later recaptured for his previous acts of violence.

- Issue still debated so U.S. policy is not to return successfully escaped POW to same theater of operations (i.e. COL Rowe).

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."[87]

I. Repatriation.[88]

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 NK & 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.[89] Logic supported by Pictet.

      (4) The experience in Vietnam.[90]

      (5) Desert Storm experience.

3. During a cease-fire or Armistice

a. CW2 Hall incident[91]

(1) Probable basis for repatriation: Art. 118

(2) Art. 117 provides: "No repatriated person may be employed on active military service."

- only applies to Art. 109,110 repatriations.

b. Legally there is no problem going back to duty in S. Korea.[92] But does it make common sense?

V. CODE OF CONDUCT.

A. The Air Force is the Executive Agent.

B. The Joint Services SERE Agency (JSSA) implements the DoD Directive on Code of Conduct matters.

C. History of U.S. POW Misconduct.

1. First American POW "turncoat" occurred in Revolutionary War. Later, he was convicted of treason. *Republica v. M'Carty*, 2 U.S. 86 (1781).

2. 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.

3. 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).

4. During the Korean War, a conservative estimate is 30% of U.S. personnel collaborated to some degree with the enemy.[93]

5. President Eisenhower issued E.O. 10631 creating the modern day concept of the Code of Conduct in response to Korean War POW conduct.

6. Between 1955 and 1979 DoD issued guidance on the Code of Conduct five times.[94]

7. Most recent change did not substantively change the Code of Conduct. It only made the Code gender neutral. (*See* E.O. 12633).

D. Code of Conduct Applies Regardless of Service member's "Status" (i.e., MOOTW).[95]

E. POW Statements: Do they Violate the Code?

1. *USS PUEBLO* crew detained after being seized in international waters (physical torture)? No Code violation.

2. Did LT Zaun violate the Code of Conduct?[96] No

3. Did WO Hall violate the Code of Conduct?[97]

   a. Official U.S. position: No

   b. Why not? (No physical coercion).

4. Key words are "resist" and to the "utmost of my ability."

5. Does a POW violate the Code if he writes a letter to his family? No. It's not in response to questioning.

6. "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.

F. Is Art. III of the Code of Conduct inconsistent with POW status?[98]

1. No, even during escape attempt, once POW is outside detaining powers immediate control, POW retains status but detaining power can use all necessary means to prevent his successful escape, including deadly force (Art. 5 & 42, GPW).

2. Retained personnel exception: the requirement to escape does not apply to doctors/chaplains.

3. SRO can authorize temporary parole to perform acts which will materially contribute to the welfare of the prisoner or fellow prisoner (FM 27-10, para. 187b).

G. Can It Be Punitive?

1. Moral code, not a legal code.[99]

2. But can be punitive by analogy under the UCMJ.

   a. Disrespect/Disobey SRO;

   b. Aiding the enemy;

   c. Mutiny and sedition;

   d. Cruelty and maltreatment; and,

   e. Misconduct as a prisoner.[100]

3. 14 former POWs were court-martialed after Korea.[101]

4. Attempts were made after Vietnam to prosecute POWs but for "policy" reasons this did not occur.[102] Note the Garwood exception.

H. 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."*[103]

1. Should JAs be teaching this? Why not, if no 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."**[104]

3. Bounce back theory (developed by a SRO while in the "Hanoi Hilton").

   a. Resist as long as possible. The factors that effect a POWs ability to resist are:

      (1) Shock of captivity;

      (2) Wounds or illness;

      (3) Malnutrition; and,

(4) Exploitation by captors. For example, the North Vietnamese prison guards would tell U.S. POWs of their obligations under the Code of Conduct. [105]

(5) Disease used as a means to influence.

b. If broken, give as little as possible. COL Rowe identifies three levels of information:

(1) Information they already possess or could easily acquire from other readily available sources.

(2) Information whose value diminishes over time (perishable).

(3) Information where you "bite the bullet."[106]

(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.

c. Regroup and begin to resist again.

d. Don't be overwhelmed with guilt.

4. SERE: COL Nick Rowe experience.

5. SRO is the commander regardless of service branch.[107]

6. By E.O. 12018, Retained Personnel cannot be SROs. Being an SRO would be inconsistent with their retained status.

7. Box 25 - used by Vietnam POWs (modified Morse Code).[108]

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

VI. CONCLUSION

[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 COMMITTE OF THE RED CROSS 4 (1960).
[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).
[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).
[9] Rev. J. William Jones, CONFEDERATE VIEW OF THE TREATMENT OF PRISONERS (1876).
[10] Over one-half of the Northern P.O.W.s 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] COMMENTARY, *supra* note 2.
[12] G.I.A.D. Draper, THE RED CROSS CONVENTIONS 11 (1958).
[13] Grady, *supra* note 4 at 103.
[14] Draper, *supra* note12 at 49.
[15] Grady, *supra* note 4 at126.
[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 GCC] and the Protections of Civilians in Armed Conflict chapter of this text.

[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 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 captives, *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. *See* APPENDIX B. 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 Civilians During 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).

[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.

[27] *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].

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

[29] *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).

[30] 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.

[31] 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), PI, 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).

[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).

[34] *See* Pictet, at 67.

FM 27-10, ¶ 65 says all <u>males</u> 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* 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).

[36] 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.

[37] *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).

[38] *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.).

[39] *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. Schapior, *Repatriation of Deserters,* 29 BRIT. YB. INT'L L. 310 (1952).

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

[41] *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).

[42] DoD PERSIAN GULF REPORT, at 578.

[43] *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.

[44] Note, the DoD Directive refers to the Geneva Conventions, not simply the one relating to EPWs. This supports the use of the GCC 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.

[45] *See also* Art. 4 & 27, GCC.

[46] *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.

[47] 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 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.

[48] *See* Levie, at 262.

[49] 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.

[50] 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.

[51] *See* DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (April 1992), at 618. DEP'T OF ARMY, REGULATION 190-8, 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.

[52] Ltr, HQDA, DAJA-IA 1987/8009, subj: Protective Clothing and Equipment for EPWs.

[53] *See also*, Pictet, at 166, n. 2.

[54] 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* Chapter 9, OPLAW HANDBOOK (2000) 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.

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

[56] FM 27-10, ¶94b.

[57] 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.

[58] 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 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.

[59] 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.'").

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

[61] 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 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.

U.S. P.O.W.s have routinely been subjected to torture by their captors. In the Persian Gulf War, all 23 American P.O.W.s 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).

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

[63] *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. P.O.W.s generally during the Korean War.

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

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

[66] For a historical recount of some of the most horrific treatment of conditions faced by P.O.W.s in any war, *see* GAVAN DAWS, PRISONERS OF THE JAPANESE: POWS OF WORLD WAR II IN THE PACIFIC (1994). *Compare* conditions U.S. P.O.W.s 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 P.O.W.s during World War II) and Gary Marx, *Panama prison camp no Stalag 17*, CHI. TRIB., Jan. 8, 1990.

[67] Iraq used U.S. and allied P.O.W.s 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.

[68] 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).

[69] 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).

[70] 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.

[71] *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.

[72] *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.

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

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).

[74] *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.

[75] *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 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.

[76] DoD DIR. 2310.1, ¶C(3).

[77] *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.

[78] *See* Art. 40 & 51, GCC 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.
[79] *See* DEP'T OF THE ARMY REGULATION 37-1, FINANCIAL ADMINISTRATION: ARMY ACCOUNTING AND FUND CONTROL (30 Apr. 1991), Chapter 36.
[80] The GCC provides the same maximum punishments for civilian internees. *See* Art. 119, GCC.
[81] *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 P.O.W. 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.
[82] *See* Robinson O. Everett and Scott L. Silliman, *Forums For Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).
[83] Between 1942 and 1946, 2,222 German P.O.W.s 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 P.O.W.s ever successfully escaped. During World War II, 435,788 German P.O.W.s 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 P.O.W. 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 P.O.W. 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 P.O.W. 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.
[84] *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.
[85] *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. . . ."

[86] *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 escaped 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, he committed no crime.

[87] 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."

[88] 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.

[89] *See* R.R. Baxter, *Asylum to Prisoners of War*, BRITISH YEARBOOK INT'L L. 489 (1953).

[90] *See* Alfred Richeson, *The Four-Party Joint Military Commission*, MIL. REV. (Aug. 1973), at 16.

[91] *See* Scott R. Morris, *America's Most Recent Prisoner of War: The WO Bobby Hall Incident*, ARMY LAW., Sept. 1996, at 3.

[9292] Or was there? *See* The Korean Armistice Agreement, para. 52, *reprinted in*, DA PAM. 27-1, at 210.

[93] The treatment of American P.O.W.s 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.

[94] 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. P.O.W.s in North Vietnam.

[95] 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.

[96] *See* APPENDIX A. *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. P.O.W.s were subjected to during the Gulf War.

[97] *See* Scott R. Morris, *America's Most Recent Prisoner of War: The WO Bobby Hall Incident*, ARMY LAW., Sept. 1996, at 3.
[98] *See generally,* Elizabeth R. Smith, Jr., *The Code of Conduct in Relation to International Law*, 31 MIL. L. REV. 85 (1966).
[99] *See generally*, Richard E. Porter, *The Code of Conduct: A Guide to Moral Responsibility*, 32 AIR. UNIV. REV. 107 (Jan. - Feb. 1983).
[100] *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 P.O.W.s informed on other P.O.W.s 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).
[101] *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.
[102] 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 P.O.W.s
2. The Secretary of Defense had made a public statement saying no P.O.W.s who made propaganda statements would be prosecuted.
3. The service TJAGs said public opinion made convictions unlikely for P.O.W.s, 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 P.O.W. that the SRO preferred charges against after the war.
[103] The Code of Conduct: a Second Look (U.S. Air Force Productions, 198_)
[104] Experiences of a P.O.W. (TJAGSA Productions, Sept. 1985). This two hour videotape captures the incites of COL Nick Rowe. COL Rowe was captured by the North Vietnamese in 1964. He spent 5 1/2 years as a P.O.W. 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.
[105] Experiences of a P.O.W. (TJAGSA Productions, Sept. 1985).
[106] Experiences of a P.O.W. (TJAGSA Productions, Sept. 1985).
[107] *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.

[108] *See* Bobby D. Wagnor, *Communication: the key element to prisoners of war survival*, 23 AIR. UNIV. REV. 33 (May - June 1976).

APPENDIX

UNITED STATES CENTRAL COMMAND
7115 South Boundary Boulevard
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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.

Note: This regulation has been re-formatted for this publication.

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 l2 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:
A (1 Ea)

APPENDIX 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.

APPENDIX 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

APPENDIX 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.

APPENDIX 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

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† 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

APPENDIX 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.

APPENDIX 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.

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 H.IV or H.R.].
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 G.C.].
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 (1990).
19. Frank Newman and David Weissbrodt, Selected International Human Rights Instruments (1990).
20. Frank Newman and David Weissbrodt, 1994 Supplement to International Human Rights and Selected International Human Rights Instruments (1994).

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 not under enemy control, but subject to enemy lethality;

4. Civilians under the control of an enemy;

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. FACILIATION 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 19th 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 <u>are not in the hands of an enemy force</u> (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.

1. Post Thirty Years War - Pre World War II: Civilians generally **not** targets of war. War waged in areas removed from civilian populations. 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."[3]

[3] Josef L. Kunz, THE LAWS OF WAR, 50 *Am. J. Int'l. L.* 313 (1950).

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 a separate treaty devoted exclusively to protecting civilians emerges from the diplomatic conference, **the obvious gaps in protections for civilians suggest the victors were not inclined to condemn their own conduct:**

   a. The characterization of Allied targeting of civilian population centers as legitimate reprisal actions;

   b. The focus on the unprecedented brutality directed against civilians in areas occupied by Axis forces;

   c. Making civilians who fall under the control of an enemy power the beneficiaries of a comprehensive and "stand alone" treaty – The 1949 Geneva Convention Relative to the Treatment of Civilians.

   d. Providing virtually no protection for civilians who have not fallen under enemy control.

4. The "Gap Filler." In 1977, two treaties which supplement the four Geneva Conventions of 1949 were intended to fill this gap in the law. Geneva Protocol I applies to international armed conflict. The need for a more comprehensive civilian protection regime was highlighted in the official commentary:

> 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 . . .[4]

   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.

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[4] Protocols Commentary at 587.

c. The result: Protocol I. The primary focus of this treaty, which supplements the four Geneva Conventions of 1949, was to fill the void related to protecting persons and property from enemy lethality;

5. The Current Trend. Prohibiting specific methods of warfare which impact civilians in the conflict area, such as chemical weapons and land mines.

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 of war, **no law of war treaty attempted to define "civilian" until the 1977 Protocol I.** The official commentary to Protocol I notes the ineffectiveness of "informal" definitions utilized throughout history:

> "In the course of history many definitions of the civilian population have been formulated, and everyone has an understanding of the meaning of this concept. However, all these definitions are lacking in precision, and it was desirable to lay down some more rigorous definitions, particularly as the categories of persons they cover has varied."[5]

1. While the Fourth Geneva Convention of 1949 is devoted exclusively to the protection of civilians, it contains no definition of who falls within that category.

   a. Many provisions refer to protections afforded to certain categories of civilians, but it seems the definition of civilians is left to common sense.

   b. By 1977, it was apparent that this approach was inadequate, and that the lack of definition jeopardized the principle of distinction. According to the 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.**"[6]

2. The Protocol Method. Protocol I adopts a "negative" method of defining civilians. It defines civilians as all persons who **do not** qualify for Prisoner of War status pursuant to the Geneva Prisoner of War Convention and

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[5] *Id.* 610.

[6] *Id.*

Protocol I, except that civilians who accompany the force, and thereby qualify for PW status, fall within the definition of civilians for "protective" purposes.

a. Bottom Line. This "negative" definition really means that anyone not qualifying as a combatant, in the sense that they are entitled to PW status upon capture, should be regarded as a civilian.

b. 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 . . .**[7]

c. This "actual harm" standard is consistent with contemporary U.S. practice, as reflected in ROE-based "harmful act/harmful intent" test for justifying use of deadly force against civilians during military operations.

d. The "gray area:" civilians contributing to the war effort. Since the emergence of long range warfare, one major issue related to the immunity afforded civilians from intentional targeting has been the status of civilians working in support of the enemy war effort.

(1) Some advocate the position that any civilian working in support of a war effort becomes a legitimate target.

(2) Protocol I explicitly rejects this expansive definition of a legitimate target. According to 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.**

(a) The official commentary then explains that "direct part" means "acts of war which by their nature or purpose are likely to cause

[7] *Id.* at 618.

actual harm to the personnel and equipment of the enemy armed forces."[8]

(b) 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."[9]

e. United States Position. Although the United States decided not to ratify Protocol I, there was no indication that this definition of "civilian" was objectionable.

B. Bottom Line. This "hostile act/hostile intent" standard for losing the immunity afforded to civilians during armed conflict is:

1. Embraced by Protocol I;

2. Consistent with contemporary U.S. practice;

3. Probably a binding norm of customary international law.

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. The 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."

1. Application to Any Armed Conflict. ICJ Position: In 1986, the International Court of Justice ruled that article 3 serves as a "minimum yardstick of protection" in all conflicts, not just internal conflicts.

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[8] *Id.* at 619.

[9] *Id.*

2. Common Article 3 (MINIATURE CONVENTION)[10] mandates the following minimum protections during internal armed conflict (civil war), and international armed conflict as a matter of customary international law.[11]

   a. No adverse distinction based upon race, religion, sex, etc.;

   b. No violence to life or person;

   c. No taking hostages;

   d. No degrading treatment;

   e. No passing of sentences in absence of fair trial, and;

   f. The wounded and sick must be cared for.

B. Recent re-affirmation of the expanded scope of Common Article 3 application. 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."[12]

C. This expanded view of Common Article 3 is consistent not only with U.S. policy (which extends it's application even into non-conflict operations other than war), but ironically, with the original understanding of it's 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

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[11]This provision has gained importance given the sharp rise in the number of self-determination movements.

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principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built."[13]

D. The Protocol I "safety net." Because Protocol I was drafted and opened for signature before the ICJ decision in the Nicaragua case, Common Article 3 could not be considered to apply, as a matter of law, to international armed conflict. This meant that **there was an absence of an explicit guarantee of human treatment for all civilians during international armed conflict.**

1. The Response: Article 75. The drafters 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.

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.

E. **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 as it existed prior to 1949.

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. The **"Special Need"** civilians. While the Fourth Geneva Convention was the first law of war treaty devoted exclusively to the protection of civilians, only a small portion of this treaty applies to **every** civilian in the area of conflict.

1. The primary focus of these limited protections is to establish mechanisms to shield civilians **who presumptively can play no role in support of the war**

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effort, or people or places that function to aid such civilians. Because of this, it is logical to think of the beneficiaries of these rules as "special need" civilians. These protections are established in Part II of the Fourth Geneva Convention.

2. As a general rule, the following non-combatants fall within this "special need" category:

   (1) Mothers of children under seven;

   (2) Wounded, sick, and infirm;

   (3) Aged;

   (4) Children under the age of 15; and

   (5) Expectant mothers.

3. GC—Part II. The primary thrust of Part II is to provide for the establishment of areas, which as the result of mutual agreement of the parties, become shielded from potential lethality. These areas are intended to be utilized for the exclusive benefit of non-combatants.

   a. Art. 14 **informs** (does not direct) parties to the conflict that they **may** establish zones/areas of protection, by mutual agreement, to shield "special need" individuals:

      (1) HOSPITAL ZONES &/OR SAFETY ZONES & LOCALITIES. G.C. Art. 14.

         (a) Generally of a permanent nature, established outside the combat zone.

      (2) NEUTRALIZED ZONES. G.C. Art. 15.

         (a) Generally of a temporary nature, established within a combat zone.[14]

[14]Unlike hospital or safety zones, neutral zones are designed to be based upon hasty decisions of combat leaders, within the combat zone. The military leaders on the ground are permitted to enter into these agreements. Pictet at 130.

b. In addition to providing for the establishment of these "safe haven" type areas, Part II also mandates that the following persons and places be "respected and protected" by all parties to the conflict at all times:

(1) Expectant mothers (Arts. 16, 17, 23).

(2) The Wounded, Sick & Infirm (Arts. 16, 17, 23).

(3) Ministers & Medical Personnel (Arts. 20 & 23).

(4) Medical Search and Transport Personnel (Art. 20).

(5) Medical Convoys used to transport "special need" personnel. (Art. 21).

(6) Medical Aircraft when flying on routes pursuant to prior agreement between the parties to the conflict. (Art 22).

(7) Civilian Hospitals. (Art. 18).

(a) Parties to conflict must provide civilian hospitals with certificates stating that structures are only used for medical purposes.

(b) Parties must mark civilian hospitals with distinctive emblems.

(c) Parties should situate hospitals as far as possible from any military objective.

(d) Protections continue until the hospital is used for acts harmful to the enemy. Caring for sick or wounded soldiers or the presence of small arms is NOT considered harmful to the enemy.

VI. 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 . . ."

(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 the Methods and Means of Warfare Chapter).

d. No civilian may be the object of a reprisal **(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.

Protocol I, except that civilians who accompany the force, and thereby qualify for PW status, fall within the definition of civilians for "protective" purposes.

a. Bottom Line. This "negative" definition really means that anyone not qualifying as a combatant, in the sense that they are entitled to PW status upon capture, should be regarded as a civilian.

b. 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 . . .**[7]

c. This "actual harm" standard is consistent with contemporary U.S. practice, as reflected in ROE-based "harmful act/harmful intent" test for justifying use of deadly force against civilians during military operations.

d. The "gray area:" civilians contributing to the war effort. Since the emergence of long range warfare, one major issue related to the immunity afforded civilians from intentional targeting has been the status of civilians working in support of the enemy war effort.

(1) Some advocate the position that any civilian working in support of a war effort becomes a legitimate target.

(2) Protocol I explicitly rejects this expansive definition of a legitimate target. According to 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.**

(a) The official commentary then explains that "direct part" means "acts of war which by their nature or purpose are likely to cause

[7] *Id.* at 618.

actual harm to the personnel and equipment of the enemy armed forces."[8]

(b) 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."[9]

e. United States Position. Although the United States decided not to ratify Protocol I, there was no indication that this definition of "civilian" was objectionable.

B. Bottom Line. This "hostile act/hostile intent" standard for losing the immunity afforded to civilians during armed conflict is:

1. Embraced by Protocol I;

2. Consistent with contemporary U.S. practice;

3. Probably a binding norm of customary international law.

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. The 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."

1. Application to Any Armed Conflict. ICJ Position: In 1986, the International Court of Justice ruled that article 3 serves as a "minimum yardstick of protection" in all conflicts, not just internal conflicts.

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[8] *Id.* at 619.

[9] *Id.*

2. Common Article 3 (MINIATURE CONVENTION)[10] mandates the following minimum protections during internal armed conflict (civil war), and international armed conflict as a matter of customary international law.[11]

   a. No adverse distinction based upon race, religion, sex, etc.;

   b. No violence to life or person;

   c. No taking hostages;

   d. No degrading treatment;

   e. No passing of sentences in absence of fair trial, and;

   f. The wounded and sick must be cared for.

B. Recent re-affirmation of the expanded scope of Common Article 3 application. 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."[12]

C. This expanded view of Common Article 3 is consistent not only with U.S. policy (which extends it's application even into non-conflict operations other than war), but ironically, with the original understanding of it's scope as expressed in the official commentary to the Geneva Conventions of 1949. According to Jean Pictet:

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effort, or people or places that function to aid such civilians. Because of this, it is logical to think of the beneficiaries of these rules as "special need" civilians. These protections are established in Part II of the Fourth Geneva Convention.

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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."**[16]

   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 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:

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[15] Protocols Commentary at 586.

[16] *Id.* at 597.

(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;

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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.

VII. THE LAW FOR THE BENEFIT OF CIVILIANS UNDER THE CONTROL OF THEIR NATION'S ENEMY.

A. The Two Situations When a **Belligerent** Controls **Alien** Civilians, Thereby Triggering the Bulk of the Fourth Geneva Convention (Part III):

1. **Belligerent** Occupation of Another Nation's Territory;

2. Aliens Located in the Territory of their Nation's Enemy.

   a. These civilians become vested with extensive law of war benefits because they obtain the status of **"protected persons."**

B. Key Definitions.

1. PROTECTED PERSONS. Part III of the GC is the primary source of law that operates to the benefit of alien civilians under the control of a belligerent. These civilians **are presumed to have lost the diplomatic protection of their state, and are the primary focus of this Treaty.**

> ** 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 it's 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. The "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.

   a. PERSONS PROTECTED (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." In plain English: There are two main classes of protected persons:

(1) Nationals within the hands of a party to the conflict who is an enemy of their state.

(2) The population of occupied territories, excluding nationals of the Occupying Power or a co-belligerent (because these individuals do not need alternate protections).

b. Exceptions:

(1) Nationals of a Neutral State (if that state has normal diplomatic representation within the occupying or hostile state). BUT...this exception does not apply in occupied territories. Here "neutrals" are protected persons, whether normal diplomatic relations exist between their government and the occupying power or not. *(This is the only time the "loss of diplomatic protection" rationale is not the basis for vesting civilians with protected person status).*

(2) Nationals of a Co-belligerent (An Ally)

(a) Example: In the case of WW II, once war commenced, a German national residing in Britain was a "protected person." Later in the war, that same German national, if he had returned to Germany, becomes a "protected person" once again as soon as Britain occupies the area of Germany where he is located. However, a Swiss national, be he in Britain, or in Germany, is not a "protected person." (Note that this neutral individual does become a protected person if he is in an area of occupation). Nor is a U.S. national in Britain, or an Italian national in Germany, because in both cases, they are in the territory of a co-belligerent. Note, however, that once Britain occupies Germany, that same Italian national would become a "protected person" if he was in the area occupied.

2. Aliens in the territory of their nation's enemy. This simply refers to civilians who, at some point during hostilities between their nation and another nation, find themselves in the territory of that other nation. In most cases, these are civilians living in or visiting the nation when conflict breaks out between that nation and their own nation.

3. 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.**

4. Belligerent Occupation: Territory is occupied "when it is actually placed under the authority of the hostile army." (FM 27-10, Para. 351).

   a. Occupation = Invasion + Firm Control (FM 27-10, Para. 352a). (Occupation does "not include territory in which an armed force is located but has not assumed supreme authority."[17]).

      (1) Resisted v. Unresisted Invasion. Occupation "presupposes" a hostile invasion – **remember, this is belligerent occupation.** However, a "hostile" invasion may be either resisted or unresisted.

   b. Subjugation: Whereas Occupation is temporary or provisional control, subjugation (conquest) is permanent. It is a transfer of sovereignty. Subjugation = Occupation + Permanent Control. (FM 27-10, Para. 353). In theory, this concept is no longer permissible under international law.

   c. Military Government:[18] When the occupying power exercises governmental authority over the occupied territory (because the legitimate government is unable to administer the government). (FM 27-10, paras. 12 & 362).

5. COMMENCEMENT OF OCCUPATION.

   a. Proclamation of Occupation (FM 27-10, para. 357). General Eisenhower issued a powerful proclamation. This is not technically required.

   b. Without such a proclamation, **commencement is a Question of Fact** (FM 27-10, Paras. 355 & 356) (H.R. Art. 42). It is based on the following elements:

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[17]Dep't of the Army, Pamphlet 27-5, Military Government and Civil Affairs, para. 1b (1944).

[18]*See* von Glahn at 770. The Department of the Army announced on June 9, 1959, that it had authorized the deletion of the term "military government." The term "civil affairs" was offered (and has been used exclusively since) in its stead.

(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.

(b) Invader has taken measures to establish authority.

(c) The existence of resistance groups does not render the occupation ineffective.

(d) The existence of a fort or defended place does not render the occupation of the remaining territory ineffective.

6. TERMINATION OF OCCUPATION (FM 27-10, Paras. 353, 360, & 361) (G.C. Art. 6). Occupation terminates when the occupying power either loses control of the territory (displacement) or asserts sovereignty over the territory (subjugation). **In all other cases, the GC applies within occupied territories until one year after the close of military operations or for the duration of the occupation (as to occupying powers), whichever is longer.**

C. The Law Related to These Civilians.

1. HAGUE CONVENTON PROVISIONS FOR THE PROTECTION OF CIVILIANS DURING OCCUPATION[19]: (Occupation defined: a "territory is considered occupied when it is actually placed under the authority of the hostile army." H.R. Art. 42).

a. Duty to ensure public safety. H.R. Art. 43.

b. No coercion of information. H.R. Art. 44.

c. No forcing inhabitants of occupied territory to swear an oath of allegiance. H.R. Art. 45.

d. No pillaging. H.R. Art. 47.

[19]"Territory is considered occupied when it is actually placed under the authority of the hostile army." H.R. Art. 42.

e. No general punishment for the acts of an individual, subgroup, or group. H.R. Art. 50.

f. Family honor, property rights, and religious freedom must be respected. H.R. Art. 46. This is the source of the "Nine Commandments" of Property Use During Occupation:

(1) Destroy, take or damage property based ONLY upon military necessity. H.R. Art. 23 (g). (This standard is elevated to "absolute military necessity" by the GC).

(2) No Pillaging (Taking Property By Violence). H.R. Art. 47.

(3) State Property May Normally be Confiscated (Permanent Taking). H.R. Art. 46.

(4) Private Movable Property May be Seized/Requisitioned (taken without payment/taken with payment or receipt) if Susceptible of Direct Military Use.

(5) Requisitions shall only be made upon order of the commander of locality occupied. H.R. Art. 52.

(6) Private Real Property May NOT be Seized.

(7) No Private Property May be Confiscated. H.R. Art. 46.

(8) All Vehicles & Equipment Used to Transmit Information May be Seized (Whether Privately Owned or Not).

(9) Cultural & Religious Property, & Educational Centers Shall be Regarded as Private Property. H.R. Art. 56.

D. GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (GC OR GENEVA IV).

1. INTRODUCTION. The first international agreement to exclusively address the treatment of civilians, Geneva IV resulted from the bitter lessons of World War II (Hague IV did not provide enough protections). Although the principle source of law for the protection of civilians, it is a supplement to, and not replacement of, Hague IV. G.C. Art. 154. The provisions of this Convention are regarded as having attained the status of **customary international law.**

2. SPECIFIC PROTECTIONS – LOCATION OF PROTECTED PERSON IRRELEVANT.

a. 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." G.C. Art. 27.

(1) "Respect For Their Persons." Intended to grant a wide array of rights to protect physical, moral, and intellectual integrities.

(2) "Respect for Honor." Acts such as slander, insults, and humiliation are prohibited.

(3) "Respect for Family Rights." Arbitrary acts which interfere with marital ties, the family dwelling, and family ties are prohibited. This is reinforced by Geneva IV, Article 82, that requires that, in the case of internment, that families be housed together.[20]

(4) "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).

(5) "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."

(6) No insults and exposure to public curiosity. GC Art. 27.

(7) No rape, enforced prostitution, and indecent assault on women. GC Art. 27.[21]

(8) No using physical presence of persons to make a place immune from attack. GC Art. 28.

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[20] In addition, if a family is divided, as a result of war time events, they must be reunited. *See* Pictet at 202-203.

[21] 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).

(9) No physical or moral coercion, particularly to obtain information. GC Arts. 31 & 33 and H.R. Art 44.

(10) No actions causing physical suffering, intimidation, or extermination; including murder, torture, corporal punishment, mutilation, brutality, and medical/scientific experimentation. GC Art. 32.

(11) No measures of brutality. This prohibition was intended to prevent acts other than the specific acts discussed immediately above. It grants the same type of sweeping protection that the "no violence" prohibition of Article 27 bestows. It also forbids such acts, whether applied by military or civilian agents.

(12) No pillaging (under any circumstances and at any location). GC Art. 33 and H.R. Arts. 28 & 47.

(13) No collective penalties. GC Art. 33.

(14) No reprisals against the person or his property. GC Art. 33.

(15) No taking of hostages. GC Art. 34.

b. PROTECTIONS SPECIFICALLY FOR ALIENS WITHIN THE TERRITORY OF A PARTY TO THE CONFLICT.

(1) THE GENERAL RULE. 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."**[22] This translates to afford these civilians many of the same rights and privileges as host nation civilians.

(a) Right to Leave the Territory. GC Art. 35. (Right is overcome by the national interests of the State (Security)).

(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) Limitations on the Type and Nature of Labor. GC Arts. 39 & 40.

[22]See Dep't of Army, Pamphlet 27-161-2, International Law, Volume II (23 October 1962).

(i) Can only be compelled to work to the same extent as nationals.

(ii) Cannot be forced to contribute to the war effort of their enemy.

c. PROTECTIONS SPECIFICALLY FOR PROTECTED PERSONS IN OCCUPIED TERRITORIES.

(1) Inviolability of Rights. The occupying power does not have the authority to deprive protected persons of any rights derived from Geneva IV as a result of occupation.

(2) **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:

(a) 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.

d. RESTRICTIONS ON PROTECTED PERSONS DURING OCCUPATION.

(1) Generally. Many activities may be regulated or forbidden by the occupant, even if the acts do not violate laws of war.

(a) Newspapers and Other Media. May be shut down or severely restricted.

(b) Public Meetings. May be restricted or forbidden.

(c) Travel. May be restricted or forbidden (exceptions for religious ministers & medical personnel).

(d) Voting Privileges. May be suspended.

(e) National Symbols (flag, song). May be forbidden. AR 190-57, para 2-10.

3. DEPRIVING PROTECTED PERSONS OF THEIR LIBERTY: Generally, four types of liberty deprivation are permissible with regard to protected persons:

   a. Imprisonment for criminal misconduct (referred to as confinement in AR 190-57).[23]

      (1) Occupation Courts. 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;

   c. Assigned residence;

   d. Internment (**most severe form of non-penal related restraint permitted** - even if the detaining Power finds that 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) 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.

      (2) Grouped as Families Whenever Possible. GC Art. 82.

   e. Internment may be voluntary

[23]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 a internee camp. AR 190-57, para. 2-12.

4. TREATMENT OF PROPERTY DURING OCCUPATION.[24] General Rule: The occupying power cannot destroy "real or personal property..., except where such destruction is rendered **absolutely necessary**". GC Art. 53.

   a. Pillage. Defined as the "the act of taking property or money by violence." Also referred to as plundering, ravaging, or looting." GC Art. 33. **Forbidden in all circumstances** (one of the general provision protections of Section I).

   b. Reprisal. The property of a protected person may not be the object of a reprisal. GC Art. 33.

   c. Control. 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 which is harmful to the occupying power.

   d. Seizure. The **temporary taking** of property, with or without the authorization of the local commander.

      (1) Rules for State Property. FM 27-10, paras. 402-405.

         (a) 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).

         (b) Occupying power may seize all (STATE OWNED) cash, funds, and movable property, which is capable of military use.

      (2) Rules for Private Property.

         (a) Permitted if the property has a DIRECT MILITARY USE.

         (b) A receipt must be given, so that restoration and compensation can be made.

   e. Confiscation. **Permanent taking**. Differs from seizure, which is temporary. FM 27-10, Paras. 396 & 406. H.R. Art. 46, Para. 2.

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[24] *See* "Nine Commandments of Property Use" printed under the Hague Regulations section of this outline.

(1) State Owned Property. State property seized or captured becomes the property of the capturing nation (title passes).

(2) Private Property. Cannot be confiscated. In addition, threats, intimidation, or pressure cannot be used to circumvent this rule.

f. 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).

(a) May only be ordered by local commander.

(b) 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.

(c) Use of Force. Minimum amount required to secure needed services or items.

5. Functions of Local Government During Occupation.

a. Allowing the local government to perform many of its normal functions is often beneficial to the occupying power.

b. Local officials may be removed from their posts. GC Art. 54. (But they may not be punished if they abstain from their duties as a matter of conscience).

E. 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, Para. 1.

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").

F. RENUNCIATION. Protected persons cannot renounce any portion of their protected status. GC Art 8.

VIII. CONCLUSION.

A. The Fourth Convention is 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 this Convention 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 the CPL Fourth Tier/Law by Analogy process. Judge Advocate's 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.

CHAPTER 7

METHODS AND MEANS 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].
15. Dep't of the Air Force, Air Force Publication 110-31, International Law--The Conduct of Armed Conflict and Air Operations (19 November 1976) [hereinafter AFP 110-31].
16. Dep't of Defense Instruction 5000.1, Defense Acquisition (15 March 1996) [hereinafter DoD Instr. 5000.1].

I. LEGAL FRAMEWORK.

A. The Law of the Hague (ref. (1) and (2)). Regulates "methods and means" of warfare -- prohibitions against using certain weapons such as poison and humanitarian concerns such as warning the civilian population before a bombardment. 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.

B. Geneva Conventions of 1949 (ref. (3) - (6)). Protects "victims" of war such as wounded and sick, shipwrecked at sea, prisoners of war, and civilians.

C. 1977 Geneva Protocols (ref. (7)). The U.S. has not ratified these treaties. Portions, however, do reflect state practice and legal obligations -- the key ingredients to customary international law.

1. 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 WW II, specifically aerial bombardments, protection of civilians, and wars of national liberation.

2. As of October 1998:

   a. 152 nations have become Parties to GP I.

   b. 144 nations have become Parties to GP II

3. 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.

4. U.S. views these GP I articles as either customary international law or acceptable practice though not legally binding: 5 (appointment of protecting powers); 10(equal protection of wounded, sick, and shipwrecked); 11 (guidelines for medical procedures); 12-34 (medical units, aircraft, ships, missing and dead persons); 35 (1)(2)(limiting methods and means of warfare); 37 (perfidy prohibitions); 38 (prohibition against improper use of protected emblems); 45 (prisoner of war presumption for those who participate in the hostilities); 51 (protection of the civilian population, except para. 6 -- reprisals); 52 (general protection of civilian objects); 54 (protection of objects indispensable to the survival of the civilian population); 57-60 (precautions in attack, undefended localities, and demilitarized zones); 62 (civil defense protection); 63 (civil defense in occupied territories); 70 (relief actions); 73-89 (treatment of persons in the power of a party to the conflict; women and children; and duties regarding implementation of GP I).

5. The U.S. specifically objects to articles 1(4) (GP I applicability to certain types of armed conflicts); 35(3) (environmental limitations on means and methods of warfare); 39(2) (use of enemy flags and insignia while engaging in attacks); 44 (combatants and prisoners of war (portions)); 47 (non-protection of mercenaries); 55 (protection of the natural environment) and 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).

D. Treaties. The following treaties that limit specific aspects of warfare are another source of targeting guidance.

1. Gas (ref. (8) and (9)). Geneva Protocol of 1925 prohibits use in war of asphyxiating, poisonous, or other gases . . . U.S. reserves right to respond with chemical weapons to a chemical attack by other side. *But cf.* Chemical Weapons Convention (CWC), article I(1), which prohibits production, stockpiling, and use (even in retaliation). The U.S. ratified the CWC, April 1997. This ratification has had the practical effect of renouncing the right to respond with chemical weapons to a chemical weapon attack by the other side.

2. Cultural Property (ref. (10)). The 1954 Hague Cultural Property Convention prohibits targeting cultural property, and sets forth conditions when cultural property may be used by a defender or attacked.

3. Biological Weapons (ref (11)). Biological weapons are prohibited by the 1925 Geneva Protocol. However, their use in retaliation, as well as their production, manufacture, and stockpiling are prohibited by the 1972 Biological Weapons Convention.

4. Conventional Weapons (ref. (12)). 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 and amendments to Protocol II 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 11 November 1998, 72 nations are Party to the Treaty (72 states party to Protocol I; 67 states party to

Protocol II; 68 states party to Protocol III; 31 states party to Protocol IV.). Protocol I, II, III, and IV have entered into force. (Protocol IV entered into force on 30 July 1998 and amended Protocol II entered into force on 3 December 1998.)

E. Regulations. Implementing targeting guidance for U.S. Armed Forces is found in respective service regulations. (FM 27-10 (Army), NWP 1-14M/FMFM 1-10 (Navy and Marine Corps), and AFP 110-31 (Air Force).)

II. PRINCIPLES

A. The Principles:

1. **Military Necessity**: may target those things which are not prohibited by LOW and whose targeting will produce a military advantage. **Military Objective**: persons, places, or objects that make an effective contribution to military action.

2. **Humanity or Unnecessary Suffering**: must minimize unnecessary suffering - incidental injury to people and collateral damage to property.

3. **Proportionality**: the loss of life and damage to property **incidental** to attacks must not be **excessive** in relation to the **concrete and direct** military advantage expected to be gained.

4. **Discrimination or Distinction**: must discriminate or distinguish between combatants and non-combatants; military objectives and protected people/protected places.

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.)

1. "Not forbidden." Targeting of enemy personnel and property permitted unless otherwise prohibited by international law. This check on the application of military force, i.e., international law, is the distinction cited by Dr. Lieber in 1863. This differed from the 19th Century European view as stated below by Germany's Bismarck:

> Humanitarian claims such as the protection of men and goods can only be taken into consideration insofar as the nature of war permits." See Dep't of the Army, *International Law*, Dep't of the

Army Pamphlet 27-161-2, 12 (1962) [hereinafter DA Pam. 27-161-2].

2. Indispensable for complete submission. In a limited war, the act must be indispensable to attain the limited objective. For example, in the Persian Gulf War, the UN mandate limited the coalition's objective to forcing Iraq from Kuwait. This objective did not require the complete submission of all Iraqi forces.

3. 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. Approach -- look to whether international law allows targeting of a person or property. Examples:

   a. Protected Persons. Law generally prohibits the intentional targeting of protected persons under any circumstances. WW II Germans, under 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 their attack. (Rejected as a valid defense.)

   b. Protected Places - The Rendulic Rule. Law typically allows destruction of civilian property, if military circumstances require such destruction. (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. Current norms for protection (and destruction) of civilian property:

      (1) [Don't destroy real or personal property of civilians] "except where such destruction is rendered absolutely necessary by military operations." (GC, art. 53.)

(2) "[F]orbidden . . . to destroy or seize the enemy's property . . unless demanded by the necessities of war." (HR, art. 23g.)

C. Principle of Unnecessary Suffering or Humanity - "It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering." (HR, art. 23e.) This concept also extends to unnecessary destruction of property.

1. Can't use 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. Can't use otherwise lawful arms in a manner that causes unnecessary suffering (e.g., 2000 pound bomb instead of precision guided munitions against a military objective where civilians are nearby, used with the intent to cause civilian suffering).

D. Principle of Proportionality

1. The Test. The loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. (FM 27-10, para. 41, change 1.)

> The U.S. test is taken, in part, from Article 51(5)b of Protocol I. "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."

2. Protocol I. Under GP I, Article 51 (*Protection of the civilian population*), paragraph 5(b) prohibits "indiscriminate attacks", defined in part as an attack where incidental injury to civilians or incidental damage to civilian objects would be "excessive in relation to the concrete and direct military advantage anticipated." Under GP I, Article 57 (*Precautions in the attack*), paragraph (2)(b) requires planners to cancel an attack in the same circumstances. The U.S. considers these provisions customary international law.

3. Incidental Injury and Collateral Damage. Unavoidable and unplanned damage to civilian personnel and property incurred while attacking a military objective. Incidental (a/k/a collateral) damage is not a violation of international law. While no law of war treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. As stated

above, GP I, Article 51(5) describes indiscriminate attacks as those causing "incidental loss of civilian life . . . excessive . . . to . . . the military advantage anticipated." Id. Caution, however, the law of proportionality still applies.

4. Judging Commanders. It may 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 may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated. (FM 27-10, para. 41.)

   b. 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, at para. B,3. But based on case law and modern applications, the test is not entirely subjective -- "reasonableness" seems to have an objectivity element as well. In this regard, two questions seem relevant. Did the commander reasonably gather 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.

   c. Example: Al Firdus Bunker. During the Persian Gulf War, planners identified this bunker as a military objective. Barbed wire surrounded the complex, which was camouflaged, and had armed sentries guarding 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 lawful 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 Discrimination or Distinction. GP I prohibits "indiscriminate attacks." Under Article 51, paragraph 4, these are attacks that:

a. are "not directed against a specific military objective", (e.g., SCUD missiles during Persian Gulf War);

b. "employ a method or means of combat the effects of which cannot be directed at a specified military objective", [e.g., might prohibit area bombing in certain populous areas, such as a bombardment "which treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, or village..."(GP I, art. 51, para. 5(a))]; or

c. "employ a method or means of combat the effects of which cannot be limited as required" by the protocol (e.g., release of dangerous forces - GP I, art. 56 or incidental effect excessive in relation to concrete and direct military advantage - GP I, art. 51, para. 5(b); 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).)

III. TARGETS

A. Military Objectives. (FM 27-10, para. 40, and GP I, art. 52(2).) Combatants, defended places, and those objects which by their nature, location, purpose or use make an effective contribution to military action.

B. PERSONS

1. Combatants. Anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless "out of combat"

a. Lawful Combatants. Receive protections of Geneva Conventions, specifically, the GWS, GWS Sea, and GPW.

b. Geneva Convention Definition. (GPW, art. 4; GWS, art. 13.)

(1) Under Responsible Command,

(2) Distinctive Sign Recognizable at a Distance,

(3) Carry Arms Openly, and

(4) Abide by the Laws of War.

c. Protocol I Definition. Article 44(3) of GP I states that a belligerent attains combatant status by merely carrying his arms openly during each military engagement, and when visible to an adversary while deploying for an attack. GP I thus drops the requirement for a fixed recognizable sign. The U.S. believes this does not reflect customary international law and diminishes the distinction between combatants and civilians, thus undercutting the effectiveness of humanitarian law.

d. Unlawful combatants. May be treated as criminals under the domestic law of the captor. An unlawful combatant can be a civilian who is participating in the hostilities or a member of the armed forces who violates the laws of war.

2. Noncombatants. The law of war prohibits attacks on non-combatants.

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) Indiscriminate Attacks. 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 U.S..)

(3) Warning Requirement. (FM 27-10, para. 43; see HR, art. 26.) General requirement to warn before a bombardment. Only applies if civilians are present. **Exception**: if it is an assault (any surprise attack or an attack where surprise is a key element). GP I, Article 57(2)(c),

however, requires warning of civilians before an attack (not necessarily a bombardment), unless circumstances do not permit (this is considered customary international law by the U.S.).

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 a surrender. However, most agree surrender constitutes a cessation of resistance and placement of one's self at the discretion of the captor.

(b) Onus on person or force surrendering to communicate intent to surrender.

(c) Captors must respect (not attack) and protect (care for) those who surrender--no reprisals.

(d) Protocol I. Expands definition of prisoners of war to include "combatants." Combatants include those who don't distinguish themselves from the civilian population except when carrying arms openly during an engagement and in the deployment immediately preceding the engagement; e.g., national liberation movements. (GP I, art. 44.) U.S. asserts that this definition does not reflect customary international law.

(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, supra, 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."

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 must 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. All available help shall be given to civilian medical personnel when civilian 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 U.S.).

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 hostilities 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. Military Objective. Objects--if their nature, use, location, or purpose makes an effective contribution to military action. (FM 27-10, para. 40, GP I, art. 52(2).) The destruction, capture or neutralization must offer a definite military advantage. There must be a nexus between the object and a "definite" advantage toward military operations. Examples: munitions factory, bridges, railroads.

2. Protected Property

   a. Civilians. 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.

(4) Captured medical facilities and supplies of the armed forces. (FM 27-10, para. 234).

(a) Fixed facilities. May be used by captors, in cases of urgent military necessity, provided proper arrangements are made for the wounded and sick who are present.

(b) Mobile facilities. Captors may keep mobile medical facilities, provided they reserved for care of the wounded and sick.

(c) Medical Supplies. May not be destroyed.

c. Medical Transport. Transports of the wounded and sick or of medical equipment shall not be attacked. (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 exist. (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 U.S..) Medical aircraft in areas controlled by an adverse party must have a prior agreement in order to gain protection. (GP I, art. 27.)

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 U.S. (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.

3. 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 nearby 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.

4. 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 rights of belligerents to adopt means of injuring the enemy is not unlimited." (HR, art. 22.)

B. Legal Review. All U.S. weapons and weapons systems must be reviewed by the service TJAG for legality under the law of war. (DoD Directive 5000.1, "Defense Acquisition," of March 15, 1996, para. D2j., AR 27-53, 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. (DoD Directive 5000.1, para. D2j.) Legal review of new weapons required also 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? (DoD Directive 5000.1, "Defense Acquisition," of March 15, 1996, para. D2j.) In the TJAG reviews, the discussion will often focus on whether the suffering occasioned by the use of the weapon is needless, superfluous, or grossly disproportionate to the advantage gained by its use?

2. 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: a conventional air strike against a military objective where civilians are nearby vs. use of a more precise targeting method that is equally available - if choice is made with intent to cause unnecessary suffering.

   c. By agreement or prohibited by specific treaties. Example: certain land mines, booby traps, and laser weapons are prohibited under the Protocols to the 1980 Conventional Weapons Treaty.

C. 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). Prohibited by late 19th century treaties (of which U.S. was never a party). U.S. practice, however, accedes to this prohibition as being customary international law. State practice is to use jacketed small arms ammunition (which reduces bullet expansion on impact).

1. 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 by customary international and the treaties mentioned above. There are 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).

2. High Velocity Small Caliber Arms

   a. Early controversy about M-16 causing unnecessary suffering.

   b. "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.

3. 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.

4. 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 attempts 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 is inherently flawed because of its data base of casualty figures is mostly based upon wounds inflicted in domestic disturbances, civil wars, from antipersonnel mines and from bullets of undetermined type.

D. Fragmentation (FM 27-10, para 34.)

1. Legal unless used in an illegal manner (on a protected target or in a manner calculated to cause unnecessary suffering).

2. Unlawful if fragments are undetectable by X-ray (Protocol I, 1980 Conventional Weapons Treaty).

E. Landmines and Booby Traps. Lawful if properly used, however, international process underway to outlaw all antipersonnel land mines.

1. Indiscriminate. Primary legal concern: indiscriminate use that endangers civilian population. Articles 4 and 5, Protocol II of the 1980 Conventional Weapons Treaty restricts placement of mines and booby traps in areas of "civilian concentration", when combat between ground forces is not on-going or imminent.

   a. Remotely delivered mines (those planted by air, artillery etc.). Only used against military objectives; and then so only if their location can be accurately recorded or if they are self-neutralizing.

   b. Non-remotely delivered mines, booby traps, and other devices. Can't be used in towns or cities or other places where concentrations of civilians are present, unless:

      (1) They are placed in the vicinity of a military objective under the control of an adverse party; or

      (2) Measures are in place to protect civilians from their effects (posting of signs etc.).

2. Booby Traps. Definition: A device designed to kill or maim an unsuspecting person who disturbs an apparently harmless object or performs a normally safe act. Protocol II of the 1980 Conventional Weapons Treaty contains specific guidelines on the use of booby-traps in Article 7:

> 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

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 which recognized that such legitimate military targets 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. Amended Protocol II (Mines Protocol). Amended Protocol II was ratified by the United States on 24 May 1999. (1) Expands the scope of the original Protocol to include internal armed conflicts. (2) Requires that all remotely delivered anti-personnel landmines (APL) be equipped with self-destruct devices and backup self-deactivation features. (3) Requires that all non-remotely delivered APL not equipped with such devices ("Dumb Mines") be used within controlled, marked, and monitored minefields. (Falls short of Presidents APL policy statement of 16 May 1996 that prohibited U.S. military use of "Dumb" APL, except in the Korean Peninsula and in training.

(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. Provides for means to enforce compliance. In his letter of Transmittal, the President emphasizes his continued commitment to the elimination of all APL.

a. Amended Protocol II also clarifies the use of the M18 Claymore "mine" when used in the tripwire mode. Claymore may be used in the tripwire mode if:

   (a) No longer then 72 hours

   (b) It is located in the immediate proximity of the military unit that emplaced them

   (c) Area is monitored by military personnel to ensure civilians stay out of the area.

4. U.S. policy on anti-personnel land mines. U.S. forces may no longer employ "dumb" (those that do not self-destruct or self-neutralize) anti-personnel land mines, according to a 16 May 1996 policy statement issued by the President. *See* Presidential Decision Directive 54. Exceptions to this policy:

   a. Use of "dumb" mines on the Korean Peninsula to defend against and armed attack across the DMZ; and

   b. Use of "dumb" mines for training purposes.

5. Ottawa Process. Initiated by the Canadian Foreign Minister. One hundred nations and assorted NGO's met in Oslo, Norway in September 1997 to draft the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines (APL) and on Their Destruction. Better known as the **Ottawa treaty or Process**. The Convention was signed in Ottawa, Canada in December 1997. The Convention entered into force on 1 March 1999. As of March 2000, 94 nations had ratified the Convention. 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. Many of the United States' allies are signatories of Ottawa (including Canada, Britain, Germany and Australia) which raises significant issues concerning interoperability in multi-national operations.

6. U.S. Developments. On 17 September 1997, the President announced the following U.S. initiatives in regards to anti-personnel land mines:

   a. Develop alternatives to APL by the year 2003; field them in South Korea by 2006.

   b. Appointed a Presidential advisor on land mines.

   c. Pursue a ban on APL through the U.N. Conference on Disarmament.

   d. Increase demining programs.

F. 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." (See also para 6-7, AFP 110-31.)

   1. Napalm and Flamethrowers. Designed for use against armored vehicles, bunkers, and built-up emplacements.

   2. 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.

   3. 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. 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.

G. Lasers. U.S. 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 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 (this protocol has not yet been ratified by U.S.). The Senate is reviewing the protocol for its advice and consent for ratification.

H. Chemical Weapons. (FM 27-10, para. 37.) Poison has been outlawed for thousands of years. Considered a treacherous means of warfare. Problem -- once unleashed it is hard to control. (HR, art. 23a.)

1. The 1925 Geneva Protocol. (FM 27-10, para 38, change 1.) Applies to all international armed conflicts.

   a. Prohibits use of lethal, incapacitating, and biological agents. Protocol prohibits use of "asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . ."

   b. The U.S. considers the 1925 Geneva Protocol as applying to **both** lethal and incapacitating chemical agents.

   c. 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, their use in war is not prohibited by the treaty. (Other nations disagree with interpretation.) There are, however, policy limitations that are discussed below.

   d. 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.) Presidential approval required for use. (E.O. 11850, 40 Fed. Reg. 16187 (1975); FM 27-10, para. 38c, change 1.) HOWEVER THE U.S. RATIFIED THE CHEMICAL WEAPONS CONVENTION (CWC) IN 1997. THE CWC DOES NOT ALLOW THIS "SECOND" USE.

   e. Riot Control Agents. U.S. has an understanding to the Treaty that these are not prohibited.

2. 1993 Chemical Weapons Convention (CWC) (ref. 9). This treaty was ratified by U.S. and came into force in April 1997.

   a. Provisions (twenty four articles).

(1) 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."

(2) Article II. Definitions of chemical weapons, toxic chemical, RCA, and purposes not prohibited by the convention.

(3) Article III. Requires parties to declare stocks of chemical weapons and facilities they possess.

(4) Articles IV and V. Procedures for destruction and verification, including routine on-site inspections.

(5) Article VIII. Establishes the Organization for the Prohibition of Chemical Weapons (OPWC).

(6) Article IX. Establishes "challenge inspection," a short notice inspection in response to another party's allegation of non-compliance.

3. Riot Control Agents (RCA). U.S. RCA Policy is a two part test. The U.S. policy on RCAs during international armed conflict is found in Executive Order 11850. U.S. policy regarding the use of RCA's in Military Operations Other Than War is described in CJCSI 3110.07A.

a. Executive Order 11850 applies to use of Riot Control Agents and Herbicides; requires Presidential approval before first use in an armed conflict. (However, see paragraph 3.c. below, concerning the 1993 Chemical Weapons Convention's prohibition against the use of RCA as a "method of warfare.")

(1) Riot Control Agents: renounces first use in armed conflicts except 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.

(2) Oleoresin Capsicum Pepper Spray (OC) a/k/a Cayenne Pepper Spray: U.S. classifies OC as a Riot Control Agent. (DAJA-IO, Information Paper of 15 August 1996, Use of Oleoresin Capsicum (OC) Pepper Spray and other Riot Control Agents (RCAs); DAJA-IO Memo of 20 September 1994, Subject: Request for Legal Review - Use of Oleoresin Capsicum Pepper Spray for Law Enforcement Purposes; CJCS Memo of 1 July 1994, Subject: Use of Riot Control Agents.)

b. CJCSI 3110.07A applies to RCA use during MOOTW operations. The authorization for RCA use is at the SECDEF or CINC level. 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.

c. RCA Controversy. Convention prohibits RCA use as "method of warfare." "Method of warfare" may be interpreted to include any actions that involve combatants - including traditional hostage rescue/SAR missions and human shield scenarios previously allowed by E.O. 11850.

(1) The rationale for the prohibition - 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. E.O. 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

(2) The Senate's resolution of advice and consent for ratification to the CWC (S. Exec. Res. 75 - Senate Report, S3373 of 24 April 1997, section 2- conditions, (26) - riot control agents) required that the President must certify that the U.S. is not restricted by the CWC in its use of riot control agents, including the use against "combatants" in any of the following cases:

(a) When the U.S. is not a party to the conflict

(b) In consensual (Chapter VI, UN Charter) peacekeeping, and

(c) In Chapter VII (UN Charter) peacekeeping.

(3) The implementation section of the resolution requires that the President not modify E.O. 11850. (*see* S. Exec Res. 75, section 2 (26)(b), s3378)

(4) The Presidents 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 party to the conflict for as long as possible. Therefore RCA would be available for all purposes under E.O. 11850. However, in armed conflicts (such as Desert Storm, Panama, and Grenada) it is unlikely that the NCA 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." (Thus, use of RCA unlikely in the CSAR and the human shield situations used as examples of defensive modes under E.O. 11850 .)

I. Herbicides. E.O. 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. (e.g., Agent Orange in Vietnam.)

J. Biological. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The 1972 Biological Weapons Convention (ref. 11) 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.

K. 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 Court 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. Psychological operations. Gulf War - U.S. PSYOPS leaflet program - PSYOPS units distributed over 29 million leaflets to Iraqi forces. The themes of the leaflets were the "futility of resistance; inevitability of defeat; surrender; desertion and defection; abandonment of equipment; and blaming the war on Saddam Hussein." It was estimated that nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets affected their decision to surrender." Adolph, *PSYOP: The Gulf War Force Multiplier*, Army Magazine 16 (December 1992).

B. 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.

1. Naval Tactics. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels. Some examples follow:

> 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).
>
> World War II - Britain: British Q-ship program during WW II. 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.

2. 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.) Some examples follow:

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 U.S. 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).

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).

3. Use of Enemy Property. Enemy property may be used to deceive under the following conditions:

a. Uniforms. Combatants may wear enemy uniforms but cannot fight in them. Note, however, that military personnel not wearing their uniform 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.)

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 U.S. 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.)

(1) 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).

b. 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.). Note the Protocol I position on this issue in paragraph (d) below.

c. Equipment. Must remove all enemy insignia in order to fight with it. 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).

d. 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 to be 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.)

C. Use of Property. (*See*, Elyce Santere, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 Mil. L. Rev. 111 (1989).) Confiscation - permanent taking without compensation; Seizure - taking with payment or return after the armed conflict; Requisition - appropriation of private property by occupying force with compensation as soon as possible; Contribution - a form of taxation under occupation law.

D. Treachery and Perfidy. Prohibited under the law of war. (FM 27-10, para. 50; HR. art. 23b.) Perfidy involves injuring the enemy by his adherence to the law of war (actions are in bad faith).

1. 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.)

2. 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. 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 WA*rfare* 320-21 (1959). Article 38 is analogous to the Hague IV Regulation prohibiting the improper use of a flag of truce, art 23(f).

3. 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 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 diplomatic conference. (Bothe, *supra*, 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 U.S. 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.)

4. Feigning incapacitation by wounds/sickness. (GP I, art. 37(1)(b).) Whiteman says HR, Article 23b also prohibits this, e.g. if shamming 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.

5. Feigning surrender or the intent to negotiate under a flag of truce. (GP I, Art 37(1)(a).)

   a. 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 Argentinean conduct was clearly treachery if the British soldiers were killed by those raising the white flag, but it was not treacherous if they were killed by other Argentineans either unaware of the white flag, or not wishing to surrender. 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. L. Rev., Oct. 1984, at 49.

b. Gulf War - Battle of Khafji incident was not a perfidious act. Media speculated that Iraqi tanks with turrets pointed aft, then turning forward 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).

c. Gulf War - 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.*

d. Gulf War - 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.*

6. 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.)

7. 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).)

a. 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.

b. As in the case of the misuse of the flag of truce, misuse of a UN emblem which does not result in a killing, capture, or surrender, is nonetheless, a violation of Art 38, GP I. Note, however, that this prohibition only applies if the UN force is not an actual combatant force, a condition that has only arisen on one occasion: the Korean War. Michael Bothe, *et. al.*, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 206 (1982).

8. Misuse of Red Cross, Red crescent, cultural property symbol.

a. Designed to reinforce/reaffirm HR, Article 23f.

b. 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, U.S. aircraft took fire from the Richmond Hills Hospital, and consequently engaged it. (DA Pam 27-161-2, p. 53, n. 61.)

c. Cultural property symbols include 1954 Hague Cultural Property Convention, Roerich Pact, 1907 Hague Conventions symbol. (Bothe, *supra*, at 209.)

9. Misuse of internationally recognized distress signals, e.g., ICAO, IMCO distress signals.

E. 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.

F. Espionage. (FM 27-10, para. 75; GP I, art. 46.) Acting clandestinely (or on false pretenses) to obtain information for transmission back to their 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.

G. 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 is timely;

   b. It is responsive to enemy's act;

   c. It must first attempt a lesser form of redress; and

   d. It must be proportional.

2. Prisoners of war and persons "in your control" can not 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).

3. U.S. policy is that a reprisal may be ordered only at the highest levels (NCA).

H. Rules of Engagement. Defined: Directives issued by competent superior authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue engagement with other forces.

1. ROE are drafted in part based upon the LOW. Drafted considering LOW, political policy, public opinion and military operational constraints. ROE are usually more restrictive than what the LOW would allow.

2. Targeting rules are often incorporated within ROE for a given operation.

3. CJCS Standing ROE (CJCS Instruction 3121.01A of 15 Jan 00): Guidance as to course of action in specific situations. "Inherent Right of Self Defense" for both individual and the unit is the foundation of document.

VI. CONCLUSION

A. Principles

B. Targets

C. Weapons

D. Tactics

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 (1988).
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 (1984).
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. Dep't of Army, Field Manual 27-10, The Law of Land Warfare, ch. 8 (18 July 1956) [hereinafter FM 27-10].
13. Dep't of Army, Pamphlet 27-161-2, International Law, ch. 8 (23 Oct. 1962) [hereinafter DA Pam 27-161-2].
14. International Military Tribunal, TRIAL OF THE MAJOR WAR CRIMINALS (1947) (42 volumes).
15. TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950) (15 volumes) [hereinafter Trials of War Criminals].
16. United Nations War Crimes Commission, LAW REPORTS OF TRIALS OF WAR CRIMINALS (1948) (15 volumes).
17. United Nations War Crimes Commission, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION (1948).
18. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N.Doc. S/RES/808 (1993).
19. 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].
20. Rules of Procedure & Evidence, International Criminal Tribunal—Yugoslavia since 1991, Seventh Session, the Hague, U.N. Doc. IT/32/Rev. 5 (June 15, 1995).
21. 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].
22. 18 U.S.C. § 2441, P.L. 104-192 (War Crimes Act of 1996, as amended).
23. http://www.igc.apc.org/tribunal; http://www.un.org/icty.
24. William H. Parks, *Command Responsibility For War Crimes,* 62 MIL. L. REV. 1 (1973).
25. Sun Tzu, THE ART OF WAR (Samuel B. Griffith trans., Oxford Univ. Press 1963).
26. Lynn Montross, WAR THROUGH THE AGES 105, 164 (Third Edition, 1960).

27. Theodor Meron, *Crimes and Accountability in Shakespeare,* 92 Am. J. Int'l L. 1 (1998).
28. Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War,* 86 Am. J. Int'l L. 1 (1992).
29. Yoram Dinstein & Mala Tabroy, WAR CRIMES IN INTERNATIONAL LAW (1996).
30. Henry T. King, Jr., *The Meaning of Nuremberg,* 30 Case W. Res. J. Int'l L. 143 (1998).

I. INTRODUCTION. AFTER THIS BLOCK OF INSTRUCTION, THE STUDENT WILL BE FAMILIAR WITH THE FOLLOWING:

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 activities that constitute war crimes.

C. The customary international law doctrine of command responsibility.

D. Under what jurisdiction, in what forum, and subject to what defenses war crimes may be prosecuted.

E. United States treaty and other obligations with respect to war crimes, as well as legislation and executive branch policies implementing those obligations

II. HISTORY AND DEVELOPMENT OF WAR CRIMES AND WAR CRIMES PROSECUTIONS.

A. Although war is not a compassionate trade, rules regarding its conduct and trials of individuals for specific violations of the laws or customs of war have a long history.

B. 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).

C. Byzantine Empire, 527 - 1071 AD 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).

D. 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 Tabroy, WAR CRIMES IN INTERNATIONAL LAW (1996).

E. 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. GWS Barrow, ROBERT BRUCE 203 (1965) (reporting that Sir Wallace allegedly spared "neither age nor sex nor nun").

F. 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).

G. 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).

H. 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).

I. The Anglo-Boer War. In 1902, British courts-martial tried Boers for acts contrary to the usage of war. THE MILNER PAPERS: SOUTH AFRICA, 1897-1899, 1899-1905 (1933).

J. Counter-insurgency operations in the Philippines. Brigadier General Jacob H. Smith, U.S. 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.

K. 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 accuseds 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.

L. 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 U.S. 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).

M. 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.

N. Post-World War II Insurgencies. Involved internal armed conflict thought to be outside the ambit of war crimes.

1. The object of international humanitarian law is to alleviate the suffering of the victims of armed conflict. Whether the conflict is internal or international, there is no distinction in terms of the resulting suffering. However, states are reluctant to adhere to the rules of international armed conflict internally primarily on the grounds that combatant immunity would arguably be available to insurgents or even mere bandits. Waldemar A. Solf, *Non-International Armed Conflicts*, 31 Am. U. L. Rev. 927 (1982).

2. U.S. soldiers committing war crimes in Vietnam were tried by U.S. 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.

3. 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 U.S. 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. Pol Pot. Because internal strife and civil wars are still largely outside the parameters of war crimes and the grave breaches provisions of the Geneva conventions, no attempts have been made to bring to justice those committing atrocities in Cambodia, Uganda, and northern Iraq (among other places). Current ad hoc international tribunals pursuant to Chapter VII of the UN Charter may be the last.

Q. 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).

R. 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. This is deemed an internal armed conflict as opposed to the International armed conflict in the Former Yugoslavia.

S. Current Tribunals

1. Distinct From Prior Tribunals

a. Created before conflict ceased

b. Criminal vs. military tribunals

c. Created by UNSC resolution

d. Stricter due process provisions

e. Prosecute all parties to the conflict

f. Parties to conflict can not sit in judgment

g. Authorized to demand cooperation of all UN Member states, not just parties to treaty (Dayton Accord)

h. Provides for protection of witnesses and victims

i. Provides for an appellate chamber (five judges)

2. International Criminal Tribunal for the Former Yugoslavia

a. Created to assist in restoring peace and stability in the region through the administration of justice.

b. Pursuant to UNSC Res. 827, "The Statute," the Tribunal has the authority to prosecute persons for serious violations of international humanitarian law committed in the former Yugoslavia since 1991, including grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. The statute also establishes individual command responsibility under a theory of superior or command responsibility.

c. Eleven judges were elected by the UN General Assembly from a list of nominees submitted by the UNSC on September 15, 1993. Prosecutor appointed on August 15, 1994, by the UNSC. Judges are from countries other than those involved in conflict. Sit for four-year terms. First terms expired Nov. 1997. There are currently 14 judges, 15 authorized, and 729 staff members on the court.

d. Sits in The Hague, Netherlands in a modern insurance building now rented by the UN. Modern bright facility. Totally computerized, library, law clerks, and staff. The ICTY's budget has grown from $276,000 in 1993 to $95,942,600. GAO has indicated the court needs more money. Report to the Chairman, Committee on Foreign Relations, GAO, *War Crimes Tribunal's Workload Exceeds Capacity,* B-27946 (June 2, 1998).

e. Since its inception, 94 individuals have been publicly indicted in 67 public indictments. Eighteen have had charges dropped against them, seven indictees have died, and one has been acquitted. Thirty-nine accuseds are currently in some form of proceeding before the court. Twelve accuseds are at the appeal stage, six are in on-going trials, sixteen are at the pre-trial stage, and two have begun to serve their sentences. Of those in custody, 19 have been captured by international forces, 12 voluntarily surrendered, and nine were arrested by national police.

f. Summary of Trials:

(1) *Drazen Erdemovic,* 29 November 1996, pleaded guilty to a crime against humanity and was sentenced to 10 years. The Appellate Chamber found that his plea was not informed and remitted his case to the Trial Chamber. He subsequently reentered a plea on 5 March 1998 to war crimes and was sentenced to 5 years. He is currently servicing his sentence in Norway.

(2) *Dusko Tadic*, 7 May 1997, was found guilty of 11 counts of violations of the laws or customs of war and crimes against humanity, and sentenced to 20 years. Both the Defense and Prosecution appealed. On July 15, 1999, the Appellate Chamber reversed the Trial Chamber's assertion that the conflict was not international in nature and found *Tadic* guilty of grave breaches of the Geneva Conventions as well. *Tadic* was ultimately sentenced to 20 years.

(3) *Goran Jelsic,* pleaded guilty to31 counts of crimes against humanity and violations of the laws or customs of war. He was found not guilty of the crime of genocide. On December 20, 1999, he was sentenced to 40 years in prison. He is now awaiting appeal.

(4) *Zdravko Mucic,* (co-defendant in the Celebici village case) 16 November 1998, found guilty on 13 counts of grave breaches of the Geneva Conventions and violations of the laws or customs of war, and was sentenced to 7 years. Both the prosecution and defense have appealed.

(5) *Hazim Delic,* (co-defendant in the Celebici village case) 16 November 1998, found guilty of 13 counts of grave breaches of the Geneva Conventions and violations of the laws or customs of war, and was

sentenced to 20 years. Both the defense and prosecution have appealed.

(6) *Esad Landzo,* (co-defendant in the Celebici village case) 16 November 1998, found guilty of 17 counts of grave breaches of the Geneva Conventions and violations of the laws or customs or war, and sentenced to 15 years. The defense has appealed.

(7) *Anto Furundzija,* 10 December 1998, found guilty on two counts of violations of the laws or customs of war, and sentenced to 10 years. The defense has appealed.

(8) *Zlatko Aleksovski,* 23 March 1999, found not guilty of two counts of grave breaches of the Geneva Conventions, found guilty as both an individual and superior on violations of the laws or customs of war, and sentenced to two years and six months. He was given credit for two years, 10 months and 29 days and immediately released. The appellate chamber ordered him back into custody and increased his sentence to seven years.

(9) *Zejnil Delalic,* (co-defendant in the Celebici case) 16 November 1998, found not guilty of 11 counts of grave breaches of the Geneva Conventions and violations of the laws or customs of war. He was immediately released, the prosecution has appealed.

(10) *Zoran Kupreskic,* 14 January 2000, found guilty of one count of a crime against humanity and sentenced to ten years. He has appealed.

(11) *Mirjan Kupreskic,* 14 January 2000, found guilty of one count of a crime against humanity and sentenced to six years imprisonment. He has appealed.

(12) *Vlatko Kupreskic,* 14 January 2000, found guilty of one count of a crime against humanity and sentenced to 6 years imprisonment. He has appealed.

(13) *Drago Josipovic,* 14 January 2000, found guilty of three counts of crimes against humanity and sentenced to 25 years imprisonment. The prosecution has appealed.

(14) *Dragen Papic,* 14 January 2000, found not guilty of one count of crimes against humanity and immediately released.

(15) *Vladimir Santic,* 14 January 2000, found guilty of three counts of crimes against humanity and sentenced to 25 years imprisonment. The prosecution has appealed.

(16) *Tihomir Blaskic,* 3 March 2000, found guilty of three counts of crimes against humanity, six counts of grave breaches of the Geneva Convention, and ten counts of the laws or customs of war and sentenced to 45 years imprisonment.

3. International Criminal Tribunal for Rwanda

   a. The primary objectives are to restore regional peace and stability through the administration of justice and to eliminate the culture of impunity that has characterized the Rwandan culture for the past two decades by seeking to hold individuals responsible for the genocide.

   b. To prosecute genocide and other serious violations of international humanitarian committed in Rwanda and by Rwandans in neighboring states during 1994. Violations are defined as genocide, crimes against humanity, and violations of article 3 common to the four Geneva Conventions and of Protocol II.

   c. Made up of three trial chambers of three judges each and an appellate chamber of five judges from the ICTY. Judges sit for four-year terms. There are 729 persons working for the tribunal with its $79,753,900 budget. Sits in Arusha, Tanzania, a neighboring state, which is not easily accessible due to bad roads and minimal air transport.

   d. There have been 29 indictments issued against 50 individuals. Forty-four individuals are currently in custody.

   e. Summary of Trials:

      (1) *Jean-Paul Akayesu,* 2 September 1998, found guilty of genocide and crimes against humanity and sentenced to life in prison. This was the first-ever conviction for the crime of genocide by an international tribunal. Both the accused and prosecutor have appealed.

      (2) *Jean Kambanda,* 4 September 1998, pleaded guilty to six counts of genocide and crimes against humanity and sentenced to life in prison. The accused has appealed the sentence.

(3) *Omar Serushago,* 17 November 1998, pleaded guilty to genocide and crimes against humanity and sentenced to 15 years in prison.

(4) *Clement Kayishema and Obed Ruzindana,* trial ended on 17 November 1998. On May 21, 1999, *Kayishema* was sentenced to life and *Ruzindana* was sentenced to a term of 25 years.

(5) *Georges Anderson Nderubmwe,* June 1999, was sentenced to life in prison for genocide.

(6) *Alfred Musema,* June 1999, was sentenced to life in prison for genocide.

4. The International Criminal Court. Treaty is open for signature until 31 December 2000. It will become effective 60 days after 60 countries have ratified the document. Some predict that this will take approximately 5 to 6 years. Eighty-two countries have signed and nine, Belize, Fiji, Ghana, Italy, Norway, San Marino, Senegal, Tajikistan, and Trinidad/Tobago, have ratified the treaty.

   a. Although the U.S. is in favor of a standing permanent forum to address war crimes, the U.S. does not support the treaty as written. Some of the concerns of the U.S. include:

      (1) A state party, the UNSC, or the independent prosecutor may refer cases to the court. There is concern that under such a regime, prosecutions may become overly political in nature. For example, after the launch of *Tomahawk* missiles into the Sudan against a terrorist chemical weapons plant, certain members of the Sudanese government called for the indictment of President Clinton at the ICC for starting an aggressive war. Today, the U.S. is the world's last remaining superpower and finds itself involved in a variety of peacekeeping, humanitarian, disaster relief, counter-terrorism and counter-proliferation operations. Referral, especially over non-parties, belongs with the UNSC, the body responsible for international peace and security.

      (2) The treaty violates the most basic of international law requirements that non-parties to a treaty cannot be bound by a treaty. Jurisdiction over non-party nationals in cases where the UNSC has not referred the matter to the ICC, exists where either the state of territory where the crime was committed or the state of nationality of the accused

consents. This dual system of consent may lead to absurd results. For example, if an international force was used to put down a rogue state bent on domestic violations of international humanitarian law, the rogue state would have the ability to refer cases to the ICC allegedly involving war crimes committed by the international force on its territory and yet be able to completely avoid jurisdiction over its own actions.

(3) The treaty includes a provision which allows party states to "opt out" of war crimes court jurisdiction over its national for seven years, as well as for any newly defined crime. (The crime of aggression has not yet been defined). This means that parties can opt out for seven years for violations of these crimes but non-state parties have no such ability to do so.

(4) The ICC is not a UN body, yet the plan calls for funding by the UN. This creates a situation where non-state parties to the treaty that are parties to the UN will be paying for the court as well as party member states.

b. The U.S. supports several aspects of the treaty.

(1) The statute seeks to define war crimes by including a "laundry list" of violations of the laws and customs of war. Moreover, it points out which apply in internal as well as international armed conflict.

(2) The treaty requires that elements be drafted for the crimes listed in the treaty.

(3) Evidentiary and procedural rules are to be established.

(4) The protections against the release of classified information by a party and or third parties are adequate.

(5) The defense of superior orders and the protection of mission essential property are officially recognized.

(6) Two separate and distinct standards are set for command and superior responsibility.

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, & 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 & 499. This definition is arguably too broad. The act must be somewhat serious in nature. For example, it difficult to imagine an EPW compound commander charged with the war crime of failing to provide adequate recreational and educational opportunities to the PW's as required by the Third Geneva Convention.

4. As with other crimes, there is an Actus Reus and Mens Rea element.

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. Common Article 2 of the Geneva Conventions must apply. Second, the victim must be a "protected person" in one of the conventions.

1. Grave Breaches. Serious felonies. Examples include:

   a. Willful killing;

   b. Torture or inhumane treatment;

   c. Biological experiments;

   d. Willfully causing great suffering or serious injury to body or health;

   e. Taking of hostages;

   f. Extensive destruction of property not justified by military necessity;

   g. Compelling a prisoner of war to serve in the armed forces of his enemy;

   h. Willfully depriving a prisoner of war of his rights to a fair and regular trial. GWS, art. 50; GWS Sea, art. 51; GPW, art. 130; GC, art. 147

2. Simple Breaches. Examples include:

   a. Making use of poisoned or otherwise forbidden arms or ammunition;

   b. Treacherous request for quarter;

   c. Maltreatment of dead bodies;

d. Firing on localities which are undefended and without military significance;

e. Abuse of or firing on the flag of truce;

f. Misuse of the Red Cross emblem;

g. Use of civilian clothing by troops to conceal their military character during battle;

h. Improper use of privileged buildings for military purposes;

i. Poisoning of wells or streams;

j. Pillage or purposeless destruction;

k. Compelling prisoners of war to perform prohibited labor;

l. Killing without trial spies or other persons who have committed hostile acts;

m. Compelling civilians to perform prohibited labor;

n. Violation of surrender terms. *See* FM 27-10, & 504.

3. The Implications of Protocol I. *Cf.* DA Pam 27-1-1, Protocol I, arts. 11(4), 85.

D. Common Article 3 to 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 internal as well as international armed conflicts.

2. The International Criminal Court statute provides for prosecution of violations of Common Article 3 in non-international armed conflicts.

3. 18 U.S.C. § 2441 now permits prosecutions for violations of Common Article 3 in the U.S. federal court system.

E. 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).

F. 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.

G. 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, & 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.

H. 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 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 acts 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.

On July 15, 1999, the Appellate Chamber reversed the Trial Chamber and found that the conflict was international. *Tadic* was therefore found guilty of 9 counts of grave breach by the Appellate Chamber. 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.

(3) In the *Celebici* case, the ICTY found that the indictment covered a period of international armed conflict. Three of the four accuseds 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) Not charged in *Tadic* case.

(3) 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 & 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 or internal armed conflict. The *Tadic* judgment set out elements as follows:

(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).

I. International Criminal Court. The ICC will have 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 in with an armed conflict in order for the ICC to have jurisdiction. This is consistent with the Genocide convention discussed above.

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.

   b. The ICC does not specifically require the need to have a nexus with an armed conflict.

   c. 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 large-scale governmental abuse.

3. War Crimes. For the purposes of the ICC, war crimes means:

   a. Grave Breaches of the Geneva Conventions.

   b. Serious violations of the Laws and Customs of War applicable in international armed conflict. The statute then goes on to list what it considers to be serious violations.

   c. 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 Statute provides a laundry list of these crimes from various treaties.

(b) It is also criminalizes the attack of personnel, equipment, installations, or vehicles involved with a UN peacekeeping or humanitarian mission.

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 *knows 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. *U.S. 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. 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.

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." Rept of the Secretary-General; Statute for Rwanda, art. 6(3).

2. Indictments against Radovan Karadzic (as founding member and President of Serbian Democratic Party) and Gen. Ratko Mladic (Commander of JNA Bosnian Serb Army) highest ranking Bosnian-Serb military leaders. (command responsibility)

3. Indictments against Theoneste Bagosora (assumed official and *de facto* 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. (superior responsibility)

G. Operations Other Than War.

1. Law of War may not apply. The operation may involve an internal armed conflict or no conflict at all.

2. DOD policy is that the Law of War applies in all operations irrespective of how the operation is classified, including MOOTW. *See*, DoDD 5100.77, *The Law of War Program*, and CJCS 5810.01, *Implementation of the DOD Law of War Program.*

3. Despite this policy, it is questionable whether a commander could be held liable in a domestic court-martial for the unlawful acts of the commander's subordinates based on the Yamashita "should have known" standard.

   a. Command Responsibility is a theory of criminal liability that traditionally has only been applied in international armed conflicts. It does however appear in the ICTY and ICTR statutes.

   b. It is U.S. Army Policy that soldiers be tried in courts-martial rather than international forums. FM 27-10, The Law of Land Warfare, para. 507 (July 1956).

   c. No separate crime of command responsibility or theory of liability, such as conspiracy, for command responsibility in UCMJ.

   d. 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 negligence based knowledge, is required.

      (1) 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. Captain Medina was not physically present at My Lai at the time of the crimes and was acquitted of the charges.

      (2) Accordingly, it appears that in domestic courts-martial, a prosecutor must establish actual knowledge on the part of the accused. *See U.S. v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973); *U.S. v. Medina*, C.M. 427162 (A.C.M.R. 1971).

V. THE PROSECUTION AND DEFENSE 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 when the warrior class asserted its right to punish knights who 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 Jurisdictional Bases.

1. International Tribunal.

   a. Ad hoc.

   b. UN Charter.

   c. Separate treaty.

2. Constitutional.

   a. Congress has the power to define and punish offenses against the Law of Nations. U.S. Const., art. I, § 8(10).

   b. Congress has the power to "provide for the common defense." Art. I, § 8(1).

   c. Congress has the power to provide and maintain a Navy, Art. I, § 8(13), and to raise and support Armies. Art. I, § 8(12).

   d. Congress is given authority to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Art. I, § 8(11).

e. Congress has the authority "To make rules for the Government and Regulation of the land and naval Forces." Art. I, § 8(14).

f. Congress has the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8 (18).

g. The President is the "executive Power." Art. II, § 1(1), who has the duty to "take Care that the Laws be faithfully executed." Art. II, § 3.

h. The President is the Commander in Chief of the Army and Navy, Art. II, § 2(1), and has the power to appoint and commission officers of the United States. Art. II, § 3(1)

i. Treaties are the supreme law of the land. Art. VI, cl. 2. *See generally Ex Parte Quirin*, 317 U.S. 1, 26 (1942) (reviewing constitutional underpinnings for military commissions).

3. Statutory

a. UCMJ, art. 18. Authorizes the military to try by general court-martial anyone subject to trial for violations of the law of war.

b. UCMJ, art. 21. Authorizes the use of military commissions, tribunals, or provost courts to try individuals for violations of the law of war.

c. 18 U.S.C. § 2441. Authorizes the prosecution of individuals in federal court if the victim or the perpetrator is a U.S. national (as defined in the Immigration and Nationality Act) or member of the armed forces of the U.S., whether inside or outside the U.S..

(1) After the My Lai incident, several soldiers were able to escape prosecution because they had ETS'd and no longer were subject to the UCMJ.

(2) Jurisdiction attaches if the appropriate accused commits:

(a) A Grave Breach.

(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 U.S. becomes parties to either of the Protocols.

(d) Violations of Protocol II to the Amended Conventional Weapons Treaty.

C. The Choice of Forum

1. International Tribunals.

a. Because no permanent international court for the trial of war crimes exists, this category of forum requires ad hoc creation by special international agreement, as occurred in the creation of the International Military Tribunal at Nuremberg by the London Agreement of 8 August 1945, and as occurred in the provision for subsequent proceedings at Nuremberg by Control Council Law No. 10 of 20 December 1945. *See generally* DA Pam 27-161-2 at 224-33.

b. International Tribunals for the Former Yugoslavia and Rwanda were established by UNSC Resolutions. The UNSC exercised its authority under Chapter VII of the U.N. Charter to take measures to restore international peace and security. UNSC resolutions are binding on all UN Member States. UN Charter, arts. 48, 49.

2. General Courts-Martial.

a. Punishment may be any permitted by the law of war. UCMJ, art. 18.

b. For a capital case, the court must consist of a military judge and not less than five members. UCMJ, arts. 16, 18.

c. All rights and procedures provided under the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles shall apply. *See* MCM, pt. I, & 2.b.(1).

3. Military Commissions.

a. Have concurrent jurisdiction with general courts-martial. UCMJ, art. 21.

b. Historically used not only for war crimes trials but also for violations of Occupation Ordinances and orders of Theater Commanders. *See e.g.,* OPPENHEIM § 172 ("But an occupant may, where necessary, set up

military courts instead of the ordinary courts . . . ."). *See also* FM 27-10, & 373 (noting that in situations dictating the suspension of the ordinary courts of justice of the occupied territory, "the occupant may establish courts of its own and make this measure known to the inhabitants.").

(1) Authority Under U.S. Municipal Law. "[Military commissions have jurisdiction] with respect to offenders or offenses that by . . . the law of war may be tried by military commissions, provost courts, or other military tribunals." UCMJ, art. 21.

(2) Have withstood statutory, treaty-based, and constitutional challenges before the Supreme Court. *See Ex Parte Quirin,* 317 U.S. 1 (1942); *In Re Yamashita*, 327 U.S. 1 (1945).

(3) 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).

(4) In theory, could provide very limited evidentiary and procedural formality, see e.g., *Yamashita,* 327 U.S. 18, and a very streamlined appeal process. *Cf. Eisentrager v. Forrestal*, 174 F.2d 961 (1949) (finding that German nationals, confined in custody of the U.S. Army in Germany following conviction by military commission of having engaged in military activity against the U.S. after surrender of Germany, had substantive right to writ of habeas corpus to test legality of their detention).

(5) But treaty obligations provide a floor of procedural rights, at least as to offenses by prisoners of war, which preclude military commissions in this category of cases.

(a) *See* GPW, art. 102 ("A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed."); GPW, art. 85 ("Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.").

(i) *Cf. Yamashita*, 327 U.S. 22 (construing predecessor to art. 102 as applying only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war and not to pre-capture offenses).

(ii) *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).

4. Forum Considerations Connected to Status of the Accused.

a. U.S. soldiers. Tried at court-martial under appropriate provisions of the UCMJ or if separated from the military, possibly 18 U.S.C. § 2441.

b. Civilians Accompanying the U.S. Forces.

(1) If a declared war, then same forum as for U.S. soldiers. *See* UCMJ, art. 2(a)(10).

(2) UCMJ jurisdiction, both personal and substantive, over civilians accompanying the force exists only during "time of war." UCMJ, Art. 2(10). This time of war qualifier has been interpreted to require an actual declaration of war. Therefore, civilians accompanying the force may not be charged with violations of the UCMJ unless they are accompanying the force in a declared war. *U.S. v. Averette*, 41 C.M.R. 363 (1970). However, in theory, it may be possible to try civilians, both American and foreign, at a court-martial for war crimes, rather than for specific violations of the UCMJ, even where war has not been officially declared. UCMJ, Art. 18 not only grants substantive UCMJ jurisdiction over civilians that meet the personal jurisdictional requirements of Art. 2(10), but it also states that, "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal...." There have been occasions where both US and foreign civilians, not accompanying the force, have been tried by US military tribunals for law of war violations. *US v. Schultz*, 4 C.M.R. 104 (1952); *Madsen v. Kinsella,* 343 U.S. 341 (1952); *Johnson v. Eisentrager,* 339 U.S. 763 (1950); *Ex Parte Quirin,* 327 U.S. 1 (1942). Although all of these cases either involve law of war violations that occurred during a declared war or during

occupation, they stand for the proposition that jurisdiction over law of war violations may exit even where jurisdiction based on an accompanying the force theory may not.

c. Enemy Prisoners of War and Civilians.

(1) For post-capture offenses, try by general courts-martial if civilian. If a POW, try by general courts-martial or at other appropriate level of disposition under the UCMJ. *See* UCMJ, art. 2(a)(9).

(2) For pre-capture offenses, try civilians by either military commission or general courts-martial. Try POW by general court-martial or at other level of disposition under UCMJ as would be appropriate for a U.S. soldier similarly charged.

5. Potential Defenses. *See generally* R.C.M. 916; DA Pam. 27-161-2 at 245-251.

a. Military Necessity. Action was demanded by military circumstances and was done to prevent a greater harm; does not apply as a defense to the taking of human life.

b. Mistake of Fact. Traditional mistake of fact defense.

c. Mistake of Law. Ignorance of the law may be asserted as a defense in war crimes trials.

d. Duress.

(1) Traditional View. (*Law Reports of Trials of War Criminals,* U.N. War Crimes Commission (1949) Vol. XV, p. 174).

(a) The act charged was done to avoid an immediate danger both serious and irreparable;

(b) There was no other adequate means of escape; and

(c) The remedy was not disproportionate to the evil.

(d) *Einsatzgruppen* case. "Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and

inevitable. No Court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever."

(2) ICTY, *Prosecutor v. Erdemovic*. Duress does not afford a complete defense to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings. (See also R.C.M. 916(h)).

(a) With war crimes and crimes against humanity, large numbers of victims not unusual.

(b) Will be considered in mitigation.

(c) Even though it often coexists with the defense of superior orders, it is not the same defense.

(d) It is irrelevant that the victims will die anyway.

(3) International Criminal Court. Duress is a defense where:

(a) Crime caused by threat of imminent death or of continuing or imminent serious bodily harm against that person or another,

(b) The person acts necessarily and reasonably to avoid the treat,

(c) Provided the person does not intend to cause a greater harm than the one sought to be avoided.

e. Reprisals. Otherwise illegal acts done in response to a prior illegal act by the enemy. Requirements must be met, and it must be properly authorized. See FM 27-10, & 497.

f. Alibi.

g. Superior Orders. *See generally* R.C.M. 916(d); FM 27-10, & 509; Dep't of Navy, NWP 1-14M, Annotated Supplement to The Commander's Handbook on the Law of Naval Operations, & 6.1.4. *See* Military Judge Benchbook, Instruction, 5-8-1, Obedience to Orders - Unlawful Order.

(1) This is a very limited defense:

(2) The accused did not know the order was unlawful; and

(3) A person of ordinary sense and understanding would not have known the order was unlawful.

(4) According to many, Superior Orders is more along the lines of mitigation than a defense. It is not recognized as a defense in the ICTY or ICTR. However, it is clearly a defense in domestic courts-martial. It is also recognized as defense in the ICC treaty.

h. Considerations for the trier of fact when applying the defense of superior orders.

(1) Obedience to lawful orders is the duty of every member of the military.

(a) Failure to obey may place the mission, other soldiers, or civilians at risk.

(b) The soldier should receive a degree of immunity for his willingness to follow the orders of a commander.

(c) The soldier should receive a degree of immunity for being willing to engage in life-threatening activity.

(2) Subordinates cannot be expected scrupulously to weigh the legal merits of orders received in combat.

(a) Virtually all military activities would be criminal if committed in peacetime.

(b) Combat involves a significant deviation from moral norms.

(c) Unlike domestic courts, international forums do recognize that a soldier cannot possibly know all the law on the subject.

(3) Certain laws of warfare may be controversial.

i. Prohibited Defense before the International Criminal Tribunals for the Former Yugoslavia and Rwanda. "Individual Criminal Responsibility: 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." Rwanda Statute.

j. International Criminal Court. The elements of a Superior Orders Defense are:

(1) The person was under a legal obligation to obey orders of the Government or the superior in question,

(2) The person did not know that the order was unlawful; and

(3) The order was not manifestly unlawful.

6. Presumption of Innocence.

7. Penal Sanctions. The punishment for violations of the law of war must be proportionate to the seriousness of the offense. The death penalty may be imposed for grave breaches of the Geneva Conventions. See FM 27-10, & 508.

8. Charging Considerations. *See generally* FM 27-10, & 507b; R.C.M. 307(c)(2).

VI. U.S. OBLIGATIONS, IMPLEMENTING LEGISLATION, AND POLICIES

A. The U.S. shoulders the following obligations as a matter of treaty-made law, and to a less clearly-defined extent, customary international law:

1. To enact laws to ensure effective punishment of those committing grave breaches. *See* GWS, art. 49, cl. 1; GWS Sea, art. 50, cl. 1; GPW, art. 129, cl. 1; GC, art. 146, cl. 1.

2. To search out and either prosecute or extradite those who have committed grave breaches. *See* GWS, art. 49, cl. 2; GWS Sea, art. 50, cl. 2; GPW, art. 129, cl. 2; GC, art. 146, cl. 2.

a. The United States has jurisdiction, as a matter of international law, to try and punish all war criminals that fall into its hands, whether or not the offenses have been committed against Americans. *See* OPPENHEIM § 257c. In this sense, there is universality of war crimes jurisdiction among states. *See* FM 27-10, ¶ 507.

b. Universality of jurisdiction over war criminals was part of customary international law well before the 1949 Geneva Conventions. *See Israel v.*

Eichman, Israel District Court of Jerusalem, Dec. 12, 1961, *reprinted in* II Leon Freidman, THE LAW OF WAR: A DOCUMENTARY HISTORY 1627, 1631-35 (1972); *see also* William B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177-218 (1945).

c. Obligation was limited by the Dayton Peace Accord for Former Yugoslavia for IFOR. "IFOR personnel will have the authority to detain any persons who may be indicted for war crimes, but they will not try to track them down." Operation Joint Endeavor Fact Sheet, p.2, No. 0004-B, (Dec. 7, 1995).

3. To "take measures necessary for the suppression" of simple breaches. *See* GWS, art. 49, cl. 3; GWS Sea, art. 50, cl. 3; GPW, art. 129, cl. 3; GC, art. 146, cl. 3.

4. To provide accused persons "safeguards of proper trial and defense." *See* GWS, art. 49, cl. 4; GWS Sea, art. 50, cl. 4; GPW, arts. 105-08, 129, cl. 4; GC, art. 146, cl. 4.

5. To pay compensation--"if the case demands"--for the grave breaches committed by members of its armed forces. *See* H IV, art. 3; GWS, art. 51; GWS Sea, art. 52; GPW, art. 131; GC, art. 148.

B. U.S. law and policy operate to discharge these obligations.

1. New U.S. legislation has been passed to meet these obligations.

a. 1996 National Defense Authorization Act (NDAA) redefined "war criminal" to include war criminals indicted by the Tribunals for the Former Yugoslavia and Rwanda.

b. 1996 NDAA amended the extradition law to allow for extradition by the U.S. to the Tribunals (non-states).

c. 1996 War Crimes legislation created a established federal jurisdiction over those who commit a grave breach on a U.S. national or member of the armed services, and over U.S. nationals and members of the armed services who commit a grave breach on another. The law was recently amended to allow for prosecution of violations of Common Article 3, certain violations of the Hague Convention, and for violations of Protocol II of the Amended Conventional Weapons Treaty. 18 U.S.C. § 2441.

2. As discussed below, Congress has provided general courts-martial and military commissions with requisite authority to try and punish war criminals effectively. UCMJ, arts. 18, 21.

   a. Because the international law of war is part of the law of the land, see U.S. Const., art. VI, these courts can directly apply international law in trials, outside the U.S., of enemy personnel charged with war crimes. No recourse need be made to substantive criminal statutes of the U.S.. *See* FM 27-10, & 505e.

   b. Violations of the law of war committed within the U.S. by those not subject to the punitive articles of the UCMJ will usually constitute violations of federal or state criminal laws. They should be prosecuted under these municipal laws. *See* FM 27-10, & 507b.

   c. Violations of the law of war that constitute grave breaches or violations of Common Article 3 are now subject to prosecution under federal law, if the perpetrator or the victim is a national of the U.S. or a member of the U.S. armed forces, if the perpetrator is found in the U.S. after the crime is committed, or if such activity occurs within the U.S.. War Crimes Act of 1996, 18 U.S.C. § 2441.

   d. Violations of the law of war committed by persons subject to the UCMJ usually will constitute violations of the UCMJ and, if so, will be prosecuted thereunder. *See* FM 27-10, & 507b.

3. Executive branch policies require the prompt reporting and investigation of alleged war crimes as well as appropriate disposition of resulting cases under the UCMJ. DoD Dir. 5100.77 at ¶ C.3. & E.2.e.(2)-(3); FM 27-10, & 507.

   a. The U.S. Army has designated its Criminal Investigation Command as an investigative asset. *See* Dep't of Army, Regulation 195-2, *Criminal Investigation Activities* at ¶ 3-3(7) (30 Oct. 1985).

   b. The Army has designated Reserve Component International/Operational Law Teams to investigate and report on violations of the law of war. See Dep't of Army, Regulation 27-1, Judge Advocate Legal Service at ¶ 11-6b(1) (3 Feb. 1995).

   c. If involved in a prolonged armed conflict, a directive at the level of the unified combatant command or lower will likely dictate a specific investigative procedure.

(1) *See e.g.,* Headquarters, Military Assistance Command, Vietnam, Directive 20-4, Inspections and Investigations of War Crimes (18 May 1968), *reprinted in* Major General George S. Prugh, LAW AT WAR: VIETNAM 1964-1973 136-39 (1975);

(2) *See also* Headquarters, U.S. Armed Forces Central Command, Regulation Number 27-25, Reporting and Documentation of Alleged War Crimes (9 Feb. 1991) (Persian Gulf conflict).

4. The foregoing investigative policies and procedures, combined with the law of war training program in place in the U.S. armed forces, discharge the obligation to suppress breaches. *See, e.g.,* Dep't of Army, Regulation 350-41, Training in Units, Ch. 14 (19 Mar. 1993). U.S. policy places significant responsibility for the prevention of war crimes with the individual soldier, who is expected to recognize patently illegal orders. *See* FM 27-10, & 509; TC 27-10-3, & 14-16; Dep't of Army, STP 21-1-SMCT, Soldier's Manual of Common Tasks, Skill Level 1, at 727-28 (1 Oct. 1990).

5. Official inquiries yield recommendations on how to avoid similar crimes in the future. The inquiry in the aftermath of the My Lai incident associated the following factors with an increased potential for war crimes in a unit:

   a. High friendly losses.

   b. High turnover rate in the chain of command.

   c. A tendency to dehumanize the enemy by the use of derogatory names or epithets.

   d. Poorly trained or ill-disciplined troops.

   e. Inexperienced troops.

   f. No clearly defined enemy.

   g. Unclear orders.

   h. "Body-count" syndrome. *See e.g.*, Lieutenant General W.R. Peers, THE MY LAI INQUIRY 229-237 (1979). By inculcating the lessons of such incidents through instruction, officers participate in discharging the U.S. obligation to suppress both grave and simple breaches.

6. Using authority derived from statute, *see* UCMJ, art. 36, the President prescribes rules governing pretrial, trial, and post-trial procedures that comply with GPW, arts. 105-08.

APPENDIX

War Crimes Act of 1996 (as amended)

18 U.S.C. § 2441. War crimes

(a) Offense.--Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.--The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition.--As used in this section the term 'war crime' means any conduct--

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non- international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

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, Preamble, art. 1.

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 SOFA's 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. JA's 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. JA's 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, *supra*, 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,

(7) a consistent pattern of gross violations of internationally recognized human rights[25]

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.[26]

(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;

(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.

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[25] 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.

[26] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27).

(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."[27]

(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."[28]

(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 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.**

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[27] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 702.

[28] Id. § 702 k.

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]."[29] 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 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.

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[29] FM 27-10, supra note 9, at para. 369 and GC, supra note 3, at art. 64.

(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 are 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.[30]

   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 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.

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[30] 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.

(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 emerge 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, JA's 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 (attached).

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 categories 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

VIII. 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)[31]:
   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."[32]

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[31] 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 a internee camp. AR 190-57, para. 2-12.

[32] 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 CINC 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.[33]

   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.

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[33] 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 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).

(6) 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 a clear and principled criteria.

(2) Draft an 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).

C. 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.

D. 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.

E. No detainee shall be subjected to cruel, inhuman, or degrading treatment. Univ. Declar. of Human Rights, Art. 5.

F. Detain away from dangerous areas. GC, Arts. 49 and 83.

G. The place of detainment must possess (to the greatest extent possible) every possible safeguard relative to hygiene and health. GC Art. 85.

H. 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.

I. 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.

J. 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.

K. Adverse decisions on appeals must (if possible) be reviewed every six months. GC, Art. 78.

L. Detainees retain all the civil rights (HN due process rights), unless incompatible with the security of the Detaining Power. GC, Art. 80.

M. Detainees have a right to free medical attention. GC, Arts. 81, 91, & 92.

N. The Detaining Power must provide for the support of those dependent on the detainee. GC, Art. 81.

O. 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.

P. Forwarding Correspondence.

1. In absence of operational limitations, there are no restriction 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 on 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 which 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 conform U.S. law to the 1967 RP.

   a. Applies only to refugees located inside the U.S.[34]

   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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[34] 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, para 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.

CHAPTER 10

LAW OF WAR: METHODS OF INSTRUCTION

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 H.R.].
2. Geneva Conventions 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. DoD Directive 5100.77, *DoD Law of War Program* (1998).
4. Dept. of Army, Field Manual 100-5, Operations, Chapter 2, (14 June 1993) [hereinafter FM 100-5].
5. Dept. of Army, Field Manual 27-10, THE LAW OF LAND WARFARE (18 July 1956) [hereinafter FM 27-10].
6. Dept. of Army, Field Manual 27-2, YOUR CONDUCT IN COMBAT UNDER THE LAW OF WAR, 10 November 1984) [hereinafter FM 27-1].
7. Dept. of Army, Regulation 350-41, TRAINING IN UNITS (19 March 1993) [hereinafter AR 350-41].
8. Dept. of Army, Training Circular No. 27-10-1, SELECTED PROBLEMS IN THE LAW OF WAR (26 June 1979) [hereinafter TC 27-10-1].
9. Dept. of Army, Training Circular No. 27-10-2, PRISONERS OF WAR (17 September 1991) [hereinafter TC 27-10-2].
10. Dept. of Army, Training Circular No. TC 27-10-3, INSTRUCTOR'S GUIDE - THE LAW OF WAR (12 April 1985) [hereinafter TC 27-10-3].
11. Dept. of Navy, Marine Corps Order 3300.3, MARINE CORPS LAW OF WAR PROGRAM (2 August 1984) [hereinafter MCO 3300.3].
12. Dept. of Army, Soldier Training Publication No. 21-1-1 SMCT, SOLDIER'S MANUAL OF COMMON TASKS (1 October 1985) [hereinafter Soldier's Manual of Common Tasks].
13. United States Army, The Judge Advocate General's School, U.S. ARMY, OPERATIONAL LAW HANDBOOK (JA 422)(2001) [hereinafter OPLAW HANDBOOK]

I. INTRODUCTION.

A. Not Just An Extra Duty.

1. Operational Law Training Represents The First Opportunity for Junior Judge Advocates to Practice Operational Law. Operational Law Training, whether it be Code of Conduct, Law of War, Rules of Engagement, or Human Rights Familiarization training is an essential part of what judge advocates do. It represents the first opportunity for most judge advocates to become involved in the area of Operational Law. In addition, it provides an opportunity for young judge advocates to study this important area of their practice.

2. An Opportunity To Work With Commanders and Operational Planners/Trainers. One of the commander's most important responsibilities is to train his troops to fight wars and successfully execute any type of military operation. Operational law training provides judge advocates an opportunity to become involved in this function. In doing so, lawyers

establish important relationships and gain the confidence of other key members of the commander's staff. Judge advocates that display enthusiasm and competence in the construction and execution of a training program forge contacts and build confidence with their client.

II. THE ROLE OF THE JUDGE ADVOCATE.

A. Generally. Military lawyers have performed remarkably well in the operational law arena because they have a firm grasp upon their role as members of the staff. Their efforts to establish operational law programs has benefited from their relationship with staff members and subordinate commanders.

B. To the soldier: Trainer. Operational lawyers should remember that they have an important role to play as a unit trainer. They should not, however, confuse this role with their role as advisor to the commander. The training program and training objectives are dictated by the commander. The nature of the training is based upon the advice given by the lawyer and decisions made by the commander. Obviously, the lawyer who has won the confidence of his client will receive valuable latitude in constructing a meaningful and successful operational training program.

C. To the commander: Advisor. Fortunately, most military lawyers quickly gain the reputation as one of the brightest members of the staff, and this reputation often serves as the foundation for building a training program. Conversely, the judge advocate who briefs his commander on his desire to construct a first rate operational law training program within the commander's unit can the further the confidence of the commander.

D. Understanding Your Weaknesses. Although the commander, most members of his staff, subordinate commanders, and soldiers respect judge advocates; they also harbor suspicions that military lawyers have not endured the hardships of the field and many of the other experiences that harden soldiers into professional warriors. Although the goal of all Army judge advocates is to become soldiers who happen to be lawyers, the suspicion referred to above is based upon sound logic. Unlike line officers, military lawyers do not spend very much time in the field, training on military weapons systems and related equipment, or simply learning the art of soldiering. Soldiers and their leaders know this and it generates a suspicion that these "combat JAGs" are not true soldiers, and this creates a credibility gap. Judge advocates must accept this reality and work to reduce the credibility gap.

E. Reducing The Credibility Gap. The best way to reduce the gap is to never offer the soldiers that you train any evidence that lends credence to their suspicion. You must, without exception, appear as a professional soldier. Your uniform, hair, grooming, and bearing must be flawless. You command of military terms and vocabulary must be equally impressive. Finally, your knowledge of the unit's mission, past missions, place in history also serve to reduce the gap. For example, a military lawyer who walks into a battalion classroom and looks as professional (or more professional) as the company commander who introduces him begins his class with the respect that all officers in our Army automatically command. When that same lawyer punctuates his class with informed references to equipment and weapon systems organic to that unit he will find that his audience becomes more engaged with every reference and example that he provides. This is because he has increased the relevance of his class, while bolstering his own credibility. Finally, if that same lawyer has taken the time to read and integrate into his teaching plan examples from the unit's past operational successes, he will have once again magnified the value of his class.

F. Mastering The Corporate Model. Recently, members of the Corps have engaged in a quiet debate regarding what MG Michael Nardotti refers to as the corporate model. General Nardotti proffers that the Corps should aspire to a corporate model. Others argue that the Army is nothing like Chrysler Corporation or IBM and that judge advocates must by definition be very different from corporate counsel. A review of the imperatives of a good corporation lawyer reflect that there may be something to the corporate model.

1. For example, a good IBM lawyer must understand his client's mission, goals, and problems. Similarly, he must be well versed in the client's personnel issues, its equipment and production techniques. The IBM lawyer must be fluent in the language of technology and automation. Finally, he must be able to grasps the major and subtle issues that confront the industry. In short, he must be *a corporate officer who just happens to be lawyer.*

2. The obligation of the judge advocate is nearly identical to that of the corporation lawyer. He must understand the supported unit's mission. He must understand the tactics, techniques, and procedures of the Army and the supported unit. He must be fluent in the military vocabulary and understand the equipment and weaponry of his unit. Last, he must understand the motivations and imperatives of the military leader and the soldiers who are so ably led. In short, he must be *a soldier who just happens to be a lawyer.*

G. Soldier - Lawyers and Training. The connection between lawyers who have a firm grasp on the profession of arms and good operational training is obvious. Training programs that are constructed by soldiers who happen to be lawyers will prove to be relevant, realistic, interesting, and dynamic.

III. THE TRAINING CONTINUUM.

A. The Left End of The Continuum. All Army training occurs along a continuum. At one end of the continuum is ineffective training, done simply to satisfy unit training records. It is probably done with little or no thought, without prior planning, and under less than ideal training conditions. The judge advocate who receives the last minute phone call, at 0715, to provide a law of war class to a battalion of soldiers in the brigade basketball gym is the prime example of the shallow end of the training continuum. The trainer will not be prepared. The audience, having just finished physical training, will not be in the proper mode to receive information. Finally, the gym is hot and not designed for its acoustical characteristics. The result is bad training.

B. The Right End of The Continuum. Training that occurs at the deep end of the training continuum is the product of a well thought out training program that required the lawyer to work with unit leaders and members of the commander's staff. It is part of an overall operational law training program. For example, it is a law of war class taught in a battalion classroom by the supported unit's own noncommissioned officers (who have been trained by the unit judge advocate). It is based upon a training product generated by the lawyer in coordination with unit leaders. The training product is also based upon the nature of the unit, its mission, and its recent operational and training history. Because of these elements it is relevant and realistic. The result is good training.

IV. TRAIN IN THE CLASSROOM OR THE FIELD?

A. Actually, a good training program offers training in both the classroom and the field environment. The most successful programs report that initial training is done in the classroom to small groups of soldiers. Level two training is done in a field environment. It is here where reinforcement and correction is made most effectively.

B. Classroom training should be primarily conducted by the same group of professionals that conduct most of the Army's training: the Noncommissioned Officer (NCO). The operational law training program should provide for training the NCOs first. Judge advocates should conduct this training.

Thereafter, judge advocates should continuously evaluate the program by dropping into classes and participating in the training. Many judge advocates recommend team teaching with NCOs as a method of evaluating how unit training is progressing.

V. RELEVANCE AND REALISM.

A. Build Classes Around The Supported Unit's Mission and Mission Essential Task List (METL). Training that is not relevant to the training audience has no value. For example, if the training audience is made up of an aviation company, law of war training that is focused upon infantry tactics is not relevant and has no value. The best training is based upon familiar terms and mission tasks. This type of training permits soldiers to see the connection between teaching objectives and their assigned tasks.

B. Use Scenarios. During both classroom and field training events, the use of scenarios allows soldiers to understand legal principles in the operational context. For example, an instructor can tell a classroom of soldiers that they must anticipate attack and respond with force only if they identify a threat that has either (1) been declared hostile, (2) commits a hostile act, or (3) manifest hostile intent. Only a small percentage of students will walk out of the classroom with a firm grasp of what the instructor was talking about. However, had the instructor expressed these principles in terms of real world scenarios, most of the students would have gained a good appreciation for the teaching points.

C. An example of a Rules of Engagement Scenario. During a Peace Enforcement Operation a patrol of soldiers has frequently witnessed host nation police forces beating host nation civilians. They have been informed that the local police are very dangerous and to avoid encounters with them when possible. The soldiers have, however, a duty to intercede whenever they see an ongoing serious criminal act, such as aggravated assault. Today, they witness a local policeman beating a civilian with the butt of his rifle. As the U.S. patrol moves in, several policeman reach for their sidearms. How should the members of the U.S. patrol react? The answer is based upon the concept of hostile intent. Based upon the totality of the circumstances, the police officer has manifested hostile intent and the soldiers may now defend themselves using proportionate force (which may include deadly force). Scenarios like this provide an excellent springboard for discussion, wherein, soldiers can ask questions and gain a better understanding of the legal concepts that serve as the foundation for the training standards.

D. Where Possible Use Existing Scenarios and Training Products. Although the prime directive of good training is making the training relevant by tailoring it to the individual unit, this can be done without creating an entirely new training product. The prudent judge advocate will call around to other units and ask for copies of operational law training packages (a number of units have very fine packages; i.e., 1st Armored Division and 82nd Airborne Division). In addition, there is a wealth of training materials found in existing Training Circulars and Pamphlets. Many of these publications are listed under the reference section on page one of this outline.

E. Integrate Recent Training Events or Operations Into The Training Program. One of the best ways to make teaching points relevant is to connect them directly with events that the unit recently encountered during a recent field training exercise or actual operation. The student is able to see why the class is important and how it relates to their real world mission. For example, after discussing a recent training event with the supported unit's commander, a battery commander within Division Artillery, you learn that his unit accompanied deep maneuver forces through its self-propelled or towed capability beyond the Forward Line of Own Troops (FLOT). The battery was very vulnerable during this phase of the operation and moved frequently to prevent the enemy from detecting its exact location. A number of excellent law of war principles could be built into such a scenario. For instance, how should battery soldiers react to discovery by a local civilian, who might travel back to her home and report the unit's location to local authorities?

F. Integrate Unit Weaponry and Equipment into the Training Event. By integrating equipment and weapons familiar to the training audience into training scenarios students immediately become interested in the class. Soldiers spend a great deal of time working with, maintaining, and using unit equipment and weapons. In most instances, soldiers feel that they own these systems and are proud of the capabilities and even the limitations of these items. Making reference to them during operational law training adds realism to the training and makes it more interesting for soldiers that spend most of their waking hours with these systems.

G. Use role players.

H. Evaluate. Establish an evaluation system with goals and milestones. Each soldier should understand whether or not their performance met training standards. Whenever possible, the GO/NO GO evaluation of a field exercise should be supplemented with a comprehensive classroom after action review

where soldiers are walked through the training event and where appropriate responses are highlighted and substandard responses are discussed.

VI. WHAT DO WE TEACH?

A. The Law of War: The Soldier's Rules. The Army has established a body of minimum knowledge required by all soldiers.[35] The following basic law of war rules, referred to as "The Soldier's Rules," are taught to all soldiers during their entry level training and again is reinforced by training in units.

1. Soldiers fight only enemy combatants.

2. Soldiers do not harm enemies who surrender. Disarm them and turn them over to your superior.

3. Soldiers do not kill enemy prisoners of war.

4. Soldiers collect and care for the wounded and sick, whether friend or foe.

5. Soldiers do not attack medical personnel, facilities, or equipment.

6. Soldiers destroy no more than the mission requires.

7. Soldiers treat all civilians humanely.

8. Soldiers do not steal. Soldiers respect private property and possessions.

9. Do your best to prevent violations of the law of war; report all violations to your superior, a judge advocate, a chaplain, or provost marshal.

B. Rules of Engagement (ROE). During any type of operation knowledge of the rules of engagement is critical. This is particularly true for Operations Other Than War, where the right to use force is typically more restricted. A number of units have adopted standardized ROE training programs, which focus upon the self-defense measures contained in the CJCS Standing Rules of Engagement (SROE). These programs establish a base-line ROE training standard, which has the versatility to apply in any type of operation. Soldiers are trained to the baseline ROE and commanders and their staffs on the procedures for receiving, disseminating and supplementing ROE by using ROE conditions or ROECONS. I recommend that judge advocates integrate such a program into their overall

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[35] DEP'T OF ARMY, REGULATION 350-41, TRAINING IN UNITS, 14-1 (19 Mar 1993) [hereinafter AR 350-41].

operational law training program. The XVIII Airborne Corps recently adopted a standardized base-line ROE program, based upon the mnemonic RAMP.

C. Human Rights Familiarization. In MOOTW, the restoration of basic human rights is often a key mission objective. In such an operation it is important that soldiers understand that they have a two-prong responsibility. First, they must serve as a shining example of a nation that possesses a deep respect for individual human rights. They do this by understanding and conducting themselves in accordance with the basic human rights law. Second, they must be able to recognize human rights violations committed by host nation citizens and government agents (police officers), and know what action to take in regard to such violations. The basic rules are as follows:

1. Respect human life.
2. Treat all persons humanely.
3. Do not commit sexual abuse.
4. Do not torture.
5. Do not take hostages.
6. Report crimes and human rights violations to proper authorities.
7. Avoid the unnecessary destruction of property.

D. Code of Conduct Training.

VII. COMMAND INVOLVEMENT

A. In planning.

B. As Integrated Teachers.

C. Training the Trainers.

D. In Sponsoring and Lending Credibility To the Program

VIII. PRACTICE POINTERS.

A. Have Faith in the Student.

B. Be Enthusiastic - Be an Obvious Believer.

C. Pose the Right Questions.

D. Use History and Current Events.

E. Make it Fun for the Student and Yourself.

F. Recognize the Importance of your Subject.

G. Be Relevant and Prepared or Be Somewhere Else.

H. Stir Their Souls.

IX. CONCLUSION.

APPENDIX A

OPERATIONAL LAW TRAINING: TOUGH QUESTIONS PRACTICAL EXERCISE

Those who have taught the Law of War are familiar with the doubts concerning this subject often expressed in the classroom and in training areas. These doubts may be manifested in many forms, but the most difficult to counter are those questions based on certain elements of truth and broad generalizations that, while true for a particular time or place (i.e., one-time incidents), do not reflect the norm. Failure to adequately answer or address these questions or statements concerning the Law of War frequently results in the loss of instructor credibility and leads to a further lack of respect for the Law of War. The following discussion addresses some of the more difficult questions associated with the Law of War.

1. "These rules are all well and good, but if no one else follows them, why should we?"

Response: This question incorrectly assumes that the Law of War is not followed by most nations. As all but a small handful of countries have signed and ratified the Geneva and Hague Conventions, there is evidence that the great majority of nations consider the Law of War a binding obligation. Despite lapses, the Law of War has been applied by most nations during armed conflicts. The Falklands War demonstrated, on numerous occasions, the effectiveness of the Law of War in limiting unnecessary suffering (e.g. the British and Argentines shared medical information and established a combat-free medical zone). The Grenada intervention also demonstrated that the Law of War will be applied by most countries when it is in their interest to do so. This concept of national self-interest has always been one of the principal bases for applying the Law of War. Without such self-interest, many, if not most, nations would not adhere to the Law of War. National self-interest is shaped by a number of different factors:

a. Reciprocity: This is one of the principal factors influencing adherence to the Law of War. Essentially, this is an international quid pro quo: We adhere to the law because we want other nations to do so. Obviously, if we do not comply with the Law of War, it will not be possible to convince potential or actual adversaries that it is in their self-interest to do so.

b. Violations of the Law of War Frequently Lead to Loss of Public Support for the War: The experience of the U.S. and most other western nations has been that media reports of actual or alleged Law of War violations usually lead to diminished public enthusiasm or support for the war effort. This fact is important from the standpoint that decisions to commit and maintain military forces of democratic nations are much more influenced by public opinion than are similar decisions in totalitarian states. This was a lesson learned time and again during the Vietnam War. The U.S. military will be held to an exceptionally high standard of conduct by the American public.

c. Violations of the Law of War May Lead to Increased Enemy Resistance: When military personnel believe that if captured, they will be mistreated by the enemy, they fight more tenaciously and will not surrender. This situation was graphically illustrated on the Eastern Front in WWII, as the Germans and Russians both mistreated, or were perceived as mistreating, POWs. The Japanese increased their soldiers' will to fight by telling them that, upon capture, they would be mistreated by the Americans. This is a natural human reaction to reports of atrocities by an enemy military force. Throughout our history, slogans, such as "Remember the Alamo" (the killing of all the defenders at the Alamo mission in San Antonio, Texas, during the Texas war of independence) and "Remember Bataan" (the mistreatment of U.S. POWs during the Bataan death march) have served as rallying cries to stir American soldiers to fight more aggressively.

d. Violations of the Law of War Detract From Mission accomplishment: Engaging in random and indiscriminate use of military force is not an efficient use of scarce resources and does not add to the accomplishment of the mission.

e. Adherence to the Law of War Is Essential to Internal Discipline: This is very closely tied to the preceding factor. Military forces are uniformly characterized by their exacting standards of discipline. Adherence to the Law of War adds to, and complements, this internal discipline. As stated above, violations of the Law of War do not advance accomplishment of the mission.

f. Adherence to the Law of War Facilitates the Restoration of Peace: History effectively demonstrates that the enemy of today may well be the ally of tomorrow. At some point in the future, the U.S. will wish to resume normal relations with a past adversary. This becomes, then, a very practical consideration. Most wars have ended with some form of negotiated peace, rather than the complete destruction of the enemy. It is pointless to so embitter an enemy through violations of the Law of War that it becomes impossible to negotiate a peace and a return to normal relations.

Finally, as Americans sworn to uphold the Constitution, our soldiers should know that treaties ratified by the U.S. are part of the supreme law of the land (U.S. CONST. art. VI , cl 2). Thus, the U.S. is bound, by law, to comply with these treaties governing land warfare.

2. "Some of the rules are just ridiculous! For example, how can it be humane to allow the commander to use napalm in combat, but not allow him to use tear gas?"

Response: This statement confuses two separate issues.

a. The general rule against causing unnecessary suffering.

b. The Presidential Executive order on Riot Control Agents (E.O. 11850) which is aimed at preventing escalation in the use of chemical weapons.

Napalm is a legal weapon. The same legal targeting considerations that govern the use of other weapons in the U.S. inventory also apply to napalm. These considerations include the following.

1. Is it a lawful target?

2. Are there protected persons or places nearby?

3. Will the use of the particular weapon be indiscriminate in its effect, and, if so, is there another weapon available that will be more discriminate?

4. Is there a military reason for choosing this weapon over another weapon?

5. Will the intended use of the weapon cause unnecessary suffering (that which is needless, superfluous, or grossly disproportionate to the advantage gained by its use)?

E.O. 11850 places limits on the commander's authority for first use of Riot Control Agents (and Herbicides) in combat situations. The purpose of the E.O. is to ensure that U.S. forces do not initiate offensive chemical actions that might lead to the enemy's escalated use of lethal or incapacitating agents. The E.O. states that Presidential approval is required for first use and, then, only for essentially defensive measures undertaken to save lives.

3. "If we are on a sensitive mission behind enemy lines and we end up taking prisoners, How can you expect us not to kill them? It is either them or us !!!

Response: This question is presented in many different forms; however, it always describes a situation in which the soldier seems to have no choice but to kill prisoners. As with any hypothetical, you usually have only a few facts upon which to base your decision.

It is never lawful to kill prisoners for operational expediencies. Necessity has been offered as an excuse for many notorious war crimes (e.g., the court-martial of BG Jacob H. Smith for giving the order to a subordinate commander in the Philippines in 1901 to "not burden himself with prisoners" if they impaired the efficiency of his command; or the statement by General Sepp Dietrich of the Sixth Panzer Army prior to the Battle of the Bulge, urging subordinates ... "to remember the victims of Allied bombings of German cities and to shoot prisoners . . . when combat conditions required it." Sixth Panzer units were involved in the Malmedy Massacre). Once a soldier realizes that this absolute prohibition exists, he is less inclined to rationalize circumstances justifying the murder of prisoners.

To reinforce this prohibition against killing POWs, it is often useful to point out the practical considerations that support the rule.

a. US soldiers who kill prisoners, and are later captured by the enemy, will likely be tried as war criminals and sentenced to death.

b. Once the unit has encountered the enemy or has taken POWs, the unit's presence (and therefore, under the hypothetical, the mission) has been or will soon be compromised. Even if the POWs are killed, they will likely be missed and their unit will initiate a search for them. If they are military personnel (as posed by the hypothetical), their general location will be known, and a search of that area will be conducted if they do not report to their headquarters or parent unit. This fact is true, whether the POWs are protected as the law requires, or killed, as the hypothetical proposes. Therefore, killing POWs may not enhance the likelihood of mission accomplishment.

c. Finally, killing POWs constitutes murder. Such acts are never kept secret for long, and, once the crimes are reported, the commander must investigate and prosecute the violators.

Advising the soldier that military necessity will not sanction the killing of POWs is only half of the answer. The problem still exists as to what action may be taken with respect to the POWs. Point out to the soldier that this contingency should have been considered in the mission's planning process. As this does not appear to have been done in the hypothetical posed, the options include leaving a guard with the POWs; taking the POWs with the unit; tying the POWs and leaving them (to be picked up or released later); releasing them and possibly limiting their movement by taking their boots and some of their clothing (obviously, their weapons and radio equipment should be confiscated); or, finally aborting the mission.

As noted above, the reasons for not killing POWs, even when such an action might appear to be required by operational expediency, are both legal and practical. The law (both the Law of War and the Uniform Code of Military Justice (UCMJ)) absolutely forbids it. Furthermore, the execution of POWs fails to serve any practical interests of the U.S. military. A failure to rigorously obey the law in this area will lead to mistreatment of U.S. soldiers who become POWs, a loss of home-front support, and, possibly, a renewed will to resist in the enemy.

4. "There were lots of war crimes in Vietnam which were never reported or prosecuted. I know; my brother served there and told me about them. How do you explain that? Won't our next war be fought the same way?"

Response: As in every war, there were war crimes or violations of the Law of War committed during the Vietnam conflict. If a soldier had knowledge of suspected war crimes, he was obligated to report them. If he did not report them, he was part of the problem. Alternatively, misconceptions concerning the Law of War led people to believe that war crimes had been committed, when, in fact, no violations had occurred. For example r many people erroneously believed that the use of a .50 caliber machine gun against individual enemy combatants was a violation of the Law of War.

Based on our experiences in Vietnam, the Army and the Department of Defense recognized that there was a need for more emphasis on Law of War training for U.S. personnel. In 1974, the Department of Defense responded to this concern by publishing Department of Defense Directive 5100.77, "DoD Program for the Implementation of the Law of War." This directive established, for the first time, a comprehensive Law of War program for all of the armed services. Subordinate commands are directed to ". . . institute necessary programs within their respective commands to prevent violations of the Law of War and ensure that they are subject to

periodic review and evaluation, particularly in light of any violations reported." Guidance is also provided for the purpose of ensuring that all war crimes are reported and investigated.

There were many investigations and courts-martial in Vietnam for offenses that constituted violations of the Law of War. Many people do not realize that the U.S. prosecuted soldiers for violating the Laws of War because these offenses were charged under the substantive criminal articles of the UCMJ (e.g., the unlawful killing of POWs would be charged as murder under UCMJ article 118). To the uninformed, these cases appeared to be routine criminal cases. In fact, over 240 investigations of alleged war crimes were initiated during the Vietnam conflict. These investigations involved allegations of war crimes committed by, or against, U.S. personnel.

5. "The United States is not really serious about the Law of War, since it did not prosecute all the persons involved in the My Lai massacre. How do you explain that?"

Response: As noted above, U.S. soldiers who commit violations of the Law of War are tried for substantive offenses under the UCMJ. The same procedural safeguards afforded every accused are provided persons charged with violating the Law of War. Sufficient evidence must be available to prove the accused guilty beyond a reasonable doubt. The government will not proceed to trial without sufficient evidence. As frequently happens in criminal cases, the prosecutor may know that a war crime has been committed, and suspect a particular individual, but not have enough evidence to support the case. In the aftermath of the My Lai Massacre, twenty-eight officers (ranging in rank from major general to second lieutenant) were investigated for their failure to stop, or report, the war crimes in issue. In addition to those court-martialed, several individuals received adverse administrative sanctions. It may also be necessary to immunize an accused in order to obtain his testimony against others accused of crimes. This may result in insufficient independent evidence for prosecution of the immunized individual. Moreover, when one accused is less culpable than another in a joint criminal enterprise, the commander may exercise administrative options, rather than prosecuting both individuals. For these reasons, and others, rarely will every individual associated with criminal activities involving a significant number of people (either war crimes or other crimes under the UCMJ) be tried by court-martial.

6. "Didn't the US and its allies violate the Law of War when German cities were bombed indiscriminately during World War II? Didn't

the U.S. and its allies engage in carpet bombing of certain urban areas?

Response: There will always be examples of bombing missions that appear excessive or indiscriminate. The loss of life and damage to civilian property caused by the strategic bombing campaigns of World War II resulted from a combination of several different factors. Initially, the Allied Powers announced that they would not attack any civilian population centers, unless the Germans did so first. As the war progressed, it became apparent that Germany frequently targeted civilian population areas (e.g., Warsaw, Rotterdam, Coventry, and London). In reprisal, Prime Minister Churchill ordered attacks on targets in German population areas. These attacks were directed at military objectives, however, such as munitions factories, ball bearing factories, submarine pens, etc.

Several problems contributed to increased civilian casualties. First, high-level bombing was not accurate. This was a particular problem in Germany, as most of the targets were located in urban areas. The enemy's heavy anti-aircraft defenses complicated the bombing missions and frequently led to bombs being dropped over areas that were not targeted. Bad weather and night bombing missions further added to the inaccurate targeting. Finally, some of the Allied bombing of German population areas was undertaken in reprisal for Germany's indiscriminate use of the V-1 (an early version of today's cruise missiles) and the V-2 (the world's first supersonic long-range rocket) against Allied targets in England.

7. "Isn't it true that if soldiers are going to commit war crimes, they are going to do it anyway? What can a lawyer or a commander do to prevent this from happening?"

Response: This is a false assumption, and the question illustrates a lack of understanding regarding war crimes. Soldiers usually commit war crimes out of a sense of frustration and a lack of proper training and leadership. Following the My Lai massacre, a commission headed by Lieutenant General William Peers conducted an exhaustive investigation of the incident and the subsequent cover-up attempts. In its report, the Peers Commission pointed out a series of significant factors that contributed to the incident. These factors should have alerted the command to the problems that eventually occurred as a result of ineffective command and control. The Peers Commission referred to previous reports concerning the mistreatment of Vietnamese civilians by the troops of Task Force Barker. Yet, even in the face of these reports, there was little in the way of positive enforcement (either disciplinary or judicial

action) designed to discourage this activity. Coupled with the failure of the command to monitor the activities of subordinate units, the inaction led to a permissive attitude in subordinate units.

Numerous studies have been conducted detailing factors contributing to the commission of war crimes by soldiers in combat. Although it is impossible to predict or prevent every war crime, just as it is impossible to predict and prevent every domestic crime on an installation, it is possible to identify factors indicating a high potential for the occurrence of war crimes. With this knowledge, the command can take action to ensure that this potential is not realized. The following are some of the factors that the command and the judge advocate should monitor in order to avert war crimes. (These not only indicate the potential for war crimes, but also indicate potential morale problems for the command).

a. High Friendly Losses: Units sustaining high friendly losses are more prone to seek revenge on the enemy. In the case of My Lai, the Peers Commission found that Task Force Barker had sustained a relatively high number of casualties as the result of the enemy's use of mines and booby traps.

b. High Turnover Rate of the Chain of Command: This was always a problem in Vietnam, as the tour of duty was usually a year. The constantly changing leadership in most units weakened the command and leadership structure, a problem that may also occur in future conflicts.

c. A Tendency to Dehumanize the Enemy By Use of Derogatory Names or Epithets: The Peers Commission found this was common practice in Task Force Barker and contributed to the massacre. Terms such as "gook," "slope," "dink," "kraut," "Jap' "hun"' and "bosch," have been used by Americans in past conflicts. In every war, names are developed that inspire hatred for the enemy and, perhaps, make it easier for U.S. soldiers to kill on the battle field. Problems inevitably occur when this attitude carries over to the treatment of enemy civilians and POWs, however. When this occurs, soldiers may begin to view all enemy nationals as less than human and thus treat them with less respect than the law requires.

d. Poorly Trained Troops: The troops assigned to Task Force Barker had received only marginal formal training in several key areas because of accelerated preparation for, and deployment to, Vietnam. These key areas included the Geneva Conventions, POW handling procedures, and rules of engagement (ROE). During any period of prolonged combat, the possibility exists that training will be sacrificed to meet operational requirements. Law of War training frequently receives scant attention

when operational matters are pressing. If this is the case, the judge advocate must ensure that the troops are aware of their responsibilities under the Law of War.

e. Inexperienced Troops: This will always be a problem until new troops are tested in combat. The problem can be minimized through the good leadership of battle experienced Nicosia and officers. During the Vietnam War, many of the units either lacked the combat-experienced leadership when they arrived, or were continually infused with inexperienced troops and leadership.

f. No Clearly Defined Enemy: This was particularly true in Vietnam. The absence of a clearly defined enemy created a high level of frustration among the regular forces attempting to engage the enemy. The Peers Commission Report stated: "The tactical difficulties in ferreting enemy forces out of populated areas, the practical difficulties involved in clearly identifying friend from foe, and a generally widespread knowledge of VC control of the Son My area unquestionably played a major role in the events of Son My."

g. Unclear Orders: Commanders and their staffs must make their orders as clear as possible in order to ensure correct and expeditious compliance by their subordinates. In the area of war crimes, unclear orders have frequently been the cause, or perhaps the excuse, for the crimes committed. Leaders can sometimes communicate unlawful intent through unclear orders and yet retain the argument that these did not commit a crime.

The example frequently cited is the order, "Take care of the prisoners." On its face, it appears perfectly lawful. In the My Lai incident, this order was given, and several individuals later testified that they clearly understood that their superior meant for them to kill the prisoners.

Rules of engagement (ROE) may also cause confusion. The terms Free Fire Zones and Specified Strike Zones were used in several of the Vietnam ROE. Commanders declared these zones free of friendly personnel and allowed subordinates to target anything in these areas for specified periods of time. The idea was to free the soldier from having to coordinate with higher headquarters or local political officials before initiating the use of offensive military force. The Law of War requirement to identify proper military targets was implicit in the ROE, but, in many cases, was not clearly stated. As a result, soldiers felt they no longer had any responsibilities under the Law of War in these designated areas. A popular misconception was that, in such areas, the soldier could kill anything that moved, without first determining whether the target was a legitimate military objective. The judge advocate has a responsibility, in

reviewing ROE, to ensure that misconceptions of this nature are clarified or eliminated.

h. The Body-count Syndrome: During the Vietnam War, a decision was made by certain high-level administration officials that, if the war effort could be quantified, a more effective evaluation could be made of the success of U.S. efforts. This idea led to the body-count syndrome. The concept became an evaluation criterion for the success of units and leaders in the field. The all-important body count became the chief concern of many ground commanders and their staffs. This, in turn, led to pressure to ensure that there was a high body count reported at the conclusion of each operation. At lower levels, this pressure sometimes led to the temptation to either falsify the reports or, to a much lesser extent, to target noncombatants.

i. High Frustration Level Among the troops: This is often the sum effect of all of the other factors. Due to their high losses, inability to identify the enemy, lack of proper training and leadership, and unclear orders, the soldiers experienced a tremendously high level of frustration. This was not what they anticipated when they went into combat. Soldiers thus sought something upon which to vent their frustration. The object of this emotional outlet sometimes became enemy personnel under their control (either POWs or civilians). A judge advocate confronted with this situation should immediately advise the commander of this fact, raise the issue with subordinate commanders, and initiate an aggressive training program.

8. "Suppose you are on a combat mission and your unit has taken heavy casualties. One of sour own men and a POW are seriously wounded and are both in extreme pain. You only have one ampoule of morphine left. Which person do you give it to?"

Response: This scenario would probably never occur in just this way; however, it does raise the issue of proper treatment of enemy wounded. Enemy wounded must be treated in the same manner, and with the same priority of treatment, as U.S. wounded. The triage concept, which focuses medical attention on the most seriously wounded, must be employed to identify the priority of treatment for all wounded, friendly and enemy alike. Medical personnel must determine which individuals are the most seriously wounded and treat them first. If friendly and enemy wounded have suffered the same extent of injuries and have the same need for treatment, the Law of War does not dictate an order of care, and the decision is left to the attending physician or medic. As initially indicated, a scenario in which all factors appear to be equal, and there exists only enough medicine to treat one individual, is highly unlikely.

9. "I have heard that it is illegal to use Dum Dum bullets, yet it is legal to shoot a person with a .50 caliber machine-gun. This doesn't make sense, as both forms of ammunition would cause a similar injury or, even more likely, death. How does the Law of War justify this?"

Response: Prior to discussing the legal issues, it is useful to explain how a Dum Dum or similar round differs from a normal bullet. The latter has a regular symmetrical shape and a hard metal coating surrounding the outside of the round. Dum Dums, hollow points, and soft point bullets have irregular shapes and are designed to flatten out upon striking an object, such as the human body, causing damage greatly in excess of that caused by a normal bullet.

Bullets can be designed and manufactured so as to effect this flattening characteristic, or lawful rounds can be altered in order to achieve this effect (e.g. cutting the point off of or removing the steel jacket from a normal bullet).

The prohibition on the use of Dum Dum bullets is based on the Convention on Prohibiting Use of Expanding Bullets, signed at the Hague, Netherlands, on 29 July 1899. This Convention states, in part:

> "The Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced

The customary practice or usage of nations has adopted this principle as it applies to bullets altered to increase the suffering occasioned by their use.

Hague Convention Number IV, Respecting the Law and Customs of War on Land, dated 18 October 1907, in Article 23 of the Annex to the Convention, states, in part:

> "In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . e. To employ arms, projectiles, or material calculated to cause unnecessary suffering ....." In Paragraph 34b of FM 27-10, the above quoted language has been interpreted to include "irregular shaped bullets ... and the scoring of the surface or the filing off of the ends of the hard cases of bullets."

The use of the .50 caliber machine-gun is perfectly lawful under treaty law and the customary practice of states. Large caliber weapons are in the inventories of almost all nations. Obviously, if a .50 caliber bullet is altered in order to make it an irregular-shaped round that would flatten easily in the human body, this would constitute a violation of the Law of War. The fact that, in some situations, the extent of injury

from a Dum Dum would be the same or, possibly, even less than that of a .50 caliber round, does not render the .50 caliber illegal.

10. "Didn't the United States commit a war crime by dropping atomic bombs on Hiroshima and Nagasaki?"

Response: This is an emotional issue. Seemingly, everyone has an opinion on this issue and, frequently, these opinions have nothing to do with the facts as the U.S. knew them at the time the decision was made to employ atomic weapons.

The U.S. believed that the Japanese government would not accept a demand for unconditional surrender, absent a demonstration of the absolute futility of continued resistance. Although the Japanese Navy and Air Forces had suffered staggering losses to the Allied forces in the Pacific, the Japanese Army still possessed the capacity to continue the fight. The home islands had a well-equipped and well-fed force of over 2 million men. In addition to this, there existed a force of approximately 10 million able-bodied citizens equipped to fight a guerrilla war. The terrain of the home islands was riddled with tunnels and fortified caves in anticipation of an invasion. Throughout the war in the Pacific, no Japanese unit had surrendered, intact, to the Allied forces. There was even less reason to believe that Japanese forces would surrender following an invasion of the home islands.

The Operation Plan for the invasion of Japan, code-named Operation Downfall, had a proposed D-Day of 1 November 1945. The plan estimated that the invasion would require approximately 4.5 million men and that U.S. casualties would number approximately 1 million. Moreover, prior experiences in Okinawa had illustrated the magnitude of potential Japanese casualties. In contrast to the 12,000 American casualties, the Japanese had suffered 100,000 military and 30,000 civilian casualties. The invasion was to occur in stages, beginning with the southern part of the home islands. It was to be the largest single military operation in history, with an initial beachhead of approximately 250 miles. Its scope would dwarf the Normandy invasion of Europe. Finally, even the most optimistic estimates anticipated that it would take one and one-half years to defeat and occupy Japan.

Hiroshima and Nagasaki, both located in the southern part of the home islands, were active centers of the Japanese war effort. Hiroshima served as the headquarters for the Army defending the southern portion of Japan (the intended invasion area). It also functioned as a major military storage and assembly point. Nagasaki was a major seaport and contained several large industrial plants of substantial wartime importance.

Additionally, both cities contained large numbers of "shadow" or "cottage' industries (war goods manufactured in homes and small local factories).

The Japanese had to be convinced that the U.S. was capable of dropping a series of atomic bombs, should resistance continue. The truth was that only two atomic bombs were available at the time. The first was dropped on 6 August 1945, followed by the second on 9 August. The Japanese fear of continued U.S. use of atomic bombs, in addition to their actual effect, led to Japan's decision to surrender. Lastly, it is important to note that the loss of life suffered in each of the two atomic bomb attacks was less than that suffered in the March 1945 raid on Tokyo in which conventional bombs were used.

APPENDIX B

EXTRACT FROM AR 3504-41, *TRAINING IN UNITS*, 19 MARCH 1993

Chapter 14
Law of War Training

14–1. Overview
This chapter provides general policy for training soldiers on their law of war obligations.

14–2. Personnel requiring training
Soldiers and leaders require law of war training commensurate with their duties and responsibilities. Paragraphs 14–3, 14–4, and 14–5 prescribe subject matter for training at various levels, defined as follows:

a. Level A. Initial entry level training included in the program of instruction at basic training and at all officer and warrant officer basic courses of instruction.

b. Level B. Training conducted in units for officer, noncommis-sioned officer, and enlisted personnel, commensurate with the mis-ions of the unit and the duties and responsibilities of the individual soldier.

c. Level C. Training conducted at MOS schools, service schools, career courses, the Command and General Staff College, and the U.S. Army War College.

14–3. Level A – initial entry training
a. Level A training provides minimum knowledge required by all members of the Active Army, Army Reserve, and National Guard.

b. The following basic law of war rules, to be referred to as 'The Soldier's Rules,' will be taught in Level A training:

(1) Soldiers fight only enemy combatants.

(2) Soldiers do not harm enemies who surrender. Disarm them and turn them over to your superior.

(3) Soldiers do not kill or torture enemy prisoners of war.

(4) Soldiers collect and care for the wounded, whether friend or foe.

(5) Soldiers do not attack medical personnel, facilities, or equipment.

(6) Soldiers destroy no more than the mission requires.

(7) Soldiers treat all civilians humanely.

(8) Soldiers do not steal. Soldiers respect private property and possessions.

(9) Soldiers should do their best to prevent violations of the law of war. Soldiers report all violations of the law of war to their superior.

c. Instruction on The Soldier's Rules will stress their military and moral importance in U.S. warfighting.

14–4. Level B – training in units
a. Unit commanders plan and execute training on the law of war that —

(1) Is commensurate with the unit mission and the duties and responsibilities of the individual soldier.

(2) Reinforces the principles set forth in The Soldier's Rules (para 14–3b).

(3) Is designed, where appropriate, around current missions and contingency palns (including intended geographical areas of deployment or rules of engagement).

(4) Is integrated, as appropriate, into unit training activities and field exercises.

b. Commanders should adapt level B training to the specific needs of the unit and its personnel. Subject matter can be integrated

into field training exercises and unit external evaluations. Maximum combat realism will be applied to tactical exercises consistent with good safety practices.

14–5. Level C – training in schools

a. Level C training will emphasize staff and noncommissioned officer responsibility for —

(1) The performance of duties in accordance with the law of war obligations of the United States.

(2) Law of war issues in command planning and execution of combat operations.

(3) Measures for the reporting of suspected or alleged war crimes committed by or against U.S. or allied personnel.

b. Schools will tailor law of war training to the skills taught in those schools, commensurate with the duties and responsibilities of persons attending the school.