LAW OF ARMED CONFLICT DESKBOOK

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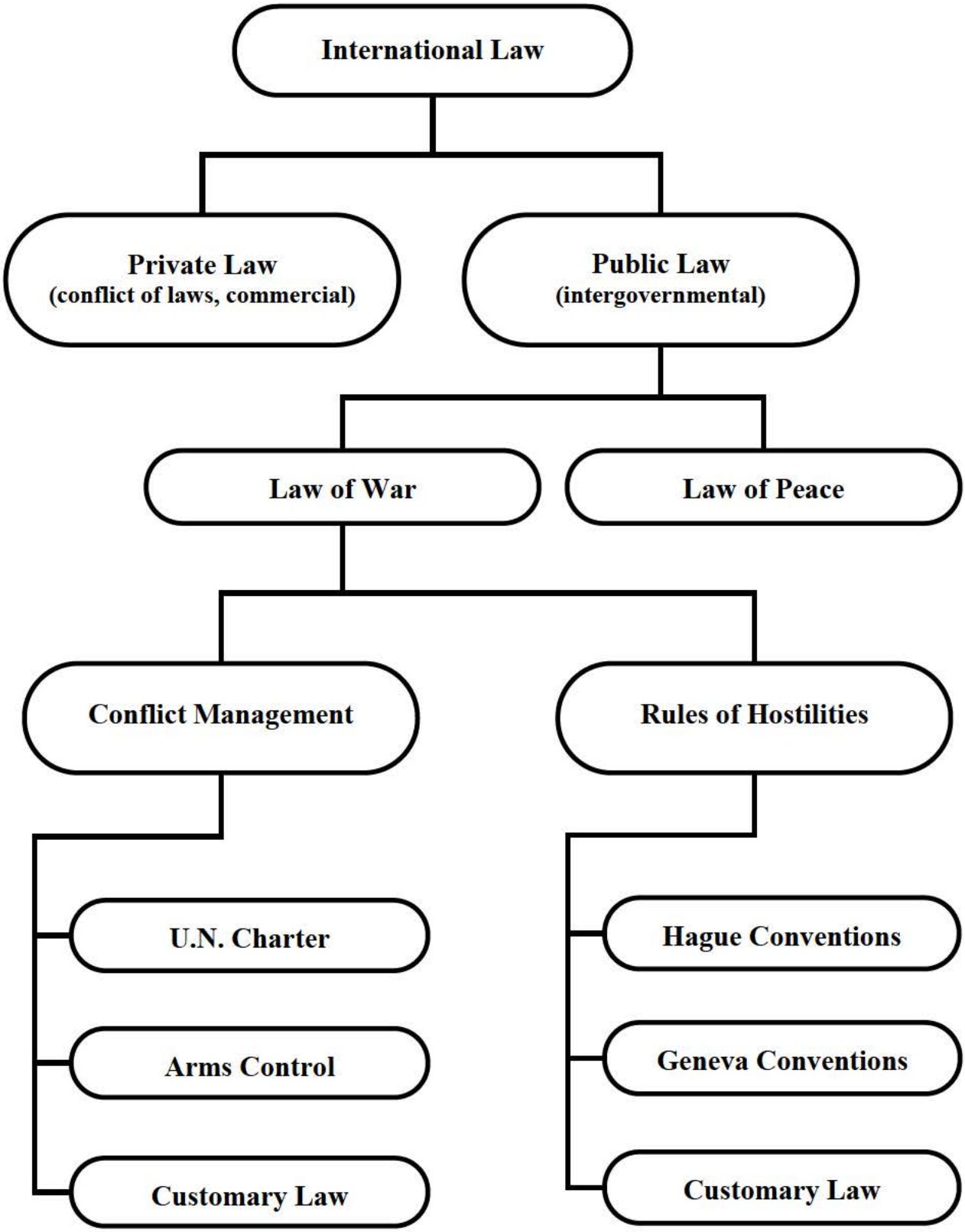
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INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT
THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY
CHARLOTTESVILLE, VIRGINIA

LAW OF ARMED CONFLICT DESKBOOK

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To all of the faculty who have served with and before us and contributed to the literature in the field of the Law of Armed Conflict

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2012

PREFACE

This Law of Armed Conflict Deskbook is intended to replace, in a single bound volume, similar individual outlines that had been distributed as part of the Judge Advocate Officer Graduate and Basic Courses and departmental short courses. Together with the Operational Law Handbook and Law of Armed Conflict Documentary Supplement, these three volumes represent a range of international and operational law subjects taught to military judge advocates. These outlines, while extensive, make no pretence of comprehensively covering this complex area of law. Our audience is the beginning and intermediate level practitioner; our hope is that this material will provide a solid foundation upon which further study may be built.

The proponent of this publication is the International and Operational Law Department, The Judge Advocate General's Legal Center and School (TJAGLCS). Send comments and suggestions to TJAGLCS, International and Operational Law Department, 600 Massie Road, Charlottesville, VA 22903-1781. Our phone number is (434) 971-3370; our administrative assistant will connect you with the author for the particular chapter.

This Deskbook is not a substitute for official publications. Similarly, it should not be considered to espouse an "official" position of the U.S. Army, Department of Defense, or U.S. Government. While every effort has been made to ensure that the material contained herein is current and correct, it should be remembered that these are merely a collection of teaching outlines, collected, bound, and distributed as a matter of instructional convenience, intended only to introduce students to the law and point them to primary sources of that law. Accordingly, the only proper citation to a substantive provision of this Deskbook should be for the limited proposition of how the Army JAG School teaches its judge advocate students.

INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT
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CHARLOTTESVILLE, VIRGINIA

LAW OF ARMED CONFLICT DESKBOOK

TABLE OF CONTENTS

References	iv
Abbreviations	vi
Introduction to Public International Law	1
History of the Law of Armed Conflict	7
Framework of the Law of Armed Conflict	19
Legal Basis for the Use of Force	29
Wounded and Sick in the Field	41
Prisoners of War	67
LOAC Protections for Civilians	91
Occupation and Post-Conflict Governance	121
Means and Methods of Warfare	135
War Crimes and Command Responsibility	171
Human Rights	195
Comparative Law	209
Index	243

REFERENCES

This Deskbook is intended as a teaching tool, not as a collection of law review articles. The references which most chapters cite are common, so to avoid undue repetition, they are cited here in full. The Short Version citation will generally be used in the chapters. Those references which are reprinted in the Law of Armed Conflict Documentary Supplement are noted.

Short Version	**Citation**	**Doc Supp?**
HR	Regulations Concerning the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, T.S. 539 .	X
UN Charter	U.N. Charter.	X
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31. May also be abbreviated as GWS.	X
GC II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85. May also be abbreviated as GWS(Sea).	X
GC III	Geneva Convention, Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135. May also be abbreviated as GPW.	X
GC IV	Geneva Convention, Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287. May also be abbreviated as GC.	X
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.	X
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.	X

Short Version	Citation	Doc Supp?
AP III	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005.	X
GC I Commentary GC II Commentary etc.	INTERNATIONAL COMMITTEE OF THE RED CROSS, GENEVA CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD: COMMENTARY (Jean Pictet gen. ed., 1958).	
AP Commentary	INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987).	
G.BC	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 UST. 571, 94 L.N.T.S. 65.	X
CWC	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.	X
H.CP	1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216.	X
1972 BW	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 UST. 583.	X
CCW	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, Oct. 10, 1980, 19 I.L.M. 1523.	X
FM 27-10	DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956).	X
NWP 1-14M	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).	

ABBREVIATIONS

AP I .....Additional Protocol I
AP II.....Additional Protocol II
AP III .....Additional Protocol III
CIL .....Customary International Law
CJCS .....Chairman of the Joint Chiefs of Staff
GC I.....Geneva Convention I
GC II .....Geneva Convention II
GC III .....Geneva Convention III
GC IV .....Geneva Convention IV
GC……..Alternative abbreviation for GC IV
GPW……...Alternative abbreviation for GC III
GWS……...Alternative abbreviation for GC I
GWS(Sea)……..Alternative abbreviation for GC II
HR .....Hague Regulations
IAC.....International Armed Conflict
ICJ .....International Court of Justice
ICRC .....International Committee of the Red Cross
IHL .....International Humanitarian Law
JA .....Judge Advocate
LOAC.....Law of Armed Conflict
LOW .....Law of War
NIAC.....Non-international Armed Conflict
POW.....Prisoner of War
RCA .....Riot Control Agents
ROE.....Rules of Engagement
SROE .....Standing Rules of Engagement
UN.....United Nations
UNSC.....United Nations Security Council
UNSCR .....United Nations Security Council Resolution

INTRODUCTION TO PUBLIC INTERNATIONAL LAW

I. OBJECTIVES

A. Understand the foundation of the international legal system.

B. Understand the primary sources of international law, how they are created and how they relate to each other.

II. INTRODUCTION

A. Military operations involve complex questions related to international law. International law provides the framework for informed operational decisions, establishes certain limitations on the scope and nature of command options, and imposes affirmative obligations related to the conduct of U.S. forces. Commanders rely on Judge Advocates to understand fundamental principles of international law, translate those principles into an operational product, and articulate the essence of the principles when required.

B. This body of law has an independent, binding significance in the context of U.S. law and jurisprudence because international law—among the cornerstones of our own Constitution[1]—"is part of our law."[2]

III. FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW

A. Definition. International law is defined as "rules and principles of general application dealing with the conduct of States and of international organizations and with their relations *inter se*, as well as some of their relations with persons, whether natural or juridical."[3] Regulating those relations is generally viewed through two different lenses: public and private. Public international law is that portion of international

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[1] *See* U.S. Const. art I, §8 (giving Congress the power to "define and punish . . . Offences against the Law of Nations"); art. II, §2 (giving the President authority, with the advice and consent of the Senate, to appoint ambassadors and make treaties); art. III (providing that the judicial power extends to all cases involving treaties, ambassadors, and maritime cases); and art. VI (listing treaties as among three sources noted as the "supreme Law of the Land").

[2] The Paquete Habana, 175 U.S. 677, 700 (1900).

[3] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 101 (1987) [hereinafter RESTATEMENT].

law that deals mainly with intergovernmental relations. Private international law is primarily concerned with the "foreign transactions of individuals and corporations."[4]

B. States. International law developed to regulate relations between States, and States are the focus of the international legal system. International law establishes four criteria that must be met for an entity to be regarded as a State under the law:

1. Defined territory (which can be established even if one of the boundaries is in dispute or some of the territory is claimed by another State);

2. Permanent population (the population must be significant and permanent even if a substantial portion is nomadic);

3. Government (note that temporary occupation by enemy forces during war or pursuant to an armistice does not serve to extinguish statehood even if the legal control of the territory shifts temporarily); and,

4. Capacity to conduct international relations.[5]

C. Consequences of statehood. Under international law, a State has:

1. Sovereignty over its territory and general authority over its nationals;

2. Status as a legal person, with capacity to own, acquire, and transfer property, to make contracts and enter into international agreements, to become a member of international organizations, and to pursue, and be subject to, legal remedies; and

3. Capacity to join with other States to make international law, as customary law or by international agreement.[6]

D. Inherent tension. Under international law, sovereignty is the ultimate benefit of statehood. Inherent to sovereignty is the notion that a State should be free from outside interference. International law, however, seeks to regulate State conduct. States "trade" aspects of sovereignty in order to reap the benefits of the international legal system. While this may seem natural in cases of warfare between states (or international armed conflict), it becomes more contentious in cases of internal or non-international armed conflict.

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[4] MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 2 (1997).

[5] *See* RESTATEMENT, *supra* note 3 at § 201.

[6] *Id*. at § 206.

IV. SOURCES OF INTERNATIONAL LAW

A. Article 38 of the Statute of the International Court of Justice (ICJ)[7] lists the following sources of international law:

1. International agreements (i.e., conventions, treaties).

a. Treaties are written international agreements concluded between two or more States. They are also referred to as conventions, protocols, covenants, and attached regulations. They only bind those States that are parties.

b. In the U.S., treaties include those international agreements concluded by the Executive branch which receive the consent of at least two-thirds of the Senate. Once ratified by the President, they become the "supreme law of the land" pursuant to the Supremacy Clause of the U.S. Constitution (Article VI, Clause 2).

c. Reservations and Understandings. A reservation is essentially a unilateral modification of the basic obligations established by a treaty. Under international law, a reservation is permitted if it is compatible with the object and purpose of the treaty. It is treated as a "counter-offer," and is only binding upon other States that agree to it, though agreement is assumed. Unlike a reservation, an understanding does not modify basic treaty obligations; rather, it guides future interpretation of those obligations.[8]

d. Treaties and domestic statutes. U.S. laws fall under the umbrella of the Supremacy Clause. Accordingly, a "later in time" analysis determines the supremacy of a treaty in conflict with a statute. Courts always attempt to reconcile apparent inconsistent provisions before resorting to the later in time rule. Because U.S. courts generally seek to avoid such conflicts by interpreting statutes "in ways consistent with the United States'

[7] The ICJ was created by operation of the UN Charter.

[8] *See* Vienna Convention on the Law of Treaties, arts. 19–23, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT]. The United States is not a party to the VCLT, but regards most of its provisions as customary international law. Note too that the Commentaries to the 1949 Geneva Conventions and the Additional Protocols of 1977 are useful sources to determine the intent of the drafters.

international obligations,"[9] any conflict must be explicit for a court to find a statutory intent to contradict a treaty.[10]

2. International custom (i.e., customary international law).

   a. That law resulting from the general and *consistent* practice of States followed from a sense of legal obligation (*opinio juris*).[11]

   b. Best understood as the "unwritten" rules that bind all members of the community of States. Note, however, that customary international law can emerge from rules established in treaties and, as a consequence, bind all States that do not persistently object to the application of that rule. Also, customary international law can be codified in subsequent treaties.

   c. A practice does not require acceptance by 100% of States to amount to customary international law. However, the argument that a norm exists is enhanced proportionally in relation to the number of States that recognize and adhere to the norm. There is also a correlation between the length of time a practice is followed and the persuasiveness that the practice amounts to customary international law. While this factor is not dispositive, developing law is more suspect than long-established practice.[12]

   d. Persistent objector. It is possible for a State not to be bound by a rule of customary international law if that State persistently and openly objects to the rule as it develops, and continues to declare that it is not bound by the rule. The U.S. may act in accordance with principles that other States assert amount to customary international law, but expressly state it does not consider itself legally obligated to do so. Such declarations are motivated by a concern that discretionary State conduct not be considered evidence of a customary norm.

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[9] *See* JANIS & NOYES, *supra* note 4, at 216.

[10] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

[11] *See* RESTATEMENT, *supra* note 3, § 102(2) cmt c. (1987) (from the Latin *opinio juris sive necessitates*, a practice undertaken by a State out of a sense of legal obligation).

[12] In 1996 the ICRC initiated a study of current state practice in order to identify customary international humanitarian law. That study, which has been criticized by the United States on several grounds, has resulted in 161 "Rules" of customary international humanitarian law and a summary of the underlying practice for those rules. *See* Customary International Law Database (last visited May 4, 2012), *available at* http://www.icrc.org/customary-ihl/eng/docs/home.

e. *Jus Cogens*. Some principles of international law are considered peremptory norms that cannot be derogated, even by treaty. Examples cited by the ICJ include prohibitions against inter-state aggression, slavery, genocide, racial discrimination, and torture.[13]

f. Unlike international law established by treaty, customary international law is not mentioned in the Constitution's Supremacy Clause. It is, however, considered part of U.S. law.[14]

g. Customary international law and treaty law are equal in stature, with the later in time controlling.[15]

3. General principles of law recognized by civilized nations. These "general principles," as reflected primarily in the judicial opinions of domestic courts, can serve as "gap fillers" in international law.[16] The prevailing view is "that general principles of law are to be found in municipal law through the comparative law process. Under this approach, if some proposition of law is to be found in virtually every legal system, it will constitute a general principle of law."[17] This provides flexibility to resolve issues that are not squarely resolved by existing treaty or customary international law.

4. Judicial Decisions and Writings..

a. Judicial decisions and the teaching of the most highly qualified publicists can be subsidiary means for the determination of rules of law. These are not really "sources" of law in that they are "not ways in which law is made or accepted, but opinion-evidence as to whether some rule has in fact become or been accepted as international law."[18]

b. Note too that judicial decisions, while persuasive, are not dispositive. They only bind the parties before the tribunal. Also, there is some caution

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[13] Barcelona Traction, Light and Power Company, Limited, Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5).

[14] *See* The Paquete Habana, *supra* note 2.

[15] *See* VCLT, *supra* note 8, art. 64 (the emergence of a new *jus cogens* peremptory norm which conflicts with existing treaty obligations voids the conflicting treaty provisions).

[16] John F. Murphy, THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY 25 (2010).

[17] *Id.*

[18] *See* RESTATEMENT, *supra* note 3, at § 102, reporters' notes.

in using stare decisis with international courts, since there is no hierarchical structure for international courts.

HISTORY OF THE LAW OF ARMED CONFLICT

I. OBJECTIVES

A. Understand the two principal "prongs" of legal regulation of warfare, *Jus ad Bellum*. and *Jus in Bello*.

B. Understand the historical evolution of laws and events related to the conduct of war.

II. INTRODUCTION

A. "In times of war, the law falls silent."[1] This may have been the case in ancient times, but it is not so in modern times where the laws of war permeate armed conflict.

B. What is war? Although there is no universally accepted definition of war, one proposed definition contains the following four elements: (a) a contention; (b) between at least two nation-states; (c) wherein armed force is employed; (d) with an intent to overwhelm.

C. War v. Armed Conflict. Historically, the applicability of the LOAC often depended upon a State subjectively classifying a conflict as a "war." Recognition of a state of war is no longer required to trigger the LOAC. After the 1949 Geneva Conventions, the LOAC is now triggered by the existence of "armed conflict" between States.

> "The substitution of [armed conflict] for the word 'war' was deliberate. One may argue almost endlessly about the legal definition of 'war'. . . . The expression 'armed conflict' makes such arguments less easy. 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."[2]

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[1] This Latin maxim ("Silent enim leges inter arma") is generally attributable to Cicero, the famous Roman philosopher and politician (106 – 43 BC). Justice Scalia wrote in his dissent in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), "Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it."

[2] GC I Commentary at 32.

D. The Law of Armed Conflict (LOAC). FM 27-10 notes that the LOAC is the "customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States."[3] It "requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry."[4] The law of armed conflict is also referred to as the law of war (LOW) or international humanitarian law (IHL).[5]

E. LOAC has evolved to its present content over millennia based on the actions and beliefs of States. It is deeply rooted in history, and an understanding of this history is necessary to understand current LOAC principles.

III. UNIFYING THEMES OF THE LOAC

A. Law exists to either prevent conduct or control conduct. These characteristics permeate the LOAC, as exemplified by its two major prongs. *Jus ad Bellum* serves to regulate the conduct of going to war, while *Jus in Bello* serves to regulate conduct within war.

B. Validity. Although critics of the regulation of warfare cite examples of violations of evolving laws of war, a comprehensive view of history provides the greatest evidence of the overall validity of this body of law.

1. History shows that in most cases the LOAC works. Despite the fact that the rules are often violated or ignored, it is clear that mankind is better off with than without them. Mankind has always sought to limit the effect of conflict on combatants and has come to regard war not as a state of anarchy justifying infliction of unlimited suffering, but as an unfortunate reality which must be governed by some rule of law. This point is illustrated in Article 22 of the 1907 Hague Regulations: "the right of belligerents to adopt means of injuring the enemy is not unlimited."[6] This rule does not lose its binding force in a case of necessity.

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[3] FM 27-10, para. 1.

[4] *Id*. at para. 3.

[5] The moniker describing this body of law has changed over time. Before the 1949 Geneva Conventions, it was known universally as the "Law of War." The 1949 Geneva Conventions advanced a change to the term "Law of Armed Conflict" to emphasize that the application of the law and prescriptions did not depend on either a formal declaration of war or recognition by the parties of a state of war. Of late, many scholars and nongovernmental organizations refer to this body of law as "International Humanitarian Law" (IHL).

[6] HR, art. 22.

2. Regulating the conduct of warfare is ironically essential to the preservation of a civilized world. General MacArthur exemplified this notion when he confirmed the death sentence for Japanese General Yamashita, writing: "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."[7]

C. 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 LOAC.

1. The purposes of the LOAC include: (1) integrate humanity into war; (2) preserve the fundamental human rights of persons who fall into the hands of the enemy; and (3) assist in restoring the peace.[8]

2. The validity of the LOAC 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 LOAC denies the enemy a rallying cry against difficult odds.

D. Why respect the LOAC?

1. May motivate the enemy to observe the same rules.

2. May motivate the enemy to surrender.

3. Guards against acts that violate basic tenets of civilization, protects against unnecessary suffering, and 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.

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[7] WILLIAM MANCHESTER, AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964 488 (1978) (quoting DOUGLAS MACARTHUR, REMINISCENCES 295-96 (1964)).

[8] FM 27-10, para. 2.

E. The LOAC has two major prongs: *Jus ad Bellum* and *Jus in Bello*, and one less developed prong, *Jus post Bellum*.

1. *Jus ad Bellum* is the law dealing with conflict management, and how States initiate armed conflict (i.e., under what circumstances the use of military power is legally and morally justified).

2. *Jus in Bello* is the law governing the actions of States once conflict has started (i.e., what legal and moral restraints apply to the conduct of waging war).

3. Both *Jus ad Bellum* and *Jus in Bello* have developed over time, drawing most of their guiding principles from history. 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. Eventually, both theories began to evolve together.

4. *Jus post Bellum* is the third, largely historically neglected prong of the Just War Tradition, that focuses on the issues regulating the end of warfare and the return from war to peace (i.e., what a just peace should look like).

IV. ORIGINS OF JUS AD BELLUM AND JUS IN BELLO

A. *Jus ad Bellum*. Law became a factor early in the historical development of warfare. The earliest references to rules regarding war referred to the conditions that justified resort to war both legally and morally.

1. The ancient Egyptians and Sumerians (25th century B.C.) generated rules defining the circumstances under which war might be initiated.

2. The ancient Hittites (16th century BC) required a formal exchange of letters and demands before initiating war. In addition, no war could begin during the planting season.

3. A Greek city-state was justified in resorting to the use of force if a number of conditions existed. If those conditions existed, the conflict was blessed by the gods and was just; otherwise, armed conflict was forbidden.

4. The Romans formalized laws and procedures that made the use of force an act of last resort. Rome dispatched envoys to the States 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.

B. *Jus in Bello*. This body of law deals with rules that control conduct during the prosecution of a war to ensure that it is legal and moral.

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

2. 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, including the treatment and care of captives, and respect for women and children in captured territory.

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

4. Similarly, the Old Testament and Koran imposed some limits on how victors could treat the vanquished.

V. THE HISTORICAL PERIODS

A. JUST WAR PERIOD (335 B.C. – 1800 A.D.)

1. This period ranged from about 335 B.C.-1800 A.D. The law during this period was principally concerned with *Jus ad Bellum* considerations and developed initially as a means to refute Christian pacifists and provide for certain, defined grounds under which a resort to warfare was both morally and religiously permissible.

2. Early Beginnings: Just War Closely Connected to Self-Defense. Aristotle (335 B.C.) wrote that war should be employed only to (1) prevent men becoming enslaved, (2) establish leadership which is in the interests of the led, or (3) enable men to become masters of men who naturally deserved to be enslaved. Cicero refined Aristotle's model by stating that "the only excuse for going to war is that we may live in peace unharmed...."

3. Era of Christian Influence: Divine Justification. 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. Church scholars later reconciled the dictates of Christianity with the need to defend the Holy Roman Empire from the approaching vandals by adopting a *Jus ad Bellum*

position under which recourse to war was just in certain circumstances (5th century A.D.).

4. Middle Ages. In his *Summa Theologica*, Saint Thomas Aquinas (12th century A.D.) refined the Just War theory by establishing 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."

5. Juristic Model.

   a. Saint Thomas Aquinas' work signaled a transition of Just War doctrine from a concept designed to explain why Christians could bear arms (apologetic) toward the beginning of a juristic model. The concept of Just War initially sought to solve the moral dilemma posed by the tension between the Gospel and the reality of war. With the increase in the number of Christian nation-states, this concept fostered an increasing concern with regulating war for more practical reasons.

   b. The concept of Just War was being passed from the hands of the theologians to the lawyers. Several great European jurists emerged to document customary laws related to warfare. Hugo Grotius (1583-1645) produced the most systematic and comprehensive work, *On the Law of War and Peace* (published in 1625). His work is regarded as the starting point for the development of the modern LOAC. While many of the principles enunciated in his work were consistent with previous church doctrine, Grotius boldly asserted a non-religious basis for this law. According to Grotius, the law of war was based not on divine law, but on recognition of the true natural state of relations among States. This concept was reinforced through the Peace of Westphalia in 1648 - a series of treaties resulting from the first modern diplomatic congress, based on the concept of sovereign states.

6. *Jus ad Bellum* Principles. By the time the next period emerged, Just War doctrine had generated a widely-recognized set of principles that represented the early customary LOAC. The most fundamental Just War *Jus Ad Bellum* principles are:

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

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

c. Right Intention. The State must intend to fight the war only for the sake of the Just Cause. It cannot employ the cloak of a Just Cause to advance other intentions.

d. Probability of Success. Except in the case of self-defense, there must be a reasonable prospect of victory.

e. Last Resort. A State may resort to war only if it has exhausted all plausible, peaceful alternatives to resolving the conflict in question.

f. Macro Proportionality. A State must, prior to initiating a war, weigh the expected universal good to accrue from prosecuting the war against the expected universal evils that will result. Only if the benefits seem reasonably proportional to the costs may the war action proceed.

7. *Jus in Bello* Principles. *Jus in Bello* received less attention during the Just War Period. Two principles, however, do exist according to the Just War tradition.

a. Micro Proportionality. States are to weigh the expected universal goods/benefits against the expected universal evils/costs, in terms of each significant military tactic and maneuver employed within the war. Only if the goods/benefits of the proposed action seem reasonably proportional to the evils/costs, may a State's armed forces employ it.

b. Discrimination. One must make a distinction between combatants and non-combatants. Non-combatants may not be directly targeted and must have their rights respected.

C. WAR AS FACT PERIOD (1800-1918)

1. This period saw the rise of the State as the principal actor in foreign relations. States transformed war from a tool to achieve justice, into a tool for the legitimate pursuit of national policy objectives.

2. Just War Notion Pushed Aside. Positivism, reflecting the rights and privileges of the modern State, replaced natural or moral law principles. This body of thought held that law is based not on some philosophical speculation, but on rules emerging from the practice of States and international conventions. Basic Tenet of Positivism: 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 the 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 State achieve its policy objectives, force may be used.

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

4. Foundation for Upcoming "Treaty Period." Based on the positivist view, the best way to reduce the uncertainty associated with conflict was to codify rules regulating this area. Intellectual focus began shifting towards minimizing resort to war and/or mitigating the consequences of war. National leaders began to join academics in the push to control the impact of war (e.g., Czar Nicholas and Theodore Roosevelt pushed for the two Hague Conferences that produced the Hague Conventions and Regulations).

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

6. Henry Dunant's *A Memory of Solferino* (1862). A graphic depiction of one of the bloodiest battles of the Austro-Sardinian War, it served as the impetus for the creation of the International Committee of the Red Cross and the negotiation of the 1864 Geneva Convention.

7. Francis Lieber's *Instructions for the Government of Armies of the United States in the Field* (1863). First modern restatement of the LOAC, issued in the form of General Order 100 to the Union Army during the American Civil War.

8. International Revulsion to General Sherman's Total War. Sherman was very concerned with the morality of war. His observation that "War is Hell" demonstrates the emergence and reintroduction of morality. As his 1864 "March to the Sea" during the American Civil War demonstrated, however, 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 recognized only the first prong (*Jus ad Bellum*) of the LOAC.

9. Near the end of this period, the major States held the Hague Conferences (1899-1907) that produced the Hague Conventions. While some Hague law focuses

on war avoidance, the majority of the law dealt with limitation of suffering during war.

D. JUS CONTRA BELLUM PERIOD (1918-1949)

1. World War I represented a significant challenge to the validity of the "war as fact" theory. Despite the moral outrage directed toward the aggressors of World War I, legal scholars unanimously rejected any assertion that initiation of the war constituted a breach of international law. Nevertheless, 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 *Jus ad Bellum* shift in intellectual direction, leading to the conclusion that aggressive use of force must be outlawed.

   a. League of Nations. First time in history that States agreed upon an obligation under the law not to resort to war to resolve disputes or to secure national policy goals. The Covenant of the League of Nations was designed to impose upon States certain procedural mechanisms prior to initiating war. President Wilson, the primary architect, believed during these periods of delay, peaceful means of conflict management could be brought to bear. The League, operating without the United States or the Soviet Union, ultimately proved to be ineffective at preventing war.

   b. Kellogg-Briand Pact (1928). Officially referred to as the General Treaty for the Renunciation of War, it banned aggressive war. This is the event generally thought of as the "quantum leap": for the first time in history, aggressive war is clearly and categorically banned. In contradistinction to the post-World War I period, this treaty established an international legal basis for the post-World War II prosecution of those responsible for waging aggressive war. The Kellogg-Briand Pact remains in force today. Virtually all commentators agree that the provisions of the treaty banning aggressive war have ripened into customary international law.

2. Use of force in self-defense remained unregulated. No law has ever purported to deny a sovereign the right to defend itself. Some commentators have stated that the use of force in the defense of the State is not war.

E. POST-WORLD WAR II PERIOD (1949-)

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

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

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

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

3. United Nations Charter. Continues the shift to outright ban on war. Required Members, through Article 2(4), to refrain "from the threat or use of force" against other States.

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

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

4. Geneva Conventions (1949). The four Conventions that evolved from the earlier conventions of 1864, 1906, and 1929[9] were a comprehensive effort to protect the victims of war.

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

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[9] The Convention of 1864 had 10 articles, and provided implicit protections for the wounded and sick soldiers in the field who were out of combat, and the prohibition against attacking neutral personnel—medical and chaplains—who were assisting them. The 1906 Geneva Convention had 33 articles and gave explicit protections to the wounded and sick in the field and added what became GC II by addressing the care and protection of wounded and sick at sea. The 1929 Convention added the Prisoner of War protections that were updated in GC III.

b. Birth of the Civilians Convention (GC IV). A post-war recognition of the need to specifically address this class of individuals.

c. The four Conventions are considered customary international law. This means that even if a particular State has not ratified the treaties, that State is still bound by the principles within each of the four treaties because they are merely a reflection of customary law that binds all States. As a practical matter, the customary international law status matters little because every State is currently a party to the Conventions.

d. The Conventions are directed at State conduct, not the conduct of international forces. In practice, forces operating under U.N. control comply with the Conventions.

e. Clear shift toward 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."[10]

5. The 1977 Additional Protocols. These two treaties were negotiated to supplement the 1949 Geneva Conventions. Protocol I supplements rules governing international armed conflicts, and Protocol II extends the protections of the Conventions as they relate to internal armed conflicts.

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."[11]

[10] GC I Commentary at 28.

[11] Malham M. Wakin, *Introduction to War and Morality, in* WAR, MORALITY, AND THE MILITARY PROFESSION 224 (Malham M. Wakin ed., 2nd rev. ed. 1986).

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FRAMEWORK OF THE LAW OF ARMED CONFLICT

I. OBJECTIVES

A. Become familiar with the language and primary sources of the LOAC.

B. Understand how LOAC is triggered, and distinctions between Common Article 2 and Common Article 3.

C. Become familiar with the 1977 Additional Protocols to the 1949 Geneva Conventions.

II. HAGUE TRADITION, GENEVA TRADITION, AND THE "INTERSECTION"

A. Primary Sources of the LOAC. While there are numerous LOAC treaties in force today, most fall within two broad categories, commonly referred to as the "Hague Law" or "Hague Tradition" of regulating *means and methods* of warfare, and the "Geneva Law" or "Geneva Tradition" of *respecting and protecting victims* of warfare.

1. The "Hague Tradition." This prong of the LOAC focuses on regulating the means and methods of warfare (e.g., 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,[1] plus the 1954 Hague Cultural Property Convention[2] and the 1980 Certain Conventional Weapons Convention.[3]

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

   c. Treaties. The following treaties, limiting specific aspects of warfare, are also sources of targeting guidance. These treaties are discussed more fully in the Means and Methods of Warfare section on weapons.

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[1] HR.

[2] H.CP.

[3] CCW.

i. Gas. The 1925 Geneva Protocol prohibits use in war of asphyxiating, poisonous, or other gases.[4] A number of States, including the U.S., reserved the right to respond with chemical weapons to a chemical attack. The 1993 Chemical Weapons Convention, however, prohibits production, stockpiling, and use of chemical weapons, even in retaliation. The U.S. ratified the CWC in April 1997.

ii. Cultural Property. The 1954 Hague Cultural Property Convention seeks to protect cultural property.[5]

iii. Biological Weapons. The 1925 Geneva Protocol prohibits biological weapons. The 1972 Biological Weapons Convention prohibits their use in retaliation, as well as production, manufacture, and stockpiling.[6]

iv. Conventional Weapons. The 1980 Certain Conventional Weapons Convention (often referred to as the CCW) 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; Protocol IV- laser weapons; and Protocol V - explosive remnants of war. The U.S. has ratified the Convention with certain reservations, declarations, and understandings.[7]

2. The "Geneva Tradition." This prong of the LOAC is focused on establishing non-derogable protections for the "victims of war." In contrast to the Hague model of regulating specific weapons and their application, the Geneva Tradition confers the protections of the LOAC primarily by assigning certain persons and places a legal status.

a. This method is exemplified by the four Geneva Conventions of 1949. While there were earlier Geneva Conventions (1864, 1906, and 1929), the current four treaties of 1949 are each devoted to protecting a specific category of war victims:

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[4] G.BC.

[5] H.CP.

[6] 1972 BW.

[7] CCW.

i. GC I: Wounded and Sick in the Field.[8]

ii. GC II: Wounded, Sick, and Shipwrecked at Sea.[9]

iii. GC III: Prisoners of War.[10]

iv. GC IV: Civilians.[11]

b. The Geneva Conventions entered into force on October 21, 1950. The U.S. ratified the conventions on February 8, 1955. Currently, all existing States are parties to the 1949 Geneva Conventions.

3. The "Intersection." In 1977, two treaties were drafted to supplement the 1949 Geneva Conventions: Additional Protocols I and II (AP I and AP II).

a. The Protocols were motivated by the International Committee of the Red Cross's belief that the 1949 Geneva Conventions and the Hague Regulations insufficiently covered certain areas of warfare in the conflicts following World War II, specifically aerial bombardments, protection of civilians, and wars of national liberation.

b. Status. At the time of this writing, 172 States were parties to AP I and 166 States were parties to AP II. Unlike the Hague and Geneva Conventions, the U.S. has never ratified either of these Protocols. Significant portions, however, reflect customary international law. While there is no current authoritative list of the AP I articles the U.S. currently views as either customary international law, or specifically objects to, many consider remarks made in 1987 by Michael J. Matheson, then Deputy Legal Advisor at the Department of State, as the most comprehensive expression of the U.S. position.[12] The U.S. has recently

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[8] GC I.

[9] GC II.

[10] GC III.

[11] GC IV.

[12] *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 L. & POL'Y 419, 420 (1987). This article is summarized in the Law of Armed Conflict Documentary Supplement. *See also Memorandum for Mr. John H. McNeil, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications, 9 May 1986*, contained in the Law of Armed Conflict Documentary Supplement (summarizing DoD's views on the customary international law status of AP I articles). Taken together, these two documents establish that as of 1987 the U.S. considered at least two-thirds of AP I's provisions as CIL.

stated it considers almost all of AP II to reflect customary international law. In March 2011, President Obama announced his continued support of AP II and urged the Senate to act "as soon as practicable" on AP II. At that same time, President Obama announced that the United States would comply with a provision of AP I, Article 75, which provides fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, "out of a sense of legal obligation."[13]

c. Although the U.S. has never ratified either AP I or AP II, their relevance continues to grow. These treaties bind virtually all U.S. coalition partners.

B. Other sources for analyzing the LOAC.

1. Treaty Commentaries. These are written works (also referred to as *travaux preparatoires*) by official recorders of the drafting conventions for the major LOAC treaties (Jean Pictet for the 1949 Geneva Conventions and Yves Sandoz for the Additional Protocols). The commentaries provide critical explanations to many treaty provisions, and are therefore similar to legislative history in the domestic context. While a reading of the *travaux* is not always necessary where the plain meaning of the terms is evident from the text, they remain useful. Given the prevalence of terms of art in the LOAC, a reading of the commentaries often illuminates the text of the treaty in question. Where the meaning of a provision contained in the treaty is unclear, the *travaux* can be decisive in resolving conflicts regarding the understanding of the parties at the time States party became signatories.

2. Military Publications. Military manuals are not sources of law in the context of creating law. Rather, such manuals are useful references in developing an understanding of the application of LOAC concepts within the military generally and specific services in particular. However, recent studies have examined military manuals for evidence of *opinio juris* in seeking to resolve questions of whether State practice has ripened into binding customary international law.[14] Because some of these publications are no longer available in printed form they have been compiled, along with many other key source documents, in the *Law of Armed Conflict Documentary Supplement*.

a. FM 27-10, *The Law of Land Warfare*. Organized functionally by category, and incorporates rules from multiple sources including

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[13] *Fact Sheet: New Actions on Guantánamo and Detainee Policy*, THE WHITE HOUSE, http://www. whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy (last visited May 22, 2012) [hereinafter *Fact Sheet*].

[14] *See generally* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

customary and treaty law. Note that FM 27-10 is dated July 1956, with Change 1 dated 15 July 1976.

b. DA Pam 27-1, *Treaties Governing Land Warfare*. A verbatim reprint of the Hague and Geneva Conventions.

c. DA Pam 27-1-1, *Protocols to the Geneva Conventions of 12 August 1949*. A verbatim reprint of the 1977 Additional Protocols to the Geneva Conventions.

d. NWP 1–14M/MCWP 5–12.1, *The Commander's Handbook on the Law of Naval Operations*. Chapters 5, 6, and 8–13 address specific aspects of the LOAC. Other chapters of the publication are more broadly applicable to maritime operations and international law generally.

III. HOW THE LOAC IS TRIGGERED

A. The Barrier of Sovereignty. Among the most fundamental aspects of State sovereignty is freedom from external threats.

1. That freedom is prominently displayed in the United Nations, the first purpose of which is maintenance of international peace and security.[15] The UN Charter recognizes the sovereign equality of all member States,[16] who in turn must resolve disputes in peaceful means and refrain from "the threat or use of force against the territorial integrity or political independence of any state."[17]

2. Normally, the concept of sovereignty protects a State from outside interference in its internal affairs. This is exemplified by the predominant role of domestic law in internal affairs. The LOAC is a body of international law intended to regulate the conduct of State actors (typically combatants) during periods of conflict. Whenever international law operates to regulate the conduct of a State, it must pierce the shield of sovereignty. The LOAC is therefore applicable only after the requirements for piercing the shield of sovereignty have been satisfied.

3. Once triggered, the LOAC intrudes upon the sovereignty of the regulated State by limiting the means and methods of its application of violence in combat, and by imposing obligations to respect and protect certain persons and places.

[15] U.N. Charter art. 1, para. 1.

[16] *Id*. at art. 2, para. 1.

[17] *Id*. at art. 2, para. 4.

4. The extent of this intrusion depends on the nature of the conflict, but may include restrictions on targeting, requirements for the treatment of POWs or detainees, and the imposition of criminal liability for failure to abide by the law.

B. The Triggering Mechanism. The LOAC includes standards for when it becomes applicable. These standards are reflected in the four Geneva Conventions.

1. **Common Article[18] 2 – International Armed Conflict (IAC)**: "[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."[19] Insofar as this is an article common to all four Conventions, its triggering indicates that all four Conventions are thereby applicable.

a. This is a true *de facto* standard. The subjective intent of the belligerents is irrelevant. The drafters deliberately went beyond the legalistic term "war" in favor of the broader principle of armed conflict. According to the GC Commentary, this article was intended to be broadly defined in order to extend the reach of the Conventions to as many conflicts as possible.

b. The Commentary states "[a]ny difference arising between two States and leading to the intervention of 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."

c. Additional Protocol I. Supplements Common Article 2.

i. This controversial expansion of Common Article 2 expands the Geneva Conventions' application to conflicts previously considered non-international: "[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."[20]

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[18] "Common Article" is a critical term used in the law of armed conflict. It refers to the articles that are common to 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.

[19] *See, e.g.*, GC I, art. 2.

[20] AP I, art. 1(4).

ii. The United States has not previously ratified this treaty largely because of objections to the expanded applicability noted above.

d. Termination of Application. The status of a conflict as an international armed conflict within the meaning of Common Article 2 terminates on the later of:

i. Final repatriation (GC I, art. 5; GC III, art. 5).

ii. General close of military operations (GC IV, art. 6).

iii. Occupation. (GC IV, art. 6). In cases of occupation, GC IV 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 certain key provisions of GC IV for the duration of the occupation.

2. **Common Article 3 – Non-International Armed Conflict (NIAC)**: "Armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ."[21]

a. These types of conflicts make up the vast bulk of ongoing conflicts. Whereas the existence of an international armed conflict triggers the entire body of the LOAC, the existence of a non-international armed conflict only triggers application of Common Article 3's "mini convention" protections (and, in the case of States party, the protections contained in Additional Protocol II).

b. Regulation of these types of conflict necessarily involves the interjection of international regulation into what was previously viewed as a purely internal conflict - a much more substantial impairment of both territorial sovereignty and sovereign independence. As such, Common Article 3 was considered a monumental achievement for international law in 1949. However, the internal nature of these conflicts explains the limited scope of international regulation.

i. Domestic law still applies. Unlike combatants during international armed conflict, guerrillas do not receive combatant immunity for

[21] *See, e.g.* GC I, art. 3. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) the U.S. Supreme Court held that the "term 'conflict not of an international character' is used here in contradistinction to a conflict between nations." *Hamdan* is significant because the Court recognized that a Common Article 3 conflict can expand beyond the territory of one particular state.

their war-like acts. They may be punished by the sovereign as any other criminal.

ii. Lack of effect on legal status of the parties. Despite the clear language of the last paragraph of Common Article 3 ("The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."), States have been reluctant to apply Common Article 3 protections explicitly for fear of conferring a degree of international legitimacy on rebels.

c. What is non-international armed conflict? Not all internal conflicts rise to the level of non-international armed conflict within the meaning of Common Article 3. Some conflict is more like isolated acts of violence, riots, or banditry. Although no set of criteria is listed in the Convention itself for determining the existence of a non-international armed conflict, the Commentary offers non-binding criteria to guide observers in determining whether any particular situation rises to the level of armed conflict:[22]

i. Does the group have an organized military force?

ii. Are members of the group subject to some authority?

iii. Does the group control some territory?

iv. Does the group demonstrate respect for the LOAC? This is more often accepted to mean that the group must not demonstrate an unwillingness to abide by the LOAC.

v. Does the government respond to the group with regular armed forces?

d. Additional Protocol II. Supplements Common Article 3.

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[22] GC I Commentary. An alternate view to determine when a NIAC arises was offered in the *Prosecutor v. Tadic´* decision. There, in the view of the International Criminal Tribunal for the Former Yugoslavia, the Appeals Chamber gave two criteria to determine the existence of a non-international armed conflict: 1) the intensity of the conflict; and 2) the organization of the parties to the conflict. *See* ICTY, Prosecutor v. Tadic´, Case No. IT–94–1-T, Opinion and Judgment (Trial Chamber II), 7 May 1997, para. 562. The Rome Statute (establishing the International Criminal Court), adopted on July 17, 1998, defines non-international armed conflicts as "armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." *See* Rome Statute of the International Criminal Court, art. 8, July 17, 1998, U.N.T.S. 90.

i. Controversial shrinking coverage of law relating to non-international armed conflict. Intended to supplement the substantive provisions of Common Article 3, AP II formalized the criteria for the application of that Convention to a non-international armed conflict, requiring both more formalized command structures *and* some control over specific territory. According to AP II, art. 1, "dissident armed forces or other organized armed groups" must:

A. Be under responsible command.

B. Exercise control over a part of a State so as to enable them to carry out sustained and concerted military operations and to implement the requirements of AP II.

C. How do the Protocols fit in?

1. As indicated, the 1977 Additional Protocols to the 1949 Geneva Conventions are supplementary treaties. AP I is intended to supplement the LOAC related to international armed conflict (Common Article 2 conflicts), while AP II is intended to supplement the LOAC related to non-international armed conflict (Common Article 3 conflicts). Therefore:

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

b. When you think of the law related to non-international armed conflict, also think of AP II.

D. U.S. policy is to comply with the LOAC during all operations, whether international armed conflict, non-international armed conflict, or situations short of armed conflict.

1. DoD Directive 2311.01E (9 May 2006), DoD Law of War Program, states that DoD policy requires all "[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[23]

2. The Chairman of the Joint Chiefs of Staff has issued further guidance on the matter. CJCSI 5810.01D (30 Apr 2010), which implements the DoD Law of

[23] DoD Directive 2311.01E (May 9, 2006) supersedes the language in DoD Directive 5100.77 (Dec 9, 1998 – now canceled) that required members of the armed forces to "comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations."

War Program, similarly states that "[m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[24]

IV. LOAC AND INTERNATIONAL HUMAN RIGHTS LAW

A. What is the relationship between the LOAC and international human rights law? International human rights law refers to a distinct body of international law, intended to primarily protect individuals from the arbitrary or cruel treatment by their own governments. While the substance of human rights protections may be synonymous with certain LOAC protections, it is critical to remember these are two distinct bodies of international law. The LOAC is triggered by conflict. No such trigger is required for international human rights law. These two bodies of international law are easily confused, especially because of the contemporary use of the term "international humanitarian law" in place of "law of war" or "law of armed conflict." There is much current debate between the merging, or "complementarity" between the law of armed conflict and international human rights law. Further discussion of this issue is found in the Human Rights chapter, *infra*.

[24] Chairman of the Joint Chiefs of Staff Instruction 5810.01D, Implementation of the DoD Law of War Program (30 Apr 2010).

LEGAL BASIS FOR THE USE OF FORCE

I. OBJECTIVES

A. Understand the international legal prohibition against the threat or use of force as found in Article 2(4) of the United Nations (UN) Charter (the "rule").

B. Understand enforcement action taken by the UN Security Council pursuant to Chapter VII of the UN Charter ("exception #1").

C. Understand the "inherent right of self-defense" as found in Article 51 of the UN Charter ("exception #2").

II. INTRODUCTION

A. General. In both customary and treaty law, there are a variety of internationally-recognized legal bases for the use of force in relations between States. Generally speaking, however, **modern *jus ad bellum*** (the law governing a State's resort to force) is reflected in the United Nations (UN) Charter. The UN Charter provides two bases for a State's choice to resort to the use of force: Chapter VII enforcement actions under the auspices of the UN Security Council, and self-defense pursuant to Article 51 (which governs acts of both individual and collective self-defense).

B. Policy and Legal Considerations.

1. Before committing U.S. military force abroad, decision makers must make a number of fundamental policy determinations. The President and the national civilian leadership must be sensitive to the legal, political, diplomatic, and economic factors inherent in a decision to further national objectives through the use of force. The legal aspects of such a decision, both international and domestic, are of primary concern in this determination. **Any decision to employ force must rest upon the existence of a viable legal basis in *international* law as well as in *domestic* law** (including application of the 1973 War Powers Resolution (WPR), Public Law 93-148, 50 U.S.C. §§ 1541-1548). This chapter will focus exclusively on the international legal basis for the use of force.

2. Though these issues will normally be resolved at the national political level, Judge Advocates (JAs) must understand the basic concepts involved in a determination to use force abroad. Using the mission statement provided by higher authority, JAs must become familiar with the legal justification for the mission and, in coordination with higher headquarters, be prepared to brief all local commanders on that legal justification. This will enable commanders to

better plan their missions, structure public statements, and conform the conduct of military operations to U.S. national policy. It will also assist commanders in drafting and understanding mission specific Rules of Engagement (ROE), which must be tailored to calibrate the authority to use force consistent with national security and policy objectives.

3. The JA must also remember that the success of any military mission abroad will likely depend upon the degree of domestic support demonstrated during the initial deployment and sustained operation of U.S. forces. A clear, well-conceived, effective, and timely articulation of the *legal* basis for a particular mission is essential to sustaining support at home and gaining acceptance abroad.

C. Article 2(4): The General Prohibition Against the Use of Force.

1. The UN Charter mandates that all member States resolve their international disputes peacefully.[1] It also requires that States refrain in their international relations from the *threat or use of force* against the territorial integrity or political independence of any State.[2] This ban on aggression, taken from Article 2(4) of the UN Charter, is regarded as the heart of the UN Charter and the basic rule of contemporary public international law.[3] An integral aspect of Article 2(4) is the principle of non-intervention, which provides that States must refrain from interference in other States' internal affairs.[4] Put simply, non-intervention stands for the proposition that States must respect each other's *sovereignty*.

2. U.S. policy statements have frequently affirmed the principle of non-intervention, which itself has been made an integral part of U.S. law through the ratification of the Charters of the United Nations and the Organization of

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[1] UN Charter, Article 2(3): "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered." The UN Charter is reprinted in full in various compendia, including the International and Operational Law Department's Law of Armed Conflict Documentary Supplement, and is also available at http://www.un.org/aboutun/charter/index.html.

[2] UN Charter, Article 2(4): "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."

[3] *See* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 117 (Bruno Simma ed., Oxford Univ. Press 2nd ed., 2002).

[4] UN Charter, Article 2(7): "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."

American States (OAS),[5] as well as other multilateral international agreements which specifically incorporate nonintervention as a basis for mutual cooperation. The emerging concept of **humanitarian intervention**, however, has placed pressure on the principle of non-intervention and respect for State sovereignty in circumstances when a State is unable or unwilling to avert a humanitarian catastrophe, or is itself responsible for massive violations of human rights against its citizens.[6]

III. THE LAWFUL USE OF FORCE

A . General. Despite the UN Charter's broad legal prohibitions against the use of force and other forms of intervention, specific exceptions exist to justify a State's recourse to the use of force or armed intervention. While States have made numerous claims, using a wide variety of legal bases to justify uses of force, it is generally agreed that there are only two exceptions to the Article 2(4) ban on the threat or use of force: (1) actions authorized by the UN Security Council under Chapter VII of the UN Charter, and (2) actions that constitute a legitimate act of individual or collective self-defense pursuant to Article 51 of the UN Charter and/or customary international law (CIL).[7]

B. UN Enforcement Action (Chapter VII).

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[5] OAS Charter, Article 18: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements." *See also* Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Art. I: ". . . Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or this Treaty."

[6] *See* Report of the International Commission on Intervention and State Sovereignty, December 2001 ("Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."). The United States does not accept humanitarian intervention as a separate basis for the use of force; however, the United Kingdom has expressed support for it. *See* Lord Goldsmith**,** Attorney General, Iraq: Resolution 1441, para. 7 (Mar. 7, 2003) (secret memo to Prime Minister, released on April 28, 2005), *available at* http://www.guardian.co.uk/politics/2005/apr/28/election2005.uk.

[7] As stated above, a minority of States would include humanitarian intervention as a separate exception to the rule of Article 2(4). In addition, consent is sometimes stated as a separate exception. However, if a State is using force with the consent of a host State, then there is no violation of the host State's territorial integrity or political independence; thus, there is no need for an exception to the rule as it is not being violated.

1. The UN Security Council. The UN Charter gives the UN Security Council both a powerful role in determining the existence of an illegal threat or use of force and wide discretion in mandating or authorizing a response to such a threat or use of force (enforcement). The unique role is grounded primarily in Chapter VII of the UN Charter, which demonstrates **the Charter's strong preference for collective responses to the illegal use of force over unilateral actions in self-defense**. Chapter V of the UN Charter establishes the composition and powers of the Security Council. The Security Council includes **five permanent members** (China, France, Russia, the United Kingdom, and the United States) and ten non-permanent, elected members. Decisions within the Security Council require nine votes, and in those cases involving a non-procedural (i.e., substantive) matter, they also require the concurring votes of all five permanent members.[8] In practice, anything other than a veto by one of the permanent five members is considered a concurring vote. Article 24 states that UN members "confer on the Security Council primary responsibility for the maintenance of international peace and security" and, in Article 25, members "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

2. **Chapter VII of the UN Charter**, entitled "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," gives the UN Security Council authority to label as illegal threats and uses of force, and then to determine what measures should be employed to address the illegal behavior. Before acting, **the Security Council must first, in accordance with Article 39, determine the existence of a threat to the peace, a breach of the peace, or an act of aggression.** Provided the Security Council makes such a determination, the UN Charter gives three courses of action to the Security Council: 1) make recommendations pursuant to Article 39; 2) mandate non-military measures (i.e., diplomatic and economic sanctions) pursuant to Article 41; or 3) mandate military enforcement measures ("action by air, land, or sea forces") pursuant to Article 42.

   a. **Article 39**, the same article through which the Security Council performs its "labeling" function, allows the Council to make non-binding recommendations to maintain or restore international peace and security. Because Article 42 has not operated as intended (*see infra*), some have grounded UN Security Council "authorizations" to use military force in Article 39 (as non-binding permissive authorizations) vice Article 42 (as binding mandates).

   b. **Article 41** lists several non-military enforcement measures designed to restore international peace and security. These include "complete or

[8] According to Article 27 of the UN Charter, non-procedural decisions must include "the concurring votes of the permanent members."

partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." **Article 41 measures are stated as a *mandate*, binding on all UN members**. Article 42 implies that Article 41 measures must be attempted (or at least considered) before the Security Council adopts any of the military measures available to it.

c. **Article 42** contemplated that the Security Council would be able to mandate military action by forces made available to it under special agreements with UN member States. However, because no Article 43 special agreement has ever been made, Article 42 has not operated as envisioned. This means that the Security Council is unable to mandate military enforcement action in response to illegal threats or uses of force. Consequently, **military measures taken pursuant to Chapter VII are fundamentally permissive, phrased by the Security Council in the form of an *authorization* rather than a mandate**.

3. UN Peacekeeping and Peace Enforcement Operations. In the absence of special agreements between member States and the Security Council, UN peacekeeping operations enable the Security Council to carry out limited enforcement actions through member States on an ad hoc, voluntary basis. While these operations were traditionally grounded in Chapter VI of the UN Charter, which deals with peaceful means of settling disputes, today more peace operations are considered peace enforcement operations and carry with them a Chapter VII authorization from the Security Council. The authorization that accompanies these operations is usually narrowly worded to accomplish the specific objective of the peace operation. For example, UN Security Council Resolution (UNSCR) 794 (1992) authorized member States to use "all necessary means to establish, as soon as possible, a secure environment for humanitarian relief operations in Somalia."

4. Regional Organization Enforcement Actions. Chapter VIII of the UN Charter recognizes the existence of regional arrangements among States that deal with such matters relating to the maintenance of international peace and security, as are appropriate for regional actions (Article 52). Regional organizations, such as the OAS, the African Union, and the Arab League, attempt to resolve regional disputes peacefully, before referral to the UN Security Council. Regional organizations do not, however, have the ability to unilaterally authorize the use of force (Article 53). Rather, the Security Council may utilize the regional organization to carry out Security Council enforcement actions. In other words, regional organizations are subject to the same limitation on the use of force as are individual States, with the same two exceptions to the general prohibition against the use of force (i.e., enforcement actions under Chapter VII, and actions in individual or collective self-defense under Article 51 of the UN Charter or CIL).

IV. SELF-DEFENSE

A. Generally.

1. The right of all nations to defend themselves was well-established in CIL prior to adoption of the UN Charter. Article 51 of the Charter provides: "Nothing in the present Chapter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN until the Security Council has taken measures necessary to maintain international peace and security."

2. The questions that inevitably arise in conjunction with the UN Charter's "codified" right of self-defense involve the scope of authority found therein. Does this right, as the language of Article 51 suggests, exist only *after* a State has suffered an "armed attack," and then only *until* the Security Council takes effective action? Did the UN Charter thus limit the customary right of self-defense in such a way that eliminated the customary concept of *anticipatory self-defense* (*see infra*) and extinguished a State's authority to act independently of the Security Council in the exercise of self-defense?

3. Those in the international community who advocate a **restrictive approach** in the interpretation of the UN Charter—and in the exercise of self-defense—argue that reliance upon customary concepts of self-defense, to include anticipatory self-defense, is inconsistent with the clear language of Article 51 and counterproductive to the UN goal of peaceful resolution of disputes and protection of international order.

4. In contrast, some States, including the United States, argue that an **expansive** interpretation of the UN Charter is more appropriate, contending that the customary law right of self-defense (including anticipatory self-defense) is an inherent right of a sovereign State that was not "negotiated" away under the Charter. Arguing that contemporary experience has demonstrated the inability of the Security Council to deal effectively with acts and threats of aggression, these States argue that, rather than artificially limiting a State's right of self-defense, it is better to conform to historically accepted criteria for the lawful use of force, including circumstances which exist outside the "four corners" of the Charter.

B. Self-Defense Criteria: Necessity and Proportionality.

1. It is well-accepted that the UN Charter provides the essential framework of authority for the use of force, effectively defining the foundations for a modern

jus ad bellum. Inherent in modern *jus ad bellum* is the customary requirement that all uses of force satisfy both the ***necessity*** and ***proportionality*** criteria.[9]

2. **Necessity.** To comply with the necessity criterion, States must consider the exhaustion or ineffectiveness of peaceful means of resolution, the nature of coercion applied by the aggressor State, the objectives of each party, and the likelihood of effective community intervention. In other words, force should be viewed as a "last resort."

3. **Proportionality.** To comply with the proportionality criterion, States must limit the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack. In the context of *jus ad bellum,* proportionality is sometimes referred to as "proportionate force." However, the principle does not require limiting the response to mirror the type of force constituting the threat or attack.

C. Types of Self-Defense.

1. Individual Self-Defense. Within the bounds of both the UN Charter and customary practice, the inherent right of self-defense has primarily found expression in three recurring areas: 1) protection of a nation's *territorial integrity*; 2) protection of a nation's *political independence*; and 3) protection of *nationals* and their property located abroad. Judge Advocates must be familiar with these foundational issues, as well as basic concepts of self-defense, as they relate to overseas deployments, the response to State-sponsored terrorism, and the rules of engagement.

   a. Protection of Territorial Integrity. States possess an inherent right to protect their national borders, airspace, and territorial seas. No nation has the right to violate another nation's territorial integrity, and force may be used to preserve that integrity consistent with the Article 51 (and customary) right of self-defense.

   b. Protection of Political Independence. A State's political independence is a direct attribute of sovereignty, and includes the right to select a particular

[9] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 235-42 (4th ed. 2005). Yoram Dinstein would include a third criterion called immediacy. *Id.* at 242. "War may not be undertaken in self-defence long after an isolated armed attack." *Id.* In other words, the timeliness of the action in self-defense matters because a delay in response to an attack or the threat of attack attenuates the immediacy of the threat and the necessity to use force in self-defense. It should be noted that necessity and proportionality mean different things in *jus ad bellum* and *jus in bello*. *Jus ad bellum* defines these terms for purposes of using force, whereas j*us in bello* (law of war) defines these terms for purposes of targeting analysis.

form of government and its officers, the right to enter into treaties, and the right to maintain diplomatic relations with the world community. The rights of sovereignty or political independence also include the freedom to engage in trade and other economic activity. Consistent with the principles of the UN Charter and CIL, each State has the duty to respect the political independence of every other State. Accordingly, force may be used to protect a State's political independence when it is threatened and all other avenues of peaceful redress have been exhausted.

c. Protection of Nationals. Customarily, a State has been afforded the right to protect its citizens abroad if their lives are placed in jeopardy and the host State is either unable or unwilling to protect them. This right is cited as the justification for non-combatant evacuation operations (NEO).[10]

i. The protection of U.S. nationals was identified as one of the legal bases justifying U.S. military intervention in both Grenada and Panama. In each case, however, the United States emphasized that protection of U.S. nationals, standing alone, did not necessarily provide the legal basis for the full range of U.S. activities undertaken in those countries. Thus, while intervention for the purpose of protecting nationals is a valid and essential element in certain uses of force, it cannot serve as an independent basis for continued U.S. military presence in another country after the mission of safeguarding U.S. nationals has been accomplished.

ii. The right to use force to protect citizens abroad also extends to those situations in which a host State is an active participant in the activities posing a threat to another State's citizens (e.g. the government of Iran's participation in the hostage-taking of U.S. embassy personnel in that country in 1979-81; and Ugandan President Idi Amin's support of terrorists who kidnapped Israeli nationals and held them at the airport in Entebbe in 1976).

2. Collective Self-Defense. Also referred to in Article 51, the inherent right of collective self-defense allows victim States to receive assistance from other States in responding to and repelling an armed attack. To constitute a legitimate act of collective self-defense, all conditions for the exercise of an individual State's right of self-defense must be met, along with the additional requirement that **assistance must be requested by the victim State**. There is no recognized right of a third-party State to unilaterally intervene in internal conflicts where the issue in question is one of a group's right to self-determination and there is no request by the *de jure* government for assistance.

[10] Non-combatant evacuation operations are discussed more fully in Chapter 9 of the Operational Law Handbook.

a. Collective Defense Treaties and Bilateral Military Assistance Agreements.

i. Collective defense treaties, such as that of the North Atlantic Treaty Organization (NATO), the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty), the Security Treaty Between Australia, New Zealand, and the United States (ANZUS), and other similar agreements, do not provide an international legal basis for the use of U.S. force abroad, per se. Such agreements simply establish a commitment among the parties to engage in "collective self-defense" as required by specified situations, and provide the framework through which such measures are to be taken. From an international law perspective, a legal basis for engaging in measures involving the use of military force abroad must still be established from other sources of international law extrinsic to these collective defense treaties (i.e., there still must be a justifiable need for collective self-defense or a UN Security Council authorization to use force).

ii. The United States has entered into *bilateral military assistance agreements* with numerous countries around the world. These are not defense agreements, and thus impose no commitment on the part of the United States to come to the defense of the other signatory State in any given situation. Moreover, such agreements, like collective defense treaties, also provide no intrinsic legal basis for the use of military force.

3. Anticipatory Self-Defense. As discussed above, some States embrace an interpretation of the UN Charter that extends beyond the black letter language of Article 51, under the CIL principle of anticipatory self-defense. Anticipatory self-defense justifies using force in anticipation of an imminent armed attack. Under this concept, a State is not required to absorb the first hit before it can resort to the use of force in self-defense to repel an imminent attack.

a. Anticipatory self-defense finds its roots in the 1837 Caroline case and subsequent correspondence between then-U.S. Secretary of State Daniel Webster and his British Foreign Office counterpart Lord Ashburton. Secretary Webster posited that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if the circumstances leading to the use of force are "instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation." As with any form of self-defense, the principles of necessity and proportionality serve to bind the actions of the offended State.

b. Because the invocation of anticipatory self-defense is fact-specific in nature, and therefore appears to lack defined standards of application, it

remains controversial in the international community. Concerns over extension of anticipatory self-defense as a pretext for reprisal or preventive actions (i.e., the use of force before the coalescence of an actual threat) have not been allayed by contemporary use. It is important to note, however, that **anticipatory self-defense serves as a foundational element in the CJCS SROE, as embodied in the concept of hostile intent,** which makes it clear to commanders that they do not, and should not, have to absorb the first hit before their right and obligation to exercise self-defense arises.[11]

c. Preemptive Use of Force. In the 2002 National Security Strategy (NSS), the U.S. Government took a step toward what some view as a significant expansion of use of force doctrine from anticipatory self-defense to preemption.[12] This position was reinforced in the 2006 NSS, which reaffirmed the doctrine of preemptive self-defense against "rogue states and terrorists" who pose a threat to the United States based on their expressed desire to acquire and use weapons of mass destruction.[13] The "Bush Doctrine" of preemption re-casted the right of anticipatory self-defense based on a different understanding of imminence. Thus, the NSS stated, "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." It concluded: "The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack."[14] The 2010 NSS, however, suggests a possible movement away from the Bush Doctrine, as the Obama Administration declares in the NSS that, "while the use of force is sometimes necessary, [the United States] will exhaust other options before war whenever [it] can, and [will] carefully weigh the costs and risks of action versus the costs and risks of inaction."[15] Moreover, according to the 2010 NSS, "when force is necessary . . . [the United States] will seek broad international support, working with such institutions as NATO and the U.N. Security Council."[16] Nevertheless, the Obama Administration maintains that "the United States must reserve the right to act unilaterally

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[11] *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES, (13 June 2005).

[12] The White House, *The National Security Strategy of the United States of America*, (2002).

[13] The White House, *The National Security Strategy of the United States of America*, (2006).

[14] *Id*. at 15.

[15] The White House, *The National Security Strategy of the United States of America* 22 (2010).

[16] *Id.*

if necessary to defend our nation, yet we will also seek to adhere to standards that govern the use of force."[17]

d. A modern-day legal test for imminence, consistent with the above, was perhaps best articulated by Professor Michael Schmitt in 2003. He stated that States may legally employ force in advance of an attack, at the point when (1) evidence shows that an aggressor has committed itself to an armed attack, and (2) delaying a response would hinder the defender's ability to mount a meaningful defense.[18]

e. Anticipatory self-defense, whether labeled anticipatory or preemptive, must be distinguished from preventive self-defense. **Preventive self-defense—employed to counter non-imminent threats—is illegal under international law**.

D. Self-Defense Against Non-State Actors. Up to now, this handbook has discussed armed attacks launched ***by*** a State. Today, however, States have more reasons to fear armed attacks launched by non-state actors ***from*** a State. The law is still grappling with this reality. While the answer to this question may depend on complicated questions of state responsibility, **many scholars base the legality of cross border attacks against non-state actors on whether the host State is *unwilling or unable* to deal with the non-state actors who are launching armed attacks from within its territory**.[19] Some scholars have posited that a cross border response into a host State requires the victim State to meet a higher burden of proof in demonstrating the criteria that establish the legality of a State's use of force in self-defense.[20]

E. OPERATION ENDURING FREEDOM (OEF). In the wake of the attacks on the World Trade Center on 11 September 2001 (9/11), the UN Security Council passed, on the very next day, UNSCR 1368. This resolution explicitly recognized the United States' inherent right of individual or collective self-defense pursuant to Article 51 of the UN Charter against the terrorist actors who perpetrated the 9/11 attacks. The basis for the United States' use of force in OEF is, therefore, the Article 51 right of individual or collective self-defense. United States forces involved in the North Atlantic Treaty Organization (NATO) International Security Assistance Force (ISAF) mission must also, however, be aware of current UNSCRs, the most recent of which

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[17] *Id.*

[18] Michael Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 534 (2003).

[19] *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 244-46 (4th ed. 2005); Ashley Deeks, *'Unwilling or Unable': Toward an Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT'L L. 483 (2012).

[20] *See* Michael Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1 (2009).

is UNSCR 2011 (dated 12 October 2011), which "[a]uthorizes the Member States participating in ISAF to take all necessary measures to fulfill its mandate." The mandate of ISAF per the UNSCR is to assist the Afghan Government in improving "the security situation and build its own security capabilities." Thus, forces operating within the ISAF mission do so legally on the basis of a Security Council resolution, whereas forces operating within the OEF mission do so legally on a self-defense basis.

WOUNDED AND SICK IN THE FIELD

I. OBJECTIVES

A. Understand the importance of GC I's protections for the wounded and sick in the field.

B. Recognize the beneficiaries of GC I's protections.

C. Understand the obligations GC I imposes on the belligerents.

D. Recognize the different status given to medical personnel and chaplains, and the implications of such status, including the protections they are afforded, and the difference between being a retained person vice being a prisoner of war.

E. Understand the protections afforded to medical facilities/units/transports/aircraft.

F. Recognize the distinctive emblems which enjoy the Convention's protections, as well as the additional distinctive emblem introduced by AP III.

G. Be aware of GC II, which protects the wounded, sick, and shipwrecked members of the armed forces at sea.

H. Be aware of the legal developments that AP I and AP II introduced for the wounded, sick, and shipwrecked.

II. INTRODUCTION

A. Background.

1. Henry Dunant's book "*A Memory of Solferino,*" published in 1862, served as a catalyst in Europe to discuss the treatment of wounded and sick on the battlefield.

   a. Led to 1863 Conference in Geneva.

   b. The Conference resulted in the 1864 Geneva Convention, which the U.S. ratified in 1882. Key provisions include:

      i. Military ambulances and hospitals are neutral.

ii. Medical personnel and Chaplains are neutral. Repatriation is the rule.

iii. Wounded must be cared for. Repatriation if incapable of further service and agree not to take up arms again.

2. Updated in 1906 (followed shortly by the Xth Hague Convention of October 18, 1907, for the adaption to Maritime Warfare of the principles of the Geneva Convention of 1906). The Xth Hague convention was replaced in 1949 by a new Geneva Convention related to the shipwrecked (GC II). (*See* GC II, art. 58)

3. Updated again in 1929, adding a new Geneva Convention related to POWs.

4. Updated again in 1949, adding yet another Convention related to civilians (GC IV).

5. Most recently updated in 1977 by AP I for *international* armed conflicts, and by AP II for *non-international* armed conflicts.

a. The U.S. signed both AP I and AP II.[1]

b. Despite the fact that the U.S. has not ratified these treaties, understanding AP I and II is important for at least two reasons: (1) Certain provisions of AP I and AP II are considered customary international law, and therefore binding on the U.S.; and (2) many U.S. coalition partners have ratified AP I and II and therefore may have different legal obligations than the U.S. during a combined operation.

c. AP I, Part II, concerns "Wounded, sick and shipwrecked" in *international* armed conflict. It further developed the protections and obligations contained within GC I and II in a number of ways, including:

i. Defined the terms, which was not done in GC I and II;

ii. Recognized that civilian medical personnel and units shall receive the same protection as that formerly reserved for military medical personnel and units;

iii. Confirmed and extended the humanitarian role of the civilian population and of relief societies;

[1] *See supra* ch. 5, sec. II.A.3.b. for a discussion about the current U.S. position on AP I and AP II.

iv. Extended the scope of the protection for medical transportation by air by developing the procedures required to invoke this right;

v. Introduced the right of families to be informed of the fate of their relatives and developed the provisions concerning missing persons and the remains of the deceased.

d. AP II, Part III, concerns "Wounded, sick and shipwrecked" in *non-international* armed conflict and supplements AP II, Part II (Humane Treatment). This Part reiterates the essential substance of AP I, Part II, but taking into account the particular context of *non-international* armed conflict. It develops the protections and obligations contained within Common Article 3, attempting to make explicit what were implicit in that article's very simple statements.

B. Geneva Conventions – Scope of Application. The purpose of this section is to provide a brief review of when the Geneva Conventions become applicable. Students should consult the Framework of the Law of Armed Conflict, at chapter 5 of this deskbook, for a more in-depth discussion. When conducting a legal analysis applying the Geneva Conventions, one starting point for the analysis could be to answer the following two questions: (1) In what type of conflict are the parties engaged?; and (2) What type of person is the subject of the analysis?

1. Geneva Trigger: What Type of Conflict? All four Geneva Conventions of 1949 have "common articles," which are substantially verbatim in each.[2] Common Article 2 , is singularly important in that it sets up all four Conventions with an "either/or" condition/trigger:

a. Either it is an *international* armed conflict (IAC), in which case Common Article 2 states that the Geneva Conventions apply in their entirety,

b. Or it is a *non-international* armed conflict (NIAC), in which case Common Article 3 states that, although the remainder of the Geneva Conventions do not apply, there are still certain minimum protections (discussed *infra*) which do apply.

c. However, it is also possible to have a hybrid situation, with both an IAC and a NIAC occurring simultaneously. For example, during the most recent conflict in Libya, there was an IAC between NATO and Libya (Gaddafi), as well as a NIAC between Libya (Gaddafi) and armed Libyan insurgents/rebels.

[2] *See supra* ch. 5, sec. III.B., note 18.

d. Note 1: Both IAC and NIAC—as suggested by their terms—depend upon a state of armed conflict being attained. If there is no armed conflict, no part of the Conventions apply as a matter of law. However, the U.S. may still apply the Conventions by policy, as discussed below.

e. Note 2: For States party to AP I, article 1(4) expands the scope of IAC to "include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." This expansion is one of the reasons the U.S. has not ratified AP I.

f. Note 3: For States party to AP II, article 1 restricts the scope of NIAC to conflicts of a certain degree of intensity over that provided by Common Article 3.[3] The U.S. opposes this contraction of protection.

2. Geneva Trigger: What Type of Person? A legal analysis involving the Geneva Conventions must not only inquire into the nature of the conflict (as discussed above), but must also ask what is the type of person that is the subject of the analysis? Since each Convention, and parts of those Conventions, protects different types of persons, an understanding of the person's identity and role in the armed conflict is required to determine their associated legal protections.

a. So, for instance, civilians are primarily protected by GC IV, while the protections governing a shipwrecked sailor would generally be found in GC II.

b. The types of persons protected by GC I will be discussed below. However, the point made here is that persons who do **not** fit into a GC I category are not legally protected by that particular Convention, but might be protected by another. For example, a shipwrecked sailor, initially protected by GC II, who is sick or wounded is protected by GC I once put ashore; once he recovers, he is protected as a POW by GC III.

3. Even if the "Type of Conflict/Type of Person" analysis reveals that the protections of the Geneva Conventions are not legally required, the lack of legal protection does not prevent a policy judgment being made to provide the protections/treatment anyway. For instance, DoD Directive 2311.01E, the DoD Law of War Program, states that U.S. Forces will "comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."

C. Definitions.

[3] *See* AP Commentary at 1348.

1. The term "**wounded and sick**" is not defined in GC I or II. 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."[4] However, AP I, art. 8(1), contains the following definition of "wounded" and "sick": "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."

2. "**Shipwrecked**" is also not defined in GC II, though it includes shipwrecks "from any cause and includes forced landings at sea by or from aircraft." (GC II, art. 12). AP I, art. 8(2) provides a more detailed definition of "shipwrecked" to mean "persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them."

D. General Substantive Protections.

1. NIAC and Common Article 3 Protections for the Wounded and Sick. Common Article 3, also known as the "Mini-Convention" because it alone provided protections in NIAC prior to AP II, does include some protections for the wounded and sick.

   a. "Persons . . . placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." (Common Article 3, para. (1))

   b. "The wounded and sick shall be collected and cared for." (Common Article 3, para. (2))

   c. Recall that AP II also applies to NIAC. For those nations which are parties to AP II (the United States is not a party), the Protocol expands slightly the protection for the wounded and sick and those who aid them beyond that provided for in Common Article 3.

2. **IAC and Protections for the Wounded and Sick**. In a Common Article 2 conflict, the full GC I (and GC II for those at sea) are applicable. It is with these protections that the remainder of this chapter will be concerned. The protections can be summarized as consisting of three pillars:

   a. Treatment of the wounded and sick;

[4] GC I Commentary at 136.

b. Protections for personnel aiding the wounded and sick; and,

c. Distinctive emblems/symbols to identify protected personnel, units, and establishments.

III. CATEGORIES OF WOUNDED AND SICK

A. Protected Persons. Note that the title of GC I—Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field—implies that its application is limited to Armed Forces. This is largely, though not entirely, true. Article 13 sets forth those persons protected by GC I. This article **is the same** as GC III, art. 4; therefore, the analysis to determine whether the person is protected by GC I is identical to the analysis of whether the person is entitled to POW status under GC III, art. 4. Students should refer to the deskbook chapter on Geneva Convention III – Prisoners of War, for a more detailed discussion of these categories.

B. Other Persons. Wounded and sick persons who do not qualify under any of the categories in GC I, art. 13, will be covered as civilians by GC IV.

1. GC IV, art. 16, provides: "The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect."

a. This coverage of civilians is qualified by the following language in GC IV, art. 16: "*As far as military considerations allow*, each Party to the conflict *shall facilitate* the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment" (emphasis added). This recognizes the fact that saving civilians is the responsibility of the civilian authorities rather than of the military. The military is not required to provide injured civilians with medical care in a combat zone. However, once the military starts to provide treatment, the provisions of GC I apply.[5]

b. It is U.S. policy that "[c]ivilians who are injured, wounded, or become sick as a result of military operations *may* be collected and provided *initial* medical treatment in accordance with theater policies."[6]

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[5] Dept. of Army, Tactics, Techniques, and Procedures 4-02, Army Health System, para. 4-12 (7 October 2011) (hereinafter ATTP 4-02).

[6] Dept. of Army, Field Manual 4-02.6, The Medical Company Tactics, Techniques, and Procedures, para. A-4 (August 2002) (hereinafter FM 4-02.6) (emphasis added).

3. AP I, art. 8(a), however, expressly includes civilians within its definition of "wounded and sick." Though the U.S. is not bound by AP I, practitioners should be wary of treating wounded and sick civilians in a manner different from wounded and sick combatants. Given the GC IV protections and the development of the law by AP I, as a practical matter, all wounded and sick, military and civilian, in the hands of the enemy must be respected and protected. (*See also* FM 27-10, para. 208)

4. The rules applicable to civilians connected with medical transports may vary depending on whether such persons accompany the armed forces (GC III, art. 4.A.(4)), are members of the staff of voluntary aid societies either of a belligerent State (GC I, art. 26) or of a neutral State (GC I, art. 27), or are civilians not otherwise protected by GC I or GC III (GC IV, art. 4).

IV. THE HANDLING OF THE WOUNDED AND SICK

A. Respect and Protect. (GC I, art. 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." (GC I, art. 12, para. 1 (emphasis added))

2. *Respect*: to spare, not to attack. It is "unlawful for an enemy to attack, kill, ill treat or in any way harm a fallen and unarmed soldier." (GC I Commentary at 135). The shooting of wounded soldiers who are out of the fight is illegal. Similarly, there is no lawful justification for "mercy killings."

3. *Protect*: to come to someone's defense; to lend help and support. The enemy has an obligation to come to the aid of a fallen and unarmed soldier and give him such care as his condition requires. (*See* GC I Commentary at 135)

4. These duties apply "in all circumstances." Military considerations do not permit any lesser degree of treatment.

B. Standard of Care. (GC I, art. 12) Protected persons "shall be treated **humanely** and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria." (GC I, art. 12) Thus the standard is one of humane treatment: "[E]ach belligerent must treat his fallen adversaries as he would the wounded of his own army." (GC I Commentary at 137)

C. Order of Treatment. (GC I, art. 12)

1. **No *adverse* distinction** may be made in providing care, other than for medical reasons. (GC I, art. 12) Medical personnel must make the decisions regarding medical priority on the basis of their medical ethics. (*See also* AP I, art. 10)

   a. May not discriminate against wounded or sick because of "sex, race, nationality, religion, political opinions, or any other similar criteria." (GC I, art. 12)

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

2. "**Only urgent medical reasons** will authorize priority in the order of treatment to be administered." (GC I, art. 12) 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 life-threatening, are given lesser priority.

   b. The U.S. applies this policy at the evacuation stage, as well as at the treatment stage. Sick, injured, or wounded enemy are treated and evacuated through normal medical channels, but can be physically segregated from U.S. or coalition patients. Subject to the tactical situation and available resources, enemy personnel will be evacuated from the combat zone as soon as possible. Only those injured, sick, or wounded enemy who would run a greater health risk by being immediately evacuated may be temporarily kept in the combat zone.

3. Triage Categories:[7]

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

   b. <u>Delayed</u>. Treatment can be delayed for 8-10 hours without undue harm. Examples: Soft tissue injuries requiring debridement; maxillofacial

[7] *See* FM 4-02.6, para. C-3; *see also* Dept. of Army, Field Manual 8-42, Combat Health Support in Stability Operations and Support Operations, para. J-3 (27 October 1997).

injuries without airway compromise; eye and central nervous system injuries.

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

d. Expectant. Injuries are so extensive that even if they were the sole casualty, survival would be unlikely. Treatment will address pain and discomfort.

4. 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." (GC I, art. 12)

a. The first prohibition stems from a recognition that wounded personnel, who had not yet received medical treatment, were profitable subjects for interrogation. During World War II, the Germans frequently delayed medical treatment until after interrogation at their main aircrew interrogation center. Such conduct is now expressly forbidden.

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

D. Abandoning Wounded and Sick to the Enemy. (GC I, art. 12)

1. If, during a retreat, a commander is forced to leave behind wounded and sick, the commander 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. (*See* GC I Commentary at 142)

E. Search for Casualties. (GC I, art. 15)

1. Search, Protection, and Care. (GC I, art. 15)

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.

i. The drafters recognized that there were times when military operations would make the obligation to search for the fallen impracticable. (*See* GC I Commentary at 151)

ii. By way of example, U.S. policy during Operation Desert Storm was not to search for casualties in Iraqi tanks or armored personnel carriers because of concerns about unexploded ordnance.

iii. Similar obligations apply to maritime operations. (GC II, art. 18) "Following each naval engagement at sea, the belligerents are obligated to take all possible measures, consistent with the security of their forces, to search for and rescue the shipwrecked."[8]

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*.

2. Suspensions of Fire and Local Agreements. (GC I, art. 15)

a. Suspensions of fire are agreements calling for ceasefires that are sanctioned by the Convention to permit the combatants to remove, transport, or exchange the wounded, sick and the dead. Such exchanges of wounded and sick between parties did occur to a limited extent during World War II. (*See* GC I Commentary 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 remove or exchange wounded and sick from a besieged or encircled area, as well as the passage of medical and religious

[8] The Commander's Handbook on the Law of Naval Operations, NWP 1-14M, para. 11.4 (2007).

personnel and equipment into such areas. GC IV, art. 17, contains similar provisions for civilian wounded and sick in such areas. It is this type of agreement that was used to permit the passage of medical supplies to the city of Sarajevo during the siege of 1992.

F. Identification of Casualties. (GC I, arts. 16-17)

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

2. Forward the information to the Information Bureau required by GC III, art. 122. Information Bureaus are established by Parties to the conflict to transmit and to receive information/personal articles regarding Prisoners Of War to/from the International Committee of the Red Cross' (ICRC's) Central Tracing Agency. The U.S. employs the National Prisoner of War 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. Identification 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) is required 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. In addition, it is important to be aware of cultural issues, such as Islamic traditions regarding treatment and handling of the dead.

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

   c. <u>Honorable burial</u>. 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. (*See* GC I Commentary at 177)

d. Mark and record grave locations.

G. Voluntary Participation of Local Population in Relief Efforts. (GC I, art. 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 are 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. (*See* GC I Commentary at 193)

5. Civilians must also respect the wounded and sick. This is the same principle discussed above (GC I, art. 12) vis-à-vis armed forces. This is the only article of the Convention that imposes a duty directly on civilians. (*See* GC I Commentary at 191)

V. STATUS AND PROTECTION OF PERSONNEL AIDING THE WOUNDED AND SICK

A. There are **three categories** of persons who are protected for their work in aiding the wounded and sick.

1. First category: 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 attached to the armed forces (GC I, art. 24); and personnel of national Red Cross/Red Crescent Societies and other recognized relief organizations. (GC I, art. 26)

a. Respect and protect "in all circumstances." (GC I, art. 24) This means that they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions. The accidental killing

or wounding of such personnel, due to their presence among or in proximity to combatant elements actually engaged, by fire directed at the latter, gives no just cause for complaint. (FM 27-10, para. 225)

b. Status upon capture: **Retained Personnel**, not POWs. (GC I, art. 28)

i. This was 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 POWs.

ii. The 1949 convention institutionalized this process. Some government experts proposed making medical personnel regular POWs, the idea being that wounded POWs prefer to be cared for by their countrymen who speak 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 POWs, they were to be retained and treated at least as well as POWs. (*See* GC I Commentary at 238-40)

iii. Note that medical personnel may only be retained to treat POWs. Under no circumstances may they be retained to treat *enemy* personnel. While the preference is for the retained persons to treat POWs of their own nationality, the language is sufficiently broad to permit retention to treat **any** POW. (*See* GC I Commentary at 241)

c. Repatriation of Medical Personnel. (GC I, arts. 30-31)

i. 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 POWs and then are to be returned when retention is not indispensable.[9]

[9] *See* GC I Commentary at 260-262. Since World War II, this is one of the least honored provisions of the convention. U.S. medical personnel in Korea and Vietnam were neither repatriated nor given retained person status. *See* Memorandum of W. Hays Parks to Director, Health Care Operations *reprinted in* THE ARMY LAWYER, April 1989, at 5.

ii. GC I, art. 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.

iii. 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 U.S. practice is that retained persons will be assigned to POW camps in the ratio of 2 doctors, 2 nurses, 1 chaplain, and 7 enlisted medical personnel per 1,000 POWs. Those not required will be repatriated.[10]

d. Treatment of Medical Personnel. (GC I, art. 28)

i. Medical personnel and chaplains may only be required to perform medical and religious duties.

ii. They will receive at least all benefits conferred on POWs, e.g., pay, monthly allowances, correspondence privileges.

iii. They are subject to camp discipline.

e. Relief. Belligerents may relieve doctors retained in enemy camps with personnel from the home country. (GC I, art. 28) During World War II some Yugoslavian and French doctors in German camps were relieved. (*See* GC I Commentary at 257)

f. Continuing obligation of detaining power. (GC I, art. 28) The detaining power is bound to provide, free of charge, whatever medical attention the POWs require.

2. Second category: *Auxiliary* medical support personnel of the Armed Forces. (GC I, arts. 25 and 29)

a. These are personnel who have received special training in other medical specialties (e.g., orderlies, stretcher bearers) in addition to performing other military duties. (While Article 25 specifically refers to nurses, nurses are Article 24 personnel if they meet the "exclusively engaged" criteria of that article.)

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[10] *See* Army Regulation 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).

b. Respect and protect: when acting in their medical capacity. (GC I, art. 25)

c. Status upon capture: POWs; however, must be employed in medical capacity insofar as a need for their special training arises. (GC I, art. 29)

d. Treatment. (GC I, art. 29)

i. When not performing medical duties, shall be treated as POWs.

ii. When performing medical duties, they remain POWs, but receive treatment under GC III, art. 32 as retained personnel; however, they are not entitled to repatriation.

iii. Auxiliaries are not widely used.[11]

iv. The U.S. Army does not have any personnel who *officially* fall into the category identified in Article 25.[12]

3. Third category: Personnel of aid societies of neutral countries. (GC I, art. 27 and 32)

a. Nature of assistance: procedural requirements. (GC I, art. 27)

i. Consent of neutral government.

ii. Consent of party being aided.

iii. Notification to adverse party.

b. Retention prohibited: must be returned "as soon as a route for their return is open and military considerations permit." (GC I, art. 32)

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[11] *But see* W. Hays Parks memorandum, *supra* note 7, for discussion of certain U.S. personnel, who *de facto*, become auxiliary personnel. *See also* ATTP 4-02 at para. 4-21 (discusses this same issue and points out that Article 24 personnel switching between medical and non-medical duties are **at best** placed in the auxiliary category).

[12] *See* W. Hays Parks memorandum, *supra* note 7. 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). While the Army has personnel trained as Combat Lifesavers, such personnel are not considered Article 24 (medical personnel exclusively engaged) or Article 25 (auxiliary medical support personnel).

c. Treatment pending return: must be allowed to perform medical work. (GC I, art. 32)

VI. MEDICAL UNITS AND ESTABLISHMENTS

A. Protection.

1. Fixed Establishments and Mobile Medical Units. (GC I, art. 19)

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

b. Commanders are encouraged to situate medical units and establishments away from military objectives. *See also* AP I, art. 12, 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, as long as the captor has not ensured the necessary care.

d. GC I does not confer immunity from search by the enemy on medical units, establishments, or transports. (FM 27-10, para. 221)

2. Discontinuance of Protection. (GC I, art. 21)

a. Medical units/establishments lose protection if committing "acts harmful to the enemy." Acts harmful to the enemy are not only acts of warfare proper, but also any activity characterizing combatant action, such as setting up observation posts, or the use of the hospital as a liaison center for fighting troops. (*See* FM 27-10, para. 258) Other examples include using a hospital as a shelter for combatants, or as an ammunition dump. (*See* GC I Commentary at 200-201)

b. Protection ceases only after a warning has been given, and it remains unheeded after a reasonable time to comply. A reasonable time varies depending on the circumstances, e.g., no time limit would be required if fire is being taken from the hospital. (*See* GC I Commentary at 201)

c. AP I, art. 13, extends this same standard to civilian hospitals.

3. Conditions **not** depriving medical units and establishments of protection: (GC I, art. 22)

a. Unit personnel armed for their own defense against marauders and those violating the law of armed conflict, 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, grenade launchers, mines, light antitank weapons, etc., around a medical unit **would** cause a loss of protection.[13]

b. Self-Defense Defined. Although medical personnel may carry arms for self-defense, they may not employ such arms against enemy forces acting in conformity with the law of armed conflict. These arms are for their personal defense and for the protection of the wounded and sick under their charge against persons violating the law of armed conflict. Medical personnel who use their arms in circumstances not justified by the law of armed conflict expose themselves to penalties for violation of the law of armed conflict and, provided they have been given due warning to cease such acts, may also forfeit the protection of the medical unit or establishment of which they form part or which they are protecting. (*See* FM 27-10, para. 223)

c. Unit guarded by sentries. Normally a medical unit is 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 the previous paragraph.[14]

d. Small arms and ammunition taken from wounded may be present in the unit. However, such arms and ammunition should be turned in as soon as practicable and, in any event, are subject to confiscation. (FM 27-10, para. 223)

e. Presence of personnel from the veterinary service.

f. Provision of care to civilian wounded and sick.

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

1. Mobile Medical Units. (GC I, art. 33)

[13] ATTP 4-02, *supra* note 3, at para. 4-35.

[14] *Id*. at para. 4-35.

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

b. But captured medical material must be used to care for the wounded and sick. First priority for the use of such material is the wounded and sick in the captured unit. If there are no patients in the captured unit, the material may be used for other patients.[15]

2. Fixed Medical Establishments. (GC I, art. 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 a requirement exists.

b. Exception: "in case of urgent military necessity," fixed medical establishments 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. Medical material and stores of both mobile and fixed establishments "shall not be intentionally destroyed." **No military necessity exception.**

VII. MEDICAL TRANSPORTATION

A. Medical Vehicles—Ambulances. (GC I, art. 35)

1. Respect and protect: Medical vehicles may not be attacked if performing a medical function.

2. These vehicles may be employed permanently or temporarily on such duties, and they need not be specially equipped for medical purposes. (*See* GC I Commentary at 281). As 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 to forward areas with ammunition may bring back the wounded, with the important reservation that the emblem must be detachable (e.g., a flag), so that it may be displayed only while the vehicle is employed exclusively for its temporary medical function.

[15] *See* GC I Commentary at 274; *see also* ATTP 4-02, *supra* note 3, at para. 4-25.

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.[16]

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

4. Upon capture, these vehicles are subject to the laws of armed conflict.

   a. Captor may use the vehicles for any purpose. However, the ***material*** of mobile medical units falling into the hands of the enemy must be used only for the care of the wounded and sick, and does not constitute war booty, until GC I ceases to be operative. (*See* FM 27-10, para. 234)

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

B. Medical Aircraft. (GC I, art. 36)

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

2. Protection.

   a. Marked with protected emblem.

   b. However, **protection ultimately depends on an agreement**: medical aircraft are not to be attacked if "flying at heights, times and on routes specifically agreed upon between the belligerents." (GC I, art. 36) 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 color or markings useless. Only previous agreement could afford any real safeguard.

[16] *See* ATTP 4-02, *supra* note 3, at para. 4-26.

c. Without such an agreement, belligerents use medical aircraft at their own risk.[17]

d. Aircraft may be used permanently or temporarily on a medical relief mission; however, to be protected they must be used "exclusively" formedical purposes during the relief mission. (*See* GC I Commentary 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. The GC I Commentary also says "exclusively engaged" means flying without any armament.[18]

e. Reporting information acquired incidentally to the aircraft's medical 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 armed conflict or constitute grounds for loss of protected status. For example, a Medevac aircraft crew could report the presence of an enemy patrol if the patrol was observed in the course of its regular mission and not as part of an information gathering mission outside its medical duties.

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

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[17] *See* GC I Commentary at 288; ATTP 4-02, *supra* note 3, at para. 4-24. 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." PETER DORLAND AND JAMES NANNEY, DUST OFF: ARMY AEROMEDICAL EVACUATION IN VIETNAM 85-86 (1982). 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). By contrast, in the Falklands each of the hospital ships (four British and two Argentinean) had one dedicated medical aircraft with Red Cross emblems. Radar ID was used to identify these aircraft because of visibility problems. Later it was done by the tacit agreement of the parties. Both sides also used combat helicopters extensively, flying at their own risk. No casualties occurred. SYLVIE-STOYANKA JUNOD, PROTECTION OF THE VICTIMS OF THE ARMED CONFLICT IN THE FALKLANDS 26-27 (1984).

[18] *See also* AP I, art. 28(3); Dept. of Army, Field Manual 8-10-6, Medical Evacuation in a Theater of Operations – Tactics, Techniques, and Procedures, para. A-4 (14 April 2000) (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 antitank weapons).

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, medical aircraft must 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. Materiel will be governed by the provisions of GC I, arts. 33 and 34. (*See* GC I Commentary at 293)

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

   c. Wounded and sick must still be cared for.

5. The inadequacy of GC I, art. 36, in light of growth of use of medical aircraft, prompted an overhaul of the regime in AP I. (AP I, arts. 24-31)

   a. Establishes three overflight regimes:

      i. Land controlled by friendly forces (AP I, art. 25): No agreement between the parties is required for the aircraft to be respected and protected; however, the article recommends that notice be given, particularly if there is a surface-to-air missile threat.

      ii. Contact Zone (disputed area) (AP I, art. 26): Agreement required for absolute protection. However, enemy is not to attack once aircraft identified as medical aircraft.

      iii. Land controlled by enemy (AP I, art. 27): Overflight agreement required. Similar to GC I, art. 36(3) requirement.

   b. Bottom line: *Known* medical aircraft shall be respected and protected when performing their humanitarian functions.

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

C. Hospital ships. Military hospital ships, which are to be marked in the manner specified by GC II, art. 43, may in no circumstances be attacked and captured but must be respected and protected, *provided* their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed. (GC I, art. 20; GC II, art. 22)

1. Hospital ships must be used exclusively to assist, treat, and transport the wounded, sick, and shipwrecked. The protection to which hospital ships are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. (GC II, art. 34)

2. Traditionally, hospital ships could not be armed, although crew members could carry light individual weapons for the maintenance of order, for their own defense, and that of the wounded, sick, and shipwrecked. However, due to the changing threat environment in which the Red Cross symbol is not recognized by various hostile groups and actors as indicating protected status, the United States views the manning of hospital ships with defensive weapons systems, such as anti-missile defense systems or crew-served weapons to defend against small boat threats, as prudent force protection measures, analogous to arming crew members with small arms, and consistent with the humanitarian purpose of hospital ships and the duty to safeguard the wounded and sick.[19]

3. GC II, art. 34 provides that hospital ships may not use or possess "secret codes" as means of communication, so that belligerents could verify that hospital ships' communications systems were being used only in support of their humanitarian function and not as a means of communicating information that would be harmful to the enemy. However, subsequent technological advances in encryption and satellite navigation, while recognized as problematic, have not been specifically addressed by treaty. As a practical matter, modern navigational technology requires that the traditional rule prohibiting "secret codes" be understood to not include modern encryption communication systems.[20]

4. Coastal Rescue Craft. Small craft employed by a State or by the officially recognized lifeboat institutions for coastal rescue operations are to be respected and protected, so far as operational requirements permit. (GC II, art. 27)

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[19] NWP 1-14M, *supra* note 7, at para. 8.6.3.

[20] *Id*.

5. Any hospital ship in a port which falls into the hands of the enemy is to be authorized to leave the port. (GC II, art. 29)

6. Retained Personnel and Wounded and Sick Put Ashore. The religious, medical, and hospital personnel of hospital ships retained to care for the wounded and sick are, on landing, subject to GC I. (GC II, art. 37) Other forces put ashore become subject to GC I. (GC II, art. 4)

VIII. DISTINCTIVE EMBLEMS

A. Emblem of the Conventions and Authorized Exceptions. (GC I, art. 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 it has *since been replaced by the Red Crescent*.

4. Red Crystal. On 14 January 2007, the Third Additional Protocol to the 1949 Geneva Conventions (AP III) entered into force. **The United States is a party to AP III**, which established an additional emblem—the red crystal—for use by Governments and the International Red Cross and Red Crescent Movement. Under international law, the red crystal offers the same protection as the red cross and the red crescent when marking military medical personnel, establishments and transport; the staff of national societies; staff, vehicles and structures of the ICRC and the International Federation.

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. (*See* GC I Commentary at 301). As discussed above, Additional Protocol III to the Geneva Conventions also recognizes the Red Crystal. The Red Crystal replaces the Red Star of David.[21]

C. Identification of Medical and Religious Personnel. (GC I, art. 40)

[21] *See* ATTP 4-02, *supra* note 3, at para. 4-26.

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.[22]

   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. (GC I, art. 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" status extremely difficult.

3. Auxiliary personnel. (GC I, art. 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. (GC I, art. 42) The distinctive flag of the Convention (e.g., the Red Cross) may be hoisted only over such medical units and establishments as are entitled to be respected under GC I. It may be accompanied by the national flag of the Party to the conflict. However, if captured, the unit will fly only the Red Cross flag.

E. Marking of Medical Units of Neutral Countries. (GC I, art. 43)

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

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

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[22] *See id*. at para. 4-22.

F. Authority over the Emblem. (GC I, art. 39) 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. (*See* GC I Commentary at 308) 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.[23]

G. The emblem of the red cross on a white ground and the words "Red Cross" or "Geneva Cross" may not be employed, **either in time of peace or in time of war**, except to indicate or to protect the medical units and establishments, the personnel and material protected by GC I and other Conventions dealing with similar matters. (GC I, art. 44 (which also lists exceptions to the rule). *See also* AP I, art. 38, and AP II, art. 12, which prohibit the improper use of the distinctive emblems, such as the red cross).

H. "The use by individuals, societies, firms or companies . . . of the emblem . . . shall be **prohibited at all times**." (GC I, art. 53)

FOR FURTHER READING:

A. Joint Chiefs of Staff, Joint Publication 4-02, Health Service Support (31 October 2006).

B. Dept. of Army, Field Manual 4-02.1, Army Medical Logistics (8 December 2009).

[23] *See id.* at para. 4-26.

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PRISONERS OF WAR

I. OBJECTIVES

A. Become familiar with the historic influences on the development of protections for prisoners of war (POWs) during periods of armed conflict.

B. Understand the legal definition of "prisoner of war," and the test for determining when that status is conferred.

C. Understand the basic protections, rights, and responsibilities afforded to Prisoners of War.

II. 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] The captive could be killed, sold, or put to work and the discretion of the captor. No one was as helpless as an enemy prisoner of war.[3]

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

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

[2] GC III Commentary at 4.

[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).

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 threats to state survival. The British, therefore, prepared to try colonists for treason. In time, however, British forces begrudgingly recognized the colonists as belligerents and no colonial prisoners were tried for treason. However, colonists that were captured were subjected 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 POWs. He took steps to prevent abuse.[5]

D. The first agreement to establish POW treatment guidelines was likely found in 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 Confederate Soldiers. President Lincoln issued General Orders No. 100, "Instructions of the Government of Armies of the United States in the Field," known as the Lieber Code. The Lieber Code provided several protections for Confederate prisoners.

1. Although the Lieber Code went a long way in bringing some humanity to warfare, many traditional views regarding POWs 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]

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[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 TJAGLCS library) [hereinafter Grady].

[5] JOHN C. MILLER, TRIUMPH OF FREEDOM (1948); REV. R. LIVESAY, THE PRISONERS OF 1976; A RELIC OF THE REVOLUTION COMPILED FROM THE JOURNAL OF CHARLES HERBERT (1854); SYDNEY GEORGE FISHER, THE STRUGGLE FOR AMERICAN INDEPENDENCE (1908).

[6] *See* HOWARD S. LEVIE, 60 INTERNATIONAL LAW STUDIES, DOCUMENTS ON PRISONERS OF WAR 8 (1979) [hereinafter Levie, DOCUMENTS ON PRISONERS OF WAR] (providing additional test interpreting the Third Geneva Convention).

[7] *See id.* at 39; George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field,* 1 AM. J. INT'L L. 13 (1907) (providing a summary of who Doctor Francis Lieber was and the evolution of the Lieber Code)(emphasis added).

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 black soldiers that could not prove they were free were sold into slavery. Civilian free blacks were not much better off. They were treated like slaves and forced to perform labor to support 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 POWs 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.[9] The Union stopped paroling southern Soldiers for several reasons, most notably its significant numerical advantage. It was fighting a war of attrition and POW exchanges did not support that effort. This Union decision may have impacted on the poor conditions in southern POW 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 POW guards were living in conditions only slightly better than their Union captives.[10]

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.[11]

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[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] The Dix-Hill Cartel was signed and ratified by both sides on the Civil War on July 22, 1862. It lasted until 1863, failing primarily because of Confederate refusals to parole black POWs, and parolees returning to the battlefield too quickly. *See* HENRY P BEERS, THE CONFEDERACY, GUIDE TO THE ARCHIVES OF THE GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 234 (GSA 1986).

[10] REV. J. WILLIAM JONES, CONFEDERATE VIEW OF THE TREATMENT OF PRISONERS (1876).

[11] Over one-half of the Northern POWs died at Andersonville. *See* Lewis Lask and James Smith, *'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865*, 68 MIL. L. REV. 77 (1975). *See also* U.S. Sanitary Commission, Narrative of Privations and Sufferings of United States Officers and Soldiers while Prisoners of War in the Hands of the Rebel Authorities, S. RPT. NO. 68, 40th CONG., 3RD SESS. (1864), for a description of conditions suffered by POWs during the Civil War. FLORY, *supra* note 2, 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).

5. Despite being developed for the non-international armed conflict of the Civil War, the Lieber Code was instrumental in influencing European efforts to create international rules dealing with the conduct of war.

F. The first multilateral international attempt to regulate the handling of POWs occurred in 1907 with the promulgation of the Hague Regulations Respecting the Laws and Customs of War on Land (HR). Although the HR gave POWs 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 POWs.[12]

G. World War I. The Hague Regulations proved insufficient to address the treatment of the nearly 8,000,000 POWs taken in WWI. Germany was technically correct when it argued that the Hague Regulations were not binding because not all participants were signatories.[13] According to the Regulations, all parties to the conflict had to be signatories if the Regulations were to apply to any of the parties. If one belligerent was not a signatory, then all parties were released from mandatory compliance. The result was the inhumane treatment of POWs in German control.

H. Geneva Convention Relative to the Treatment of Prisoners of War in 1929. This convention complemented the requirements of the 1907 Hague Regulations and expanded safeguards for POWs. This convention did not include the requirement that all parties to the conflict had to be signatories in order for the Convention to be applicable to the signatory parties.

I. World War II. Once again, all the participants in the war were not signatories to the relevant treaties protecting POWs. Arguably, this was a large contributing factor in the maltreatment of POWs during the war. The gross maltreatment of POWs constituted a prominent part of the indictments preferred against Germans and Japanese in the post World War II war crimes trials.

1. Prior to World War II, the Japanese had signed, but not ratified, the 1929 Geneva Convention. They had reluctantly signed the treaty as a result of international pressure but ultimately refused to ratify it. The humane treatment of POWs was largely a western concept. During the war, the Japanese were surprised at the concern for POWs. To many Japanese, surrendering Soldiers were traitors to their own countries and a disgrace to the honorable profession of

[12] GC III Commentary at 6.

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

arms.[14] As a result, most POWs 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 Geneva Convention and therefore the Germans did not apply it to Soviet POWs. In Sachsenhausen alone, some 60,000 Soviet POWs died of hunger, neglect, flogging, torture, and shooting in the winter of 1941-42. The Soviets retained German POWs in the U.S.S.R. some twelve years after the close of hostilities.[15] Generally speaking, the regular German army, the Wehrmacht, did not treat American POWs too badly. The same cannot be said about the treatment Americans experienced at the hands of the German Schutzstaffel (S.S.) or Sicherheitsdienst des Reichsführers (S.D.)[16]

3. The post-World War II war crimes tribunals determined that international law regarding the treatment of POWs had become customary international law (CIL) by the outset of hostilities. Therefore, individuals could be held criminally liable for the mistreatment of POWs whether or not the perpetrators or victims were from States that had signed the various international agreements protecting POWs.[17]

J. Geneva Convention Relative to the Treatment of Prisoners of War in 1949 (GC III). The experience of World War II resulted in the expansion and codification of the laws of war in four Geneva Conventions of 1949. International armed conflict triggers the full body and protections of the Geneva Conventions.[18] 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.[19] Moreover, with the exception regarding reprisals, all parties must apply the rules of the treaty even if the protections are not being applied reciprocally. The proper treatment of POWs has now risen to the level of CIL.

K. 1977 Additional Protocols I to the 1949 Geneva Conventions (AP I). The U.S. is not a party to this Protocol. It creates no new protections for prisoners of war, but does,

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

[15] DRAPER, *supra* note 13, at 49.

[16] Grady, *supra* note 4, at 126.

[17] *Id*.

[18] GC III, art. 2.

[19] Currently, all 194 nations are parties to the 1949 Geneva Conventions. *See* *http://*www.icrc.org/ihl.nsf/CONVPRES?OpenView.

however, have the effect of expanding the definition of "status"—that is, who is entitled to the POW protections in IAC.[20]

III. PRISONER OF WAR STATUS AS A MATTER OF LAW

A. Important Terminology.

1. Prisoners of War: A detained person as defined in GC III, art. 4. (*See also* FM 27-10, para. 61)

2. Civilian Internees: 1. A civilian who is interned during armed conflict or occupation for security reasons, for protection, or because he or she has committed an offense against the detaining power. 2. A term used to refer to persons interned and protected in accordance with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Geneva Convention).[21]

3. Retained personnel: Medical and religious personnel retained by the Detaining power with a view of assisting POWs.[22]

4. Detainee: [23] Any person captured, detained, held, or otherwise under the control of DoD personnel (military, civilian, or contractor employee). It includes any person held during operations other than war. This is the default term to use when discussing persons who are in custody of U.S. armed forces.

5. Refugees: Persons who by reason of real or imagined danger have left home to seek safety elsewhere.[24]

6. Dislocated civilian: Dislocated civilian is a generic term that includes a displaced person, an evacuee, expellee, internally displaced person, a migrant, a

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[20] AP I, arts. 43-45.

[21] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 88 (1 June 1987) [hereinafter JOINT PUB. 1-02]. *See also* The Law of Occupation and Post-Conflict Governance chapter of this deskbook.

[22] GC III, art. 33.

[23] U.S. Dep't of Defense, Dir. 2310.01E, The Department of Defense Detainee Program, para. E2.1. (5 Sep 2006) [hereinafter DoD Dir. 2310.01E].

[24] JOINT PUB. 1-02, *supra* note 21, at 453. *See also* GC IV, art. 44; 1951 UN Convention Relating to the Status of Refugees, 189 U.N.T.S. 137.

refugee, or a stateless person.[25] A displaced person is a civilian who is involuntarily outside the national boundaries of his or her country.[26]

B. Right Kind of Conflict for GC III Protections. In order to achieve POW status, the individual must be the right kind of person in the right kind of conflict. POW status is only given in an International Armed Conflict (also known as a Common Article 2 conflict (CA2)). The status of POW is not recognized in a Non-International Armed conflict (Common Article 3 conflict (CA3)). Not all hostile actors in a CA2 conflict are entitled to POW status. Captured persons must also belong to one of the groups of fighters described in GC III, art. 4. The question of status is enormously important. There are two primary benefits of POW status. First, POWs receive immunity for warlike acts (i.e., any acts of killing and causing damage in compliance with the LOAC) are not criminal). Second, POWs are entitled to all the rights, privileges, and protections under GC III. One of those rights is that the prisoner is no longer a lawful target.

C. The Right Kind of Person for GCIII protections.

1. Once a conflict rises to the level of CA2, parties should look to GC III, art. 4 in order to determine who is entitled to POW status. Traditionally, persons were only afforded POW status if they were members of the regular armed forces involved in an international armed conflict. However, GC III also includes, members of militias or resistance fighters belonging to a party to an IAC if they meet the following criteria:

a. Commanded by a person responsible for his subordinates;

b. Fixed distinctive insignia recognizable at a distance;[27]

c. Carrying arms openly;[28] and,

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[25] JOINT PUB. 1-02, *supra* note 21, at 163.

[26] *Id*.

[27] For a discussion of the uniform requirement, *see* Ex parte 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.

[28] 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. AP I changes this requirement in a significant way. Under GC III, a combatant is required to distinguish himself throughout military operations. AP I, art. 44(3) only obligates a combatant to distinguish himself from the civilian population "while they are engaged in an attack or in a military operation

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

2. In addition, numerous other persons detained by military personnel are entitled to POW 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;[29]

b. War Correspondents;[30]

c. Civilian members of military aircraft crews;[31]

d. Merchant marine and civil aviation crews;[32]

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

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

i. Be in non-occupied territory;

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preparatory to an attack, or in any action carried out with a view to combat." AP Commentary at 527.

Judge Advocates must recognize that with coalition operations, one may have to apply a different standard; our coalition partners may use AP I's criteria. AP I only requires combatants to carry their arms openly in the attack and to be commanded by a person responsible for the organization's actions, comply with the laws of war, and have an internal discipline system. Therefore, guerrillas may be covered.

[29] GC III, art. 4(a)(4).

[30] *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).

[31] GC III, art. 4(a)(4).

[32] GC III, art. 4(a)(5).

[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 (Nov. 26, 1992).

[34] *See* GC III, art. 4(a)(6); FM 27-10, para. 65, which states all males of military age may be held as POWs in an area in which a levée en masse operates. GC III does not discriminate the right to detain by gender, and therefore females may be detained as well.

ii. Act spontaneously to the invasion;

iii. Carry their arms openly; and,

iv. Respect the laws and customs of war.

g. This is NOT an all-inclusive list. One's status as a POW is a question of fact. One factor to consider is whether or not the individual is in possession of an identification card issued by a belligerent government. Prior to 1949, possession of an identification card was a prerequisite to POW status.

4. Medical and religious personnel (Retained Personnel) receive the protections of GC III.[35] Additionally,

a. Retained personnel are to be repatriated as soon as they are no longer needed to care for other POWs.

b. Of note, retained status is not limited to doctors, nurses, corpsmen, etc. This status also includes, for example, the hospital clerks, cooks, and maintenance workers.[36]

5. Persons whose POW status is debatable:[37]

a. Deserters/Defectors;[38]

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[35] GC III, arts. 4(c) and 33.

[36] *See* GC I Commentary at 218-58. *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).

[37] *See* Levie, *supra* note 6, at 82-84; Richard R. Baxter, *So-Called 'Unprivileged 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.).

[38] *See* Memorandum, HQDA, DAJA-IA, 22 January 1991, Subj: Distinction Between Defectors/Deserters and Enemy Prisoners of War. *See also* Levie, *supra* note 6, at 77 - 78; James D. Clause, *The Status of Deserters Under the 1949 Geneva Prisoner of War Convention*, 11 MIL. L. REV. 15 (1961); L.B. Schapior, *Repatriation of Deserters,* 29 BRIT. YB. INT'L L. 310 (1952).

b. Saboteurs;[39]

c. Military advisors;[40]

d. Belligerent diplomats;[41]

e. Mercenaries[42] (AP I, art. 47).

f. U.N. personnel during U.N. peace missions.[43]

6. Spies are not entitled to POW status (HR, art. 29, and AP I, art. 46).

E. When POW's Status is in Doubt.

1. Article 5 Tribunal. Article 5, GC III: "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."

2. AR 190-8[44] provides guidance on how to conduct an Article 5 Tribunal.

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[39] Not entitled to status if at time of capture, the individual is dressed in civilian clothes and engaged in a sabotage mission behind enemy lines. *See* Ex parte Quirin, 317 U.S. 1, 31 (1942). *See also* HOWARD S. LEVIE, 59 INTERNATIONAL LAW STUDIES, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 36-37 and 82-83(1977).

[40] If a neutral nation sends a military advisor or some other representative that accompanies an armed force as an observer then that person, if taken into custody of the armed forces of the adverse Party, would not be considered a POW. The military representative could be ordered out of, or removed from the theater of war. On the other hand, if the military representative takes part in the hostilities and acts as a "military advisor" and renders "military assistance to the armed forces opposing those of the belligerent Power into whose hands they have fallen, it could be argued that they fall within the ambit of Article 4(A) and that they are therefore entitled to prisoner-of-war status." Levie, *supra* note 47, at 83-84.

[41] If a belligerent diplomat, in addition to his political office, is a member of the regular armed forces or is accompanying the armed forces in the field in one of the categories included in GC III, art. 4(A), then he is subject to capture and to POW status. Levie, *supra* note 47, at 83, 342n.

[42] *See generally* AP I, art. 47 (indicating that mercenaries do not qualify for Prisoner of War status; however, the United States is not a party to AP I and objects to this specific provision); John R. Cotton, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 144 (1977).

[43] *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).

a. A General Court-Martial Convening Authority appoints the tribunal.

b. There are to be three voting members and one nonvoting recorder, preferably a Judge Advocate. The president must be a field grade officer.

c. 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 judge advocate and there is no right to representation for the subject whose status is in question.

d. If a Combatant Commander has his own regulation or policy on how to conduct an Article 5 Tribunal, the Combatant Commander's regulation controls. For example, *see* CENTCOM Regulation 27-13.

IV. PRIMARY PROTECTIONS PROVIDED TO PRISONERS OF WAR

A. Protection "Top Ten."[45]

1. Humane Treatment.[46] (GC III, art. 13)

2. Prohibition against medical experiments. (GC III, art. 13)

3. Protection from violence, intimidation, insults, and public curiosity.[47] (GC III, art. 13)

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[44] U.S. Dep't of Army, Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees para. 1-6(a) (1 Oct. 1997) [hereinafter AR 190-8].

[45] For an excellent discussion regarding the "Top Ten" protections, s*ee* Major Geoffrey S. Corn and Major Michael L. Smidt, *"To Be or Not to Be, That is the Question," Contemporary Military Operations and the Status of Captured Personnel,* ARMY LAW. June 1999.

[46] The requirement that POWs must at all times be humanely treated is the basic theme of the Geneva Conventions. GC III Commentary at 140. A good rule of thumb is to follow the "golden rule." That is, to treat others in the same manner as you would expect yourself or one of your fellow service members to be treated if captured. In other words, if you would consider the treatment inhumane if imposed upon one of your fellow service members, then it probably would violate this provision.

[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

4. Equality of treatment. (GC III, art. 16)

5. Free maintenance and medical care. (GC III, art. 15)

6. Respect for person and honor (specific provision for female POWs included). (GC III, art. 14)

7. No Reprisals. (GC III, art. 13)

8. No Renunciation of Rights or Status. (GC III, art. 7)

9. The Concept of the Protecting Power, especially the ICRC. (GC III, art. 8)

10. Immunities for warlike acts, but not for pre-capture criminal offenses, or violations of the law of war.[48]

B. Post-Capture Procedures

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

2. The protection and treatment rights, as well as the obligations begin ". . . [F]rom the time they fall into the power of the enemy . . ."[49] (GC III, art. 5)

CROSS, No. 295, (July/Aug. 1993), at 288 (focusing on the issue of photographing prisoners of war).

[48] GC III does not specifically mention combatant immunity. Rather, it is considered to be customary international law. Moreover, it can be inferred from the cumulative effect of protections within GC III. For example, Article 13 requires that prisoners not be killed, and Article 118 requires their immediate repatriation after cessation of hostilities. Although Article 85 does indicate that there are times when prisoners of war may be prosecuted for precapture violations of the laws of the detaining power, the Commentary accompanying Article 85 limits this jurisdiction to only two types of crimes: a prisoner may be prosecuted only for (1) war crimes, and (2) crimes that have no connection to the state of war. *See* Corn and Smidt, *supra* note 53 at n. 124.

[49] 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.

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

   a. Protect against public curiosity.

      i. Art. 13 does not *per se* prohibit photographing a POW. The prohibition extends to photographs that degrade or humiliate a POW. With respect to POWs, there is some value added in disseminating photographs since it gives family members assurance that their loved one is alive. Bottom line: strict guidelines required.[50]

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

   b. POW capture tags. All POWs will, at the time of capture, be tagged using DD Form 2745.[51]

4. Property of Prisoners. (GC III, art. 18)

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

   b. POWs and retained personnel are allowed to retain personal effects such as jewelry, helmets, canteens, protective mask and chemical protective garments, clothing, identification cards and tags, badges of rank and nationality, and Red Cross brassards, articles having personal or sentimental value and items used for eating except knives and forks. [52] (*See* GC III, art. 18; AR 190-8)

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[50] AR 190-8 provides: "Photographing, filming, and video taping of individual EPW, CI, and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of POW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Interment Facility commander's chain of command. AR-190-8, *supra* note 52, para. 1-5(4)(d).

[51] AR 190-8, *supra* note 52, para. 2-1.a.(1)(b), (c). This provision is routinely overlooked, as noted in After Action Reviews from Operation Iraqi Freedom.

[52] Ltr, HQDA, DAJA-IA 1987/8009, Subj: Protective Clothing and Equipment for EPWs. *See also* GC III Commentary at 166, n. 2.

c. But what about captured persons not entitled to POW status?[53] (*See* GC IV, art. 97)

5. Rewards for the capture of POWs are permissible, but they must avoid even the hint of a "wanted dead or alive" mentality.[54]

6. Questioning POWs

a. All POWs are required to give: (GC III, art. 17)

i. Surname, first name;

ii. Rank;

iii. Date of birth; and,

iv. Service number.

b. What if a POW refuses to provide his rank? Continue to treat as POW, but as of the lowest enlisted rank.[55]

c. No torture, threats, coercion in interrogation (Art. 17, GC III). **It's not what you ask but how you ask it.**[56] See the chapter on Intelligence Law

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[53] GC IV, art. 97 essentially allows the military to seize, but not confiscate, personal property of those civilians protected by GC IV. 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* 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 each.

[54] 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 (Dec. 20, 1989). This is distinct from a wanted "dead or alive" type award offer prohibited by the Hague Regulations. *See* FM 27-10, para. 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'").

[55] GC III, art. 17, para. 2. *See also* GC III Commentary at 158-59.

[56] 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*

and Interrogation Operations in the Operational Law Handbook for a more detailed discussion.

d. The U.S. military ID card doubles as the Geneva Conventions identification card. Note: Categories are I to V, which corresponds to respective rank. (GC III, art. 60)

V. POW CAMP ADMINISTRATION AND DISCIPLINE

A. Responsibility. (GC III, art. 12). The State (Detaining Power) is responsible for the treatment of POWs. POWs are not in the power of the individual or military unit that captured them. They are in the hands of the State itself, of which the individuals or military units are only agents.[57]

B. Locations?

1. Land only. (GC III, art 22). However, during the Falklands War, the British temporarily housed Argentine POWs on ship while in transit to repatriation.

2. Not near military targets.[58] (GC III, art. 23). During the Falklands War, several Argentine POWs were accidentally killed while moving ammunition away from their billets.

3. POWs must be assembled into camps based upon their nationality, language, and customs. (GC III, art. 22)

a. Generally, cannot segregate prisoners based on religion or ethnic background.[59] However, segregation by these beliefs may be required

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Prisoners of War Convention, 21 MIL. L. REV. 145 (1963); GC II Commentary at 163-64; Levie, *supra* note 47, at 106-09.

[57] GC III Commentary at 128-29.

[58] Iraq used U.S. and allied POWs during the Persian Gulf War as human shields in violation of GC III, arts. 19 and 23. *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.

[59] GC III, art. 34. One of the most tragic events of discrimination by a detaining power for religious reasons was the segregation by the Nazis of Jewish-American POWs. Several Jewish American Soldiers were segregated from their fellow Americans and sent to slave labor camps where "they were beaten, starved 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

especially when they are a basis for the conflict (E.g.,Yugoslavia: Serbs, Croats, and Muslims; Rwanda: Hutus, Tutsis; and Iraq: Sunni and Shia).

b. Political beliefs. GC III, art. 38 encourages the practice of intellectual pursuit. However, the U.N. experience in POW camps 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 POW camps instigated by North Korean POW communist activists. Scores of prisoners sympathetic to South Korea were murdered by North Korean POW extremist groups. During the rioting, POWs captured the camp commander, Brigadier General Dodd.[60]

C. What Must Be Provided?

1. Quarters equal to that provided to Detaining forces (GC III, art. 25); total surface and minimum cubic feet.

2. Adequate clothing considering climate. (GC III, art. 27)

3. Canteen? [61] (GC III, art. 28)

4. Tobacco? [62] (GC III, art. 26)

5. Recreation. (GC III, art. 38)

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).

[60] 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).

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

[62] *See* Memorandum, HQDA-IO, 12 Sept. 94, Subj: Tobacco Products for Enemy Prisoners of War. During Desert Storm, the 301st Military Police POW 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 POWs.

6. Religious accommodation. (GC III, art. 34)

7. Food accommodation (GC III, arts. 26 and 34); if possible, utilize enemy food stocks and let them prepare their own food.

8. Copy of GC III in POWs own language. Copies are available at: www.icrc.org.

9. Due process. (GC III, arts. 99 - 108)

10. Hygiene (GC III, art. 29); separate baths, showers and toilets must be provided for female POWs.

D. POW Accountability.[63] (GC III, arts. 122 and 123)

1. Capture notification – PWIS (Prisoner of War Information System). This system was utilized during Operations Desert Storm and Operation Uphold Democracy. The PWIS is now known as the National Detainee Reporting Center (NDRC).

2. POW deaths. (GC III, arts. 120 and 121). Any death or serious injury to a POW requires an official inquiry. Look to theater-specific SOPs to provide additional guidance on the appointing authority and routing system for the investigation or inquiry into a POW death or serious injury.

4. Reprisals against POWs are prohibited. (GC III, art. 13)

E. Transfer of POWs. (GC III, arts. 46 - 48)

1. Belligerent can only transfer POWs to nations which are parties to the Convention.

2. Detaining Power remains responsible for POW care.

a. There is no such thing as a "U.N." or "coalition" POW.[64]

[63] 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 POWs. *See also* Robert G. Koval, *The National Prisoner-of-War Information Center*, MILITARY POLICE (June 1992), at 25.

b. To ensure compliance with GC III, U.S. Forces routinely establish liaison teams and conduct GC III training with allied forces prior to transfering POWs to that nation.[65]

F. Complaints and Prisoners' Representatives.

1. The primary rights and duties/oversight responsibilities of Prisoner Representatives are set forth in the following articles of GC III: 57, 78-81, 98, 104, 107, 125, and 127.

2. There is the potential for conflict of the Prisoner Representative duties with the Code of Conduct Senior Ranking Officer (SRO) requirement.[66]

3. The SRO will take command, regardless of the identification of the Prisoners Representative.

G. POW Labor.[67] (GC III, arts. 49 - 57)

1. Rank has its privileges.

a. Officers cannot be compelled to work.

b. NCOs can be compelled to supervise only.

c. Enlisted can be compelled to do manual labor.

d. If they work, they must be paid.

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[64] *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.

[65] *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 (Apr. 3, 1992). *See also* DOD PERSIAN GULF REPORT, at 583.

[66] *See* DEP'T OF DEFENSE INSTRUCTION 1300.21, CODE OF CONDUCT TRAINING AND EDUCATION (Jan. 8, 2001).

[67] *See* Howard S. Levie, The Employment of Prisoners of War, 23 MIL. L. REV. 41, and Levie, *supra* note 47, 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.

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

2. Compensation.[68] (GC III, art. 60). 8 days paid vacation annually? (GC III, art. 53)

3. Type of Work.

a. Work cannot be unhealthy or dangerous, unless the POW volunteers. Work cannot be humiliating. (GC III, art. 52)

b. Work such as camp administration, installation, and maintenance is authorized, as well as work relating to agriculture; commercial business, and arts, and crafts; and domestic service without restriction to military character or purpose.[69]

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

d. Work in the metallurgical, machinery, and chemical industry is strictly prohibited. (GC III, art. 50)

H. Camp Discipline.

1. Disciplinary sanctions.

a. Must relate to breaches of camp discipline.

b. Only four types of punishments (UCMJ Art. 15-type punishments) are authorized (GC III, arts. 89 and 90). The maximum punishments are:[70]

i. Fine: ½ pay up to 30 days.

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[68] *See* Dep't of the Army Regulation 37-1, Financial Administration: Army Accounting and Fund Control (Apr. 30, 1991), Chapter 36.

[69] GC III Commentary at 150-51.

[70] GC IV provides the same maximum punishments for civilian internees. *See* GC IV, art. 119.

ii. Withdrawal of privileges, not rights.

iii. 2 hours of fatigue duty per day for 30 days.

iv. Confinement for 30 days.

c. Imposed by the camp commander. (GC III, art. 96)

2. Judicial sanctions.

a. POWs: Pre-capture v. post-capture.

i. Pre-capture: General court-martial or federal or state court prosecution if they have jurisdiction over U.S. Soldier for the same offense.[71] (GC III, arts. 82 and 85)

ii. Post-capture: any level court-martial allowed under UCMJ. Jurisdiction for post-capture offenses is found under Art. 2(9), UCMJ (GC III, arts. 82 and 102).

iii. Court-martial or military commission.[72] (GC III, art. 84). [But note effect of GC III, art. 102, is that U.S. must use a court-martial unless policy is changed to allow trial of a U.S. service members before a military commission.]

b. Due process required.

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[71] *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 GC III, art. 85. The reservation in essence would deny a POW their protected status if convicted of a war crime. North Vietnam used their reservation under Art. 85 to threaten on several occasions the trial of American pilots as war criminals. *See* MARJORIE WHITEMAN, 10 DIGEST OF INTERNATIONAL LAW 231 - 234 (1968); J. Burnham, *Hanoi's Special Weapons System: threatened execution of captured American pilots as war criminals,* NAT. REV., Aug. 9, 1966; *Dangerous decision: captured American airmen up for trial?,* NEWSWEEK, July 25, 1966; *Deplorable and repulsive: North Vietnam plan to prosecute captured U.S. pilots as war criminals*, TIME, July 29, 1966, at 12 - 13. *See generally*, Joseph Kelly, *PW's as War Criminals*, MIL. REV. (Jan. 1972), at 91.

[72] *See* Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion on the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW., Mar. 2002. For a historical use of military commissions, *see* Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002.

i. POWs: same due process as that provided to the Detaining Power's own military forces. (GC III, arts. 99 - 108)

ii. Right to appeal. (GC III, art. 106)

I. Escape.

1. When is an escape deemed successful?[73] (GC III, art. 91)

a. Service member has rejoined their, or an ally's, armed forces;

b. Service member has left the territory of the Detaining Power or its ally; (e.g., entered a neutral country's territory);

c. Service member has joined a ship flying the flag of the Power on which he depends, or of an Allied Power, in the territorial waters of the Detaining Power, the said ship not being under the control of the last named Power.[74]

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[73] Between 1942 and 1946, 2,222 German POWs escaped from American camps in the U.S. At the time of repatriation, 28 still were at large. One remained at large and unaccounted for in the U.S. until 1995! None of the German POWs ever successfully escaped. During World War II, 435,788 German POWs were held on American soil (about 17 divisions worth). Of all the Germans captured by the British in Europe, only one successfully escaped and returned to his own forces. This German POW did this by jumping a prisoner train in Canada and crossing into the U.S., which at that time was still neutral. ALBERT BIDERMAN, MARCH TO CALUMNY: THE STORY OF AMERICAN POW'S IN THE KOREAN WAR 90 (1979); Jack Fincher, *By Convention, the enemy within never did without*, SMITHSONIAN (June 1995), at 127. *See also* ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA (1994).

See A. Porter Sweet, *From Libby to Liberty*, MIL. REV. (Apr. 1971), at 63, for an interesting recount of how 109 Union Soldiers escaped a Confederate POW camp during the Civil War. *See* ESCAPE AND EVASION: 17 TRUE STORIES OF DOWNED PILOTS WHO MADE IT BACK (Jimmy Kilbourne, ed. 1973), for stories of servicemen who successful avoided capture after being shot down behind enemy lines or those who successfully escaped POW camps after capture. The story covers World War I through the Vietnam War. According to this book, only 3 Air Force pilots successfully escaped from captivity in North Korea. Official Army records show that 670 Soldiers captured managed to escape and return to Allied control. However, none of the successful escapees had escaped from permanent POW camps. *See* Paul Cole, I POW/MIA Issues, The Korean War 42 (Rand Corp. 1994). *See also* George Skoch, *Escape Hatch Found: Escaping from a POW camp in Italy was one thing. The next was living off a war-torn land among partisans, spies, Fascists and German Patrols*, MIL. HISTORY (Oct. 1988), at 34.

2. Unsuccessful escape.

   a. Only disciplinary punishment for the escape itself (GC III, art. 92).[75]

   b. Offenses in furtherance of escape.

      i. Disciplinary punishment only: [76] if sole intent is to facilitate escape and no violence to life or limb, or self-enrichment (GC III, art. 93). For example, POWs may wear civilian clothing during escape attempt without losing their POW status.[77]

      ii. Judicial punishment: if violence to life or limb or self-enrichment (GC III, art. 93).

3. Successful escape.

   a. Some authors argue no punishment can be imposed for escape or violence to life or limb offenses committed during escape if later recaptured. (GC III, art. 91)

   b. However, most authors posit that judicial punishment can occur if a POW is later recaptured for his previous acts of violence.

   c. Issue still debated, so U.S. policy is not to return successfully escaped POW to same theater of operations.

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[74] *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.

[75] *See also* GC IV, art. 120, for similar treatment of civilian internees who attempt escape.

[76] *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. . . ."

[77] 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.

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."[78]

J. Repatriation of Prisoners of War.[79]

1. Sometimes required before cessation of hostilities (GC III, art. 109).

a. Seriously sick and wounded POWs whose recovery is expected to take more than 1 year (GC III, art. 110).

b. Incurably sick and wounded (GC III, art. 110).

c. Permanently disabled, physically or mentally (GC III, art. 110).

d. This pre-cessation of hostilities repatriation provision is routinely ignored.

2. After cessation of hostilities.

a. GC III, art. 118, provides: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."

b. Rule followed after World War II. Result: thousands of Russian POWs executed by Stalin upon forced repatriation.

c. U.N. command in Korea first established principle that POWs do not have to be repatriated, if they do not so wish.[80]

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[78] GC III Commentary at 246. *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). "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." GC III, at 42.

[79] 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 TJAGLCS Library.

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

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LOAC PROTECTIONS FOR CIVILIANS

I. OBJECTIVES

A. Understand the definition of "civilian" under the LOAC.

B. Understand the historical development of protections for civilians during armed conflict.

C. Understand the Parts and Sections of GC IV and their corresponding protections.

D. Understand the definition of "protected person" under GC IV.

E. Understand the protections afforded to civilians by the Additional Protocols and Customary International Law.

F. Understand the protections afforded to U.S. contractors in military contingency operations.

II. THE DEFINITION OF "CIVILIAN" UNDER THE LOAC

A. Background. Although the concept of distinction between combatants and civilians dates back to the very foundations of the LOAC, the term "civilian" had no precise definition in the LOAC until 1977 when the international community adopted AP I, which is addressed in greater detail below. The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) provides protections for civilians during IACs but it does not define the term "civilian." Similarly, neither Common Article 3 nor AP II contains a specific definition of the term "civilian" for application in NIACs, and as the ICRC has noted in its work described below, CIL does not provide a clear definition for application in NIACs either. Further, while the ICRC espouses the view that during armed conflict a person is either a combatant or a civilian, and thus civilians are those who are not combatants, U.S. domestic law, addressed in greater detail below, has recognized a third category into which a person may fall. Such U.S. domestic law has designated this third category alternately as "unlawful combatants," "unlawful enemy combatants," and "unprivileged enemy belligerents." The key take away from this background is an understanding that determining whether a person is a civilian entitled to LOAC protections requires an analysis of the type of conflict and the law applicable in that conflict.

B. International Armed Conflict.

1. GC IV and AP I.[1] GC IV does not define the term "civilian" but AP I, art. 50 does as follows: "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." As the AP I Commentary explains, the Protocol contains a "negative definition" of civilian, which "follows a process of elimination and removes from the definition those persons who could by and large be termed 'combatants'."[2] Accordingly, under AP I, art. 50, a person is a civilian if that person does not belong to one of the following groups identified in GC III, art. 4(A) and AP I, art. 43:

   a. GC III, art. 4(A)(1). Members of the armed forces of parties to the conflict, including militias or volunteer corps forming part of such armed forces.

   b. GC III, art. 4(A)(2). Members of other militias and members of other volunteer corps, including organized resistance movements, who belong to parties to the conflict and:

      i. are commanded by a person responsible for his subordinates;

      ii. have a fixed distinctive sign recognizable at a distance;

      iii. carry arms openly; and

      iv. conduct their operations in accordance with the laws and customs of war.

   c. GC III, art. 4(A)(3). "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

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[1] Recall from the Chapter on the Framework of the Law of Armed Conflict that the international community created the Additional Protocols to supplement and update the 1949 Geneva Conventions and the 1907 Hague Regulations. As described more fully in this Chapter, AP I supplements the full GCs with civilian protections that are applicable in IACs, and AP II supplements CA 3 with civilian protections that are applicable in NIACs. The U.S. has signed but not ratified AP I and II so it is not bound by their provisions as a matter of treaty law. As described in the Customary International Law sections in this Chapter, however, the U.S. considers itself bound by many AP I and AP II provisions as a matter of customary international law.

[2] AP I Commentary at 610-611.

d. GC III, art. 4(A)(6). Inhabitants of a non-occupied territory, who spontaneously take up arms to resist invading forces ("mass levies"[3]), provided they carry arms openly and respect the laws and customs of war.

e. AP I, art. 43. "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates."

2. Customary International Law. Remember that States are also bound by CIL, which is formed over time by the general and consistent practice of States followed from a sense of legal obligation (*opinio juris*). Determining CIL is not as precise an exercise as looking up a statute or even interpreting the holding of a judicial opinion.[4] A thorough analysis (which cannot be completed in this Deskbook) should consider any existing U.S. views on the particular provision as well as others sources of CIL.

a. U.S. Views.

i. The most recent comprehensive U.S. statement on whether AP I provisions are considered CIL is a 1986 memorandum signed by attorneys from each of the four services for Mr. John McNeill, the Assistant General Counsel for International Affairs in the Secretary of Defense's Office.[5] At the time of that memo, the U.S. did not view the definition of "civilians" found in AP I, art. 50 "as already part of customary international law" or "supportable for inclusion in customary law through state practice."[6]

ii. Another U.S. position on whether certain AP I provisions relevant to civilian protections are "deserving of treatment as customary law" is found in remarks made in 1987 by Mr. Michael Matheson, Deputy

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[3] GC III Commentary at 67.

[4] *See supra* Introduction to Public International Law Chapter; *see also* U.S. Letter on ICRC CIL Rules *infra* note 11.

[5] Memorandum from W. Hays Parks, Chief, Int'l Law Branch, DAJA-IA, LCDR Michael F. Lohr, NJAG, Code 10, Lt Colonel Dennis Yoder, AF/JACI, and William Anderson, HQ USMC/JAR, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications, for Mr. John H. McNeill, Assistant Gen. Counsel (Int'l), Office of the Sec'y of Def. (May 9, 1986) [hereinafter AP I CIL Memo]. This memorandum is available in the most recent copy of the Law of Armed Conflict Documentary Supplement published by the International and Operational Law Department at The Judge Advocate General's Legal Center and School, U.S. Army [hereinafter LOAC DocSup].

[6] *See id*.

Legal Advisor, U.S. Department of State, at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law.[7] In his remarks, Mr. Matheson commented on U.S. support for certain principles espoused in various Articles of AP I, and stated that such principles "should be observed and in due course recognized as customary international law, even if they have not already achieved that status."[8] Mr. Matheson did not comment on AP I, art. 50 or its definition of "civilians."

b. Other References.

i. The ICRC CIL Database[9] "provides rapid access to the rules of customary IHL and enables users to examine practice around the world. Launched in August 2010, and built in large part upon the ICRC's study of CIL that it began in 1996 and published in 2005, the database is updated regularly with new State and international practice."[10] **Note, however, that the U.S. has disagreed with the ICRC's methodology used to determine many of the rules listed in its study and CIL Database.**[11]

ii. The ICRC CIL Database defines "civilians" for the purposes of IACs as "persons who are not members of the armed forces" and

[7] A summary of these remarks is available in the most recent copy of the LOAC DocSup. For Mr. Matheson's full remarks, *see* Martin P. Dupuis, et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POLICY 419, 426-428 (1987) [hereinafter Matheson's Remarks].

[8] Matheson's Remarks *supra* note 7, at 422.

[9] *Customary IHL*, INT'L COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/home [hereinafter ICRC CIL Database] (last visited Jun. 4, 2012).

[10] *Customary International Humanitarian Law*, INT'L COMMITTEE OF THE RED CROSS, http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/ (last visited Jun. 4, 2012).

[11] Letter from John B. Bellinger, III, Department of State Legal Advisor, and William J. Haynes, Department of Defense General Counsel, to Dr. Jakob Kellenberger, President of the ICRC (Nov. 3, 2006) [hereinafter U.S. Letter on ICRC CIL Rules] ("we are concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules.")

cites AP I, art. 50 and other sources as support for the customary status of the rule.[12]

iii. The ICRC CIL Database excepts out of its customary definition of "civilians" applicable in IACs the *levée en masse* ("inhabitants of a country which has not yet been occupied, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having time to form themselves into an armed force").[13]

C. Non-International Armed Conflict.

1. Geneva Conventions CA 3 and AP II. Common Article 3 does not contain a precise definition of the term "civilian" for application in NIACs. It does, however, require "each Party to the conflict" to treat humanely "persons taking no active part in the hostilities" and it also lists specific acts that are prohibited against such persons. AP II provides specific protections for civilians during NIACs[14], but it also does not contain a precise definition of the term "civilian."

2. Customary International Law.

a. U.S. Views. The U.S. has not expressed an official position on the customary status of a definition of civilians applicable in NIACs.

b. Other References.

i. The ICRC CIL Database[15] recognizes the absence of any precise definition of the term "civilian" in AP II but asserts that "[i]t can be argued that the terms "dissident armed forces or other organized armed groups … under responsible command" in Article 1 of Additional Protocol II inferentially recognized the essential conditions of armed forces, as they apply in international armed

[12] *Customary IHL - Rule 5. Definition of Civilians*, INT'L COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5.

[13] *Id*.

[14] *See* AP II, Part IV, Civilian Population.

[15] *See supra* note 9 and accompanying text.

conflict, . . . and that it follows that civilians are all persons who are not members of such forces or groups."[16]

ii. The ICRC CIL Database also provides that "practice is not clear as to whether members of armed opposition groups are civilians subject to [ICRC CIL Database] Rule 6 on loss of protection from attack in case of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6."[17]

iii. **Note, however, that the U.S. has disagreed with the ICRC's methodology used to determine many of the rules listed in its study and CIL Database.[18]**

D. Unlawful Combatants and Unprivileged Enemy Belligerents. While the ICRC espouses the view that in any type of armed conflict people are either combatants or civilians, U.S. domestic law has recognized additional categories of persons.

1. In 1942, the U.S. Supreme Court recognized the category of "unlawful combatant" in the LOAC.[19] In Quirin, the Court defined "unlawful combatants" as "subject to capture and detention" and "trial and punishment by military tribunals for acts which render their belligerency unlawful."[20] The Court also listed "the spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the line for the purpose of waging war by destruction of life or property," as "familiar examples of belligerents who are generally

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[16] *Customary IHL - Rule 5. Definition of Civilians*, INT'L COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 (citing NEW RULES FOR VICTIMS OF ARMED CONFLICTS 672 (Michael Bothe, Karl Joseph Partsch & Waldemar A. Solf eds., Martinus Nijhoff Publishers, 1982) (last visited Jun. 4, 2012).

[17] *Customary IHL - Rule 5. Definition of Civilians*, INT'L COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 (last visited Jun. 4, 2012). The database also explains that "most [military] manuals [of States] define civilians negatively with respect to combatants and armed forces and are silent on the status of members of armed opposition groups." *Id*.

[18] *See* U.S. Letter on ICRC CIL Rules *supra* note 11.

[19] Ex parte Quirin, 317 U.S. 1, 30-31 (1942) ("By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants") (citation omitted).

[20] *Id*. at 31 (citation omitted).

deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."[21]

2. In the Military Commissions Act of 2006, the U.S. Congress defined an "unlawful enemy combatant" as:

   a. a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

   b. a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[22]

3. In 2009, Congress amended the Military Commissions Act to remove references to "unlawful enemy combatant" and define the category of "unprivileged enemy belligerent" as "an individual (other than a privileged belligerent) who:

   [a. H]as engaged in hostilities against the United States or its coalition partners;

   [b. H]as purposefully and materials supported hostilities against the United States or its coalition partners; or

   [c. W]as a part of al Qaeda at the time of the alleged offense under [the Military Commissions Act]."[23]

4. Although the terms "unlawful combatant," "unlawful enemy combatant," and "unprivileged enemy belligerent" do not appear expressly in the LOAC applicable in either an IAC or a NIAC, the Quirin opinion suggests that all three terms have a foundation in the LOAC.[24] Even so, such terms, including the

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[21] *Id*.

[22] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2601.

[23] Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2575. The 2009 Act defines the term "Privileged Belligerent" as "an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War [(GC III)]." *Id*.

[24] The Quirin Court seemingly referred to "unlawful combatants," "unlawful belligerents" and "enemy belligerents" interchangeably when referring to individuals not entitled to the privilege

current U.S. definition of "unprivileged enemy belligerent" applicable to military commissions, are not widely recognized outside the U.S. as relevant to determining who qualifies for civilian status under the LOAC.

III. DEVELOPMENT OF CIVILIAN PROTECTIONS DURING ARMED CONFLICT

A. Historical Background. Although the LOAC did not precisely define the term "civilian" until 1977, 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, followed codes of chivalry, or issued instructions to soldiers in the hope similar rules would protect their own land and people if they fell under their enemy's control.

2. Facilitation of strategic success. Military and political leaders recognized that enemy civilians who believed that they would be well treated were more likely to surrender and cooperate with occupying forces. 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 armed conflict in the mid-nineteenth century and continues to be a major focus of advocates of "humanitarian law."

B. The Lieber Code. Prior to the American Civil War, although treatises existed, there was no written "Law of War." Only customary law existed regarding the need to distinguish between combatants and civilians.

1. Dr. Francis Lieber, a law professor at Columbia College in New York at the outset of American Civil War, advised President Lincoln on law of war matters. In November 1862, Dr. Lieber and four General Officers drafted the Lieber Code. On April 24, 1863, the United States published the Lieber Code as

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of prisoner of war treatment. *See* Quirin, *supra* note 19, at 30-31, 35, and 37-38. The Court also wrote that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention [of 1907] and the law of war." *Id*. at 37-38. *But see* Pub. Comm. Against Torture in Israel v. Gov't of Israel, HCJ 769/02 (2005) ("[A]s far as existing law goes, the data before us are not sufficient to recognize this third category [of unlawful combatant]. That is the case according to the current state of international law, both international treaty law and customary international law.") (citation omitted).

General Order No. 100, *Instructions for the Government of the Armies of the United States in the Field*. Incorporating customary law and contemporary practices, it was the first official laws of war published and implemented by a State.

2. The Lieber Code contained 157 articles and ten sections. The first two sections contain specific language regarding civilians.

   a. Section I, Martial law—Military jurisdiction—Military necessity—Retaliation.

   b. Section II, Public and private property of the enemy—Protection of persons, and especially of women; of religion, the arts and sciences—Punishment of crimes against the inhabitants of hostile countries.

3. **Lieber Code Principles on Treatment of Civilians**. The Lieber Code expressly condoned, under military necessity, starvation of civilians; however, it recognized civilian status and that the "unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit." (Art. 22)

   a. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy. (Art. 17)

   b. When a commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender. (Art. 18)

   c. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity. (Art. 19)

   d. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war. (Art. 21)

   e. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more

and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit. (Art. 22)

f. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war. (Art. 23)

g. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was, and still is with uncivilized people, the exception. (Art. 24)

h. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer, or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior. (Art. 44)

C. Civilian Protections in the Modern Jus in Bello. By the early twentieth century, two methodologies for regulating the conduct of war developed under international law.

1. The Hague Tradition. The Hague Tradition developed a focus on limiting the means and methods used in combat. Named for the series of treaties produced at the 1899 and 1907 Hague Conferences, instruments of the Hague Tradition restrict Parties' conduct of combat operations. The Hague treaties contain regulations regarding the means and methods of warfare during hostilities (regarding protection of civilian property) and protection of civilians during occupation. General civilian protections are not a focus of the Hague Tradition.

a. Protections During Hostilities.

i. No killing or wounding treacherously individuals belonging to the hostile nation. (HR, art. 23(b))

ii. No seizing or destroying enemy property unless imperatively demanded by military necessity. (HR, art. 23(g))

iii. No compelling enemy nationals to assist in the war effort against their own nation. (HR, art. 23(h))

iv. No attacking or bombarding towns, villages, dwellings, or buildings which are undefended. (HR, art. 25)

v. All necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military. (HR, art. 27)

vi. No pillaging. (HR, art. 28)

b. Protections of Civilians During Occupation. "Territory is considered occupied when it is actually placed under the authority of the hostile army." (HR, art. 42)

i. Occupying power must restore and ensure public order and safety while respecting, unless absolutely prevented, the laws in force in the country. (HR, art. 43)

ii. No coercing inhabitants of occupied territory to furnish information about the enemy army. (HR, art. 44)

iii. No forcing inhabitants of occupied territory to swear an oath of allegiance to the hostile Power. (HR, art. 45)

iv. No disrespecting family honor and rights, the lives of persons, and private property, or religious convictions and practice. (HR, art. 46)

v. No pillaging. (HR, art. 47)

2. The Geneva Tradition. The second methodology, the Geneva Tradition, focuses on treatment of war victims in the hands of enemy armed forces. Prior to World War II, the Geneva Conventions of 1864,[25] 1906,[26] and 1929[27] afforded

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[25] *See* Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864**,** Art. 5, 18 Martens Nouveau Recueil (1e ser.) 612, *translated and reprinted in* THE LAWS OF ARMED CONFLICTS 279 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).

[26] *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906, Art. 5, 35 Stat. 1885, 1 Bevans 516.

protections to civilians only when they were aiding wounded soldiers.[28] Following World War II, however, the international community signed the Fourth Geneva Convention to expressly protect civilians from the effects of armed conflict in broader circumstances detailed below.

IV. FOURTH GENEVA CONVENTION, 1949 (GC IV)

A. Background. World Wars I and II exposed civilians to increasingly destructive methods of warfare and arbitrary action while in the hands of their nations' enemies.[29] Consequently, as early as 1921, the ICRC began proposing the ratification of a Convention for the protection of civilians.[30] Only in the aftermath of World War II's devastating civilian carnage, however, did the international community finally recognize the need for such a Convention and sign GC IV.[31]

B. Organization. GC IV is organized in three Parts. Part I contains the Convention's General Provisions; Part II provides protections for "the whole of the populations of the countries in conflict;"[32] and Part III – "the main body of the Convention"[33] – provides additional protections for a specific category of civilians defined in Article 4 of the Convention as "protected persons." Each of these Parts is described in more detail below.

1. GC IV, Part I - General Provisions. Part I contains, among other Articles, Articles 2 and 3, which determine the Convention's application. It also contains Article 4, which defines a specific category of civilians – referred to as

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[27] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303.

[28] As the Commentary to GC IV notes, "[t]he lack at that time of any recent international Convention for the protection of civilians is explained by the fact that it was until quite recently a cardinal principle of the law of war that military operations must be confined to the armed forces and that the civilian population must enjoy complete immunity. It is interesting to note, for example, that the Hague Conference in 1907 decided not to include a provision to the effect that the nationals of a belligerent residing in the territory of the adverse Party should not be interned, considering that that principle went without saying." GC IV Commentary at 3.

[29] JOHN NORTON MOORE, SOLVING THE WAR PUZZLE 91 (2004) ("World War II, with the associated Holocaust, produced at least forty million deaths. As many as 1,700 cities and towns and 70,000 villages were devastated in the Soviet Union. Over 40 percent of the buildings were destroyed in forty-nine of Germany's largest cities and many suffered much worse.")

[30] GC IV Commentary at 4.

[31] *Id.* at 5.

[32] *Id.* at 118.

[33] *Id.*

"protected persons" – that is entitled to the most robust set of protections under the Convention. Article 5 authorizes derogations from certain GC IV provisions in specific circumstances, and Article 8 prohibits "protected persons" from renouncing in part or in entirety their GC IV protections.

a. Articles 2 and 3 (LOAC Triggers). Recall that, as a matter of law, full protection under the Geneva Conventions, including GC IV, exists only in the right type of conflict.[34] IACs, also known as Common Article 2 conflicts, trigger application of the full body of the LOAC, including GC IV and the other GCs, AP I if ratified, and any applicable CIL. NIACs, also known as Common Article 3 conflicts, trigger application only of Common Article 3, AP II if ratified, and any applicable CIL.

b. Article 4 ("Protected Persons"). As mentioned above, GC IV provides protections for two primary groups of civilians: 1) the whole of the civilian populations of the countries in conflict, covered in GC IV, Part II; and 2) the specifically defined category of "protected persons," covered in GC IV, Part III. GC IV, art. 4 defines who qualifies for this second group of "protected persons" under the Convention.

i. Who is a "protected person" (GC IV, art. 4). "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

(1) This definition can create the mistaken belief that only "protected persons" as defined by GC IV, art. 4 are "protected by the Convention." However, a civilian may not qualify as a "protected person" as defined in GC IV, art. 4, but still be protected by the Convention if that civilian is part of the "whole population" of one of the countries in conflict, which is covered by GC IV, Part II. This result is confirmed by the third paragraph in GC IV, art. 4, which provides that the GC IV, Part II provisions are "wider in application" than those limited to "protected persons."[35]

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[34] Remember that all four Geneva Conventions of 1949, including GC IV, also apply "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." GC IV, Article 2 (Common Article 2).

[35] *See also*, GC IV Commentary at 50 ("It will be recalled that Part II has the widest possible field of application; it covers the whole population of the Parties to the conflict, both in occupied

(2) A key teaching point about the definition of "protected person" is that it "remains faithful to a recognized principle of international law: it does not interfere in a State's relations with its own nationals." GC Commentary at 46.[36]

ii. Who is not a "protected person" (GC IV, art. 4).

(1) Nationals of a State not bound by the Convention.

(2) Nationals of a neutral State who are located in the territory of a belligerent State, as long as the neutral State has normal diplomatic representation in the belligerent State. In belligerent territory, the drafters believed that the "position of neutrals is still governed by any treaties concerning the legal status of aliens and their diplomatic representatives can take steps to protect them." (GC IV Commentary at 49).

(3) Nationals of a co-belligerent State (an ally), as long as their State has normal diplomatic representation in the State where they are located "or with the Occupying Power."[37]

(4) Persons protected by any of the other three GCs.

iii. Determining whether a civilian qualifies for "protected person" status is important because while all "protected persons" under GC IV are also entitled to the "whole population" protections provided under GC IV, Part II, not all civilians entitled to the "whole population" protections under Part II qualify as "protected persons" entitled to protections under Part III. Accordingly, determining who qualifies and who does not qualify for "protected person" status under GC IV is critical to ensuring compliance with GC IV. See Figure 1 for a flowchart that serves as a guide to a GC

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territory and in the actual territory of the Parties. . . . It could have formed a special Convention on its own.").

[36] As the GC IV Commentary at 46 notes, "[t]he only exception to this rule is the second paragraph of Article 70, which refers to nationals of the Occupying Power who sought refuge in the territory of the occupied State before the outbreak of hostilities."

[37] While the language of GC IV, art. 4 does not expressly contain this quoted text, the Commentary indicates that it should be read into the Article. *See* GC IV Commentary at 49.

IV protections analysis. Use of the flowchart is not a substitute for a thorough legal analysis of GC IV protections.[38]

c. Article 5 (Derogations). GC IV, art. 5 provides for the suspension of certain protections afforded to "protected persons."

i. Such derogations are authorized in two specific circumstances:

(1) Protected persons suspected or who have engaged in activities hostile to the security of the State **in an enemy State's territory**. In these circumstances, the State may suspend any right or privilege under GC IV that would prove prejudicial to the security of the State.

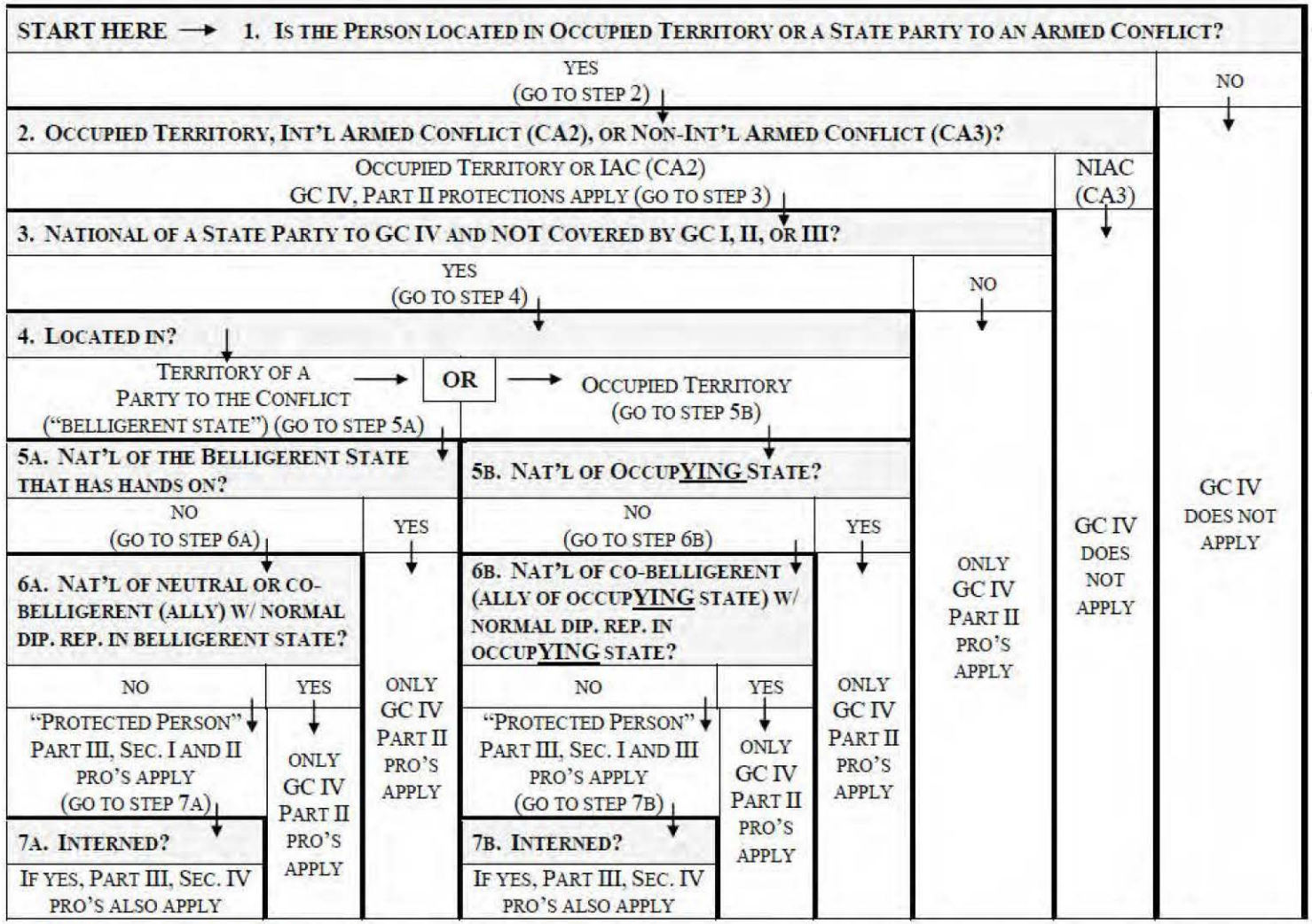
(2) Protected persons detained as spies, saboteurs, or suspected of activity hostile to an **occupying power**. In an occupation, the Occupying Power may suspend only **rights of communication** under GC IV.

ii. While these provisions appear to subject "protected persons" in the territory of the detaining power to the potential suspension of a far larger number of protections than that relevant to a "protected person" in occupied territory, the GC IV Commentary suggests otherwise: "[T]he Article refers mainly to the relations of the detained person with the outside world, and that is the sphere in which restrictions will doubtless be applied."[39]

[38] For an example of such a legal analysis conducted at the national strategic level during ongoing military operations, see Memorandum Opinion from Jack L. Goldsmith III, Assistant Attorney Gen., U.S. Dep't of Justice, Office of Legal Counsel, to the Counsel to the President, subject: "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention (Mar. 18, 2004), *available at* http://www.justice.gov/olc/2004/gc4mar18.pdf.

[39] GC IV Commentary at 56.

Figure 1 - GC IV Protections Analysis Flowchart



GC IV PROTECTIONS ANALYSIS FLOWCHART

KEY: DIP. REP. = DIPLOMATIC REPRESENTATION; INT'L = INTERNATIONAL; NAT'L = NATIONAL; PRO'S = PROTECTIONS; SEC. = SECTION

ALL GC IV PROTECTIONS ARE CUMULATIVE

d. Article 8 (Renunciation Prohibited). In no circumstances may a "protected person" renounce in part or in entirety the rights afforded to them by GC IV.

2. GC IV, Part II - Protection of the Entire Population. GC IV, art. 13 provides that "the provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race nationality, religion or political opinion, and are intended to alleviate the suffering caused by war." **GC IV Part II protections apply to every civilian in countries that are a party to an IAC**.[40] Some Part II protections follow below.

   a. GC IV, Part II – art. 14. Provides for, but does not mandate, the establishment of "hospital/safety zones" (permanent structures established outside combat area) to shelter from the effects of war the following specific groups of civilians:

      i. Wounded, sick, and aged persons;

      ii. Children under fifteen; and

      iii. Expectant mothers and mothers of children under seven.

   b. GC IV, Part II - art. 15. Provides for, but does not mandate, the establishment of "neutralized zones" (temporary zones in the area of combat) to shelter from the effects of war:

      i. Wounded and sick combatants and non-combatants;

      ii. Civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

   c. Additional Protections for the Entire Population. In addition to providing for the establishment of these "protected" zones, Part II also mandates the following protections:

      i. The wounded, sick, infirm and expectant mothers must be "respected and protected" by all parties to the conflict at all times (GC IV, art. 16)

      ii. The parties to the conflict shall attempt to conclude agreements for the removal of wounded, sick, infirm, aged persons, and children and maternity cases from besieged areas, and for the passage of ministers and medical personnel/equipment to such areas. (GC IV, art. 17)

[40] *See supra* note 35 and accompanying text.

iii. Civilian hospitals shall be respected and protected and shall not be the object of attack. (GC IV, art. 18)

iv. Free passage of consignments of medical supplies and objects necessary for religious worship, and essential foodstuffs, clothing and tonics for children under 15, expectant mothers and maternity cases. (GC IV, art. 23)

v. Protection and maintenance of children under 15 who are orphaned or separated from their families, including the exercise of their religion and education in all circumstances. (GC IV, art. 24)

vi. The right to communicate with family via correspondence, and through a neutral intermediary if necessary (GC IV, art. 25)

3. GC IV, Part III – Protections for Protected Persons. Individuals who meet the definition of "protected person" are entitled to Part II protections. They are also entitled to additional protections from GC IV, Part III, as described below.

a. Part III, Section I – Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories. Unlike the provisions in Part III, Sections II and III, the provisions in Part III, Section I apply to all "protected persons" regardless of whether they are located in the territory of a party to an armed conflict or in an occupied territory. "Protected persons are entitled in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated." (GC IV, art. 27)

i. Respect for Their Persons. Intended to grant a wide array of rights to protect physical, moral, and intellectual integrities. (GC IV, art. 27; GC Commentary at 201)

ii. Respect for Honor. Acts such as slander, insults, and humiliation are prohibited. (GC IV, art. 27; GC Commentary at 202)

iii. Respect for Family Rights. Arbitrary acts which interfere with marital ties, the family dwelling, and family ties are prohibited. This is reinforced by GC IV, art. 82, that requires, in the case of internment, that families be housed together. (GC IV, art. 27; GC Commentary at 202)

iv. 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). (GC IV, art. 27; GC Commentary at 203)

v. Respect for Manners and Customs. 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." (GC IV, art. 27; GC Commentary at 203)

vi. No insults and exposure to public curiosity. (GC IV, art. 27)

vii. No rape, enforced prostitution, and indecent assault on women. (GC IV, art. 27)

viii. No using physical presence of protected persons to make a place immune from attack. (GC IV, art. 28)

ix. No physical or moral coercion, particularly to obtain information. (GC IV, art. 31)

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

xi. No collective penalties. (GC IV, art. 33)

xii. No pillaging (under any circumstances or at any location). (GC IV, art. 33)

xiii. No reprisals against the person or his property. (GC IV, art. 33)

xiv. No taking of hostages (GC IV, art. 34)

b. Part III, Section II - Aliens in the Territory of a Party to the Conflict. The provisions in this Section apply only to "protected persons" who are located in the territory of a party to an IAC. They do not apply to "protected persons" located in occupied territory. Many of the rights and privileges granted in this Section, including some listed below, equal those provided to a nation's civilians.

i. Right to Leave the Territory. (GC IV, art. 35). (Right may be overcome by the national interests (security) of the State.)

ii. Right to Humane Treatment during Confinement. Protected persons are entitled to humane treatment when confined pending proceedings or subject to a sentence involving loss of liberty for a violation of penal law. (GC IV, art. 37)[41]

iii. Right to receive relief packages, medical attention, and practice of their religion. (GC IV, art. 38)

iv. Right to find paid employment, subject to security concerns, and the right to support if security concerns prohibit employment. (GC IV, art. 39)

v. Limitations on the Type and Nature of Labor.

(1) Can be compelled to work only to the same extent as own nationals. (GC IV, art. 40)

(2) Cannot be compelled to do work that is directly related to the conduct of military operations. (GC IV, art. 40)

vi. Internment. Protected persons in the territory of a party to an IAC may be interned or placed in assigned residence in accordance with other GC IV provisions if the security of the Detaining power makes it absolutely necessary. (GC IV, arts. 41-46)

c. Part III, Section III - Occupied Territories. The provisions in this Section apply only to "protected persons" who are located in occupied territory.[42] They do not apply to "protected persons" located in the territory of a party to an IAC. Some examples follow below.

i. Repatriation. Protected persons who are not nationals of the occupied territory may leave the territory. (GC IV art. 48)

ii. Deportations, Evacuations, and Transfers. (GC IV, art. 49)

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[41] "[T]his Article is restricted to protected persons who are the subject of judicial measures either on preventive grounds or as a result of conviction and sentence. Persons to whom security measures are applied are protected under other provisions." GC IV Commentary at 242 (citing GC IV, art. 79 et. seq.)

[42] *See infra* Occupation and Post-Conflict Governance Chapter regarding rules for determining whether territory is occupied.

(1) Deportations of protected persons out of the occupied territory and forcible individual or mass transfers are prohibited.

(2) If security or military necessity requires it, the Occupying Power may partially or completely evacuate a given area, but not outside of occupied territory unless it cannot be avoided for material reasons.

(3) Occupying Power may not relocate its own population into occupied territory.

iii. Children. (GC IV, art. 50)

(1) Occupying Power shall facilitate proper working of institutions devoted to care and education of children.

(2) Occupying Power shall take all necessary steps to facilitate identification of children and registration of parentage.

(3) Occupying Power shall arrange for the maintenance and education (if possible, by persons of the same nationality, religion, and language) of children orphaned or separated from their parents.

(4) Occupying Power shall take all necessary steps to identify children whose identity is in doubt.

(5) Occupying Power shall not hinder application of preferential treatment for children younger than age fifteen, expectant mothers, and mothers of children under age seven in terms of food, medical care, and protection against effects of war.

iv. Property. Destruction of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations is prohibited except when military necessity requires such destruction. (GC IV, art. 53)

v. Public Officials. Occupying Power may not alter the status of, apply sanctions to, or coerce or discriminate against public officials or judges in occupied territory should they abstain from

fulfilling their functions for reasons of conscience. (GC IV, art. 54)

vi. Food and Medical Supplies. Occupying Power has duty to ensure population has food and medical supplies, particularly if resources of occupied territory are inadequate. (GC IV, art. 55)

vii. Hygiene and Public Health. Occupying Power has duty to ensure and maintain medical and hospital establishments and services and public health and hygiene in the occupied territory. (GC IV, art. 56)

viii. Requisition of Hospitals. In cases of urgent necessity for care of military wounded and sick, Occupying Power may requisition civilian hospitals temporarily provided that Occupying Power arranges for care of civilian patients; if materials and stores of civilian hospitals are needed for civilian population, cannot be requisitioned. (GC IV, art. 57)

ix. Spiritual Assistance. Occupying Power shall allow clergy to provide religious and spiritual assistance to their religious communities; Occupying Power shall accept religious articles and books and arrange for their distribution. (GC IV, art. 58)

x. Relief.

(1) Collective Relief. If all or part of the population of an occupied territory needs supplies, then the Occupying Power shall agree to and facilitate relief schemes through other states or the ICRC; provisions shall consist of food, clothing, and medical supplies; passage of such consignments must be permitted and protected. (GC IV, art. 59)

(2) Responsibilities of Occupying Power. Relief consignments do not relieve the Occupying Power of its obligations regarding food and medical supplies, hygiene, and public health, nor may the Occupying Power divert such relief consignments from their intended purpose. (GC IV, art. 60)

(3) Relief Consignments.

(a) Distribution. All contracting parties shall make every effort to ensure transit and transport of relief consignments to occupied territories; such consignments shall be exempt from charges, taxes, or customs duties. (GC IV, art. 61; AP I, art. 81)

(b) Individual Relief. Protected persons in occupied territories shall be allowed to receive individual consignments sent to them. (GC IV, art. 62)

(4) Relief Societies. Recognized national Red Cross, Red Crescent, and Red Lion and Sun societies shall be permitted to pursue their activities, as shall other humanitarian organizations; Occupying Power may not require changes to personnel or structure of such societies. (GC IV, art. 63)

xi. Penal Laws. "[P]enal laws of the occupied territory shall remain in force" unless they constitute a threat to security or an obstacle to application of GC IV; subject to those same considerations, "the tribunals of the occupied territory shall continue to function" with respect to penal offences. (GC IV, art. 64)[43]

xii. Internment. Protected persons in occupied territory may be interned or placed in assigned residence in accordance with other GC IV provisions if the Occupying Power considers it necessary for "imperative reasons of security." (GC IV, art. 78)

d. Part III, Section IV - Regulations for the Treatment of Internees. This Section provides the protections required for all "protected persons" who are interned either in the territory of a party to an IAC or in occupied territory. **Internment is the most severe form of non-penal related restraint permitted under GC IV.** 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

[43] The Occupying Power may subject the occupied population to provisions that are essential to enable the Occupying Power to comply with GC IV, to main orderly government in the territory, and to ensure the Occupying Power's security. GC IV, art. 64. Any penal provisions enacted by the Occupying Power may not be retroactive and shall not come into force before publication to the occupied population in their native language. GC IV, art. 65. Breaches of penal provisions enacted by the Occupying Power pursuant to GC IV, art. 64 may be tried in the Occupying Power's military courts if they are situated in the occupied territory. GC IV, art. 66. Articles 67-77 contain additional GC IV provisions relevant to the Occupying Power's prosecution of protected persons for penal offences committed in occupied territory.

severe. (GC IV, art. 79 (referencing arts. 41-43, 68 and 78)). Some provisions relevant to internment follow below.

i. Internment is subject to periodic review (6 months) by a competent body. (GC IV, art. 79, referencing arts. 43 and 78)

ii. Internees shall be grouped as families whenever possible. (GC IV, art. 82)

iii. Separate from POWs and Criminals. Internees "shall be accommodated separately from prisoners of war and persons deprived of liberty for any other reason." (GC IV, art. 84)

iv. Proper housing. (GC IV, art. 85)

v. Premises suitable for holding religious services, of whatever denomination. (GC IV, art. 86)

vi. Sufficient food, water and clothes. (GC IV, art. 89)

vii. Adequate infirmary with qualified doctor. (GC IV, art. 91)

viii. Complete religious freedom. (GC IV, art. 93)

ix. Right to control property and money. (GC IV, art. 97)

x. Must post convention in native language, right to petition for redress of grievances, and elect internee committee. (GC IV, arts. 99 – 102)

xi. Right to notify family of location and send and receive letters. (GC IV, arts. 105 – 107)

xii. Penal laws in place continue to apply to internees (subject to operational imperatives); internees cannot be sent to penitentiaries for disciplinary violations. (GC IV, art. 117; see arts. 118-126 for additional penal and disciplinary provisions)

xiii. Transfers must be done safely and notice must be given to internee's family. (GC IV, art. 128)

xiv. Interning power must ensure issuance of death certificates; must conduct inquiry if death of internee is caused by sentry or other internee. (GC IV, arts. 129 – 131)

xv. Each internee shall be released "as soon as the reasons which necessitated his internment no longer exist." GC IV, art. 132. Internment shall cease as soon as possible after the close of hostilities. (GC IV, art. 133)

V. CIVILIAN PROTECTIONS UNDER THE ADDITIONAL PROTOCOLS AND CUSTOMARY INTERNATIONAL LAW

A. Additional Protocols I and II.[44]

1. AP I – IACs. Part IV of AP I covers the civilian population in IACs. It is further subdivided into three Sections.

a. Section I (Articles 48-67) provides general protections against the effects of IACs, and specifically supplements, among other rules, the "whole population" protections afforded by GC IV, Part II described above;

b. Section II (Articles 68-71) covers relief actions for civilians primarily located in occupied territory; and

c. Section III (Articles 72-79) governs the treatment of persons in the power of a party to an IAC, supplementing, among other rules, GC IV, Parts I and III.

2. AP II – NIACs. AP II "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949."[45]

a. Part II of AP II contains provisions governing humane treatment in NIACs and is subdivided into three articles: Article 4 contains a list of "fundamental guarantees" for "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities….;" Article 5 provides protections for persons interned or detained for reasons related to the NIAC; and Article 6 mandates basic procedural guarantees in prosecutions of criminal offenses related to the NIAC.

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[44] *See supra* note 1.

[45] AP II, art. 1.

b. Part IV of AP II specifically covers civilian populations in NIACs via Articles 13-18.

i. Article 13 emphasizes that civilians and the civilian population shall be protected from the dangers arising from military operations and shall not be targeted.

ii. Article 14 prohibits the starvation of civilian populations and otherwise protects objects that are "indispensible to the survival of the civilian population."

iii. Article 15 protects works or installations that contain dangerous forces, such as dams, nuclear plants, etc., even when they are lawful military objectives, if their destruction would cause the release of dangerous forces and severe losses to the civilian population.

iv. Article 16 protects civilian cultural objects and places of worship.

v. Article 17 prohibits the forced movement of civilians.

vi. Article 18 covers relief actions.

B. Customary International Law. As mentioned above, CIL also obligates States to provide LOAC protections for civilians. Accordingly, even though the U.S. is not bound by AP I and II as a matter of treaty law, it does regard many AP I and II provisions relevant to civilian protections as binding CIL or otherwise consistent with U.S. practice.

1. AP I civilian protections provisions regarded as CIL.

a. U.S. Views.

i. In 1986, the authors of the AP I CIL Memo[46] viewed "as already part of customary international law" the following AP I Articles relevant to civilian protections: 51(2), 52(1), 52(2) (except for the reference to "reprisals"), 57(1), 57(2)(c), 57(4), 59, 60, 73, 75, 76(1), and 77(1).[47] They also opined that AP I, Articles 74, 76(2), 76(3), 77(2) – 77(4), 78 ("subject to the right of asylum and compliance with the

[46] *See supra* note 5 and accompanying text.

[47] *Id*.

[UN] Protocol on Refugees"), and 79 were "supportable for inclusion in customary law through state practice."[48]

ii. In his 1987 remarks, Mr. Matheson commented on U.S. support for certain principles espoused in various Articles of AP I, including several relevant to civilian protections.[49]

iii. On March 7, 2011, in a Fact Sheet on American policy for the detention facility at Guantánamo Bay, the U.S. President declared that the "U.S. Government will…choose out of a sense of legal obligation to treat the principles set forth in [AP I,] Article 75 as applicable to any individual it detains in an [IAC], and expects all other nations to adhere to these principles as well."[50]

b. Other References. The ICRC CIL Database references many provisions of AP I, including those relevant to civilian protections, as customary international law applicable in IACs.[51] It also cites other sources as justification for the CIL status of "rules" applicable in IACs.[52] **Note, however, that the U.S. has disagreed with the ICRC's methodology used to determine many of the rules listed in its CIL study and CIL Database.**[53] Additional references on the CIL status of AP I provisions are referenced in the LOW DocSup.

2. AP II civilian protections provisions regarded as CIL.

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[48] *Id*.

[49] *See* Matheson's Remarks *supra* note 7 and accompanying text.

[50] Press Release, The White House Office of the Press Secretary, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011) [hereinafter Fact Sheet], *available at* http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy. A copy of the Fact Sheet is also available in the most recent copy of the LOAC DocSup.

[51] ICRC CIL Database, *supra* note 9.

[52] *See, e.g.*, *id.* at Rule 5, Definition of Civilians. The Rule 5 commentary relevant to IACs recognizes that in addition to the definition of civilians found in AP I, Article 50, support for the customary status of the Rule can also be found in *Prosecutor v. Tihomir Blaškić (Trial Judgement)*, IT-95-14-T, para. 180, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 March 2000, *available at*: http://www.unhcr.org/refworld/docid/4146f1b24.html (defining civilians within the meaning of the ICTY's statute as "persons who are not, or no longer, members of the armed forces").

[53] *See* U.S. Letter on ICRC CIL Rules, *supra* note 11.

a. U.S. Views.

i. In 1987, the Reagan Administration submitted AP II to the Senate for its advice and consent to ratification, subject to certain reservations and understandings.[54] Reagan's Secretary of State, George Shultz, concluded at that time that "the obligations contained in [AP II] are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency."[55] Secretary of State Shultz also wrote at that time, however, that AP II's provisions "are not uniformly observed by other States."[56]

ii. To date, the Senate has not provided its advice and consent to ratification of AP II but the Obama Administration has recognized that "[U.S.] military practice is already consistent with the Protocol's provisions" and has urged the Senate to consent to ratification of AP II.[57]

b. Other References. The ICRC CIL Database references many provisions of AP II, including those relevant to civilian protections, as reflective of customary international law applicable in NIACs.[58] It also cites other sources as justification for the CIL status of "rules" applicable in NIACs.[59] **Note, however, that the U.S. has disagreed with the ICRC's methodology used to determine many of the rules listed in its CIL**

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[54] Message from Ronald Reagan, President of the United States, transmitting The Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims on Noninternational Armed Conflicts, concluded at Geneva on June 10, 1977, to the United States Senate (Jan. 29, 1987), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf.

[55] *Id.* at Letter of Submittal, p. VIII.

[56] *Id.*

[57] Fact Sheet *supra* note 50.

[58] ICRC CIL Database, *supra* note 9.

[59] *See, e.g.*, *id.* at Rule 24, Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives. The Rule 24 commentary relevant to NIACs recognizes that while AP II does not explicitly contain a provision directly on point with the Rule, compliance with AP II, Article 13(1) would be difficult "when civilian persons and objects are not removed from the vicinity of military objectives whenever feasible." *Id.* The commentary further notes that the Rule's customary status is also supported through other instruments pertaining to NIACs, including the Second Protocol to the Hague Convention for the Protection of Cultural Property. *Id.* (citations omitted).

study and CIL Database.[60] Additional references on the CIL status of AP I provisions are referenced in the LOW DocSup.

VI. CIVILIAN CONTRACTORS IN MILITARY CONTINGENCY OPERATIONS

A. Army Regulation 715-9, Operational Contract Support Planning and Management (Jun. 20, 2011).

1. Paragraph 4-2a. provides:

a. Under applicable law, contractors may support military contingency operations in a noncombat role if:

i. the force they accompany has designated them as contractors authorized to accompany the force (CAAF), and;

ii. they are provided with an appropriate identification card under the provisions of GC III and DODD 4500.54E.

b. If captured during armed conflict, only contractors with CAAF status are entitled to prisoner of war status.

c. All contractor personnel are covered by GC IV but may be at risk of injury or death incidental to enemy actions while supporting military operations.

d. Contractor personnel may support contingency operations through indirect participation in military operations such as providing communications support; transporting munitions and other supplies; performing maintenance functions for military equipment; providing private security services (as restricted in para. 4–11);[61] and providing logistic services such as billeting and messing. The requiring activity and/or designated supported unit commanders will review each service to be performed by contractor personnel in contingency operations on a case-by-case basis in consultation with the servicing legal office to ensure compliance with relevant laws and international agreements.

2. Appendix B – Inherently Governmental Function Guidance.

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[60] *See* U.S. Letter on ICRC CIL Rules, *supra* note 11.

[61] AR 715-9, para. 4-11 provides, "If consistent with applicable U.S., local, and international laws and relevant SOFAs or other security agreements, contractor personnel may be utilized to provide private security services as outlined in DODI 1100.22 and DODI 3020.50."

a. "The term 'inherently governmental function' means a function that is so intimately related to the public interest as to require performance by Federal Government employees. . . ."

b. Paragraph B-2 provides specific restrictions on the use of contractors to perform "the inherently governmental nature of specific contingency operations focused services," including:

i. Direction and control of combat and crisis situations. Note that "[p]rohibited contract functions include actions that directly result in disruptive and/or destructive combat capabilities including offensive cyber operations, electronic attack, missile defense, and air defense."

ii. Security provided to protect resources in hostile areas.

iii. Medical and chaplain services performed in hostile areas.

iv. Criminal justice, criminal investigation, and law enforcement.

v. Treatment and handling of enemy prisoners of war, civilian internees, retained persons, other detainees, terrorists, and other criminals.

B. Field Manual 3-100.21 (100-21), Contractors on the Battlefield, para. 6-3 (Jan. 2003), provides that contractors "cannot be required to perform force protection functions… and cannot take an active role in hostilities but retain the inherent right of self-defense."

C. The use of contractors in military operations is heavily restricted by other U.S., instructions and regulations, including DoD Instruction 3020.41, Operational Contract Support (OCS) (Dec. 20, 2011), DoD Instruction 1100.22, Policy and Procedures for Determining Workforce Mix (Apr. 12, 2010), DoD Instruction 3020.50, Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises (Jul. 22, 2009), the Federal Acquisition Regulation, Subpart 7.5 – Inherently Governmental Functions, and the Defense Financial Acquisition Regulation Supplement (DFARS).[62] Ensure compliance with such instructions and regulations to ensure contractors receive the LOAC protections to which they are entitled, if any.

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[62] FARSite (Federal Acquisition Regulation Site), http://farsite.hill.af.mil/farsite.html (last visited Jun. 12, 2012) is a useful online tool to navigate the Federal Acquisition Regulation and the Defense Financial Acquisition Regulation Supplement, among other related resources.

OCCUPATION AND POST-CONFLICT GOVERNANCE

I. OBJECTIVES

A. Understand the sources of occupation law and policy.

B. Understand the requirements for the existence of an occupation.

C. Understand the obligations and requirements of an Occupying Power.

II. OCCUPATION LAW AND POLICY

A. Law. The primary sources of international occupation law include the HR, Section III; GC IV, Part III, Sections I, III and IV; various provisions of AP I; and CIL. The application of IHRL to an occupation is more controversial.[1] Note also that the domestic penal laws of an occupied territory also apply during an occupation, as described more fully below.

B. Policy. U.S. policy on occupation is found primarily in FM 27-10, Chapter 6. Note that while many of the provisions in FM 27-10 merely restate existing occupation law, and cite such law when applicable, other provisions are statements of policy that may not reflect a legal obligation.

III. OCCUPATION DEFINED

A. General. Belligerent occupation is the military occupation of enemy territory: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." (HR, art. 42; FM 27-10, para. 351)

1. Commencement of occupation is a **question of fact**. A state of occupation exists when two conditions are satisfied: first, the invader has rendered the invaded government incapable of publicly exercising its authority; and second,

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[1] *Compare, e.g.,* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 13 (2d ed. 2012) (citations omitted) (while "[s]ome have claimed that when armed conflict erupts, most 'peacetime' human rights are temporarily superseded by the humanitarian laws of war[,]…the opposite position ultimately gained the upper hand") *with* Captain Brian J. Bill, *Human Rights: Time for Greater Judge Advocate Understanding*, ARMY LAW., Jun. 2010, at 54, 58 (citation omitted) (according to general U.S. policy, "in situations where the law of war applies, the law of war (*lex specialis*) prevails over human rights law (*lex generalis*)"). *See also infra* the Deskbook Chapter on Human Rights.

the invader has successfully substituted its own authority for that of the legitimate government. (FM 27-10, para. 355)

2. **Occupation = Invasion + Firm Control**. The radius of occupation is determined by the effectiveness of control; occupation must be actual and effective. (FM 27-10, para. 356)

B. Proclamation Not Required. No proclamation of occupation is legally necessary, but the fact of military occupation should be made known (FM 27-10, para. 357). In post-WWII Germany, General Eisenhower issued Proclamation Number 1. In Operation Iraqi Freedom, L. Paul Bremer, civilian administrator of the Coalition Provisional Authority (CPA) issued CPA Regulation Number 1 on 16 May 2003.[2]

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[2] The following is an excerpt from CPA Regulation Number 1:

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council Resolutions, including Resolution 1483 (2003), and the laws and usages of war, I hereby promulgate the following:

Section 1, The Coalition Provisional Authority

1) The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.

2) The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.

3) As the Commander of Coalition Forces, the Commander of U.S. Central Command shall directly support the CPA by deterring hostilities; maintaining Iraq's territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally.

Section 2, The Applicable Law

Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.

Section 3, Regulations and Orders issued by the CPA

1) In carrying out the authority and responsibility vested in the CPA, the Administrator will, as necessary, issue Regulations and Orders. Regulations shall be those instruments that define the institutions and authorities of the CPA. Orders are binding instructions issued by

C. No Transfer of Sovereignty.

1. Military occupation does not transfer sovereignty to the Occupant, and the Occupant's powers are provisional only; the Occupant may take only those measures necessary for the maintenance of law and order and proper administration of the occupied territory. (FM 27-10, para. 358)

2. Annexation or the establishment of puppet governments is prohibited. (GC IV, art. 47)

D. Termination. Occupation does not end upon cessation of hostilities, but continues until full authority over the occupied area is returned to the displaced sovereign, or until sovereignty is assumed by another State.

1. "In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations. . ." (GC IV, art. 6(2))

2. **But**, AP I, art. 3(b) purports to replace GC IV, art. 6(2). Article 3(b) rejects the one-year expiration, extending application of the Conventions and Protocol until "termination of the occupation."[3] FM 27-10, para. 361 seems to track Article 3(b), providing that "the law of belligerent occupation generally ceases to be applicable under the conditions set forth in paragraphs 353 [(a passage of sovereignty)] and 360 [(cessation of the occupation)]."

3. The Occupant is bound to apply certain provisions throughout the duration of occupation (*e.g.*, humane treatment, fair trial, protection against forced transfers or deportations).

IV. PROTECTING POWERS

A. The 1949 Geneva Conventions envisioned that interests of parties to conflicts would be safeguarded by neutral nations designated as "Protecting Powers."[4] Such Protecting Powers have a named role in certain aspects of occupation.

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the CPA. Regulations and Orders will remain in force until repealed by the Administrator or superseded by legislation issued by democratic institutions of Iraq. Regulations and Orders issued by the Administrator shall take precedence over all other laws and publications to the extent such other laws and publications are inconsistent. The Administrator may also from time to time issue Public Notices. . . .

[3] *See* AP Commentary at 67-68.

[4] *See, e.g.*, GC IV, art. 9.

B. AP I restated and clarified duties of parties to conflicts to designate Protecting Parties or substitutes. (AP I, art. 5). In practice, such designations are rare; ICRC often serves as substitute. (GC IV, art. 11)

V. TREATMENT OF "PROTECTED PERSONS" IN OCCUPIED TERRITORY

A. Recall from the last chapter that GC IV provides specific protections for "protected persons" located in occupied territory.[5] (GC IV, Part III, Sections I, III, and IV (if interned)). While some of those protections are listed again in this chapter, not all of them are. Accordingly, a review of the sections of the last chapter that reference GC IV, Part III, Sections I, III, and IV will reinforce an understanding of their applicability in occupied territory.

B. Additionally, as a matter of law, the provisions outlined here in this chapter (and the last) that reference GC IV apply only to "protected persons" located within the occupied territory. Note however, that occupation rights and obligations found in the HR, AP I, CIL, and FM 27-10, may, as a matter of law and/or policy, extend to individuals located in the occupied territory other than those who meet GC IV's definition of "protected person."[6]

VI. AUTHORITY OF OCCUPANT

A. "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, **unless absolutely prevented**, the laws in force in the country." (HR, art. 43 (emphasis added))

1. Authority of occupying force is supreme, constrained only by:

   a. The doctrine of military necessity; and

   b. Limitations imposed by binding international law, including customs and treaties, such as the rights of protected persons contained in GC IV.

2. Occupant is obligated to maintain public order and can demand obedience from inhabitants of occupied territory for the security of its forces, maintenance of law and order, and proper administration. (FM 27-10, para. 432)

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[5] *See supra* LOAC Protections for Civilians Chapter.

[6] *See, e.g.*, AP I, art. 11, Protection of persons, which covers, among others, "all persons in the power of the adverse Party, i.e., prisoners of war, civilian internees, … and the inhabitants of territory occupied by the adverse Party…." AP I Commentary at 153.

3. Inhabitants have a duty to behave in a peaceful manner, take no part in hostilities, to refrain from acts harmful to the occupying force and its troops, and to render strict obedience to orders of the Occupant. (FM 27-10, para. 432)

4. All functions of legitimate government cease upon commencement of occupation; functions of government continue only to extent Occupant allows. (FM 27-10, para. 367)

B. Security Measures. Military authorities in occupied territories have the right to perform police functions and to protect their own security.

1. The following are examples of permissible population control measures. (GC IV, arts. 27(4), 48, 49(2), 64, 66, and 78):

   a. Restricting freedom of movement;

   b. Evacuation;

   c. Judicial process;

   d. Assigned residence;

   e. Internment.

2. The following are examples of prohibited population control measures. (GC IV, arts. 31, 32, 33(1) and (3), 49(1)):

   a. Violence;

   b. Physical or moral coercion, particularly to obtain information;

   c. Brutality;

   d. Punishment for acts of others (reprisals or collective penalties);

   e. Individual or mass forcible transfers.

C. Penal Laws. "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupant in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." (GC IV, art. 64)

1. Occupant does not bring its own jurisdiction and civil and criminal laws; ordinarily, laws of occupied territory continue in force and courts continue to sit and try criminal cases not of a military nature. (GC IV, art. 64)

2. Local courts should be used when feasible, but may be suspended if:

    a. Judicial personnel will not perform their duties;

    b. Courts are corrupt or unfairly constituted;

    c. Local courts have ceased to function; or

    d. Judicial process does not comply with fundamental human rights.

3. Occupant may establish military courts or provost courts.

    a. May be used to try violations of occupation provisions or regulations.

    b. May be used if properly constituted, non-political, and located in occupied territory.

4. Occupant may suspend, repeal, or alter existing laws, or promulgate new laws, if required by military necessity, maintenance of order, or welfare of the population. (HR, art. 43; GC IV, art. 64(3))

5. Suspension or repeal of local laws should be related to security of the force, mission accomplishment, or compliance with international law. Examples:

    a. Suspension of the right to bear arms;

    b. Suspension of the rights of assembly and protest;

    c. Suspension of freedom of movement; or

    d. Suspension of discriminatory laws;

6. Issuing New Laws (GC IV, art. 65; FM 27-10, para. 435).

    a. Must publish in writing and provide notice to inhabitants in their own language;

b. Must not be retroactive.

c. Occupant has no obligation to comply with the constitutional or procedural rules of the occupied country.

7. Occupying force is exempt from local law and jurisdiction of local courts. (FM 27-10, para. 374)

D. Competent Courts. When penal provisions are breached, Occupant may try accused before its own properly constituted non-political military courts, provided such courts sit in the occupied territory; courts of appeal should likewise sit in the occupied territory. (GC IV, art. 66)

E. Applicable Law and Penalties.

1. Courts shall apply those laws in effect prior to the offense.

2. Penalties shall be proportionate to the offenses committed and shall take into account that the inhabitants are not nationals of the Occupant. (GC IV, art. 67)

3. Offenses against Occupant which (a) do not constitute attempts on life or limb of members of occupying forces, (b) do not pose a grave collective danger, or (c) do not seriously damage property of the occupying forces shall carry a punishment of internment or simple imprisonment proportionate to the offense committed. (GC IV, art. 68)

4. Death Penalty.

a. Occupant may only impose death penalty on protected persons convicted of espionage, serious acts of sabotage against military installations, or intentional offenses which have caused the death of one or more persons. (GC IV, art. 68)

b. Death penalty may not be imposed on protected persons less than 18 years of age at the time of the offense. (GC IV, art. 68)

c. Death penalty may only be imposed for those offenses that were punishable by death under the law of the territory prior to occupation. (GC IV, art. 68)

d. **U.S. Reservation**: U.S. has reserved the right to impose the death penalty without regard to whether the offense was punishable by death under the law of the occupied territory prior to occupation. (FM 27-10, para. 438b)

e. No person condemned to death shall be deprived of the right to petition for pardon or reprieve; execution of the death sentence suspended for 6 months absent grave emergency involving organized threat to Occupant or its forces. (GC IV, art. 75)

5. Other Offenses and Penalties.

a. Fines and other penalties not involving deprivation of liberty may also be imposed. (FM 27-10, para. 438c)

b. Period of time a person spends under arrest awaiting trial or punishment shall be deducted from any sentence of imprisonment. (GC IV, art. 69)

F. Pre-Occupation Offenses.

1. Protected persons shall not be arrested, prosecuted, or convicted by the Occupant for offenses committed before the occupation, except for violations of the law of war. (GC IV, art. 70)

2. Nationals of the Occupant who sought refuge in the occupied territory shall not be arrested, prosecuted, convicted, or deported from the occupied territory, except as follows:

a. For offenses committed after the outbreak of hostilities;

b. For offenses committed before the outbreak of hostilities which would have justified extradition in time of peace;

G. Penal Procedure.

1. Occupant may pronounce sentence only after a regular trial. (GC IV, art. 71)

2. Occupant must promptly provide those accused of crimes with a written copy of the charges in a language they understand; trial must be held as rapidly as possible. (GC IV, art. 71)

3. Accused persons have the following rights at trial (GC IV, art. 72):

a. To present evidence and call witnesses;

b. To be represented by a qualified counsel or advocate of their choice, and time to prepare their defense;

c. To have the assistance of an interpreter;

d. To appeal (not absolute).

4. Protecting Power. (GC IV, art. 74)

a. Occupant must advise Protecting Power of proceedings involving the death penalty, or imprisonment for 2 years or more, and must notify the Protecting Power of any final judgment confirming a death sentence.

b. Representatives of the Protecting Power may attend trial of any accused person except for those cases involving security of the Occupant; Occupant must send date and place of trial to Protecting Power.

c. Protecting Power may appoint the accused counsel or an advocate.

VII. PROPERTY

A. General Rules.

1. Destruction Prohibited. Destroying or seizing enemy property is prohibited, unless such destruction or seizure is demanded by imperative necessities of war (HR, art. 23(g)); Occupant is prohibited from destroying real or personal property (State or private) unless absolutely necessary due to military operations. (GC IV, art. 53)

2. Pillage Prohibited. Pillage, or looting by occupation troops, is strictly forbidden. (HR, art. 47; GC IV, art. 33)

3. Property Control Authorized. Occupant may control property within occupied territory to extent necessary to prevent use by hostile forces. (FM 27-10, para. 399)

4. Seizure. The **temporary taking** of proper, with or without authorization from the local commander. Generally, the on-scene commander is the authority to seize property. Seizing, or temporarily taking, private property that has a direct military use (i.e., broadcasting or communications equipment) is permissible, but Soldiers must provide the owner a receipt to reclaim the property later, as well as compensation for any damage to the property. (FM 27-10, para. 409)

5. Confiscation. Confiscating, or permanently taking, private property is not permissible. (HR, art. 46(2); FM 27-10, para. 406)

6. Requisition. Requisitioning of services and property from the population is permissible if ordered by the local commander and paid for in cash; food or other items needed by the civilian population may only be requisitioned after taking those needs into consideration. (FM 27-10, paras. 412 - 415). Specific requisition rules are detailed below.

B. Ownership.

1. Beneficial Ownership. It may be necessary to look beyond legal title to determine whether property is public or private; evaluate character of property based on who benefits from ownership, i.e., private trust funds are not public property just because they are held in a state bank. (FM 27-10, para. 394a)

2. Mixed or Unknown Ownership. Property is public if State has assumed economic risk involved in holding and managing the property; if owner unknown, treat as public until ownership ascertained. (FM 27-10, para. 394b, c)

C. State Property.

1. Occupant serves as administrator and conservator of public buildings, real estate, forests, and agricultural estates belonging to the hostile State; Occupant must safeguard and administer. (HR, art. 55)

2. Real property of direct military use (forts, arsenals, dockyards, magazines, barracks, railways, bridges, piers, wharves, airfields, and other military facilities) remain in Occupant's control until close of the war and may be damaged or destroyed if militarily necessary. (FM 27-10, para. 401)

3. Non-military real property may not be damaged or destroyed unless military operations render absolutely necessary; Occupant may not sell real property or lessen its value. (FM 27-10, para. 402)

4. Movable Property.

a. "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for operations of the war." (HR, art. 53)

b. Classes of Movable Property. All movable property susceptible to military use may be taken and used by the Occupant; all other property must be respected and may not be appropriated. (FM 27-10, para. 404)

D. Private Property.

1. Municipal, Religious, Charitable, and Cultural Property. Even where such property belongs to the State, it shall be treated as private property; seizure and destruction is forbidden. (HR, art. 56)

   a. Such premises may be requisitioned in the event of necessity for quartering troops and the sick and wounded, storage of supplies and material, housing of vehicles and equipment, and otherwise as allowed for private property; must secure against all avoidable injury. (FM 27-10, para. 405b)

   b. It is U.S. practice that—if emergency conditions require such use—religious buildings, shrines, and consecrated places employed for worship are to be employed only as aid stations, medical installations, or for housing the wounded awaiting evacuation. (FM 27-10, para. 405c)

2. No Confiscation of Private Property. Prohibition extends to outright takings as well as to any acts that, by use of threats, intimidation, or pressure, or by actual exploitation of the Occupant's power, permanently or temporarily deprives the owner of the property without consent or without authority under international law. (HR, art. 46 para. 2; FM 27-10, para. 406). Private real property may not be seized, but may be requisitioned. (FM 27-10, para. 407)

3. Private Property Susceptible to Direct Military Use.

   a. Property such as cables, telephone and telegraph plants, radio, television, and telecommunications equipment, motor vehicles, railways, railway plants, port facilities, ships in port, barges and other watercraft, airfields, aircraft, depots of war, all varieties of military equipment, including that in the hands of manufacturers, component parts of or material suitable only for use in the foregoing, and in general all kinds of war material, may be seized provided a receipt is given to the owner for return of the property and/or compensation. (GC IV, art. 53; FM 27-10, para. 410a)

   b. Destruction of any of the foregoing is permissible only if rendered absolutely necessary by military operations. (GC IV, art. 53; FM 27-10, para. 410b)

E. Requisitions.

1. Requisitions in kind and services shall be made only for the needs of the occupying army; shall be in proportion to the resources of the country; shall be

demanded only by the commander of the occupied locality; and shall be paid for in cash so far as possible. (HR, art. 52)

2. Almost everything may be requisitioned for the maintenance of the army: fuel, food, clothing, building materials, machinery, tools, vehicles, furnishings for quarters; billeting of troops in occupied areas is authorized. (FM 27-10, para. 412b)

3. Requisitioning of food and medical supplies in the occupied territory is only permissible for use by the occupation forces and administration personnel, and only if the needs of the civilian population have been taken into account; the Occupant shall pay fair value for any requisitioned goods. (GC IV, art. 55 para. 2)

4. Coercive measures must be limited to the amount and kind necessary to secure the requisitioned articles. (FM 27-10, para. 417)

VIII. SERVICES OF OCCUPIED POPULATION

A. Labor.

1. "The Occupant may not compel protected persons to serve in its armed or auxiliary forces." (GC IV, art. 51)

2. Permissible Work. Protected persons over age 18 may only be compelled to do work necessary for the needs of the occupation army, for public utility services, or for feeding, sheltering, clothing, transportation or health of occupied population; no military operations. (GC IV, art. 51)

3. Prohibited Labor. Prohibition against working in support of military operations includes services directly promoting the ends of the war such as construction of fortifications, entrenchments, and military airfields or the transportation of supplies or ammunition in the zone of operations; however, voluntary employment for pay to do such work is permitted. (FM 27-10, para. 420)

B. Services That May be Requisitioned.

1. Professional services, to include: engineers, physicians and nurses, artisans and laborers such as clerks, carpenters, butchers, bakers, and truck drivers. (FM 27-10, para. 419)

2. Officials and employees of railways, truck lines, airlines, canals, river or coastwise steamship companies, telephone, telegraph, radio, postal and similar

services, gas, electric, and water works, and sanitary authorities. (FM 27-10, para. 419)

3. Repair of roads, bridges, and railways and services on behalf of local population, including care for wounded and sick and burial of the dead. (FM 27-10, para. 419)

C. Protection of Workers. "All measures aimed at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupant, are prohibited." (GC IV, art. 54)

D. Judges and Public Officials.

1. Occupant may not alter status of judges or public officials or coerce or discriminate against them for not fulfilling their functions based on reasons of conscience; however, Occupant may remove officials from their posts. (GC IV, art. 54)

2. Oath. Occupant may require officials to take an oath to perform their duties conscientiously, and failure to do so may result in removal (FM 27-10, para. 423); distinguish this oath of obedience from an oath of allegiance to the Occupant, which is forbidden. (HR, art. 45)

3. Salaries. Civil officials such as judges, administrative or police officers, and officers of city governments are paid from public revenues of occupied territory until military government has reason to dispense with their services. (FM 27-10, para. 424)

IX. PUBLIC FINANCE

A. Taxes.

1. If Occupant collects taxes, dues, and tolls for the benefit of the occupied state, it shall be done in accordance with existing rules of incidence and assessment. (HR, art. 48)

2. Taxes shall be applied first to the costs of administering the occupied territory, and the balance may be used for the needs of the Occupant. (FM 27-10, para. 425b)

3. No new taxes may be levied by Occupant unless considerations of public order and safety so require. (FM 27-10, para. 426b)

B. Contributions.

1. If the Occupant levies money contributions in addition to taxes, these may only be for the needs of the army or for administration of the occupied territory. (HR, art. 49)

2. Contributions may only be collected pursuant to a written order, and receipts shall be given for all contributions. (HR, art. 51)

C. Costs of Occupation.

1. Economy of occupied country can be required to bear expenses of occupation, which should not be greater than the economy can reasonably be expected to bear. (FM 27-10, para. 364)

2. In practice, U.S. occupation expenses are funded by Department of Defense appropriations.

X. CUSTOMARY INTERNATIONAL LAW

A. Remember that CIL also applies in occupied territory.

B. The ICRC CIL Database references many provisions of AP I, including those relevant to occupation, as reflective of customary international law applicable in occupied territories. It also cites other authorities as justification for the CIL status of "rules" applicable in occupied territories.[7] **Note, however, that the U.S. has disagreed with the ICRC's methodology used to determine many of the rules listed in its CIL study and CIL Database.**[8] Additional references on the CIL status of AP I provisions are referenced in the LOAC DocSupp.

[7] *See, e.g.*, ICRC CIL Database *supra* LOAC Protections for Civilians Chapter, at Rule 51, Public and Private Property in Occupied Territory.

[8] *See* U.S. Letter on ICRC CIL Rules, *supra* LOAC Protections for Civilians Chapter.

MEANS AND METHODS OF WARFARE

I. OBJECTIVES

A. Become familiar with the four key principles of the law of armed conflict.

B. Understand the major rules regulating use of weapons and tactics in conflict.

C. Recognize the difference between a "ruse" and "perfidy."

II. BACKGROUND

A. "Means and methods" is the phrase commonly used to refer to law governing the conduct of hostilities—the *jus in bello.* The "justness" of a struggle or how the parties ended up in armed conflict is not addressed. Rather, this area of law deals with how parties conduct the armed conflict once engaged.

B. In past centuries, ideals of culture, honor, religion, and chivalry helped define battlefield norms. Though these ideals and others still inform our sense of what conduct is "fair" in combat, four legal principles govern modern targeting decisions: (1) Military necessity, (2) Distinction, (3) Proportionality, and (4) Humanity.

C. The laws of armed conflict also guide two related choices in combat: (1) the means, that is, the weapons used to fight; and (2) the methods, that is, the tactics of fighting. JAs must be proficient not only in *what* may legally be targeted, but *how*.

D. This is a complex arena which frequently requires consulting multiple treaties, regulations, commentaries, and case law. Rules of engagement, policy directives, and coalition partner or host nation concerns may further restrict legally permissible acts. It can be frustrating, but there is no substitute for careful research to ensure a thorough grasp of the relevant law and other applicable considerations.

III. PRINCIPLES

A. Principle of Military Necessity.

1. Definition. "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.a.). "This principle limits those measures not forbidden by international law to legitimate military objectives whose engagement offers a definite military advantage." (JP 3-60, appendix E, para. E.2.b.).

a. Elements. Military necessity includes two elements: (1) a military requirement to undertake a certain measure, (2) not forbidden by the laws of war. A commander must articulate a military requirement, select a measure to achieve it, and ensure neither violates the law of armed conflict.

b. Sources. The Lieber Code, article 14, first codified military necessity as those measures "indispensible for securing the ends of war, and which are lawful according to the modern law and usages of war." Though many treaties subsequently acknowledged military necessity's role, the principle arises predominantly from customary international law.[1] The United States follows the definitions cited in FM 27-10 and JP 3-60 above.

c. Limits. "Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war . . ." (FM 27-10, para. 3.a.). Specific treaties may, however, provide an exception. The *Hostage Case* at the Nuremberg Tribunal illustrates the difference.[2]

i. General rule. General List faced a charge of allowing his soldiers to kill thousands of civilians. He argued in part that the killings were lawful reprisals for casualties inflicted by insurgent uprisings. The Tribunal rejected the German "Kriegsraison" war doctrine that expediency and necessity supersede international law obligations. It held that "the rules of international law must be followed even if it results in the loss of a battle or even a war." (*Hostage Case* at 1282).

ii. Rule-based exception: General Rendulic faced a charge of ordering extensive destruction of civilian buildings and lands while retreating from an expected attack, in a "scorched earth" campaign to deny use to the enemy. He grossly overestimated the danger, but argued that Hague IV authorized such destruction if "imperatively demanded by the necessities of war."[3] The Tribunal acquitted him of this charge, holding that the law's provisions "are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary." (*Hostage Case* at 1296).

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[1] GARY SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 258–59 (2010). Professor Solis observes that major conventions like Hague IV, GC I–IV and AP I and II thereto, and others all acknowledge necessity, but the principle remains undefined by treaty language.

[2] *See* "Opinion and Judgment of Military Tribunal V," United States v. Wilhelm List, X TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1230 (Feb. 19, 1948) (Case 7) [hereinafter *Hostage Case*]. The case consolidated charges against twelve German general officers for conduct while in command of armies occupying enemy countries, including the alleged taking of civilian hostages.

[3] HR art. 23(g); *see also* FM 27-10, para. 56 and 58; *compare* GC IV, art. 147.

iii. Rendulic Rule. The Rendulic case also stands for a broader proposition regarding a commander's liability for mistakes in war. The Tribunal observed that Rendulic's judgment may have been faulty, but was not criminal. "[T]he 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." (*Hostage Case* at 1297).[4]

2. Military objective. The goal of military necessity is to identify and pursue lawful military objectives that achieve the conflict's aims and swift termination. "Only a military target is a lawful object of direct attack. By their nature, location, purpose, or use, military targets are those objects whose total or partial destruction, capture, or neutralization offer a [definite] military advantage." (JP 3-60, para. E.4.b.). Though this definition closely resembles article 52.2 of AP I, which the United States has not yet ratified, some differences exist.[5]

a. "Nature, location, purpose, or use." The ICRC Commentary to AP I, at 636–37, defines these terms as follows:

i. "Nature" includes "all objects used directly by the armed forces," such as weapons, equipment, transports, fortifications, etc.

ii. "Location" includes an object or site "which is of special importance for military operations in view of its location," such as a bridge, a deepwater port, or a piece of high ground.

iii. "Purpose" is "concerned with the intended future use of an object," such as a construction site for a suspected new military facility.

iv. "Use," on the other hand, is "concerned with [the object's] present function," such as a school being used as a military headquarters.

b. "Make an effective contribution to military action." Under AP I, an object clearly military in nature is not a military objective if it fails to meet the "effective contribution" test —for example, a tank abandoned or out of ammunition/gas. Though JP 3-60, para. E.4.b. provides more latitude to target potential threats as well as "military adversary capability," limited resources should be directed toward highest-priority targets first.

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[4] Rendulic did not entirely escape judgment. The Tribunal convicted him on other charges and sentenced him to twenty years in prison. *See* ROBERT H. JACKSON CENTER, NUREMBERG CASE # 7 HOSTAGES, at http://www.youtube.com/watch?v=RtwOgQEpgCo (video of Rendulic sentencing, starting at 0:50).

[5] *See also* FM 27-10 (Change 1, July 15, 1976), para. 40.c. (incorporating AP I definition, though perhaps prematurely); FM 3-60, para. 1-7 (listing potential lethal and non-lethal effects of targeting).

c. "Offers a definite military advantage." The ICRC Commentary to AP I declares illegitimate those attacks offering only potential or indeterminate advantage. The United States takes a broader view of military advantage in JP 3-60, appendix E. This divergence causes debates about attacks on enemy morale, information operations, interconnected systems, and strategic versus tactical-level advantages, to name a few areas.[6]

d. Dual use facilities. Some objects may serve both civilian and military purposes, for instance power plants or communications infrastructure. These may potentially be targeted, but require a careful balancing of military advantage gained versus collateral damage caused.

3. People. Only combatants or those directly participating in hostilities may be targeted. Determining who counts as a combatant depends on status or conduct. Non-combatants, including civilians and persons out of combat, may not intentionally be targeted.

a. Status-based vs. conduct-based. The United States recognizes these two broad categories of potential belligerents in the Standing Rules of Engagement. The SROE recognize the status-based concept of a declared hostile force. Such groups or individuals may immediately be attacked without any showing of hostility. The SROE also recognize that hostile conduct may also justify attacks on those who commit hostile acts or demonstrate hostile intent, and authorizes several self-defense responses. These concepts are helpful to keep in mind when studying the various categories of persons and their protections under the law.

b. Combatants include anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. This can be a status- or conduct-based designation. These persons are lawful targets unless hors de combat, e.g., wounded, sick, or taken prisoner.

i. Combatants may be referred to as "lawful" or "privileged" if they meet the GC III, article 4 requirements for POW status:

A. Under responsible command;

B. Wear a fixed distinctive sign recognizable at a distance;

[6] This portion of the ICRC Commentary to AP I remain contested. *See, e.g.*, W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 135–49 (1990) (criticizing the ICRC Commentary as "ignorant of the modern target intelligence process," while noting the psychological utility of U.S. military operations like the 1942 Doolittle raid on Tokyo).

C. Carry arms openly; and

D. Abide by the laws of war.

ii. The phrase "unprivileged enemy belligerents" (formerly "unlawful combatants") refers to persons who engage in combat without meeting the criteria above. These may be civilians participating in hostilities or members of an armed force violating the laws of war.

c. Non-combatants. The law of armed conflict prohibits attacks on non-combatants, to include those sometimes referred to as *hors de combat*, or out of combat.

i. Civilians.

A. 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 any armed force or group, and who do not take a direct part in hostilities (AP I, arts. 50 and 51).

B. No indiscriminate attacks. AP I, article 51.4, prohibits attacks not directed at a specific military objective, incapable of being so directed, or whose effects cannot be limited. The U.S. considers the first two restrictions customary international law, but follows a more expansive view of the third, to permit weapons such as cluster munitions and nuclear arms.

ii. *Hors de Combat*. Prohibition against attacking enemy personnel who are "out of combat." Such persons include:

A. Prisoners of War. (GC III, art. 4; Hague IV, art. 23(c), (d))

B. Surrender may be made by any means that communicates the intent to give up. No clear rule exists as to what constitutes surrender. However, most agree surrender means ceasing resistance and placing oneself at the captor's discretion. Captors must respect (not attack) and protect (care for) those who surrender—no reprisals.

C. Wounded and Sick in the Field and at Sea. (GC I, art. 12; GC II, art. 12). Combatants must respect and protect those who have fallen by reason of sickness or wounds and who cease to fight. Civilians are included in the definition of wounded and

sick ("who because of trauma, [or] disease . . . are in need of medical assistance and care and who refrain from any act of hostility"). (AP I, art. 8). Shipwrecked members of the armed forces at sea are to be respected and protected. (GC II, art. 12; NWP 1-14M, para. 11.6). Shipwrecked includes downed passengers or crews on aircraft, ships in peril, and castaways.

D. Parachutists. (FM 27-10, para. 30). Paratroopers are presumed to be on a military mission and therefore may be targeted. Parachutists who are crewmen of a disabled aircraft are presumed to be out of combat and may not be targeted unless engaged on a hostile mission. Parachutists, according to AP I, art. 42, "shall be given the opportunity to surrender before being made the object of attack" and are clearly treated differently from paratroopers.

E. Medical Personnel. Considered out of combat if exclusively engaged in medical duties. (GC I, 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: (GC I, art. 24)

1. Doctors, surgeons, nurses, chemists, stretcher-bearers, medics, corpsman, and orderlies, etc., "exclusively engaged" in direct care of the wounded and sick.

2. Administrative staffs of medical units (drivers, generator operators, cooks, etc.).

3. Chaplains.

F. Auxiliary Medical Personnel of the Armed Forces. (GC I, art. 25). To gain the GC I protection, these must have received "special training" and be carrying out their medical duties when they come in contact with the enemy.

G. Relief Societies. Personnel of National Red Cross societies and other recognized relief societies (GC I, art. 26). Personnel of relief societies of neutral countries (GC I, art. 27).

H. Civilian Medical and Religious Personnel. Article 15 of AP I requires that civilian medical and religious personnel shall be respected and protected. They receive the benefits of the

provisions of the Geneva Conventions and the Protocols concerning the protection and identification of medical personnel. Article 15 also dictates that any help possible shall be given to civilian medical personnel when civilian medical services are disrupted due to combat.

I. Personnel Engaged in the Protection of Cultural Property. Article 17 of the 1954 Hague Cultural Property Convention[7] 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.

J. Journalists. Given protection as "civilians," provided they take no action adversely affecting their status as civilians. (AP I, art. 79; considered customary international law by the U.S.).

iii. Loss of protection. AP I, article 51.3,[8] states that civilians enjoy protection "unless and for such time as they take a direct part in hostilities," commonly referred to as "DPH." Those who directly participate in hostilities may be attacked in the same manner as identified members of an opposing armed force.

A. The notion of permitting direct attack on civilians, and the meaning and limits of Article 51(3)'s individual terms remains hotly contested.[9] The original ICRC Commentary to AP I distinguishes general "participation in the war effort" from

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[7] Reprinted in the Documentary Supplement

[8] AP II, article 13 contains similar language.

[9] This paragraph is based on the editor's best understanding of accepted parameters in an ongoing debate both academic and real world. JAs should be aware that the International Committee of the Red Cross recently published "interpretive guidance" on what constitutes direct participation in hostilities. *See* NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 78 (2009) *available at* http://www.icrc.org/web/eng/siteeng0 nsf/html/p0990 [hereinafter ICRC Interpretive Guidance]. The guidance was published after six years of expert meetings; however, many experts, including both U.S. experts assigned to those meetings, withdrew their names from the final product in protest over the process by which Melzer reached the conclusions contained in the study. The United States has not officially responded to the guidance but many of the experts, including Michael Schmitt, Hays Parks, and Brigadier General (Ret.) Kenneth Watkin, have published independent responses to the ICRC's guidance. *See*, *e.g.*, Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC'Y J. 5 (2010), *available at* http://www harvardnsj.com/wp-content/uploads/2010/05/Vol.-1_Schmitt_Final.pdf.; and W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 INT'L L. & POL. 769, 778–80 (2010) (Mr. Parks, a retired Marine Colonel, was one of the two U.S. experts assigned to the study); and Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641 (2010).

DPH: "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."[10] Examples of general "participation in the war effort" that do not constitute direct participation include:

1. Employment in munitions factories;

2. Participation in rationing/conservation efforts;

3. Expressions of support for enemy government;

4. Provision of purely administrative or logistical support to forces not deployed in hostile territory.

B. Most commentators, including prominent U.S. ones, agree that extremely remote or indirect acts do not constitute DPH (e.g., contractor factory workers distant from the battlefield, general public support for a nation's war effort). Also, many agree that the mere presence of civilians does not immunize military objectives from direct attack, but rather presents a question of proportionality (not distinction). (E.g., a contractor supply truck driven to the front lines may be attacked, with the civilian driver considered collateral damage).

C. However, Article 51 recognizes that at a minimum, some acts meet the definition of DPH and justify a response by deadly force (e.g., personally engaging in lethal acts like firing small arms at Soldiers). More difficult cases arise as conduct becomes more indirect to actual hostilities, remote in location, or attenuated in time. For the past decade, the United States has faced determined enemies who are members not of nation state forces, but rather transnational organized armed groups in constantly shifting alliances, sometimes in locations where governments are unable or unwilling to respond. These foes deliberately and illegally use the civilian population and civilian objects to conduct or conceal their attacks as a strategy of war. Further complicating the issue, U.S. and other forces increasingly utilize civilian or contractor support in battlefield

[10] ICRC Commentary to AP I at 619.

or targeting roles, and rely on sophisticated technology and intelligence to plan and conduct attacks.

C. Thus far, universally agreed-upon definitions of DPH have proven elusive. The International Committee of the Red Cross (ICRC) proposed a narrow reading of DPH requiring a (1) threshold showing or likelihood of harm, (2) a direct causal link between the act in question and that harm, and (3) a belligerent nexus to the conflict as shown by specific intent to help or harm one or more sides. The ICRC also proposed that those individuals engaged in "continuous combat functions" could be attacked at any time, but suggested that combatants should attempt to capture civilians first and use deadly force as a last resort. These proposals and others remain debated by nations, warfighters, and scholars alike, with some allies moving to implement all or part.[11]

D. To date, the United States has not adopted the complex ICRC position, nor its vocabulary. Instead, the United States relies on a case-by-case approach to both organized armed groups and individuals. U.S. forces use a functional[12] DPH analysis based on the notions of hostile act and hostile intent as defined in the Standing Rules of Engagement, and the criticality of an individual's contribution to enemy war efforts. After considering factors such as intelligence, threat assessments, the conflict's maturity, specific function(s) performed and individual acts and intent, appropriate senior authorities may designate groups or individuals as hostile. Those designated as hostile become status-based targets, subject to attack or capture at any time if operating on active battlefields or in areas where authorities consent or are unwilling or unable to capture or

[11] See Melzer, ICRC Interpretive Guidance, *supra* note 9, proposed rules IV, V, and IX and related discussion. For a brief discussion of specific examples by the ICRC, see ICRC, Direct Participation in Hostilities: Questions and Answers, Feb. 6, 2009, at http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609 htm. These examples may prove helpful in facilitating discussion with foreign counterparts regarding their position on the ICRC Interpretive Guidance, but should *not* be read as representative of the U.S. position on DPH.

[12] *See generally* Parks, *supra* note 9; Schmitt, *supra* note 9. *See also* Col W. Hayes Parks, USMCR (Ret), *Memo. of Law, Executive Order 12333 and Assassination*, 2 November 1989, THE ARMY LAWYER, Dec. 1989, at 5–6 (arguing that attacks on military objective with civilians present, or civilians participating in efforts vital to the enemy war effort, do not constitute prohibited attacks *per se*); Col W. Hayes Parks, USMCR (Ret), Memorandum of Law, Law of War Status of Civilians Accompanying Military Forces in the Field, 6 May 1999 (unpublished and on file with TJAGLCS International and Operational Law Dep't, pp. 2-4) (advising that, for example, civilians entering a theater of operations in support or operation of sensitive or high value equipment such as a weapon system, may be at risk of intentional attack because of the importance of their duties).

control them.[13] These designations and processes normally remain classified due to the sensitive nature of intelligence sources and technology, the need for operational security in military planning, and classic principles of war such as retaining the element of surprise. JAs should gather the facts and closely consult all available guidance, particularly the Rules of Engagement and theater-specific directives or references, as well as host nation laws and sensitivities.

4. Places.

a. Defended Places. (FM 27-10, paras. 39 and 40). As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include:

i. A fort or fortified place;

ii. A place occupied by a combatant force or through which a force is passing; and

iii. A city or town that is surrounded by defensive positions under circumstances that the city or town is indivisible from the defensive positions. AP I, art. 51.5(a), further prohibits bombardments that treat "as a single military objective a number of clearly separated and distinct military objectives located in a city, town, or village."

iv. Other legitimate military objectives which are not "defended" are also subject to attack. (FM 27-10, para. 40(c)).

b. 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:

i. All combatants and mobile military equipment are removed;

ii. No hostile use made of fixed military installations or establishments;

[13] *See*, *e.g.*, U.S. Dep't of Justice, Attorney General Eric Holder Speaks at Northwestern University School of Law, Mar. 5, 2012, *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html ("[T]here are instances where [the U.S.] government has the clear authority – and, I would argue, the responsibility – to defend the United States through the appropriate and lawful use of lethal force. . . . [I]t is entirely lawful – under both United States law and applicable law of war principles – to target specific senior operational leaders of al Qaeda and associated forces."). *See also* Chapter 5 in the Operational Law Handbook on Rules of Engagement.

iii. No acts of hostility shall be committed by the authorities or by the population; and

iv. 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, para. 39b).

c. Natural environment. "It is generally lawful under the LOAC to cause collateral damage to the environment during an attack on a legitimate military target. However, the commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practical to do so consistent with mission accomplishment . . . .

[M]ethods and means of attack should be employed with due regard to the protection and preservation of the natural environment. Destruction . . . not required by military necessity and carried out wantonly is prohibited." JP 3-60, appendix E, para. 8.b.

i. U.S. policy establishes clear guidelines and requires a mandatory OPLAN annex to protect the environment in certain conditions during overseas operations.[14]

ii. AP I, article 55 further states that the environment cannot be the object of reprisals, and that care must be taken to prevent long-term, widespread, and severe damage. The United States objects to this article as overbroad (for example, it might categorically rule out napalm or nuclear strikes), and does not consider it to be customary international law.

d. Protected Areas. Hospital or safety zones may be established for the protection of the wounded and sick or civilians. (GC I, art. 23 & annex I; GC IV, art. 14). 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 are designated under the convention as "specially protected." The U.S. recently ratified this treaty.

e. Protected Property

i. Civilian Objects. It is prohibited to intentionally attack civilian property. (FM 27-10, para. 246; AP I, art. 51(2)). A presumption of

[14] *See* Executive Order 12114, implemented by DoD Directive 6050.7, and Chapter 21 in the Operational Law Handbook, for greater detail.

civilian property attaches to objects traditionally associated with civilian use (dwellings, schools, etc.). (AP I, art. 52(3)).

ii. Medical Units and Establishments. (FM 27-10, paras. 257 and 258; GC I, art. 19)

A. Fixed or mobile medical units shall be respected and protected. They shall not be intentionally attacked.

B. Protection shall not cease, unless they are used to commit "acts harmful to the enemy."

C. There is a warning requirement before attacking a hospital that is committing "acts harmful to the enemy."

1. Reasonable time must be given to comply with the warning, before attack.

2. When receiving fire from a hospital, there is no duty to warn before returning fire in self-defense. Example: Richmond Hills Hospital, Grenada; hospitals during combat in Operation Iraqi Freedom.

D. Medical Transport. Ground transports of the wounded and sick or of medical equipment shall not be attacked if performing a medical function. (GC I, art. 35). Under GC I, 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. AP I extends further protection to medical aircraft flying over areas controlled by friendly forces. Under this regime, identified medical aircraft are to be respected, regardless of whether a prior agreement between the parties exists. (AP 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." (AP 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. (AP I, art. 27). For further discussion, see the chapter on GC I, earlier in this Deskbook.

f. Cultural Property. There is a longstanding prohibition against attacking cultural property. (HR, art. 27; FM 27-10, para. 45, 57; *see* AP I, art. 53, for similar prohibitions). The 1954 Cultural Property Convention

elaborates, but does not expand, the protections accorded cultural property found in these other treaties.[15] Misuse will subject them to attack. The enemy has a duty to indicate the presence of such buildings with visible and distinctive signs.

g. Works and Installations Containing Dangerous Forces. (AP I, art. 56, and AP II, art. 15). Under the Protocols, dams, dikes, and nuclear electrical generating stations shall not be attacked—even if military objectives—if the attack will cause release of dangerous forces and "severe losses" among the civilian population. The United States objects to this language as creating a different standard than customary proportionality test of "excessive" incidental injury or damage. JP 3-60, appedix E, para. 8.a. requires careful consideration of potentially catastrophic damage when attacking such targets.

i. Military objectives near these potentially dangerous forces are also immune from attack if the attack may cause release of the forces. Parties also have a duty to avoid locating military objectives near such locations.

ii. AP I states that a military force may attack works and installations containing dangerous forces only if they provide "significant and direct support" to military operations and the attack is the only feasible way to terminate the support. The United States objects to this provision as creating a heightened standard for attack that differs from the historical definition of a military objective.

iii. 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.

h. Objects Indispensable to the Survival of the Civilian Population. AP I, article 54, prohibits starvation as a method of warfare. It is prohibited to attack, destroy, remove, or render useless objects indispensable for

[15] Article 1 of the 1954 Convention defines cultural property as "movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art, or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; . . . buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined [above] such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property . . . [and] centres containing a large amount of cultural property . . . ."

survival of the civilian population, such as foodstuffs, crops, livestock, water installations, and irrigation works.

5. Protective Emblems. (FM 27-10, para. 238). Objects and personnel displaying emblems are presumed to be protected under Conventions. (GC I, art. 38)

a. Medical and Religious Emblems.

i. Red Cross.

ii. Red Crescent.

iii. Red Crystal (*see* Additional Protocol III to the Geneva Conventions).

b. Cultural Property Emblems

i. "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, arts. 16 and 17).

ii. 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."

c. 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. (AP I, annex I, art. 16.)

C. Principle of Discrimination or Distinction. The principle of distinction is sometimes referred to as the "grandfather of all principles," as it forms the foundation for much of the Geneva Tradition of the law of armed conflict. The essence of the principle is that military attacks should be directed at combatants and military targets, and not civilians or civilian property. AP I, art. 48 sets out the rule: "[p]arties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

1. AP I, art. 51(4), defines "indiscriminate attacks" as those attacks that:

a. Are "not directed against a specific military objective" (e.g., SCUD missiles during Desert Storm);

b. "Employ a method or means of combat the effects of which cannot be directed at a specified military objective" (e.g., area bombing);

c. "Employ a method or means of combat the effects of which cannot be limited as required" (use of bacteriological weapons); and

d. "Consequently, in each case are of a nature to strike military objectives and civilians or civilian objects without distinction."[16]

2. JP 3-60, appendix E, para. 2.e. adds, "[d]efenders are obligated to use their best efforts to segregate noncombatants and to refrain from placing military personnel or materiel in or near civilian objects or locations. Attackers are required to only use those means and methods of attack that are discriminate in effect and can be controlled, as well as take precautions to minimize collateral injury to civilians and protected objects or locations."

D. Principle of Proportionality. The test to determine if an attack is proportional is found in AP I, art. 51(5)(b): "[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" violates the principle of proportionality. (*See also* JP 3-60, appendix E, para. E.2.d.; FM 3-60, para. 2-88). If the target is purely military with no known civilian personnel or property in jeopardy, no proportionality analysis need be conducted. That is a rare circumstance, though.

1. Incidental loss of life or injury and collateral damage. The law recognizes that unavoidable civilian death, injury, and property destruction may occur during military operations. Such losses are always regretted. Commanders must consider such losses both before and during attack, and "weigh the anticipated loss of civilian life and damage to civilian property reasonably expected to result from military operations [against] the advantages expected to be gained." JP 3-60, appendix E, para. E.2.d. The question is whether such death, injury, and destruction are **excessive** in relation to military advantage linked to the full context of strategy, "anticipated from those actions considered as a whole, and not only from isolated or particular parts thereof.; not whether they will occur." *Id*. In other words, the prohibition is on the death, injury, and destruction being excessive; not on the attack causing such results.[17] Rules of engagement may require elevating the decision to attack if collateral damage is anticipated to exceed thresholds established by higher-level commanders.

[16] *See* A.P.V. RODGERS, LAW ON THE BATTLEFIELD 19-24 (1996).

[17] This strategic-level perspective is not without controversy. The ICRC Commentary to AP I advocates a far narrower, more tactical view of military advantage.

2. Taking Precautions. AP I, art. 57.2 requires commanders to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects[,]" "take all feasible precautions" to avoid or minimize incidental loss or damage, and choose (where possible) objectives "expected to "cause the least danger to civilian lives and civilian objects." Some have argued this language imposes higher burdens on those parties capable of taking greater precautions, for example, claiming that a party with precision-guided munitions must always use them. The United States disputes any such unequal burden under LOAC, and prefers the term "all practicable precautions" and a reasonableness standard for evaluating command decisions.[18]

3. Judging Commanders. AP I, art. 85 states that it is a grave breach of Protocol 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. In judging a commander's actions one must look at the situation as the commander saw it in light of all known circumstances.[19] This standard has both objective (what would a reasonable commander do?) and subjective (what circumstances affected this commander's judgment?) components.

   b. When conducting this inquiry, two questions seem relevant: First, did the commander gather a reasonable amount of information to determine whether the target was a military objective and that the incidental damage would not be disproportionate? Second, did the commander act reasonably based on the gathered information? Factors such as time, available staff, and combat conditions also bear on the analysis.

   c. Example: Al Firdos Bunker. During Desert Storm, planners identified this bunker as a military objective. Barbed wire surrounded the complex, camouflage concealed its location, and armed sentries guarded its entrance and exit points. Unknown to coalition planners, however, Iraqi civilians used the shelter as nighttime sleeping quarters. The complex was bombed, resulting in nearly 300 civilian casualties. Was there a LOAC violation? No. Based on information gathered by planners, the commander made a reasonable assessment that the target was a military objective and that incidental damage would not outweigh the military advantage gained.

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[18] See *Additional Protocol I as an Expression of Customary International Law*, summarizing the remarks of Michael J. Matheson, a former Department of State Legal Advisor, in the Documentary Supplement. *See also* FM 27-10, para. 41 ("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").

[19] *See id*. at 66; *see also* discussion of the "Rendulic Rule," *supra* note 4, and accompanying text.

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.[20]

4. "The key factor in determining if a target is a lawful military object is whether the desired effect to be rendered on the target offers a definite military advantage in the prevailing circumstances without excessive collateral damage. In all cases, consult the Staff Judge Advocate." (JP 3-60, appendix E, para. E.4.b.(3))

E. Principle of Unnecessary Suffering or Humanity. Sometimes referred to as the principle of superfluous injury or humanity, this principle requires military forces to avoid inflicting gratuitous violence on the enemy. It arose originally from humanitarian concerns over the sufferings of wounded soldiers, and was codified as a weapons limitation: "It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering." HR, art. 23(e). More broadly, this principle also encompasses the humanitarian spirit behind the Geneva Conventions to limit the effects of war on the civilian population and property, and serves as a counterbalance to the principle of military necessity.

1. Today, this principle underlies three requirements to ensure the legality of weapons and ammunitions themselves, as well as the methods by which such weapons and ammunition are employed. Military personnel may not use arms that ***civilized societies recognize as per se causing*** unnecessary suffering (e.g., projectiles filled with glass, hollow point or soft-point small caliber ammunition, lances with barbed heads), must scrupulously observe ***treaty or customary limitations*** on weapons use (e.g., CCW Protocol III's prohibition on use of certain incendiary munitions near concentrations of civilians), and must not ***improperly use*** otherwise lawful weapons in a manner ***calculated to cause*** unnecessary suffering (i.e., with deliberate intent to inflict superfluous or gratuitous injury to the enemy).

2. The prohibition of unnecessary suffering constitutes acknowledgement that necessary suffering to combatants is lawful in armed conflict, and may include severe injury or loss of life justified by military necessity. **There is no agreed definition for unnecessary suffering**. A weapon or munition would be deemed to cause unnecessary suffering only if it inevitably or in its normal use has a particular effect, and the injury caused thereby is considered by governments as disproportionate to the military necessity for that effect, that is, the military advantage to be gained from use. This balancing test cannot be

[20] *See* DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 615-616 (1992).

conducted in isolation. A weapon's or munition's effects must be weighed in light of comparable, lawful weapons or munitions in use on the modern battlefield.

3. A weapon cannot be declared unlawful merely because it may cause severe suffering or injury. The appropriate determination is whether a weapon's or munition's employment for its normal or expected use would be prohibited under some or all circumstances. The correct criterion is whether the employment of a weapon for its normal or expected use inevitably would cause injury or suffering manifestly disproportionate to the military advantage realized as a result of the weapon's use. A State is not required to foresee or anticipate all possible uses or misuses of a weapon, for almost any weapon can be used in ways that might be prohibited.

4. In practice, DoD service TJAGs oversee legal reviews of weapons during the procurement process. JAs should read these legal reviews prior to deployment for all weapons in their unit's inventory, watch for unauthorized modifications or deliberate misuse, and coordinate with higher headquarters legal counsel if it appears that a weapon's normal use or effect appears to violate this principle. See also the discussion of the DoD Weapons Review Program below.

IV. WEAPONS

A. Two major precepts govern the regulation of weapons use in conflict. The first is the law of armed conflict principle prohibiting unnecessary suffering. The second is treaty law dealing with specific weapons or weapons systems.

B. Legal Review. Before discussing these areas, it is important to note first that all U.S. weapons and weapons systems must be reviewed by the Service TJAG for legality under the law of armed conflict.[21] Reviews occur as early as possible before the award of the engineering and manufacturing development contract and again before award of the initial production contract. Legal review of new weapons is also required under AP I, art. 36.

1. U.S. Policy. "The acquisition and procurement of DoD weapons and weapon systems shall be consistent with all applicable domestic law and treaties and international agreements . . . , customary international law, and the law of armed conflict . . . ." (DoD Directive 5000.01, ¶ E1.1.15). In a "TJAG review," the discussion will often focus on whether employment of the weapon or munition for its normal or expected use would inevitably cause injury or suffering manifestly disproportionate to its military effectiveness. This test cannot be

[21] DoD Directives 3000.3, ¶ 5.6.2 and 5000.01, ¶ E1.1.15; AR 27-53, AFI 51-402, and SECNAVINST 5000.2D ¶ 2.6.

conducted in isolation, but must be weighed in light of comparable, lawful weapons in use on the modern battlefield. As discussed above, weapons may be found 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, ¶ 34).

b. By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: using a flamethrower against enemy troops in a bunker after dousing the bunker with gasoline; the *intent* being to inflict severe pain and injury on the enemy troops.

c. By agreement or specific treaty prohibition. Example: certain land mines, booby traps, and non-detectable fragments are prohibited under the Protocols to the 1980 Conventional Weapons Treaty.

C. Consideration of Specific Weapons. As noted above, HR article 22, states that the right of belligerents to adopt means of injuring the enemy is not unlimited. Furthermore, "it is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering." (HR art. 23(e)). The following weapons and munitions are considered under this general principle.

1. Small Arms Projectiles. Must not be exploding or expanding projectiles. The 1868 Declaration of St. Petersburg prohibits exploding rounds of less than 400 grams (14 ounces). The 1899 Hague Convention prohibits expanding rounds. Though not a party to either convention, U.S. practice accedes to these prohibitions as being customary international law. Current state practice is to use jacketed small arms ammunition, thereby reducing bullet expansion on impact.

a. Hollow point ammunition. Typically, this is semi-jacketed ammunition designed to expand dramatically upon impact. Customary international law and the treaties mentioned above prohibit use of this ammunition in armed conflict against combatants.

b. Frangible ammunition. Ammunition designed to break apart upon impact, thereby reducing ricochet. These rounds are also known to produce wounds similar to those suffered by victims of hollow-point ammunition, possibly violating the principle of unnecessary suffering. Use of this ammunition may be lawful in limited situations to significantly reduce collateral damage to noncombatants and protected property, e.g., during a hostage rescue, aircraft security mission, or urban combat to minimize penetration of walls or risk to bystanders.

c. High Velocity Small Caliber Arms

i. M-16 rifle ammunition. Early critics claimed these rounds caused unnecessary suffering. Legal review found they may cause suffering, but it is not deemed to be unnecessary.

ii. "Matchking" ammunition. These rounds have a hollow tip, but do not expand on impact. The tip is designed to enhance accuracy only, and does not cause unnecessary suffering.

d. Sniper rifles, .50 caliber machine guns, and shotguns. Much mythology exists about the lawfulness of these weapons. At present, they are considered lawful weapons, although rules of engagement (policy and tactics) may limit their use.

e. Superfluous Injury and Unnecessary Suffering Project (SIrUS) In the late 1990s, the ICRC launched an effort purporting to increase objectivity of legality reviews for various weapons systems. The SIrUS project proposed two criteria to determine if a weapon causes unnecessary suffering: casualty survival rates off the battlefield, and seriousness of an inflicted injury. Later research discredited these criteria by showing that available casualty data did not reliably account for the specific source of injury or quality of medical care provided.[22]

2. Fragmentation Weapons. (FM 27-10, para. 34)

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

b. Unlawful if primary effect is to injure by fragments which in the human body are undetectable by X-ray (Protocol I, CCW, discussed below[23]).

D. Recent Restrictions. The following weapons and munitions are regulated not only by the principle prohibiting unnecessary suffering, but also by specific treaty law. Many of these restrictions followed as Protocols to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW), which provided a framework for HR-like restrictions on means and methods of warfare.

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[22] *See* Maj Donna Verchio, *Just Say No! The SirUS Project: Well-Intentioned, but Unnecessary and Superfluous*, 51 A.F.L. Rev. 183 (2001).

[23] Reprinted in the Documentary Supplement.

1. Landmines. Lawful if properly used; however, regulated by a number of different treaties. Keep in mind that while the U.S. has not signed all the applicable treaties, many of our allies have, and therefore it is important to understand what limitations our coalition partners may be facing and the impact on U.S. operations.

   a. The primary legal concern with landmines is that they may violate the law of armed conflict principle of discrimination. A landmine cannot tell if it is being triggered by an enemy combatant or a member of the civilian population.

   b. When considering legal restrictions on landmines, three questions must be answered:

      i. What type of mine is it: anti-personnel, anti-tank, or anti-tank with anti-handling device?

      ii. How is the mine delivered: remotely or non-remotely?

      iii. Does it ever become inactive or self-destruct? Is it "smart" or "dumb?" ("Smart" mines are those that are self-destructing, self-neutralizing, or self-deactivating; "dumb" landmines are persistent, and a threat until they are triggered or lifted.)

   c. The primary treaty that restricts U.S. use of mines is Amended Protocol II to the CCW.[24] The U.S. ratified the Amended Protocol on May 24, 1999. Amended Protocol II:

      i. Expands the scope of the original Protocol to include internal armed conflicts;

      ii. Requires that all remotely delivered anti-personnel landmines be "smart";

      iii. Requires that all "dumb" anti-personnel landmines be used within controlled, marked, and monitored minefields; accordingly, they may not be remotely delivered;

      iv. Requires that all anti-personnel landmines be detectable using available technology (i.e., that they contain a certain amount of iron so as to be detectable using normal mine sweeping equipment);

[24] Reprinted in the Documentary Supplement.

v. Requires that the party laying mines assume responsibility to ensure against their irresponsible or indiscriminate use; and

vi. Provides for means to enforce compliance.

vii. Amended Protocol II also clarifies the use of the M-18 Claymore "mine" when used in the tripwire mode (art. 5(6)). (When used in command-detonated mode, the Protocol does not apply, as the issue of distinction is addressed by the "triggerman" monitoring the area). Claymores may be used in the tripwire mode, without invoking the "dumb" mine restrictions of Amended Protocol II, if:

A. They are not left out longer than 72 hours;

B. The Claymores are located in the immediate proximity of the military unit that emplaced them; and

C. The area is monitored by military personnel to ensure civilians stay out of the area.

d. In addition to Amended Protocol II, the United States released a new policy statement on landmines in February 2004. Under this policy:

i. The United States has committed to eliminate persistent (dumb) landmines of all types from its arsenal.

ii. Persistent anti-personnel landmines are *only* stockpiled for use by the United States in fulfillment of our treaty obligations to the Republic of Korea.

iii. Since 2010, the United States will not employ either persistent anti-personnel or persistent anti-vehicle landmines.

e. Although not applicable to the U.S., many nations, including many of our allies, have signed the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction.[25] This treaty is commonly referred to as the Ottawa Treaty and entered into force on March 1, 1999. As of this writing, 156 States have ratified it. Although the U.S. was active in negotiations, in September of 1997 it withdrew when other countries would not allow exceptions for the use of anti-personnel landmines mines in Korea and other uses of smart anti-personnel landmines. **Note:** Ottawa only bans

[25] Reprinted in the Documentary Supplement.

anti-personnel landmines; therefore, Ottawa does not restrict our allies in regards to anti-tank or anti-tank with anti-handling device mines.

2. Booby Traps. A device designed to kill or maim an unsuspecting person who disturbs an apparently harmless object or performs a normally safe act.

   a. Amended Protocol II of the 1980 Conventional Weapons Convention contains specific guidelines on the use of booby-traps in article 7, prohibiting booby-traps and other devices which are in any way attached or associated with:

      i. Internationally recognized protective emblems, signs or signals;

      ii. Sick, wounded, or dead persons;

      iii. Burial or cremation sites or graves;

      iv. Medical facilities, medical equipment, medical supplies or transportation;

      v. Children's toys or other portable objects or products specifically designed for the feeding, health, hygiene, clothing, or education of children;

      vi. Food or drink;

      vii. Kitchen utensils or appliances, except in military establishments;

      viii. Objects clearly of a religious nature;

      ix. Historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of peoples; or

      x. Animals or their carcasses.

   b. The above list is a useful "laundry list" for the operational law attorney to use when analyzing the legality of the use of a booby-trap. There is one important caveat to the above list: sub-paragraph 1(f) of article 7 prohibits the use of booby-traps against "food or drink." Food and drink are not defined under the Protocol, and if interpreted broadly, could include such viable military targets as supply depots and logistical caches. Consequently, it was imperative to implement a reservation to the Protocol that recognized that legitimate military targets such as supply depots and

logistical caches were permissible targets against which to employ booby-traps. The reservation clarifies the fact that stocks of food and drink, if judged by the United States to be of potential military utility, will not be accorded special or protected status.

3. Incendiaries. (FM 27-10, para. 36). Examples: napalm or flame-throwers. These are not illegal *per se* or illegal by treaty. The only U.S. policy guidance is found in paragraph 36 of FM 27-10 ,which warns that they should "not be used in such a way as to cause unnecessary suffering."

   a. Napalm and Flame-throwers. Designed for use against armored vehicles, bunkers, and built-up emplacements.

   b. Protocol III of the 1980 Convention on Certain Conventional Weapons [26] prohibits use of air-delivered incendiary weapons on military objectives located within concentrations of civilians.

      i. The U.S. ratified the Protocol in January 2009, 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, while incendiary munitions would burn up the chemicals.

      ii. Tracers, white phosphorous, and other illuminants, as well as explosive munitions that combine incendiary and other effects such as thermobaric munitions, are not considered incendiaries. (Art 1(1)). However, JAs should ensure they are properly used, particularly if near concentrations of civilians.

4. Cluster Bombs or Combined Effects Munitions (CM). These are highly effective against a variety of targets, such as air defense radars, armor, artillery, and large enemy personnel concentrations. Since the bomblets or submunitions dispense over a relatively large area and a small percentage typically fail to detonate, this may create an unexploded ordinance (UXO) hazard. CMs are not mines, are acceptable under the laws of armed conflict, and are not timed to go off as anti-personnel devices. However, disturbing or disassembling submunitions may explode them and cause civilian casualties.[27] Protocol V on Explosive Remnants of War to the 1980 Convention on Certain Conventional

[26] Reprinted in the Documentary Supplement.

[27] *See* U.S. DoD Report to Congress: Kosovo/Operation Allied Force After Action Report. *See also* Maj. Thomas Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F.L. Rev. 229 (2001).

Weapons addresses some aspects of the use of cluster bombs. Protocol V requires Parties to clear areas under its control of unexploded ordnance insofar as is feasible. The U.S. ratified Protocol V in January 2009.

a. Another NGO-initiated treaty, the 2008 Convention on Cluster Munitions, prohibits development, production, stockpiling, retention or transfer of cluster munitions (CM) between signatory States. Also known as the Oslo Process, this recent treaty binds many U.S. allies, but most nations that manufacture or use CMs still reject it. The United States is not a party as it continues to use CMs for certain targets as described above, but lobbied to preserve interoperability for non-signatory states to use and stockpile CM even during multinational operations.

b. The Secretary of Defense has signed a DoD Cluster Munitions Policy mandating by 2018 a reduction of obsolete CM stocks, improvement of CM UXO standards to 1%, and replacement of existing stocks. [28] From 2008-2011, the United States also sponsored an unsuccessful effort to add a new CCW Protocol regulating—but not banning—cluster munitions. [29] Current U.S. practice is to mark coordinates and munitions expended for all uses of cluster munitions, and to engage in early and aggressive EOD clearing efforts as soon as practicable.[30]

5. 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. The policy recognizes that collateral or incidental damage may occur as the result of legitimate military use of lasers (range finding, targeting). This policy mirrors that found in Protocol IV of the CCW.[31] The U.S. ratified Protocol IV in January 2009.

6. Chemical Weapons. Poison has long been outlawed in battle as being a treacherous means of warfare. Chemical weapons, more specifically, have been regulated since the early 1900's by several treaties.

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[28] *See* Robert M. Gates, Memorandum for Secretaries of the Military Dep'ts et. al., SUBJECT: DoD Policy on Cluster Munitions and Unintended Harm to Civilians, 19 June 2008, available at http://www.defense.gov/news/d20080709cmpolicy.pdf.

[29] *See* U.S. Dep't of State, Statement of the [US] on the Outcome of the Fourth Review Conference of the CCW, Nov. 25, 2011, *at* http://geneva.usmission.gov/2011/11/25/u-s-deeply-disappointed-by-ccws-failure-to-conclude-procotol-on-cluster-munitions/.

[30] *See* U.S. DoD Report to Congress: Kosovo/Operation Allied Force After Action Report. *See also* Thomas Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F.L. REV. 229 (2001).

[31] Reprinted in the Documentary Supplement.

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

i. Prohibits the use of lethal, incapacitating, and biological agents. The protocol prohibits the use of "asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . ."

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

iii. Incapacitating agents are those chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated. The U.S. views Riot Control Agents (RCA) as having a "transient" effect, and thus they are NOT incapacitating agents. Therefore, the U.S. position is that the treaty does not prohibit the use of RCA in war, and it published an Understanding to this effect upon ratifying the treaty. (Other nations disagree with this interpretation). See further discussion below on RCA.

iv. Under the Geneva Gas Protocol, the U.S. reserved the right to use lethal or incapacitating gases if the other side uses them first. (FM 27-10, para. 38b). The reservation did not cover the right to use bacteriological methods of warfare in second use. Presidential approval was required for use. (Executive Order 11850, 40 Fed. Reg. 16187 (1975); FM 27-10, para. 38c.) However, the Chemical Weapons Convention (CWC), which the U.S. ratified in 1997, does not allow this "second" use.

b. 1993 Chemical Weapons Convention (CWC).[32] This treaty was ratified by the U.S. and came into force in April 1997. Key articles are:

i. Article I. Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. Retaliatory use (second use) is not allowed, a significant departure from the Geneva Gas Protocol. It requires the destruction of chemical stockpiles. Each party agrees not to use RCAs as a "method of warfare."

ii. Article II includes definitions of chemical weapons, toxic chemical, RCA, and purposes not prohibited by the convention.

[32] Reprinted in the Documentary Supplement.

iii. Article III requires parties to declare stocks of chemical weapons and facilities they possess.

iv. Articles IV and V include procedures for destruction and verification, including routine on-site inspections.

v. Article VIII establishes the Organization for the Prohibition of Chemical Weapons (OPWC).

vi. Article IX establishes "challenge inspection;" a short notice inspection in response to another party's allegation of non-compliance.

7. Riot Control Agents (RCA). The use of RCA by U.S. troops is governed by four key documents. In order to determine which documents apply to the situation at hand, you must first answer one fundamental question: is the U.S. currently engaged in war? If so, use of RCA is governed by the CWC and Executive Order 11850. If not, then use of RCA is governed by CJCSI 3110.07C, and, more tangentially, by the Senate's resolution of advice and consent to the CWC.

a. War. In determining if the U.S. is at war for purposes of use of RCA, the question is whether the international armed conflict the U.S. is involved in is of a scope, duration, and intensity to be an operation that triggers the application of the law of armed conflict (i.e., a Common Article 2 conflict).

i. CWC. As noted above, the CWC prohibits use of RCA as a "method of warfare." The President decides if a requested use of RCA qualifies as a "method of warfare." As a general rule, during war, the more it looks like the RCA is being used on enemy combatants, the more likely it will be considered a "method of warfare" and prohibited.

ii. Executive Order 11850. Guidance also exists in E.O. 11850. Note that E.O. 11850 came into force nearly 20 years before the CWC. E.O. 11850 applies to use of RCA and herbicides. It requires Presidential approval before use, and only allows for RCA use in armed conflicts in **defensive** military modes to save lives, such as:

A. Controlling riots;

B. Dispersing civilians where the enemy uses them to mask or screen an attack;

C. Rescue missions for downed pilots, escaping POWs, etc.; and

D. For police actions in our rear areas.

iii. What is the rationale for prohibiting use of RCA on the battlefield? First, to avoid giving States the opportunity for subterfuge. Keep all chemical equipment off the battlefield, even if supposedly only for use with RCA. Second, to avoid an appearance problem, should combatants confuse 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.

b. Operations other than war. In a situation less than a Common Article 2 conflict, the CWC and E.O. 11850 restrictions on RCA do **not** apply. Rather, CJCSI 3110.07C applies. The authorization for RCA use may be at a lower level than the President. CJCSI 3110.07C 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:

i. The conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict.

ii. Consensual peacekeeping operations when the use of force is authorized by the receiving State, including operations pursuant to Chapter VI of the UN charter.

iii. Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the UN charter.

iv. These allowable uses are drawn from the language of the Senate's resolution of advice and consent for ratification of the CWC (S. Exec. Res. 75 – Senate Report section 3373 of Apr. 24, 1997). The Senate required that the President certify when signing the CWC that the CWC did not restrict in any way the above listed uses of RCA. In essence, the Senate made a determination that the listed uses were not "war," triggering the application of the CWC.

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

B. The President's certification document of Apr. 25, 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."

v. Thus, during peacekeeping missions (such as Bosnia, Somalia, Rwanda and Haiti) it appears U.S. policy will maintain that we are not a party to the conflict for as long as possible. Therefore, RCA would be available for all purposes. However, in armed conflicts (such as Operation Iraqi Freedom, Enduring Freedom, Desert Storm, and Panama) it is unlikely that the President would approve the use of RCA in situations where "combatants" are involved due to the CWC's prohibition on the use of RCA as a "method of warfare."

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

9. Biological Weapons. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The 1972 Biological Weapons Convention[33] supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons. The U.S. renounced all use of biological and toxin weapons.

10. Nuclear Weapons. (FM 27-10, para. 35). Not prohibited by international law. In 1996, the International Court of Justice (ICJ) issued an advisory opinion[34] that "[t]here 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 "[t]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict." The ICJ stated 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.

[33] Reprinted in the Documentary Supplement.

[34] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), *available at* http://www.icj-cij.org/docket/files/95/7495.pdf.

V. TACTICS

A. "Tricking" the enemy

1. Ruses. (FM 27-10, para. 48). Injuring the enemy by legitimate deception (abiding by the law of armed conflict—actions that are in good faith). Examples of ruses include:

a. Naval Tactics. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels.

i. World War I: Germany often fitted 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.[35]

ii. World War II: The British Q-ship program 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 British sank 12 U-boats by this method. This tactic caused the Germans to shift from surfaced gun attacks to submerged torpedo attacks.[36]

b. Land Warfare. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, or using a small force to simulate a large unit. (FM 27-10, para. 51.)

i. World War II: During Allied Operation Fortitude prior to the D-Day landings in 1944, the Allies transmitted false radio messages and references in bona fide format, and created a fictitious First U.S. Army Group, supposedly commanded by General Patton, 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.[37]

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[35] *See* C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 454-55 (1962).

[36] *See* LCDR Mary T. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, NAV. WAR. COLL. REV., Summer 1989, at 60.

[37] *See* JOHN KEEGAN, THE SECOND WORLD WAR 373-79 (1989).

ii. Gulf War: 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. Smoke generators and loudspeakers playing tape-recorded tank and truck noises, and inflatable Humvees and helicopters, furthered the ruse.[38]

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

i. Uniforms. Combatants may wear enemy uniforms but cannot fight in them. Note, however, that military personnel not wearing their uniform may lose their POW status if captured and risk being treated as spies (FM 27-10, paras. 54 and 74; NWP 1-14M, para. 12.5.3; AFP 110-31, para. 8-6).

A. World War II: The most celebrated incident involving the use of enemy uniforms was the Otto Skorzeny trial arising from the Battle of Bulge. Otto Skorzeny commanded 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. Eighteen of his men were executed as spies following the battle. After the war, Skorzeny and ten of his officers were tried for improper use of enemy uniforms, among other charges. All were acquitted. The evidence did not show they actually fought in the uniforms, consistent with their instructions. The case suggests that only fighting in the enemy uniform violates the law of armed conflict.[39]

ii. 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

[38] *See* RICK ATKINSON, CRUSADE 331-33 (1993).

[39] *See* DA Pam 27-161-2 at 54. For listing of examples of the use of enemy uniforms, *see* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 77-78 (1990). For an argument against any use of the enemy's uniform, *see* Valentine Jobst III, *Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?,* 35 AM. J. INT'L L. 435 (1941).

long as they are not employed during actual combat (FM 27-10, para. 54; NWP 1-14M, para. 12.5).

iii. Equipment. Military forces must remove all enemy insignia in order to fight with the equipment. Captured supplies: may seize and use if State property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made. (HR, art. 53)

iv. Effect of Protocol I. AP I, art. 39(2), prohibits virtually all use of these enemy items. (*see* NWP 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 United States does not consider this article reflective of customary international law. The 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. (AP I, art 39(3); NWP 1-14M, para. 12.5.1)

2. Treachery/Perfidy. In contrast to the lawful ruses discussed above, treachery and perfidy are prohibited under the law of armed conflict. (FM 27-10, para. 50; HR, art. 23(b)). These involve injuring the enemy while relying on his adherence to the law of armed conflict (i.e., actions in bad faith). As noted below, treachery/perfidy can be further broken down into feigning and misuse.

a. History. Condemnation of perfidy is an ancient precept of the law of armed conflict, derived from the 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 law of armed conflict to gain a military advantage. Thus, the prohibition is directly related to the protection of war victims. The practice of perfidy also inhibits the restoration of peace.[40]

b. Feigning and Misuse. Distinguish feigning from misuse. Feigning is treachery resulting in killing, wounding, or capturing the enemy. Misuse is an act of treachery resulting in *some other* advantage to the enemy.

c. Effect of Protocol I. According to AP I, art. 37(1), the **killing, wounding, or capture** via "[a]cts inviting the confidence of an adversary to lead him

[40] *See* MICHAEL BOTHE, ET. AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 202 (1982); FM 27-10, para. 50.

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]." This prohibition is considered customary international law by the United States. Article 37(1) does not prohibit perfidy *per se* (although it comes very close); rather, only certain perfidious acts that result in killing, wounding, or capturing. The ICRC could not gain support for an absolute ban on perfidy at the diplomatic conference.[41] Article 37 also refers only to confidence in international law (LOW), not moral, obligations. The latter was viewed as too abstract by certain delegations.[42] The U.S. view includes breaches of moral and legal obligation as being violations, citing the broadcast of an announcement to the enemy that an armistice had been agreed upon, when it had not, as being treacherous. (FM 27-10, para. 50)

d. Feigning incapacitation by wounds/sickness. (AP I, art. 37(1)(b)). The U.S. position is that HR, art. 23(b), also prohibits such acts, e.g., faking wounds and then attacking an approaching soldier.[43]

e. Feigning surrender or the intent to negotiate under a flag of truce. (AP I, art. 37(1)(a)). Note that in order to be a violation of AP I, art. 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 AP I, art. 38, 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.[44] AP I, art. 38, is analogous to HR, art. 23(f), prohibiting the improper use of a flag of truce.

i. 1982 Falklands War: During the Battle for Goose Green, some Argentinean soldiers raised a white flag. A British lieutenant and two soldiers advanced to accept what they thought was a proffered surrender. They were killed by enemy fire in a disputed incident. Apparently, one group of Argentines was attempting to surrender, but not the other group. The Argentine conduct was arguably treachery if those raising the white flag killed the British soldiers, but not if other Argentines fired unaware of the white flag. This

[41] Bothe, *supra* note 40, at 203.

[42] *Id.* at 204-05.

[43] *See* Marjorie M. Whiteman, Dep't of State, 10 *Digest of International Law* 390 (1968); NWP 1-14M, para. 12.7.

[44] *See* MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 320-21 (1959).

incident emphasizes the rule that the white flag indicates merely a desire to negotiate, and its hoister has the burden to come forward.[45]

ii. Desert Storm: The Battle of Khafji incident was not a perfidious act. Media speculated that Iraqi tanks with turrets pointed to the rear, then turning forward to fire when action began, was a 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."[46]

iii. Desert Storm: On one occasion, however, Iraqi forces did apparently engage in perfidious behavior. In a situation analogous to the Falklands War scenario above, Iraqi soldiers waved a white flag and also laid down their arms. As Saudi forces advanced to accept the surrender, they took fire from Iraqis hidden in buildings on either side of street.[47] Similar conduct occurred during Operation Iraqi Freedom when Iraqis took some actions to indicate surrender and then opened fire on Marines moving forward to accept the surrender.

iv. Desert Storm: On another occasion an Iraqi officer approached Coalition forces with hands up indicating his intent to surrender. Upon nearing the Coalition forces he drew a concealed pistol, fired, and was killed.[48]

f. Feigning civilian, noncombatant status. "Attacking enemy forces while posing as a civilian puts all civilians at hazard." (AP I, art. 37(1)(c); NWP 1-14M, para. 12.7.)

g. Feigning protected status by using UN, neutral, or nations not party to the conflict's signs, emblems, or uniforms. (AP I, art. 37(1)(d))

i. 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 armored personnel carrier with UN emblems. French forces thought all was normal.

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[45] *See* Major Robert D. Higginbotham, *Case Studies in the Law of Land Warfare II: The Campaign in the Falklands*, Mil. Rev., Oct. 1984, at 49.

[46] *See* DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN CONFLICT (1992), at 621.

[47] *Id.*

[48] *Id*.

The commandos, however, then proceeded to capture French peacekeepers without firing a shot.[49]

ii. It is not perfidy (a violation of AP I, art 37) to (mis)use the emblem of the UN to try to gain protected status if the UN has member forces in the conflict as combatants (even just as peacekeepers). As in the case of the misuse of the flag of truce, misuse of a UN emblem that does not result in a killing, capture, or surrender, is nonetheless a violation of AP I, art. 38, because that article prohibits the use of the UN emblem without authorization.

h. Misuse of Red Cross, Red Crescent, or cultural property symbol.

i. Designed to reinforce/reaffirm HR, art. 23(f).

ii. GC I requires that wounded and sick, hospitals, medical vehicles, and, in some cases, medical aircraft be respected and protected. The protection is lost if forces are committing acts harmful to the enemy. As an example, during the Grenada Invasion, U.S. aircraft took fire from the Richmond Hills Hospital, and consequently engaged it.[50]

iii. Cultural property symbols include the 1954 Hague Cultural Property Convention, Roerich Pact, and 1907 Hague Conventions symbols.

i. Misuse of internationally recognized distress signals (also prohibited).

B. Assassination. Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" is prohibited. (FM 27-10, para. 31; Executive Order 12333). Targeting military leadership or individuals, however, is not considered assassination. Recent U.S. practice is to offer money in exchange for "information leading to the capture of" the individual.[51]

C. Espionage. (FM 27-10, para. 75; AP I, art. 46). Defined as acting clandestinely (or on false pretenses) to obtain information for transmission back to friendly territory. Gathering intelligence while in uniform is not espionage.

1. Espionage is not a law of armed conflict violation.

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[49] Joel Brand, *French Units Attack Serbs in Sarajevo*, Wash. Post, May 28, 1995, at A1.

[50] *See* DA Pam 27-161-2, p. 53, n. 61.

[51] See Parks, *supra* note 12, at 4.

2. There is no protection, however, under the Geneva Conventions for acts of espionage.

3. The spy is tried under the laws of the capturing nation; e.g., Art. 106, UCMJ.

4. Reaching friendly lines immunizes the spy for past *espionage* activities, but can be prosecuted for any LOAC violations committed. Upon later capture as a lawful combatant, though, the former spy cannot be tried for past espionage.

D. Belligerent or wartime reprisals. (FM 27-10, para. 497). Defined as 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 armed conflict.

1. Reprisals are authorized if they are:

a. Timely;

b. Responsive to that enemy's act that violated the law of armed conflict;

c. Follow an unsatisfied demand to cease and desist; and

d. Proportionate to the previous illegal act.

2. Prisoners of war and persons "in your control" cannot be objects of reprisals. AP I prohibits reprisals against numerous other 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, and installations containing dangerous forces (dams, dikes, nuclear power plants) (AP I, arts. 51 and 53 - 56). The U.S. specifically objects to these restrictions as not reflective of customary international law.

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

WAR CRIMES AND COMMAND RESPONSIBILITY

I. OBJECTIVES

A. Understand the history of the law of war as it pertains to war crimes and war crimes prosecutions, focusing on enforcement mechanisms.

B. Understand the definition of "war crimes."

C. Understand the doctrine of command responsibility.

D. Understand the jurisdictions and forums in which war crimes may be prosecuted.

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

A. General. 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. 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.[1]

C. American Civil War. In 1865, Captain Henry Wirz, a former Confederate officer and commandant of the Andersonville, Georgia, prisoner of war camp, was convicted and sentenced to death by a federal military tribunal for "having ordered, and permitted the torture, maltreatment, and death of Union Prisoners of War in his custody.".[2]

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[1] *See* George L. Coil, *War Crimes of the American Revolution*, 82 MIL. L. REV. 171, 173-81 (1978).

[2] W. Hays Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1, at 7 (1973), *citing* The Trial of Captain Henry Wirz, 8 American State Trials 666, *as cited* in THE LAW OF WAR: A DOCUMENTARY HISTORY 783 (L. Friedman ed. 1972). *See* J. MCELROY, ANDERSONVILLE (1879); W.B. HESSELTINE, CIVIL WAR PRISONS (1930); 1 LAW OF WAR: A DOCUMENTARY HISTORY 783–98 (Leon Friedman, ed. 1972).

D. Anglo-Boer War. In 1902, British courts-martial tried Boers for acts contrary to the usages of war.[3]

E. 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.[4]

F. World War I. Because of German resistance to extradition—under the 1919 Versailles peace treaty—of persons accused of war crimes, the Allies agreed to permit the cases to be tried by the Supreme Court of Leipzig, Germany. The accused were treated as heroes by the German press and public, and many were acquitted despite strong evidence of guilt.

G. 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.[5]

H. Geneva Conventions. Marked the codification—beginning in 1949 when the Conventions were opened for signature—of specified international rules pertaining to the trial and punishment of those committing "grave breaches" of the Conventions.[6]

I. U.S. soldiers committing war crimes in Vietnam were tried by U.S. courts-martial under analogous provisions of the UCMJ.[7]

J. 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.[8]

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[3] *See* THE MILNER PAPERS: SOUTH AFRICA, 1897-1899, 1899-1905 (1933).

[4] See 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.

[5] NORMAN E. TUTOROW, WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK 4-8 (1986).

[6] *See* GC I Commentary 357-60.

[7] *See* 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.

K. 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.[9]

L. Former Yugoslavia. On Feb. 22, 1993, the UNSC established the first international war crimes tribunal since the Nuremberg and Far East trials after World War II.[10] On May 25, 1993, the Council unanimously approved a detailed report by the Secretary General recommending tribunal rules of procedure, organization, investigative proceedings, and other matters.[11]

M. Rwanda. On Nov. 8,1994, the UNSC adopted a Statute creating the International Criminal Tribunal for Rwanda.[12] 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.

N. Sierra Leone. On Aug. 14, 2000, the UNSC adopted Resolution 1315, which authorized the Secretary General to enter into an agreement with Sierra Leone and thereby establish the Special Court for Sierra Leone (agreement signed Jan. 16, 2002). The court is a hybrid international-domestic Court to prosecute those allegedly responsible for atrocities in the Sierra Leone.

O. International Criminal Court. The treaty entered into force on July 1, 2002. At the time of this writing, 121 States have ratified the Rome Statute of the International Criminal Court.[13] Although the U.S. is in favor of a standing permanent forum to address war crimes, the U.S. is not a party to the Statute of the ICC. The United States signed the Rome Treaty on Dec. 31, 2000. However, based on numerous concerns, President George W. Bush directed, on May 6, 2002, that notification be sent to the Secretary General of the United Nations, as the depositary of the Rome Statute, that the United States does not intend to become a party to the treaty and has no legal obligations arising from its previous signature. The United States has taken a significant step back from a hardlined position with regard to the ICC. Although the

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[8] *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.].

[9] *See* 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.

[10] S.C. Res. 808, U.N. SCOR, U.N. Doc. S/RES/808 (1993).

[11] S.C. Res. 827, U.N. SCOR, U.N. Doc. S/RES/827 (1993).

[12] S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994).

[13] Reprinted in the Documentary Supplement.

United States is still not a party, the United States has been participating in ICC proceedings in an Observer status since 2009.[14]

P. Military Commissions. In October 2006, President Bush signed the Military Commissions Act (MCA) of 2006, significantly amending the original military commissions order issued in 2001. In January 2009, President Obama paused prosecutions while his administration reviewed the cases and whether to continue or change the military commissions. In November 2009, Congress amended the Military Commissions Act. In 2010, the Secretary of Defense approved the 2010 Manual for Military Commissions, implementing the 2009 Military Commissions Act. In July 2010, prosecutions under the 2009 Military Commissions Act began.

III. WAR CRIMES

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. It appears, however, 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."[15]

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."[16]

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.**"[17]

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[14] *See*, Stephen J. Rapp, Amassador-at-Large For War Crimes Issues, United States Department of States, Address to the Assembly of States Parties (Nov. 19, 2009), available at http://www.state.gov/j/gcj/icc/index.htm

[15] L. OPPENHEIM, 2 INTERNATIONAL LAW 251 (7th ed., H. Lauterpacht, 1955); *accord* TELFORD TAYLOR, NUREMBERG AND VIETNAM 19-20 (1970).

[16] Black's Law Dictionary 1583 (6th ed. 1990); *cf*. FM 27-10, para. 498 (defining a broader category of "crimes under international law" of which "war crimes" form only a subset and emphasizing personal responsibility of individuals rather than responsibility of states).

[17] FM 27-10, para. 499 (emphasis added).

4. As with other crimes, there are Actus Reus and Mens Rea elements.

5. Recurring problems with prosecution of war crimes:

   a. Partiality.

      i. War crimes prosecutions are subject to criticism as "Victor's Justice" vice truly principled prosecution. A primary focus must be on a fundamentally fair system of justice with consistent application of the laws applied to all.

      ii. In the trial of Admiral Dönitz, in part for the crime of not coming to the aid of enemy survivors of submarine attacks, he argued the point that this was the same policy used by U.S. forces in the Pacific under Admiral Nimitz. 22 I.M.T. 559 (1949).

      iii. Influence of Realpolitik impacts prosecutions.

         A. Yamashita. Appearance of expedited trial with sentence (death) announced on Dec. 7, 1945. Justice Rutledge stated in his dissent that the trial was "the uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander." 327 U.S. 1, 41 (1946).

         B. War crimes prosecutions not pursued post-conflict. In the Korean Conflict, 23 cases were ready for trial against POWs in U.S. custody, yet they were released under terms of the armistice. Prosecution was not mentioned in the First Gulf War Ceasefire agreement.

   b. Legality.

      i. Ongoing issues with respect to *nullum crimen sine lege* and *ex post facto* laws, and balancing gravity of offenses with no statute of limitations against reliability of evidence/witness testimony.

      ii. Lack of a coherent system to define and enforce this criminal system presupposes a moral order superior to the States involved. This legally positivistic system requires a shared ethic that may or may not exist and is certainly disputed.

iii. Status of individuals under international law is relatively new, although arguably has now crystallized into a customary international law principle. Historically, States were held responsible as such; however, beginning with the Treaty of Versailles, and certainly after World War II, individuals were held responsible as actors for the State.

B. Customary International Law War Crimes.

1. General. There are many rules, both conventional and customary, imposing requirements and prohibitions on combatants in war. For example, HR, art. 23(d) prohibits declarations that no quarter shall be given. However, art. 23(d) provides no consequences for a violation of the provision. As a matter of custom, the violation has been termed a "war crime." (compare this with the Geneva Convention scheme, discussed below).

2. Definitions.

a. FM 27-10, para. 504, includes the following categories of customary war crimes: Making use of poisoned or otherwise forbidden arms or ammunition; Treacherous request for quarter; Maltreatment of dead bodies; Firing on localities which are undefended and without military significance; Abuse of or firing on the flag of truce; Misuse of the Red Cross emblem; Use of civilian clothing by troops to conceal their military character during battle; Improper use of privileged buildings for military purposes; Poisoning of wells or streams; Pillage or purposeless destruction; Compelling prisoners of war or civilians to perform prohibited labor; Killing without trial spies or other persons who have committed hostile acts; Violation of surrender terms.

b. The Rome Statute of the International Criminal Court, contains a similar, though more expansive list, under the heading of "other serious violations of laws and customs applicable in international armed conflict." (Rome Statute, art. 8.2.(b))

3. It is not clear the extent to which universal jurisdiction applies to customary war crimes. Those prosecutions which have occurred based solely on the customary right to try war criminals have involved States which were the victims of the crimes; there have been few, if any, cases where an unconnected third State attempts a prosecution. The effect of the lack of clarity has diminished, however, with the advent of special tribunals and the International Criminal Court, both discussed below, which specifically grant jurisdiction to themselves for these types of crimes.

C. The Geneva Categories. The 1949 Geneva Conventions were written to protect the various non-combatant victims of international armed conflict, namely the wounded and sick, shipwrecked, prisoners of war, and civilians, with a Convention devoted to each. Each Convention set forth various positive and negative duties toward those persons protected by its provisions; for example, GC I, art. 12, states that the wounded and sick shall be treated humanely, and that they shall be respected (i.e., not targeted). Failure of either of these types of duties is a breach of the Convention, and potentially a war crime, though there is a significant qualitative difference between, for example, murdering a POW (GC III, art. 13) and failing to post a copy of the Convention in the POW's language (GC III, art. 41). To provide greater guidance, the Conventions characterize certain breaches as "grave," and mandate particular State action.

1. Grave Breaches.

a. Each Convention has an article enumerating the applicable grave breaches. The articles are similar, though not exactly the same, and appear at different places in each Convention, so they cannot be considered "common" in the same sense as Common Article 2 or 3.

i. GC I: Article 50.

ii. GC II: Article 51.

iii. GC III: Article 130.

iv. GC IV: Article 147.

Common among these is the inclusion of murder, torture, causing great suffering or injuring, and medical experiments. Compelling a protected person to serve in his enemy's armed forces, excessive destruction of property, and deprivation of a fair trial are also included as they are applicable to a particular type of victim.

b. With regard to grave breaches, each State has a duty to prosecute or extradite. (GC I, art. 49; GC II, art. 50; GC III, art. 129; GC IV, art. 146). Specifically, each State must:

i. Enact penal laws criminalizing grave breaches.

ii. Bring persons alleged to have committed grave breaches before its courts, regardless of the person's nationality. This is the basis for "universal jurisdiction" over grave breaches.

iii. Alternatively, hand the person over to another Party willing to prosecute.

c. Additional Protocol I contains additional acts that constitute grave breaches, (AP I, arts. 11(4) and 85). Some of these relate to targeting decisions, while others are restatements, or extensions, of the Geneva Convention grave breaches.

d. Grave breaches are only possible in an international armed conflict as defined by Common Article 2. In the *Tadic* case before the International Criminal Tribunal for the Former Yugoslavia (ICTY), the trial court found the defendant Not Guilty of charged grave breaches of the Geneva Conventions solely because, in its view, the conflict was not international (i.e., not a Common Article 2 conflict). The Appellate Chamber reversed, ruling that the conflict was international.

2. Other, or Simple Breaches.

a. The Conventions do not provide a term for breaches "other" than grave breaches; "simple" breaches is the term often used. In short, anything that is not a grave breach is a simple breach.

b. With regard to simple breaches, the State's duty is to "take measures necessary for the suppression of such acts." (GC I, art. 49; GC II, art. 50; GC III, art. 129; GC IV, art. 146). These measures may include prosecution, but might also be nothing more severe than additional training, depending on the breach. By the terms of the Conventions, there is <u>no</u> universal jurisdiction over simple breaches.

3. <u>Non-International Armed Conflict</u>. Common Article 3 provides 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, however, discusses individual criminal liability for violation of those standards. Nevertheless, other instruments may make explicit reference to the standards of Common Article 3 in defining war crimes under that instrument:

1. The Rome Statute for the International Criminal Court, discussed below, specifically provides for prosecution of violations of Common Article 3. (Rome Statute, article 8(c))

2. 18 U.S.C. § 2441 (War Crimes Act of 1996, as amended) permits prosecutions for violations of Common Article 3 in the U.S. federal court system.

D. Genocide. The Genocide Convention[18] 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." (Genocide Convention, art. 1). Although the Genocide Convention defines the crime, it contemplates trial before "a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction." (Genocide Convention, art. 6).

E. International Criminal Court. The ICC has jurisdiction over the following crimes:

1. Genocide. The definition (Rome Statute, art. 6) is consistent with that of the Genocide Convention.

2. Crimes against Humanity. "For the purpose of this Statute, "crimes against humanity" means … acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack…" (Rome Statute, art. 7). 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; the ICC Statute does not specifically require such a nexus.

   b. However, jurisdiction exits only where the "attacks" are "widespread or systematic." This language suggests that there must be something akin to an armed conflict or at least large-scale governmental abuse.

3. War Crimes. For the purposes of the ICC (Rome Statute, art. 8), war crimes means:

   a. In the case of an International Armed Conflict:

      i. Grave Breaches of the Geneva Conventions.

[18] Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 11, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). The U.S. ratified the Genocide Convention in 1988, and provided for domestic implementation by 18 U.S.C. § 1091.

ii. Serious violations of the Laws and Customs of War applicable in international armed conflict. The statute lists what are considered to be serious violations.

b. In the case of an Non-International Armed Conflict:

i. Violations of Common Article 3.

ii. Other violations of the laws and customs of war "applicable … within the established framework of international law."

A. The Statue provides a list of these crimes, drawn from various treaties.

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

C. Recognizes that the Statute does not apply to situations of mere internal disturbances and tensions that do not rise to the level of a Common Article 3 conflict.

c. Rome Statute, art. 9, contemplated the publication of elements to each of the crimes discussed above, in a manner similar to the way UCMJ offenses are broken down into constituent elements in the Manual for Courts-Martial. The elements were adopted for use in 2002.[19]

4. Crime of Aggression. The Rome Statute of 1998 contained the crime of aggression, but the definition of aggression and the conditions for exercising jurisdiction were left for future negotiations. In 2010, in Kampala, Uganda, the Assembly of States Parties negotiated the final terms for prosecution of the crime of aggression in the ICC. The court may exercise jurisdiction over the crime of aggression once thirty states have ratified the amendment and after a

[19] *See* The International Criminal Court, *Elements of Crimes*, at http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm. *See also* KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2003), for an analysis of each of the crimes and their respective elements.

majority decision by the states party to the statute to takes place after 1 January 2017.[20]

F. Specialized Tribunals.

1. Nuremberg Tribunals. The Charter of the International Military Tribunal defined the following crimes[21] as falling within the Tribunal's jurisdiction:

a. 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.

b. Crimes Against Humanity. A collective category of major inhumane acts committed against any (internal or alien) civilian population before or during the war.

c. Violation of the Laws and Customs of War. The traditional violations of the laws or customs of war; for example, targeting non-combatants.

2. International Criminal Tribunal for the Former Yugoslavia.

a. Crimes against Peace or Crime of Aggression are not among listed offenses to be tried.

b. Violations of the Laws or Customs of War (War Crimes).

i. 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.

ii. The Opinion & Judgment in the *Tadic* case set forth elements of proof required for finding that the Law of War had been violated:

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[20] The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (July 1, 2002), Art. 8*bis*, *available at* http://untreaty. un.org/ cod/icc/statute/english/rome_statute(e).pdf,

[21] *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, *supra* note 15, at 257 (noting that only one accused was found guilty solely of crimes against peace and two guilty solely of crimes against humanity).

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.

i. Charged in the indictments as murder, rape, torture, and persecution on political, racial, and religious grounds, extermination, and deportation.

ii. In the *Tadic* Judgment, the Court cited elements as:

A. A serious inhumane act as listed in the Statute;

B. Act committed in international or internal armed conflict;

C. At the time accused acted there were ongoing widespread or systematic attacks directed against civilian population;

D. Accused knew or had reason to know he/she was participating in widespread or systematic attack on population (actual knowledge);

E. Act was discriminatory in nature; and

F. Act had nexus to the conflict.

iii. Crimes against humanity also act as a gap filler to the crime of Genocide, because a crime against humanity may exist where a political group becomes the target.

d. Grave Breaches. As defined by the Geneva Conventions, may occur only in the context of an international armed conflict.

e. Genocide. Any of the listed acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.

3. 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. 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.

c. Violations of Common Article 3 and AP II. 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.

4. Special Court for Sierra Leone. Categories of crimes include:

a. Crimes Against Humanity.

b. Violations of Common Article 3 and Additional Protocol II.

c. Other Serious Violations of International Humanitarian Law.

d. Certain Crimes under Sierra Leonean Law, to include offenses relating to the abuse of girls under the Prevention of Cruelty to Children Act (1926) and offenses relating to the wanton destruction of property under the Malicious Damage Act (1861).

G. Defenses in a War Crimes Prosecution. Not well-settled based upon the competing interests of criminal law principles and the seriousness of protecting victims from war crimes, crimes against humanity, etc. Defenses available will be specifically established in the court's constituting documents (although an argument from customary international law is always open as a possibility for a zealous defense counsel).

1. Official Capacity or Head of State Immunity. Historically, this was thought a complete defense rooted in sovereign immunity. The Charter for the International Military Tribunal explicitly rejected the defense, stating, "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." (Charter of the I.M.T., art. 7). The Rome Statute for the International Criminal Court contains a similar provision (Rome Statute, art. 27). However, in the absence of a specific treaty or like provision which disposes of the defense, it appears that the defense of official capacity exists in customary international law. The International Court of Justice so held when it directed Belgium to quash an indictment of a sitting foreign minister of the Congo alleged to have committed war crimes, including grave breaches of the Geneva Conventions, even though the conduct was committed prior to the charged person's tenure as foreign minister.[22] Insofar as the Court opined that Belgium could reinstate their warrant after the person had ceased to be foreign minister, the case could be limited to the proposition that, absent a conventional source which provides otherwise, the immunity of officials is absolute, but temporary.

2. Superior Orders. Generally, it is only a possible defense if the defendant was required to obey the order, the defendant did not know it was unlawful, and the order was not manifestly unlawful.

3. Duress. May be available as a defense; however, it may also only be taken into account as a mitigating factor depending on the specific law governing the court. For example, the ICTY and ICTR only allow duress to be considered as a mitigating factor and not as a full defense. In general, duress requires that the act charged was done under an immediate threat of severe and irreparable harm to life or limb, there was no adequate means to avert the act, the act/crime committed was not disproportionate to the evil threatened (crime committed is the lesser of two evils), and the situation must not have been brought on voluntarily by the defendant (i.e., did not join a unit known to commit such crimes routinely).

4. Lack of Mental Responsibility. Not clearly defined in customary international law. Possibly available if the defendant, due to mental disease or defect, did not know the nature and quality of the criminal act or was unable to control his/her conduct.

[22] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 3 (Feb. 14).

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. Customary International Law Treatment of Command Responsibility.

1. 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.[23]

2. A commander is not strictly liable for all offenses committed by subordinates. The commander's personal dereliction must have contributed to or failed to prevent the offense. Japanese Army General Tomoyuki Yamashita was convicted and sentenced to hang for war crimes committed by his soldiers in the Philippines. Although there was no evidence of his direct participation in the crimes, the Military Tribunal determined that the violations were so widespread in terms of time and area, that the General either must have secretly ordered their commission or failed in his duty to discover and control them. Most commentators have concluded that *Yamashita* stands for the proposition that where a commander *knew or should have known* that his subordinates were involved in war crimes, the commander may be liable if he or she did not take reasonable and necessary action to prevent the crimes.[24]

3. Two cases prosecuted in Germany after WWII further helped to define the doctrine of command responsibility.

a. In the High Command case, the prosecution tried to argue a strict liability standard. The court rejected this standard stating: "Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility . . . A high commander cannot keep completely informed of the details of military operations of subordinates . . . He has the right to assume that details entrusted to responsible subordinates will be legally executed . . . There must be a personal dereliction. That can

[23] *See* William H. Parks, *Command Responsibility for War Crimes,* 62 MIL L. REV. 1 (1973).

[24] U.S. v. Tomoyuki Yamashita, Military Commission Appointed by Paragraph 24 , Special Orders 110, Headquarters United States Army Forces Western Pacific, Oct. 1, 1945.

only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations."

b. The court in the Hostage Case found that knowledge might be presumed where reports of criminal activity are generated for the relevant commander and received by that commander's headquarters.

C. AP 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."

D. The International Criminal Tribunals for the Former Yugoslavia and Rwanda.

1. "Individual Criminal Responsibility: The fact that any of the acts referred to in articles 2 to 5 of the present Statute were committed by a subordinate does not relieve his superior of criminal responsibility if he *knew or had reason to know* that the subordinate was about to commit such acts or had done so and the superior failed to take the *necessary and reasonable measures* to prevent such acts or to punish the perpetrators thereof." (ICTY Statute, art. 7(3); ICTR Statute, art. 6(3)(emphasis added))

2. In the ICTR, the doctrine of superior responsibility was used in numerous indictments; for example, those 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).

3. In the ICTY, the doctrine of command responsibility was used in numerous indictments, to include those against Slobodan Milosevic (President of the FRY), Radovan Karadzic (as founding member and President of Serbian Democratic Party) and Gen. Ratko Mladic (Commander of JNA Bosnian Serb Army).

E. The International Criminal Court establishes its definition of the requirements for the responsibility of Commanders and other superiors in Article 28 of the Rome Statute. Note that the responsibility of military commanders and those functioning as such addressed in subparagraph (a) differs from other superiors, i.e., civilian leaders

(subparagraph (b)), in that only military commanders are responsible for information they *should* have known.

1. Art. 28(a) states: "A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

    a. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

    b. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

2. Art. 28(b) states: "With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

    a. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

    b. The crimes concerned activities that were within the effective responsibility and control of the superior; and

    c. The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

F. Prosecution of command responsibility cases in the U.S. Military.

1. It is U.S. Army policy that soldiers be tried in courts-martial rather than international forums. (FM 27-10, para. 507)

2. No separate crime of command responsibility or theory of liability exists, such as conspiracy, for command responsibility in the UCMJ.[25]

3. UCMJ, art. 77, Principals.

   a. For a person to be held liable for the criminal acts of others, the non-participant must share in the perpetrator's purpose of design, and "assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist…." Where a person has a duty to act, such as a security guard, inaction alone may create liability. However, Art. 77 suggests that *actual knowledge*, not a lack of knowledge due to negligence, is required.

   b. At the court-martial of Captain Medina for his alleged participation in the My Lai incident in Vietnam, the military judge instructed the panel that they would have to find that Medina, the company commander, had actual knowledge in order to hold him criminally liable for the massacre. There was not enough evidence to convict Captain Medina under the standard and he was acquitted of the charges.[26] Accordingly, it appears that in courts-martial, a prosecutor must establish actual knowledge on the part of the accused.

V. FORUMS FOR THE PROSECUTION OF WAR CRIMES

A. International v. Domestic Crimes.

1. Built on the concept of national sovereignty, jurisdiction traditionally follows territoriality or nationality.

2. 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.

3. Universal jurisdiction in war crimes only first came into being in the days of chivalry where the warrior class asserted its right to punish knights that had violated the honor of the profession of arms, irrespective of nationality or location. The principle purpose of the law of war eventually became

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[25] For a discussion of this and some proposed changes, *see* Michael L. Smidt, *Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations,* 164 MIL. L. REV. 155 (2000).

[26] *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).

humanitarianism. The international community argued that crimes against "God and man" transcended the notion of sovereignty.

B. Current International Jurisdictional Basis.

1. Grave Breaches of the Geneva Conventions

a. As discussed above, the Geneva Conventions establishes universal jurisdiction over those offenses which it defines as grave breaches. "Each High Contracting Party . . . shall bring [persons alleged to have committed grave breaches], regardless of their nationality, before its own courts." (GC I, art. 49; GC II, art. 50; GC III, art. 129; GC IV, art. 146.)

b. There is no comparable provision granting universal jurisdiction over simple breaches.

2. Violation of the Laws and Customs of War. It is not clear the extent to which customary international law vests universal jurisdiction is States for serious violations of the law of war other than Geneva Conventions grave breaches. Most prosecutions have been sponsored by States intimately affected by the violations (e.g., Nuremburg, Tokyo) or been sanctioned by UN Security Council action. Some States, notably Belgium and Spain, have been active in charging alleged war criminals around the world. Spain has limited itself to cases where there has been a connection with Spain, generally cases where Spanish citizens have been among the victims. Belgium, in a 1993 law, passed a true universal jurisdiction law, which required no connection between the charged conduct and Belgium. Due to international concerns regarding sovereignty and practical difficulties, Belgiumrevised the law in 2003 to limit charges to those alleged offenses with a direct link to Belgium.

3. International Criminal Court.

a. The ICC has personal jurisdiction over:

i. State parties;

ii. Nationals of State parties;

iii. Conduct occurring within the territory of State parties;

iv. Non-party States acceding to jurisdiction

b. Recently, the ICC has been granted personal jurisdiction over nationals of non-signatory States through a UNSCR establishing jurisdiction. *See* UNSCR 1593 (referring charges to the ICC against sitting Sudanese President Omar el-Bashir for war crimes).

4. Ad hoc tribunals under the authority of UN Security Council (ICTY or ICTR) or separate treaty (Sierra Leone). Established via a UNSCR.

C. Domestic Jurisdictional Bases. Each nation provides its own jurisdiction. The following is the current U.S. structure.

1. General Courts-Martial.

a. U.S. service members are subject to court-martial jurisdiction under UCMJ, art 2(a)(1).

b. UCMJ, art. 18, also grants general court-martial jurisdiction over "any person who by the law of war is subject to trial by military tribunal."

c. In 2006, Congress amended UCMJ, art. 2(a)(10), to provide court-martial jurisdiction over civilians accompanying U.S. forces not only during a declared war[27] but also during "contingency operations," which would include OIF, OEF and ISAF

2. War Crimes Act of 1996. (18 U.S.C. § 2441) (amended in 1997 and 2006). 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.. Jurisdiction attaches if the accused commits:

a. A Grave Breach of the 1949 Geneva Conventions.

b. Violations of certain listed articles of the Hague Conventions.

c. Some violations of Common Article 3 of the Geneva Conventions.

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

[27] Previous case law had strictly interpreted the "time of declared war" language. U.S. v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

D. The Military Extraterritorial Jurisdiction Act of 2000 may also serve as a basis for prosecution for war crimes. DoD issued implementing instructions in DoD Instruction 5525.11 on Mar. 3, 2005.

E. Military Commissions.

1. Military commissions, tribunals, or provost courts may try individuals for violations of the law of war. (UCMJ, art. 21). This jurisdiction is concurrent with that of general courts-martial.

2. Historical use can be traced back to Gustavus Adolphus and his use of a board of officers to hear law of war violations and make recommendations on their resolution. The British frequently used military tribunals throughout history, which was incorporated into the U.S. Military from its beginning. The continental army used military commissions to try Major John Andre for spying in conjunction with General Benedict Arnold. Military commissions were used by then General Andrew Jackson after the Battle for New Orleans in 1815, and again during the Seminole War and the Mexican-American War. The American Civil War saw extensive use of military tribunals to deal with people hostile to Union forces in "occupied" territories. Tribunal use continued in subsequent conflicts and culminated in World War II where military commissions prosecuted war crimes both in the United States and extensively overseas. Such use places the legitimacy of military commissions to try persons for war crimes firmly in customary international law.

3. In Hamdan v. Rumsfeld, 548 U.S. 557 (2006), the Supreme Court called into question the President's unilateral power to convene military commissions, a power which had earlier been recognized in Ex parte Quirin, 317 U.S. 1 (1942). Congress responded with Military Commissions Act of 2006.[28] The Act was revised and amended by the Military Commissions Act of 2009.[29] Among its most important provisions:

a. Jurisdiction is established over an alien who is also an "unprivileged enemy belligerent," defined as an individual other than a privileged belligerent (i.e., one who qualifies for POW protection under GC III, art. 4) who:

i. Has engaged in hostilities against the United States or its coalition partners;

[28] Military Commissions Act of 2006, Pub L. No. 109-366, 120 Stat. 2600 (2006), *codified at* 10 U.S.C. §§ 948a *et seq*.

[29] Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190.

ii. Has purposefully and materially supported hostilities against the United States or its coalition partners; or

ii. Was a part of al Qaeda at the time of the alleged offense.[30]

b. Sets forth in detail procedures to be followed in such commissions, which generally follow those of general courts-martial, with the exception of:

i. Speedy trial;

ii. Rules related to compulsory self-incrimination; and

iii. The requirement for pre-trial investigations (i.e., Article 32, UCMJ investigations).[31]

c. Specifically excludes from evidence any statements obtained through torture or other cruel, inhuman, or degrading treatment. Other statements are admissible if probative and voluntary.[32]

d. Defines the specific crimes amenable to trial by military commission.[33] The crimes are generally consistent with "classic" war crimes, though a new offense of "terrorism" is included.[34]

FOR FURTHER READING

A. INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS (1947) (42 volumes).

B. TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950) (15 volumes).

C. INTERNATIONAL JAPANESE WAR CRIMES TRIALS IN THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (209 volumes).

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[30].10 U.S.C. § 948a.

[31] 10 U.S.C. § 948b. Sub-chapters III – VII contain the detailed procedures, from Pre-Trial through Post-Trial matters.

[32] 10 U.S.C. § 948r.

[33] 10 U.S.C. § 950t.

[34] 10 U.S.C. § 950t(24).

D. UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS (1948) (15 volumes).

E. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION (1948).

F. Statute of the International Criminal Tribunal for the Former Yugoslavia. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N.Doc. S/RES/808 (1993); further amended in U.N. Security Council Resolutions 1166 (13 May 1998), 1329 (30 Nov 2000) and 1411 (17 May 2002).

G. Rules of Procedure & Evidence, International Criminal Tribunal for the Former Yugoslavia Since 1991, Seventh Session, the Hague, U.N. Doc. IT/32/Rev. 22 (Dec. 13, 2001).

H. S.C. Res, 955, U.N. SCOR, U.N. DOC. S/RES/955(1994), *reprinted in* 33 I.L.M. 1598, Nov. 8, 1994 [Statute for the International Criminal Tribunal for Rwanda].

I. YORAM DINSTEIN & MALA TABROY, WAR CRIMES IN INTERNATIONAL LAW (1996).

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HUMAN RIGHTS

I. OBJECTIVES

A. Understand the history and development of international human rights law and how it interacts with the law of war.

B. Understand major international human rights treaties, their scope and application, as well as the Unites States' approach to human rights treaty law.

C. Understand those human rights considered customary international law.

D. Understand different regional international human rights systems.

II. INTRODUCTION

A. International human rights law[1] focuses on the **life and dignity of human beings**. In contrast with most international law, international human rights law (IHRL) protects persons as individuals rather than as subjects of sovereign States.

B. To best understand IHRL, it may be useful to think in terms of obligation versus aspiration. International human rights law exists in two forms: **treaty law** and **customary international law (CIL)**.[2] Human rights law established by treaty generally only binds the state in relation to persons within its territory and subject to its jurisdiction, and tends to be more aspirational. Human rights law based on CIL binds all States, in all circumstances, and is thus obligatory. For official U.S. personnel ("State actors" in the language of human rights law) dealing with civilians **outside the territory of the United States**, it is CIL that establishes the human rights considered fundamental, and therefore obligatory. Unfortunately, there is no authoritative source stating which human rights the United States considers to be CIL.

III. HISTORY AND DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW

A. As a field of international law, human rights did not fully develop until the years following World War II. The systematic abuse and near-extermination of entire populations by States gave rise to a truly revolutionary focus on human rights as international law. Prior to modern human rights law, how States treated their own

[1] All references to "human rights law" in this chapter refer to international human rights law, not to domestic human rights law, unless otherwise noted.

[2] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 701 (2003) [hereinafter RESTATEMENT].

citizens was regarded as a **purely domestic matter**. International law regulated State conduct vis-à-vis other States, and chiefly protected individuals as symbols of their parent States (e.g., diplomatic immunity). As sovereigns in the international system, States could expect other States not to interfere in their internal affairs. Human rights law, however, pierced the "veil of sovereignty" by seeking directly to **regulate how States treated their own people within their own borders**.[3]

1. The **Nuremberg War Crimes Trials** are an example of a human rights approach to protection. The trials held former government officials legally responsible for the treatment of individual citizens within the borders of their state. The trials did not rely on domestic law, but rather on novel charges like "crimes against humanity."

2. Human rights occupied a central place in the newly formed United Nations. The **Charter of the United Nations** contains several provisions dealing directly with human rights. One of the earliest General Assembly resolutions, the **Universal Declaration of Human Rights**[4] (UDHR), is undoubtedly the strongest international statement of universal human rights norms. Though aspirational, it continues to shape treaty interpretation and custom.

3. Following the adoption of the **1949 Geneva Conventions**, law of armed conflict development (LOAC) began to slow. Through the so-called Geneva Tradition, the Conventions had introduced an approach to regulating armed conflict that focused on protecting and respecting individuals. By the mid-1950's, however, the LOAC process stalled. The international community largely rejected the 1956 Draft Rules for Limitation of Dangers Incurred by Civilian Populations in Time of War as a fusion of the Geneva and Hague Traditions.[5] In fact, the LOAC would not see a significant development in humanitarian protections until the 1977 Additional Protocols.

4. At the same time, however, human rights law experienced a boom. Two of the most significant human rights treaties, the International Covenant on Civil and Political Rights[6] (ICCPR) and the International Covenant on Economic Social

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[3] *See* Louis Henkin, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, 13–16 (Henkin ed., 1981) ("International human rights law and institutions are designed to induce states to remedy the inadequacies of their national law and institutions so that human rights will be respected and vindicated.").

[4] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948).

[5] Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, *reproduced in* DIETRICH SCHINDLER & JIŘÍ TOMAN, THE LAWS OF ARMED CONFLICT, 339 (2004).

[6] Int'l Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Reprinted in the Documentary Supplement.

and Cultural Rights,[7] were adopted and opened for signature in 1966, and came into force in 1976. Since the 1970s, news media, private activism, public diplomacy, and legal institutions have monitored and reported on human rights conditions worldwide with increasing scrutiny and sophistication. Human rights promotion also remains a core part of both the U.S. National Security Strategy and U.S. public diplomacy.[8] This is a growth area of the law.

B. IHRL and the LOAC. Scholars and States disagree over how the two bodies of law interact. Some argue that they are entirely separate systems, others for a default rule of IHRL at all times (and a correspondingly narrow view of LOAC). Still others argue they should be interpreted in a complementary manner, mutually reinforcing each other. In the late 1960's, the United Nations General Assembly attempted to address application of human rights during armed conflict.[9] Ultimately, however, the resolutions passed produced many ambiguous references, but few useful rules. The most pressing current question is to what extent IHRL should apply outside a nation's borders (extraterritorially) to battlefield situations traditionally governed by LOAC (i.e. as inapplicable, complementary, gap-filling, or even the dominant law).

1. The Traditional / United States View.[10] Traditionally, IHRL and the LOAC have been viewed as separate systems of protection. This classic view applies human rights law and the LOAC to different situations and different relationships respectively.

a. IHRL traditionally regulates the relationship between States and individuals within their territory and under their jurisdiction and may, however, be inapplicable during emergencies. This reflects the original focus of human rights law, which was to protect individuals from the harmful acts of their own governments.

b. LOAC traditionally regulates wartime relations between belligerents and civilians as well as protected individuals, usually not one's own citizens or nationals. LOAC largely predates IHRL and, therefore, was never intended to comprise a sub-category of human rights law. For example,

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[7] Int'l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

[8] *See generally* U.S. GOV'T, NATIONAL SECURITY STRATEGY (May 2010); U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Human Rights homepage, at http://www.state.gov/j/drl/hr/.

[9] G.A. Res. 2675 (1970); G. A. Res. 2444 (1968) "Respect for Human Rights in Armed Conflict"; UN GAOR 29th Sess. Supp. No. 31. Professor Schindler argues that while the UN said "human rights" in these instruments, it meant "humanitarian law." Dietrich Schindler, *Human Rights and Humanitarian Law: The Interrelationship of the Laws*, 31 AM. U. L. REV. 935 (1982) [hereinafter Schindler].

[10] Michael J. Dennis, *Applying Human Rights Law and Humanitarian Law in the Extraterritorial War Against Terrorism: Too Little, Too Much, Or Just Right?: Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking all Around?*, 12 ILSA J. INT'L & COMP. L. 459 (2006).

the 1949 Geneva Conventions largely do not impose obligations on a state towards its own nationals. This view notes that LOAC includes very restrictive triggering mechanisms which limit its application to specific circumstances.[11] As such, LOAC is cited as a *lex specialis* to situations of armed conflict and therefore applies in lieu of, not alongside, IHRL.[12] The argument is becoming increasingly hard to maintain though.[13]

2. Emerging view. An expanding group of scholars and States now views the application of IHRL and the LOAC as complementary and overlapping. In this view, IHRL can regulate a sovereign's conduct even on distant battlefields towards non-citizens, during periods of armed conflict as well as peace. The International Court of Justice recently adopted this view in two different Advisory Opinions,[14] though without clear explanation.

3. Most recent statement. In its Fourth Periodic Report to the UN Human Rights Committee on compliance with the ICCPR, the United States clarified that "a time of war does not suspend the operation of the [ICCPR] to matters within its scope of application."[15] The Report also noted:

"Under the doctrine of *lex specialis*, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are typically found in [LOAC] . . . [IHRL] and [LOAC] are in many respects complementary and mutually reinforcing [and] contain many similar protections. . . Determining the international law rule that applies to a particular action taken by a government

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[11] *See e.g.* GC I, art. 2; *see also*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 226, para. 25 (July 8).

[12] Christopher Greenwood, *Rights at the Frontier - Protecting the Individual in Time of War*, *in* LAW AT THE CENTRE, THE INSTITUTE OF ADVANCED LEGAL STUDIES AT FIFTY (1999); Schindler, *supra* note 9, at 397. *Lex specialis* means that a law governing a specific subject matter (*lex specialis*) is not overridden by a law which only governs related general matters (*lex generalis*).

[13] *See e.g.*, Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law* 90 INT'L. REV. RED CROSS 501, 501 (2008) ("[T]here is today no question that human rights law comes to complement humanitarian law in situations of armed conflict.")

[14] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion**,** 1996 I.C.J. 226. ("The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."). *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, I.C.J. 36. The Advisory Opinion in the *Wall* case explained the operation of this "emerging view" as follows:

> As regards the relationship between international humanitarian law [i.e., LOAC] and human rights law, there are thus three possible situations: some rights may be exclusively matters of [LOAC]; others may be exclusively matters of [IHRL]; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

[15] *See* U.S. Dep't of State, United States Fourth Periodic Report to the United Nations Committee on Human Rights para. 506, 30 Dec 11, at http://www.state.gov/g/drl/rls/179781.htm.

in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized, and raises especially complex issues in the context of non-international armed conflicts . . ."[16] where there is far less developed law.

C. Modern Challenges. As human rights are asserted on a global scale, many governments regard them as "a system of values imposed upon them."[17] States in Asia and the Islamic world question the universality of human rights as a neo-colonialist attitude of northern states.[18] It is perhaps for this reason that neither of these two regions has a separate human rights system, such as the European, Inter-American, or African systems, discussed *infra*.

IV. FUNDAMENTAL HUMAN RIGHTS: THE OBLIGATION

A. If a specific human right falls within the category of CIL, it should be considered a "fundamental" human right. As such, it is binding on U.S. forces during all overseas operations. This is because CIL is considered part of U.S. law,[19] and human rights law operates to regulate the way State actors (in this case the U.S. armed forces) treat all humans.[20] If a "human right" is considered to have risen to the status of CIL, then it is considered binding on U.S. State actors wherever such actors deal with human beings. Unfortunately, for the military practitioner **there is no definitive "source list" of those human rights considered by the United States to fall within this category of fundamental human rights**. As a result, the Judge Advocate (JA) must rely on a variety of sources to answer this question. These sources may include: the UDHR, although the United States has not taken the position that everything in the UDHR is CIL; Common Article 3 of the Geneva Conventions; and the Restatement (Third) of The Foreign Relations Law of the United States (2003). The Restatement claims that a State violates international law when, as a matter of policy, it "practices, encourages, or condones"[21] a violation of human rights considered CIL.[22]

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[16] *Id*. at para. 507

[17] MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 2 (2003) [hereinafter NOWAK].

[18] *See* DARREN J. O'BYRNE, HUMAN RIGHTS: AN INTRODUCTION 52-55 (2003) (discussing Marxist, Confucian, and Islamic attitudes toward concepts of universal human rights); UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 132-35 (2002) (citing ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION (1997); MIKE FEATHERSTONE, UNDOING CULTURE: GLOBALIZATION, POSTMODERNISM AND IDENTITY (1995)).

[19] *See* The Paquete Habana, 175 U.S. 677 (1900); *see also* RESTATEMENT, *supra* note 2 at § 111.

[20] RESTATEMENT, *supra* note 2, at §701.

[21] *Id.*

[22] The Restatement gives the following examples of human rights that fall within the category of CIL: genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, violence to life or limb, hostage taking, punishment without fair trial, prolonged arbitrary detention, failure to care for and collect the wounded and sick, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights. *Id.* at §702.

B. Furthermore, the Restatement makes no qualification as to where the violation might occur, or against whom it may be directed. Therefore, it is the CIL status of certain human rights that renders respect for such human rights a legal obligation on the part of U.S. forces conducting operations outside the United States, and not the fact that they may be reflected in treaties ratified by the United States.

V. HUMAN RIGHTS TREATIES

A. The original focus of human rights law—to protect individuals from the harmful acts of **their own governments**[23]—must be emphasized. Understanding this original focus helps make sense of why human rights treaties, even when signed and ratified, may fall within the category of "aspiration" instead of "obligation." The original focus of human rights law was its "groundbreaking" aspect: that international law could regulate the way a government treated the residents of its own State. Human rights law was not originally intended to protect individuals from the actions of **any** government agent they encountered. This is partly explained by the fact that historically, other international law concepts provided for the protection of individuals from the cruel treatment of foreign nations.[24]

B. Major Human Rights Instruments**.** Until 1988, the United States had not ratified any major international human rights treaties.[25] Since then, the United States has ratified a few international human rights treaties, including the ICCPR; however, there are numerous human rights treaties that the United States has not ratified. The following is a list of the major international human rights treaties including a brief description of each one and whether the United States is a party to the treaty.

1. International Covenant on Civil and Political Rights (ICCPR) (1966).[26] The most preeminent international human rights treaty, the ICCPR was ratified by the United States in 1992. It is administered by UN Human Rights Committee (HRC). Parties must submit reports in accordance with Committee guidelines for review by the HRC. The HRC may question State representatives on the substance of their reports. The HRC may report to the UN Secretary General. The HRC issues General Comments to members but those comments have no binding force in international law. The ICCPR addresses so-called "first generation rights." These include the most fundamental and basic rights and freedoms. **Part III** of the Covenant lists substantive rights.

[23] *See* RESTATEMENT, *supra* note 2, and accompanying text.

[24] *See id.* at Part VII, Introductory Note.

[25] THOMAS BUERGENTHAL ET. AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 350 (2002).

[26] Reprinted in the Documentary Supplement.

a. The ICCPR is **expressly non-extraterritorial**. Article 2, clause 1 limits a Party's obligations under the Covenant to "all individuals within its territory and subject to its jurisdiction . . ." Although some commentators and human rights bodies argue for a disjunctive reading of "and," such that the ICCPR would cover anyone simply under the control of a Party, [27] the United States interprets the extraterritoriality provision narrowly.[28]

b. First Optional Protocol. The First Optional Protocol to the ICCPR empowers private parties to file "communications" with the UN HRC. Communications have evolved as a basis for individual causes of action under the ICCPR. **The United States is not party to the First Protocol.**

c. Second Optional Protocol. The Second Optional Protocol to the ICCPR seeks to abolish death penalty. The United States is also not party to the Second Protocol.

2. International Covenant on Economic, Social, and Cultural Rights (ICESCR) (1966). The ICESCR deals with so-called "second generation human rights."[29] Included in the ICESCR are the right to self-determination (art. 1), the right to work (art. 6), the right to adequate standard of living (art. 11), and the right to an education (art. 13). States party to this treaty must "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [the] available resources, with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant." (art. 2). The ICESCR does not establish a standing committee. Reports go to the Committee on Economic, Social, and Cultural Rights, composed of eighteen elected members. There is no individual complaint procedure. The Committee uses General Comments to Parties to highlight and encourage compliance. As with the ICCPR, these general comments are not binding international law. **The United States has signed, but not ratified, the ICESCR.**

3. Convention on the Prevention and Punishment of the Crime of Genocide[30] (1948). The United States signed the Genocide Convention in 1948, transmitted it to the Senate in 1949, **which ratified it in 1988**. The Genocide Convention was the first international human rights law treaty and also the first one that the United States ratified.

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[27] Human Rights Committee, General Comment No. 31, U.N. Doc. HRI/GEN/1/Rev.6 (2004).

[28] Matthew Waxman, Head of U.S. Delegation, Principal Deputy Director of Policy Planning, Dep't of State, Opening Statement to the U.N. Human Rights Committee (July 17, 2006), http://www.state.gov/g/drl/rls/70392 htm (last visited Feb. 26, 2008) ("[I]t is the longstanding view of the United States that the Covenant by its very terms does not apply outside the territory of a State Party. . . . This has been the U.S. position for more than 55 years").

[29] NOWAK, *supra* note 15, at 80.

[30] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9,1948, 102 Stat. 3045, 78 UNTS 277. Reprinted in the Documentary Supplement.

4. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment (CAT) (1984).[31] The CAT is a United Nations treaty, administered by UN Committee on Torture, which is composed of ten elected experts. The Committee is informed by periodic reporting system and inter-state and individual complaint procedures. Article 20 empowers the Committee to conduct independent investigations, but it must have cooperation of the State Party subject of investigation. The Convention Against Torture (CAT) requires States party to the Convention to take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [their] jurisdiction." (CAT, art. 2(1)). The **United States ratified the CAT in 1994.**

5. Convention on the Elimination of All Forms of Racial Discrimination32 (CEFRD) (1965). The CEFRD prohibits and defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" to "nullify[] or impair[] the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other filed of public life."[33] The parties agree to eliminate racial discrimination and apply rights set out in the Universal Declaration of Human Rights and the two Covenants. The CEFRD is administered by United Nations Committee on the Elimination of Racial Discrimination. The United States signed in 1966, transmitted to the Senate in 1978, and **ratified the CEFRD in 1994**.[34]

C. The United States Treaty Process.

1. Article II, Section 2, clause 2 of the United States Constitution enumerates to the President the power to make treaties. After receiving the advice and consent of two-thirds of the Senate, the President may ratify a treaty. Article VI of the United States Constitution establishes treaties as "the supreme Law of the Land." Consequently, treaties enjoy the same force as statutes. When treaties and statutes conflict, the later in time is law.

2. Reservations, Understandings and Declarations (RUDs). The United States policy toward human rights treaties relies heavily on RUDs. RUDs have been essential to mustering political support for ratification of human rights treaties in the United States Senate.

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[31] Reprinted in the Documentary Supplement.

[32] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969).

[33] Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

[34] The southern congressional delegation's concern over the international community's view of Jim Crow laws in the South delayed U.S. ratification of this treaty, which was implemented by the Genocide Convention Implementation Act of 1987. *See* Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-93.

a. **Reservations** modify treaty obligations with respect to relevant provisions between parties that accept the reservation. Reservations do not modify provisions for other parties. If a State refuses a reservation but does not oppose entry into force between the reserving State and itself, the proposed reservation does not operate between the two States.[35] An example of a reservation would be the United States' reservation to the ICCPR whereby it "reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."[36]

b. **Understandings** are statements intended to clarify or explain matters incidental to the operation of the treaty. For instance, a State might elaborate on or define a term applicable to the treaty. Understandings frequently clarify the scope of application. An example of an understanding would be the United States' understanding to the ICCPR whereby it stated "[t]hat the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments."[37]

c. **Declarations** give notice of certain matters of policy or principle. For instance, a State might declare that it regards a treaty to be non-self-executing under its domestic law.[38]

d. United States practice**.** When the Senate includes a reservation or understanding in its advice and consent, the President may only ratify the treaty to the extent of the ratification or understanding.

D. Application of Human Rights Treaties. Understanding how the U.S. applies human rights treaties requires an appreciation of two concepts: non-extraterritoriality and non-self execution.

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[35] Vienna Convention on the Law of Treaties, .N. Doc. A/CONF.39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969), *and in* 8 I.L.M. 679 (1969). Reprinted in the Documentary Supplement.

[36] International Covenant on Civil and Political Rights, Text of Resolution of Advice and Consent to Ratification as Reported by the Committee on Foreign Relations and Approved by the Senate (Apr. 2, 1992). The RUDs mentioned in the text are reprinted in the Documentary Supplement following the ICCPR.

[37] *Id.*

[38] *See e.g.*, *id.* ("[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.").

1. **Non-extraterritoriality.** In keeping with the original focus of human rights law, the United States interprets human rights treaties to apply to persons living in the territory of the United States, and not to any person with whom agents of our government deal outside of our borders.[39] This theory of treaty interpretation is referred to as "non-extraterritoriality."[40] The result of this theory is that these international agreements do not create treaty-based obligations on U.S. forces when dealing with civilians in another country during the course of a contingency operation. This distinction between the scope of application of fundamental human rights, which have attained CIL status, versus the scope of application of non-core treaty based human rights, is a critical aspect of human rights law JAs must grasp.

2. **Non-self execution.** While the non-extraterritorial interpretation of human rights treaties is the primary basis for the conclusion that these treaties do not bind U.S. forces outside the territory of the U.S., JAs must also be familiar with the concept of **treaty execution**. Although treaties entered into by the United States become part of the "supreme law of the land,"[41] some are not enforceable in U.S. courts absent subsequent legislation or executive order to "execute" the obligations created by such treaties.

   a. This "self-execution" doctrine relates primarily to the ability of a litigant to secure enforcement for a treaty provision in U.S. courts.[42] However, the impact on whether a JA should conclude that a treaty creates a binding obligation on U.S. forces is potentially profound. First, there is an argument that if a treaty is considered non-self-executing, it should not be

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[39] While the actual language used in the scope provisions of such treaties usually makes such treaties applicable to "all individuals subject to [a state's] jurisdiction" the United States interprets such scope provisions as referring to the United States and its territories and possessions, and not any area under the functional control of United States armed forces. This is consistent with the general interpretation that such treaties do not apply outside the territory of the United States. *See* RESTATEMENT, *supra* note 2, at §322(2) and Reporters' Note 3; *see also* CLAIBORNE PELL REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. COC. NO. 102-23 (Cost Estimate) (This Congressional Budget Office Report indicated that the Covenant was designed to guarantee rights and protections to people living within the territory of the nations that ratified it).

[40] *See* Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78-82 (1995); *see also* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995, at 49 (1995) (citing human rights groups that mounted a defense for an Army captain that misinterpreted the ICCPR to create an affirmative obligation to correct human rights violations within a Haitian Prison). *See also* LAWYERS' COMMITTEE FOR HUMAN RIGHTS, PROTECT OR OBEY: THE UNITED STATES ARMY VERSUS CPT LAWRENCE ROCKWOOD 5 (1995) (reprinting an amicus brief submitted in opposition to a prosecution pretrial motion).

[41] U.S. CONST. art VI. According to the Restatement, "international agreements are law of the United States and supreme over the law of the several states." RESTATEMENT, s*upra* note 2, at §111. The Restatement Commentary states the point even more emphatically: "[T]reaties made under the authority of the United States, like the Constitution itself and the laws of the United States, are expressly declared to be 'supreme Law of the Land' by Article VI of the Constitution." *Id.* at cmt. d.

[42] *See* RESTATEMENT, *supra* note 2, at cmt h.

regarded as creating such an obligation.[43] More significantly, once a treaty is executed, it is the subsequent executing legislation or executive order, and not the treaty provisions, that is given effect by U.S. courts, and therefore defines the scope of U.S. obligations under our law.[44] U.S. courts have generally held human rights treaties to be non-self-executing and therefore not bases for causes of action in domestic courts.[45]

b. The U.S. position regarding the human rights treaties discussed above is that "the intention of the United States determines whether an agreement is to be self-executing or should await implementing legislation."[46] Thus, the U.S. position is that its unilateral statement of intent, made through the vehicle of a declaration during the ratification process, is determinative of the intent of the parties. Accordingly, if the United States adds such a declaration to a treaty, the declaration determines the interpretation the United States will apply to determining the nature of the obligation.[47]

3. **Derogations.** Each of the major human rights treaties to which the United States is a party includes a derogations clause. Derogation refers to the legal right to suspend certain human rights treaty provisions in time of **war or in cases of national emergencies**. Certain fundamental (customary law) rights, however, may not be derogated from:

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[43] There are several difficulties with this argument. First, it assumes that a U.S. court has declared the treaty non-self-executing, because absent such a ruling, the non-self-executing conclusion is questionable: "[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts." RESTATEMENT, *supra* note 2, at §111, Reporters Note 5. Second, it translates a doctrine of judicial enforcement into a mechanism whereby U.S. state actors conclude that a valid treaty should not be considered to impose international obligations upon those state actors, a transformation that seems to contradict the general view that failure to enact executing legislation when such legislation is needed constitutes a breach of the relevant treaty obligation. "[A] finding that a treaty is not self-executing (when a court determines there is not executing legislation) is a finding that the United States has been and continues to be in default, and should be avoided." *Id.*

[44] "[I]t is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States." *Id.* Perhaps the best recent example of the primacy of implementing legislation over treaty text in terms of its impact on how U.S. state actors interpret our obligations under a treaty was the conclusion by the Supreme Court of the United States that the determination of refugee status for individuals fleeing Haiti was dictated not pursuant to the Refugee Protocol standing alone, but by the implementing legislation for that treaty – the Refugee Act. United States v. Haitian Centers Council, Inc., 113 S. Ct. 2549 (1993).

[45] In Sei Fujii v. California, 38 Cal. 2d, 718, 242 P. 2d 617 (1952), the California Supreme Court heard a claim that UN Charter Articles 55 and 56 invalidated the California Alien Land Law. The land law had varied land owner rights according to alien status. The court struck down the law on equal protection grounds but overruled the lower court's recognition of causes of action under the UN Charter. The court stated, "The provisions in the [C]harter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification." 242 P. 2d at 621-22. Federal and state courts have largely followed *Sei Fujii's* lead.

[46] *See* RESTATEMENT, *supra* note 2, at § 131.

[47] *See* RESTATEMENT, *supra* note 2, at § 111, cmt.

a. Right to life;

b. Prohibition on torture;

c. Prohibition on slavery;

d. Prohibition on *ex post* punishment;

e. **Nor** may States adopt measures inconsistent with their obligations under international law.

4. With very few exceptions (e.g., GC IV, Article 5), the LOAC does not permit derogation. Its provisions already contemplate a balance between military necessity and humanity.

VI. INTERNATIONAL HUMAN RIGHTS SYSTEMS

A. General. International human rights are developed and implemented through a layered structure of complimentary and coextensive systems. "The principle of universality does not in any way rule out regional or national differences and peculiarities."[48] As the United States participates in combined operations, JAs will find that allies may have very different conceptions of and obligations under human rights law. In addition to the global UN system, regional human rights systems, such as the European, Inter-American, and African systems, have developed in complexity and scope. Judge Advocates will benefit from an appreciation of the basic features of these systems as they relate to allies' willingness to participate in and desire to shape operations.[49] Moreover, in an occupation setting, JAs must understand the human rights obligations, both international and domestic, that may bind the host nation as well as how that host nation interprets those obligations.

B. The United Nations System. An understanding of international human rights obligations begins with the primary human rights system, the UN system, the foundation of which is the Universal Declaration of Human Rights.

1. The Universal Declaration of Human Rights (UDHR). The UDHR was a UN General Assembly Resolution passed on December 10, 1946. The UDHR is not a treaty but many of its provisions reflect CIL. The UDHR was adopted as "a common standard of achievement for all peoples and nations."

[48] NOWAK, *supra* note 15, at 2.

[49] Sei Fujii v. California, 38 Cal.2d 718, 242 P.2d 617 (1952).

2. The Human Rights Committee (HRC). The HRC was established by the ICCPR as a committee of independent human rights experts who oversee treaty implementation. In this role, the HRC reviews the periodic reports submitted by states party to the ICCPR. The HRC may also hear "communications" from individuals in states party to the (First) Optional Protocol to the ICCPR. The **United States, however, is not a party to the First Protocol to the ICCPR.**

3. The Human Rights Council. The Human Rights Council is an inter-governmental body within the UN system made up of forty-seven States responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the UN General Assembly in March of 2006 with the main purpose of addressing situations of human rights violations and making recommendations on them. The Council replaced the UN Commission on Human Rights, another General Assembly-created body designed to monitor and strengthen international human rights practices.[50]

C. The European Human Rights System**.** The European Human Rights System was the first regional human rights system and is widely regarded to be the most robust. The European System is based on the 1950 European Convention of Human Rights (ECHR), a seminal document that created one of the most powerful human rights bodies in the world, the European Court of Human Rights. Presently, all 47 Council of Europe members are party to the ECHR. In recent years, this European Court has taken an expansive interpretation of the ECHR's obligations, even limiting actions normally permitted by LOAC such as battlefield detention. Though the United States is not party to the ECHR, JAs working with European allies should become familiar with the treaty's basic terms[51] and recent case law that may impact allied operations.

D. The Inter-American Human Rights System**.** The Inter-American System is based on the Organization of the American States (OAS) Charter and the American Convention on Human Rights. The OAS Charter created the Inter-American Commission on Human Rights. The **American Convention on Human Rights**, of which the **United States is not a party**, created the Inter-American Court of Human Rights. Because the United States is not a party to the American Convention, it is not subject to that court's jurisdiction. However, the United States does respond to the comments and criticisms of the Inter-American Commission on Human Rights.[52]

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[50] G.A. Res. 60/251, U.N. Doc A/Res/60/251 (Apr. 3, 2006).

[51] The Council of Europe's Treaty Office is the depositary for the ECHR, and maintains a website at http://conventions.coe.int/. The ECHR's text and copies of the court's decisions can be accessed at http://www.echr.coe.int/ECHR/Homepage_EN. .

[52] *See e.g.*, U.S. Additional Response to the Request for Precautionary Measures: Detention of Enemy Combatants at Guantanamo Bay, Cuba, (July 15, 2002), *available at* http://www.state.gov/s/l/38642 htm.

E. The African Human Rights System**.** The African System falls under the African Union, which was established in 2001. It is, therefore, the most recent and least formed human rights system. The African system is based primarily on the African Charter on Human and Peoples' Rights which entered into force in 1986. The Charter created the African Commission on Human and People's Rights. A later protocol created an African Court of Human and People's Rights, designed to complement the work of the Commission. The Court came into being as a treaty body in 2004, however, it is still in the development stage.

COMPARATIVE LAW

I. OBJECTIVES

A. Realize the importance of comparative law to an international/operational attorney.

B. Understand the difference between International Law, Foreign Law, and Comparative Law.

C. Recognize a general approach for researching comparative law.

D. Gain familiarity with the differences and similarities between the predominant legal traditions, as well as their geographical distribution.

E. Understand the distinction between legal *traditions* and legal *systems*.

II. DEFINING COMPARATIVE LAW

A. What is "law?"

1. From Black's Law Dictionary:

   a. "Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force."

   b. "That which is laid down, ordained, or established."

   c. "The 'law' of a state is to be found in its statutory and constitutional enactments, as interpreted by its courts, and, in absence of statute law, in rulings of its courts."

   d. "With reference to its origin, 'law' is derived from judicial precedents, from legislation, or from custom."

2. Law may mean or embrace:

   a. A body of principles, standards, and rules promulgated by government.

   b. Rules of civil conduct commanding what is right and prohibiting what is wrong.

c. General rules of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human, and among human authorities is that which is paramount in a political society.

d. Statutes or enactments of a legislative body.

e. Judicial decisions, judgments or decrees.

f. Long-established local custom which has the force of law.

g. Administrative agency rules and regulations.

B. What is the purpose of law? This value-laden question is the subject of significant philosophical disagreement.

1. One answer is that the purpose of law is to provide a government of:

a. Security: To protect against anarchy.

b. Predictability: To allow planning of affairs with confidence in legal consequences.

c. Reason: To provide guarantees against official arbitrariness.

2. Some comparative law scholars refer to four "law jobs":

a. Social control.

b. Conflict resolution.

c. Adaptation and social change.

d. Norm enforcement.

C. International law governs relations between two or more States, and is comprised of those sources of law noted in Chapter 1 *supra*, including treaty, custom, general principles of law as recognized by civilized nations, in addition to judicial decisions and the teachings of eminent "publicists" .

D. Foreign law is the domestic law of a foreign State.

E. Comparative law is the study of the similarities and differences between the legal approach of two or more legal traditions (e.g., comparison between the common law and the civil law approaches to criminal procedure), or between the laws of two or more legal systems (e.g., comparison of U.S. criminal code and the German criminal code). Comparative law can be at the theoretical or applied level.

F. Legal Tradition is a much broader concept than a "legal system," and may be thought of as a "legal family." A legal tradition is a deeply rooted, historically conditioned cultural attitude about the nature of law, the role of law in society, and the proper organization of a legal system.

1. Generally, there are seven or eight major legal traditions/families (Common Law, Civil Law, Tribal/customary, Talmudic, Hindu, Islamic, Asian, Socialist). Some scholars would remove the Socialist tradition from the grouping, and others would add groups such as the Scandinavian Tradition.

2. Common Law tradition prevails in England, the U.S., Canada, Australia, South Africa, and New Zealand. Other common law jurisdictions include Nigeria, Pakistan, Zimbabwe, and India.

3. Civil Law traditions prevail in Europe and Latin America, though civil law has also heavily influenced legal systems throughout the Middle East, Africa, and Asia. The civil law tradition is the most widespread legal tradition and the primary influence of the majority of the world's legal systems.

4. Elements of the or Islamic legal tradition can be found throughout the Middle East, Northern Africa, Southeast Asia, and portions of the Pacific.

5. Many countries are classified as "mixed jurisdictions" because they have legal systems that exhibit characteristics of multiple legal traditions.

6. Even within a legal tradition, there may be much variance between legal systems (e.g., prevalence of jury trials in U.S. versus U.K.).

G. Legal System is an operating set of legal institutions, procedures, and rules. Thus, there are as many legal systems as there are sovereign States in the world.

H. Theoretical Level of comparative law: how and why certain legal systems are different or alike (e.g., why does the U.S. Constitution focus on freedom of speech, whereas the premier right in the German "Basic Law" is the inviolability of dignity?).

I. Applied Level of comparative law: how a specific problem can best be solved under the given social and economic circumstances; much richer variety of ideas "than

could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system."[1]

1. How positive law should be altered.

2. How a perceived gap should be filled.

3. What rules should be adopted in an international uniform law.

III. HISTORICAL BACKGROUND AND RELEVANCE OF COMPARATIVE LAW

A. Historical Background of Comparative Law.

1. 18th and 19th Centuries. Rise of sovereignty and the influence of legal positivism; beginning of learned societies for cross-national legal studies and/or comparative law in France, Germany, and England.

2. 1900 – World Exhibition in Paris. Two French Scholars (Edouard Lambert and Raymond Saleilles) organized the 1st International Congress for Comparative Law, with goal of "A Common Law for All Mankind."

3. 20th Century. Focus on Common Law vs. Civil Law. Comparative Law viewed as a tool for Private International Law (international business and commerce).

4. 21st Century. Focus shifted to other Legal Traditions. Comparative Law applied to Public International Law, and viewed as useful in cross cultural understanding and diplomacy.

B. Relevance of Comparative Law. The modern view is that Comparative Law is useful in cross-cultural understanding and diplomacy (e.g., as an aid to negotiating more meaningful international agreements).

1. For the military international/operational law judge advocate, a comparative law study is a key component of pre-deployment preparation. Not only should the judge advocate have a basic understanding of a host nation's legal tradition and system to properly advise a commander on planned operations, but in the event that "Rule of Law" and counterinsurgency operations are planned, then a comparative law study is critical.

[1] Conrad Zweigert and Hein Koetz, Introduction to Comparative Law 15 (3rd ed., 1998).

a. "Rule of Law pertains to the fair, competent, and efficient application and fair and effective enforcement of the civil and criminal laws of a society through impartial legal institutions and competent police and corrections systems. This functional area includes judge advocates trained in international law as well as CA specialists in related subjects." FM 3-05.40, para. 2-8.

b. "When insurgents are seen as criminals, they lose public support. Using a legal system established in line with local culture and practices to deal with such criminals enhances the Host Nation government's legitimacy. Soldiers and Marines help establish Host Nation institutions that sustain that legal regime, including police forces, court systems, and penal facilities." FM 3-24, MCWP 3-33.5, Counterinsurgency, para. 1-131.

c. "To enhance host-nation legitimacy, justice reform should build upon the existing legal framework. This may include common law, civil law, criminal codes and traditional or religious law, as well as international law. SSR planners do not impose their concepts of law, justice, and security on the host nation. The host nation's systems and values are central to its development of justice system reform." FM 3-07, Stability Operations, para. 6-91

d. Some judge advocate activities in furtherance of Rule of Law operations will include:

   i. Determine capabilities of the host nation legal system.

   ii. Review the host nation laws and legal traditions.

   iii. Advise and assist the host nation development of law consistent with international standards.

   iv. Evaluate the host nation judicial infrastructure.

   v. Mentor the host nation judges, magistrates, prosecutors, defense counsel, legal advisors and court administrators.

e. From a moral perspective, it is problematic for a State to impose a legal system that does not reflect its society's values. From a practical perspective, the failure of a legal system to become internalized can devastate the official legal infrastructure either because of constant resistance or by requiring the State to rely on its coercive power to resolve more legal disputes than it has the capacity to handle.

f. Formalist v. Substantive conceptions of the "Rule of Law."

i. Formalist: Focused on the ***procedures*** for making and enforcing law and the ***structure*** of the nation's legal system.

ii. Substantive: Focused on the content of the law and protecting certain rights.

iii. The distinction between "formalist" and "substantive" is a matter of emphasis and priority. Formalist goals are less likely to result in controversy and less likely to threaten the cultural identity.

2. Comparative Law is also important at the international level; for example at the International Court of Justice, which is the judicial organ of the United Nations.

a. Article 38 of the Statute of the ICJ provides a hierarchy of law which the Court should apply to resolve disputes. The Court shall apply: (a) international conventions establishing rules expressly recognized by the contesting states [i.e., treaties]; (b) international custom, as evidence of a general practice accepted as law [i.e., customary international law]; (c) **the general principles of law, recognized by civilized nations [i.e., as determined through comparative law studies]**; (d) judicial decisions and teachings of most highly qualified publicists of various nations, as subsidiary means for determination of rules of law.

b. Article 38 of the Statute of the ICJ is a useful starting point for understanding the relative hierarchy within international law, as well as recognizing the role that comparative law plays in determining what exactly are "the general principles of law, recognized by civilized nations."

IV. COMPARATIVE METHODOLOGY

A. Comparative Law framework:

1. Is it a "social science" or a separate body of knowledge?

a. Scholars appear to be arguing over whether the data obtained should be regarded simply as part of the method, or whether they should be regarded as a separate body of knowledge.

b. Really the term "comparative law" can be used to include both the method and the data resulting from its application.

2. Macro-comparison v. micro-comparison. Two different species of comparative study. There is no one single method applicable.

   a. Macro-comparison refers to the study of two or more ENTIRE legal systems.

   b. Micro-comparison refers to the study of topics or aspects of two or more legal systems.

3. The academic aims of Comparative Law include:

   a. Aiding and informing the legislative process and law reform.

   b. Understanding the application of foreign law in the courts.

   c. Contributing to the unification and harmonization of laws.

B. Comparative Law Methodology and Research Strategy.

1. Identify the problem and state it precisely. The framing of the particular issue is crucial. What is the problem or issue? What is the goal or objective? What should be compared?

2. Identify the relevant jurisdictions/legal systems (which may be based on the availability of research materials).

3. Identify the foreign jurisdiction's parent legal family using sources, mode of legal thought, and ideology. Note if it happens to be a "hybrid" system or a system predominantly based on a religious faith.

4. Find, gather, and organize primary and secondary sources of law and other materials.

   a. Should give equal attention to historical influence and socio-economic factors.

   b. Think about hierarchy of sources. Can use law codes, case law, law reports, law and socio-legal journals, and legal periodicals. Also think about using introductory works, and then go to their bibliographies.

   c. Mandatory Authority: treaties, UN Security Council Resolutions, constitutions, statutes, regulations, etc.

d. Persuasive Authority ("Soft Law"): UN General Assembly Resolutions, UN Committee comments/recommendations, Agency Guidelines/Manuals, etc.

e. Helpful Secondary Resources: Encyclopedias, Research Guides, Yearbooks, etc., which are comparative law texts on specific topics (e.g., comparative criminal law). [Note: A comparative law researcher may want to start with these first to learn the primary sources.]

i. Encyclopedias.

A. Encyclopedia of Public International Law.

B. International Encyclopedia of Laws (comparative): http://www.cer-leuven.be/cerleuven/iel/outlines/outlcrim.htm and http://www.cer-leuven.be/cerleuven/iel/published.htm.

ii. Research Guides.

A. Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions of the World http://www.foreignlawguide.com/login.htm.

B. CIA World Factbook: https://www.cia.gov/library/publications/the-world-factbook/

C. Defense Language Institute resources (Note: contains both linguistic and extensive cultural information): http://www.lingnet.org/default.asp

iii. Yearbooks.

A. Yearbook of the United Nations.

B. Digest of U.S. Practice in International Law: http://www.state.gov/s/l/6151.htm.

C. SIPRI Yearbook: Armaments, Disarmament and International Security.

5. Determine similarities and differences. Compare the different approaches, bearing in mind cultural differences and socio-economic factors.

a. Ask how does the rule/institution *really* operate in practice?

b. Are the reasons historical, pragmatic, or cultural? Are they based on religious beliefs, economic practices or certain trade practices, etc?

6. Explain similarities and differences. Includes an analysis of the rationale behind the system's approach to resolving the legal issues being studied. Analyze the legal principles in terms of their intrinsic meaning rather than according to any Western standards.

   a. Historical Background. Consider the cultural rather than the literal meaning of terms/phrases/concepts.

   b. Jurisprudential Basis. What purpose does the rule fulfill? What principle, if any, does it support or apply? What practical effects might it have on the parties involved?

   c. Evolutive (i.e., evolution of legal approaches).

7. Evaluate the results. What are the key cases and legislation? What does the future development of this area of law hold for the jurisdiction?

   a. The comparatist is NOT seeking to be judgmental about legal systems in the sense of whether he or she believes them to be "better" or "worse" than any other given system. Rather, the comparatist is seeking to evaluate the efficacy of a given solution or approach to a legal problem in terms of that particular jurisdiction's cultural, economic, political and legal background.

   b. Given a set of priorities, the task is to assess the effectiveness of a solution in terms of achieving those aims and objectives.

C. Comparative Law Pitfalls and Perils.

1. **Pitfall/Peril #1:** Cultural differences between legal systems.

   a. The same legal ideas and institutions crop up in many different and diverse jurisdictions.

   b. Law can survive without any close connection to any particular people, period, or place (e.g., Roman law survived, despite radical change in circumstances; Civil law tradition subsists in countries as culturally and geographically diverse as Germany and Paraguay).

c. But – every legal system is the product of its history and, very often, its political fortunes.

d. You have to look at the "values and attitudes" which bind the system together and which determine the place of the legal system in the culture of the society as a whole.

i. What kind of training and habits do lawyers and judges have?

ii. What do people think of law?

iii. Do groups or individuals willingly go in to court?

iv. For what purposes do people turn to lawyers?

v. For what purpose do people make use of intermediaries?

vi. Is there respect for law, government, and tradition?

vii. What is the relationship between class structure and the use or non-use of legal institutions?

viii. What informal social controls exist in addition to or in place of formal ones?

ix. Who prefers which kinds of controls and why?

e. Note: The study of Asian law, Islamic law, or Hindu law is probably going to require greater cultural attuning from U.S. military judge advocates than studying French or German law.

2. **Pitfall/Peril #2:** The tendency to impose one's own (native) legal conceptions and expectations on the system(s) being compared.

a. When studying non-Western legal systems and cultures, Westerners must not approach or appraise these systems from their own Western viewpoints or judge them by European or American standards.

i. For example, some Western lawyers concluded in the 1970's that China had no legal system because it had no attorneys in the American or European sense, no independent judiciary, no codes, and no system of legal education. But that is like the Western visitor

who assumed that there was no "proper" music played in China because he did not see Western instruments in the Chinese concert hall he visited.

ii. Had the scholars in the 70's looked for "functional equivalents of legal terms and concepts" and asked by which institutions and which methods are the four "law jobs" being performed, they would have concluded that there is a Chinese legal system, albeit a unique system that didn't fit into Western conceptions of law or legal systems.

3. **Pitfall/Peril #3:** The difficulties of "comparability." The military judge advocate needs to be sensitive to the fact that it is difficult to "compare" legal systems that are at different points in their evolution. Without a baseline of similarities there can be misunderstandings.

4. **Pitfall/Peril #4:** The desire to see a common legal pattern in legal systems.

   a. Do NOT assume that there has been a general or similar pattern of legal development.

   b. Such an assumption may obscure the discovery of the actual development of the legal system being studied.

5. **Pitfall/Peril #5:** Danger of exclusion and ignorance of extra-legal rules.

   a. Do not ignore informal customs and practices which operate outside strict law.

   b. Do not ignore various non-legal phenomena which ultimately influence the state of the law. Obviously this includes revolutions, coup d'états, and wars, but also, radical devaluations of currency, radical changes in government economic and legal policy, widespread unemployment, technological change, nationalistic fervor, and the gaining of independence.

   c. Historical events in education, industry, and commerce.

   d. The signing of international treaties that result in the integration of laws that unite the particular system with others, with the inevitable effects on legislation, case law, and even the everyday practice of law (e.g., European Union law).

6. **Pitfall/Peril #6:** Linguistic and terminological problems.

   a. The **greatest** difficulty and danger of comparative law.

   b. Physicians, chemists, mathematicians, and musicians have a common vocabulary…but legal terminology is fraught with linguistic traps and potential minefields of misunderstanding.

   c. Even in English speaking countries, the same word or phrase may have different meanings. A legal example in the common law system is *stare decisis* ("let the decision stand"). American and English systems each have adopted this doctrine of precedent. But in America it has never acquired the formalistic authority that it has in England. This is due to our differences in judicial and political structure and hierarchy, the great volume of decisions in America, the conflicting precedents in different jurisdictions, etc.

   d. There are even more difficulties in translating "alien" legal concepts, since an authentic translation often demands more than mere linguistic accuracy. For a translation of a legal term to be meaningful, intimate knowledge is required both of the system being translated as well as of the native system.

V. COMMON LAW TRADITION

A. Common Law has its origins only in 1066 with the Battle of Hastings and subsequent Norman Conquest.

B. Common Law characteristics.

   1. Law created and molded by judges: Although legislation is binding, until it has been judicially interpreted, laws are sometimes believed to lack the authority which arises with judicial sanctification. Legislation gains greater respect, and perhaps authority, when judicially interpreted.

   2. Authority to find legislation invalid or interpret legislation.

   3. Lengthy, multiple judicial opinions, many of which are published.

   4. Gradual development/"gap-filling" of the law: judicial view that no system possesses a written law governing all conceivable disputes, therefore judges must fill the gaps by creating new law.

C. Sources of Law.

1. Legislation is paramount, but judicial precedent is fabric of common law.

2. Hierarchy of courts, with lengthy published opinions.

   a. But "holding of case" vs. "mere obiter dicta."

   b. Distinguishing precedent that otherwise seems on point.

3. Judicial Independence (some lifetime tenure).

4. Goals: certainty, but also flexibility.

5. Criminal and Civil Trials, including jury trials (typical in U.S., not in England).

D. Procedure

Countries that adhere to the common law tradition have generally adopted the adversarial model of legal procedure. In contrast to the inquisitorial model, the adversarial model is much more attorney-centered. The role of the judge is passive, while attorneys face off as adversaries. The parties have the sole responsibility of investigating the circumstances of their case and presenting to the fact-finder that information they deem relevant.

VI. CIVIL LAW TRADITION

A. Background: predominant system worldwide.

1. Spread throughout Western Europe via continental universities as an academic system of law.

2. Spread throughout Central and South America, and parts of Asia and Africa, due to colonialism.

   a. The French codification occurred at the beginning of the industrial revolution, and the German codification towards the end. Both occurred during the era of colonialism, and contributed to the imposition of the civil law tradition throughout much of the world. As a result, not only are there a significant number of civil law systems in the world, there are an extremely large number of mixed systems that have components of the civil law tradition.

b. As a percentage of the world population, civil law systems apply to four times more people than common law systems, and twice as many States (88 Civil Law vs. 42 Common Law States).

B. History.

1. Origins in the Law of the Roman Empire with publication of the XII Tables of Rome in 450 B.C..

2. In approximately 534 A.D., Emperor Justinian sought to rescue Roman law from centuries of deterioration by codifying and simplifying what had grown into an enormous and unwieldy body of law filled with conflict. Emperor Justinian ordered the preparation of *Corpus Juris Civilis (CJC)*, which was a compilation of the multitude of treatises and commentaries. Once the *CJC* was compiled, Emperor Justinian sought to abolish all prior law except that included in *CJC*; he forbade study of the earlier works and even went so far as having many earlier treatises burned.

3. Roman Law was carried into all corners of the Roman Empire, but it was an imposed system and did not take root in most of Europe—it fell into disuse with many cultures reverting back to customary systems after the collapse of the Empire. That isn't to say that there were no remnants of Roman law, and crude variants were adopted by some cultures.

4. Canon Law (Middle Ages): Throughout the middle ages the Canon Law system of the Christian Church remained and evolved replacing some aspects of the government that had collapsed. The Church assumed jurisdiction over certain aspects of family, property, and criminal law, and the Church formed its own tribunals. Canon Law, although Christian, had borrowed heavily from Roman Law, and was influenced by the *CJC*, but over the centuries after the fall of the Empire, it evolved its own sets of rules and procedures that would influence development of the civil law tradition upon the re-emergence of Roman Law in the 10th Century.

5. Commercial Law, developed by Merchant Guilds and Trade Associations: As Europe settled politically, renewed travel and commerce helped foster a desire for predictability and efficient methods of dispute resolution. Scholars began to look once again at the *CJC*. A need arose for a body of law to govern business transactions which the ancient Roman laws did not address well. Merchant guilds and trade associations developed their own rules and tribunals. These procedures became widely practiced and accepted and were deemed "customary law."

6. 10th Century Revival of Roman Law: With the continued rise of the nation-state in Europe and the re-emergence and spread of Roman Law throughout Europe's centers of learning, Roman Law once again took root, but added elements from Canon and Commercial Law. Legal Scholars, such as St. Thomas Aquinas in the 13th Century, wrote treatises and commentaries that were widely circulated and studied. As the influence of the reemerging law took effect, with allowance for some local or customary augmentation, the concept of "*Jus Commune*"[2] was born.

C. Competing Modern Traditions:

1. The French Revolutionary Tradition: as a result of the French Revolution and Napoleonic Rule, the French Tradition was codified and established in the French Civil Code of 1804.

   a. The characteristics of this codification were recognition of a "Separation of Powers," "Natural Rights," and "Glorification of the State."

   b. The code rejected feudalism and claimed the areas of property, contract, and family law for the citizen.

   c. The Code was designed to be understandable by the average citizen.

2. The German Scientific Tradition: The German Civil Code of 1896 was based on a *scientific* reconstruction of the legal system.

   a. The underlying thought to the German system was that by studying legal scholars in their historical context, a set of historically verified and essential principles could be discovered. That is, legal scientists can discover inherent principles and relationships just as the physical scientist discovers natural laws from the study of physical data.

   b. The Code was prepared for those trained in the law, and thus was responsive to the needs of lawyers, not the average citizen.

   c. Similar to the French, the German system retained a sharp separation of powers.

   d. The German Civil Law system is distinguished from the French System, due to customary influences on the early German legal scholars who wanted to integrate local custom into the Roman "Jus Commune."

[2] That is, the common law (*commune jus*) of all mankind.

D. Civil Law Jurisdictions in General.

1. Secular in nature (post-1789).

   a. Law no longer considered of divine origin.

   b. Ultimate lawmaking power lay in the State.

   c. Heavily influenced by 19th Century Liberalism.

      i. Individual autonomy.

      ii. Freedom of contract.

      iii. Respect for private property.

2. Supremacy of the State.

   a. Only statutes enacted by the legislature are law.

   b. Books and articles written by scholars have a central place in legal traditions

      i. Trace importance back to Roman *juris consuls*

      ii. Germany used to send difficult legal issues to law school faculties for discussion, debate, and ultimate decision

      iii. Contrast with Common Law States.

         A. Common Law: Know the names and writings of great *jurists* from the past

         B. Civil Law: Know the names and writings of great *legal scholars* of the past

3. Elements of the Law.

   a. <u>Statutes enacted by a legislature</u>. Five Basic Codes typically found in civil law jurisdictions

i. Civil Code.

ii. Commercial Code.

iii. Code of Civil Procedure.

iv. Penal Code.

v. Code of Criminal Procedure.

b. Legislation promulgated by the executive, by authority delegated from the legislature.

c. Custom.

4. Role of the Judge.

a. Apply the law.

b. Traditionally no judicial review of acts of the legislature. However, there is a new trend toward Constitutionalism.

i. Created special constitutional courts. Not part of the judicial system. Couldn't give judges authority to overrule the legislature

ii. France: Constitutional Council

c. Judges viewed as functionaries, civil servants, and "Expert clerks": Presented with a fact pattern; couple it with the appropriate legislative provision.

5. The Role of Lawyers.

a. Judge.

b. Public Prosecutor.

i. Prosecutor in criminal actions.

ii. Represent public interest in judicial proceedings between private individuals.

c. Government lawyer.

d. Advocate.

e. Notary.

i. Drafts legal instruments (wills, corporate charters).

ii. Authenticates instruments.

iii. Public records repository.

f. Law-professor/Scholar. Common law is the law of judges; but civil law is the law of the professors.

6. Interpretation of Statutes.

a. Theoretically: legislature only.

b. French system:

i. Created a new governmental body.

ii. Not a part of the judiciary.

iii. Power to *quash* incorrect interpretations by the courts.

iv. Maintained separation of powers.

A. Delegated authority from legislature.

B. Upholds legislative supremacy.

v. Evolved into a Supreme Court.

A. Supreme Court of Cassation.

B. Quash and "instruct" lower courts. Reviews issues of law only, not issues of fact.

c. Interpretation of Unclear Provisions. "In interpreting the statute, no other meaning can be attributed to it than that made clear by the actual significance of the words according to the connections between them, and by the intention of the legislature."

d. Civil Law interpretation in the absence of specific law: "If a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it is decided according to general principles of the legal order to the state."

7. Legal Classifications.

a. Public law.

b. Private law.

i. Civil Law. Persons, the family, inheritance, property, and obligations.

ii. Commercial Law. In many Civil Law jurisdictions, commercial law has remained its own distinct legal system.

8. Jurisdiction of Civil Law Courts.

a. "Ordinary" courts.

b. Commercial courts.

c. Administrative Courts (e.g., Council of State (France)).

9. Civil Procedure.

a. Trial. Isolated hearings dominated by written communications.

b. Hearing judge vs. Adjudicator.

c. Attorney's fees based on an official schedule.

d. Appeal.

e. Decisions.

10. Criminal Procedure.

a. Countries that adhere to the continental civil law system generally adopt an inquisitorial legal procedure. The inquisitorial model is judge-centered. During the investigation of an alleged crime, a special judge is placed in charge of the investigation, compiles evidence, and reports to the court that will hear the case.

b. Typically three phases:

i. Investigative, which the public prosecutor directs.

ii. Examining.

A. Controlled by the examining judge.

B. Primarily written record, prepared by the examining judge.

C. Not public.

D. Examining judge determines:

1. Crime committed?

2. Accused is perpetrator? If yes, trial.

iii. Trial.

A. Presumption of Innocence.

B. Jury Trial.

1. Range of offenses depends on the code.

2. Size.

3. Unanimity.

VII. TRIBAL OR CUSTOMARY TRADITION

A. The Tribal or Customary legal tradition is a relatively new concept, although it describes the oldest of legal traditions. Interestingly, in spite of a multitude of geographic and cultural variables, it is within the customary tradition that scholars have found the most constants.

1. Indigenous systems. All of the legal traditions have their roots in various customary systems, and were influenced by them.

2. Modern View: still influential on legal systems in many areas of the world, including many of our modern concepts; typically found in family and property law.

3. Systems which are largely customary in nature are still active in almost every part of the world. Representative systems can be found throughout the South Pacific, Asia, Africa, Australia, and even in the United States on Native American Reservations—although it must be conceded that they are not purely customary. In fact, it is very difficult to find a pure customary legal system today.

B. Characteristics:

1. Oral (vs. written) tradition.

2. Legal system is seen as an integral to "way of life" rather than a distinct system.

3. Council of Elders / Advisors, whose function is to interpret and decide issues within the legal system, even if the group has a Chief or King.

4. Tendency to informal dispute resolution, even in criminal cases, and decision is based on the best interests of the community.

5. Family law characterized by mutual consent and informality.

6. Lacking law of obligation (e.g., no contracts or torts), when issues arise, they are dealt with relatively informally by the community or council of elders.

7. Property Law: the basic ideas are to keep large families together since many members were necessary for the many tasks of daily life, and concepts of property look more towards communal use rather than individual ownership. Customary concepts of property are getting a fresh look as models for environmental laws and regulations in more modern traditions and systems.

VIII. TALMUDIC TRADITION

A. Talmudic Law is one of the oldest remaining legal traditions (along with the Hindu Tradition).

1. Written Torah: revelations given to Moses, which were recorded as the first five books (Genesis, Exodus, Leviticus, Numbers, and Deuteronomy) of the Hebrew Bible, approximately 1400 B.C..

   a. There is an all encompassing concept of "Torah" or revelation that contributes to Talmudic Law.

   b. The "Written Torah" generated comment and explanation, and the oral tradition of commentary became an expansion on the Torah called the "Oral Torah."

2. Mishnah: Oral Torah, approximately 70 B.C. through 200 A.D..

   a. Oral tradition which generated a written record compiled over time.

   b. The Mishnah itself generated comment, and this second set of expositions was recorded on two occasions in the Jerusalem and Babylonian Talmuds.

3. Jerusalem Talmud: approximately 400–500 A.D..

4. Babylonian Talmud: approximately 600–700 A.D..

5. There are some additional portions of the Talmud found in the Tosefta and Midrashe Halakhah as well. Consider that at the time of the writing of the two Talmud, almost two millennia of legal commentary had passed.

6. Commentaries and Restatements: During the middle ages, commentaries continued to be promulgated, most notably that of Maimonides (a.k.a. Rabbi Moses Ben Maimon) which is still considered one of the most influential.

   a. Maimonides (12th Century) was a scholar, physician, and philosopher whose works (legal, religious, medical, and scientific) were influential throughout the Jewish and Arab communities as well as on later European culture and traditions as well. For example, Maimonides had a great influence on St. Thomas Aquinas.

   b. Responsa: written advice regarding application of Talmudic Law.

B. Influential on later traditions (e.g., Greek, Roman and Islamic).

C. General sense of obligation to God and to act towards others in accordance with God's will.

IX. HINDU TRADITION

A. One of the oldest remaining legal traditions. Hinduism is also a religion, a way of life, which includes much outside of the law (e.g., how to engage in politics).

1. Four books of Veda (= to see), approximately 2000 B.C..

   a. Revelations essential to Hindu way of life.

   b. Brahmans taught Vedas from memory, using Sutras, which were chains of verbal maxims.

2. Sastras = texts/poetry, including law and religious observance (200 B.C. – 400 A.D.).

3. Commentaries and Digests (700 - 1700 A.D.).

B. Private/religious works of law without judicial or legislative foundation, applicable to all Hindus worldwide (e.g., India, Pakistan, Burma, Singapore, Malaysia, Tanzania, Uganda, and Kenya).

1. Complex, hierarchical structure of appeals.

2. Much Hindu teaching outside law books about how to live a life, e.g., politics (arthasutras/arthasastras) and pleasure (kamasutras/kamasastras).

C. Dharma infuses Hindu law.

1. Dharma = specific, individual sense of obligation to society, to do what is just and what is right (righteousness); it also assigns us a place in life (Varna = caste) and specific obligations in course of living that life.

   a. The word *dharma* (Sanskrit; "धर्म" in the Devanagari script) or *dhamma* (Pali) is used in most or all philosophies and religions of Indian origin, Dharmic faiths, namely Hinduism (Sanatana Dharma), Buddhism, Jainism, and Sikhism. It occurs first in the Vedas, in its oldest form as dharman. It is difficult to provide a single concise definition for

"Dharma"; the word has a complex history and an equivalently complex set of meanings.

2. One's Dharma and caste are dictated by one's past Karma (good or bad, including past lives).

   a. In law, there is no 5th class of untouchables, though popular conceptions of untouchables translate into Sudras.

   b. With the passage of time, caste acquired significance as indicative of social status arising by virtue of birth only.

   c. The current Indian Constitution prohibits discrimination on the basis of caste, which are made up of Brahmans (teachers), Kshatriya (warriors), Vaishyas (traders), and Sudras (servants).

3. Failure to comply with Dharma results in accumulating bad Karma, which must be repaid in future lives (e.g., lower caste).

D. It is important to note that the legal system of India is based on British common law and, accordingly, most legal matters will be addressed within the framework of a common law system. The modern legal system of India is a "mixed" jurisdiction (see below) in which Hindu law forms part of the system of personal laws (i.e., marriage, adoption, inheritance) which is applicable to Hindus in India for that limited set of issues.

X. ISLAMIC TRADITION

A. Background.

1. Roots in pre-Islamic Arab society.

2. Goal was not to establish a new legal order, but to teach people what to do in life.

B. Definitions.

1. Islam: "Submission or surrender to Allah's will."

2. Qadi: Islamic Judge.

3. Sharia: "The path to follow God's Law."

4. Fiqh: The science of understanding and interpreting legal rulings (Islamic jurisprudence).

C. General Principles.

1. No separation of church and State.

2. Most Muslim States have a bifurcated legal system:

a. Civil laws applicable to Muslims and non-Muslims.

b. Sharia applicable to Muslims only.

D. The role of Judges.

1. For serious crimes, there are distinct punishments.

2. For less serious crimes, judges are free to create new options and ideas to address the issue

3. Not bound by precedent and rules inherent in the Common Law system. More freedom/latitude than Civil Law judges.

E. Sharia Law.

1. Holistic approach to guide the individual in most daily matters.

2. Controls all public and private behavior including personal hygiene, diet, sexual conduct, child rearing, prayers, fasting, charity, and other religious matters.

3. Elements of Sharia Law.

a. The Qur'an. Primary source. No appeal.

b. Sunna.

i. Teachings of the Prophet Mohammed not explicitly found in the Qur'an.

ii. *Sunna* is recorded in the hadith.

iii. *Isnad* is the chain of reporters who produced the hadith.

c. Ijma. Consensus of religious scholars (Ulamas) on subjects not found explicitly in the Qur'an or the Sunna.

d. Qiyas. New cases or case law (application by analogy).

e. Other written works.

i. The New Testament.

ii. Legal discourses from Civil and Common Law jurisdictions.

4. Classification of *Hadith.*

a. According to the reference to a particular authority

b. According to the links of Isnad—interrupted or uninterrupted.

c. According to the number of reporters involved in each stage of Isnad.

d. According to the nature of the text and Isnad.

e. Overall Classifications of *Hadith:*

i. Sahih: Sound. One cannot question the rulings of the Qur'an and *sahih hadith*

ii. Hasan: Good. The source is known and its reporters are unambiguous.

iii. Da'if: Weak. Not to the level of hasan, usually because of a discontinuity in the Isnad, or one of the reporters is unreliable.

iv. Maudu': Fabricated. A hadith whose text goes against the established norms of the Prophet's sayings, or its reporter is a liar.

5. Crimes.

a. *Hadd* Crimes. Crimes against God's Law, the most serious of all crimes.

i. Found by an exact reference in The Qur'an.

A. A Specific act.

B. A Specific punishment.

ii. No plea bargaining.

iii. No reduced punishment.

iv. Examples: (* Specific punishment listed in the Qur'an.).

A. *Murder.

B. *Apostasy from Islam. Making war upon Allah and his messengers.

C. *Theft.

D. *Adultery.

E. Defamation. False accusation of Adultery or Fornication.

F. Robbery.

G. Alcohol-drinking.

v. Level of Proof: Confession, or a minimum of two witnesses.

vi. If any doubt; treat as a *Ta'zir* crime.

vii. Mitigation.

b. *Ta'zir* Crimes.

i. Crimes against society.

ii. Ta'zir crimes can be punished if they harm the societal interest.

iii. The assumption is that a greater "evil" will be prevented in the future if you punish the offender now.

iv. Historically not written down or codified; now set by parliament in some countries (Egypt).

v. Absent codification, judges are free to choose punishment they think will help the offender.

vi. Examples of crimes:

A. Bribery.

B. Selling defective products.

C. Treason.

D. Usury.

E. Selling pornography.

vii. Examples of punishments:

A. Counseling.

B. Fines.

C. Public or private censure.

D. Seizure of property.

E. Confinement.

F. Flogging.

c. *Qisas* Crimes.

i. A crime of retaliation.

ii. Victim (or victim's family) has a right to seek retribution or retaliation.

iii. Examples of crimes:

A. Murder (Premeditated and non-premeditated).

B. Premeditated offense against human life, short of murder.

C. Murder by error.

D. Offenses by error against humanity, short of murder.

iv. Punishments. Sought, in most cases, by the victims family

A. *Diya* (Blood money).

B. Public execution

1. Traditionally carried out by the victim's family.

2. Now carried out by the government.

C. Pardon.

6. Criminal Cases.

a. Although all ostensibly are based on the Qur'an, handling of cases can vary between different schools of thought.

b. Sunni Legal Schools:

i. Hanafi.

A. The oldest school of law.

B. Founded in Iraq around 767.

C. The most flexible of the four schools.

D. Heavy emphasis on analogy.

E. Turkey, Afghanistan, India, and China.

ii. Maliki.

A. Founded in Medina around 795.

B. Emphasis on the relevance and authority of traditions of the Prophet and first Muslim community at Medina.

C. Incorporated local customs and traditions into Sharia.

D. North Africa, Upper Egypt, and the Sudan.

iii. Shafi'i.

A. Founded around 810.

B. Apply prophetic traditions; yet apply a rigorous rational criticism to them.

1. Verify every link in the chain of transmission.

2. Closely scrutinize the transmitters/reporters.

C. Lower Egypt, southern India, Indonesia, and Malaysia.

iv. Hanbali.

A. Strictly the Qur'an and verifiable tradition of the Prophet.

B. Rejected both reason and community consensus as the bases for legal rulings.

C. Saudi Arabia (Wahhabis).

F. It is important to note that the legal systems of most countries in the Middle East and North Africa are "mixed" jurisdictions (see below) based principally on continental civil law and, accordingly, most legal matters will be addressed within the framework of a civil law system. In such systems, Islamic law forms part of the system of personal laws (i.e., marriage, adoption, inheritance) which is applicable to Muslims for that limited set of issues.

XI. ASIAN TRADITION

A. Overview.

1. Asia has historically included other legal traditions (customary, Talmudic, Islamic, Hindu), and is now picking and choosing from civil and common law sources.

2. Some authors claim the Asian Tradition to be a misnomer today, due to influence of colonization and modernization.[3]

   a. Common Law (UK colonies): India, Malaysia, Singapore, and Brunei.

   b. Civil Law (French and Dutch colonies): Indochina (Burma, Cambodia, Laos, Malaysia, Vietnam), and Indonesia.

   c. Other Asian States chose to adopt systems based on Civil Law: China, Japan, and Thailand.

   d. U.S. law also had influence on Philippines and Japan, due to pre- and post-World War II occupation.

B. Characteristics

1. Confucianism, Buddhism, Shintoism, and Taoism all have dim views of formal law.

2. Important issues regulated more by Persuasive, Informal Traditions, and Social Harmony (*Li*) than by Obligatory, Formal Laws, and Sanctions (*Fa*).

3. *Fa* focuses on penal and administrative law.

4. *Li* focuses on everything else (including "non-legal" issues). Belief that business relations are best not reduced to writing and should be seen as ongoing, harmonious relationships of mutual advantage. For example, an exemplary person seeks harmony vs. agreement on immediate detail; a small person does the opposite

5. Emphasis on Informal Dispute Resolution.

[3] Margaret Fordham, Comparative Legal Traditions – Introducing the Common Law to Civil Lawyers in Asia (2006); H. Patrick Glenn, Legal Traditions of the World 304, 306 (2000).

6. Legal Maxims:

a. "Win a lawsuit and lose a friend."

b. "The more laws are promulgated, the greater the number of thieves."

c. "Litigation ultimately ends in disaster."

XII. SOCIALIST TRADITION

A. Overview. Very few comparative law texts still refer to the "socialist tradition," which has all but died.[4]

B. Fairly recent tradition that mostly dissolved with disintegration of legal order of the former Soviet Union.

C. Only survives in partial form in communist regimes (Cuba, North Korea, and Vietnam).

D. Public law subsumes traditionally private law fields (e.g., bankruptcy, contracts, property, commercial law, torts).

E. Intense reliance on formal law, enforced by the communist party, e.g., judicial decisions of "independent" judges are subject to party control and revision.

XIII. "MIXED" JURISDICTIONS

A. A "mixed jurisdiction" is a legal system which, to varying degrees, exhibits characteristics of multiple legal traditions.

B. Though it can be argued that all legal systems are "mixed," these systems are classified separately because of the degree and prominence of elements of multiple legal traditions;

C. Examples of mixed jurisdictions in the United States are Louisiana and Puerto Rico, which blend elements of continental civil law and common law. In Europe, Scotland and Malta are examples of mixed jurisdictions. Similarly, countries throughout the Middle East and North Africa -- such as Egypt, Iraq, Libya, and Algeria -- blend elements of continental civil law and Islamic law.

[4] Id.

1. Examples of Mixed Jurisdictions in the U.S. and Europe

   i. In Louisiana, a former French and Spanish colony in the United States, civil law is still regulated by a European-style civil code which adheres to the continental civil law tradition. The Louisiana Civil Code, first enacted as a Digest of Civil Laws in 1808, continues to evidence strong French and Spanish legal influences. Louisiana jurisprudence, likewise, reflects these influences.

   ii. In the United Kingdom, Scotland is an example of a mixed jurisdiction (and an "uncodified" civil law jurisdiction.). In early Scottish history, Scottish lawyers who were educated in Paris, Orléans, Utrecht and Leiden, returned home trained in the terminology, and concepts of Roman law. Civilian rules and principles were thus incorporated into Scots law in order to supply rules and principles which the old customary law could not provide. The civilian heritage is still very evident in the structure of Scots private law, as well as in its terminology and content.

2. Examples of Mixed Jurisdictions in the Middle East and North Africa

   i. Many countries in the Middle East and North Africa maintain legal systems in which the majority of events are regulated by a system that mirrors the French model, reserving only a limited area of private law which is governed by Islamic law.

   ii. In such countries, the penal code and civil code will frequently mirror the procedures and substantive content of Western civil law codes. Matters relating to marriage, adoption, and certain specific family law matters, however, are regulated by a personal status code which is typically heavily influenced by Islamic law.

   iii. The Iraqi Civil Code, as an example, is a modern code which carefully blends continental civil law with certain

provisions taken from Islamic law (and even certain provisions which are taken from legal codes which pre-date Islam.) Overall, however, the Iraqi code reflects the substantive provisions and undergirding legal philosophy of Western civil codes. The same can be said of the Egyptian civil code.

D. Understanding a mixed legal system requires a careful comparativist approach and sensitivity to the nuances and deeply-rooted legal traditions of other cultures.

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.50 caliber machine guns 154
Additional Protocol I 24, 42
Additional Protocol II 26, 42
Additional Protocol III.....63
African Human Rights System 208
Anticipatory Self-Defense 37
Article 5 Tribunal 76
Asian Legal Tradition 239
Assassination 169
Auxiliary personnel 64
Best Convention Ever 91
Biological weapons.....163
Booby traps.....157
CAT 202
Chemical weapons.....159
Chemical Weapons Convention
    Protocol II 155, 157
    Protocol III.....158
    Protocol IV.....159
    Protocol V 159
Chemical Weapons Convention
    Protocol I 154
Chemical Weapons Convention 160
Civil Law Tradition 221
Civilian aircraft crews 74
Civilians
    Defined 91
    Internment.....113
    Protected Persons in occupied territory.....110
    Protections under the Additional
        Protocols.....115
Claymore mines.....156
Code of Conduct.....84
Collateral damage 149
Collective Self-Defense 36
Combatants 138
Command Responsibility 185
Common Article 2 .....24, 43
Common Article 3 .....25, 43
Common Law Tradition 220
Comparative Law
    Defined 209
    Methodology.....214
Contractors 74, 115, 119
    Indirect Participation in military
        operations 119
Convention Against Torture 202
Crime fo Aggression.....180
Crimes against Humanity 179
Crimes Against Peace 181
Cultural Property 146
Customary international law
    Defined 4
    Judicial Decisions and Writings.....5
    Persistent objector.....4
Customary Legal System 229
Defended places.....144
Derogations.....205
Discrimination 148
Distinction 148
Dunant, Henry 41
E.O. 11850.....161, 163
Emblems 63
Espionage 169
European Human Rights System 207
Ex parte Quirin 96
Exploding rounds.....153
Flame-throwers.....158
Fragmentation weapons 154
Frangible ammunition.....153
Geneva Convention IV 102
    Aliens in the territory of a party to the
        conflict 109
    Derogations.....105
    Entire Population 107
    Flowchart 105
    General Provisions 102
    Internees.....113
    Occupied Territories 110
    Organization.....102
    Protected Persons 103
    Protected Persons, Protections for 108
Geneva Tradition 20, 101
Genocide.....179
Genocide Convention 201

Grave breaches 177
Hague Tradition.....19, 100
Herbicides.....163
Hindu Tradition 231
Hollow-point ammunition 153
Hors de combat.....139
Hospital ships 62
Hospital/Safety Zones.....107
Hospitals.....56
Human Rights Committee 207
Human Rights Council 207
Human Rights Law.....195
ICC 173, 179
ICCPR 200
ICESCR.....201
ICTR.....183
ICTY.....181
Incendiaries.....158
Inherently Governmental Function.....120
Inter-American Rights System 207
International Covenant on Civil and Political Rights.....200
International Covenant on Economic, Social, and Cultural Rights 201
International Criminal Court.....173, 179
International Criminal Tribunal for Rwanda 183
International Criminal Tribunal for the Former Yugoslavia 181
International human rights law 28
International Human Rights Law
    Complementarity 198
    Regions, Europe.....207
International law
    Defined 1
    Sources.....3
International Military Tribunals 181
Internees 113
Internment of Civilians.....113
Islamic Tradition 232
Journalists.....74, 141
Jus ad bellum.....7, 10
Jus cogens.....5
Jus in bello.....7, 10
Just War.....11
Kellogg-Briand Pact 15
Landmines 155
Lasers.....159
League of Nations.....15
Legal review of weapons.....152
Levée en masse 74
Lieber Code 98
M-16 ammunition.....154
Matchking ammunition.....154
Medical material.....58
Medical personnel
    Auxiliaries.....54
    Exclusively engaged 52
    Repatriation.....53
Medical units
    Fixed 56, 146
    Mobile.....56, 146
    Self-Defense.....56
Medical vehicles
    Aircraft.....59, 146
    Ambulances 58, 146
MEJA.....191
Mercenaries 76
Merchant marines 74
Military Commissions 191
Military Extraterritorial Jurisdiction Act 191
Military necessity 135
Military objective 137
Militias.....73
Napalm 158
Natural environment.....145
Neutralized Zones.....107
Non-combatants.....139
Nuclear weapons.....163
Nuremberg Tribunals.....181
Objects indispensable to the population 147
Occupation.....121
    Authority of the Occupant 124
    Defined 121
    Judges and Public Officials.....133
    Law and Policy 121
    Penal Law, Death Penalty 127
    Penal Law, Penalties 127
    Penal Law, Pre-Occupation Offenses 128
    Penal Laws.....125

Penal Procedure 128
Pillage 129
Proclamation 122
Property Confiscation 129
Property Control 129
Property Destruction 129
Property Ownership 130
Property Requisition 130
Property Seizure.....129
Protected Persons.....124
Public Finance.....133
Sovereignty 123
Taxes.....133
Termination.....123
Opinio juris.....4, 6
Ottawa Treaty 156
Parachutists.....140
Perfidy 166
Persistent objector.....4
Personnel of Aid Societies.....55
Persons accompanying armed forces.....74
POW
Camp administration.....81
Civilian aircraft crews.....74
Contractors.....74
Defined 72
Disciplinary punishment 85
Escape 87
Journalists 74
Judicial punishment 86
Labor.....84
Levée en masse.....74
Merchant marines 74
Militia 73
Persons accompanying armed forces 74
Photographing.....79
Property.....79
Questioning.....80
Repatriation.....89
Representative.....84
Status.....73, 119
Status in doubt 76
Transfer.....83
Preemptive Use of Force 38
Prisoner of War status.....119
Proportionality (in targeting) 149
Protecting Powers 123
Red Crescent.....63
Red Cross.....63
Red Shield of David 63
Regional Organizations 33
Enforcement Actions 33
Rendulic Rule 136
Reprisals 170
Retained Personnel 53
Riot Control Agents.....161
Ruses 164
Saboteurs 76
Security Measures.....125
Self-Defense 34
Against Non-State actors 39
Individual.....35
Necessity.....35
Proportionality 35
Self-execution of treaties 204
Services of Occupied Population.....132
Shipwrecked
Defined 45
Duty to search for 50
Treatment.....140
Shotguns 154
Simple breaches.....178
SIrUS Project.....154
Sniper rifles 154
Socialist Legal Tradition 240
Special Court for Sierra Leone 183
Spies 76
Spying.....169
Superfluous Injury and Unnecessary
Suffering Project.....154
Surrender 139
Suspension of Fire agreements 50
Talmudic Tradition.....230
Tracers 158
Treachery.....166
Treaties
Declarations 203
Derogations.....205
Reservations.....3, 203

Self-execution 204
Understandings 3, 203
Triage.....48
Tribal Law Tradition 229
Undefended places.....144
United Nations
Chapter VII Actions.....31
Charter 30
Charter, Article 2(4).....29
Charter, Chapter VII 29
Peacekeeping 33
Security Council 32
United Nations Charter.....29
Universal Declaration of Human Rights.....206
Unlawful Combatant.....96
Unprivileged enemy belligerents.....96, 139
Enemy colors.....165
Enemy uniforms 165
Enemy equipment.....166
War Crimes.....179
Customary International Law.....176
Defenses.....183
Defenses, Duress.....184
Defenses, Head of State Immunity 184
Defenses, Lack of mental responsibility 184
Defenses, Superior orders 184
Defined 174
Forums 188
General Court-Martial.....190
Geneva Conventions 177
Prosecuting U.S. military.....187
War Crimes Act.....190
War Powers Resolution 29
Weapons, Legal review 152
White phosphorous rounds 158
Works containing dangerous forces.....147
Wounded and Sick
Abandoning.....49
Civilians.....46
Defined 45
Order of treatment.....47
Relief efforts 52
Searching for.....49
Standard of care 47
Treatment.....45

-- Introduction to Public International Law

-- History of the Law of Armed Conflict

-- Framework of the Law of Armed Conflict

-- Legal Basis for the Use of Force

-- Wounded and Sick in the Field

-- Prisoners of War

-- LOAC Protections for Civilians

-- Occupation and Post-Conflict Governance

-- Means and Methods of Warfare

-- War Crimes and Command Responsibility

-- Human Rights

-- Comparative Law

-- Index