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Judge Advocate General Activities

INTERNATIONAL LAW——THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS

This pamphlet is for the information and guidance of judge advocates and others particularly concerned with international law requirements applicable during armed conflict. It furnishes references and suggests solutions to a variety of legal problems but is not directive in nature. As an Air Force pamphlet, it does not promulgate official US Government policy although it does refer to US, DOD and Air Force policies.

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Chapter 1
THE INTERNATIONAL LAW OF ARMED CONFLICT

1-1. Scope of Publication:

a. **General Scope.** This publication covers the law of armed conflict[1] applicable to air operations. Other matters of relevance to the Air Force, such as obligations toward civilians in occupied areas, air law and law of the sea are also surveyed. Legal-political matters, such as neutrality, are examined as they may affect aerial operations. As the law of armed conflict is often indivisible, whether applicable to land, sea or air operations, some generally applied legal rules and principles are discussed where appropriate. The subject matter of this publication is organized in chapters dealing separately with the legal status of aircraft and air space, the status of combatants, air to air and air to sea operations, aerial bombardment, weapons, uniforms and marking, perfidy, independent missions and enforcement measures. The 1949 Geneva Conventions Relative to The Protection of War Victims are surveyed in separate chapters, as are state responsibility and criminal responsibility.

The international law of armed conflict is constantly developing, as diplomatic conferences meet and as the nations of the world, individually or collectively, through such bodies as the United Nations, take action in specific disputes. This publication concentrates on current law and not possible prospective law.

b. **Reason for Separate Publication:**

(1) **Historical Development.** Much of the law of armed conflict was codified in the 1899 and 1907 Hague Peace Conferences,[2] before air power had become a significant factor in warfare. Nevertheless, those conferences clearly intended that aerial warfare be covered by law, and some provisions of the resulting treaties dealt specifically with aerial operations. Extensive efforts were made in 1923 to adopt a Code of Laws specifically applicable only to air warfare; however, the 1923 Draft Hague Rules of Aerial Warfare were never formally adopted by states. No convention applicable solely to aerial operations has since been prepared, although other conventions have included specific references to aspects of war in the air, such as protection for military medical aircraft in the 1949 Geneva Conventions for the Protection of War Victims. During the 20th century new principles and concepts have arisen to govern all armed conflict including that applicable to air warfare. Nevertheless, the law affecting aerial operations cannot be understood without some concurrent references to the law applicable to land and sea environments.

(2) **General Principles.** The principles of the law of armed conflict are the same in land, sea or air warfare. However, there are differences in particulars when applied.[3] For example, the 1949 Geneva Conventions recognize different applications in land, air, and sea environments. Yet, the Conventions establish and confirm rules and principles applicable to all environments in which armed conflict might occur. In short, there are common principles in the law of armed conflict but differences in application.

1-2. The Law of Armed Conflict: Its Context.

a. **Scope of Chapter.** This chapter discusses sources, explains terms, and evaluates the significance of the law of armed conflict. It addresses questions frequently asked. What is international law? What is the law of armed conflict? Why is there a law of armed conflict? Why is this law important for the US, DOD, and the individual serviceman? What are the basic principles of this law? When is the law applicable?

b. **Terms Explained:**

armed conflict —conflict between states in which at least one party has resorted to

the use of armed force to achieve its aims. It may also embrace conflict between a state and organized, disciplined and uniformed groups within the state such as organized resistance movements.

attacks—acts of violence committed against an adversary whether in defense or offense.

belligerent—a state or other entity engaging in armed conflict, also combatants in some contexts.

civilian—any person other than one of the categories of persons referred to in Article 4 A(1), (2), (3), and (6), GPW.[4] Civilians have general immunity from being the object of attack if not taking a direct part in hostilities.

combatant—a direct participant in an armed conflict, traditionally a member of an armed force as specified in Article 4A(1) (2) and (3), GPW.

convention—a multilateral treaty.

Geneva Conventions of 1949—Four separate Conventions protecting the wounded and sick (GWS), wounded and sick at sea (GWS-SEA), prisoners of war (GPW) and civilians (GC). These are reprinted in AFP 110–20.

Hague Conventions and Regulations—various Conventions and rules adopted by international Diplomatic Conferences at The Hague in 1899 and 1907. These are reprinted in AFP 110–20.

hors de combat—a combatant who, having laid down his arms, no longer has any means of defense or has surrendered. These conditions are fulfilled by an adversary who abstains from any hostile act, is not attempting to escape, and who is unable to express himself or clearly expresses an intention to surrender.

law of war—see law of armed conflict.

law of armed conflict—the international law regulating the conduct of states and combatants engaged in armed hostilities, often termed law of war.

reprisal—an act, otherwise unlawful under the international law regulating armed conflict, utilized for the purpose of coercing an adversary to stop violating the recognized rules of armed conflict. (See chapter 10 for analysis.)

c. **International Law.**[5]

(1) **Definition.** International law, as opposed to municipal law, may seem to be without definition, precision or authority. However, civilized nations have in practice made and observed rules in their relations with one another. It has been termed the law of nations. Among the most descriptive definitions of international law is that by Hackworth.

> International law . . . is a system of jurisprudence which, for the most part, has evolved out of the experiences and the necessities of situations that have arisen from time to time. It has developed with the progress of civilization and with the increasing realization by nations that their relations *inter se,* if not their existence, must be governed by and dependent upon rules of law fairly certain and generally reasonable. . . . Whether international law is law in a strictly *legal* or Austinian sense, depends upon the meaning attributed to the word *law.* Although international law is readily distinguishable in many respects from domestic law, it is nonetheless a system of law possessing certain characteristics peculiar to itself as well as certain others common to municipal law.[6]

Another useful definition is set forth by Whiteman.

> International law is the standard of conduct, at a given time, for states and other entities subject thereto. It comprises the rights, privileges, powers, and immunities of states and entities invoking its provisions, as well as the correlative fundamental duties, absence of rights, liabilities and disabilities. International law is, more or less, in a continual state of change and development.[7]

(2) **Sources of International Law.**[8] The varied sources of international law include

treaties, such as multilateral conventions, the practice of states reflected as custom, and general principles. Decisions of national and international courts and tribunals and writings of qualified authorities are subsidiary sources of international law.[9] International law, like domestic law, is the product of a political process. Thus the law changes and develops as internationally accepted standards of conduct change.[10] An excellent discussion is provided by Whiteman:

"International law is based largely on custom, e.g., on practice, and whereas certain customs are recognized as obligatory, others are in retrogression and are recognized as nonobligatory, depending upon the subject matter and its status at a particular time.

"Over varying periods of time certain international practices have been found to be reasonable and wise in the conduct of foreign relations, in considerable measure the result of a balancing of interests. Such practices have attained the stature of accepted principles or norms and are recognized as international law or practice. Accordingly, there are in the field of international law, public and private, certain well-recognized principles or norms.

"The recognized customs prevailing between states and other subjects of international law are reflected not only in international practice *per se* but also in international treaties and agreements, in the general principles of law recognized by states, in judicial and arbitral decisions, and in the works of qualified scholars. Based largely on custom, thus reflected and recognized, international law is, to considerable extent, unwritten in form and uncodified.

"International law is evidenced by international agreement, by international custom or practice, and by the general norms of civilization. As evidence of such agreements, custom or practice, and norms, resort may appropriately be had to treaties and agreements and, secondarily, to their subsequent interpretation and application; to the practice and custom of states and other entities subjects of international law, as set forth in primary sources and, secondarily, as reported elsewhere; and to accepted standards as revealed in agreements or in practice or in authoritative pronouncements. Decisions of international judicial tribunals and international arbitral bodies, depending upon their competence, constitute an important evidentiary source of international law. Decisions of local courts and tribunals bearing upon aspects of international law or international custom or practice may, according to their competence, also be resorted to for evidence of international law. The teachings of universities and the writings of publicists may constitute a secondary source of evidence as to the standard of conduct properly denominated international law, depending upon their merit."[11]

(3) **International Law as a System.**[12] International law as a legal system differs in many substantial respects from domestic legal systems. One primary difference is the lack of a central enforcement authority equipped to resolve disputes similar to the domestic enforcement mechanisms of states. Instead, states are expected to enforce international law themselves although some centralized institutions exist.[13] Another difference is that the subjects of international law are primarily states rather than persons. A third major difference is the sources of law. Domestic law is frequently derived from an acknowledged superior legislative or executive competence. International law derives its basis primarily from state practice and state consent represented in the form of treaties, custom or general principles of law acknowledged by all states or by all principal legal systems. Domestic law is often precise particularly when enacted by legislatures or adjudicated by courts over an extended period of time.[14] The methodology, substance, sources, subjects and enforcement mechanisms of international law thus vary substantially from domestic law.

Yet nations have many of the same reasons to obey international law as individuals do to follow domestic law.[15] Positive benefits include foreseeability, reciprocity, approbation and efficiency. Foreseeability

refers to a nation's ability to expect that certain behavior will or will not occur. Reciprocity is an adjunct of illegal behavior—if one nation breaks the rules it might expect that others will reciprocate. Approbation refers to pressures from other states or from a state's own population. Efficiency refers to the fact that failures to observe and follow the law frequently cost more in economic resources than observance.[16] Within the context of the international law of armed conflict, there are certain pressures for observance which are examined in depth elsewhere[17] as well as certain measures which a state may use to enforce the law.[18]

The Air Force view on international law is expressed in the following:

> . . . (W)hile it is easy to perceive the shortcomings of a system of law that frequently relies on the coercive power of individual states or groups of states for its execution, we *also* need to recognize the inestimable *value* of international law, which introduces norms of behavior and establishes identifiable parameters of acceptable actions; and we must continue to strive to substitute the rule of law for the rule of force in international relations. As Thomas Baty, a well known publicist, noted in 1954 (*International Law in Twilight*), 'International law is the last stronghold of true law' since its permanence is 'based on a general consciousness of stringent and permanent obligation.' This is, indeed, a major consideration. International law is not promulgated by *decree*, but, rather, by reasoned *consent* and *cooperation*. 'This,' he states, 'is its outstanding merit.'
>
> We in the Air Force constantly benefit from the existence of international law, are sensitive to its changes, and contribute to its formulation in many functional areas. Above all, we actively support it in the hope that it will lead mankind to a peaceful world.[19]

d. **Law of Armed Conflict:**

(1) **Explained.** The law of armed conflict is a part of the international law primarily governing relationships between states.[20] The term refers to principles and rules regulating the conduct of armed hostilities between states. Traditionally known as the law of war, the term "law of armed conflict" is preferred. Since World War II, states have avoided formal declarations of war. Recent multilateral conventions, notably the 1949 Geneva Conventions, refer to armed conflict rather than war.[21] International law regulating armed conflict applies if there is in fact an international armed conflict.[22] It may also apply to armed conflicts that traditionally have not been viewed as "international" but which clearly involve the peace and security of the international community.[23]

(2) **Related topics.** International law includes many areas of interest to the Air Force other than the law of armed conflict. Such topics include the law of the sea and aviation law which are surveyed in chapter 2. Other topics which are relevant include the international law affecting forces overseas, *e.g.*, base rights agreements and status of forces agreements. However, these are beyond the scope of this publication.

(3) **Equal Application.**[24] The law of armed conflict applies equally to all parties to an armed conflict, whether or not the international community regards any participant as the "aggressor" or "victim". Its application is not conditioned by the causes of the conflict. This principle is vitally necessary. Events since World War II have demonstrated that it is frequently impossible to obtain international consensus on the reasons for a particular conflict. Obtaining agreement on who is the aggressor and who is the victim is even more difficult. Thus, the issues of whether aggression has been committed, and if so, by whom, and determining the consequences resulting from aggression are independent of the equal application of the law of armed conflict to the conduct of the conflict.

The individual victims of conflict, notably civilians, PWs, and wounded, sick and shipwrecked are the beneficiaries of much of the law of armed conflict. Indeed all military members of nations involved in armed con-

flict benefit from the law. It is unacceptable to make their legal protection contingent upon an international consensus on the causes of the conflict.

e. **Domestic Law:**

(1) **Relationship with International Law.**[25] International law primarily governs the relations between states. In addition, it may be a part of the domestic law of particular states. Within a domestic legal system, international law will be one of the sources of legal norms that must be harmonized with principles of domestic law either constitutional, statutory or decisional. In the relationships between states, a state cannot generally defend a failure to abide by international law or strict treaty requirements by pleading its own domestic legal constraints.

(2) **US View.** Since the US Constitution, state and federal courts have declared international law to be part of the law of the land.[26] Generally, courts attempt to harmonize US law with international law under various theories. With respect to treaties, Article VI, clause 2 of the Constitution explicitly states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States,* shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (emphasis supplied).

(3) **Relationship with Uniform Code of Military Justice.** The Uniform Code of Military Justice (UCMJ),[27] is a statute enacted by Congress with Presidential assent to insure that American armed forces are subject to effective military discipline. International law requires an armed force to be disciplined through command by a person responsible for his subordinates.[28] Only through a disciplined force can military operations be conducted in accordance with the international law of armed conflict. Discipline thus serves the dual function of insuring that orders are carried out expeditiously and that operations are conducted within the law. This important function of military discipline, avoidance of violations of the law of armed conflict, is illustrated by a graphic example found in the "Lieber Code" of 1863, in force during the US Civil War.

> 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, *Instructions for the Government of Armies of the United States* by Order of the Secretary of War, General Order No. 100, April 24, 1863.

f. **Functions of the Law of Armed Conflict.**[29] The law of armed conflict is essentially inspired by the humanitarian desire of civilized nations to diminish the effects of conflicts. It protects both combatants and noncombatants from unnecessary suffering, and safeguards the fundamental rights of civilians, PWs, and the wounded and sick. The law also attempts to prevent degeneration of conflicts into savagery and brutality, thereby facilitating the restoration of peace and the friendly relations which must, at some point, inevitably accompany or follow the conclusion of hostilities. It has been said to represent in some measure minimum standards of civilization.

1–3. Determinants of the Law:

a. **Basic Principles:**[30]

(1) **Military Necessity.**[31] Military necessity is the principle which justifies measures

of regulated force not forbidden by international law which are indispensable for securing the prompt submission of the enemy, with the least possible expenditures of economic and human resources. This concept has four basic elements: (i) that the force used is capable of being and is in fact regulated by the user; (ii) that the use of force is necessary to achieve as quickly as possible the partial or complete submission of the adversary; (iii) that the force used is no greater in effect on the enemy's personnel or property than needed to achieve his prompt submission (economy of force), and (iv) that the force used is not otherwise prohibited. The 1907 Hague Regulations (Article 23g) state the principle that "it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." The principle of military necessity is not the 19th Century German doctrine, *Kriegsraison,* asserting that military necessity could justify any measures—even in violation of the laws of war—when the necessities of the situation purportedly justified it. War crimes trials after World War II clearly rejected this view. "Military necessity" cannot justify actions absolutely prohibited by law; the means to achieve military victory are not unlimited. Armed conflict must be carried on within the limits of the prohibitions of international law, including the restraints inherent in the principle of "necessity." However, the legitimacy of any particular act cannot be judged without reference to all the principles which govern armed conflict including reciprocity as discussed in chapter 10.

(2) **Humanity.**[32] Complementing the principle of necessity and implicitly contained within it is the principle of humanity which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes. This principle of humanity results in a specific prohibition against unnecessary suffering, a requirement of proportionality, and a variety of more specific rules examined later. The principle of humanity also confirms the basic immunity of civilian populations and civilians from being objects of attack during armed conflict. This immunity of the civilian population does not preclude unavoidable incidental civilian casualties which may occur during the course of attacks against military objectives, and which are not excessive in relation to the concrete and direct military advantage anticipated.

(3) **Chivalry.**[33] Although difficult to define, chivalry refers to the conduct of armed conflict in accord with well-recognized formalities and courtesies. During the Middle Ages, chivalry embraced the notion that combatants belonged to a caste, that their combat in arms was ceremonial, that the opponent was entitled to respect and honor, and that the enemy was a brother in the fraternity of knights in arms. Modern technological and industrialized armed conflict has made war less a gentlemanly contest. Nevertheless, the principle of chivalry remains in specific prohibitions such as those against poison, dishonorable or treacherous misconduct, misuse of enemy flags, uniforms, and flags of truce. The principle of chivalry makes armed conflict less savage and more civilized for the individual combatant.

b. **Custom.**[34] Some of the law of armed conflict has never been incorporated in any treaty or convention to which the United States is a party. Yet the United States, as are other nations, is bound by customary rules of international law. Custom develops from the practice of states and has been referred to as the "common law" of nations.

In the Nuremberg judgment in the case of the Major War Criminals, the International Military Tribunal observed,

> The law of war is to be found not only in treaties, but in the customs and practices of States which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accu-

rate reference the principles of law already existing.[35]

Evidence of customary law arises from the general consent and practice of states under the belief that the practice is required by law. It may be found in certain international conventions or drafts of conventions and declarations, judicial decisions of international and national tribunals (e.g. trial of Major Henry Wirz, who was in charge of the Confederate prison at Andersonville), and other documentary materials and acts of states. Some of the sources of the law of war, for example, go back as far as the second millennium, B.C. The United States is bound to follow such law, not because a treaty requires it, but because international law imposes the obligation on all states. An example is the 1899 Declaration Respecting Expanding Bullets, commonly termed the Dum Dum Declaration.[36] The preamble to *Hague* IV, to which the United States is a party, provides,

> Until a more complete code of laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.[37]

c. **International Agreements.** The law of armed conflict affecting aerial operations is not entirely codified. Therefore, the law applicable to air warfare must be derived from general principles, extrapolated from the law affecting land or sea warfare, or derived from other sources including the practice of states reflected in a wide variety of sources. Yet the US is a party to numerous treaties which affect aerial operations either directly or by analogy. It is especially important that treaties, having the force of law equal to laws enacted by the Congress of the United States, be scrupulously adhered to by the United States armed forces. The following are relevant examples of treaties to which the US is a party:[38]

(i) Hague Convention III of 18 October 1907, Relative To The Opening Of Hostilities (herein Hague III).

(ii) Hague Convention IV of 18 October 1907, Respecting The Laws And Customs Of War On Land and Annex Thereto (herein Hague IV, HR).

(iii) Hague Convention V of 18 October 1907, Respecting The Rights And Duties of Neutral Powers And Persons In Case Of War On Land (herein Hague V).

(iv) Hague Convention VIII of 18 October 1907, Relative to the Laying of Automatic Submarine Contact Mines (herein Hague VIII).

(v) Hague Convention IX of 18 October 1907, Concerning Bombardment By Naval Forces In Time Of War (herein Hague IX).

(vi) Hague Convention XI of 18 October 1907, Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (herein Hague XI).

(vii) Hague Convention XIII of 18 October 1907, Concerning the Rights and Duties of Neutral Powers in Naval War (herein Hague XIII).

(viii) Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare of 1925.

(ix) Inter-American Treaty On The Protection Of Artistic And Scientific Institutions and Historical Monuments of 15 April 1935 (herein Roerich Pact).

(x) Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (herein GWS).

(xi) Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (herein GWS–SEA).

(xii) Geneva Convention Relative to Treatment of Prisoners of War, 12 August 1949 (herein GPW).

(xiii) Geneva Convention Relative to the Protection of Civilians in Time of War, 12 August 1949 (herein GC).

(xiv) Convention on the High Seas, 29 April 1958.

(xv) Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies, 27 January 1967.

1–4. Views on the Law of Armed Conflict:

a. **International Community.**[39] The views of the international community on the importance of codifying the law of armed conflict have varied over time. On occasion, elaborate rules were drafted, such as the 1874 Declaration of Brussels and the 1923 Draft Hague Rules of Aerial Warfare, but these never came into formal effect. The 1899 and 1907 Hague Peace Conferences, exerting considerable effort, ultimately produced 15 distinct Conventions on the subject. These remain the foundation stones of the modern law of armed conflict. In spite of a reluctance to clarify the rules after World War II, partially resulting from an idealistic view that universal adherence to the letter and spirit of the UN Charter would preclude future wars, the 1949 Geneva Conference produced four detailed Conventions to better protect the victims of armed conflicts. As a result of efforts by the International Committee of the Red Cross (ICRC), and others, renewed interest in attempts to reaffirm and clarify the law has been evident since 1968. Numerous Conferences of Government experts, as well as three separate sessions of a Diplomatic Conference, have considerably clarified certain areas in an attempt to formulate specific multilateral Protocols to the 1949 Geneva Conventions.

b. **US Views.**[40] The US has always viewed the law of armed conflict as important. In 1863, the United States issued the first comprehensive code regulating armed conflict in modern times. Named after the author, Francis Lieber, the "Lieber Code" was issued as General Orders No. 100, entitled "Instructions for the Government of Armies of the United States in the Field". Although formulated with particular reference to a civil, as distinguished from an international war, it served as a model for the 1907 Hague Convention IV regulating international conflict. The failure of Germany to respect the law of neutrality governing naval warfare was cited as a principal basis for US entry into World War I on the side of the Allies. After World War II, the US was a principal participant in the War Crimes trials and a leader in the adoption of the 1949 Geneva Conventions. Numerous public statements by the highest officials of the US during the Vietnam struggle, as well as a leadership role in the 1970's in the Diplomatic Conferences considering the Protocols to the Conventions, confirm the continued importance of the subject in official US views.

c. **DOD.** DOD policy on the Law of Armed Conflict is set forth in DOD Directive 5100.77, 5 November 1974, establishing the DOD Law of War Program. Paragraphs V and VI(E) of that Directive are as follows:

V. POLICY

A. The Armed Forces of the United States will comply with the law of war in the conduct of military operations and related activities in armed conflict however such conflicts are characterized.

B. The Armed Forces of the United States will insure that programs to prevent violations of the law of war to include training and dissemination as required by the Geneva Conventions (GWS Art. 47, GWS-Sea Art. 48, GPW Art. 127, GC Art. 144 and by Hague Convention IV (Art. I)), are instituted and implemented.

C. Violations of the law of war alleged to have been committed by or against members of, or persons accompanying or serving with, the Armed Forces of the United States will be promptly reported, thoroughly investigated, and, where appropriate, followed by corrective action.

D. Violations of the law of war alleged

to have been committed by or against allied military or civilian personnel will be reported through appropriate command channels for ultimate transmission to appropriate agencies of allied governments.

VI. RESPONSIBILITIES

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E. The Secretaries of the Military Departments will develop internal policies and procedures consistent with this Directive in support of the DoD law of war program in order to:

1. Provide publications, instructions, and training so that the principles and rules of the law of war will be known to members of their respective departments, the extent of such knowledge to be commensurate with each individual's duties and responsibilities.
2. Provide for the prompt reporting and investigation of alleged violations of the law of war committed by or against members of their respective departments. . . .
3. Provide for the appropriate disposition, under the Uniform Code of Military Justice, of cases involving alleged violations by persons subject to court-martial jurisdiction of their respective departments.
4. Provide for the central collection of reports and investigations of violations of the law of war alleged to have been committed by members of their respective military departments.
5. Insure that programs within their respective departments to prevent violations of the law of war are subject to periodic review and evaluation, particularly in light of any violations reported.

d. **Importance to Individuals.**[41] The system of international law regulating armed conflict represents an effort to provide humanitarian protections while maintaining the concept of military necessity. The Chairman, JCS, has noted

> The Armed Forces of the United States have benefited from, and highly value, the humanitarianism encompassed by the laws of war. Many are alive today only because of the mutual restraint imposed by these rules, notwithstanding the fact that the rules have been applied imperfectly.[42]

Because of its importance to the international community, to the US, and to the DOD, individual service members should understand the law of armed conflict. The profession of arms has a long and proud tradition—and the law of armed conflict is an integral part of that tradition. Although international law chiefly serves to regulate state conduct, combatants individually are responsible for following the law of armed conflict which obligates their nation. Compliance is important because states have reciprocal interests in the law's continued application. Individuals have a personal interest as well. Not only are obligations imposed, but rights are created in individuals by the law of armed conflict. Most important is the right of the combatant to engage in combatant acts, which if not done by recognized combatants in armed conflict, would be unlawful. Every legal system is based on rights and responsibilities. One of the best ways to protect rights is the diligent fulfillment of responsibilities. If responsibilities are not executed in accordance with the law regulating conflict, corresponding rights may be compromised. Rights not only belong to combatants but equally concern the nation and populations their services protect and defend.

1-5. Application of Law:

a. **Traditional View of War Explained.**[43] Under traditional international law, war is a legal state, the commencement, and to a lesser extent, termination, of which are regulated by formal acts recognized in international law. War begins when specified in a declaration, upon receipt of a declaration if not specified, or by attacks accompanied by

an intention to make war. A nation attacked can elect to treat an attack as a state of war regardless of the intention of the attacker. The legal status of war ceases by agreement, usually in the form of a peace treaty; by a unilateral declaration by one of the parties accepted *de facto* by the other; by a complete subjugation; or by simple cessation of hostilities accompanied by a tacit agreement that the war is over.

b. **Modern State of War and the UN Charter.**[44] Since World War II, states have avoided formal declarations of war. This reflects a shift in the legal basis on which states claim to have resorted to war as an instrument to settle disputes. Following World War I, and even more particularly since World War II when the UN Charter came into existence, states have not claimed a right to declare war to achieve political aims. Recognizing existing limits on any state's right to resort to armed conflict, conflicts have been justified as exercises of each state's right of individual or collective self-defense against aggression or subversion. This is in marked contrast to previous eras, in which states recognized and exercised a right to resort to war. Although international law may prohibit aggressive war, armed conflict has not disappeared. Thus, the law of armed conflict retains its importance. Moreover conflicts have been terminated by a variety of arrangements, political or otherwise, termed armistice agreements, truces and cease fires, other than the formal peace treaties of earlier times. "Cease fire," was originally descriptive of a simple military order to stop firing. International usage, particularly UN practice, has made the term broader and in some contexts synonomous with an armistice. An "armistice," which was originally a mutually-agreed suspension of military operations, has evolved into a functional substitute for a peace treaty. Peace treaties, although used frequently prior to World War II and concluded with most of the belligerents of that war, have since then not been widely used to establish a *de jure* end to armed conflicts. In part, the reason for this is that their use implies the existence of a state of war—a condition which states have declined to apply to their armed conflicts.

c. **Application of the Law of Armed Conflict.**[45] The law of armed conflict applies to an international armed conflict regardless of whether a declared "war" exists. This rule, necessitated by the law's humanitarian purpose and disuse of the legal status of war in international contexts, is confirmed by international agreement and consensus. Moreover, relevant international law protects certain war victims, such as PWs or civilians in occupied areas, even though active armed conflict has ceased. International armed conflicts are regulated whatever the level of conflict. However, the international community has not regarded a few sporadic acts of violence, even between states, as indicating a state of armed conflict if the parties themselves do not regard a state of armed conflict as existing. Generally, the international community has encouraged broad application of the law of armed conflict to as many situations as possible to protect the victims of conflicts.

d. **Internal Conflicts.**[46] The law of armed conflict does not generally apply to conflicts occurring solely within the territory of a state between persons who are nationals of that state. Yet the difference between an internal and international conflict is frequently subject to international dispute. More importantly, the policy of protecting the victims of conflict should also apply in an internal conflict. Recognizing these factors, customary international law provides that insurgents in internal armed conflicts may attain the legal status of belligerents or lawful combatants. This occurs when there is a general civil war involving sustained armed conflict and control by the insurgents of a significant portion of national territory. The law of armed conflict applies to all combatants in such a situation imposing obligations and rights equally. Moreover, even in internal armed conflict of intensity less than that required for recognition of such belligerency, Article 3, common to the 1949 Geneva Conventions for the Protection

of War Victims, prescribes certain basic legal standards to be applied in all noninternational armed conflicts.

1-6. Observance of the Law.[47] The law of armed conflict developed from an amalgam of social, political and military considerations. The primary basis for the law, and the principal reason for its respect, is that it generally serves the self-interest of everyone subject to its commands. Because of the lack of effective international mechanisms to prevent war, armed conflicts have occurred. Equally, violations of the law of armed conflict have occurred including violations of the latest formal international consensus on the law—the 1949 Geneva Conventions. Violations that do occur are likely to be highly publicized. They may even tend to obscure the routine compliance, observance and enforcement of international law that does exist. It, nevertheless, remains true and highly significant that much of the law of armed conflict has not been violated and has been observed during periods of armed conflict by all participants. Since compliance is commonplace, it is little reported.

a. **Political.**[48] Clausewitz noted that wars are a continuation of politics by other means. Although states have formally renounced war as a means of achieving political aims, armed conflict has remained a fact of life in the international community. However, the application of military force has never been an end in itself. In many respects, the overall political context has increased in importance in recent years although that political context has always influenced the means of destruction or tactics used in warfare. Violations of the law of armed conflict have been recognized as counterproductive to the political goals sought to be achieved. For example, they may arouse public opinion and induce neutrals to become involved in the conflict on the adversary's side, such as the entry of the United States into World War I. Violations are likely also to stiffen enemy resistance, enhance antagonisms on both sides and prevent successful negotiation of the differences which precluded peaceful relations. Thus, mutual and reciprocal self-interest is an underlying basis of the law of armed conflict, although reciprocity is not a formal condition for all obligations. For example, if a state expects and hopes that its captured prisoners will be treated humanely, that state's self-interest requires self compliance by that state and its allies with the law of armed conflict and humane treatment of the prisoners it captures. Nevertheless a state must treat its prisoners humanely regardless of the conduct of the other state. Violations that do occur often arise from inaccurate perceptions of self-interest blurred by the passions of the moment, from unauthorized individual acts by combatants, or simply from lack of due diligence to prevent violations.

b. **Military.**[49] The law of armed conflict has been shaped with a recognition of the concept of "military necessity." Hence "necessity" cannot be claimed as a defense to violations of absolute prohibitions included in the law of armed conflict, for example, killing of prisoners of war. More importantly, various military doctrines, such as accuracy of targeting, concentration of effort, maximization of military advantage, conservation of resources, avoidance of excessive collateral damage, and economy of force are not only fully consistent with compliance with the law of armed conflict but reinforce its observance. Use of excessive force is not only costly and highly inefficient—and to be avoided for those reasons—it may also be a waste of scarce resources. It also might, depending on the situation, involve a violation of the law of armed conflict, with its attendant counterproductive political consequences. Conversely, conduct which violates the law of armed conflict frequently is found to be of marginal military advantage. Examples include attacks directed against the civilian population. As the Chairman of The Joint Chiefs of Staff, observed,

> We recognize that wanton destruction and unnecessary suffering are both violations of these military developed legal principles and counterproductive to the

political military goals of the Nation. The law of "proportionality" is simply a legal restatement of the time honored military concept of "economy of force."[50]

c. **Humanitarian.**[51] Humanitarian considerations underlie the law of armed conflict. For example, the requirements of uniforms and markings exist not only to assure combatants that enemy targets and not their own are being attacked, but to reinforce the protections secured to civilian populations and civilian objects. PWs, wounded and sick, and the civilian population although the inevitable victims of war are sought to be protected to the maximum extent possible. The international community has sought to identify situations in armed conflicts in which humanitarian principles can be invoked to protect such victims and to limit the destruction of enemy property without sacrificing material military advantages. For example, if an adversary represents no military threat because he is *hors de combat,* no military advantage is secured by treating him in an inhumane manner. The Geneva Conventions themselves are very predominantly humanitarian in nature although political and military considerations are also relevant.

FOOTNOTES

[1] On the general subject of this chapter, see Bishop, *International Law, Cases and Materials* 900 (3rd ed. 1971); 2 *Oppenheim's International Law* (7th ed. Lauterpacht 1952); Stone, *Legal Controls of International Conflict* (1973); McDougal and Feliciano, *Law and Minimum World Public Order* (1961); 2 Schwarzenberg, *International Law, International Courts The Law of Armed Conflict* (1968). On the application of law in civil war, see *The International Law of Civil War* (Falk ed. 1971).

[2] For discussion, see Introduction to chapter 2, "Hague Conventions of 1907," in AFP 110–20, at 2–1; and chapter 5, paragraph 5–2, this publication.

[3] The principles common to the law of armed conflict discussed elsewhere in the publication, for example, include military necessity, humanity and chivalry (chapter 1, paragraph 1–3); lawful and unlawful combatants (chapter 3); the basic immunity of noncombatants including civilians, particularly the principle of distinction and proportionality (chapters 3 and 5); the rule against unnecessary suffering (chapter 6); prohibition of treachery (chapter 8); the concept of the military objective (chapter 5); enforcement measures (chapter 10); and criminal responsibility (chapter 15); as well as the rules and principles of the Geneva Conventions protecting wounded and sick, PWs and civilians (chapters 11–14). Different applications of those principles will be discussed in all chapters.

[4] Geneva Convention Relative to the Protection of Prisoners of War, 6 UST 3316; TIAS 3364 (1956), [herein GPW] (discussed chapter 3, this publication). The persons so named are:

(1) members of armed forces, militias and volunteer corps forming part of such armed forces.

(2) members of other militias, corps and organized resistance movements belonging to a Party to a Conflict, who meet certain requirements.

(3) inhabitants of nonoccupied territory who spontaneously take up arms to resist invading forces and who are required to carry arms openly and obey the laws and customs of war.

[5] Modern textbooks of broad scope and great utility to the military lawyer include Bishop, *International Law, Cases and Materials* (3rd ed. 1971); Brownlie, *Principles of Public International Law* (1973); Friedmann, Lissitzyn and Pugh, *International Law* (1969); O'Connell, *International Law,* 2 Volumes (1970). Principal U.S. Digests include Hackworth, *Digest of International Law,* 7 Volumes (1940–1943); Whiteman, *Digest of International Law,* 15 Volumes with index (1963–1973) [herein Whiteman].

[6] 1 Hackworth, *supra* note 5, at 1. "Austinian" refers to the system of jurisprudence developed in 1 Austin, *The Province of Jurisprudence Determined* 2, 128 (1861).

[7] 1 Whiteman, at 1.

[8] The most frequently cited authoritative reference to sources is Article 38 of the Statute of the International Court of Justice (Annex to UN Charter), 59 Stat 1031; TS 993; reprinted AFP 110–20, at 9–19.

Article 38:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

For material on the sources of international law, the Digests which reflect practice, such as the U.S. Digests of Hackworth and Whiteman, as well as standard sources cited, *supra* note 5, should be consulted.

[9] "[The works of jurists and commentators on the subject of International Law] are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquette Habana,* 175 U.S. 677, 700 (1900).

[10] Law in the context of the world political process is examined in depth, for example, by McDougal, *supra* note 1.

[11] 1 Whiteman, at 1–2.

[12] See authorities *supra* note 5.

[13] One type of centralized law enforcement mechanism is the United Nations system which includes the UN General Assembly, Security Council and other principal organs such as the International Court of Justice. Affiliated with the UN are various specialized agencies, some of which play a central enforcement role in various functional or specialized areas. As listed in Bishop, *supra* note 1, at 225, these include the International Labor Organization; Food and Agricultural Organization; UN Educational, Scientific and Cultural Organization; the International Bank for Reconstruction and Development (and its companions, the International Development Association and the International Finance Corporation); International Monetary Fund; International Civil Aviation Organization; Universal Postal Union, International Telecommunications Union, World Meteorological Organization; and the

International Maritime Consultative Organization. Closely allied to the UN is the International Atomic Energy Agency—a key organization under the Treaty on the Non-Proliferation of Nuclear Weapons (see chapter 6, this publication). There are large numbers of other organizations which are regional or have less than universal membership.

[14] Insofar as international law is based on custom or general principles this may be particularly true. Yet, much of international law is expressed in elaborate treaty commitments which are fairly precise in form, such as the 1949 Geneva Conventions for the Protection of War Victims. These are discussed in chapters 11 through 14, this publication.

[15] The pressures to observe international law, in the context of the law of armed conflict, are examined in depth later, particularly paragraphs 1–6 and 15–2, this publication.

[16] This remains true because of the heavy influence of state practice in the formation of the law as examined in paragraphs 1–6, 5–2 and 15–2, this publication.

[17] See paragraphs 1–6 and 15–2, this publication.

[18] Chapter 10, this publication.

[19] Air Force News Release, Tuesday, November 4, 1975, Speech by The Honorable John L. McLucas, Secretary of the Air Force.

[20] See generally 10 Whiteman chapters 29, 30. On historical analysis of its application in civil war, see *The International Law of Civil War, supra* note 1.

[21] For example, ". . . [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 . . . Parties, even if the state of war is not recognized by one of them." (Art 2, in all 1949 Geneva Conventions). States are also bound to apply the Conventions in relations between themselves although one Power in conflict may not be a Party (there are in fact only a few states not Parties, notably the Republic of China). Avoidance of declarations of war, a significant factor in state practice since WW II, stems from the United Nations Charter, and the Kellogg-Briand Peace Pact, *Renunciation of War As An Instrument of National Policy,* 27 Aug 1928, 46 Stat. 2343; TS 796; 2 Bevans 732; 94 LNTS 57 (1929), found in AFP 110-20, at 11-7. All US Defense Agreements are collective self defense arrangements. See, for example, AFP 110-20, at 3-1. Also, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625 (XXV) of 24 Oct 1970, discussed in relation to force, 12 Whiteman 39 (an elaboration of certain principles of the UN Charter, not a revision or amendment thereof). On 14 December 1974, the General Assembly adopted by consensus a Definition of Aggression. For US views accepting the definition, see 72 *State Dept. Bull.,* 155 (3 Feb 1975), and Rovine, "Contemporary Practice of the United States," 68 *Am. J. Int'l. L.* 720, 735 (1974). Authority of US Armed Forces to engage in armed conflict, under US domestic law, is a matter of US Constitutional law, not international law. War Powers Resolution, 50 U.S.C. § 1541; P.L. 93–148 (1973).

[22] See authorities *supra* note 21; US Army, FM 27–10, *Law of Land Warfare* 7 (1956) [herein FM 27–10]; DOD Directive 5100.77, 5 Nov 1974, (Para V A.).

[23] See statement of Secretary of State Dulles, commenting on the Korean War, in 39 *State Dept. Bull.* 604 (1958), reprinted 10 Whiteman 41–42. In Vietnam, the US position was that the conflict was international (N. vs S. Vietnam) whereas Hanoi regarded the conflict solely as a civil war in which there was unlawful US intervention. For discussion and authorities, see chapter 13, particularly footnote 2. A collection of Articles on the debate is found in Am. Soc'y. Int'l. L., *The Vietnam War and International Law* (3 Vols. 1968–1972). On historical application of the law of armed conflict in civil war, see *International Law of Civil War, supra* note 1.

[24] In the past there has been, on occasion, differing international views on this subject and some differing practice particularly during World War II. The position expressed here represents the view of the US, the International Committee of the Red Cross, that adopted by the 1949 Geneva Conventions, as well as the 1907 Hague Regulations and Conventions. Clearly the law of armed conflict does not authorize aggression—nor does it condemn aggression—it exists independently of the causes of the conflict and applies regardless of the causes. For discussion, see US Naval War College, "The Law of War and Neutrality at Sea," 1955 *International Law Studies,* 3, 6, 8–9 (1957); Lauterpacht, "The Limits of the Operation of the Law of War," 30 *Brit. Y. B. Int'l. L.* 206, 212–73 (1953); "The Hostage Case," 11 US Trials of War Criminals Before the Nuremberg Military Tribunals 1246–47 (1948), reprinted 10 Whiteman 55; Taylor, "The Concept of Justice and the Laws of War," 13 *Colum. J. Transnat'l. L.* 189, 199 (1974); Carnegie Endowment for Int'l Peace, *Report of the Conference on Contemporary Problems, The Law of Armed Conflicts* 47 (1970).

[25] See Restatement, Foreign Relations Law of the United States (2d) § 140 (1965); on the relationship between national (municipal) law and international law, see 1 Whiteman 103; Bishop, *supra* note 1; Friedmann, et al., *supra* note 5, at 100; 1 O'Connell, *supra* note 5, at 38; Brownlie, *supra* note 5, at 32.

[26] See for example Ware vs. Hylton, 3 US (3 Dall.) 199 (1796); Foster vs. Neilson, 27 US (2 Pet.) 252; 314 (1829); Asakura vs. City of Seattle, 265 US 332, 341 (1924).

[27] 10 U.S.C. § 801–940 (1970).

[28] This is recognized in GPW, Art 4A(2)(a) making command an indispensible characteristic of groups to be accorded combatant status. "It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates." US Supreme Court in *In Re Yamashita,* 327 US 1 (1946), quoted from 2 Friedman, *Law of War* 1605 (1973). On command responsibility see Parks, "Command Responsibility for War Crimes," 62 *Mil. L. Rev.* 1 (1973) and authorities, paragraph 15–2, this publication.

[29] These stated purposes are recognized in Hague Convention IV (Preamble), the 1949 Geneva Conventions For the Protection of War Victims, as well as customary international law. FM 27–10, at 1 (1956); 10 Whiteman 298; US Navy, NWIP 10–2, *Law of Naval Warfare* at 2–3 (1959) and Ikle, *Every War Must End* (1971).

[30] The law of armed conflict contains both affirmative obligations and prohibitions. Yet this body of law neither authorizes nor prohibits the basic decision to use force. That issue is related back to the concept of self defense—aggression discussed *supra* footnote 21. The law of armed conflict represents "standards of civilization" which have been shaped by the concepts of military necessity, humanity and chivalry. On state practice and legal materials relating to permissible and impermissible uses of force, see 12 Whiteman 1 (1971). For these reasons, the law of armed conflict cannot be argued to authorize the use of force since the legal regulation of that issue is by a separate and distinct legal regime. The law of armed conflict represents standards applicable *whether or not* the use of force was prohibited, permissible or unascertainable. See authorities *supra* note 24.

[31] The close relationship of these legal principles to military doctrines such as economy of force should be recalled. AFM 1–1, United States Air Force Basic Doctrine, 15 January 1975, fully recognizes these elements in discussing command and control, that military objectives (and resultant force application) be appropriate to the political objectives established by national authorities, and that force be regulated. On discussion of military necessity, see Carnegie Endowment Pamphlet, *supra* note 24 at 14; Stone, *supra* note 1, at 352; McDougal, *supra* note 1, at 72, 528; Greenspan, *Modern Law of Land Warfare* 279 (1959); US Navy, NWIP 10–2, *Law of Naval Warfare* at 2–4 (1959); FM 27–10, at 3; US Naval War College Studies, *supra* note 24, at 33; Note "Military Necessity in War Crimes Trials," 29 *Brit. Y. B. Int'l. L.* 442 (1953); 3 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1801 (1945); "The Lieber Code." (Article 15) reprinted 1 Friedman, *supra* note 28, at 161.

[32] See authorities, *supra* note 31, and those in chapter 5 and chapter 6.

[33] Authorities *supra* note 31. Chivalry is implicit in other restrictions as seen from Articles 15 and 16 of the Lieber Code, being *Instructions for the Government of Armies of the United States in the Field* by Order of the Secretary of War, found 1 Friedman, *supra* note 28, at 161.

> Article 15. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.
>
> Article 16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

[34] Article 38, *Statute of International Court of Justice,* quoted *supra* note 8. For discussion, see FM 27–10, at 6; (noting Hague IV as customary law); NWIP 10–2, *supra* note 31, at 2–3; Brittin and Watson, *International Law for Seagoing Officers* 127 (1960); McDougal, *supra* note 1, at 363; Taylor, *Nuremberg and Vietnam* 28 (1971); Wright, "Killing of Hostages as a War Crime," 25 *Brit. Y. B. Int'l. L.* 299, 303 (1948). On custom in international law, see 1 Whiteman 75; 1 O'Connell, *supra* note 5, at 6; Brownlie, *supra* note 5, at 4. An excellent compilation of sources including those which predate modern times back to the second millennium, B.C. (at the time of Egyptian-Sumerian wars) is Friedman, *The Law of War, A Documentary History,* 2 Volumes (1972).

[35] 1 *Trial of the Major War Criminals Before the International Military Tribunal* 221 (1947). Absent common agreement, the practice of states, while a useful guide to treaty interpretation, does not modify the legal obligation to comply therewith which is contractual in nature. Articles 26, 27, 31; Vienna Convention on the Law of Treaties, 23 May 1969, reprinted AFP 110–20, at 11–2. 1 O'Connell, *supra* note 5, at 261–262 notes ". . . the probative value of subsequent conduct is not high in the case of multilateral conventions, especially where the number of parties has considerably changed."

[36] 6 Hackworth, *supra* note 5, at 271; FM 27–10, at 19; Rovine, "Contemporary Practice of the United States Relating to International Law," 68 *Am. J. Int'l. L.* 504, 528 (1974).

[37] Hague Convention No. IV, Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277; TS 539; 1 Bevans 631 (1910), reprinted AFP 110–20, at 2–4.

[38] Hague III, 36 Stat 2259; TS 538; 1 Bevans 619 (1910), reprinted AFP 110–20, at 2–2.

Hague IV, 36 Stat 2277; TS 539; 1 Bevans 631 (1910), reprinted AFP 110–20, at 2–4.

Hague V, 36 Stat 2310; TS 540; 1 Bevans 654 (1910), reprinted AFP 110–20, at 2–11.

Hague VIII, 36 Stat 2332; TS 541; 1 Bevans 669 (1910), discussed chapter 6, this publication.

Hague IX, 36 Stat 2351; TS 542; 1 Bevans 681 (1910), reprinted AFP 110–20, at 2–14.

Hague XI, 36 Stat 2396; TS 544; 1 Bevans 711 (1910), discussed chapter 4, this publication.

Hague XIII, 36 Stat 2415; TS 545; 1 Bevans 723 (1910), discussed chapter 4, this publication.

See also Convention on Maritime Neutrality, signed at Havana 20 Feb 1928; 47 Stat 1989; TS 845; 2 Bevans 721; 135 LNTS 187 (1932). (limited number of parties).

1925 Geneva Gas Protocol TIAS 8061; 94 LNTS 65, entered into force for the United States, 10 April 1975 (discussed chapter 6, this publication), reprinted AFP 110–20, at 8–25.

Roerich Pact (A Treaty on Protection of Artistic and Scientific Institutions and Historical Monuments) 49 Stat 3267; TS 899; 3 Bevans 254 (1935) (limited to US and Inter-American Republics).

GWS, 6 UST 3114; TIAS 3362; 75 UNTS 31 (1956), reprinted AFP 110–20, at 1–3.

GWS–SEA, 6 UST 3217; TIAS 3363; 75 UNTS 85 (1956), reprinted AFP 110–20, at 1–16.

GPW, 6 UST 3316; TIAS 3364; 75 UNTS 135 (1956), reprinted AFP 110–20, at 1–27.

GC, 6 UST 3516; TIAS 3365; 75 UNTS 287 (1956), reprinted AFP 110–20, at 1–66.

Convention on High Seas, 29 April 1958, 13 UST 2312; TIAS 5200; 450 UNTS 92 (1962), reprinted AFP 110–20, at 7–10. Also see other Law of the Sea Treaties including Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 15 UST 1606; TIAS 5639; 516 UNTS 205 (1964), reprinted AFP 110–20, at 7–2; and Convention on the Continental Shelf 29 April 1958, 15 UST 471; TIAS 5578; 499 UNTS 311 (1964), reprinted AFP 110–20, at 7–7. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 27 January 1967, 18 UST 2410; TIAS 6347; 610 UNTS 205 (1967), reprinted AFP 110–20, at 6–2.

The law of air, space, law of the sea and neutrality are discussed generally in chapter 2.

[39] The importance of the law has not been seriously questioned by states in their public utterances although frequent disputes have arisen over what the law requires, particularly in maritime warfare (chapter 4). The term "codify" refers to incorporation of a preexisting law into specific treaty obligations. Both the 1907 Hague Peace Conferences and the 1949 Geneva Conferences were *in part* codification conferences.

[40] The US has stressed the need for better observance and improvement of mechanisms for enforcement. See Report of US Delegations to the *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* 1st Sess. (1974) and 2nd Sess. (1975). For background, see ICRC Report to 22nd International Conference of the Red Cross, "Implementation and Dissemination of the Conventions" (Tehran Nov 1973); ICRC Report, Replies sent by Governments, "Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949" (1972).

During both the Korean and Vietnam conflicts, a basic *lack* of international consensus on whether the conflict was an internal struggle (civil war: communist view) or an international conflict (US view) frustrated observance. Contrast this with the Mid-East conflicts where there is consensus. Wright, "Legal Aspects of the Viet-nam Situation," 60 *Am. J. Int'l. L.* 750 (1966).

[41] On criminal responsibility, see chapter 15. The law of armed conflict represents the fundamental legal basis behind rules of engagement—the method used in addition to the Uniform Code of Military Justice to enforce the obligations on individual members of the Armed Forces. The recognition that conflict occurs in a political context and that foreign policy objectives can be jeopardized or destroyed by violations represents an important reason to observe the law. Recall Clausewitz's dictum that war is a continuation of political intercourse. Hague IV, Article 1, for example, notes "The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations. . . ."

[42] DOD News Release No. 479–74 (10 Oct 1974). Address by General George S. Brown, Chairman of the Joint Chiefs of Staff.

[43] Hague III; 2 *Oppenheim's International Law* 202 (Lauterpacht ed. 1952); Renault, "War and the Law of Nations in the Twentieth Century," 9 *Am. J. Int'l. L.* 1 (1915).

[44] The shift began initially in 1928. See Kellogg Briand Peace Pact, *supra* note 21 ". . . solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with

one another." The term "war" in international discourse should not be confused with the *domestic* legal meaning including that concerning relations between the Executive and Congress culminating in the War Powers Resolution, *supra* note 21. On the status of war in international law, and the prevalence of the terms self defense and aggression, see authorities *supra* notes 1 and 21; 5 Whiteman 706; on self defense, see 5 Whiteman 971; and McDougal, *supra* note 1, at 121. The United Nations Charter provides:

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.

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 matter inconsistent with the Purposes of the United Nations. . . .

* * * * *

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . .

On cartels, parliamentaries, capitulations, surrender, armistice, cease fire and related topics, see FM 27–10; 2 Oppenheim, *supra* note 1, at 534, *et seq;* Levie, "The Nature and Scope of the Armistice Agreement," 50 *Am. J. Int'l. L.* 880 (1956). 10 U.S.C. § 899(2); Article 99, UCMJ, states, *inter alia,* "Any member of the armed forces who before or in the presence of the enemy . . . (2) shamefully abandons, surrenders, or delivers up any command . . ." which it is his duty to defend; shall be punished by death or such other punishment as a court-martial may direct.

[45] Authorities *supra* note 21. Also, McDougal, *supra* note 1, at 540; FM 27–10, at 7–8; 10 Whiteman 27–66 (1968). DOD Policy (DOD Directive 5100.77) requires compliance by US Armed Forces regardless of how the conflict is characterized. "US Defense Department Statement," 5 *International Legal Materials* 791 (1966) (quoted in footnote 2, chapter 13, this publication).

[46] 2 Oppenheim, *supra* note 1, at 248–253; also see authorities, *supra* note 23, and discussion of Common Article 3, 1949 Geneva Conventions, chapter 11, this publication.

[47] "If the United Nations picked and chose among the laws of war this would seem to be an invitation for the opposing belligerents to do the same. During the Korean War, as a matter of fact, the United Nations carefully observed the laws of war. This seems a more practical way of manifesting 'a superior legal and moral position'." US Naval War College, *1966 International Law Studies* 24 (1966); McDougal, *supra* note 1, at 54. That violations are highly publicized is a function of the "propaganda value" found by parties to a conflict in violations by an adversary discoverable in any review of the popular press during any armed conflict.

[48] The violation of Belgian and US Neutrality, and the British campaign relating to German atrocities in the first World War; as well as the massive violations by Germany during the 1941 invasion of the USSR (turning the population actively hostile) are illustrations. For discussion, see Lutz, "World War Propaganda," in *Public Opinion and World Politics* 151 (Wright ed. 1933); Ikle, *Every War Must End* (1971); Reed, "Address to the Air War College," 27 Aug 1974, contained in AUIPD, Supplemental Readings, *The Laws of War Including the Law Applicable to Air Operations* (1975).

[49] FM 27–10, at 3–4; Spaight, *Air Power and War Rights* 270 (1947); Dunbar, "Military Necessity in War Crimes Trials," 29 *Brit. Y.B. Int'l. L.* 442 (1953); US Naval War College Studies, *supra* note 24, at 34; McDougal, *supra* note 1, at 528, 671. On military principles see Possony, *Strategic Air Power* (1943) and authorities chapter 5, paragraph 5–3, this publication.

[50] *Supra* note 42.

[51] See Schwarzenberger, *supra* note 1, at 12; Schwarzenberger, "The Law of Armed Conflict," 1974 *Y.B. of World Affairs* 293 (1974); Taylor, "The Concept of Justice and the Laws of War," 13 *Colum. J. Transnat'l. Law* 189 (1974).

Chapter 2
STATUS OF AIRSPACE AND AIRCRAFT

2-1. Airspace Defined:

a. **Scope of Chapter.** This chapter surveys a wide variety of general international law topics relevant to the law of armed conflict. It explains basic legal concepts relevant to airspace including airspace over national territory, territorial seas, and high seas. Related concepts of identification zones and outer space are discussed. Legal rules relevant to control of airspace and outerspace are covered. The basic legal concepts regarding access of military aircraft to airspace, both during armed conflict and during peacetime, are surveyed. Civil aircraft are discussed, as appropriate.

b. **Historic Roots of Definition of Airspace.** Until the advent, in the 20th century, of reliable craft capable of carrying men or materials through the air, little public consideration was given to the question of sovereignty, ownership or control over "airspace." It was assumed that sovereignty over the land implied sovereignty over all superjacent airspace.[1] To the extent that a state claimed sovereignty or other rights of control over littoral waters as "territorial" seas, the surface rules were presumed equally applicable to the air above. The space immediately above the earth's surface and constituting the atmosphere has since been regulated in accordance with these concepts. With the development in the second half of the 20th century of craft not dependent upon atmosphere to provide lift, and able to navigate at great speeds high above the earth's surface, a wholly separate regime has developed for "outer space." No fixed boundary between the two has been recognized under international law to date.

c. **Airspace Over National Territory, Internal Waters and Territorial Seas.** The upper geographic limits of "airspace" are still undefined by international law. Nevertheless, an extensive body of law is applicable to the zone next to the earth characterized by the presence of atmosphere.[2] This zone is here referred to as airspace. The legal status of airspace is essentially identical to that of the national territory, internal waters and territorial seas below it. The rule was embodied in the first multilateral international agreement on the subject: the 1919 Paris Convention Relating to the Regulation of Aerial Navigation, and has been followed in all subsequent international agreements. The Convention purports to express the rule for all states, including those not parties to it. Although the United States did not ratify the 1919 Convention, this country nevertheless adopted the principle in its first Air Commerce Act of 1926 and all successor laws.[3] Territorial sovereignty over the airspace includes all of the attributes of sovereign control, including the rights to regulate, and ultimately prevent access, exit or transit of both personnel and aircraft, whether or not manned.

d. **Innocent Passage.** The Convention on the Territorial Sea and the Contiguous Zone codified international law on "innocent passage" through the territorial sea. Innocent passage is the right of all ships, including military vessels, to traverse the territorial sea of other states provided passage is "not prejudicial to the peace, good order or security of the coastal state."[4] No comparable right has been recognized for aircraft through airspace over the territorial sea or other territory of another state.

e. **Airspace Over the High Seas.** Article 1 of the 1958 Convention on the High Seas, to which more than 50 nations are parties, defines the "high seas" as

> all parts of the sea that are not included in the territorial sea or in the internal waters of a State.[5]

This definition does not establish the geographic width of the "territorial sea." Nor does international agreement on the width of the territorial sea now exist. The United States was among the first to establish and has generally adhered to the view that the appropriate width is 3 miles from the low water mark on the shore.[6] Many nations claim up to 12 miles, and some others claim 200 miles.[7] Whatever the outer boundary of the territorial sea, the rule that has evolved for airspace above the high seas has flowed from the strictly territorial concepts applicable to airspace. Thus, as sovereignty may not be exercised over the high seas, so assertions of sovereignty in the form of controlling or denying access, exit or transit are improper in the airspace above the high seas and above territory unclaimed by any sovereign (to the extent it exists). This does not mean that a sovereign is denied all right of action in the airspace above the high seas. On the high seas sovereigns may act in self defense and may engage in any other reasonable activity that does not interfere with the rights of others also freely to use the high seas. The airspace above the high seas is subject to the same regime. As summarized in Article 2 of the 1958 Convention on the High Seas,

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised . . . *inter alia,* both for coastal and non-coastal States [through]
>
> * * * * *
>
> (4) Freedom to fly over the high seas.

Airspace that is not national airspace may be referred to as international airspace. The international airspace includes all airspace above the high seas, above unclaimed areas, and over other areas which by agreement have in some respect been internationalized.[8]

f. **Absence of "Contiguous Zones" in Airspace.** The 1958 Convention on the Territorial Sea and the Contiguous Zone[9] codified international practice under which states are permitted to establish relatively narrow "contiguous zones" of the high seas immediately adjacent to their territorial seas, within which they may exercise certain controls without claiming sovereignty over such areas. Under the Convention, the contiguous zone is limited to a width of 12 miles from the coast, within which the coastal state may, according to Art. 24(1), establish such controls as are

> necessary to:
>
> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
>
> (b) Punish infringement of the above regulations committed within its territory or territorial sea.

Security controls are not among those enumerated in the Convention. As the contiguous zone is a part of the high seas, the coastal state may not prevent passage of warships or otherwise impede access, exit or transit. This is always subject to the right of every nation to act in self defense and to use the seas for observation and similar purposes that do not interfere with the equal rights of use by others.

The concept of the "contiguous zone" is not recognized in airspace. Accordingly, airspace must be considered either entirely within the territorial control of a sovereign if superjacent to territory or territorial sea or entirely outside the control of any sovereign when above the high seas.[10]

g. **Air Defense Identification Zones.** The United States is among the countries in the world that have established "air defense identification zones" (ADIZ) in the airspace above the high seas adjacent to their coasts and above their territory and territorial seas. Civil aircraft on a course to penetrate United States airspace are required to identify themselves upon entry into the zone.[11] This requirement is based on the right of every state to establish conditions and procedures for entry into its airspace.[12] State aircraft on a course to penetrate United States airspace may be requested to identify themselves, and failing voluntary identification may be identified by intercept aircraft or otherwise

as appropriate. An air defense identification zone does not constitute a claim of sovereignty over airspace above the high seas. Such a zone is merely a reference point for initiation of identification procedures for aircraft on a course to penetrate national airspace. In addition to air defense identification zones, "warning zones" have been created from time to time.[13]

h. **Differences Between "Airspace" and "Outerspace."** Although the upper limit of airspace has not yet been authoritatively defined, international practice since the orbiting of Sputnik I in 1957, has established that it ends below the lowest altitude at which artificial satellites can be placed in orbit without free-falling to earth. Under both customary and treaty law, a right of passage concept for orbiting satellites and manned spacecraft has developed[14] subject to the outer space regime discussed in paragraph 2-3, this publication. As with the airspace above the high seas, prohibition on the exercise of sovereign controls in outer space does not prevent any sovereign either from acting in its self defense against hostile acts in that domain (such as the orbiting of weapons) or in using the domain for non-hostile acts of its own (such as surveillance).[15]

2-2. Control of Airspace:

a. **Sovereign State's Complete Control Over National Airspace.** It is a firmly established rule of international law that the sovereign over particular territory and territorial seas has absolute control over the superjacent airspace. This airspace is referred to as "national airspace." From this principle flow the following generally accepted corollaries:

(1) No aircraft may enter national airspace without prior permission, either specific or based upon prior general agreement;

(2) Each aircraft entering national airspace must identify itself;

(3) Each aircraft entering national airspace must obey all reasonable orders of the territorial state, including orders to land, to turn back or to fly a prescribed course (unless prevented by distress or *force majeure*);

(4) Control by the territorial sovereign of aircraft intruding national airspace cannot expose the craft or occupants to unreasonable dangers. Thus, in time of peace, intruding aircraft known to be harmless to the security or other appropriate interests of the territorial state may not be attacked even if they disobey orders to land. On the other hand, if the intruder's intentions are unknown and cannot reasonably be ascertained, after disregard of appropriate warnings, the intruder may be forced to land or attacked if it refuses to obey;

(5) Intruding aircraft may be given immunity from the consequences of intrusion if it is genuinely based on distress or *force majeure*. Because of the difficulty of determining if distress is genuine, such circumstances as response to requests for identification, location of the aircraft in relation to military or other installations requiring protection, character of the aircraft, its equipment, and crew are relevant to a determination of whether immunity should be accorded. If immunity is not properly claimed, the crew and aircraft of the intruder are subject to the civil and criminal law of the territory intruded.[16]

b. **International Agreements Affecting Control of National Airspace.** The basic international agreement affecting control of national airspace is the Convention on International Civil Aviation of 1944 (Chicago). It confirms the rule that absent permission aircraft of one state may not enter the national airspace of another. Permission for military aircraft to enter the airspace of another sovereign can never be presumed. If the right to enter is based upon the consent of the territorial sovereign, there must be some expression of agreement found.

Numerous bilateral agreements relating to overflight by military aircraft have been concluded by the United States. Usually, United States military overflight, landing and take off rights are included in military base rights or mutual defense agreements.[17] Article 43 of the United Nations Charter further

obligates members to assure "rights of passage" through national airspace for military aircraft engaged in actions undertaken pursuant to decisions of the Security Council.

2–3. Control of Outerspace:

a. **Historic Development of Different Regime.** Since access to outer space has been a recent phenomenon, traditional practices have not played as significant a role in the development of a legal regime as was the case with airspace. Shortly after the Soviet Union first orbited an artificial satellite in 1957, the United States adopted the National Aeronautics and Space Act of 1958 expressing this country's goal that activities in outer space should be devoted to peaceful purposes for the benefit of all mankind. However, Congress did direct that adequate provisions be made in space activities for the welfare and security of the United States. The DOD was given specific responsibility for space activities pertaining to or primarily associated with the development of weapons systems, military operations or defense of the United States including research and development. Resolutions of the United Nations General Assembly unanimously adopted in 1961 and 1963, were fully consistent with the goal of peaceful purposes and culminated in the Space Treaty of 1967. This treaty and others have established for outer space legal rules that have few terrestrial counterparts and which provide for general access, shared information and peaceful use.[18]

b. **International Agreements:**

(1) The Space Treaty. The principal international agreement applicable to outer space is the Space Treaty of 1967, to which over 65 states are parties including the two states most heavily involved, the United States and the Soviet Union. Under the treaty, all parties are assured freedom of, access to, and exploration of, all regions of outer space, the moon, and other celestial bodies; and freedom to use space and the celestial bodies on the basis of equality and in accordance with international law, including the right to conduct scientific investigations. The treaty prohibits the appropriation as national territory of outer space, the moon, or any celestial body and the orbiting, emplacement or testing of nuclear weapons or weapons of mass destruction. The establishment of military bases or the conduct of military maneuvers and interference with the peaceful use of space, the moon, or other celestial bodies by others is prohibited. Finally, the treaty imposes obligations on parties to render assistance to astronauts and to accept liability for damages from its space activities, to return space objects found on its territory and astronauts who land there in distress, and to avoid activities that would be harmful to the environment of the earth or of celestial bodies.

(2) Other treaties. The Nuclear Test Ban Treaty of 1963 bans the testing of nuclear weapons in outer space. Separate agreements on the rescue and return of astronauts and liability for objects launched into space elaborate some of the provisions of the Space Treaty on those subjects.[19] Work is continuing in the UN on more detailed agreements relating to registration, direct broadcasting from satellites and other issues.

2–4. Military Aircraft:

a. **Definition of "Aircraft."** The definitional annex to the Chicago Convention of 1944 defines "aircraft," as a machine that "can derive support in the atmosphere from the reactions of the air." It thus includes both heavier than air and lighter than air objects, but appears to exclude objects more properly viewed as projectiles which do not derive support from the reactions with the air, such as rockets. On the other hand, the definition does not require the existence of any crew; pilotless craft can be regarded as "aircraft." Domestic US legislation is more broadly drawn; the Federal Aviation Act defines "aircraft" as "any contrivance now known or hereafter invented, used, or designed for navigation of or flight in air." 49 U.S.C. §1301(5) (1970).

b. **Nationality of Aircraft.** Aircraft, like ships, have the nationality of their country of

registry. All civil aircraft registered in countries belonging to the International Civil Aviation Organization are required to be marked with symbols and designations of nationality.[20] State aircraft, including military aircraft, are also marked to indicate their nationality. The attribution of nationality to aircraft reflects the legal relationships between the state whose "flag" the aircraft carries and that craft. Thus, the flag state is responsible for the international good conduct of the aircraft when it operates beyond its national boundaries. The flag state exercises jurisdiction over the craft of the flag state and asserts on behalf of the aircraft the privileges and immunities to which it is entitled when in international airspace or in the airspace of other states. The flag state also has jurisdiction over the personnel who operate the craft.[21]

c. **Historic Problem in Defining "Military Aircraft."** The principal international conventions relating to aircraft distinguish between "state" aircraft and "civil" aircraft. Article 3(b) of the Chicago Convention of 1944 defines "state" aircraft as "aircraft used in military, customs and police services." The earliest efforts to characterize aircraft as "military" were based upon the character of the commander of the craft. If he was a uniformed member of the military services and had on board a certificate of military character, the aircraft would be considered military. In the wake of World War I, some effort was made to distinguish between civil and military aircraft on the basis of design. Later commentators pointed out the impossibility in distinguishing aircraft on the basis of design, and therefore use was the principal basis upon which aircraft were distinguished.[22]

d. **Present Status.** At the present time, no single aspect of ownership, use or control is recognized as decisive for distinguishing military from other types of aircraft. A comparison to the definition of warships in Article 8(2) of the Convention on the High Seas may be drawn:

> ". . . the term 'warship' means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears on the Navy List, and manned by a crew who are under regular naval discipline."

The operation of aircraft not owned by a government, but used for government purposes, including the military services, has raised a variety of questions concerning taxes, landing fees, and other issues dependent upon the legal status of the aircraft.[23]

Other forms of state aircraft, such as aircraft used in customs or police services, are not regarded as military aircraft. Accordingly, their markings should differ from those applied to military aircraft. In armed conflict they are assimilated to civil aircraft for purposes of determining belligerency rights and vulnerability to attack.[24]

e. **Medical Aircraft.** Military aircraft engaged exclusively in specified medical functions are subject to a separate legal regime under the 1949 Geneva Conventions.[25]

2-5. Access by Military Aircraft to Airspace During Peacetime:

a. **General Principles.** Military aircraft of any state are free to operate in international airspace without interference from any other state. However, military aircraft are not entitled to enter the national airspace of any other state without the consent of that state. Military aircraft entering the national airspace or landing on the territory of another sovereign with the latter's consent do so subject to the terms and conditions of that consent.[26] As a general proposition of international law, military aircraft present in the territory of a foreign country with its permission are exempt from search, seizure, or inspection by that country's authorities.[27] However, the crews of military aircraft may be subject to the jurisdictional provisions of applicable status of forces agreements.[28] Unless inconsistent with an applicable status of forces or other international agreement, the United States generally asserts immunity for its military aircraft and crews entering

the national airspace or landing on the territory of a foreign country with its consent.

b. **Nonapplicability of Chicago Convention to Military Aircraft and Other State Aircraft.** Article 3 of the 1944 Chicago Convention on International Civil Aviation provides:

> (a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.
>
> (b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.
>
> (c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.
>
> (d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

Thus, other than iterating the general principle of international law that state aircraft require the consent of another sovereign for entry into its airspace or landing on its territory, and establishing a duty for parties to the Convention to regulate their state aircraft in such a manner that they have "due regard for the safety of navigation of civil aircraft," the provisions of the Chicago Convention, as well as the standards, practices and procedures of the International Civil Aviation Organization (ICAO) established thereunder, do not apply to military aircraft. The United States Government has issued a detailed statement of its position on the effect of Article 3 on the relationship of the Chicago Convention to military and other state aircraft.[29]

c. **Intrusions Into National Airspace Based on Self-Defense:**

In the Cuban situation in 1962, the aerial surveillance of the island was also justified on the basis of the United States' inherent rights of self-defense, recognized in customary international law, the United Nations Charter, and participation in the collective self-defense efforts of the Organization of American States (OAS).

Self-defense is properly invoked only when a threat is apparent and immediate, and when the measures are proportional in means and degree to the threat perceived.[30] A general concern about surprise attack without evidence of immediacy, does not render transit through the national airspace for purpose of photographing the ground a proportional act.[31]

d. **Intrusions Into National Airspace Based on Mistake or Duress.** No settled international rule permits intrusions of military aircraft into national airspace on grounds of mistake, duress, distress or other *force majeure*. An intruding military aircraft must obey orders to leave or land and, failing a proper and prompt response, can be attacked and destroyed, even in hot pursuit in international airspace. Hot pursuit refers to immediate and continuous pursuit when engaged aircraft have not lost contact with each other for a period of time and not involving contact in the airspace of another sovereign state.[32]

The use of force against an intruding military aircraft, however, is subject to the general rule of international law that the employment of measures of force to protect territorial sovereignty is subject to the duty to "take into consideration the elementary obligations of humanity, and not to use a degree of force in excess of what is commensurate with the reality and the gravity of the threat . . ."[33]

e. **Peripheral Surveillance.** While a state has broad rights to prevent any physical intrusion of its national airspace by military aircraft of another state, the United States has maintained the view that a state has no right to prevent the use of international airspace for purposes of surveillance or observation of its airspace or territory. It is common practice for military aircraft to fly in the international airspace adjacent to the national airspace of other states for purposes of photographing and otherwise observing activities within the national airspace or territory.

2–6. Access to Airspace by Military Aircraft During Hostilities:

a. **General Principles of Access.** The general principles applicable to military aircraft in time of peace also apply during armed conflict. The rule as between parties to an armed conflict is stated in paragraph 4–2a. Consideration of the rights and obligations of neutrals is also particularly relevant during armed conflict. Each neutral state can, in self-defense, attack hostile aircraft and continue to prevent intrusion into its own airspace.

b. **Combat Zones.** Parties to a conflict are not prohibited from establishing areas of immediate air operations within which they pursue combat activities. Notice of the existence of such areas must be given. Such zones may exist over the territories and territorial waters of all states involved in given hostilities. All aircraft entering such zones, including the aircraft of neutral states, are subject to damages from military hostilities.[34] However, belligerents may not deny access to international airspace by neutrals and must permit transit through international airspace by neutral aircraft even if bound for enemy territory.

c. **Neutral Airspace.** The territory and, hence, the airspace above the territory of neutrals is inviolable.[35] This includes recognized territorial waters. Therefore, belligerent aircraft may not enter the airspace of a neutral, even in hot pursuit (unless the neutral airspace is a sanctuary for the adversary). Offenders may be repulsed with force by the neutral, and may be liable for damages caused the neutral as a result of the intrusion. The right of territorial integrity is coupled with a duty to avoid violations of that neutrality by parties to a conflict including the expansion of the conflict into their territory or the use of their territory as a base of operations. Should the neutral be unable or fail to prevent recurring violations by one belligerent, opposing belligerents are entitled to take appropriate measures in self defense. This may involve entry into the neutral territory (or airspace) to attack the adversary. The decision to do so is a political decision to be made at an appropriately high political level. Belligerent aircraft that are downed by a neutral, or which in distress or similar circumstances land on the territory of a neutral, are to be detained by the neutral until the cessation of hostilities and then returned to the belligerent from which they originated. Military personnel in such aircraft are to be similarly detained during the conflict and returned at the end of hostilities.[36]

d. **Military Aircraft Have Belligerent Status.** Aircraft are considered entities of combat in the same manner as ships. Thus, the aircraft, as such, has the status of a combatant aircraft and must, accordingly, be properly identified to enable other combatants and neutral forces to recognize its status. Only military aircraft may exercise such rights of belligerents as attacking and destroying military objectives or transporting troops in the adversary's national airspace or behind its lines.

Although civil aircraft may be used for support missions, such as transporting troops or supplies in international airspace or over friendly national airspace, such aircraft are not entitled to engage in direct combat operations unless they are designated as state aircraft. Civil aircraft must not be marked with the distinctive markings of military aircraft, nor may they be armed. Combat in the airspace and attacks on various categories of aircraft are discussed in chapter 4.

e. **Medical Aircraft.**[37] To enjoy effective immunity, medical aircraft must be clearly marked with the red cross or other comparable, internationally recognized symbols. To enjoy specific treaty immunity they must follow the flight paths, elevation and times specifically agreed upon by the belligerents. Medical aircraft cannot retain status as protected medical aircraft during any flight in which they engage in any activity other than the transportation of patients and medical personnel or medical equipment and supplies. Use of the red cross during such a mission would be perfidious and unlawful. The medical and operational personnel of medical aircraft are also entitled to special protections under the Geneva Conventions.

FOOTNOTES

[1] The International Air Navigation Conference of Paris was convened in 1910 to consider French objections to German balloons carrying German military personnel crossing into French airspace. The rule of territoriality of airspace there asserted was then incorporated into the first multilateral agreement on the subject, the Paris Convention of 1919, and is the very first article of the present multinational Convention applicable to the regulation of civil aviation, the Chicago Convention of 1944. See Cooper, "The International Air Navigation Conference, Paris 1910," 19 *J. Air L. & Com.* 127, 128–9 (1952); Convention Relating to the Regulation of Aerial Navigation (Paris 1919), Article 1, reprinted in English in Cooper, *The Right to Fly* 291 (1947); Article 1, Convention on International Civil Aviation (Chicago 1944), 61 Stat 1180; TIAS 1591; 3 Bevans 944 15 UNTS 295; AFP 110–20, at 5–2 (1947) [hereafter Chicago Convention].

[2] The existence of atmosphere is relevant, since the Chicago Convention defines "aircraft" as a "machine that can derive support in the atmosphere from the reactions of the air." Annex 7. This includes pilotless craft. Article 8. The altitude at which the component atoms of the air begin to dissociate, the Von Karman line, is approximately 50 miles above the earth's surface. The altitude above which aerodynamic forces on spacecraft for orbit or reentry can usually be disregarded is about 62 miles. United States domestic law defines aircraft as a "contrivance . . . used or designed for navigation of or flight in air." 49 U.S.C. § 1301(5) (1970). For present purposes the terms "atmosphere" and "air" can be considered synonymous.

[3] See, *e.g.*, Federal Aviation Act of 1958, § 103(c), 49 U.S.C. § 1303(c) (1970).

[4] Article 14, 1958 Convention on the Territorial Sea and the Contiguous Zone, 15 UST 1606; TIAS 5639; 516 UNTS 205; AFP 110–20, at 7–2 (1964). As to passage for space entry, see Christol, *infra* note 14. The Space Treaty does recognize a right of innocent passage in case of distress by its provision for emergency landings and the commitment of signatories both to assist astronants in such circumstances and to return space vehicles so landing to their state of registry. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Art V, 18 UST 2411; TIAS 6347; 610 UNTS 205; AFP 110–20, at 6–2 (1967) [hereafter Space Treaty]; Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched Into Outer Space, Arts 1 and 2, 19 UST 7570; TIAS 6599; 672 UNTS 119; AFP 110–20, at 6–6 (1968).

[5] Convention on the High Seas of April 29, 1958, 13 UST 2312; TIAS 5200; 450 UNTS 82; AFP 110–20, at 7–10 (1962).

[6] The United States does not recognize claims to territorial seas in excess of 3 miles in breadth. As a condition for agreement in a new Law of the Sea Convention that the territorial sea may extend up to 12 miles, the United States insists that the right of unimpeded transit through and over international straits be maintained. See also United States v. California, 332 U.S. 19, 32–34 (1947).

[7] Various claims to territorial seas in excess of three miles have been advanced and protested, some up to 200 miles. The United Nations has studied the issue extensively, and several sessions of a Diplomatic Conference have met and may soon conclude agreement on the issue of the proper breadth of the territorial sea. 4 Whiteman, *Digest of International Law* 19–35 (1965) [hereafter cited as Whiteman]; Department of State, International Boundary Study, Series A, *Limits in the Seas* (March 1, 1973).

[8] There are probably no remaining uninhabited and unclaimed land areas in the world where airspace would be subject to the same freedom of overflight as over the high seas. Pursuant to the Antarctic Treaty, however, each party is assured the right to fly over Antarctica for aerial observation. On the other hand, all measures of a military nature are prohibited, although military personnel and equipment may be used for "peaceful purposes." See Article VII, Antarctic Treaty, 12 UST 794; TIAS 4780; 402 UNTS 71; AFP 110–20, at 11–25 (1961).

[9] 15 UST 1606; TIAS 5639; 516 UNTS 205; AFP 110–20, at 7–2 (1964).

[10] See discussion and authorities cited in notes 6 and 7 *supra*.

[11] 14 CFR § 99.1(a)–99.49 (1976). Although identification is not required of state aircraft, including military aircraft, the USAF requires its aircraft, and encourages foreign military aircraft, to adhere to the identification procedures of the US ADIZs and has recognized the propriety of the establishment of ADIZs by other governments with which USAF aircraft may comply if the identification procedures are comparable to the standards applied by the United States. See paragraph 5, AFR 60–22 (17 April 70).

[12] Article 11 of the Chicago Convention expressly recognizes the right of a state to establish laws and regulations relating to the admission to or departure from its territory of aircraft engaged in international air navigation.

[13] From time to time, and for temporary purposes and times, states have declared certain areas of international airspace as "warning zones." Exam-

ples include where practice maneuvers are under way, or where, prior to the Test Ban Treaty, nuclear weapons were tested. Appropriate international "Notices to Airmen" (NOTAM's) must be issued, which, under USAF regulation applicable to activities in international airspace over the high seas, must keep the airspace and time involved to a minimum. Paragraph 7, AFR 60–28 (23 Oct 62). When a state identifies a hazardous area above the high seas, however, it does not purport to have authority to prohibit aircraft of other states from flying through that airspace or to punish the owners or operators of such aircraft.

[14] Space Treaty, *supra* note 4; Christol, " 'Innocent Passage' in the International law of Outer Space," 7 *AF JAG L. Rev.*, No. 5, 22 (1965); Fawcett, *International Law and the Uses of Outer Space* 22 (1968); and authorities in 2 Whiteman 300 (1963).

[15] DeSaussure and Reed, "Self Defense—A Right in Outer Space," 7 *AF JAG L. Rev.* No. 5, 38 (1965).

[16] A right of intrusion in the exercise of self-defense may also be recognized. See Fedele, "Overflight By Military Aircraft in Time of Peace," 9 *AF JAG L. Rev.* No. 5, 8, 23 (1967).

[17] See, *e.g.*, bilateral air rights agreement with Spain in Procedural Annex VII to the Agreement in Implementation of Chapter VIII of the Agreement of Friendship and Cooperation between the United States and Spain, 21 UST 2259; TIAS 6977; AFP 10–20, at 4–48, 4–64 (1970); with the Netherlands, 13 UST 488; TIAS 5013 (1962); with Japan in Article V, of the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States and Japan, 11 UST 1652; TIAS 4510; 373 UNTS 248; AFP 110–20, at 4–19, 4–20 (1960).

[18] For a comprehensive review, see Reed, "The Outer Space Treaty; Freedoms—Prohibitions—Duties," 9 *AF JAG L. Rev.* No. 5, 26 (1967).

[19] The generalized obligations of the Space Treaty have been amplified by the specific Assistance Treaty, *supra* note 4, and the Convention on the International Liability for Damage Caused by Space Objects, 24 UST 2389; TIAS 7762; AFP 110–20, at 6–9 (1973). Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Art I(1)(a), 14 UST 1313; TIAS 5433; 480 UNTS 43; AFP 110–20, at 8–3 (1963).

[20] Arts. 17, 20, Chicago Convention.

[21] Fedele, *supra* note 16, at 13.

[22] *Ibid.*

[23] See, *e.g.*, Art VIII(1) of the Agreement in Implementation of Chapter VIII of the Agreement of Friendship and Cooperation Between the United States and Spain, 21 UST 2259; TIAS 6977; AFP 110–20, at 4–48 (1970); Arts. X(5), XV(3)(a), Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, 17 UST 1677; TIAS 6127 (1967), amalgamate for purposes of access and exit rights, freedom from landing charges and the like, "United States . . . aircraft operated by, for or under the control of the United States for official purposes." Upon certification from the United States authorities, also exempted are aircraft of,

> Corporations organized under the laws of the United States . . . present in the Republic of Korea solely for the purpose of executing contracts with the United States for the benefit of the United States armed forces.

Similar provisions are found in other status of forces and base rights agreements to which the United States is a party. The main purpose of such provisions is to secure for DOD charter aircraft the same rights of access, exit and freedom from landing fees and similar charges as are enjoyed by United States military aircraft under the particular agreement. The granting of such rights, however, does not mean that DOD charter aircraft thereby qualify as military aircraft or any other form of state aircraft. However, as the US Navy Law of Naval Warfare Manual states, "military aircraft" are only those operated by the military forces, bearing military markings, commanded by a member of the military forces and manned by a crew subject to military discipline. US Navy, NWIP 10–2, *Law of Naval Warfare* § 500(d) (1955), reprinted in 10 Whiteman 610 (1968).

[24] US Navy, NWIP 10–2, *Law of Naval Warfare* § 500, nn 3–4 (1955), reprinted in 10 Whiteman 614 (1968).

[25] Article 36, GWS; Article 39–40, GWS–SEA; Article 22, GC. See also paragraph 5(a), AFR 160–4, (10 September 1971) and discussion paragraph 2–6e, this publication.

[26] Authorities, *supra* note 17.

[27] 9 Whiteman 434 (1968).

[28] See, *e.g.*, NATO Status of Forces Agreement, Art. VII(3)(a)(ii); 4 UST 1792; TIAS 2846; 199 UNTS 67; AFP 110–20, at 4–2 (1951). Agreement Regarding Facilities and Areas and The Status of United States Armed Forces in Japan with Agreed Minutes, 11 UST 1652; TIAS 4510; 373 UNTS 248; AFP 110–20, at 4–19 (1960), Art XVII(3)(a)(ii) and Agreed Minutes thereto. See AFP 110–3, Air Force Civil Law Pamphlet, for discussion of applicable SOFA principles and rules.

[29] The position of the United States Government on the effect of article 3 on the relationship of the Chicago Convention to state aircraft was stated as follows in 1964:

> The Chicago Convention expressly excludes state aircraft from its scope and thus from the scope of ICAO responsibility. The United States intends that its state aircraft will follow the ICAO procedures set forth in Annex 2 to the greatest extent practicable; however, the

United States considers that state aircraft of any nation are subject to control and regulation exclusively by that nation (unless operating within airspace over which another nation has sovereignty). With respect to State aircraft, contracting States need not undertake any commitment, and the United States does not undertake any commitment, to other nations as to the rules and regulations which any specific state aircraft or class of state aircraft will follow, except when issuing regulations for their state aircraft, that 'they will have due regard for the safety of navigation of civil aircraft.' (Article 3(d), Chicago Convention.)

In the application of these principles to all areas of civil/military coordination, . . . it is the position of the United States that when aircraft used in the military services of contracting States, are operating in international airspace in which another State is responsible, under ICAO arrangements, for the provision of civil air traffic sevices, States operating such aircraft should in their discretion, and the United States will in its discretion, advise the other States of the procedures being utilized by such aircraft. The State providing air traffic services can thus better judge what information concerning aviation activities in the area should be given to the authorities operating such state aircraft and what information or air traffic clearances should be given to civil aircraft in the vicinity. While contracting States operating such state aircraft should consider any information so received to determine whether, and the extent to which, they should utilize the information in controlling these aircraft activities, no State is required to obtain the concurrence of any other State when issuing rules, regulations or operating instructions for its state aircraft operating in international airspace. . . .

Because the Chicago Convention does not apply to state aircraft, contracting States are under no obligation to give to ICAO the notification of differences contemplated by Article 38 of the Convention when state aircraft are not complying with international Standards established by ICAO; nor is there any requirement to notify ICAO of noncompliance by state aircraft with international Recommended Practices and Procedures.

Department of State airgram CA–8085, Feb 13, 1964, quoting U.S. Inter-Agency Group on International Aviation (IGIA) Doc. 88/1/1C, MS, Department of State, file POL 31 US, reprinted 9 Whiteman 430–431.

DOD Directive 4540.1, Operating Procedures for United States Military Aircraft Over the High Seas, June 23, 1962, sets forth DOD policy as to when US military aircraft should voluntarily follow the ICAO procedures.

[30] The self-defense doctrine, and the principal international incident in which it was developed—the case of the Caroline—is discussed in DeSaussure and Reed, "Self Defense—A Right In Outer Space," 7 *AF JAG L. Rev.* No. 5, at 38, 40–41 (1965). See also 2 Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* 28–36 (1968).

[31] Fedele, *supra* note 16, at 24–25.

[32] *Ibid,* at 17 *et seq.* Hot pursuit of ships by aircraft in international airspace over the high seas is expressly covered by Art 23(5) of the Convention on the High Seas, 13 UST 2312; TIAS 5200; 450 UNTS 582; AFP 110–20, at 7–10 (1962). Hot pursuit rights cease as soon as the ship pursued enters the territorial sea of its own country or of a third state. Art 23(2). Analogous principles would seem applicable to pursuit by aircraft of other aircraft. Poulantzas, *The Right of Hot Pursuit in International Law* 329–336 (1969).

[33] 9 Whiteman 328.

[34] Such rights are analogous to rights of belligerents to establish immediate areas of naval operations on the high seas. See Tucker, "The Law of War and Neutrality At Sea," US Naval War College, 1955 *International Law Studies* 300–01 (1957).

[35] Arts 1, 2, Hague V; US Navy, NWIP 10–2, Law of Naval Warfare, § 444a (1955), reprinted in 11 Whiteman 203–04. See also additional authorities, *supra* chapter 4, footnote 1, this publication.

[36] See Hague V; authorities excerpted in 11 Whiteman 174–211; and Article 4B(2), GPW.

[37] See *supra* note 25. Carrying purely personal effects of nonmilitary significance belonging to crew, medical personnel and patients does not contravene the requirements of "exclusively engaged." Attacks on medical aircraft are discussed in paragraph 4–2, this publiction.

Chapter 3
COMBATANTS, NONCOMBATANTS, AND CIVILIANS

3-1. Introduction. This chapter defines, compares and differentiates the status of combatants, noncombatants and civilians. The requirements necessary for entitlement as a combatant are enumerated and the effects of unlawful combatant status discussed. The various categories of noncombatants, including civilians, are explained with an examination of the rights and obligations of each category.

3-2. Combatants:

a. **Explained.**[1] A combatant is a person who engages in hostile acts in an armed conflict on behalf of a Party to the conflict. A lawful combatant is one authorized by competent authority of a Party to engage directly in armed conflict. He must conform to the standards established under international law for combatants. Authority of a Party to a conflict may be expressed in various forms such as commission, emolument, attestation, warrant, order, conscription or enlistment. The combatant, thus invested with authority, must be recognizable as such. Just as the soldier is required in armed conflict on land to wear a recognizable uniform or sign, the military aircraft in combat must bear clear and visible markings which indicate its military status as an entity of combat. Unless specifically protected, it is a proper target regardless of the combatant status of individuals aboard. Their status is relevant when they debark from the plane. At that time, their status depends upon other factors such as their authorization, individual activities and mode of dress rather than markings or activities of the aircraft.[2]

b. **Categories of Lawful Combatants:**

(1) **Regular Forces.**[3] Members of regular armed forces are lawful combatants whether they are volunteers, conscripts, nationals of the state, foreigners (including neutrals who have joined the armed forces of a Party to a conflict), men or women. Also recognized as lawful combatants are members of the regular armed forces who profess allegiance to a government or authority not recognized by the other Party to the conflict. Thus, during World War II free French followers of General Charles DeGaulle or armed forces of puppet enemy governments were equally entitled to be recognized as combatants.

(2) **Militia in Regular Forces.** The greater part of the armed forces of a Party to a conflict traditionally consisted of its regular military forces. However,

> What kinds of forces constitute a regular army and a regular navy (as well as a regular air force) is not for International Law to determine, but is a matter of municipal law exclusively. Thus, whether or not so-called militia and volunteer corps belong to armies rests entirely with the municipal law of the belligerents; and there are several states whose armies consist of militia and volunteer corps exclusively, no standing army being provided for.[4]

Militia or volunteer corps may thus form part of the armed forces, as provided for in both the Hague Regulations and the 1949 Geneva Conventions.[5]

(3) **Irregular Forces.** Two kinds of irregular forces, both entitled to PW status, may take part directly in hostilities: The first group are those members of militias or volunteer corps forming part of the armed forces of a Party to the conflict (discussed above). A second type of irregular force[6] is members of other militia or other volunteer corps, including members of organized resistance movements who, belonging to a Party to the conflict, meet certain other requirements customarily required of all combatants, including:

(a) being commanded by a person responsible for his subordinates,

(b) having a fixed distinctive sign recognizable at a distance,

(c) carrying arms openly, and

(d) conducting their operations in accordance with the law of armed conflict.

These requirements were adopted because modern armed conflict frequently involves guerrilla warfare and counterinsurgency techniques. The difficulties of guerrilla warfare have long been recognized.[7] During World War II confusion arose as to the status of organized resistance movements and other irregular forces. The 1949 Geneva Conventions attempted to resolve this controversy by recognizing the PW status of irregular forces meeting certain requirements. Recognition of combatants as lawful belligerents under the Geneva Conventions depends upon certain objective criteria being met *and* the existence of an international armed conflict. The causes for which combatants fight—or indeed the causes of the conflict—do *not* condition the equal application of the law of armed conflict or the equal obligation to follow the law.[7a]

(4) **Explanation of Conditions.**[8]

(a) **Command.** The requirement that combatants be commanded by a person responsible for his subordinates requires the person in command to exercise effective control and discipline. Discipline is required to ensure compliance with the law of armed conflict. A commander may derive his authority from the state (*e.g.*, a commission), from election by his troops, or from acknowledgement by his subordinate "commander." The force must belong to a Party to the conflict whatever the source of authority, although state recognition is not essential.

(b) **Distinctive Sign.** This requirement, which may be satisfied by a uniform, insures that combatants are clearly distinguishable from civilians to enhance protection of civilians. Less than a complete uniform will suffice provided it serves to distinguish clearly combatants from civilians. The uniform or sign should be recognizable at the same distance that a civilian can be identified although no specific distance is set forth in the Geneva Conventions.

(c) **Carry Arms Openly.** Irregular forces do not satisfy this requirement by carrying arms concealed about the person or if the individuals hide their weapons on the approach of the enemy.

(d) **Comply With Law.** There is a clear obligation on all Parties to a conflict to instruct their armed forces and combatants in the law of armed conflict and to insure, through discipline, that the law is followed.[9] Concerning irregular forces,

> [It is especially necessary that they should be] warned against employment of treachery, denial of quarter, maltreatment of prisoners, wounded, and dead, improper conduct towards flags of truce, pillage, and unnecessary violence and destruction.[10]

(e) **Belong to a Party to the Conflict.** The 1949 Geneva Conventions exclude a force acting on its own initiative not belonging to a Party in a conflict to which the Conventions apply. Express authorization by the government of a Party is not required.[11]

(f) **Organized Resistance Movements.** A recognized international legal scholar noted:

> By their very nature, guerrilla forces must operate in small bands and act on their own initiative to a much greater degree than regular forces, but to obtain the protection afforded by the present provision [in the 1949 GPW] it would appear that they should have a central organization and be subject to the discipline and directives of that central command. Disorderly bands operating on their own unrestricted initiative and responsibility are seemingly excluded from the protection of this provision, as are individual guerrillas acting on their own responsibility.[12]

(5) **Levée en masse.**[13] A *levée en masse* is a spontaneous springing to arms by the

population in order to resist invading armed forces. This uprising is not prohibited by the law of armed conflict. "[T]he first duty of a citizen is to defend his country, and provided he does so loyally he should not be treated as a marauder or criminal."[14] A *levée en masse* need not be organized, under command, or wear a distinctive sign. However, members must carry arms openly and comply with the law of armed conflict. To be a lawful *levée en masse,* it must be a spontaneous response by inhabitants of a territory not under occupation to an invading armed force. Spontaneity requires that there be no time to organize into regular armed forces. Members of a *levée en masse* generally have the rights and incur the obligations and liabilities of other lawful combatants.

3-3. Unlawful Combatants:

a. **Explained.**[15] An unlawful combatant is an individual who is not authorized to take a direct part in hostilities but does. The term is frequently used also to refer to otherwise privileged combatants who do not comply with requirements as to mode of dress, or noncombatants in the armed forces who improperly use their protected status as a shield to engage in hostilities. "Unlawful combatants" is a term used to describe only their lack of standing to engage in hostilities, not whether a violation of the law of armed conflict occurred or criminal responsibility accrued.

b. **Effect during conflict.**[16] Unlawful combatants are a proper object of attack while engaging as combatants and thus may be killed or wounded directly in conflict. If captured, they may be tried and punished, subject to the relevant protective guarantees of the 1949 GC, for directly taking part in hostilities when not entitled to do so.

c. **Entitlement to PW status.**

(1) **Treaty provision.**

> The present Convention shall apply to the persons referred to in Article 4 [GPW] from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[17]

(2) **Discussion.**[18] Upon capture any person, who does not appear to be entitled to PW status, but who had committed a belligerent act is required to be treated as a PW until his status is properly determined. If found not entitled to PW status, he may not be executed, imprisoned or otherwise penalized without further judicial proceedings to determine what acts he has committed and what penalty should be imposed. If entitled to PW status, his condition is governed by applicable provisions of the GPW Convention.

3-4. Noncombatants:

a. **Term Explained.**[19] The term noncombatants includes a wide variety of disparate persons. For example, it has been used to describe civilians (who are not otherwise lawful or unlawful combatants), combatants who are *hors de combat* (PWs and wounded and sick), members of the armed forces enjoying a special status (chaplains, medics), and civilians accompanying the armed forces. The law of armed conflict, while adopting different guarantees applicable to these persons and different obligations and duties incumbent upon them, rests on the basic distinction between combatants and noncombatants as to who are proper objects of attack as such. Clearly, noncombatants, in all categories, share the risks and rigors of war. Civilians (aside from those referenced in Article 4A, GPW) are discussed separately since they are the largest category of noncombatants.

b. **Civilians Accompanying the Armed Forces.**[20] One category of persons who are not combatants in the sense that they oppose an adversary with arms in hand, but who are entitled to PW status, are civilian members of military aircraft crews, supply

contractor personnel, technical representatives of government contractors, war correspondents, and members of labor units or civilian services responsible for the welfare of armed forces. They must receive authorization from the armed forces which they accompany and be provided with an appropriate identity card. Although noncombatants when not taking a direct part in hostilities, they are assimilated to combatants in that they are subject to capture and treatment as PWs.

c. **Noncombatant Military.** These members of the armed forces are classified as noncombatants because of their status as medical personnel, chaplains, or personnel employed in specific medical functions. In addition to medical facilities and transports, they have specific protections under the 1949 Geneva Conventions. If they directly engage in hostilities themselves under the cloak of their protectd medical function, they commit serious violations of the law of armed conflict. They may not be made prisoners of war, but may be retained to perform work within their specialty. For effective protection medical personnel may wear, on the left arm, a water resistant armlet bearing the distinctive emblem (red cross), issued and stamped by military authority, and possess a special identity card bearing the distinctive emblem.

d. **Hors de Combat Personnel.**[22] Combatant personnel who have been placed out of combat by sickness, wounds, or other causes including confinement as prisoners of war are one of the most important categories of persons, aside from civilians, protected under both customary and very specific treaty law during armed conflict. The principles and rules protecting such persons are among those most crucial to the law of armed conflict and its effective observance. Their protected status requires them not to abuse that status by engaging in acts of perfidy or by using their protection as a cloak of immunity to engage in hostilities. One of the important principles relating to wounded and sick requires medical care and humane treatment to friend and foe without distinction founded on sex, race, nationality, religion, political opinions or similar criteria.

3–5. Civilians.[23] Civilians are all persons other than those mentioned as combatants in Article 4(A)(1), (2), (3) and (6), Geneva Convention for the Protection of Prisoners of War (GPW). Civilians are generally protected under the law of armed conflict in various ways as discussed later and are specifically protected under the 1949 Geneva Convention Relative to the Protection of Civilians In Time of War (GC). Certain civilians are also protected under the 1949 GPW. Since World War I, several trends have tended to blur the distinctions between combatants and noncombatants including civilians, resulting in less effective protection. These include: (a) growth of the number and kind of combatants, including irregular armed forces, guerrillas, and organized resistance movements; (b) growth of noncombatants engaged in activities directly supporting the war effort including armament production; (c) the rise of totalitarian states such as Nazi Germany; (d) the development of new weapons systems including aircraft and missiles which extend the struggle beyond the immediate battlefield; and (e) the failure of states engaged in conflicts to separate military and civilian activities to enhance effective protection of civilians. However, the distinctions remain vital—and were strongly reinforced by the 1949 Geneva Conventions and subsequent international developments. They are undergoing continual reinforcement. It is incumbent on *all* parties to a conflict to reinforce the distinctions.

FOOTNOTES

[1] The term "belligerents" is used frequently to describe both the Parties to a conflict and the actual combatants therein. The distinction between combatants and noncombatants is drawn, for example, in Hague IV and HR; Articles 13 and 14, GWS; Articles 13 and 16, GWS-SEA; Article 4, GPW; and Article 4, GC.

[2] Uniform requirements—see chapter 7. Marking requirements of aircraft, see chapter 7.

[3] Articles 4A(1) and (3), GPW; Greenspan, *Modern Law of Land Warfare* 58 (1959) [herein Greenspan]; McDougal and Feliciano, *Law and Minimum World Public Order* 544 (1961) [herein McDougal].

[4] 2 *Oppenheim's International Law* 255 (Lauterpacht ed. 1952). Municipal law is the domestic or internal law of a nation. Switzerland's regular army is composed almost entirely of militia corps.

[5] Article 1, HR; Article 13(1), GWS; Article 13(1), GWS-SEA; Article 4A(1), GPW.

[6] Article 4A(2), GPW; Article 1, HR; Article 13(2), GWS; and Article 13(2), GWS-SEA. Although disputed, in the view of the US and others, these provisions also determine who is a lawful combatant and entitled to the protections thereof. It has been asserted that irregular combatants who do not meet these requirements are "war criminals" and equally strongly asserted that they are simply unprivileged belligerents. It is clear that they are not entitled to PW status and are subject to prosecution, subject to relevant protective guarantees, for engaging in hostilities. They may indeed be guilty of grave breaches of the 1949 Geneva Conventions and bear the responsibility therefore. For discussion, see Paust, "My Lai and Vietnam; Norms, Myths and Leader Responsibility," 57 *Mil. L. Rev.* 99 (1972) (there are two myths concerning guerrilla warfare that must be exposed: one that it is new and second that the guerrilla need not comply with the law); Baxter, "So Called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs," 1951 *British Y. B. Int'l. L.* 322 (1952); McDougal 554; 2 Oppenheim, *supra* note 4, at 257. Chapter 9, this publication, discusses other unprivileged participants.

[7] The problems of guerrilla warfare and unlawful combatants (or unprivileged belligerency), as well as offenses committed aside from not being in uniform are old problems. See authorities, *supra* note 6, and Cowles, "Universality of Jurisdiction over War Crimes," 33 *Calif. L. Rev.* 177 (1945); Garner, "General Order No. 100 Revisited," 27 *Mil. L. Rev.* 1, at 17 (1965).

[7a] See authorities and discussion, *supra* paragraph 1-5c. Generally, terrorist groups which may operate or attempt to function in countries which are not a Party to an armed conflict do not raise issues under the law of armed conflict. This is true for several reasons. First, there is no relevant *international armed conflict* (see paragraphs 1-5 and 1-5d.), and second, such groups do not meet the objective requirements required for PW status.

[8] Although expressly required of irregular armed forces, they are obviously required of regular armed forces as well. Requirements (a), (b), (c) and (d) were also contained in Article 1, HR. They are discussed in US Army, FM 27-10, *Law of Land Warfare* 27-28 (1956) [herein FM 27-10]. See also Greenspan 59; 2 Oppenheim, *supra* note 4, at 257; British Manual of Military Law, Part III (*The Law of Land Warfare*), at para 94 (1958); McDougal 85. The Geneva Convention standards expressed are applicable to combatants in all environments. The French text, "appartenant à . . . une Partie au conflit," suggests a looser connection than might be inferred from "belong."

[9] Article 1, Hague IV; Article 47, GWS; Article 48, GWS-SEA; Article 127, GPW; Article 144, GC.

[10] British Manual, *supra* note 8, paragraph 95; FM 27-10, at 28.

[11] See authorities *supra* notes 6 and 8.

[12] Greenspan 60.

[13] Article 4A(6), GPW; Article 13(6), GWS; Article 13(6), GWS-SEA; Article 2, HR. For discussion, see Greenspan 62; 2 Oppenheim, *supra* note 4, at 257; FM 27-10, at 28; McDougal 546; Stone, *Legal Controls of International Conflict* 550 (1973).

[14] British Manual, *supra* note 8, at paragraph 30 (chapter 14).

[15] Authorities *supra* notes 6 and 8. "Unlawful combatants" describes persons who do not meet the legal requirements of combatant status (Article 4A(1), (2), (3), (6), GPW). The question of whether there is a violation of the law of armed conflict, and criminal responsibility for such violation are *separate* questions apart from the issue of nonprivileged status under the law of armed conflict. Chapters 7, 8, and 9 are all relevant, as are chapters 13 and 14. For example, the use of spies including military personnel out of uniform is clearly not a violation of the law of armed conflict although those captured may be prosecuted under state law because they are unprivileged, *i.e.*, not entitled to PW status.

When an airman is downed, he is entitled not to be attacked by irregular combatants (civilians), although they may be authorized to use minimum force to capture him. If attacked, he is entitled to defend himself. If the downed airman attacks the civilians, they are entitled to defend themselves. Spaight, *Air Power and War Rights* 231 (1947).

[16] On rules applicable to aerial bombardment, see

chapter 5. Authority to detain civilians is in Article 5, GC, discussed chapter 14, this publication.

[17] Article 5, GPW.

[18] For discussion, see FM 27–10, at 30–31 and chapters 13 and 14, this publication. A person found by a tribunal under Article 5, GPW, not to be entitled to PW status is not precluded from raising the issue of his status before the court-martial or military tribunal considering his case.

[19] The term noncombatants has been generally avoided elsewhere in this publication because of the different legal framework applicable to different categories of noncombatants. For example, GWS and GWS–SEA protect wounded, sick and shipwrecked as well as facilities and personnel to care for them. GPW protects prisoners; numerous sources of law including 1949 GC protect civilians.

[20] GPW, Article 4A(4). For discussion, see McDougal 545. On protection of journalists, see recent UN practice.

[21] Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded and sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances. (Art 24, GWS).

Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands. (Art 25, GWS).

Articles 26 and 27 extend protections to the staff of National Red Cross Societies, other Voluntary Aid Societies including recognized societies of neutral countries. See also chapter 12, this publication, which discusses GWS and GWS–SEA. Chapter 8 discusses misuse of the medical function. Note that some other categories of military personnel such as veterinarians and even clerks are sometimes termed noncombatants although they enjoy no specific protected status.

[22] For example:

. . . it is especially forbidden—To kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion. (Article 23c, HR). Members of the armed forces and other persons . . . [Article 4, GPW], who are wounded or sick, shall be respected and protected in all circumstances. (Article 12(1), GWS).

Members of the armed forces and other persons . . . [Article 4, GPW], who are at sea and who are wounded, sick *or shipwrecked,* shall be respected and protected in all circumstances, it being understood that the term "shipwreck" means shipwreck from any cause and includes forced landings at sea *by or from aircraft.* (Art 12, GWS–SEA) (emphasis added).

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. (Art 12(1), GPW).

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health . . . is prohibited, and will be regarded as a serious breach . . . (Art 13(1), GPW).

Likewise prisoners must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. (Art 13(2), GPW).

The obligations toward wounded and sick are discussed in chapter 12; PWs in chapter 13. For application of the *hors de combat* principle in the air to air, and air to sea environment, see chapter 4; for aerial bombardment, see chapter 5. The *hors de combat* principle also applies to armed conflict not of an international character. (Article 3, common to the 1949 Geneva Conventions, discussed chapter 11, this publication and Bond, *Rules of Riot* (1974)).

[23] For additional discussion, see chapters 5 and 11. For historical factors see Bailey, *Prohibitions and Restraints in War* (1972); British Manual, *supra* note 8, at 30; McDougal 530; Oppenheim, *supra* note 4, at 207; Stone, *supra* note 13, at 627–631; 2 Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* 110, 139 (1968); 10 Whiteman, *Digest of International Law* 134–135 (1968); Gutteridge, "The Geneva Conventions of 1949," 26 *Brit. Y. B. Int'l. L.* 319 (1949); Nurich, "The Distinction Between Combatant and Noncombatant in the Law of War," 39 *Am. J. Int'l. L.* 680 (1945). On recent developments, see Dinstein, "Another Step in Codifying The Laws of War," and Schwarzenberger, "The Law of Armed Conflict," 1974 *Yearbook of World Affairs* at 278, 293 (1974); Baxter, "Perspective: the Evolving Laws of Armed Conflicts," 60 *Mil. L. Rev.* 99 (1973); Draper, "Human Rights and The Law of War," 12 *Va. J. Int'l. L.* 326 (1972); Hewitt, "Respect for Human Rights in Armed Conflict," 4 *N.Y.U. J. Int'l. L. and Politics* 41 (1971).

Chapter 4
CONFLICT IN THE AIR AND AT SEA

4-1. Introduction:

a. **Scope of Chapter.** This chapter covers the law of armed conflict affecting air to air, and naval combat situations. Topics discussed include attacks against enemy missiles or military aircraft, civil aircraft, disabled aircraft, parachutists and downed airmen. The legal rules and principles governing sea warfare, including relevant state practice, are outlined. Aerial bombardment against land targets is discussed in chapter 5.

b. **When Occur.** During periods of international armed conflict, combat in the airspace may occur during a wide variety of military operations including counterair, close air support, air interdiction, air reconnaissance, airlift, antinaval, or strategic attack. Attacks against targets at sea may occur in support of naval attacks, in defense of vital shipping lanes, or in imposition of or defense against blockades.

4-2. Military Aircraft:

a. **Basic Rule.** During armed conflict, enemy military aircraft or missiles may be attacked and destroyed in airspace anywhere outside of neutral jurisdiction. Enemy military aircraft may be captured anywhere outside of neutral jurisdiction. Prize procedure is not used for such captured aircraft because their ownership immediately passes to the captor's government by virtue of capture.

b. **Discussion.**[1] The extent and manner in which such attacks are, in fact, undertaken depends upon a wide variety of military, political and geographical factors including the level of intensity of the conflict. For example, an adversary may choose not to attack military aircraft which only deliver supplies in a limited conflict situation although such aircraft are not internationally protected. The status of personnel aboard such aircraft is not relevant unless it has received special protection.[2] The requirement to respect neutral jurisdiction has been discussed previously.[3]

c. **Mode of Attack.**[4] Attack against aircraft may be made by any method or weapon, not otherwise prohibited, including air to air or ground to air missiles, and explosive or incendiary projectiles. The use of incendiary projectiles, limited in some uses on land, was expressly recognized as not prohibited against aircraft by the 1923 Draft Hague Rules of Air Warfare.[5] Ramming techniques including the use of suicide squadrons are also not prohibited.[6]

d. **Surrender/Aircraft in Distress.** The law of armed conflict clearly forbids the killing or wounding of an enemy who, in good faith, surrenders or is otherwise *hors de combat*.[7] Surrenders in air combat are not generally offered. If surrender is offered, usually no way exists to enforce the surrender. However, surrenders have been made on occasion.[8] If surrender is offered in good faith so that circumstances do not preclude enforcement, then surrender must be respected. Although relatively rare, surrenders by defecting enemy troops of military aircraft offer valuable intelligence and psychological opportunities, and should not be discouraged.

Disabled enemy aircraft in air combat are frequently pursued to destruction because of the impossibility in verifying its true status and inability to enforce surrender.[9] Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. If an aircraft in distress is clearly *hors de combat* (out of conflict), from the information known to the attacking force at the time, then its destruction offers no military advantage, and the attack should be broken off to permit possible evacuation by crew or passengers. If the aircraft is a support or civil aircraft it

is particularly important that this rule be observed.[10] If the distressed aircraft lands, the same protection applies if the aircraft is clearly out of the conflict, and further attack is against otherwise protected persons (wounded and sick, civilians, etc.) who do not offer resistance.[11]

e. **Downed Enemy Airmen/Parachutists.** The rescue of downed airmen is clearly a combatant activity which is not protected under international law. Such rescue efforts are entitled to be accompanied by the use of armed force and likewise resisted by armed force. Yet when an aircraft is disabled and the occupants escape by parachutes, they should not be attacked in their descent.[12] The military disadvantage of such an attack is to discourage enemy airmen from abandoning disabled aircraft. However, persons decending from an aircraft for hostile purposes, such as paratroops or those who appear to be bound upon hostile missions, are not protected.[13] Any person descending from a disabled aircraft who continues to resist may be attacked. Downed enemy airmen from aircraft in distress are subject to immediate capture and can be attacked if they continue to resist or escape or are behind their own lines.[14] Otherwise they should be afforded a reasonable opportunity to surrender. Their status as a PW and the protection to which they are entitled begins with surrender or capture.[15]

f. **Protected Medical Aircraft**[16] Extensive efforts to expand existing specific protection under treaty law for medical aircraft are currently underway.[17] Generally, a medical aircraft, (identified as such) should not be attacked unless under the circumstances at the time it represents an immediate military threat and other methods of control are not available. For example, this might occur when it approaches enemy territory or a combat zone without permission and disregards instructions, or initiates an attack. Attacks might also occur when the aircraft is not identified as a medical aircraft because of lack of agreement as to the height, time and route.

g. **Other Protected Aircraft.**[18] The parties to a conflict may enter into agreements permitting various kinds of protections for aircraft engaged in non-hostile relations including exchange of official communications, negotiations to conclude hostilities, cease fire, surrender, or exchange of PWs. Aircraft carrying out such functions must be respected and protected in accordance with the terms of the agreement. The aircraft should be suitably identified. Additionally, a party may grant safe conduct unilaterally to enemy aircraft for various purposes which must be respected in accordance with the applicable terms.

4–3. Civil Aircraft:

a. **Basic Rule.**[19]

(1). **In Flight.** If identified as a civil aircraft, air transport in flight should not be the object of attack, unless at the time it represents a valid military objective such as when there is an immediate military threat or use. An unauthorized entry into a flight restriction zone might in some conflicts be deemed an immediate military threat. Wherever encountered, enemy civil aircraft are subject to instruction in order to verify status and preclude their involvement. The requirement to respect neutral jurisdiction remains valid in any event.

(2). **On the Ground.** Civil aircraft on the ground, as objects of attack, are governed by the rules of what constitutes a legitimate military objective as well as the rules and principles relative to aerial bombardment. As sources of airlift they may, under the circumstances ruling at the time, qualify as important military objectives.

b. **Discussion-Flight.**[20] Civil aircraft entitled to protection include nonmilitary state aircraft and a state owned airline. The principle of law and humanity protecting civilians and civilian objects from being objects of attack as such, protects civil aircraft in flight, because civil aircraft are presumed to transport civilians. Such an aircraft is not subject to attack in the absence of a determination that it constitutes a valid military objective. Difficulties may

exist because of this protection. When a civil aircraft is in the vicinity of military operations, including air operations, it may be attacked before its identity as a civil aircraft is known. As a practical matter, the degree of protection afforded to civil aviation and the potential military threat represented, varies directly with the intensity of the conflict. Difficulties have been avoided in past armed conflicts by civil aircraft avoiding areas of hostile air activity and by parties to a conflict taking precautions not to attack civil aircraft. A state may establish a flight restriction zone in which civil aircraft must not enter, and provide notice of such to the International Civil Aviation Organization (ICAO).

An immediate military threat may occur when the civil aircraft initiates attack. Also, it may exist when reasonable suspicion of hostile intent exists and the aircraft disregards signals or warnings to land or proceed to a designated place, or approaches an adversary's territory or armed forces without prior permission.

c. **Historical Development.** Under the 1923 Draft Hague Rules nonmilitary aircraft flying within the jurisdiction of their own state were subject to attack unless they made the nearest available landing on approach of enemy military aircraft. They were also subject to attack if they flew within the jurisdiction of the enemy or in the immediate vicinity thereof, and outside the jurisdiction of their own state or in the immediate vicinity of the military operations of the enemy by land or sea. Otherwise they were protected although subject to capture.[21] *Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare* in 1941 applied the 1923 Draft Hague Rules.[22] During World War II, civil aircraft, particularly civil airliners, were not generally regarded as proper objects of attack by the Allies or Axis powers (with the possible exception of Japan). A recognized authority on World War II practice noted:

> There was thus an appreciable volume of international air traffic in being during the second world war. It suffered but little, on the whole, as a result of belligerent action. This was largely because the Air Forces of the States at war had more urgent tasks to perform.[23]

Since World War II, actual state practice has increasingly recognized the necessity to avoid attacks on civil aircraft. Hence, little state practice involving actual attacks has occurred with the exception of terrorist attacks on civil aircraft soundly condemned by the nations of the world.[24] The view of states concerning the protection which should be afforded to civil aviation, however, has been expressed in numerous forums on many occasions. Usually this has occurred in situations short of armed conflict but involving self defense. For example,

> It may be said there is no existing treaty or international code which in terms prohibits a government from ordering the killing of innocent passengers in an innocent civil transport aircraft that has strayed without prior authorization into the territorial airspace of the killing government. But it is submitted that any proposal in modern times to make such a treaty, bilateral or multilateral, would be viewed with consternation. The opinion of mankind constitutes the precedents and the international law which now make such action internationally criminal, and did so on July 27, 1955.[25]

Other illustrations of these views have been expressed by nations of the world in responsible forums during periods of quasi-armed conflict in recent years.[26]

d. **Military Purposes/Immediate Military Threat.** The extent to which civil aircraft used for military purposes (e.g., delivery of cargo or members of the armed forces) will be attacked in fact by Parties to a conflict depends upon a wide variety of political, geographical and military factors including the conflict's intensity. International law does not prohibit the use of civil aircraft for military purposes.[27] However, in high inten-

sity conflicts, when such aircraft are in fact attacked, care must be taken not to attempt to cloak such aircraft in civilian immunity.[28] Parties to a conflict must be able to distinguish between genuine civil aircraft, such as scheduled air service performed for public transport on an airline, and aircraft used for military purposes. The objective is to insure effective protection for civil aircraft. It is a common view that civil aircraft used for military purposes become state aircraft subject to attack.

e. **Neutrality.**[29] Respect for neutrality extends to neutral aircraft, whether military or civil, during periods of armed conflict unless the neutral abandons its neutrality and becomes an adversary. Thus an attack against a neutral aircraft in flight would not be prohibited by the law of armed conflict over nonneutral territory if the neutral initiated the attack.

f. **Capture/Condemnation.**[30] The extent to which enemy civil aircraft are subject to capture, confiscation, or condemnation is unsettled in state practice and specific treaty law. Although a right of capture may be admitted, states do not generally exercise or attempt to exercise capture rights outside of the territorial jurisdiction under their control.

4–4. Armed Conflict At Sea:

a. **Basic Rules:**[31]

(1) During armed conflict, enemy warships (including naval and military auxiliaries) may be attacked, destroyed or captured outside neutral jurisdiction. Such vessels are not subject to prize procedures because ownership vests in the captor's government by virtue of capture.

(2) It is forbidden to refuse quarter to an enemy who has surrendered in good faith. Particularly, it is forbidden either to attack enemy ships which have clearly indicated a readiness to surrender or to fire upon shipwrecked persons (including those downed from aircraft).

(3) The applicable rules in existence, including rules of engagement, as to attacks, destruction or capture of enemy merchant vessels must be strictly followed during armed conflict. Enemy merchant vessels are always subject to capture outside neutral jurisdiction.

(4) The applicable rules of engagement as to neutral vessels must be strictly observed.

(5) Certain enemy vessels when innocently employed are specifically protected from capture (and destruction) by an adversary. These include:

(a) Cartel vessels (for example designated for and engaged in exchange of PWs)

(b) Properly designated hospital ships and medical transports.

(c) Vessels charged with religious, scientific or philanthropic missions.

(d) Vessels guaranteed safe conduct by prior arrangement.

(e) Small coastal fishing vessels and small boats engaged in *local* coastal trade and not taking part in hostilities.

b. **Historical Development.**[32] The law of armed conflict applicable to naval warfare is, paradoxically, heavily regulated yet is an unsettled area of international law. Customary and treaty law on maritime warfare spans centuries. Failure to respect US maritime neutral rights prompted US entry in the War of 1812 and World War I and contributed to US entry in World War II. Duties of neutrals caused extensive disputes between the US and Great Britain during the Civil War. Complex agreements regarding naval warfare preceded both World Wars. In part, they proved impractical to apply to merchant and neutral shipping in the views of parties to those conflicts. Neither state practice in limited conflicts since World War II nor the expressed views of the international community have clarified the situation. Little international incentive exists to do so because widespread naval warfare has not been a prominent feature of recent conflicts including Korea, Vietnam, Mid-East, Indo-Pakistan, and other conflicts.[33]

c. **Enemy Merchant Ships.**[34] The immunity of civilians during armed conflict extended to protect merchant vessels in traditional naval warfare. Although subject to capture and prize proceedings, and destruc-

tion under limited conditions (after making provisions for safety of crew and passengers), unarmed merchant ships were not subject to attack. Prior evacuation of the crew and passengers were regarded as minimum assurances. After the introduction of submarine warfare, armed merchant ships, naval convoys to prevent capture, and merchant ships to gather intelligence, the actual practice of states avoided these protections. The extent to which this traditional immunity of merchant vessels, still formally recognized, will be observed in practice in future conflicts will depend upon the nature of the conflict, its intensity, the parties to the conflict and various geographical, political and military factors. The US Navy, *Law of Naval Warfare* pamphlet, NWIP 10–2, para. 503(b)(3) states:

> Enemy merchant vessels may be attacked and destroyed, either with or without prior warning, in any of the following circumstances;
>
> 1. Actively resisting visit and search or capture.
>
> 2. Refusing to stop upon being duly summoned.
>
> 3. Sailing under convoy of enemy warships or enemy military aircraft.
>
> 4. If armed, and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy.
>
> 5. If incorporated into, or assisting in any way, the intelligence system of an enemy's armed forces.
>
> 6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces.

d. **Neutral Ships.**[35] Neutral status is not determined solely by the flag a ship carries. Neutral ships may acquire the character of enemy ships under particular circumstances. Neutral merchant ships acquire the character of enemy warships and are liable to the same treatment as enemy *warships* when taking a direct part in hostilities or acting as a naval or military auxiliary to an enemy's armed forces. Neutral merchant ships may acquire the character of enemy *merchant ships* when operating under enemy control, charter or employment, or when resisting an attempt to establish identity including visit and search.

e. **Current Status.** It should be noted that many of these rules were developed during the time when surface ships met at sea and warships could stop, board and detain. They do not necessarily reflect the realities of aircraft or submarine warfare against merchant ships. Careful adherence to rules of engagement in the event of conflict will therefore be required.

FOOTNOTES

[1] *On neutrality,* see Hague V, Respecting the Rights and Duties of Neutral Powers and Persons In Case of War On Land; AFP 110–20, cited chapter 1; Hague XIII (Rights and Duties of Neutral Powers in Naval War, 18 Oct 1907, 36 Stat 2415; TS 545; 1 Bevans 723 (1910). *On the territorial inviolability of neutral airspace during armed conflict,* see Garner, "International Regulation of Air Warfare," 3 *Air L.Rev.* 309–311 (1932); Greenspan, *The Modern Law of Land Warfare* 535 (1959); 2 Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* 662 (1968); Spaight, *Air Power and War Rights* 421 (1947). *On neutral territorial sea,* see 3 Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 2337–2341 (2nd ed. 1945); McDougal and Feliciano, "International Coercion and World Public Order—The General Principles of the Law of War," 67 *Yale L.Rev.* 830 (1958); 2 *Oppenheim's International Law* 687 (7th ed. Lauterpacht 1952). Also, US Army, FM 27–10, *The Law of Land Warfare* 185 (1956); US Navy, NWIP 10–2, *Law of Naval Warfare,* at paragraph 443 (1959); US Naval War College, 1955 *International Law Studies* 165 (1957). *On Military Aircraft,* see chapter 2, this publication, and NWIP 10–2, at paragraph 503; US Naval War College, *supra* at 43; Spaight, *supra,* 76 *et seq.*

[2] Paragraph 3–2, this publication. *On uniforms, see chapter 7; on special protection, see paragraph 4–2(f)(g).*

[3] *See discussion, paragraph 2–6c, this publication and authorities cited there as well as footnote 1, supra.*

On compensation, See Brittin and Watson, *International Law for Seagoing Officers* 130 (1960); Briggs, *The Law of Nations* 1038 (1952); Greenspan, *Soldiers Guide To The Law of War* 74 (1969); Schwarzenberger, *supra* note 1, at 576. *On medical aircraft in neutral territory,* see Art. 37, GWS; Art. 40, GWS-SEA. *US Position on Cambodian incursion,* see Nelson, "Contemporary Practice of the United States Relating to International Law," 64 *Am. J. Int'l. L.* 928 (1970).

[4] Weapons are discussed in chapter 6.

[5] *On background of the Draft Hague Rules of Air Warfare (1923),* see paragraph 5–2. Article 18 states "The use of tracer, incendiary, or explosive projectiles by or against aircraft is not prohibited. This provision applies equally to States which are parties to the Declaration of St Petersburg, 1868, and to those which are not.) For discussion, see Spaight *supra* note 1, at 197.

[6] Spaight, *supra* note 1, at 151–152; and Greenspan, *supra* note 1, at 367.

[7] Article 23(c), HR, ". . . it is especially forbidden . . . c. To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;". Article 511(c) NWIP 10–2, *supra* note 1, states "It is forbidden to refuse quarter to any enemy who has surrendered in good faith. In particular, it is forbidden either to continue to attack enemy warships and military aircraft which have clearly indicated a readiness to surrender or to fire upon the survivors of such vessels and aircraft who no longer have the means to defend themselves." Common Article 3 to the 1949 Geneva Conventions (setting forth minimal standards applicable to internal conflicts) notes, *inter alia,* "Persons taking no active part in the hostilities, including numbers of armed forces *who have laid down their arms* and those placed *hors de combat by* . . . shall in all circumstances be treated humanely. . . ." (emphasis added).

[8] Spaight, *supra* note 1, at 128; Stone, *Legal Controls of International Conflict* 617 (1959).

[9] Spaight, *supra* note 1, at 127. The common use of ruses in air to air combat in World War I and II to simulate disability or an out of control condition makes it impractical to apply the *strict* rule of land and sea warfare. Spaight *supra* note 1, at 169.

[10] Attacks against civil aircraft, though not prohibited in some circumstances, should not be continued when the aircraft no longer represents a military threat. "These rules [referring to Articles 23c and d, HR, forbidding attacks against combatants who surrender and declaring no quarter] are applicable to hostilities wherever conducted. . . . A belligerent is required to use only that degree of force necessary to compel submission of the enemy, force in excess of this requirement being strictly prohibited. . . . long been considered applicable to warships. . . . it is only reasonable to demand that in the case of enemy merchant vessels a special effort be made by the attacking warship to cease the attack once active resistance has come to an end. . . ." US Naval War College, *supra* note 1, at 71. *On sea warfare,* see paragraph 4–4.

[11] *For categories of protected persons* see chapter 3. The 1949 Geneva Conventions require combatants to exert their utmost endeavors, subject to immediate operational constraints, to search for and rescue shipwrecked (including from air) survivors. On land, "At all times and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled." Art 15, GWS. See

also Art 18, GWS-SEA. The *obligation* to search for and rescue is not an *absolute* one, but is subject to operational necessity. In the case of aircraft, unfortunately, departure from the scene is usually required. The obligation not to *attack* defenseless survivors is not subject to such constraints. US Naval War College, *supra* note 1, at 82.

[12] FM 27–10, *supra* note 1, at 17, states:

> The law of war does not prohibit firing upon paratroops or other persons who are or appear to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute from disabled aircraft may not be fired upon.

Article 20, 1923 Draft Hague Rules on Air Warfare states:

> When an aircraft has been disabled, the occupants when endeavoring to escape by means of parachute must not be attacked in the course of their descent.

World War I and II practice varied with frequent violations by Axis powers. Spaight argues protection should be limited to attacks when descending over enemy territory yet the better rule is set forth in the Army Field Manual. Spaight *supra* note 1, at 154. See also Greenspan, *supra* note 1, at 318; 10 Whiteman, *Digest of International Law* 405–407 (1968) [herein Whiteman].

[13] See authorities *supra* note 12.

[14] If downed in their own territory, they remain lawful targets, as combatants, unless rendered *hors de combat* by sickness, wounds or other causes. Spaight, *supra* note 1, at 124–125. If downed in the attacker's territory and subject to capture, the advantages of capture outweigh any minimal advantage secured by attack.

[15] "The present Convention shall apply . . . from the time they fall into the power of the enemy and until their final release and repatriation." Art 5, GPW, discussed chapter 13, this publication.

[16] Art 36, GWS; Art 39, GWS-SEA: Art 22, GC. Existing *specific* treaty protection for military and civilian medical aircraft extends only if they are exclusively engaged in certain medical functions and are flying at heights, times and on routes agreed upon by the Parties to the conflict. Protection under the 1929 Red Cross Convention was extended except for flights over enemy controlled territory or in immediate combat zones. (Art 18, Red Cross Convention of 27 July 1929, founded in 1 *The Law of War, A Documentary History* 471 (Friedman ed. 1972).

[17] See Report of US Delegation to the *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict,* 1st Sess (1974) and 2nd Sess (1975).

[18] Spaight, *supra* note 1, at 134; NWIP 10–2, *supra* note 1, at paragraph 503c; US Naval War college, *supra* note 1, at 98.

[19] *In Flight/On Ground.* See chapter 2 for discussion of civil aircraft. For discussion of basic immunity of civil aircraft in airspace, see Spaight, *supra* note 1, at 394; NWIP 10–2, *supra* note 1, at paragraph 503; US Naval War College Studies, *supra* note 1, at 108; Stone, *Legal Controls of International Conflict* 618 (1973).

For discussion of attacks on military objectives on the ground, see chapter 5. Moreover injury to civilians or damage to civilian objects resulting from attacks on civil aircraft on the ground may be minimal or nonexistent.

This section distinguishes between "in flight" and "on the ground," because of the different treatments afforded civil aircraft within the context of this publication. The greater danger that exists for passengers in an aircraft in flight is recognized by the International Civil Aviation Organization (ICAO), which also draws the above distinction for aircraft in flight. See Assembly Resolutions in Force, 1975, Doc 9124, ICAO, A17–17, clause 5, at 134 "lethal object to be ejected while in flight;" A17–5, clause 5, at 136 "unlawful diversion of an aircraft in flight."

[20] *Zones.* The establishment of restrictions by zones is widely used. Although the normal procedure is to seek identification of all aircraft at all times, in practical terms this would create a broader protection for civil aircraft than actually exists in most armed conflicts. Unauthorized entry into a flight restriction zone may endanger and delay military personnel, jeopardize military operations, and distract valuable reconnaissance activities.

Authority For Zones. The authority for establishing these zones for aircraft engaged in international scheduled airline service is at Art 9(a), Convention on International Civil Aviation (Chicago), 7 December 1944, 61 Stat 1180; TIAS 1591; 3 Bevans 944; 15 UNTS 295 (1947), reprinted AFP 110–20, at 5–2 [herein Chicago Convention].

The authority for establishing these zones in an emergency is at Art 9(b), Chicago Convention. "Each contracting State reserves also the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory, ..."

Flight Restriction Zone. The use of zones is a simple and effective way in which orders and commands can issue which can be implemented by field personnel, especially when dealing with the sensitive and complicated problem of dealing with civilian activities during periods of armed conflict.

Requirement of Notice for Zones. ICAO Assembly Resolution A17–9, at 129, 1975, UN Doc 9124, invites the parties to use the Good Offices of the

ICAO. Also see, A17–16, at 136, "Reports on incidents of unlawful interference;" A17–14, at 137, "International co-operation and exchange and dissemination of information related to unlawful interference."

Unauthorized Approach of Territory. Art 36, GC; Art 9(a), 9(b), and 35(a), Chicago Convention.

State Owned Airlines. The Chicago Convention is applicable only to civil aircraft and not to state aircraft. Art 3(a), Chicago Convention. The "state aircraft" used in the Convention is a term of art to define aircraft used in military, customs and police services. Art 3(b), Chicago Convention. The term "state aircraft" should not be confused with a state owned air transport enterprise offering or operating an international air service. Art 96(c), Chicago Convention.

[21] Articles 33 and 34, 1923 Draft Hague Rules of Air Warfare, discussed paragraph 5–2, this publication, and found in Spaight and Greenspan, *supra* note 1, as appendices.

[22] US Navy, *Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare,* May 1941 (1944).

[23] Spaight, *supra* note 1, at 404.

[24] McWhinney, *Aerial Piracy and International Law* (1971); Joyner, *Aerial Hijacking as an International Crime* (1974).

[25] *Case concerning the aerial incident of 27th July, 1955 (United States of America* vs. *Bulgaria), Memorial submitted by the Government of the United States of America,* 2 Dec 1958, [Bulgarian attack on Israeli Airliner entering Bulgarian air space without permission] found in 9 Whiteman 340 (1968). The Bulgarian Government earlier had expressed regret, promised to identify those responsible, and undertook necessary steps to insure such catastrophes would not be repeated. 9 Whiteman 327. (Bulgaria was not then a member of the Chicago Convention). Israel in its brief noted ". . . when measures of force are employed to protect territorial sovereignty, whether on land, on sea or in the air, their employment is subject to the duty to take into consideration the elementary obligations of humanity, and not to use a degree of force in excess of what is commensurate with the reality and the gravity of the threat (if any)." 9 Whiteman 328.

[26] UN Security Council Resolution 262 (1968), adopted unanimously, condemning Israeli attack against Beirut Airport, 8 *Int'l. Legal Materials* 445 (1969) (herein I.L.M.); UN Security Council Decision on hijacking S/10705, 20 June 1972, 11 I.L.M. 919; International Civil Aviation Organization (ICAO) Council Resolution Concerning Israeli attack on Libyan Civil Aircraft (4 June 1973), 12 I.L.M. 1180; ICAO Council Resolution on Israeli Violation of Lebanese Airspace (diversion aircraft) (20 Aug. 1973), 12 I.L.M. 1181; ICAO Assembly Resolution Concerning Unlawful Interference with Civil Aviation (21 Sept. 1973), 12 I.L.M. 1536.

[27] See chap 2 for discussion. Also see Art 3, Chicago Convention, and Art 35, Chicago Convention: "No munitions of war or implements of war may be carried in or above the territory of a state in aircraft engaged in international navigation, except by permission of such State."

[28] See paragraph 7–4 and chapter 8 for discussion of relevant principles.

Definitions. "Airline"—Art 96, Chicago Convention. "State Aircraft"—Art 3(b), Chicago Convention.

[29] The combined protection of neutrality and general civilian immunity affords greater protection to neutral civil aircraft.

[30] See authorities *supra* note 19.

[31] This covers attacks against sea targets, not attacks against air targets over the sea or land. The text of Rules 1, 2, and 5 are from NWIP 10–2, *supra* note 1, at paragraph 503. On the basic application of sea warfare rules to attacks by aircraft against sea targets and maritime warfare in general, see NWIP 10–2, at paragraph 250; US Naval War College, *supra* note 1, at 68; Spaight, *supra* note 1, at 479; Stone, *supra* note 8, at 603, 617. *Shipwrecked at sea* and *hospital ships/medical transport.* Persons ". . . who are at sea, and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances, it being understood that the term 'shipwrecked' means shipwrecked from any cause and includes forced landings at sea by or from aircraft." Art 12, GWS-SEA. For discussion, see chapter 12.

Hague XI, Articles 3 and 4, protect vessels used exclusively for fishing along the coast or small boats employed in local trade and vessels charged with religious, scientific or philanthropic missions.

[32] The treaties to which the US is a party on naval warfare include:

Convention Regarding the Rights of Neutrals at Sea, 22 July 1854, 10 Stat. 1105; TS 300; 11 Bevans 1214 (US & USSR are parties).

Convention Relative to the Laying of Automatic Submarine Contact Mines, October 18, 1907, 36 Stat. 2332; TS 541; 1 Bevans 669 (1910). (Hague VIII)

Convention Concerning Bombardment by Naval Forces in Time Of War, October 18, 1907, 36 Stat 2351; TS 542; 1 Bevans 681 (1910). (Hague IX)

Convention Relative to Certain Restrictions With Regard to the Exercise of the Right of Capture in Naval War, October 18, 1907, 36 Stat 2396; TS 544; 1 Bevans 711 (1910). (Hague XI)

Convention Concerning the Rights and Duties of Neutral Powers in Naval War, October 18, 1907, 36 Stat 2415, TS 545; Bevans 723 (1910). (Hague XIII)

Treaty for the Limitation and Reduction of Naval Armament, London April 22, 1930; 46 Stat 2858;

TS 830; 2 Bevans 1055; 112 LNTS 60 (1930) (Expired except for Part IV to remain in force without limit of time.)

Historical development. The issues have been fairly extensive and include: taking enemy goods aboard neutral vessels (free goods—free ships), convoying of neutral merchant ships by neutral warships, arming merchant ships, converting merchant ships to warships outside of home port, conforming to requirements for search or destruction by submarines and aircraft, imposing war zones dangerous to shipping, diverting ships prior to visit, transferring of enemy merchant ships to neutrals, engaging in unneutral service and resisting search.

Adjudication. The issues have also been subject to extensive international adjudication. See Schwarzenberger, *supra* note 1, at 390.

[33] In 1963, the United States adopted limited measures of quarantine during the Cuban Missile Crises to preclude introduction of offensive missiles. See Meeker, "Defensive Quarantine and the Law," 57 *Am. J. Intl. L.* 515 (1963). Additionally in the Vietnam Conflict the US instituted a temporary mine blockade as a legitimate measure of collective self defense.

[34] Kelsen, *Principles of International Law* 107 (1957); US Naval War College, *supra* note 1, at 55; Stone, *supra* note 8, at 585; Schwarzenberger, *supra* note 1, at 385; 10 Whiteman 670.

[35] NWIP 10–2, *supra* note 1, at paragraph 501(b) and Schwarzenberger, *supra* note 1, at 399. Neutral vessels acquire enemy character as *merchant* vessels when operating under enemy control, orders, charter, employment or direction or when resisting an attempt to establish identity, including visit and search.

Chapter 5
AERIAL BOMBARDMENT

5-1. Introduction. This chapter discusses the law of armed conflict as it affects aerial bombardment. For discussion purposes, aerial bombardment includes dropping munitions from manned or unmanned aircraft, strafing, and using missiles or rockets against enemy targets on land. The historic development of legal principles and rules presently affecting aerial bombardment, and the persons and objects protected under international law are discussed. Other military air operations are discussed in other chapters.[1]

5-2. Development of Rules of Warfare Relative to Aerial Bombardment:

a. **Hague Balloon Declarations.**[2] When the first Hague Peace Conference of 1899 met, aircraft capable of sustained flight and carrying bombs had not been invented although progress in aeronautical science fully justified the expectation that balloons capable of such military operations could be manufactured. The Conference, delaying decisions on exactly how to regulate aerial bombardment, adopted a Declaration forbidding the dropping of bombs from balloons for five years. From 1899 to 1907 aerial science made significant advances, highlighted by the historic Kitty Hawk flight of the Wright Brothers in 1903. At the Second Hague Conference in 1907, aerial bombardment received closer attention. In Hague Declaration XIV (1907), the Conference, again delaying exhaustive regulation of aerial bombardment pending technological developments, stated:

> The Contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons *or by other new methods of a similar nature*. The present Declaration is only binding on the Contracting Powers in case of war between two or more of them. It shall *cease* to be binding from the time when, in a war between the Contracting Powers, one of the belligerents is joined by a non-Contracting Power (emphasis added).

In fact, World War I prevented the holding of the Third Hague Peace Conference, and thus the Declaration was overtaken by subsequent events.

b. **Hague Conventions IV and IX.** (1907). The Second Hague Peace Conference did agree upon other Conventions and Declarations which have turned out to be more significant to aerial bombardment than the Balloon Declaration. A principal Hague treaty was Hague Convention IV Respecting the Laws and Customs of War on Land (Hague IV) with annexed Regulations (HR). The Hague Regulations not only bind states which have agreed to them, such as the United States, but also reflect customary rules binding on all nations and all armed forces in international conflicts.[3] The Hague Regulations are not historical curiosities but remain viable, active and enforceable standards for combatants.

(1) The following Articles of the Hague Regulations are relevant:

> SECTION II. HOSTILITIES.
>
> Chapter I. Means of Injuring the Enemy, Sieges, and Bombardments.
>
> ARTICLE 22.
>
> The right of belligerents to adopt means of injuring the enemy is not unlimited.
>
> ARTICLE 23.
>
> In addition to the prohibitions provided by special Conventions, it is especially forbidden—
>
> a. To employ poison or poisoned weapons;
>
> b. To kill or wound treacherously individuals belonging to the hostile nation or army;
>
> c. To kill or wound an enemy who, having laid down his arms, or having no

longer means of defence, has surrendered at discretion;

d. To declare that no quarter will be given;

e. To employ arms, projectiles, or material calculated to cause unnecessary suffering;

f. To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

g. To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

h. To declare abolished, suspended, or inadmissible in a Court of law the rights and actions of the nationals of the hostile party.

* * * * *

ARTICLE 25.

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

ARTICLE 26.

The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

ARTICLE 27.

In sieges and bombardments 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 purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

(2) The Preamble to Hague IV is also of significance, stating in relevant part:

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, so far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert Regulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

(3) The following articles of the Hague Convention Concerning Bombardment By Naval Forces In Time Of War (Hague IX), entry into force for the United States on 26 January 1910, are also of considerable significance to aerial bombardment.

Chapter I. The Bombardment of Undefended Ports, Towns, Villages, Dwellings, or Buildings

ARTICLE 1.

The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbour.

ARTICLE 2.

Military works, military or naval establishments, depots of arms or war materiel, workshops or plant which

could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

* * * *

Chapter II. General Provisions

ARTICLE 5.

In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white.

ARTICLE 6.

If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

c. **Draft Hague Rules of Air Warfare, 1923.**[4] During World War I, no comprehensive body of treaty rules regulated the conduct of aerial warfare with the same specificity as land warfare is governed by the 1907 Hague Regulations. However, events during and after World War I demonstrated that aircraft had military potential in bombardment and that the earlier attempt in the Balloon Declarations to prohibit aerial bombardment absolutely was unrealistic and unworkable. Accordingly, a commission of jurists from six nations was convened and drafted a 62 article code regulating aerial warfare, known as the Draft Hague Rules of Air Warfare, 1923. This code was never ratified as a treaty by any state. Although the draft Hague Rules have some authority because eminent jurists prepared them, *they do not represent existing customary law as a total code.* Articles of the Draft Hague Rules of Air Warfare which deal specifically with aerial bombardment include the following:

ARTICLE 22.

Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited.

ARTICLE 24.

(1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well known centers engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes.

(3) The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighborhood of

the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

(4) In the immediate neighborhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings, or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

(5) A belligerent State is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article.

ARTICLE 25.

In bombardment by aircraft all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals, and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft. The use of marks to indicate other buildings, objects or places than those specified above is to be deemed an act of perfidy. The marks used as aforesaid shall be in the case of buildings protected under the Geneva Convention the red cross on a white ground, and in the case of other protected buildings a large rectangular panel divided diagonally into two pointed [sic] triangular portions, one black and the other white.

A belligerent who desires to secure by night the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible.

Article 26 provided special rules for the purpose of enabling states to obtain more efficient protection for important historical monuments situated within their territory. These rules required states to refrain from the use of such monuments and a surrounding zone for military purposes and to accept a special regime for their inspection. Article 26 contains two unique features, including (1) the establishment of safety zones, and (2) the provision for a neutral inspection system. The adoption of safety zones was optional. Their use could have certain disadvantages. For example, since the zones had to be clearly marked and visible by aircraft from the air by day and by night, they could be used by aircraft navigators as a fixed landmark to guide them to targets of military interest. There was also some reluctance to set up such zones during peacetime in the hope that war would not come. Notwithstanding this, safety zone provisions also appear in the 1949 Geneva Convention Relative To The Protection of Civilian Persons In Time Of War. (Articles 14 and 15, GC).

d. **World War II.**[5] Belligerent practices during this war, well documented elsewhere, were to some extent necessitated by the conditions under which the war started and the conditions under which it was fought. Several factors limited effective observance of the traditional protection afforded to civilian populations. One was the inaccuracy of bombing. A 1940 British study of Royal Air Force Bomber Command night operations revealed two-thirds of all aircrews were missing their targets by over 5 miles.[6] This in turn, led to enemy misconstruction of the attacker's intentions and to views that the attacker had engaged in indiscriminate bombing of civilians. A second factor was the escalating nature of reprisals and counter reprisals thereby demonstrating the importance of reciprocity in actual observance of the law. On 1 September 1939, President

Roosevelt urgently appealed to all governments, in a major diplomatic campaign,

> publicly to affirm its determination that its armed forces shall in no event, and under no circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities, upon the understanding that these same rules of warfare will be scrupulously observed by all their opponents.[7]

Britain, France, and Germany agreed although Germany thereafter bombed several cities. On 24 August 1940, German planes through a navigational error bombed London and thereafter Britain, believing the attack deliberate, ordered raids on Berlin. Infuriated, Hitler ordered the destruction of London and the London blitz began. The attack on London was justified in official German statements as a reprisal for the indiscriminate bombing of Berlin and other cities by the RAF. This diversion allowed the RAF a desperately needed respite from the previous German attacks on RAF airfields and contributed significantly to British victory in the battle of Britain.[8] After the blitz, Britain engaged in extensive raids over various other German cities. A third critical factor was the failure to separate effectively war industry and other vital targets from the population centers, thereby necessitating target area bombing. As to the latter practice, Greenspan, a recognized legal scholar, notes:

> Any legal justification of target-area bombing must be based on two factors. The first must be the fact that the area is so preponderantly used for war industry as to impress that character on the whole of the neighborhood, making it essentially an indivisible whole. The second factor must be that the area is so heavily defended from air attack that the selection of specific targets within the area is impracticable.
>
> In such circumstances, the whole area might be regarded as a defended place from the standpoint of attack from the air, and its status, for that purpose, is assimilated to that of a defended place attacked by land troops. In the latter case, the attacking force may attack the whole of the defended area in order to overcome the defense, and incurs no responsibility for unavoidable damage to civilians and nonmilitary property caused by the seeking-out of military objectives in the bombardment. Legal justification for target-area bombing would appear to rest upon analogous reasoning.[9]

During World War II cities and other areas of concentrated civilian activity came under extensive aerial bombardment. Explosives and incendiary weapons were delivered by manned aircraft and unmanned missiles, both in daylight and at night. As a result of bombing, some major cities of Europe and Asia were substantially destroyed, including traditional military targets and areas of civilian housing and activity. The Allies did not regard civilian populations and their housing as proper military targets and generally preferred to seek to destroy only the military aspects of the cities: their rail yards, war factories, communication facilities, military supply depots and the like. With the development of atomic weapons, the United States regarded two entire cities as appropriate targets and destroyed large portions of the two Japanese cities on which atomic weapons were dropped. The US justified this use of the weapons on the basis that the two cities destroyed were involved in war production. The destruction of the two cities persuaded the Japanese government to seek peace quickly.[10] The use of nuclear weapons today is discussed in chapter VI. In the European theater, the United States partially avoided controversy and increased the military effectiveness of attacks by relying upon daylight precision bombing against specified military targets. The US 8th and 15th Air Forces demonstrated to a skeptical world the military value of daylight precision bombing of carefully selected military objectives, such as German submarine construction yards and submarine pens, aircraft industry, transportation and oil facilities. This general pattern was modified somewhat in the air war over Japan because of

problems unique to the Pacific war, including the highly dispersed nature of Japanese war industry.

e. **Nuremberg Trials.**[11] After a comprehensive study of the reports of all military tribunals convened during World War II, the United Nations War Crimes Commission stated,

> No record of trials in which allegations were made of the illegal conduct of aerial warfare had been brought to the notice of the United Nations War Crimes Commission, and since the indiscriminate bombing of allied cities by the German Air Force was not made the subject of a charge against any of the major German war criminals, the judgment of the Nuremberg International Military Tribunal did not contain any ruling as to the limits of legal air warfare.[12]

However, all of the major war criminals, including Herman Goering, the Air Minister, were convicted, among other crimes, of the devastation of towns not justified by military necessity in violation of the law of war. Additionally, in one of the Nuremberg trials involving a group of German officers indicted for genocide in the form of atrocities and murders of non-combatants, one of the accused, a Major General in the SS, raised the defense that shooting civilians under orders was no more culpable than an airman dropping bombs on a densely populated area. The court answered this narrow issue by stating,

> [It] was submitted that the defendants must be exonerated from the charge of killing civilian populations since every Allied nation brought about the death of non-combatants through the instrumentality of bombing. Any person, who, without cause, strikes another may not later complain if the other in repelling the attack uses sufficient force to overcome the original adversary. That is fundamental law between nations as well.
>
> It has already been adjudicated by a competent tribunal that Germany under its Nazi rulers started an aggressive war. The bombing of Berlin, Dresden, Hamburg, Cologne, and other German cities followed the bombing of London, Coventry, Rotterdam, Warsaw, and other Allied cities; the bombing of German cities succeeded, in point of time, the act discussed here. But even if it were assumed for the purpose of illustration that the Allies bombed German cities without Germans having bombed Allied cities, there still is no parallelism between an act of legitimate warfare, namely, the bombing of a city, with a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.
>
> A city is bombed for tactical purposes, communications are destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but civilians are not individualized. The bomb falls, it is aimed at railroad yards, houses along the track are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering the houses abutting thereon, dragging out the men, women and children and shooting them.[13]

f. **Practices Subsequent to World War II.**[14] Subsequent to World War II, the practices of parties to conflicts in Korea, Vietnam, the various Middle East conflicts, the India-Pakistan conflict, as well as in other conflicts, indicate an increased interest in avoiding civilian casualties from aerial bombardment. The earlier emphasis by the United States on precision bombing of military objectives has been fully supported by other states. Efforts have been made to assert distinct military advantages as the goal of specific aerial bombardments; to emphasize the limited nature and duration of the at-

tacks; and to demonstrate the taking of all necessary precautions to avoid or minimize injury to the civilian population or damage to civilian objects. While some terrorist groups, asserting they are engaged in a "just war," declined to follow such principles, responsible states have specifically disclaimed rights to attack civilians, by bombardment or otherwise. While it would be difficult to draw a definitive list of military objectives, this is not a real problem in the actual practice of states. There was little dispute in either Vietnam or Korea over which objectives could properly be attacked; instead, controversy centered on whether those objectives were being attacked.[15]

g. **Post-World War II Legal Developments:**[16] Various state practices in World War II, particularly the practices of the Axis Powers, prompted great international concern. Accordingly, in August 1949 the four Geneva Conventions for the Protection of War Victims were adopted. Their purpose is the humanitarian protection of persons who, by virtue of their status, as wounded and sick, PWs or civilians, are to be spared the ravages of war. The Conventions clearly demonstrate the grave concern among the international community for the protection of civilian populations. Since 1949, and particularly since 1968, the United Nations and the International Committee of the Red Cross (ICRC) have actively discussed reaffirmations and clarifications of the international law regulating armed conflict in order to provide greater protection for protected persons, particularly civilians.[17] The specific issue of clarifying the international law regulating aerial combat operations is of particular interest to the Air Force. In January 1969, the United Nations General Assembly unanimously adopted Resolution 2444 (XXIII) which recognized the following specific principles:

(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

(b) That it is prohibited to launch attacks against the civilian population as such; and

(c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible.

The US later expressly declared that it regards this resolution as an accurate declaration of existing customary law.[18]

Subsequent General Assemblies have adopted numerous resolutions such as GA Resolution 2675 (XXIV), entitled "Resolution on Protection of Civilians."[19] The Secretary General of the United Nations has also issued numerous reports and studies on the process of strengthening the international law regulating armed conflict.[20] The International Committee of the Red Cross (ICRC) has prepared additional Protocols to the Geneva Conventions, which is the subject of a Diplomatic Conference that met in 1974, 1975, and again in 1976. Based on these developments it is now possible to discuss meaningfully the law of armed conflict as it affects aerial bombardment.

5-3. General Restrictions on Aerial Bombardment: Principle of Immunity of Civilians:

a. **Protection of the Civilian Population/ Civilian Objects.**

(1) **Immunity of Civilians.** The civilian population and individual civilians enjoy general protection against dangers arising from military operations. To give effect to this protection, the following specific rules must be observed.

(a) The civilian population as such, as well as individual civilians, shall not be made the object of attack. Acts or threats of violence which have the primary object of spreading terror among the civilian population are prohibited.

(b) Civilian objects shall not be made the object of attack. Civilian objects are all objects which are not military objectives. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

(c) Civilians enjoy the protection afforded by law unless and for such time as they take a direct part in the hostilities.

(d) The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attack, or to shield, favor or impede military operations. Parties to a conflict must not direct the movement of the civilian population or individual civilians in attempts to shield military objectives from attack or to shield military operations.

(2) **Discussion.**[21] The foregoing confirms the principle that the civilian population, individual civilians, and civilian objects are not lawful objects of attack, as such, during armed conflict. Attacks primarily intended to terrorize the civilian population instead of destroying or neutralizing military objectives are also prohibited. Civilian objects also enjoy general immunity from attack and include all objects which are not military objectives. Objects normally dedicated to civilian purposes, such as a house, dwelling or school are in case of doubt presumed not to be military objectives. Location as well as prior uses are important factors in determining whether objects are military objectives. Thus, dwellings located within a heavily contested contact zone need not be presumed to be civilian objects. Traditionally, sophisticated transportation systems are used heavily for military purposes in intense conflicts. Their status as military objectives is readily apparent. This general protection of civilian objects is entirely consistent with traditional military doctrine since civilian objects are not, by definition, making an effective contribution to enemy military action, and their destruction or neutralization offers no definite military advantage. Incidental civilian injury or damage is discussed subsequently.

(a) **Nonparticipation in Hostilities.** Civilian immunity requires a corollary obligation on the part of civilians not to take a direct part in hostilities. This very strict condition means they must not become combatants. For example, taking a direct part in hostilities covers acts of war intended by their nature and purpose to strike at enemy personnel and material. Thus a civilian taking part in fighting, whether singly or as a member of a group, *loses* the immunity given civilians.

(b) **Requirement to Distinguish.** The requirement to distinguish between combatants and civilians, and between military objectives and civilian objects, imposes obligations on all the parties to the conflict to establish and maintain the distinctions. This is true whatever the legal status of the territory on or over which combatant activity occurs. Inherent in the principle protecting the civilian population, and required to make that protection fully effective, is a requirement that civilians not be used to render areas immune from military operations. Civilians may not be used to shield a defensive position, to hide military objectives, or to screen an attack. Neither may they be compelled or induced to leave their homes or shelters in order to disrupt the movement of an adverse party. A party to a conflict which chooses to use its civilian population for military purposes violates its obligations to protect its own civilian population. It cannot complain when inevitable, although regrettable, civilian casualties result. In addition to geographical proximity, civilian casualties result when civilians are functionally used in war activities, as for example, in building bridges or working in munitions factories.

b. **Attacks Against Military Objectives:**

(1) **Requirement That Military Operations be Directed at Military Objectives.** In order to insure respect and protection for the civilian population and civilian objects the parties to the conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives. Attacks must be strictly limited to military objectives. Insofar as objects are concerned, military objectives are limited to those objects which by their own nature,

location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization in the circumstances ruling at the time offers a definite military advantage.

(2) **Discussion.**[22] This rule confirms the basic legal requirement that any aerial bombardment be directed specifically against a military objective. Prior to the introduction of aerial warfare, "military objectives" were often defined to include only such targets as combatant troops, defended or fortified places, military depots, and the like. Since the advent of hostilities waged from the air, the scope of lawful "military objectives" has been enlarged. Previous attempts in Hague IX, and in the 1923 Draft Hague Rules to define a military objective for purposes of bombardment have not always been followed in actual practice, particularly in World War II. Many objects, including an adversary's military encampments, his armament, such as military aircraft, tanks, antiaircraft emplacements, and troops in the field, are military objectives beyond any dispute. Controversy exists over whether, and the circumstances under which, other objects, such as civilian transportation and communications systems, dams and dikes can be classified properly as military objectives.[23] The inherent nature of the object is not controlling since even a traditionally civilian object, such as a civilian house, can be a military objective when it is occupied and used by military forces during an armed engagement. A key factor in classification of objects as military objectives is whether they make an effective contribution to an adversary's military action so that their capture, destruction or neutralization offers a definite military advantage in the circumstances ruling at the time. The requirement that attacks be limited to military objectives results from several requirements of international law. The mass annihilation of enemy people is neither humane, permissible, nor militarily necessary. The Hague Regulations prohibit destruction or seizure of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war." Destruction as an end in itself is a violation of international law, and there must be some reasonable connection between the destruction of property and the overcoming of enemy military forces. Various other prohibitions and the Hague Regulations and Hague Convention IX further support the requirement that attacks be directed only at military objectives.

c. **Precautions in Attack.**

(1) **Precautions Required:**

(a) In conducting military operations, constant care must be taken to spare the civilian population, civilians, and civilian objects.

(b) With respect to attacks, the following precautions must be taken.

(i) Those who plan or decide upon an attack must:

(a) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives and that it is permissible to attack them;

(b) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects; and

(c) Refrain from deciding to launch any 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.

(ii) An attack must be cancelled or suspended if it becomes apparent that the objective is not a military one, or that it is subject to special protection or that the attack may be expected to cause incidential 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;

(iii) Effective advance warning shall be given of attacks which may affect the

civilian population unless circumstances do not permit.

(c) When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that which may be expected to cause the least danger to civilian lives and to civilian objects.

(2) **Particular Precautionary Measures.**[24] Since states have not always separated military activities from civilian activities, a geographical and functional mixture of combatants and civilians and military objectives and civilian objects often results. The requirement for precautionary measures recognizes this reality. Precautionary measures are not a substitute for the general immunity of the civilian population, but an attempt to give effect to the immunity of civilians and the requirements of military necessity. Dangers to civilian populations in a given situation vary according to the military objective attacked, configuration of terrain, type of weapons used, meteorological conditions, the presence of civilians at the scene or in the immediate vicinity and a particular combatant's ability and mastery of bombardment techniques as well as the level of the conflict and the type of resistance to be encountered during the attack. Permissible bombardment techniques vary according to such factors. Thus, what is needed is:

(a) **Identification of Military Objective.** Initially, those who plan or decide upon an attack must do everything feasible, under the particular circumstances at the time, to verify that military objectives are in fact being attacked and not civilians or civilian objects. Sound target intelligence also enhances military effectiveness by insuring that the risks undertaken are militarily worthwhile. It is also a matter of conservation of vital resources. Economy of force, concentration of effort and maximization of military advantage support such efforts.

(b) **Incidental Civilian Casualties.** Civilian casualties are to be avoided to the greatest extent possible. However, international law has long recognized that civilian casualties and damage to civilian objects, although regrettable, do occur in armed conflict. They result from several factors. First, military objectives may not be segregated from civilian population centers, civilians, or civilian objects. Second, civilians may be used for military purposes, sometimes taking a direct part in hostilities and other times being used unlawfully in an attempt to shield military objectives from attack. Third, objects designed for civilian purposes may be used for military purposes and become military objectives. Fourth, combatants themselves may not fulfill their strict obligation to identify themselves as combatants and thus create risks that what appear to be civilians are in fact combatants. Fifth, care is not taken by combatants to avoid civilian casualties. In spite of precautions, incidental civilian casualties and damage to civilian objects are inevitable during armed conflict. Attacks are not prohibited against military objectives even though incidental injury or damage to civilians will occur, but such incidental injury to civilians or damage to civilian objects must not be excessive when compared to the concrete and direct military advantage anticipated. Careful balancing of interests is required between the potential military advantage and the degree of incidental injury or damage in order to preclude situations raising issues of indiscriminate attacks violating general civilian protections. An attack efficiently carried out in accordance with the principle of economy of force against a military airfield or other military installations would doubtless not raise the issue. On the other hand, attacks against objects used predominately by the civilian population in urban areas, even though they might also be military objectives, are likely to raise the issue. Those who plan or decide upon an attack must, in the selection of both the place to be attacked and in their choice of weapons or methods of attack, take all feasible precautions to avoid or minimize incidental injury to civilians or damage to civilian objects. They must refrain from launching an attack if injury or damage would be excessive or disproportionate compared with the military

advantage anticipated. Traditional military doctrines, such as economy of force, concentration of effort, target selection for maximization of military advantage, avoidance of excessive collateral damage, accuracy of targeting, and conservation of resources all reinforce observance of this requirement.

(c) **Cancellation or Suspension of Attacks.** Target intelligence may be found to be faulty before the attack is started or completed. Accordingly, attacks must be cancelled or suspended if it is apparent that a given target is not a military objective, or that it is under the special protection of international law. An example of special protection is a hospital protected under the 1949 Geneva Conventions. Cancellation or suspension is also required when excessive incidental injury or damage to persons or objects under the general or special protection of international law is apparent. The taking of effective military action in accordance with traditional military doctrines also supports this requirement.

(d) **Warning Requirement.** The requirement of warning, when circumstances permit, is longstanding and is derived from both Hague Conventions IV and IX. During World War II, practice was lax on warnings because of the heavily defended nature of the targets attacked as well as because of attempts to conceal targets. More recently, increased emphasis has been placed on the desirability and necessity of prior warnings. Nevertheless, the practice of states recognizes that warnings need not always be given. General warnings are more frequently given than specific warnings, lest the attacking force or the success of its mission be jeopardized. Warnings are relevant to the protection of the civilian population and need not be given when they are unlikely to be affected by the attack.

d. **Works and Installations Containing Dangerous Forces.**[25] In view of the general immunity of the civilian population and civilian objects and the requirement of precautions to minimize injury or damage to them, many states have urged a rule absolutely prohibiting attacks upon works and installations containing "dangerous forces," such as water held by a dam or radioactive material from a nuclear generating station, if the attack would release such dangerous forces. The United States has not accepted that such a rule, prohibiting attacks on works and installations containing dangerous forces, exists absolutely if, under the circumstances ruling at the time, they are lawful military objectives. Of course their destruction must not cause excessive injury to civilians or civilian objects. Under some circumstances attacks on objects such as dams, dikes and nuclear electrical generating stations may result in a distinct and substantial military advantage depending upon the military uses of such objects. Injury to civilians may be nonexistent or at least not excessive in relation to the military advantage anticipated. However, there are clearly special concerns that destruction of such objects may unleash forces causing widespread havoc and injury far beyond any military advantage secured or anticipated. Target selection of such objects is accordingly a matter of national decision at appropriate high policy levels.

e. **Prohibition of Attacks on Undefended Areas:**[26]

(1) **Text:** The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited. (Article 25, HR)

(2) **Discussion:** States desired early to formulate more specific rules furthering the general principle of civilian immunity. The Brussels Conference in 1874 barred the bombardment of unfortified cities or towns, reaffirming the concept of walled cities. In 1899, and again in 1907, the Hague Conference adopted rules prohibiting attacks on undefended cities, towns, villages, or dwellings. The term "by whatever means" was added to cover air bombardment. An international legal scholar at the time wrote regarding this prohibition:

> A place cannot be said to be undefended when means are taken to pre-

> vent an enemy from occupying it. The price of immunity from bombardment is that the place shall be left open for the enemy to enter.[27]

But cities behind enemy lines and not open to occupation may contain military objectives. The application of this undefended rule to aerial warfare, where the object of the attack was not to occupy the city but to achieve some specific military advantage by destroying a particular military objective, caused disagreements in the past. In the US view, it has been recognized by the practice of nations that any place behind enemy lines is a defended place because it is not open to unopposed occupation. Thus, although such a city is incapable of defending itself against aircraft, nonetheless if it is in enemy held territory and not open to occupation, military objectives in the city can be attacked.

One guide as to what the undefended test meant under modern conditions of air warfare is found in Hague IX which regulates naval bombardment. Hague IX, after asserting in Article 1 the prohibition of attacks on undefended ports, towns, villages, dwellings, or buildings, notes in Article 2 that:

> Military works, military or naval establishments, depots or arms or war materiel, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour, are not, however, included in this prohibition. . . .[27a]

A party to a conflict may declare, as undefended, inhabited localities which are near or in areas where land forces are in contact when the localities are open for occupation by an adverse party. Bombardment in such a locality would be unlawful, if the following conditions were met and maintained: (1) no armed forces or other combatants present, (2) no mobile weapons or mobile military equipment present, (3) no hostile use of fixed military establishments or installations, (4) no acts of warfare by the authorities or the population, and (5) no activities in support of military operations.

5–4. Separation of Military Activities:[28]

a. **Discussion.** As a corollary to the principle of general civilian immunity, the parties to a conflict should, to the maximum extent feasible, take necessary precautions to protect the civilian population, individual civilians, and civilian objects under their authority against the dangers resulting from military operations. Accordingly, they should endeavor to remove civilians from the proximity of military objectives and to avoid locating military objectives within or near densely populated areas. It is incumbent upon states, desiring to make protection of their own civilian population fully effective, to take appropriate measures to segregate and separate their military activities from the civilian population and civilian objects. Substantial military advantages may in fact be acquired by such separation. Examples of specific rules designed to enhance civilian protections include:

(1) The obligation of combatants to carry arms openly, wear uniforms (fixed distinctive emblems) or distinguish themselves in their military activities from the civilian population (See Article I, HR; Article 4, GPW).

(2) The provision for identifying protected medical personnel and objects and prohibitions on misuse of distinctive emblems (see Articles 38–44, GWS; 41–45, GWS SEA; Articles 18–22, GC).

(3) The provisions for identifying by distinctive and visible signs, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals or other places where wounded and sick are collected, and for prohibiting their use for military purposes (Article 27, HR).

(4) The provision for locating medical units in such a manner that attacks against military objectives cannot imperil their safety (See Article 19, GWS).

(5) The provision for removing combatants and mobile military equipment and desisting from hostile acts in declared nondefended localities.

(6) The obligation not to use the presence or movement of civilians to shield

military objectives from attack or impede military operations.

b. **Result of Failure to Separate Military Activities.** The failure of states to segregate and separate their own military activities, and particularly to avoid placing military objectives in or near populated areas and to remove such objectives from populated areas, significantly and substantially weakens effective protection for their own population. A party to a conflict which places its own citizens in positions of danger by failing to carry out the separation of military activities from civilian activities necessarily accepts, under international law, the results of otherwise lawful attacks upon valid military objectives in their territory.

c. **Protection Gained Through Separation.** Existing international law recognizes and encourages the right of states to separate military activities from population centers in order to gain effective protection during armed conflict. Both the 1923 Draft Hague Rules and the 1949 Geneva Conventions recognize the right of states, by agreement, to create safety zones or demilitarized zones. Doubtless the creation of such zones would be one of the most effective measures to enhance protection of one's own civilian population, and if the conditions required to make a zone were fulfilled and maintained, virtually all civilian casualties would be avoided in this zone.

5-5. Special Protection. In addition to the general international law rules protecting civilians and civilian populations, specific protections are applicable to certain facilities.

a. **Wounded and Sick, Medical Units and Hospitals and Medical Means of Transport.**[29] The law of armed conflict has traditionally provided special protection to the wounded and sick and to persons, facilities and transports caring for wounded and sick. The following persons and objects must be respected and protected from attack pursuant to the 1949 Geneva Conventions.

(1) Hospitals and other fixed or mobile medical establishments.

(2) Medical personnel and chaplains.

(3) Medical transport.

(4) Medical aircraft.

(5) Hospital ships and, to the extent possible, sick bays of warships.

(6) Wounded, sick and shipwrecked.

The protection accorded to the foregoing persons and objects means they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper function. The accidental injury of such personnel, or damage to objects, due to their presence among or in proximity to military targets actually attacked, by fire directed against the latter, gives no just cause for complaint.

b. **Special Hospital and Neutralized Zones.**[30] The Geneva Conventions of 1949 provide for protected or safety zones established by agreement between the parties to the conflict. Safety zones established under the Geneva Conventions of 1949, or by other agreement among parties to a conflict, are immune from bombardment in accordance with the terms of the agreement.

c. **Religious, Cultural, and Charitable Buildings and Monuments.**[31] Buildings devoted to religion, art, or charitable purposes as well as historical monuments may not be made the object of aerial bombardment. Protection is based on their not being used for military purposes. Combatants have a duty to indicate such places by distinctive and visible signs. When used by the enemy for military purposes, such buildings may be attacked if they are, under the circumstances, valid military objectives. Lawful military objectives located near protected buildings are not immune from aerial attack by reason of such location but, insofar as possible, necessary precautions must be taken to spare such protected buildings along with other civilian objects.

d. **Prisoner of War Camps.**[32] Prisoners of war and prisoner of war camps enjoy a protected status under the law. PWs may not be the object of attack, detained in combat zones or used to render areas immune from military operations. Parties to a conflict must convey to all other nations concerned all useful information regarding

the geographical location of their PW camps. Wherever military considerations permit, PW camps are identified during the daytime by the letters "PW" or "PG" placed so as to be clearly visible from the air. Parties to a conflict may also agree upon any other system of markings. However, only PW camps may be so marked, and the use of PW camp markings for other purposes is prohibited. PWs are required to have shelters against air bombardment and other hazards of war to the same extent as the civilian population.

5–6. Dissemination of Propaganda: [33]

a. The use of military aircraft for the purpose of disseminating propaganda from the air is well established in aerial warfare. Dissemination of propaganda by military aircraft includes dropping of leaflets, air to ground broadcasts and the like.

b. Propaganda for the purposes of inducing enemy combatants to rebel, desert, or surrender is not prohibited. Inducements may take the form of monetary rewards. In World War I, Austrian airmen dropped leaflets over Italian lines inviting desertion with the promise of compensation for every airplane surrendered intact. In the Korean conflict, an award was offered to any enemy flier who would defect with his plane intact to the United Nations Command. In fact $100,000 was paid to a North Korean pilot for such a defection. Although the international law regulating armed conflict sanctions the use of military aircraft and aircrews to deliver propaganda, not all forms of propaganda are lawful. Propaganda which would incite illegal acts of warfare, as for example killing civilians, killing or wounding by treachery or the use of poison or poisonous weapons, is forbidden.

FOOTNOTES

[1] Air to air and air to sea operations are discussed in chapter 4; aerial weapons are discussed in chapter 6; independent missions (espionage and sabotage) are discussed in chapter 9.

[2] Declaration Prohibiting Launching of Projectiles and Explosives from Balloons, signed at The Hague July 29, 1899, 32 Stat. 1839; TS 393 (entry into force 4 Sept 1900, expired Sept 4, 1905). Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons, October 18, 1907, 36 Stat. 2439; TS 546; 1 Bevans 739 (1909). Principal states which are parties to the 1907 Declaration include Australia, Brazil, Canada, China, India, the United Kingdom, and the United States among some 28 states. The USSR, Germany, and Japan are not parties. Background to the Declaration is discussed in Higgins, *The Hague Peace Conferences* 488, 491, 521 (1909); Scott, *The Hague Peace Conferences of 1899 and 1907 (1907);* Spaight, *Air Power and War Rights* 42 (1947); Garner, "Some Questions of International Law in the European War," 9 *Am. J. Int'l. L.* 72, 96 (1915).

[3] 2 *Oppenheim's International Law* 229 (Lauterpacht ed. 1952); Spaight, *Air Power and War Rights* 198 (1947); Stone, *Legal Controls of International Conflict* 551 (1973); The International Military Tribunal at Nurenberg noted ". . . by 1939, these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the Laws and Customs of War . . ." quoted in UN War Crimes Commission, *History of The United Nations War Crimes Commission* 221 (1948).

[4] For full text of the rules, see Greenspan, *The Modern Law of Land Warfare* 650 (1959); 1 *The Law of War* 437 (Friedman ed. 1972). For discussion, see Moore, *International Law and Some Current Illusions* 182–288 (1924). Spaight, *supra* note 2, at 42, notes they have the authority which the eminence of the jurists who prepared them conferred upon them. 2 Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* 154 (1968) confirms they are not binding custom. See also DeSaussure, "The Laws of Air Warfare: Are There Any?." 5 *Int'l. Lawyer* 527, 531 (1971); Stone, *supra* note 3, at 609. Greenspan, *supra* at 352, argues they have strong persuasive authority.

[5] *Legal issues:* 2 Lauterpacht, *supra* note 3, at 527–530; Carnahan, "The Law of Air Bombardment in its Historical Context," 17 *AFLR* 39 (Summer 1975); Goda, "The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War," 33 *Mil. L. Rev.* 93 (1966); as well as standard sources on the law of armed conflict. Effects of US and allied aerial bombardment are exhaustively covered in National Fire Protection Assoc., *Fire and the Air War,* (Bond ed. 1946). US preference for daylight precision bombing is discussed in Ambrose, *The Supreme Commander* 372 (1970); Calvoceressi and Wint, *Total War* 498 (1972); Glines, *The Compact History of the United States Air Force* 216 (1963); and USAF, *The Army Air Forces in WW II* Vol 1, at 597 (1962). Effect on morale is discussed in *Pacific, The Effects of Strategic Bombing on Japanese Morale* (1947) and *The Effects of Strategic Bombing on German Morale* (1947) in US Strategic Bombing Survey.

[6] Churchill, *The Hinge of Fate* 279 (1950).

[7] Various other appeals of a similar nature were also made. 6 Hackworth, *Digest of International Law* 267 (1943).

[8] For an excellent discussion of this, see Carnahan, *supra* note 5, at 39. See also Lauterpacht, *supra* note 3, at 527; Higham, *Air Power: A Concise History* 104, 131 (1972); Spaight, *supra* note 3, at 53; 2 Wheaton, *International Law* 351 (7th ed. Keith 1944).

[9] Greenspan, *supra* note 4, at 336. Target area bombing of broad industrial complexes was practiced by various belligerents on selected occasions throughout WW II. The term target area bombing should not be confused with selective pattern bombing over narrow areas to eliminate specific military objectives. Resort to target area bombing is invariably linked to failures to separate military activities from population centers and complex defense and concealment techniques. Since World War II, increased emphasis upon protection of civilians, the civilian population, and civilian objects, coupled with advancements in bombing accuracy and technology, have led to reduced reliance upon target area bombing as a useful technique. Legal controversy surrounds bombing techniques and tactics in Vietnam. Air War Study Group, Cornell University, *The Air War in Indo China* 147 (Littaur & Uphoff ed. 1972); Mallison & Mallison, "The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human and Material Values," 18 *How. L.J.* 12, 25 (1974). In fact, the use of target area bombing in populated areas has always been controversial, as noted by Spaight, *supra* note 3, at 272; Stone, *supra* note 3, at 627. Higham, *supra* note 8, at 131, notes: "Area attacks while perhaps justifiable as retaliation, were a complete violation of the principles of war strategically. They vitiated forces rather than concentrating them against the decisive point, they were uneconomical of force, and they strengthened the enemy will to resist."

[10] Carnahan, *supra* note 5, at 57. For contrasting

discussions of the Japanese campaign, see Caiden, *A Torch to the Enemy* (1960); Lemay and Kantor, *Mission with Lemay 352 (1965); Truman, 1 Memoirs by Harry S. Truman, Year of Decisions* 417–420 (1955); Spaight, *supra* note 3, at 276. *Shimoda* v. *State,* 32 I.L.R. 626 (District Ct. of Tokoyo, Japan 1963), reported in 8 *Japanese Annual of Int'l. Law* 212 (holding atomic bombing of Hiroshima and Nagasaki to be unjustified) is discussed in Falk, "The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki," 59 *Am. J. Int'l. L.* 759 (1965).

[11] For background, see UN War Crimes Commission, *supra* note 3, as well as authorities in chapter 15, footnote 37. A trial of interest to lawyers is *US* vs *Alstoetter* (Justice Trial), a trial of lawyers, discussed in Miles, "The Justice Trial," 17 *AFLR* 16 (Spring 1975). During the war, Japan tried and executed American Airmen who were captured in the first Dolittle raid. The US protested this, noting the Airmen were ordered to attack only military objectives. After the war, the Japanese personnel responsible for this trial were likewise tried. Spaight, *supra* note 3, at 59.

[12] 15 *Law Reports of Trials of War Criminals* 110 (1947–1949). In fact all of the examples listed were in occupied territory. But see Lauterpacht, *supra* note 3, at 529.

[13] US vs. Ohlendorf, 4 *US Trials Before the Nuremberg Military Tribunal* 466–467 (1948). For discussion of bombing in other trials, see Carnahan, *supra* note 5.

[14] In fact, aerial bombardment stirred considerable controversy, including attempts to ban military aircraft or aerial bombardment or adopt definitive rules in the late 1920's and 1930's. For discussion see Spaight, *supra* note 3, at 244; Stone, *supra* note 3, at 624.

Post World War II practice is illustrated by the following:

a. "The air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader. These targets are enemy troop concentrations, supply dumps, war plants and communication lines. It is well known that the communist command has compelled helpless civilians to labour on these military sites. Peaceful villages are used to cover the tanks of the invading Army. Civilian dress is used to disguise soldiers of aggression." The United Nations air forces in fact exerted particular care to confine their attacks in Korea to military objectives. Statement, Secretary of State Acheson, September 6, 1950, quoted in 10 Whiteman, *Digest of International Law* 140 (1968) [herein Whiteman].

b. Radio program to North Korea: "Remember, we are asking you please to (sic) leave any areas in North Korea where there are military targets, because the bombers will be back again and again. The United Nations planes have no desire to harm individuals who are not engaged in war work at military targets. Military targets are: railroads and railroad facilities, docks and harbours, bridges, power plants, factories helping the war, ships and boats, air fields and supply warehouses.

If you work and live near any of these areas, get out now before it is too late. Refuse to endanger your lives." 10 Whiteman 140.

c. US Secretary of Defense (McNamara) June 16, 1962, "The U.S. has come to the conclusion that to the extent feasible, basic military strategy in a possible general nuclear war should be approached in much the same way that more conventional military operations have been regarded in the past. That is to say, principal military objectives . . . should be the destruction of the enemy's military forces, not of his civilian population." 10 Whiteman 149.

d. "Resistance was encountered, but operations appear to be proceeding as planned, although no very detailed report of their progress is yet available. Repeated warnings have been given to the civilian population of Port Said to keep away from defined areas of danger. During Sunday air attacks continued. They were, as before, entirely restricted to military targets." A Statement by the British Minister of Defense (The Earl of Gosford) on November 5, 1956, during the Suez crisis, quoted in 10 Whiteman 425. See also 10 Whiteman 426–430 for various statements related to North Vietnam bombing.

e. In the Arab-Israel conflict of October 1973, the International Committee of the Red Cross (ICRC) attempted to obtain the agreement of belligerents to apply the 1973 ICRC Draft Protocol to the conflict. Syria, Iraq and Egypt accepted, but on October 19, 1973 the government of Israel's reply was construed not to be an acceptance. It did note "In response to the ICRC Appeal the Government of Israel notes it has strictly respected and will continue so to respect the provisions of public international law which prohibits attacks on civilians and civilian objects." ICRC Press Releases No. 11716 (Oct 11, 1973) and No. 11766 (Oct 20, 1973).

[15] See footnote 23, *infra.*

[16] For example, see ICRC, *Draft Rules For the Limitation of the Dangers incurred by the Civilian Population in Time of War,* Sept 1956; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, 249 UNTS 215 (US is signatory but has not ratified, hence not in force for US). Discussion is found in Bailey, *Prohibitions and Restraints in War* (1972); Carnegie Endowment, Conferences on Contemporary Problems of International Law, *The Law of Armed Conflicts* (1971); Schwarzenberger, "From the Law of War to the Law of Armed Conflict," in *International Law and Order* 169 (1971); Kunz,

"The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision," 45 *Am. J. Int'l. L.* 37 (1951). For Administration views before Congress, see "International Protection of Human Rights," Hearings Before the Subcommittee on International Organizations and Movements, Committee Print, May 1974, at 100. See also 1971 Proceedings, *Am. Soc. Int'l. L.*, at 218 (1971).

[17] The ICRC, the International Committee of the Red Cross, is an organization separate from the League of Red Cross Societies and was primarily responsible for the 1949 Geneva Conventions for the Protection of War Victims. The ICRC held conferences of Government Experts in 1971, 1972 and 1973, to prepare for the Diplomatic Conference now considering the issues, which met in 1974, 1975, and again in 1976. For discussion, see paragraph 11-2, this publication; Forsythe, "The 1974 Diplomatic Conference on Humanitarian Law: Some Observations," 69 *Am. J. Int'l. L.* 77 (1975); Miles, "Current Initiatives in the Laws of Armed Conflict," 16 *AFLR* 69 (Winter 1974).

[18] Rovine, "Contemporary Practice of the United States Relating to International Law," 67 *Am. J. Int'l. L.* 118, 122-125 (1973) (quoting DOD, General Counsel, Letter to the effect that Resolution 2444 is "declaratory of existing customary international law.") The initial draft of that resolution included a fourth principle "that the general principles of the law of war apply to nuclear and similar weapons." The Soviet delegation moved to delete this fourth principle on the ground that it did not conform to earlier UN resolutions condemning nuclear weapons. The US opposed the Soviet amendment. The US Representative, Mrs. Jean Picker, stated on 10 December 1968.

> The four principles set out in the resolution constitute a reaffirmation of existing international law . . .
>
> (3) There are indeed principles of law relative to the use of weapons in warfare, and these principles apply as well to the use of nuclear and similar weapons. The United States believes that the above principles are statements of existing international law on this subject.

At the conclusion the sponsors of the resolution accepted the Soviet amendment, but only on the understanding that the remaining principles were applicable in all armed conflict regardless of their nature or the kinds of weapons used.

[19] This resolution provided, *inter alia,*

"1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in hostilities and civilian populations.

3. In the conduct of military operations every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be made to avoid injury, loss or damage to civilian populations." G.A. Res. 2675 (XXV), Resolution On Protection of Civilians, found in 1 *The Law of War* 755 (Friedman ed. 1972).

[20] Report on Human Rights in Armed Conflict, Report of Secretary General, 20 Nov 1969, A/7720; 18 Sept. 1970, A8052 [excerpted in Friedman *supra* note 19, at 701 and 732]; 5 September 1975, A10195; 21 October 1975, A10195 Corr. 1.

[21] The immunity of the civilian population or individual civilians not taking a direct part in hostilities has long been a cornerstone of the law of armed conflict and of conventions regulating hostilities. On historic development, see Vattel, *The Law of Nations,* bk. III, sec. 145-147 (1817); Wheaton, *Elements of International Law* 394-395 (3rd ed. 1846); Lieber Code, *Instructions For The Government of Armies of the United States In The Field* by Order of The Secretary of War, Art 15, reprinted in 1 Friedman, *supra* note 19, at 161. It applies also to all forms of armed conflict including aerial bombardment. Lauterpacht, *supra* note 3, at 24; Spaight, *supra* note 3, at 43-48; Stone, *supra* note 3, at 623; McDougal and Feliciano, *Law and Minimum World Public Order* 640 (1961); Petrowski, "Law and the Conduct of the Vietnam War," in 2 Am. Soc. Int'l. L., *The Vietnam War and International Law* 438 (1969); Hearings, *supra* note 16; and Rovine, *supra* note 18. Article 28, GC, reflects the prohibition against using civilians to render areas immune from military operations.

[22] The key factor in the definition is the military advantage secured from the attack. For development of the military objective test, a fundamental doctrine of air power, see Royse, *Aerial Bombardment* 192 (1928); Spaight, *supra* note 3, at 220, 269 (1947); US Naval War college, 1955 *International Law Studies* 147 (Tucker ed. 1957). The military objective test is implicit in Hague IX, which does not prohibit certain types of naval bombardments even against undefended towns, in the 1923 Draft Hague Rules, and in the 1949 Geneva Conventions (for example, "In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives." Art 18, GC.). Also of interest is Greenspan, *The Modern Law of Land Warfare* 333-334 (1959); Greenspan, *Soldier's Guide to the Law of War* 5 (1969); Kelsen, *Principles of International Law* 122 (Tucker ed. 1970); 10 Whiteman 144, 441-442 (1968); Adler, "Targets in War, Legal Considerations," 8 *Houston L. Rev.* 15 (1970). *Military objective test and World War I;* DeSaussure, "The Laws of Aerial Warfare: Are There Any?" 5 *Int'l.*

Lawyer 527 (1971); Rolland, "Les Pratiques de la Guerre Aerienne" (The Practices of Aerial Warfare), *Review of International Law* 552 (1916); Royce, *supra* at 193; Spaight, *supra* at 224–229.

Military objective test and WWII. Spaight, *supra* note 3, at 265–271; Goda, *supra* note 4. Military objective test and Vietnam, *infra* note 23. *On economy of force and aerial bombardment,* see Possonny, *Strategic Air Power* 63–73 (1949) and other authorities, *supra* note 5.

[23] For discussion, see Carnahan, *supra* note 5. On Korea, compare 10 Whiteman, *supra* note 14, at 140, 422 with 138–139. On Vietnam, compare 10 Whiteman, at 425–429 [US regarded roads, railroads, petroleum facilities, barracks and supply depots in North Vietnam as legitimate targets and denied bombing hospitals, textile plants, fruit canning plants and dikes]; with Freymond, "Confronting Total War: A 'Global' Humanitarian Policy," 67 *Am. J. Int'l. L.* 672 (1973) quoting a letter from N. Vietnam accusing US of indiscriminately bombing hospitals, schools, road transport stations, markets, villages, fishing vessels, churches and pagodas. Only in the case of "road transport stations" might there be a direct conflict between US and N. Vietnam as to legitimacy of targets. The 1923 Draft Hague Rules fully recognized that lines of communications and transportation used for military purposes were military objectives. Article 8b of the Hague Convention on the Protection of Cultural Property in the Event of Armed conflict, 14 May 1954, (as a condition for special protection for cultural property) requires separation "from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication." 249 UNTS 216. The US is a signatory but not a party to this Convention.

[24] On precautions, see U.N. Res. 2675, *supra* note 19 (which suggested "all necessary precautions" as the rule).

Incidental Casualties. The recognition that incidental civilian casualties are permissible if not excessive in relation to the distinct military advantage attempted to be secured is confirmed by authorities note 21 *supra*. See also Rovine, *supra* note 18 at 124–125, quoting letter of DOD General Counsel to Senator Kennedy which reads, in part, "I would like to reiterate that it is recognized by all states that they may not lawfully use their weapons against civilian populations or civilians as such, but there is no rule of international law that restrains them from using weapons against enemy armed forces or military targets. The correct rule which has applied in the past and continued to apply to the conduct of our military operations in Southeast Asia is that the 'loss of life and damage to property must not be out of proportion to the military advantage to be gained'." The proportionality requirement is so basic it applies to *internal struggles.* Bond, *The Rules of Riot* 93, 87, 110 (1974).

Advance Warning. Warnings are frequently useful for psychological purposes in addition to serving the function of avoiding or minimizing civilian casualties. When given, they have usually been general (i.e. not specific as to time and place of attack) in the interest of preventing the enemy from using the warning to his military advantages. See various warnings reproduced in 10 Whiteman, *supra* note 14, at 140–141; Spaight, *supra* note 3, at 240.

Judicial Authorities. The legal problems involved in an air raid are very similar to those raised when land or naval forces raid behind an enemy's lines. For discussion, see Carnahan, *supra* note 5, who discusses US Civil War cases. The warning requirement as to air warfare was also adjudicated before the Greco-German Mixed Arbital Tribunal in two cases holding liability for failure to give warning. See Schwarzenberger, *supra* note 4, at 144.

[25] For historic development, see proceedings, 1972 *Am. Soc. Int'l. L;* President Nixon's News Conference of 27 July 1972, 62 *State Dept. Bull.* 173, 201, 203 (1972); Secretary General's Reports, *supra* note 20.

[26] The historical record confirms that the words "by whatever means" were added to specifically include attacks by aircraft. The meaning of this requirement has been subject to prolific argument for generations among legal scholars. See Carnahan, *supra* note 5; Greenspan, *supra* note 4, at 332; Note, "Open Towns," 22 *Brit. Y.B. Int'l. L.* 258, 261 (1945); Spaight, *supra* note 3, at 221; Williams, "Legitimate Targets in Aerial Warfare," 23 *Am. J. Int'l. L.* 570, 573 (1929); 10 Whiteman, *supra* note 14, at 434. The protection of open cities, while causing difficulty in application, has always been a firm requirement of international law. Past arguments usually involved whether the area was in fact open to unopposed occupation or whether combatants and mobile military equipment had been removed.

[27] Westlake, *International Law-War* 314.

[27a] The rest of the quotation from Article 2, Hague IX, is reprinted in paragraph 5–2, this publication.

[28] "This principle [of distinguishing between civilians and combatants and military objectives and civilian objects] recognizes the interdependence of the civilian community with the overall war effort of a modern society. But its application enjoins the party controlling the population to use its best efforts to distinguish or separate its military forces and war making activities from members of the civilian population to the maximum extent feasible so that civilian casualties and damage to civilian objects incidental to attacks on military objectives, will be minimized as much as possible." DOD, General Counsel, quoted *supra* note 18, at 123.

Article 14 and 15, GC, provide for neutralized zones by agreement between states in peace or in times of armed conflict. The principle was used successfully in the Sino-Japanese conflict. *Spaight, supra* note 3, at 256. Military advantages secured by separation are discussed in Kissinger, *Nuclear Weapons and American Foreign Policy* (1957).

[29] *Hospitals/Mobile medical* (Art 19, GWS; Art 18, GC).

Medical transport (Art 35, GWS; Art 21, GWS-SEA; Art 21, GC) Discussed in chapter 12.

Medical Aircraft (Arts 36 & 37, GWS; Arts 39 & 40, GWS-SEA; Art. 22 GC). Discussed in Chapter 4.

Hospitals ships & Sick bays (Art. 20, GWS; Arts 22–35, GWS-SEA; Art 21, GC.) For discussion on abuse of markings, see chap 8; for Convention, see chapter 12.

Wounded and sick-medical personnel, see chapters 3, 4, and 12.

[30] Art. 23 and Annex 1, GWS; Arts 14 and 15, GC.

[31] This requirement is derived from Article 27, HR, and Article 5, Hague IX. World War II practice is discussed in Spaight, *supra* note 3, at 286. The relationship between the law of armed conflict and effective military action was noted in the statement. "If the Germans go on long enough bombing [cultural objects] while we bomb essentially military objectives, Germany will lose the war even quicker that she is bound to do anyway" cited by *Spaight, supra* note 3, at 287, quoting Mr. Herbert Morrison. This principle has been reaffirmed by other international agreements. Treaty on the Protection of Artistic and Scientific Institutions, and Historic Monuments, 15 April 1935, 49 Stat 3267, TS 899; 3 Bevans 254; 167 LNTS 279 (1935) [known as Roerich Pact].

[32] Article 23, GPW. PG Stands for the French "Prisonniers de Guerre"

[33] Crew members are not bound to know the contents of propaganda that is distributed since it is frequently in a different language. For historical development of rule sanctioning this use of military aircraft and requirement that members of the crew must not be deprived of their rights because they have distributed propaganda, see Article 21, Draft Hague Rules of Air Warfare, *supra* note 4; Garner, "Proposed Rules for the Regulation of Aerial Warfare," 18 *Am. J. Int'l. L.* 64 (1924) and authorities cited in 10 Whiteman, *supra* note 14, at 339–401. Spaight, *supra* note 3, at 318–319, 330–334 and Greenspan, *supra* note 4, at 324, discuss restrictions on propaganda.

Chapter 6
AERIAL WEAPONS

6-1. Introduction.[1] A basic function of a belligerent's air force in time of armed conflict is delivering weapons against enemy combatants and military objectives on the ground, at sea or in the air. The advent of guided missiles and nuclear weapons has highlighted the destructive capability of aerial weapons. Yet, more conventional types of weapons have always been a part of air warfare. Small caliber ammunition, explosives and incendiary weapons were used by belligerent air forces in both World Wars, Korea and Vietnam, as well as in other recent conflicts. This chapter describes the basic international legal principles and rules governing conventional, chemical, biological and nuclear weapons.

6-2. Distinction Between Unlawful Weapon and Unlawful Use of a Weapon.[2] The international law of armed conflict is generally characterized as prohibitive law forbidding certain manifestations of force rather than positive law authorizing other such manifestations. The prohibitions may relate to a specific weapon or be expressed in one of the generic principles of warfare: to avoid unnecessary suffering and to maintain proportionality. A weapon may be illegal *per se* if either international custom or treaty has forbidden its use under all circumstances. An example is poison to kill or injure a person. On the other hand, any weapon may be used unlawfully, such as when it is directed at civilians and not at a military objective. In the first example, the question of how the weapon is used is irrelevant because the use of the weapon itself is prohibited; in the second example, the manner of employment is critical. The following observation, made with naval warfare in mind, applies equally to aerial weaponry,

> [T]he lawfulness of the weapons and methods of war must be determined not only by the expressed prohibitions contained in specific rules of custom and convention but also by those prohibitions laid down in the general principles of the law of war. . . . [E]ven if it were possible today to enumerate with precision those targets that could be regarded as constituting legitimate military objectives, there would still remain the problem of determining the limits of the 'incidental' or 'indirect' injury that admittedly may be inflicted upon the civilian population in the course of attacking military objectives. The answer to this latter problem may largely depend, in turn, upon the kinds of weapons that are used to attack military objectives, including weapons whose legal status is itself a matter for determination in accordance with these same general principles. . . . The distinction between the legality of a weapon, apart from its possible use, and the limitations placed upon the use of an otherwise lawful weapon, is frequently overlooked, despite its importance. Any weapon may be put to an unlawful use. . . .[3]

6-3. General Principles Applicable to Weapons:[4]

a. **Principles Explained.** Two key legal principles are necessity and proportionality. Military necessity protects the right to use any degree or means of force, not forbidden, *necessary* to achieve the objective sought. It is also one of the important limitations implicit in the words of Article 22 of the Hague Regulations: "The right of belligerents to adopt means of injuring the enemy is not unlimited." The principle of proportionality is a well recognized legal limitation on weapons or methods of warfare which requires that injury or damage to legally

protected interests must not be disproportionate to the legitimate military advantages secured by the weapons. Protected values subject to measurement include:

(1) The nature, degree, extent and duration of individual injuries involved in the prohibition against unnecessary suffering;

(2) Excessive incidental injury to protected civilian persons or damage to civilian objects; and

(3) Uncontrollable effects against one's own combatants, civilians or property.

The principle of proportionality, reflected in the rule against unnecessary suffering, is discussed in paragraph 6–3b. The principle of proportionality as applied to weapons which can affect the civilian population is discussed in paragraph 6–3c.

b. **Unnecessary Suffering:**

(1) **Statement of Rule.** It is forbidden to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. This rule is a matter of customary international law and has been expressed in past international agreements.

> Besides the prohibitions provided by special Conventions, it is especially prohibited: (e) to employ arms, projectiles, or material of a nature to cause superfluous injury. (Article 23(e), 1899 HR)
>
> In addition to the prohibitions provided by special Conventions, it is especially forbidden: (e) to employ arms, projectiles, or material calculated to cause unnecessary suffering. (Article 23(e), 1907 HR)

(2) **Discussion.**[5] The rule prohibiting the use of weapons causing unnecessary suffering or superfluous injury is firmly established in international law. A military commission in St. Petersburg in 1868, issued the St. Petersburg Declaration which prohibits the use in war of projectiles of less than 400 grams that have certain characteristics. In the preamble to this Declaration, the military commission stated that the legitimate object of war would ". . . be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable" and "that the employment of such arms would therefore be contrary to the law of humanity."[6] In 1899 and 1907, this principle was codified into the Hague Regulations. This prohibition against unnecessary suffering is a concrete expression of the general principles of proportionality and humanity. The rule reflects interests of combatants in avoiding needless suffering. Weapons are lawful, within the meaning of the prohibition against unnecessary suffering, so long as the foreseeable injury and suffering associated with wounds caused by such weapons are not disproportionate to the necessary military use of the weapon in terms of factors such as effectiveness against particular targets and available alternative weapons. What weapons or methods of warfare cause *unnecessary suffering*, and hence are unlawful *per se*, is best determined in the light of the practice of states. All weapons cause suffering. The critical factor in the prohibition against unnecessary suffering is whether the suffering is needless or disproportionate to the military advantages secured by the weapon, not the degree of suffering itself. International agreements may give specific content to the principle in the form of specific agreements to refrain from the use of particular weapons or methods of warfare. Thus, international law has condemned dum dum or exploding bullets because of types of injuries and inevitability of death. Usage and practice has also determined that it is *per se* illegal to use projectiles filled with glass or other materials inherently difficult to detect medically, to use any substance on projectiles that tend unnecessarily to inflame the wound they cause, to use irregularly shaped bullets or to score the surface or to file off the ends of the hard cases of bullets which cause them to expand upon contact and thus aggravate the wound they cause. The rule against unnecessary suffering applies also to the manner of use of a weapon or method of warfare against combatants or enemy military objectives. In this context, the prohibition precludes the infliction of suffering upon individuals for its own sake or mere indulgence in cruelty.

c. **Indiscriminate Weapons.**[7] The existing law of armed conflict does not prohibit the use of weapons whose destructive force cannot strictly be confined to the specific military objective. Weapons are not unlawful simply because their use may cause incidental casualties to civilians and destruction of civilian objects. Nevertheless, particular weapons or methods of warfare may be prohibited because of their indiscriminate effects. Upon occasion, a prohibition is confirmed by the practice of states in refraining from the use of a weapon because of recognition of excessive injury or damage to civilians or civilian objects which will necessarily be caused by the weapon. The extent to which a weapon discriminates between military objectives and protected persons and objects depends usually on the manner in which the weapon is employed rather than on the design qualities of the weapon itself. Where a weapon is designed so that it can be used against military objectives, its employment in a different manner, such as against the civilian population, does not make the weapon itself unlawful. Indiscriminate weapons are those incapable of being controlled, through design or function, and thus they can not, with any degree of certainty, be directed at military objectives. For example, in World War II German V–I rockets, with extremely primitive guidance systems yet generally directed toward civilian populations, and Japanese incendiary balloons without any guidance systems were regarded as unlawful. Both weapons were, as deployed, incapable of being aimed specifically at military objectives. Use of such essentially unguided weapons could be expected to cause unlawful excessive injury to civilians and damage to civilian objects. Attempting to avoid or minimize injury to civilians or damage to civilian objects is fully consistent with, and strongly reinforced by, the traditional military doctrine of economy of force. The United States, in order to avoid excessive collateral injury or damage and acquire maximum military advantage, has historically stressed the importance of accuracy in aerial weapons. In addition, some weapons, though capable of being directed only at military objectives, may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage. Biological warfare is a universally agreed illustration of such an indiscriminate weapon. Uncontrollable effects, in this context, may include injury to the civilian population of other states as well as injury to an enemy's civilian population. Uncontrollable refers to effects which escape in time or space from the control of the user as to *necessarily* create risks to civilian persons or objects excessive in relation to the military advantage anticipated. International law does not require that a weapon's effects be strictly confined to the military objectives against which it is directed, but it does restrict weapons whose foreseeable effects result in unlawful disproportionate injury to civilians or damage to civilian objects.

6–4. Chemical and Biological Weapons:

a. **Treaty Provisions:**[8]

(1) Geneva Protocol For The Prohibition Of The Use In War Of Asphyxiating, Poisonous, Or Other Gases, And Of Bacteriological Methods Of Warfare, 17 June 1925.

* * * * *

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and to the end that this prohibition shall be universally accepted as part of International Law, binding alike, the conscience and the practice of nations;

* * * * *

The High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as

between themselves according to the terms of this declaration.

(2) Convention On The Prohibition Of The Development, Production, And Stockpiling Of Bacteriological (Biological) And Toxin Weapons And On Their Destruction, 1972.

Article I. Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain: (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes; (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

Article II. Each State Party to this Convention undertakes to destroy, or to divert to peaceful purposes, as soon as possible, but not later than nine months after the entry into force of the Convention, all agents, toxins, weapons, equipment and means of delivery specified in Article I, which are in its possession or under its jurisdiction or control. In implementing the provisions of this article all necessary safety precautions shall be observed to protect populations and the environment.

Article III. Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States, or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment, or means of delivery specified in Article I of the Convention.

Article IV. Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such state, under its jurisdiction or under its control anywhere.

b. **Biological Weapons.**[9] International law prohibits biological weapons or methods of warfare whether they are directed against persons, animals or plants. The wholly indiscriminate and uncontrollable nature of biological weapons has resulted in the condemnation of biological weapons by the international community, and the practice of states in refraining from their use in warfare has confirmed this rule. The Biological Weapons Convention prohibits also the development, preparation, stockpiling and supply to others of such weapons.

c. **Chemical Weapons: Gas Warfare.** The first use of lethal chemical weapons is now regarded as unlawful in armed conflicts. During World War II President Roosevelt, in response to reports that the enemy was seriously contemplating the use of gas warfare, stated: "Use of such weapons has been outlawed by the general opinion of civilized mankind. . . . We shall under no circumstances resort to the use of such weapons unless they are first used by our enemies."[11] This United States position has been reaffirmed on many occasions by the United States as well as confirmed by resolutions in various international forums. On 11 August 1970, when the 1925 Geneva Protocol was resubmitted to the Senate for its advice and consent prior to United States ratification, President Nixon stated that the United States would ratify the Protocol with an appropriate reservation that "would permit the retalitory use by the United States of chemical weapons and agents." The 1925 Geneva Protocol came into force for the United States on 10 April 1975.

d. **Anti-plant Agents.**[13] Anti-plant agents are chemicals which possess a high potential for destroying plants. Thus, they can limit the production of food or defoliate vegetation used either as a raw material (trees for pulp) or as a cover (trees for camouflage). These agents include herbicides that kill or inhibit the growth of plants; plant growth

regulators that either regulate or inhibit plant growth, sometimes causing plant death; and those which dry up plant foliage. US policy on the use of herbicides in war is as follows:

> The United States renounces, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within US bases and installations or around their immediate defensive perimeters . . . The Secretary of Defense shall take all necessary measures to ensure that the use by the Armed Forces of any . . . chemical herbicides in war is prohibited unless such use has Presidential approval, in advance. (Executive Order 11850, 8 April 1975, issued by Gerald R. Ford, President of the United States).

The legal effect of this Executive Order is to reflect national policy. It is not intended to interpret the Geneva Protocol of 1925 or change the interpretation of the US that the Protocol does not restrain the use of chemical herbicides as such.

e. **Riot Control Agents.**[14] Riot control agents are chemicals, such as sprays and gases, which do not cause permanent injury and have no harmful effects other than temporarily disabling the person to whom they are applied. US policy on the use of riot control agents in war is as follows:

> The United States renounces, as a matter of national policy, . . . first use of riot control agents in war except in defensive military modes to save lives such as:
>
> (a) Use of riot control agents in riot control situations in areas under direct and distinct US military control, to include controlling rioting prisoners of war.
>
> (b) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
>
> (c) Use of riot control agents in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.
>
> (d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations. . . .
>
> The Secretary of Defense shall take all necessary measures to ensure that the use by the Armed Forces of the United States of any riot control agents. . . in war is prohibited unless such use has Presidential approval, in advance. (Executive Order No. 11850, 8 April 1975, issued by Gerald R. Ford, President of the United States).

The legal effect of this Executive Order is to reflect national policy. It is not intended to interpret the Geneva Protocol of 1925 or change the interpretation of the US that the Protocol does not restrain the use of riot control agents as such.

f. **Poison.**[15] Article 23(a) of the Hague Regulations provides: "It is especially forbidden . . . To employ poison or poisoned weapons." Poisons are biological or chemical substances causing death or disability with permanent effects when, in even small quantities, they are ingested, enter the lungs or bloodstream, or touch the skin. The longstanding customary prohibition against poison is based on their uncontrolled character and the inevitability of death or permanent disability as well as on a traditional belief that it is treacherous to use poison.

6–5. Nuclear Weapons.[16] The use of explosive nuclear weapons, whether by air, sea or land forces, cannot be regarded as violative of existing international law in the absence of any international rule of law restricting their employment. Nuclear weapons can be directed against military objectives as can conventional weapons. However, decisions to employ nuclear weapons emanate from a nation's highest level of government. The authority of United States forces to employ nuclear weapons resides solely with the President. Moreover, these weapons have

been the subject of intense international political interest and international regulation because of their potential for mass destruction, the historical fact of their recent development by only a very few powers with the ability to control their development and deployment, and international concern about possible proliferation of weapons of mass destruction. The United States is a party to numerous international agreements which regulate various aspects of nuclear policy. These agreements include: (i) Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water; (ii) Treaty on the Non-Proliferation of Nuclear Weapons; (iii) Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America; (iv) Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof; (v) Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitations of Anti-Ballistic Missile Systems; (vi) Interim Agreement between the Union of Soviet Socialist Republics and the United States of America on Certain Measures With Respect to the Limitation of Strategic Offensive Arms With Protocol.[17]

6-6. Conventional Weapons and Weapons Systems:[18]

a. **Aircraft, Rockets, Guided Missiles and Aerial Bombardment.** The use of aircraft, rockets and guided missiles by land, sea or air forces against combatants and other lawful military objectives is clearly permissible under the international law regulating armed conflict. This result is confirmed by the extensive practice of nations in wars during the 20th century, and even earlier in the case of rockets. Aircraft represent a unique mobile platform for the delivery of weapons. The manner in which such delivery systems are used in warfare, however, is regulated by the principles and rules of international law regulating armed conflict discussed elsewhere in this pamphlet, specifically chapters 3, 4, and 5.

b. **Fragmentation Weapons.**[19] Where a military purpose is apparent and suffering is incidental to the military necessities involved, the use of explosives and fragmentation particles such as those contained in projectiles, mines, bombs, rockets, missiles and hand grenades is not prohibited under the law of armed conflict. This result is confirmed by an extensive practice of nations in using such weapons during periods of armed conflict in the 20th century and previously. Cluster bomb units, a more recent development in warfare, are only a refinement or special type of fragmentation munition. Care must be taken in the design and development of fragmentation weapons so as to insure they accomplish only military functions and do not violate the prohibition against unnecessary suffering. The manner in which such weapons are used, moreover, is regulated in periods of armed conflict by the principles of armed conflict discussed elsewhere in this publication.

c. **Incendiary Weapons.**[20] Incendiary weapons, such as incendiary ammunition, flame throwers, napalm and other incendiary agents, have widespread uses in armed conflict. Although evoking intense international concern, combined with attempts to ban their use, state practice indicates clearly they are regarded as lawful in situations requiring their use. Conventional incendiary weapons are normally employed against materiel targets and combatants in the vicinity of such targets, such as pill boxes, tanks, vehicles, fortifications, etc. Use in ground support of friendly troops in close contact with enemy forces is an important use. Such uses are justified by the military effectiveness of incendiary weapons demonstrated during World War I, World War II, Korea, Vietnam and other conflicts. Controversy over incendiary weapons has evolved over the years partly as the result of concern about the medical difficulties in treating burn injuries, as well as arbitrary attempts to

analogize incendiary weapons to prohibited means of chemical warfare. The potential of fire to spread beyond the immediate target area has also raised concerns about uncontrollable or indiscriminate effects affecting the civilian population or civilian objects. Accordingly, any applicable rules of engagement relating to incendiary weapons must be followed closely to avoid controversy. The manner in which incendiary weapons are employed is also regulated by the other principles and rules regulating armed force discussed elsewhere in this publication. In particular, the potential capacity of fire to spread must be considered in relation to the rules protecting civilians and civilian objects discussed in chapter 5. For example, incendiary weapons should be avoided in urban areas, to the extent that other weapons are available and as effective. Additionally, incendiary weapons must not be used so as to cause unnecessary suffering.

d. **Delayed Action Weapons.**[21] Aerial dropped mines and other delayed action weapons are not prohibited under international law, provided that they do not in their design or inherent characteristics cause unnecessary suffering. The manner of use of such weapons, however, is regulated by the rules of armed conflict. Mines in the nature of booby traps are frequently unlawfully used, such as when they are attached to objects under the protection of international law, *e.g.,* wounded and sick, dead bodies, and medical facilities. Also objectionable are portable booby traps in the form of fountain pens, watches and trinkets which suggest treachery and unfairly risk injuries to civilians likely to be attracted to the objects. Of course, necessary precautions must be taken in the use of all weapons, including delayed action weapons, to avoid or minimize incidental civilian casualties. Also mines must not be used for the purpose of preventing rescue of or protection to wounded and sick persons or to deny other humanitarian protections.

6-7. New Weapons and Methods of Warfare:[22]

a. **Not Illegal Because New.** The development of new weapons or methods of warfare has often resulted in public denunciation of their allegedly cruel effects, and attempts to prohibit their use in warfare. This has been true of the crossbow, siege engines for hurling projectiles, firearms, gunpowder, bayonets and other less efficient methods of warfare. A weapon or method of warfare may not be considered illegal solely because it is new or has not previously been used in warfare. However, a new weapon or method of warfare may be illegal, *per se,* if it is restricted by international law including treaty or international custom. The issue is resolved, or attempted to be resolved, by analogy to weapons or methods previously determined to be lawful or unlawful. In addition to analogy, the legality of new weapons or methods of warfare is determined by whether the weapon's effects violate the rule against unnecessary suffering or its effects are indiscriminate as to cause disproportionate civilian injury or damage to civilian objects. The military advantages to be secured by use of the weapon must be compared with the effects caused by its use. For example, the following questions are relevant: (1) can the weapon be delivered accurately to the target; (2) would its use necessarily result in excessive injury to civilians or damage to civilian objects, so as to be termed an "indiscriminate weapon"; (3) would its effects be uncontrollable or unpredictable in space or time as to cause disproportionate injury to civilians or damage to civilian objects; and (4) would its use necessarily cause suffering excessive in relation to the military purpose which the weapon serves so as to violate that prohibition. Department of Defense policy requires that all actions of the Department of Defense with respect to the acquisition and procurement of weapons, and their intended use in armed conflict, shall be consistent with the obligations assumed by the United States Government under all applicable trea-

ties, with customary international law, and, in particular, with the laws of war.

b. **New Weapons May Be Used Illegally.** Any weapon or method of warfare may be employed in an unlawful manner; for example, when used to inflict unnecessary suffering (see paragraph 6–2) or when used in violation of the rules protecting civilians or civilian objects (see chapter 5).

FOOTNOTES

[1] For general background, see 6 Hackworth, *Digest of International Law* 259 (1943); 3 Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 1813 (1945); 2 *Oppenheim's International Law* 340 (7 ed. Lauterpacht 1952); US Army, *FM 27-10,* at 17 (1956) [herein FM 27-10]; Stone, *Legal Controls of International Conflict* 550 (1959); Greenspan, *The Modern Law of Land Warfare* 359 (1959); McDougal and Feliciano, *Law and Minimum World Public Order* 614 (1961); 10 Whiteman, *Digest of International Law* 450 (1968); ICRC, *Report on the Work of Experts, Weapons that may Cause Unnecessary Suffering or Have Indiscriminate Effects* (1973); ICRC, *Report of Conference of Government Experts On Weapons* (1974). These sources also discuss naval weapons in separate sections. On naval mines, see Hague Convention Relative to the Laying of Automatic Submarine Contact Mines Hague VIII, October 18, 1907, 36 Stat 2332; TS 541; 1 Bevans 669 (1910).

[2] The distinction is basic between use of the weapon itself versus the manner of its use or the objects against which it is used. Frequently claims relating to the indiscriminate nature of weapons, upon analysis, relate to the manner of use or the persons, *i.e.,* civilians, against whom it was used. The distinction is made in the sources referenced *supra* note 1.

[3] US Navy War College, 1955 *International Law Studies* 45, 48, 50 (Tucker ed. 1957).

[4] Higgins, *Hall on International Law* 635 (1924); Kunz, *Changing Law of Nations: Essays on International Law* 886 (1968); McDougal, *supra* note 1, at 614; Schwarzenberger, *International Law and Order* 197 (1971); O'Brien, "Some Problems of the Law of War in Limited Nuclear Warfare," *14 Mil. L. Rev.* 7 (Oct, 1961). See also *Hyde, Stone* and other sources as cited, *supra* note 1.

[5] See DOD, GC, Letter to Representative Fraser, 18 January 1974, found in 68 *Am. J. Int'l. L.* 528 (1974); McDougal, *supra* note 1, at 659; Schwarzenberger, *supra* note 4; US Army, *FM 27-10,* at 17; and other sources *supra* notes 1 and 3; G. Downey, "The Law of War and Military Necessity," 47 *Am. J. Int'l. L.* 251, 260-62 (1953).

The St. Petersburg Declaration is found in 18 *Martens* III 474, 1 *Am. J. Int'l. L. Supp.* 23 (1907); Annex I, ICRC, *Report of the ICRC, Reaffirmation and Development of the Laws and Customs Applicable to Armed Conflicts* (Geneva, 1969). The background to the St. Petersburg Declaration is discussed in Bordwell, *Law of War* 87 (1908) and Holland, *The Laws of War on Land* 77 (1908).

The 1899 and 1907 Hague Peace Conferences are discussed in Carnegie Endownment, *Instructions to the American Delegates to the Hague Peace Conferences and Their Official Reports* (Scott ed. 1916); Higgins, *The Hague Peace Conferences* (1909); Scott, *The Hague Peace Conferences of 1899 and 1907* (1907).

[6] Preamble, St. Petersburg Declaration, *supra* note 5.

[7] See authorities, *supra* notes 1 and 4, for discussion. The German V-I rockets are discussed more specifically in Greenspan, *supra* note 1, at 365. The term "indiscriminate" refers to the inherent characteristics of the weapon, when used, which renders it incapable of being directed at specific military objectives or of a nature to necessarily cause disproportionate injury to civilians or damage to civilian objects. Biological weapons are discussed in paragraph 6-4. Also see, J. Freymond, "Confronting Total War: A 'Global' Humanitarian Policy," 67 *Am. J. Int'l. L.* 672, 686-67 (1973) for a discussion on delayed-action weapons. On the issue of the legality of weather modification, see Davis, "Weather Warfare: Law and Policy," 14 *Ariz. L. Rev.* 659 (1972).

[8] Geneva Protocol, 26 UST 571; TIAS 8061; 94 LNTS 65 (1975) [subject to reservation "That the said Protocol shall cease to be binding on the Government of the United States with respect to the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials, or devices, in regard to an enemy State if such State or any of its allies fails to respect the prohibitions laid down in the Protocol]; Biological Warfare Convention, 26 UST 571; TIAS 8062 __ UNTS __ (1975). The text of these are found in AFP 110-20, *Selected International Agreements.* The Biological Warfare Convention came into force for the US on 26 March 1975.

[9] For discussion of biological weapons, see President Nixon's message transmitting to the Senate the Convention on Biological and Toxin Weapons, 67 *State Dept. Bull.* 253 (Sept. 1972), also printed S. Ex. W, 92nd Cong., 2nd Sess; Moore, "Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis," 58 *Va. L. Rev.* 419 (1972); CBW, *Chemical and Biological Warfare* (Rose ed. 1968); Thomas and Thomas, *Legal Limits on the Use of Chemical and Biological Weapons* (1970); Carnegie Endowment for International Peace, *The Control of Chemical and Biological Weapons* (1971); U.S. Senate, "Hearings Before the Committee on Foreign Relations," *92nd Cong., 1st Sess., Executive J.* [1925 Geneva Protocol] (1972), as well as other sources *supra* note 1. Also related, see: Note, "War, Genetics and The Law," 1 *Ecology L. Q.* 795 (1971); L.C. Johnstone,

"Ecocide and The Geneva Protocol," 49 *Foreign Affairs* 711 (1970–71).

[10] For discussion, see sources *supra* note 9. See also "Remarks of the President on Announcing The Chemical and Biological Defense Policies and Programs," 25 Nov 1969, 61 *State Dept. Bull.* 541 (1969) [also found in Hearings, *supra* note 9]. In 10 Whiteman, *supra* note 1, at 476, the US UN Representative, in discussing charges against the UAR concerning use of poison gas in the Yemen, stated: "The United States' position on this matter is quite clear and corresponds to the stated policy of almost all other governments. . . . The use of poison gases is clearly contrary to international law . . ."

[11] "Use of Poison Gas: Statement by the President," 12 June 1943, Vol 8, No. 207, *State Dept Bull* 507 (1947).

[12] "Message from the President of the United States transmitting the 1925 Geneva Protocol," 91st Cong 2nd Sess, *Executive J.*, 11 August 1970. See also note 8, *supra*.

[13] See authorities *supra* note 9. At the time of ratification of the 1925 Geneva Protocol, the President announced the national policy on future use of herbicides. See Gerald R. Ford, 1975 Presidential Documents (22 January 1975). Executive Order 11850, Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents, 8 April 1975, 40 Federal Register No. 70, 10 April 1975. In a related area, see E. Rosenblad, "Starvation As A Means of Warfare—Conditions For Regulation by Convention," 7 *Int'l. Lawyer* 252 (1973).

[14] Statement of Dean Rusk, *60 Am. J. Int'l. L.* 102 (1966); Gellner & Wu., "The Use of Tear Gas in War: A Survey of International Negotiations and of U.S. Policy and Practice," study pursuant to H. Res. 143, attached to *Report of the Subcommittee of National Security Policy and Scientific Developments,* House of Representatives (1970). See also sources *supra* note 9, and Executive Order, *supra* note 13.

[15] US Army, *FM 27–10,* at 18 (1956); Schwarzenberger, *supra* note 4. The Hague Rule reflected a customary rule noted in US Army, General Order No. 100, *Instructions for the Government of Armies of the U.S.* (1863), [*Lieber Code*], which stated in Article 70 "The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war."

[16] For discussion, see Greenspan, *supra* note 1, at 368; McDougal and Feliciano, *supra* note 1, at 659; Schwarzenberger, *The Legality of Nuclear Weapons* (1958); US Army, *FM 27–10,* at 18; 10 Whiteman, *supra* note 1, at 480; Lauterpacht "The Problem of the Revision of the Law of War," 29 *Brit. Y.B. Int'l. L.* 360, 369 (1952). Further authorities are collected in Bishop, *International Law, Cases and Materials* 979 (3rd ed. 1971) and Mallison, "The Laws of War and the Juridicial Control of Weapons of Mass Destruction in General and Limited Wars," 36 *Geo. Wash. L. Rev.* 308 (1967).

[17] The text of the Agreements listed are also found in AFP 110–20, 1 June 1973.

(i) Treaty Banning Nuclear Weapon Tests in the Atmosphere, In Outer Space, and Under Water, 5 August 1963, 14 UST 1313; TIAS 5433; 480 UNTS 43 (1963).

(ii) Treaty on the Non Proliferation of Nuclear Weapons, 1 July 1968, 21 UST 483; TIAS 6839 (1970).

(iii) Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, 14 February 1967, 22 UST 754; TIAS 7137; 634 UNTS 364 (1971).

(iv) Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 11 February 1971, 23 UST 701; TIAS 7337 (1972).

(v) Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972, 23 UST 3435; TIAS 7503 (1972).

(vi) Interim Agreement between the Union of Soviet Socialist Republics and the United States of America on Certain Measures with Respect to the Limitation of Strategic Offensive Arms with Protocol, 26 May 1972, 23 UST 3462; TIAS 7504 (1972).

[18] The items mentioned are delivery vehicles or in the case of aircraft a unique visible platform for delivery. For discussion, see 3 Hyde, *supra* note 1, at 1822; Greenspan, *supra* note 1, at 332; McDougal and Feliciano, *supra* note 1, at 640; Stone, *supra* note 1, at 613. The governing rules, in so far as protection of the civilian population is concerned, are discussed in chapter 5.

[19] The legal rules discussed in paragraph 6–4 regarding unnecessary suffering apply here. Sources cited there and in footnote 1, *supra,* should be consulted for background information.

[20] For historical discussion on use, see Fisher, *Incendiary Warfare* (1946); National Fire Protection Association, *Fire and the Air War* (Bond ed. 1946); US Army, *U.S. Army in World War II, The Technical Services, The Chemical Warfare Service: Chemicals in Combat* (Kleiber, Birdsell, 1966); Report of the Secretary General, *Napalm and Other Incendiary Weapons and All Aspects of Their Possible Use,* A 8803, 9 October 1972.

For legal discussion, see US Army, *FM 27–10,* at 18; Greenspan, *supra* note 1, at 360–361; McDougal, *supra* note 1, at 620; Thomas and Thomas, *supra* note 9, at 240. Fire weapons and napalm were a major item of discussion at the Sept-Oct,

1974, ICRC Conference of Government Experts on Weapons Alleged to Cause Unnecessary Suffering or Have Indiscriminate Effects. See *Report of U.S. Delegation, ICRC Conference of Government Experts on Weapons* (1974) and ICRC Reports, *supra* note 1.

[21] See Greenspan, *supra* note 1, at 362–5; Whiteman, *supra* note 1, at 469, 479–80, 2 Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* 416–23 (1968). Hague VIII, *supra* note 1, (1907) sets forth the following prohibitions with respect to naval mines: (1) to lay unanchored automatic contact mines, unless they be so constructed as to become harmless one hour at most after those who laid them have lost control over them; (2) to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings; (3) to use torpedoes which do not become harmless when they have missed their mark (Article 1); and (4) to lay automatic contact mines off the coasts and ports of the enemy, with the sole object of intercepting commercial navigation (Article 2).

[22] DOD Instruction 5500.15, October 16, 1974, is quoted as follows:

> II. Policy. All actions of the Department of Defense with respect to the acquisition and procurement of weapons, and their intended use in armed conflict, shall be consistent with the obligations assumed by the United States Government under all applicable treaties, with customary international law, and, in particular, with the laws of war.

AFR 110-29, 30 May 1975, implements the DOD Instruction and establishes procedures relative to legal review to insure consistency with international law. The reviews are performed by The Judge Advocate General, USAF.

The subject is also discussed in US Navy War College, *supra* note 3, at 45; Baldwin, "New Look at the Law of War: Limited War and FM 27-10," 4 *Mil. L. Rev.* 34–35 (April 1959); Draper, "The Place of the Law of War in Military Instruction," 111 *Royal United Service Institution Journal* 197 (Aug 1966); Kunz, *Changing Law of Nations: Essays on International Law* (1968); Kelsen, *Principles of International Law* 116 (Tucker ed. 1966).

Chapter 7

UNIFORM, INSIGNIA, AND MARKING REQUIREMENTS

7-1. General.[1] This chapter discusses the marking of aircraft and the wearing of uniforms or distinctive national insignia by aerial combatants including aircrews and parachutists. A uniform in this context includes normal flight suits when they are sufficiently distinctive in character to distinguish the wearer from the civilian population.

7-2. Uniform Requirements of Ground Forces. United States Army Field Manual, FM 27-10, *The Law of Land Warfare,* discusses the legal requirement that ground forces be uniformed.

> Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming a part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of the member of the armed forces.[2] Ground forces engaged in actual combat, in contrast to ground forces preparing for combat, are required to wear their own uniform or distinctive national insignia. A uniform is a badge of identification required of ground combatants in order to distinguish them from civilians or from enemy combatants and to preserve their rights, if captured, as prisoners of war. Failure to wear a uniform when captured does not automatically result in denial of prisoner of war status. It does raise doubt as to whether the individual captured is, in fact, a lawful combatant in the conflict and, therefore, entitled to prisoner of war status.

7-3. Uniform Requirements: Aerial Warfare:[3]

a. **Aircrews.** In contrast to ground forces, military aircrews flying in combat are not required by international law to wear either a uniform or national insignia. Since the aircraft is the entity of combat, its markings fully inform the enemy of the combatant status of its occupants while they are in the aircraft. If captured, their identity cards, required by the Geneva Conventions of 1949, constitute sufficient evidence that they have lawful combatant status. In fact, aircrew members do customarily wear uniforms because flight suits fully qualify as uniforms when they are so distinctive in character as to distinguish the wearer from the civilian population. Moreover, military crew members should be in regular Air Force flight suit or other uniform for their own protection in case they are forced down. For example, they may need to engage in hostilities on the ground to resist capture. In that connection, the prohibition of perfidy, such as disguising oneself as a civilian in order to engage in hostilities, discussed in chapter 8, is applicable. In addition, any attempt by a downed airman while out of his own flight suit or other uniform to secure military information in enemy or enemy occupied territory may subject him to treatment as a spy, when captured. If, while in civilian clothes and behind enemy lines, he attempts to destroy enemy war material, he may subject himself to treatment as a saboteur. Additionally, the risk of a mistake, by the adversary, over the status and identity of the downed crew is increased by failure to wear a regular Air Force flight suit or other uniform. Accordingly, there are numerous legal and practical reasons why regular flight

suits or other uniforms should be worn. Article 93 of the 1949 GPW, recognizes that escaping PWs may wear civilian clothes for the purpose of facilitating their escape even though they intend to resume hostilities after rejoining their units.

b. **Parachutists.**[4] Paratroops must normally wear uniforms such as regular flight suits or other distinctive national insignia in order to be entitled, if captured, to treatment as PWs. Paratroops descend in order to engage in combat as individuals and, therefore, are required to be clearly identifiable as combatants. The fact that paratroops may temporarily descend behind enemy lines to operate in small numbers does not terminate their lawful combatant status. Pilots and other crew members descending by parachute from aircraft in distress are not required by international law to wear uniforms such as regular flight suits or distinctive national insignia. However, in view of their potential need to engage in hostile acts on the ground, they should be in their own uniform for their protection. This is further reinforced by the potential problems which might arise if they are in civilian clothes, discussed in paragraph 7–3a. Firing upon paratroops or other persons descending by parachute including aircrew members is discussed in paragraph 4–2e.

7–4. Emblems of Nationality.[5] While combatant airmen are not absolutely required to wear a uniform or distinctive national insignia while flying in combat, improper use of the military insignia or uniform of the enemy is forbidden. Consequently, airmen should not wear the uniform or national insignia of the enemy while engaging in combat operations. Military aircraft, as entities of combat in aerial warfare, are also required to be marked with appropriate signs of their nationality and military character. However, circumstances may exist where such markings are superfluous and are not required. An example is when no other aircraft except those belonging to a single state are flown. Such markings serve to distinguish friend from foe and serve to preclude misidentification as neutral or civilian aircraft. Accordingly, military aircraft may not bear markings of the enemy or markings of neutral aircraft while engaging in combat. Combatant markings should be prominently affixed to the exterior aircraft surfaces and be recognizable at a reasonable distance from any direction.

FOOTNOTES

[1] For related topics, see chapter 8, Perfidy and Ruses and chapter 9, Independent Missions: Espionage and Sabotage.

[2] US Army, *FM 27–10, The Law of Land Warfare* 31 (1956). See also Greenspan, *Modern Law of Land Warfare* 591 (1959).

[3] ". . . Based on customs and practice of war, issue items of flying clothing distinctive to and bearing identifying marks or insignia of the USAF satisfy existing requirements of national identity and state authorization of combatants for aircrew members" Op JAGAF 1951/132, 1 *Dg. Ops,* War and National Defense, Sec 10.3; Stone, *Legal Controls of International Conflict* 611 (1959). Article 15, *Draft Hague Rules of Air Warfare* (1923) specifies: "Members of the crew of a military aircraft shall wear a fixed distinctive emblem of such character as to be recognizable at a distance in case they become separated from their aircraft." The necessities of war authorize the trial and punishment of spies and saboteurs caught out of uniform prior to rejoining their units in order to encourage the demarcation between combatants and civilians. See chapter 9, this publication, and Risley, *The Law of War* 108, 121 (1897); 7 Moore, *Digest of International Law* 231 (1908); Bordwell, *Law of War* 231, 291 (1908); Holland, *Laws of War on Land* 47 (1908); 6 Hackworth, *Digest of International Law* 307 (1943); 10 Whiteman, *Digest of International Law* 150 (1969). GPW, Articles 83, 89 and 93, in particular, recognize that the wearing of civilian clothing by a PW to escape is permissible and not an offense. It may result in disciplinary punishment only under the GPW.

[4] Greenspan, *supra* note 2, at 318; Spaight, *Air Power and War Rights* 155, 163 (1947); Stone, *supra* note 3, at 612; FM 27–10, *supra* note 2, at 17.

[5] For discussion, see Spaight, *supra* note 4, at 76–103; Stone, *supra* note 3, at 612; 10 Whiteman, *supra* note 3, at 406, 610, 617 (1968). The 1923 Draft Hague Rules of Air Warfare absolutely prohibited false external marks and required military marks (Articles 3 and 19). US Navy, NWIP 10–2, *Law of Naval Warfare* Section 500(d) (1959) specifies an absolute requirement of military markings for belligerent aircraft. The misuse of enemy flags, insignia and uniforms is discussed generally in chapter 8.

Chapter 8

PERFIDY AND RUSES

8-1. Introduction. This chapter defines and explains the international rules of armed conflict regarding perfidy and the use of lawful ruses. Included is an extensive list of lawful ruses and a discussion of circumstances which might make a lawful ruse unlawful. Contrasted with this permissible use of ruses is the unlawful use of deceit constituting perfidy, including specifically prohibited activities such as the misuse of protective distinctive signs and emblems. Restrictions on the use of enemy insignia and uniforms are also discussed.

8-2. Treaty Rules: [1]

a. In addition to the prohibitions provided by special Conventions, it is especially forbidden—

* * * *

b. To kill or wound treacherously individuals belonging to the hostile nation or army;

* * * * *

f. To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention. (Articles 23b and f, HR)

b. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible. (Article 24, HR)

8-3. Explained: [2]

a. **Perfidy.** Perfidy or treachery involves acts inviting the confidence of the adversary that he is entitled to protection or is obliged to accord protection under international law, combined with intent to betray that confidence. Such acts include the following: (i) the feigning of a situation of distress, notably through the misuse of an internationally recognized protective sign; (ii) the feigning of a cease-fire, a humanitarian negotiation or surrender; and (iii) the feigning by combatants of civilian, noncombatant status. Like ruses, perfidy involves simulation, but it aims at falsely creating a situation in which the adversary, under international law, feels *obliged* to take action or abstain from taking action, or because of protection under international law neglects to take precautions which are otherwise necessary. Perfidy or treachery to kill, injure or capture has been prohibited in armed conflict under international law in order to strengthen the trust which combatants should have in the international law of armed conflict. In addition, perfidy tends to destroy the basis for restoration of peace and causes the conflict to degenerate into savagery.

b. **Ruses.** Ruses of war which have customarily been accepted as lawful, such as the use of camouflage, traps, mock operations and misinformation, are not perfidy. Ruses of war involve misinformation, deceit or other steps to mislead the enemy under circumstances where there is no obligation to speak the truth. As Oppenheim, a recognized international legal scholar, indicated,

> Very important objects can be attained through ruses of war, such as, for instance, the surrender of a force, or a fortress, the evacuation of territory held by the enemy, the withdrawal of a seige, the abandonment of an intended attack, and the like. But ruses of war are also employed, and are very often the decisive factor, during battles.[3]

c. **Misuse of Recognized Signs.** It is forbidden to make use of the distinctive emblem of the red cross (red crescent, red lion and sun) and the protective signs for safety zones other than as provided for in international agreements establishing these emblems. It is also forbidden to make improper use of the flag of truce, or the distinctive sign of the

United Nations, or the protective emblem of cultural property.

d. **Enemy Flags.** It is forbidden to make use of enemy flags, military insignia and uniforms while engaging in attacks since this is "improper use" of an enemy flag, military insignia or uniform.

8–4. Lawful Ruses:[4]

a. Article 24 of the 1907 Hague Regulations confirms the general rule that ruses of war not constituting perfidy are lawful. Among the permissible ruses are surprises, ambushes, feigning attacks, retreats, or flights; simulation of quiet and inactivity; use of small forces to simulate large units; transmission of false or misleading radio or telephone messages (not involving protection under international law such as internationally recognized signals of distress); deception by bogus orders purported to have been issued by the enemy commander; use of the enemy's signals and passwords; feigned communication with troops or reinforcements which have no existence; and resort to deceptive supply movements. Also included are the deliberate planting of false information, moving of landmarks, putting up of dummy guns and vehicles, laying of dummy mines, erection of dummy installations and airfields, removal of unit identifications from uniforms, and use of signal deceptive measures.

b. The following examples provide guidelines for lawful ruses:[5]

(1) The use of aircraft decoys. Slower or older aircraft may be used as decoys to lure hostile aircraft into combat with faster and newer aircraft held in reserve. The use of aircraft decoys to attract ground fire in order to identify ground targets for attack by more sophisticated aircraft is also permissible.

(2) Staging air combats. Another lawful ruse is the staging of air combat between two properly marked friendly aircraft with the object of inducing an enemy aircraft into entering the combat in aid of a supposed comrade.

(3) Imitation of enemy signals. No objection can be made to the use by friendly forces of the signals or codes of an adversary. The signals or codes used by enemy aircraft or by enemy ground installations in contact with their aircraft may properly be employed by friendly forces to deceive or mislead an adversary. However, misuse of distress signals or distinctive signals internationally recognized as reserved for the exclusive use of medical aircraft would be perfidious.

(4) Use of flares and fires. The lighting of large fires away from the true target area for the purpose of misleading enemy aircraft into believing that the large fires represent damage from prior attacks and thus leading them to the wrong target is a lawful ruse. The target marking flares of the enemy may also be used to mark false targets. However, it is an unlawful ruse to fire false target flare indicators over residential areas of a city or town which are not otherwise valid military objectives.

(5) Camouflage use. The use of camouflage is a lawful ruse for misleading and deceiving enemy combatants. The camouflage of a flying aircraft must not conceal national markings of the aircraft, and the camouflage must not take the form of the national markings of the enemy or that of objects protected under international law.

(6) Operational ruses. The ruse of the "switched raid" is a proper method of aerial warfare in which aircraft set a course, ostensibly for a particular target, and then, at a given moment, alter course in order to strike another military objective instead. This method was utilized successfully in World War II to deceive enemy fighter intercepter aircraft.

8–5. Circumstances May Make a Lawful Ruse Unlawful.[6] Deception of the adversary is generally a permissible method of warfare if it does not involve treachery, or the violation of any expressed or implied agreement requiring truth between combatants. However, prevailing circumstances may make an otherwise lawful ruse unlawful. For example, it is an unlawful ruse to place

ground lights or landing flares around naturally or artificially dangerous places in order to lure enemy aircraft to land if civil and neutral aircraft are likely to respond. However, if circumstances were such that only enemy military aircraft would respond as was the case in World War II, then such a ruse would be permissible. Another unlawful ruse is misleading or luring an attacking force into attacking civilian objects or the civilian population in the mistaken belief that military objectives were being attacked. In that connection, see paragraph 5–5 which discusses a state's obligation to protect its own civilian population.

8–6. Perfidy and Unlawful Ruses:[7]

a. **Examples.** The following are examples of conduct which constitute perfidy when carried out in order to commit or resume hostilities.

(1) **The Feigning of a Situation of Distress Through the Misuse of an Internationally Recognized Protective Sign.**[8] Since situations of distress occur during times of armed conflict, as well as peace, and frequently suggest that the persons involved are *hors de combat, feigning* distress or death, wounds or sickness in order to resume hostilities constitutes perfidy in ground combat. However, a sick or wounded combatant does not commit perfidy by calling for and receiving medical aid even though he may intend immediately to resume fighting. Nor do medical personnel commit perfidy by rendering such aid. In aerial warfare, it is forbidden to improperly use internationally recognized distress signals to lure the enemy into a false sense of security and then attack. Feigning distress for the purpose of escape has always been permissible in air warfare. With respect to internationally recognized signals, this principle was fully recognized in 1923. Article 10 of the Hague Rules for The Control of Radio in Times of War states: "The perversion of radio distress signals and distress messages prescribed by international conventions to other than their normal, legitimate purposes constitutes a violation of the laws of war and renders the perpetrator personally responsible under international law."[9] Thus, the use of false or misleading distress signals and messages is restricted.

(2) **The Feigning of a Ceasefire, of a Humanitarian Negotiation, or of a Surrender.**[10] An example is the treacherous raising of a white flag. The white flag has traditionally indicated a desire to communicate with the enemy and may indicate more particularly, depending upon the situation, a willingness to surrender. It raises expectations that the particular struggle is at an end or close to an end since the only proper use of the flag of truce or white flag in international law is to communicate to the enemy a desire to negotiate. Thus, the use of a flag of truce or white flag in order to deceive or mislead the enemy, or for any other purpose other than to negotiate or surrender, has long been recognized as an act of treachery. This rule is codified in Article 23(f), HR. Similarly, international law prohibits pretending to surrender or requesting quarter in order to attack the enemy because of the obligation of combatants not to attack enemy combatants who are *hors de combat* or have surrendered. A false broadcast to the enemy that an armistice has been agreed upon has been widely recognized to be treacherous. The language set out above expressed in terms of cease-fire, humanitarian negotiation or surrender, expresses the customary and conventional law in this area.

(3) **The Disguising of Combatants in Civilian Clothing.**[11] Since civilians are not lawful objects of attack, as such, in armed conflict, it follows that disguising combatants in civilian clothing in order to commit hostilities constitutes perfidy. For discussion of the rules protecting civilians, see chapter 5. This is analogous to other situations where combatants attempt to disguise their intentions behind the protections afforded by the law of armed conflict in order to engage in hostilities.

b. **The Misuse of Specified Signs, Signals and Emblems Which are Internationally Recognized.**[12] The Geneva Conventions of 1949, as well as earlier conventions, contain various provisions concerning distinctive em-

blems for medical functions or for safety zones. It is accordingly forbidden to make use of the protective sign of the red cross (red crescent, red lion and sun) or signs for safety zones (oblique red bands on a white ground) in cases other than provided for in agreements establishing these signs. The 1954 Hague Convention Relative To The Protection Of Cultural Property prescribes also a distinctive emblem for the protection of specific property which should not be misused. The United Nations also has a distinctive sign. In view of the responsibilities of the United Nations, particularly the Security Council under Article 24 of the UN Charter, UN representatives may be present near the scene of future conflicts. Accordingly, prohibitions concerning improper use of its distinctive signs, emblems and signals should be observed.

The following are examples of improper use of the medical emblems: (i) using a hospital or other building marked with a red cross or equivalent insignia as an observation post, military office or depot; (ii) using distinctive signs, emblems or signals for cloaking acts of hostilities, such as firing from a building or other protected installation or means of medical transport; (iii) using protected means of medical transport, such as hospitals, trains or airplanes, to facilitate the escape of able-bodied combatants; (iv) displaying protective emblems on vehicles, trains, ships, airplanes, or other modes of transportation or other buildings containing ammunition or other military non-medical supplies.

c. **Misuse of Enemy Flags, Insignia and Uniform.** Article 23(f) of the Hague Regulations forbids "improper use . . . of the national flag, or of the military insignia and uniform of the enemy."[13] Improper use of an enemy's flags, military insignia, national markings and uniforms involves use in actual attacks. This clarification is necessary because disputes arose concerning the meaning of the term "improper" during World War II. A reciprocal advantage is secured from observing this rule. It is clear, however, that this article does not change or affect the law concerning whether a combatant is entitled to PW status. That question is a separate question determined by the 1949 GPW, as well as other applicable international law.

d. **Assassination.**[14] Article 23(b) HR, quoted previously, prohibits the killing or wounding treacherously of individuals belonging to a hostile nation or army, whether they are combatants or civilians. This article has been construed as prohibiting assassination, proscription or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for any enemy "dead or alive." Obviously it does not preclude lawful attacks by lawful combatants on individual soldiers or officers of the enemy.

FOOTNOTES

[1] The term "treachery" has been replaced more recently by the term "perfidy". For general discussion of treachery or perfidy, see *Oppenheim's International Law* 428 (Lauterpacht ed. 1952); Greenspan, *Modern Law of Land Warfare* 316 (1959); McDougal and Feliciano, *Law and Minimum World Public Order* 668 (1961); 10 Whiteman, *Digest of International Law* 381, 391 (1968). On land warfare, see US Army, FM 27-10, *The Law of Land Warfare* 23, 175 (1956) [herein FM 27-10]. For naval warfare, see US Naval War College, 1955 *International Law Studies* 138 (Tucker ed. 1957).

[2] See authorities *supra* note 1. See also ICRC Report, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 24 May—12 June 1971, *Rules Relative to Behavior of Combatants* (1971); ICRC, *Commentary on Draft Additional Protocols to the Geneva Conventions of August 12, 1949,* at 43 (1973).

[3] Lauterpacht, *supra* note 1, at 428.

[4] The listing is from US Army, FM 27-10, para. 51. See also Spaight, *Air Power and War Rights* 175 (1947); 10 Whiteman, *supra* note 1, at 392; and authorities *supra* note 1. Espionage and sabotage are discussed separately in chapter 9.

[5] Spaight, *supra* note 4, at 173. For colorful WW I discussion, see Bishop, *Winged Warfare* 185 (1919); A. Bott, *An Airman's Outings* 66, 192 (1917); Haslett, *Luck of the Wing* 157 (1920); Molter, *Knights of the Air* 142 (1918); W. Noble, *With a Bristol Fighter Squadron* 21, 142 (1922); Nordhoff, *The Lafayette Flying Corps* 250 (1920); Roberts, *A Flying Fighter* 254 (1918); Turner, *The Struggle in the Air* 172 (1919).

[6] Fenwick, *International Law* 673 (1965); Greenspan, *supra* note 1, at 318; Spaight, *supra* note 4, at 180.

[7] See authorities *supra* notes 1 and 2.

[8] Attacks on disabled aircraft and downed airmen, *not* involving internationally recognized protective signs, are discussed separately in chapter 4. The rule prohibiting feigning *hors de combat* status, such as sickness, distress or death, in order to commit or resume hostilities is only a corollary rule to the principle prohibiting attacks on persons who are *hors de combat.* See authorities *supra* notes 1 and 2.

[9] The Hague Rules, although never formally adopted, are persuasive authority on this point. Greenspan, *supra* note 1, at 318. See also Stone, *Legal Controls of International Conflict* at 617.

[10] US Army, *FM 27-10,* at 22-23, 167-168, 180; Lauterpacht *supra* note 1, at 541; Greenspan, *supra* note 1, at 320-321, 384-385. The use of civilian clothing by escaping PWs, which is recognized as lawful under Article 93, GPW, is discussed in chapter 7.

[11] ICRC Reports, *supra* note 2; Greenspan, *supra* note 1, at 61; 2 Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* 110, 114 (1968).

[12] Articles 38-40, GWS; Articles 41-45, GWS-SEA; Article 23, GPW. See also Part II, GC, particularly Articles 18, 20, 21. The Geneva Conventions are discussed in chapters 11-14, this publication. Also see authorities *supra* notes 1 and 2.

[13] International legal scholars differed prior to WW II on whether any use of enemy flags, uniforms, and insignia was improper or whether only use in combat was improper. The former view was supported by Barclay, *Law and Usage in War* 136-137 (1914); Davis, *Outlines of International Law* 222 (1887); 2 Hyde, *International Law* 659 (1922); 2 Moller, *International Law in Peace and War* 180 (1935). The latter view was supported by Bordwell, *The Law of War Between Belligerents* 283 (1908); Hall, *Treatise on International Law* 649 (1924); Taylor, *Treatise on International Public Law* 490 (1901); 2 Westlake, *International Law* 72-74 (1907). In *United States vs Skorzney,* 9 UN *Law Reports of Trials of War Criminals* 90 (1949), the tribunal determined that the wearing of the enemy uniform prior to combat was not unlawful. See also Greenspan, *supra* note 1, at 320-321; 10 Whiteman, *supra* note 1, at 395; as well as other standard sources.

[14] The text is from US Army, *FM 27-10,* at 17. See also Greenspan, *supra* note 1, at 317; 10 Whiteman, *supra* note 1, at 390; Baldwin, "New Look at the Law of War: Limited War and FM 27-10," 4 *Mil. L. Rev.* 24 (April 1959).

Chapter 9

INDEPENDENT MISSIONS: ESPIONAGE AND SABOTAGE

9-1. Introduction.[1] The international law regulating armed conflict recognizes that certain types of operations differing from traditional military engagements, reconnaissance or bombardments, are utilized to secure military advantage. Such covert operations, generally carried out by small numbers of people, are termed independent missions. Although independent missions are not prohibited, persons who engage in such missions without complying with conditions prescribed by GPW, Article 4, for recognition as lawful combatants may be subjected to domestic criminal processes by the adversary for violation of the local law. This chapter discusses some basic rules of the law of armed conflict affecting independent missions. Two major types of independent missions are espionage and sabotage.

In the context of law regulating armed conflict, espionage refers to the clandestine collection or transmission of intelligence gathered inside the territory of an adversary. As Oppenheim noted:

> War cannot be waged without all kinds of information about the forces and intentions of the enemy, and about the character of the country within the zone of military operations. To obtain the necessary information, it has always been considered lawful to employ spies, and also to make use of the treason of enemy soldiers or private enemy subjects, whether they were bribed, or offered the information voluntarily and gratuitously.[2]

Sabotage refers to clandestine acts of hostility particularly for the purpose of destroying materiel belonging to or intended for military use of an adversary while in territory under the adversary's control.

9-2. Espionage:

a. **General Rules.** A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory. (Article 29, HR)

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage. (Article 31, HR)

Members of armed forces in uniform and other combatants referred to in Article 4 of the Third Convention, as well as other lawful combatants who, in their operations, distinguish themselves from the civilian population and who, having entered enemy-controlled territory or having remained therein, gather or attempt to gather military information for further transmission shall not be considered as spies. In the event of their capture, the persons referred to above shall be prisoners of war.

b. **Discussion.** Although states are not precluded from securing military intelligence, other states, as objects of intelligence operations, are not prohibited from taking measures against spying under their own laws to prevent such activity. In the United States,

for example, Article 106, of the Uniform Code of Military Justice (UCMJ), provides,

> Spies. Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

In addition, persons charged with espionage committed in the United States are also subject to trial and punishment by criminal courts under espionage laws (18 USC § § 792–799 (1970)). Thus, although resort to espionage by a state during a period of armed conflict involves no violation of international law, a state which is the object of that espionage may subject captured spies, whether civilian or military, to trial and punishment. This is to make espionage as difficult and dangerous as possible, and to enhance the distinction between combatants and noncombatants.[3] However, members of the armed forces who are in their own uniform and other lawful combatants[4] who distinguish themselves from the civilian population during their operations are *not* "spies" and cannot be treated as such. Therefore only those persons engaging in espionage who, acting in a clandestine manner, fail to distinguish themselves from the general populace, *i.e.,* military personnel out of their own uniform and civilians, can lawfully be punished as spies.

Espionage is an insoluble enigma in the law of armed conflict because of its nature. Acts of espionage including spying are not prohibited by international law itself, but persons who commit acts of spying and are spies may be punished, in some cases by death. This is true regardless of the success or failure of his mission.[5] However, once a combatant who engaged in espionage activities while out of uniform rejoins the armed force to which he belongs, he is entitled to PW status under Article 4, GPW, and gains immunity from prosecution for all prior acts of espionage.[6]

Persons lawfully convicted of spying may also be executed in areas under occupation under Article 68, GC.[7]

9–3. Sabotage:

a. **General Rules:**

(1) Members of armed forces in uniform and other combatants referred to in Article 4 of the Third Convention [GPW], as well as other lawful combatants who, in their operations, distinguish themselves from the civilian population and who, having entered enemy-controlled territory or having remained therein, destroy or attempt to destroy military objectives, shall not be considered as saboteurs.

(2) In the event of their capture, the persons referred to above shall be prisoners of war.

b. **Discussion.** As a military tactic, sabotage has been legitimized by long use and custom. Sabotage, like espionage, has a dual nature. It is a lawful act of armed conflict which may be performed in such a manner that those who commit the destruction fail to satisfy the conditions under which they may obtain lawful combatant status.[8] Since civilian and military personnel must comply with different conditions to be eligible for PW treatment in case of capture, the criteria for each will be discussed separately.

(1) **Civilians.** Private persons may lawfully take up arms or engage in hostilities as members of a spontaneous general uprising against an invading army (*levee en masse*), or of an organized resistance movement which fulfills criteria entitling them to be treated as PWs.[9] However, private persons who engage in hostilities against an invading, occupying, or other adversary power without falling under one of the classifications entitling them to PW status may, if captured, be tried as criminals under the national law of the adversary or under occupation law, depending on the circumstances.[10]

(2) **Military Personnel.** Members of the

armed forces, who, while in their own uniform, engage in sabotage are acting as lawful combatants who, if captured, are entitled to be treated as PWs.[11] Their conduct of engaging in the conflict may not be punished as criminal behavior. However, military personnel

> . . . who during time of war passed surreptitiously [into an adversary's] territory, discarding their uniform upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. *Ex Parte Quirin,* 317 US 35 (1942).[12]

c. **Punishment.**[13] Both private persons who fail to comply with the conditions prescribed for recognition as lawful combatants, and military personnel out of uniform, who commit hostile acts on the ground in territory under the jurisdiction of the adversary, are not entitled to PW treatment. They may be tried and sentenced to imprisonment or to execution, under certain circumstances. They must be provided a trial. "Hostile acts" include, but are not limited to, sabotage, destruction of communication facilities, intentional misleading of troops by guides, liberation of PWs and other acts. Civilians who participate in a recognized resistance movement or a *levée en masse* and uniformed military personnel, even if camouflaged, who effectuate sabotage as lawful combatants are entitled to PW status and thus cannot be tried or punished for these acts.

FOOTNOTES

[1] For discussion, see ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Rules Relative to Behavior of Combatants* at 16 (1971); Greenspan, *Modern Law of Land Warfare* 54, 329 (1959); US Army, FM 27–10, *Law of Land Warfare,* para. 73–75 [herein FM 27–10]; 10 Whiteman, *Digest of International Law* 150 (1968).

[2] 2 *Oppenheim's International Law* 422 (Lauterpacht ed. 1952).

[3] FM 27–10, para. 77; McDougal and Feliciano, *Law and Minimum World Public Order* 556 (1959); Stone, *Legal Controls of International Conflict* 563 (1959). The classifications of combatants and noncombatants are discussed in depth in chapter 3.

[4] Article 4, GPW.

[5] FM 27–10, para. 78b.

[6] See also Article 31, HR, quoted previously.

[7] Article 68, GC, permits a death penalty but only if such acts were punishable by death pursuant to the preoccupation law of that territory. However, the United States ". . . reserves the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offenses referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins." GC, 6 UST 3516, at 3694; TIAS 3365 (1956), also noted at AFP 110–20, at 1–101.

[8] See authorities, *supra* notes 1 and 3.

[9] Article 4(A)(2), GPW. For discussion, see chapter 3.

[10] See British Military Manual, *The Laws of War on Land,* para. 634 (1958); and Whiteman, *supra* note 1, at 179 and 190.

[11] Greenspan, *supra* note 1, at 62; McDougal and Feliciano, *supra* note 3, at 557; FM 27–10, para. 74; Baxter, "So Called 'Unprivileged Belligerency': Spies, Guerillas and Saboteurs," 26 *Brit. Y. B. Int'l. L.* 323 (1951). PWs may use civilian clothes without incurring any penal responsibility as discussed in chapter 7.

[12] For a more detailed discussion of the importance of the uniform, including requirements for aircrew members, see chapter 7.

[13] Articles 5 and 68 GC; Article 30, HR; ICRC Conference, *supra* footnote 1, at 17; FM 27–10, paragraph 81.

Chapter 10

ENFORCEMENT MEASURES

10-1. Introduction:

a. **Background.**[1] This chapter discusses various means to enforce compliance with the law of armed conflict against other states. As discussed previously in paragraph 1-6, a state's own enlightened self-interest is the primary factor supporting observance of the law. Various military, political and humanitarian considerations reinforce a nation's obligation to follow the law of armed conflict. These include the law's compatibility with traditional military doctrines, such as economy of force, and the necessity of discipline for an effective armed force. Evolved from state practice and treaties reflecting an international consensus, the law incorporates minimum standards of civilization. Yet, under the intense pressures of armed conflict, violations occur. Important secondary enforcement measures are then relied upon to redress past grievances, stop continuing violations or deter future violations. Various enforcement measures are discussed in this chapter. They include publication and protest, demands for compensation, the role of protecting powers and international humanitarian organizations, UN sanctions, criminal responsibility and reprisals.

b. **Reciprocity.**[2] The most important relevant treaties, the 1949 Geneva Conventions for the Protection of War Victims, are not formally conditioned on reciprocity. Parties to each Convention "undertake to respect and to ensure respect for the present Convention in all circumstances" under Article 1 common to the Conventions. The Vienna Convention On the Law of Treaties, Article 60(5), also recognizes that the general law on material breaches, as a basis for suspending the operation of treaties, does not apply to provisions protecting persons in treaties of a humanitarian character. Yet reciprocity is an implied condition in other rules and obligations including generally the law of armed conflict. It is moreover a critical factor in actual *observance* of the law of armed conflict. Reciprocity is also explicitly the basis for the doctrine of reprisals. Additionally, a few obligations, such as those contained in the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, are even formally conditioned on reciprocal adherence.

10-2. Publication and Protest.[3] In the event of a clearly established violation, an injured party may publicize the facts with a view to influencing other states and world public opinion against an offending adversary. Military struggles frequently are in furtherance of an international political struggle. The support of other governments and peoples may be critically important in achieving national goals. Atrocities, real or alleged, may be prominently featured in the political struggle for international support. The newspaper campaigns by various belligerents in the United States prior to US entry into World War I are an example. If the facts are not well known, protest may be combined with demands for thorough investigation by disinterested international groups. The 1949 Geneva Conventions, for example, recognize that at the request of a party to a conflict an inquiry may be instituted concerning any alleged violations of the Conventions. The Conventions also recognize that once a violation has been established, the parties to the conflict must put an end to it and repress it with the least possible delay. Other secondary enforcement measures, such as demands for compensation or threats of reprisal, are frequently combined with any protest.

International law permits wide discretion in the choice of secondary enforcement techniques dependent upon the extent and

type of violations. However, the actual employment of techniques is regulated in a variety of ways. Various practical considerations are also relevant. For example, secondary enforcement measures should avoid adversely impacting on the attitudes of states not participating in the conflict. They should be designed to avoid unwanted escalation. Enemy morale and the will to resist must not be strengthened by their use.

10–3. Compensation.[4] States have important customary and treaty obligations to observe the law of armed conflict, as a matter of national policy, and to insure its implementation, observance and enforcement by its own armed forces. Under international law, states which violate their obligations are responsible, in appropriate cases, for payment of monetary damages to compensate states for injuries suffered. This principle applies to law of armed conflict violations. State responsibility to compensate victims of violations is an important feature in enforcement measures. Claims for compensation are frequently combined with protests about violations.

The 1907 Hague Convention IV, confirming this principle, states,

> A belligerent party which violates the provisions of the said Regulations (HR) shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. Article 3, Hague IV.

Thus, the violater state's obligation to compensate for violations of the Hague Regulations applies regardless of whether the acts constituting violations were authorized by competent authorities of the violator state. Article 12, of the 1949 GPW Convention, provides in a comparable provision, *inter alia*,

> Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Article 29, GC, similarly provides,

> The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

However, as a general rule, in the absence of some cause for fault such as inadequate supervision or training, no obligation for compensation arises on the part of a state for other violations of the law of armed conflict committed by individual members outside of their general area of responsibility.

10–4. Protecting Powers—International Humanitarian Organizations.[5] The 1949 Geneva Conventions provide for a disinterested state to act as a protecting power. The Conventions are to be applied with the cooperation and under the scrutiny of protecting powers. Their duty is to safeguard the interest of the parties to the conflict. States are obliged to facilitate, to the greatest extent possible, the task of protecting power representatives. Additionally, states may entrust to an impartial international organization, such as the International Committee of the Red Cross (ICRC), the duties incumbent on protecting powers under the Conventions. On some occasions, states are obliged to accept the services of such humanitarian organizations in the performance of humanitarian functions assigned to protecting powers. Although the protecting powers provisions in the 1949 Geneva Conventions have not proved effective in recent conflicts, continuing efforts are being made to overcome reasons for this failure.[6] More significantly, international humanitarian organizations, such as the ICRC, have played a highly significant role in attempting to ensure observance of the law.[7] However, their efforts are frequently little publicized because of a traditional emphasis on quiet diplomacy.

10–5. United Nations Procedures.[8] Under the United Nations Charter, the Security Council is empowered to take measures not involving the use of armed force and to take armed actions to maintain international

peace and security. Violations of international law —including the fundamental renunciation of the resort to arms except in self defense—can justify Security Council action. While the Security Council deals primarily with the maintenance of international peace and security, law of armed conflict violations are, on occasion, referred to in their debates and relevant resolutions voted on.[9] Additionally, violations of the law of armed conflict are debated and considered in the General Assembly.

10-6. Criminal Responsibility.[10] Individual criminal responsibility is another mechanism to enforce the law of armed conflict. Domestic tribunals have the competence and, under the grave breaches articles of the Geneva Conventions, the strict obligation to punish certain violations. States also undertake, under the Geneva Conventions, in time of peace and war, to disseminate the text of the Conventions as widely as possible and to include the study thereof in the programs of military, and if possible, civil instruction, so that their principles may be known to the entire population, in particular to the armed fighting forces. Ad hoc international tribunals, such as those established in Germany and Japan following World War II, did punish individuals for their personal actions violating the law of armed conflict. However, the importance of criminal responsibility, as well as training, primarily relates to a state's own efforts to enforce the law of armed conflict with respect to its *own* armed forces. The complex area of criminal responsibility is separately considered in chapter 15.

10-7. Reprisals:

a. **Reprisals Explained.**[11] As a US military tribunal explained,

> Reprisals in war are the commission of acts which, although illegal in themselves, may, under the specific circumstances of the given case, become justified because the guilty adversary has himself behaved illegally, and the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future.[12]

For example, if any enemy employs illegal weapons against a state, the victim may resort to the use of weapons which would otherwise be unlawful in order to compel the enemy to cease its prior violation. Reprisals can be legally justified if they meet certain requirements of international law discussed in paragraph 10-7c.

A reprisal, in this context, does not refer to the use of force to redress violations of general international law. International law embodied in the UN Charter presently prohibits the use of armed force against the territorial integrity or political independence of another state except for collective or individual self-defense.[13]

Reprisals must be clearly distinguished from retorsion and from the taking of hostages. Retorsion is a response to legally permissible acts of state which are of a cruel, discourteous, unfair, harassing, or likewise objectionable nature. Since a retorsion responds to objectionable but legal acts, it must also be legally permissible. Reprisals differ from retorsion in that a reprisal is a response to an illegal act and has the legal character of an enforcement action. Retaliation simply refers to a response. Retaliation, an imprecise term, is on occasion improperly used to denote either reprisal or retorsion, as well as simply a response. As to hostages, Article 34, GC, prohibits the taking of all civilian hostages.

If an act is a lawful reprisal, then as a legal measure it cannot lawfully be the excuse for a counter-reprisal. Under international law, as under domestic law, there can be no reprisal against a lawful reprisal. In fact, reprisals have frequently led to counter-reprisals, and the escalation of conflicts through reprisals and counter-reprisals is one of the reasons for decline in the use of reprisals.[14]

b. **When Reprisals are Forbidden:**

(1) **Text.** Measures of reprisal against prisoners of war are prohibited. Article 13, GPW

Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention (GWS) are prohibited. Article 46, GWS

Reprisals against wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention (GWS-SEA) are prohibited. Article 47, GWS-SEA

No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited.

Reprisals against protected persons and their property are prohibited. Article 33, GC

(2) **Discussion.** Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions.[15] For definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted.[16] Also, the prohibitions in Article 33, GC, protecting civilians includes all 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.(Article 4, GC)

The protection against reprisals expressed in the Conventions therefore does not protect civilians who are under the control of their own country.[17] Reprisals against protected cultural property are not taken because of their questionable legality.[18] Reprisals are also forbidden when the conditions in paragraph 10–7c have not been satisfied. The law of armed conflict should apply equally regardless of the causes of the conflict, and self-defense, not reprisals, is the appropriate response to aggression.[19]

c. **When Reprisals are Employed.**[20] In order to be considered a reprisal, an act must have the following characteristics when employed:

(1) It must respond to grave and manifestly unlawful acts, committed by an adversary government, its military commanders, or combatants for whom the adversary is responsible.

(2) It must be for the purpose of compelling the adversary to observe the law of armed conflict. Reprisals cannot be undertaken for revenge, spite or punishment. Rather, they are directed against an adversary in order to induce him to refrain from further violations of the law of armed conflict. Thus, reprisals serve as an ultimate legal sanction or law enforcement mechanism. Above all, they are justifiable only to force an adversary to stop its extra-legal activity. If, for example, one party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, and even takes steps to punish those immediately responsible, then any action taken by another party to "right" the situation cannot be justified as a lawful reprisal.

(3) There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend upon the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be undertaken.

(4) Other reasonable means to secure compliance must be attempted. The victim of a violation in order to justify taking a reprisal must first exhaust other reasonable means of securing compliance. This may involve appeals or notice discussed earlier or other methods discussed in this chapter. Finally, even if an appeal or other methods fail, reprisals should not be undertaken auto-

matically since there are various other factors governing their employment as discussed in paragraph 10–7d.

(5) A reprisal must be directed against the personnel or property of an adversary. This requirement seems self-evident except for the economic interdependence of states. If a party to a conflict responds to a violation of the neutrality of its suppliers' shipping by striking at other neutral ships carrying cargo to the adversary, the action could not be justified as a reprisal.

(6) A reprisal must be proportional to the original violation. Although a reprisal need not conform in kind to the same type of acts complained of (bombardment for bombardment, weapon for weapon) it may not significantly exceed the adversary's violation either in violence or effect. Effective but disproportionate reprisals cannot be justified by the argument that only an excessive response will forestall further transgressions.

(7) It must be publicized. Since reprisals are undertaken to induce an adversary's compliance with the recognized rules of armed conflict, any action taken as a reprisal must be announced as a reprisal and publicized so that the adversary is aware of its obligation to abide by the law. As the court noted in the *Trial of Richard Bruns*,

> Reprisals were generally understood to aim at changing the adversary's conduct and forcing him to keep the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such.[21]

(8) It must be authorized by national authorities at the highest political level and entails full state responsibility.

d. **Practical Considerations in the Use of Reprisals.**[22] Most attempted uses of reprisals in past conflicts have been unjustified either because the reprisals were not undertaken to deter violations by an adversary or were disproportionate to the preceding unlawful conduct. For example, Germany during World War II attempted to justify various unlawful acts by the doctrine of reprisals.[23] In addition to the legal requirements which regulate resort to reprisals, there are various practical factors which governments will consider before taking reprisals. The relative importance of these factors depends upon the degree and kind of armed conflict, the character of the adversary and its resources, and the importance of states not participating in hostilities. These considerations include the following:

(1) Taking reprisals may divert valuable and scarce military resources from the military struggle and may not be as effective militarily as steady adherence to the law.

(2) Reprisals will usually have an adverse impact on the attitudes of governments not participating in the conflict.

(3) Reprisals may only strengthen enemy morale and will to resist.

(4) Reprisals frequently lead only to further unwanted escalation of the conflict by an adversary. Accordingly, an adversary's ability to retaliate is an important factor.

(5) Reprisals may render resources of an adversary less able to contribute to the rehabilitation of an area after the cessation of hostilities.

(6) The threat of reprisals is usually more effective than their actual use.

(7) Reprisals, to be effective, should be carried out speedily and must be kept under control. They will be ineffective if random, excessive or prolonged.

(8) In any event, the decision to employ reprisals would be reached only as a matter of specific national policy. The immediate advantage sought, which is to stop current and deter future violations of the law by an adversary, must be weighed against the long range military and political consequences.

FOOTNOTES

[1] Related topics include (a) self interest as primary enforcement mechanism, paragraphs 1-6, 5-3, 6-3c, 15-2, this publication; (b) state obligations and enforcement against their own personnel, paragraph 15-2.

[2] For discussion of lack of reciprocity in Geneva Conventions, see ICRC, Commentaries to each of the 1949 Geneva Conventions, *ed* Pictet. For example, ICRC *Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Pictet ed. 1958) states, at 15, "It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. . . . the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from an opponent. . . ." The Vienna Convention on the Law of Treaties (now before the US Senate for advice and consent prior to US ratification) is reprinted in AFP 110-20, 1 June 1973. On reciprocity as an implied condition in treaties and international law affecting armed conflict, see Article 60, Vienna Convention on the Law of Treaties; McDougal, *Law and Minimum World Public Order* 296 (1961); 2 Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* 452, 479 (1968); and authorities *infra* note 11. The lack of reciprocal adherence may prevent effective implementation. For example, see US State Dept., *1973 Digest of US Practice in International Law* 481-482 (1974). Reciprocity as a critical factor in actual observance of the law is discussed in paragraph 1-6, this publication. The 1925 Geneva Protocol relating to Gas warfare is discussed in paragraph 6-4.

[3] Provisions for an inquiry into Geneva Convention violations are included in Article 52, GWS; Article 53, GWS-SEA; Article 132, GPW; and Article 149 GC. Relevant discussion and authorities concerning publicity about violations is found in paragraphs 1-6 and 15-2, this publication.

[4] Article 3, Hague IV; see also Article 12, 131, GPW; Articles 51, GWS and 52, GWS-SEA; and Articles 29, 148, GC. Brownlie, *Principles of Public International Law* 418 (1974); Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* 767 (1968); Spaight, *Air Power and War Rights* 431 (1947); additional authorities are found in footnote 3, chapter 15.

[5] Articles 8-11, GWS; 8-11, GWS-SEA; 8-11, GPW; 9-12, GC. The system of protecting powers is discussed in paragraph 11-3, this publication.

[6] See Report on US Delegation to the *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 1st Sess. (1974) and 2nd Sess. (1975); Report of the Secretary General, *Respect for Human Rights in Armed Conflicts*, A10195, 5 Sept 1975, at 19, and discussion paragraph 11-3, this publication.

[7] See authorities *supra* note 6. The extensive literature published by the ICRC should be consulted in assessing its impact.

[8] On legal authority of the UN Security Council, see Articles 24 and 25, UN Charter and *Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, at 16.

[9] For example, recent UN debate has involved attacks on civil aircraft on international routes during armed conflict and practices in occupied territories in the context of various Mid-East conflicts.

[10] See chapter 15, particularly paragraphs 15-3 and 15-4, for discussion and authorities. Requirements for trials of PWs under the 1949 GPW are discussed in paragraph 13-8.

[11] For general discussion of reprisals and retorsion, see Bishop, *International Law: Cases and Materials* 901 (1971); Colbert, *Retaliation in International Law* (1948); Greenspan, *The Modern Law of Armed Conflict* 407 (1959); McDougal and Feliciano, *Law and Minimum World Public Order* 679 (1961); *2 Oppenheim's International Law* 561 (Lauterpacht ed. 1952); 10 Whiteman, *Digest of International Law*, 317 (1968); Albrecht, "War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949," 47 *Am. J. Int'l L.* 590 (1953).

[12] US v. Ohlendorf, 4 *Trials of War Criminals Before the Nuremberg Military Tribunals* 493 (1950).

[13] Articles 2(4) and 51, UN Charter. An exception to this is UN enforcement and peace keeping action. For discussion of prohibitions on use of force, see chapter 1. On 29 May 1974, Acting Secretary of State Kenneth Rush advised,

> The United States has supported and supports the foregoing principle (referring to UN Resolution 2625 to the effect States have a duty to refrain from acts of reprisal involving the use of force). Of course, we recognize that the practice of states is not always consistent with this principle and that it may sometimes be difficult to distinguish the exercise of proportionate self defense from an act of reprisal. Yet, essentially for reasons of the abuse to which the doctrine of

reprisals particularly finds itself, we think it desirable to endeavor to maintain the distinction between acts of lawful self defense and unlawful reprisals. 68 *Am. J. Int'l. L.* 736 (1974).

[14] An illustration related to air warfare in World War II is discussed in paragraph 6–2. See also US v. Ohlendorf, et al, 4 *Trials of War Criminals before the Nuremberg Military Tribunals* at 493 (1950); Trial of Hans Rauter, 14 *UN Law Reports of War Criminals* 134-135 (1949); 10 Whiteman, *supra* note 11, at 338; Albrecht, *supra* note 11, at 593.

[15] Greenspan, *supra* note 11, at 408, and sources in footnote 11. For application of the Geneva Conventions if one of the parties to the conflict is not a party to the Conventions, see Article 2, common to each Convention.

[16] Article 13, GWS; Article 13, GWS-SEA; Article 4, GPW; Articles 4 and 33, GC.

[17] The Diplomatic Conference considering the 1973 ICRC Draft Protocols to the 1949 Geneva Conventions may adopt prohibitions to that effect. See ICRC Report, *Protection of the Civilian Population Against the Dangers of Hostilities*, at 36-7 (1971) and other reports, *supra* note 6. US conduct in aerial warfare during World War II, Korea and Vietnam, which involved incidental civilian casualties, was not generally justified as a reprisal.

[18] Article 4(4) of the 1954 Hague Convention for the Protection of Cultural Property provides that the parties to the Convention shall refrain from reprisals against cultural property. The US has signed but not ratified the Convention. For authority that reprisals against cultural property are prohibited by customary international law, see Trial of Franz Holstein and others, 8 *UN War Crimes Reports* 30 (1949); Trial of Hans Szabados, 9 *UN War Crimes Reports* 61 (1949); Albrecht, *supra* note 11, at 601; E. Stowell, "Military Reprisals and the Sanctions of the Law of War," 36 *Am. J. Int'l. L.* 643, 647-8 (1942); Note, "Protection of Art in Transnational Law," 7 *Vand. J. Trans. L.* 690 (1974).

[19] See authorities in paragraph 1-5, this publication, and Lauterpacht, "Rules of Warfare in an Unlawful War," in Lipskey, *Law and Politics in the World Community* (1953). *But see* Zuhlke Case, 14 *UN Law Reports of War Criminals* 143-144 (1949).

[20] For a general discussion of reprisals and their employment, as well as a more extensive look at the individual points made in this section, see Greenspan, *The Modern Law of Land Warfare* 4ll (1959); US Navy, NWIP 10-2, *Law of Naval Warfare,* section 310 and chapter 3, footnote 7; US Army, Pamphlet #27-161-2, 2 *International Law*, at 65-67 (1962); 10 Whiteman, *Digest of International Law* 319-321 and 338-339 (1968); Albrecht, *supra* note 11, at 590; Baldwin, "New Look at the Law of War: Limited War and FM 27-10," 4 *Mil. L. Rev.* 28 (1959). See also the following trials where various requirements were considered: Naulilaa Case, 8 *Mixed Arbitral Tribunals* 409 (1928), as reported in Bishop, *supra* note 11, at 903; US v. Ohlendorf, 4 *Trials of War Criminals Before the Nuremberg Military Tribunals* 494 (1950); US v. List, 11 *Trials of War Criminals Before the Nuremberg Military Tribunals* 1248 (1950); Trial of General Von Mackensen and General Maezler, 8 *UN Law Reports of Trials of War Criminals* at 1-8 (1949); Trial of General Oberst Nicholas von Falkenhorst, 11 *UN Law Reports of Trials of War Criminals* 18 (1949); Trial of Rauter, 14 *UN Law Reports of Trials of War Criminals* 133-134 (1949).

[21] Trial of Richard Bruns, 3 *UN Law Reports of Trials of War Criminals* 15, 21 (1948); Trial of Rauter, 14 *UN Law Reports of Trials of War Criminals* 89, 123 (1949); Trial of Gerhard Flesch, 6 *UN Law Reports of Trials of War Criminals* 111, 115 (1948).

[22] NWIP 10-2, *Law of Naval Warfare*, chapter 3, footnote 7 and authorities *supra* note 20.

[23] Appleman, *Military Tribunals and International Crimes*, 315 (1954). For example, it cannot be held that the German bombardments of London, from September to November of 1940, constituted lawful reprisals as argued by the Germans since they were greatly disproportionate to the original alleged violation. For references, see paragraph 5–2d, this publication.

Chapter 11

THE GENEVA CONVENTIONS—INTRODUCTION AND COMMON PROVISIONS

11-1. Introduction.[1] No discussion of the international law regulating armed conflict would be complete without a general survey of the Geneva Conventions of 1949. These four treaties, codifying humanitarian principles, remain the most widely accepted and respected "law of armed conflict." Over 140 states have ratified or acceded to the Conventions. However, a number of states have attached reservations to their accession to the Conventions, as discussed in AFP 110-20.

The Conventions specify treatment to be given persons who are actual or potential victims of armed conflict with the object of relieving and reducing their suffering. They protect those who are *hors de combat* (out of the fighting)—wounded, sick, and shipwrecked at sea, prisoners of war, and civilians. Such persons taking no part in combat must be treated with respect and humanity because they have a specific, legally recognized status entitling them to such treatment. The national interest requires that these Conventions be understood, respected and enforced. Observance of the Conventions avoids undesirable extensions of the conflict, prevents situations disruptive of the restoration of peace and aids in the protection of one's own rights under the Conventions. This chapter discusses the history of the Geneva Conventions as a regime of laws. Various Articles which are common to all four 1949 Geneva Conventions are surveyed. Some defects in the Conventions are noted, and efforts to correct these defects are discussed. The Geneva Conventions are also discussed in the context of Human Rights Law in general.

11-2. A History of the Conventions.[2] The first three 1949 Geneva Conventions (GWS, GWS-SEA, GPW) were not the earliest formal international agreements covering their respective subjects. The Wounded&Sick (GWS) and Maritime (GWS-SEA) Conventions, for example, combine salient features of the 1864 Geneva Convention as well as the 1906, and 1929 Geneva Conventions for the Amelioration Of The Conditions Of The Wounded And Sick In Armies In The Field, and the 1907 Hague Convention X extending the abovementioned principles of land warfare to conflict at sea. The 1949 GPW Convention is similar to its 1929 counterpart, but is far more extensive and, if applied with good faith, gives greater assurance of decent treatment to PWs.

Almost as soon as the 1929 Geneva Conventions went into effect it became apparent that their provisions needed reexamination. World War II experience demonstrated that the then existing instruments failed to deal with all situations where protection was necessary. In particular, the lack of a comprehensive treaty establishing standards of humane treatment for civilians left a major void in the law which was continuously exploited during the conflict. The presence of such a Convention would certainly not have averted all of the atrocities and injuries committed against civilians during World War II, but the absence of specific guidelines on treatment of civilians made it easier to justify even particularly inhumane actions.

Therefore, at the war's end, a two-fold goal emerged: (1) update and clarify the existing Conventions and earlier agreements relating to sick, wounded, shipwrecked and PWs; and (2) draft an agreement which would both extend the benefits of the other Conventions to civilian victims of armed conflict and, more importantly, prevent those civilians from becoming victims of war. These goals had to be pursued so that respect for the law of the Geneva Conventions, built up so carefully over 80 years,

would not be impaired. Hence, all new or revised provisions had to be such that nations would actually observe them. The resulting Conventions are the product of years of study, preparation and thorough analysis, comprehending much input from and negotiation between party states during the formative years 1945-48.

The Conventions were submitted to the US Senate for ratification on 25 April 1951, but were withdrawn during the Korean conflict. Resubmitted after armistice, they were ratified and came into force for the United States on 2 February 1956. They have remained in force without change. Armed conflicts since World War II have demonstrated, however, a need to reaffirm, extend and clarify the Conventions, as well as to provide better enforcement of their provisions. The Vietnam conflict demonstrated the failings of existing agreements regarding the peculiar problems of "wars of liberation," guerrilla activity and informal partisan "armies." A need was also demonstrated to clarify other portions of the law. Hence, in 1973 after extensive preliminary work,[3] the International Committee of the Red Cross (ICRC) prepared two Draft Protocols to the 1949 Conventions. The first of the Protocols supplements the four Geneva Conventions which are generally applicable to international conflicts, and the second deals with internal conflicts. The latter Protocol is the first major attempt since 1949 to define more precisely the humanitarian rules and regulations applicable during civil (internal) conflicts.

11–3. Provisions Common to the Geneva Conventions.[4]

Each of the four Conventions contains certain general provisions dealing with the application and enforcement of the Conventions. Thus, for example, Articles 1, 2, 3, 6, 7, 8, 9, 10, and 11 of the first three Conventions are identical to Articles 1, 2, 3, 7, 8, 9. 10, 11, and 12 of the fourth (GC) Convention except for minor differences in phraseology.

Article 1 requires all parties to respect and to insure respect for the Conventions in all circumstances. Article 2 requires parties to the Conventions to adhere to the provisions at all times in their relations even when other parties to the conflict are not also parties to the Conventions. These articles establish a basic theme of the Conventions - that as between parties, the force of the Conventions cannot be mitigated by the presence of a third nonsignatory party to the same conflict. Article 2 further provides that the Conventions shall apply during any armed conflict, including undeclared war, and during occupation whether it is resisted or not. Thus, artificial distinctions between "war" and "armed conflict" are eliminated.

Article 3 represents the first attempt to provide protection for victims of all internal armed conflicts. Its general provisions insure humane treatment to civilians and others who are *hors de combat,* without regard to race, color, religion, sex, birth, or wealth. After 25 years in force, the rather general protective principles therein stated may be strengthened by the more specific provisions of the Second Draft Protocol (GP II) relative to the protection of victims of internal armed conflicts. This Protocol, currently under discussion in a Diplomatic Conference, would delineate in some detail various degrees of protection for all persons, military or civilian, combatant or noncombatant, in internal armed conflicts. Because this Protocol would be applicable in some purely internal conflicts, its provisions are not as extensive as those of the four 1949 Geneva Conventions and the First Draft Protocol (GP I). But it provides victims of internal civil conflict with more specific measures of protection than those previously delineated.

By Article 13 of GWS and GWS-SEA, and Article 4 of GPW, the protections of the Conventions are extended to resistance fighters, militia and members of spontaneous volunteer corps who meet certain criteria specified therein. Article 5, GWS and GPW, and Article 6 of GC, further clarify a captor's obligations by expressly applying the Conventions to all protected persons without discrimination until final release or

repatriation. Parties may enter into special agreements to augment the Conventions, provided such agreements do not diminish the right of persons protected thereby. No person may renounce his Convention rights (Common Articles 6 and 7).

The provisions dealing with activity by a protecting power are among the most novel and important of the Conventions. A protecting power is a neutral nation which, in an effort to protect the interest of parties to the conflict, endeavors to insure proper application of the Conventions. Protecting powers may appoint delegates from their diplomatic or consular staffs whose duty is to oversee the conduct of a party-signatory on convention related matters. Such appointment is subject to the approval of the detaining power and to the imperative necessities of security of the host state. The ICRC or other impartial organizations may continue their humanitarian work on behalf of victims of armed conflict without obstacles from the Conventions and may, in case the protecting power system fails to operate effectively, be appointed to perform those functions as well. Protecting powers are to lend their good offices to help parties to conflicts settle any disputes they may have regarding interpretation or application of the Conventions.

The greatest weakness of the protecting power system as currently envisioned is the need for parties to the conflict to agree on the powers appointed. It is seldom possible to reach any agreement, with the result that no protecting power is likely to be appointed. The ICRC is left to perform its humanitarian duties without benefit of being appointed protecting power in most cases. Ths US has strongly favored the performance of the ICRC in these humanitarian functions. This deficiency would be corrected in one of the significant provisions (Art 5) in the Draft ICRC Protocol I to the 1949 Conventions.

The set of common articles found at the close of the Conventions contain virtually identical provisions concerning the execution of the Conventions and the prevention and punishment of abuses and violations. These later provisions are discussed in depth in paragraph 15–2, this publication.

The closing Articles of each Convention, termed diplomatic provisions, set forth procedures for bringing the Convention into effect.

11–4. Chart of Common Provisions.

PRINCIPLE	*GWS*	*GWS–SEA*	*GPW*	*GC*
To respect and ensure respect for Conventions	1	1	1	1
When the Conventions apply	2	2	2	2
Internal conflict	3	3	3	3
Special extra agreements	6	6	6	7
Nonrenunciation of benefits by protected persons	7	7	7	8
Protecting power	8	8	8	9
Other activities by impartial humanitarian organizations	9	9	9	10
Entrust to an organization the duties of a protecting power	10	10	10	11
Protecting powers as dispute arbiters	11	11	11	12
Who is protected	13	13	4	4
Dissemination of texts for military and civil instruction	49	48	127	144
Legislate against grave breaches and trial for commission of same	49, 50	50, 51	127	146
Denunciation clauses	63	62	142	158
Nondiscrimination by race, sex, language or religion	3, 12	3, 12	3, 16	3, 13, 27

11-5. The Geneva Conventions and Other International Agreements.[5] In addition to the Geneva Conventions, other treaty sources of international law regulating armed conflict are the 1907 Hague Conventions together with succeeding agreements and interpretations. While these earlier agreements have been partly superseded and generally supplemented so far as they concern the treatment of persons in custody, they embody a number of principles which have a very direct bearing on the fate of such persons in wartime.

There are also a number of other areas of international law directly relevant to the treatment of persons during armed conflict. In particular, provisions of international agreements and customary international law which provide guarantees of individual human rights can apply to persons in both peace and during armed conflict.

As set forth in Article 1 of the United Nations Charter, one purpose of that organization is to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, and religion." The UN Economic and Social Council is empowered to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." (paragraph 2, Article 62, UN Charter). Since 1968, the principal focus for strengthening and clarifying this area of international law has been in the context of human rights. Discussions have been frequent in forums concerned with fostering human rights. From the 1968 major UN Conference on Human Rights in Tehran through successive UN General Assembly Resolutions, this body of law has been increasingly intertwined with human rights law. Moreover, the Geneva Conventions, although applicable by their terms only during periods of armed conflict, are increasingly cited as providing relevant standards for humane treatment in other situations not involving armed conflict.

The basic human rights guarantees in the UN context, the International Declaration of Human Rights, and the International Covenant on Economic, Social, and Cultural Rights, contain important provisions which support the requirements of the Geneva Conventions.[6] Both sets of documents safeguard such fundamental rights as freedom from torture or cruel and inhuman punishment; freedom from arbitrary exile; freedom from arbitrary arrest and detention; freedom from discrimination based on race, sex, language, or religion; freedom from arbitrarily imposed punishment; and right to legal remedy for any abuse; right to a minimum standard of respect for human rights at all times; and right to health, family sanctity and nonabuse. Additionally, both the UN Resolutions and the Geneva Conventions set forth standards regardless of whether observance is reciprocated. Hence, reciprocity is neither a formal condition precedent qualifying the obligation to observe the Conventions, nor does lack of reciprocity excuse failures to comply.[7] There is a major difference between the two sets of agreements. On the one hand, the Geneva Conventions, representing binding legal commitments, recognize that there may be some situations in which the exercise of rights may be modified or restricted. On the other hand, the UN documents provide a broad general code of aspiration for human rights.

FOOTNOTES

[1] The portions of chapters 11 through 14 which outline the provisions of the Geneva Conventions are adapted from the Report of the Committee on Foreign Relations on Executives D, E, F, and G (1949 Geneva Conventions for the Protection of War Victims), 82nd Cong., 1st Sess., Executive Report No. 9 of June 27, 1955. Because some of the summary material was taken intact, or with only minor changes, from this excellent report, this note is a general footnote for these chapters. These chapters are intended primarily as an introduction to the Conventions rather than an authoritative statement of what the Conventions themselves require. The Conventions (which are reprinted in AFP 110-20) must be consulted for that latter purpose. This chapter only represents a general survey, and particular provisions of the Conventions have been examined in depth elsewhere in this publication. The most authoritative commentaries are published by the International Committee of the Red Cross (ICRC), under the general editorship of Jean S. Pictet, *e.g.*, ICRC, *Commentary to the Geneva Convention For the Amelioration of The Condition of The Wounded and Sick in Armed Forces in The Field*, (Pictet ed. 1952); ICRC, *Commentary to The Geneva Convention Relative to Protection of Prisoners of War*, (Pictet ed. 1958). See also, for discussion: Greenspan, *Modern Law of Land Warfare* (1959); ICRC, *Handbook of the International Red Cross* (annual); McDougal and Feliciano, *Law and Minimum World Public Order* (1961); Pictet, "The Principles of International Humanitarian Law," 66-68 *International Review of the Red Cross* 455, 511, 567 (1966); Esgain and Solf, "The 1949 Geneva Convention Relative to the Treatment of Prisoners of War; Its Principles, Innovations and Deficiencies," 41 *N. Car. L. Rev.* 557 (1963). The best source for discussion of the shortcomings of the Conventions is found in the reports preparatory to the Diplomatic Conference now considering the Draft ICRC Protocols to the Conventions. An illustration is ICRC, Conference of Red Cross Experts on the Reaffirmation and Development of International Law Applicable in Armed Conflicts, 20 24 March 1972, *Report of The Work of The Conference* (Geneva 1972).

[2] See sources *supra* footnote 1. For the text of previous agreements, see 1 *The Law of War, A Documentary History*, (Friedman ed. 1972). The 1949 Conventions were formulated against the background of deficiencies in previous agreements demonstrated during World War II and documented at length in the post World War II war crimes trials. Particular problems can be researched best through the *UN War Crimes Commission: Law Reports of Trials of War Criminals*, 15 vols (1949). Comparisons with previous agreements are also discussed in the Committee Report on Executives D, E, F, & G, *supra* note 1.

[3] See chapter 3, footnote 23, and footnote 17, chapter 5, for authorities.

[4] Differences in phraseology relate primarily to the requirement to distinguish the varying persons and objects protected by each Convention. Compare, for example, Article 12, GWS, and Articles 12 and 13, GWS-SEA, which specify persons protected by those Conventions, with Article 4, GPW, and Article 4, GC. Requirements for combatants have been discussed previously in chapter 3. Provisions of the Conventions dealing with enforcement by criminal process are discussed in chapter 15.

[5] The Geneva Conventions, as well as other sources of the law of armed conflict, have been extensively discussed elsewhere in this publication, *e.g.*, chapters 1, 3, 5, 10. The text of the most important 1907 Hague Conventions and the Geneva Conventions, as well as indexes thereto, are reprinted in AFP 110-20. As to the historical development of the law of armed conflict in the context of human rights law, see Bailey, *Prohibitions and Restraints in War* (1972) and authorities cross referenced, *supra* note 3.

[6] International Declarations of Human Rights, adopted 10 December 1948, 3 G.A. Res. 217, U.N. Doc. A/810 at 71 (1948); International Covenant on Economic, Social and Cultural Rights, 21 G.A. Res. 2200, Annexes; "Official Documents, United Nations, Human Rights Covenants," 61 *Am. J. Int'l. L.* 861 (1967). Not in force for the US as of the date of publication.

[7] See discussion, paragraph 10-1b, this publication. On reciprocity as a factor in observance of the law, see chapter 1.

Chapter 12

GENEVA CONVENTIONS ON WOUNDED AND SICK (GWS) AND WOUNDED AND SICK AT SEA (GWS-SEA)

12-1. Introduction.[1] These Conventions express detailed rules protecting those who are *hors de combat* and hence represent no immediate military threat to an adversary. This chapter surveys those rules, including subsidiary rules and formulations protecting medical units and personnel and means of medical transport in the context of the Conventions. Some particular provisions of importance have already been discussed in specific contexts elsewhere in this publication in chapters 3, 4, and 5.

The sick and wounded were the focus of the earliest modern international agreements regulating armed conflict. The beginnings of the modern international effort to agree on the laws of war date from 1864, when the Red Cross Convention protecting wounded and sick was agreed on due to the efforts of Henri Dunant, founder of the ICRC. The initial agreement dealt solely with the treatment of sick and wounded and the protection of medical personnel and facilities (hospitals, ambulances, etc.) during armed conflicts. This 1864 Convention was updated in 1906, and again in 1929, before the present 1949 GWS Convention was concluded. The Third (GPW) and Fourth (GC) Geneva Conventions, which protect PWs and civilians respectively, incorporate some features of the GWS and GWS-SEA Conventions in order to insure appropriate safeguards for sick and wounded falling under their respective provisions.[2] For example, sick and wounded PWs must be provided with free medical attention. Other GPW Convention articles relating to transfer, repatriation and work contain specific provisions affording protection for sick and wounded.

The Second Geneva Convention (GWS-SEA) or Maritime Convention dates originally from the 1907 Hague Convention X for the extension of the principles of the Geneva Convention of 1906 to maritime warfare. Problems of search, rescue, transport and care unique to naval warfare necessitated a separate Convention to more effectively protect the wounded, sick, and shipwrecked at sea.

As noted earlier,[3] the Geneva Conventions themselves are once again under review in an international Diplomatic Conference to reaffirm and reinforce their principles and requirements. The Draft Geneva Protocols on international (GP I) and internal (GP II) conflicts, as they relate to protections for wounded and sick, extensively update and supplement both 1949 agreements. In addition to reaffirming and clarifying Convention provisions concerning positive duties to care for and protect sick and wounded, GP I revises the regulation of medical transport, particularly medical air transport, enhancing its protection. GP II charts new territory by extending the basic principles found in the 1949 Conventions (respect for sick and wounded, duty to search and care for same, protection for those engaged in search or care) to noninternational armed conflicts. Since World War II it has become more obvious that agreements dealing with international conflicts offer little or no protection to victims of internal conflicts. The protection of the sick and wounded victims of internal conflicts represents a significant step toward extending humanitarian legal principles to cover all conflict situations.

12-2. Wounded and Sick in Armed Forces in the Field (GWS).[4]

The 1949 GWS Convention is divided into 10 separate parts. The most important part is the chapter on wounded and sick. Other divisions deal with medical units, personnel, buildings and material, medical transports, the distinctive Red Cross emblem, execution of the Convention, and repression of abuses and infractions.

a. **Wounded and Sick.**[5] Article 12 defines in detail the manner in which wounded and sick are to be treated by the parties to a conflict. Adverse distinctions on the basis of nationality, sex, race, religion, political opinions, or similar criteria are prohibited. Priority in order of treatment is justified only by urgent medical reasons. Article 12 strictly prohibits such acts as murder, extermination or violence to the person. It provides that sick and wounded members of the opposing forces shall not be subjected to torture or to biological experiments, or left without medical care and assistance. Women are required to be treated with all consideration due their sex.

Article 13, comparable to Article 4, GPW, outlines the persons entitled to protection under the Convention. Article 15, includes, *inter alia*, an obligation to search for and collect wounded and sick, and to search for dead and prevent their being despoiled. Article 15 also authorizes the conclusion of local arrangements between the parties for removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way thereto. Article 16 specifies requirements relative to the identification of wounded, sick and dead. Provisions in Article 17 govern the handling of the dead. For example, burial or cremation is to be carried out individually as far as circumstances permit, but cremation is permitted only for imperative reasons of hygiene or for motives based on the deceased's religion. Article 18 stipulates that the military authorities shall permit the inhabitants and relief societies spontaneously to collect and care for wounded and sick of all nationalities. No person may be molested or convicted solely for having nursed such individuals.

b. **Medical Units and Personnel.**[6] Articles 19 and 20 provide the basic protection for fixed and mobile medical establishments. Articles 21 and 22 set forth the circumstances under which misuse of medical establishments and medical units forfeits their protection. They list specific acts (such as possession of small arms and treatment of civilian wounded and sick) which do not forfeit protection. Article 23 introduces the concept of "hospital zones and localities." Under this provision the parties may establish, during time of peace or after hostilities have begun, hospital zones or localities organized to protect the wounded and sick from the effects of war and may staff them with personnel required for their administration. A model agreement is annexed to the Convention to facilitate mutual respect for the zones created. Basic protection and detailed provisions regarding medical personnel are listed in Articles 24 through 32.

One of the most fundamental changes wrought in 1949 relates to the status of regular medical personnel and chaplains attached to the armed forces. Traditionally, such personnel have enjoyed immunity from capture as PWs and the right of early repatriation. However, experience in World War II demonstrated a need to permit retention of at least a part of the medical and religious personnel who fell into enemy hands to nurse and minister wounded and sick PWs who might otherwise fail to receive adequate care. Article 28 adopts a compromise formula under which medical personnel and chaplains, while not to be deemed PWs, may be retained as far as the medical and spiritual needs of the PWs may require. While in detention, they are entitled to the protective provisions of the 1949 GPW. Personnel attached only temporarily to the medical service are, on the other hand, treated as PWs but must be employed on their medical duties if needed (Art 29, GWS). Article 33, GWS stipulates that captured medical material from mobile medical units may be retained, but it must be reserved for the care of the wounded and sick. Materials, buildings and stores of fixed medical establishments of the armed forces which are captured remain subject to the laws of war, but generally must be used for medical purposes. Materials of mobile and fixed installations may not be intentionally destroyed. Similar treatment is accorded to transports of wounded and sick or of medi-

cal equipment (Art 35). The capturing party must in all cases insure care of the wounded and sick.

c. **Medical Aircraft.**[7] Medical aircraft are dealt with in Articles 36 and 37 and have previously been discussed in chapter 4 of this publication. The circumstances under which medical aircraft are to be specifically protected is now under extensive discussion in connection with ICRC Draft Protocol I to the 1949 Geneva Conventions. The ICRC draft Protocol adds specific treaty protection for overflying one's own or allied territory. It also strengthens and makes more explicit the rules relating to medical aircraft.

d. **The Distinctive Emblem.**[8] Articles 38-44 relate to the military use of the distinctive emblem of the Red Cross (Red Cross, Red Crescent, Red Lion and Sun) and identification cards. Article 40 clarifies provisions for identifying medical and religious personnel. A pocket-size identification card supplements the armlet bearing the distinctive emblem. Temporary personnel are identified by the wearing of a white armlet with a smaller distinctive sign than those borne by permanent personnel (Art 41).

Article 44 prohibits the use of the distinctive emblem in peace or in war except to protect the medical personnel units, establishments and other material protected by the Conventions. This has previously been discussed in depth in chapter 8. Article 53 supplements this general proscription by specifically prohibiting at all times the use by individuals, societies, firms or companies, of the emblem or any imitations thereof unless entitled thereto under the Conventions. A US reservation to the 1949 Geneva Conventions permits continued use of the red cross by pre-1905 users provided the emblem is not used on aircraft, vessels, vehicles, buildings or structures.

National Red Cross Societies are also permitted in time of peace to make use of the name and emblem as prescribed by the International Red Cross Conferences; but this use confers no protection in wartime, when the emblem must be small and not placed on armlets or on the roofs of buildings. For the first time International Red Cross organizations are authorized to make use of the emblem which they themselves had introduced.

12-3. Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GWS-SEA).[9] This Convention is essentially a revision and refinement of Hague Convention X of October 18, 1907, For The Adaptation To Maritime Warfare Of The Principles Of The Geneva Convention Of 1906. The result is a much more detailed and comprehensive instrument than the earlier Convention, and it ensures better protection to wounded, sick and shipwrecked at sea. Basically, protection is the same as that provided for forces in the field under the GWS. In so far as GWS-SEA deals with the treatment of wounded and sick, entitlement ot the benefits of the Convention, identification and handling of wounded and dead, the status of medical and religious personnel, medical transports, and the use of the distinctive emblem, GWS-SEA provisions are largely identical to corresponding GWS provisions. Details concerning these matters can be found in the text of the Conventions. Some provisions characteristically maritime in nature are discussed next.

a. **Wounded, Sick and Shipwrecked.** Article 12, GWS-SEA, defines "shipwreck" as a shipwreck from any cause, including forced landings at sea by or from aircraft. This definition is important to the Air Force since it provides a fully protected status for pilots downed or forced to land at sea. Article 16 of the Hague Convention obligated the parties to search for shipwrecked, wounded and sick. Article 18 of the 1949 Convention adds to this the duty of taking them aboard and providing necessary care for them as well as protection against pillage and ill-treatment. Moreover, the parties are encouraged to conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way thereto (compare Article 15, GWS). Article 14,

GWS-SEA, recognizes that belligerent warships have the right to demand the surrender of wounded, sick and shipwrecked from hospital ships and other craft, provided the wounded and sick

> are in a fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment.

b. **Medical Personnel and Transports.** The conditions under which hospital ships are entitled to immunity from attack or capture are conditioned upon a notification of their names and descriptions to the parties in conflict 10 days before employment of vessels as hospital ships (Art 22). Article 23 recognizes that shore establishments entitled to protection under GWS are also protected from bombardment or attack from the sea. Hospital ships of any tonnage and their lifeboats, wherever operating, are protected by GWS-SEA and are exempt from capture (Art 25). But to insure the maximum of comfort to wounded and sick, the parties to the conflict

> shall endeavour to utilize, for the transport of wounded, sick, and shipwrecked over long distances and on the high seas, only hospital ships of over 2,000 tons gross (Art 26).

Hospital ships which happen to be in a port falling into the hands of the enemy must be allowed to depart (Art 29), a provision applying the principle of exemption from capture. Small craft engaged in rescue operations (Art 27) and sick bays on warships (Art 28) also have a measure of protection under the Convention. Article 31 concerns rights to control and search hospital ships including a right to detain them up to 7 days if grave circumstances so require. The parties may place neutral observers on board to verify strict observance of the provisions of the Convention. To prevent abuses, Article 33 prevents merchant vessels, which have been converted into hospital ships, from being put to any other use for the duration of the hostilities.

Articles 36 and 37 deal with the protection of medical and religious personnel. The immunity from capture of religious, medical and hospital personnel of hospital ships extends to the crews of such ships, without whom the ships would be rendered useless. Crews of vessels other than hospital ships are denied immunity (Art 37). Retention of medical and religious personnel when required to care for the medical and spiritual needs of PWs is also covered.

Under Article 38 of the chapter on medical transport, ships may be chartered to transport medical equipment for the exclusive use of the wounded and sick if the particulars are duly notified to the adverse party and approved by it. The latter has the right to board the vessels, but may not capture them or seize their equipment. Articles 39-40 reproduce the principles concerning medical aircraft (Art 36-37 of the GWS), adapted to maritime warfare.

Articles 41-45 pertain to the distinctive emblem of the red cross and are adaptations to maritime warfare of the corresponding provisions of the GWS.

Most of the attacks on hospital ships in World War II could be attributed to the fact that they were not recognizable as hospital ships. It is therefore provided under Article 43 that all exterior surfaces must be painted white with dark red crosses as large as possible placed so as to afford maximum visibility from the sea and from the air. The national flag must be flown along with a red cross flag at the mainmast as high as possible. Small craft (such as lifeboats) must be similarly identified.

FOOTNOTES

[1] The texts of GWS and GWS-SEA are found in AFP 110–20. For background discussion and analysis of text, see ICRC, *Commentary To The Geneva Convention For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field,* (Pictet ed. 1952); Draper, *The Red Cross Conventions* (1958); Gutterridge, "The Geneva Conventions of 1949," 26 *Brit. Y.B. Int'l. L.* 294, 308 (1949); Pictet, "The New Geneva Conventions For The Protection of War Victims," 45 *Am. J. Int'l. L.* 470 (1951); 10 Whiteman, *Digest of International Law* 351 (1968); Yingling and Ginnane, "The Geneva Conventions of 1949," 46 *Am. J. Int'l. L.* 400 (1952). The texts of the earlier conventions are found in 1 *The Law of War, A Documentary History* (Friedman ed. 1972) as well as a variety of other sources. For a discussion from the vantage point of the Vietnam War, see Bond, "Protection of Non-Combatants in Guerrilla Wars," 12 *Wm. and Mary L. Rev.* 787 (1971) and Note, "Civilian Protection in Modern Warfare: A Critical Analysis of the Geneva Civilian Convention of 1949," 14 *Va. J. Int'l. L.* 123–50 (1973).

[2] On the GPW, see chapter 13, this publication; on GC, see chapter 14. As examples of references to wounded and sick in these Conventions, see GPW, Articles 17, 19, 30, 47, 54, 55, 98, 109–117 and GC, Articles 14–22, 56–57, 91, 132. For discussion of prohibition of attacks against such protected facilities, see paragraph 5–5, this publication.

[3] See chapter 11. Other proposed changes in ICRC Draft Protocol I include definitions of various terms such as wounded and sick, enhanced protection generally for medical transport and a variety of other clarifying and strengthening features. Other changes are described, as appropriate, elsewhere in this publication.

[4] See authorities *supra* note 1.

[5] A combatant who, though wounded, has not laid down his arms and is continuing to fight is not protected by the Conventions from attack. He is not *hors de combat* and thus is not protected by GWS or Article 23c, HR. For discussion see Pictet, *Commentary on the First Convention* 133; Draper, *supra* note 1, at 76. Wounded and sick members cannot renounce rights secured to them under the Convention or under special agreements to enhance their rights (Art 7). Article 46, GWS, and Article 47, GWS-SEA, prohibit reprisals against wounded and sick.

[6] See paragraph 5–5 for discussion of the rule prohibiting attacks on fixed and mobile medical units and medical transports.

[7] See chapter 4 for discussion of protection of medical aircraft.

[8] See chapter 8, this publication, for discussion of misuse of distinctive medical signs as constituting perfidy. In Trial of Heinz Hagendorf found in 13 *UN Law Reports of Trials of War Criminals* 146–148 (1948), a soldier was convicted of the offense of firing a weapon at US soldiers from an enemy ambulance displaying such an emblem. The Red Cross is not used by all nations. For example, Turkey uses the Red Crescent; Iran, the Red Lion and Sun. Israel signed GWS subject to the reservation that it will use a Red Shield of David as its distinctive sign. See US Army, FM 27–10, *Law of Land Warfare,* 95 (1956). Identification is not a condition precedent to protection but is a necessary corollary requirement to make any protection fully effective. Thus GWS Article 44 affirms the marking of medical units and establishments in order to obviate the possibility of any hostile action. The US Reservation is listed in 6 UST 3114, 3214; TIAS 3362; 213 UNTS 378–380 and 10 Whiteman, *Digest of International Law* 377 (1968). Problems relating to distinctive emblems *vis a vis* modern automated warfare and camouflage are discussed in Freymond, "Confronting Total War; A Global Humanitarian Policy," 67 *Am. J. Int'l. L.* 672, 688–689 (1973).

[9] In addition to sources in footnote 1, *supra,* see Brittin and Watson, *International Law for Seagoing Officers* (1960); Colombos, *The International Law of the Sea,* 462, 547 (5th ed. 1962); 2 Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* 436 (1968); Tucker, "The Law of War and Neutrality at Sea," US Naval War College, 1955 *International Law Studies* (1957); Mallison, "Studies in the Law of Naval Warfare: Submarines in General and Limited Wars," US Naval War College, 1966 *International Law Studies* (1968). 10 Whiteman, *Digest of International Law* 559 *et seq.* (1968); Mossop, "Hospital Ships in the Second World War," 24 *Brit. Y.B. Int'l. L.* 398 (1947).

Chapter 13

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR

13–1. Introduction. The 1949 GPW Convention represents the latest formal international consensus on the treatment required for captured combatants during periods of international armed conflict.[1] Its predecessors include the 1929 GPW Convention and provisions of the 1907 Hague Regulations.[2] In large measure it elaborates and reinforces basic principles relating to PWs contained in earlier agreements and reflecting customary international law.[3] The Convention is one of four distinct 1949 Geneva Conventions applicable to the protection of war victims, and its provisions are interrelated to the other Conventions.[4] The Convention, containing 143 Articles, is divided into six major parts. It is accompanied by five annexes including a model agreement for repatriation of wounded and sick prisoners and regulations for the work of mixed medical commissioners provided for in Article 112. Some features of the 1949 GPW are common to all four 1949 Geneva Conventions including Part I, General Provisions, and Part VI, General & Final Provisions, and are discussed elsewhere.[5]

13–2. General Protection of PWs (Part II: Arts. 12–16).[6] Article 12 declares that PWs are in the hands of the enemy power, not the individuals or units which capture them.[7] It authorizes transfer of PWs to another State Party to the Convention but only after the detaining power is satisfied of the transferee's willingness and ability to apply the Convention. The transferring power retains residual responsibility after such transfers. Article 13, GPW, states,

> Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.
>
> In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.
>
> Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.
>
> Measures of reprisal against prisoners of war are prohibited.[8]

Articles 14, 15, and 16 provide further specific requirements such as those relating to medical care and prohibiting adverse distinctions based on race, nationality, religious belief, political opinions or similar criteria.

These provisions prohibit killing or mistreatment of PWs whatever the military reasons, even when their presence retards a captor's movement, diminishes his power of resistance or endangers his own self-preservation.[9]

13–3. Beginning of Captivity. (Arts 17–20). Under Article 17, each party to a conflict must issue an identity card to every person under its jurisdiction liable to become a PW showing name, rank, serial number, and date of birth.[10] When questioned a PW is bound only to provide this information. Physical or mental torture or any other form of coercion to secure information of any kind whatever is prohibited.[11] Effects and articles of personal use (aside from military equipment, arms or ammunition) are to remain in the PW's possession. However, currency and other items of value may be taken on order of an officer after issuance of a receipt. Articles 19 and 20 provide for the prompt evacuation of PWs from the combat zone to camps for their detention.

13–4. Internment. Article 21 authorizes internment and provides for the release on parole or promise if allowed by the law of the PW's own nation. Parole release may not be imposed involuntarily. Parolees are bound on their personal honor to fulfill the terms and conditions of their parole. Generally the US Code of Conduct prohibits US Armed Forces personnel from accepting parole. However, this may be subject to relaxation by National authorities in particular conflicts.[12] Close confinement is not authorized except for conditions of health. Article 22 requires internment only on land and not in unhealthy areas. PWs are to be assembled in camps according to nationality, language or customs. Article 23 prohibits the sending of or detention of PWs in combat zones.

Articles 25–28 state the obligations of the detaining power in furnishing quarters, food and clothing to PWs. Food rations, for example, must be sufficient in quality, quantity and variety to keep PWs in good health and avoid loss of weight or nutritional deficiencies.[13]

Articles 29–31 amplify requirements relating to medical care and sanitation. As discussed previously, under Article 33 medical personnel and chaplains who fall into the hands of the enemy are not PWs.[14] Articles 34–38 guarantee PWs enjoyment of religious, intellectual, and physical activities, and require facilities to be furnished for out-of-doors exercise.

Articles 39 through 42 contain various provisions relating to discipline. Article 39 requires a PW camp to be under the immediate authority of a responsible commissioned officer of the regular armed forces of the detaining power, and requires him to possess a copy of the Convention and insure that its provisions are known to the camp staff. Article 41 requires that the text of the Convention be made known to PWs, and Article 42 restricts the use of weapons against prisoners.

Recognition of PW rank and promotions in rank is required by the detaining power under Articles 43–44.

Articles 46–48 specify detailed requirements as to the conditions under which PWs may be transferred, and provide that PWs may take with them their personal effects not in excess of 25 kilograms (55 pounds) per person.

13–5. Labor of Prisoners of War.[15] The conditions under which the detaining power may utilize the labor of PWs are set forth in Articles 49–57. Noncommissioned officers shall only be required to do supervisory work. Officers may not be compelled to work, but may ask to do so. Previous requirements contained a vague stipulation that labor exacted from PWs should have "no direct relation with war operations." No clause proved more troublesome to apply in World War II. Article 50 now lists the specific classes of work which may be exacted. Article 52 prohibits their involuntary use in unhealthful or dangerous labor, including the removal of mines or similar devices. The requirements as to working conditions, duration of the hours of labor, accidents, pay and rest periods (Arts 27–30) are spelled out in great detail in Articles 53–57. However, in cases of accident, it is provided only that injured PWs shall be given all the care their condition requires, it being left to their own country to meet claims for compensation.

13–6. Financial Resources of Prisoners of War.[16] Section IV (Arts 58–68) contains a number of far-reaching rules dealing with financial resources of PWs. The detaining power may fix the maximum amount of money which a PW may have in his possession, and any excess must be credited to his account (Art 58). Under Article 60 of the 1949 Convention, a monthly allowance must be given to all PWs fixed on the basis of five categories for the separate ranks. This is called "advance of pay," indicating it is considered to be a part of the amount paid them in their own force. The advance of pay is fixed by the detaining power in amounts which may not go below a specified number of Swiss francs, as converted into the

national currency. In addition, the detaining power is responsible for paying PWs for work they perform, whether for private or public employers (Art 62). It must also pay them for work performed when they are permanently detailed to duties connected with the administration or management of camps.

Article 66 requires that on the termination of captivity, each PW must be furnished a statement signed by an authorized officer of the detaining power showing the credit balance due him, and a copy thereof certified to the PW's own government. The state on which the PW depends shall be responsible for settling with him any credit balance due to him from the detaining power on the termination of his captivity.

13-7. Relations of Prisoners of War With the Outside World.[17] Articles 69-77 deal with the relations of PWs with the outside world. Among other matters, it is provided in Article 69 that the PW shall be permitted to send out a "capture card" addressed to the "Central Prisoners of War Agency" for its card index system. Article 71 concerns PW correspondence and entitles them to mail a minimum of 2 letters and 4 cards each month. This minimum may be reduced if the protecting power finds that to be required by necessary censorship. PWs are also allowed to send telegrams under certain circumstances.

The right of prisoners' representatives to take possession of collective relief shipments and to distribute them, as desired by donors, is recognized in Article 73. Such relief shipments are exempt from import, customs and other dues(Art 74). Where military operations prevent compliance with the Convention's requirements as to transport of these shipments, such transport may be undertaken by the International Red Cross (Art 75).

Articles 78-81 concern the important matters of requests and complaints as to the conditions of detention, of relations between PWs and the authorities, and of the appointment of prisoners' representatives who must be allowed ready access to the representatives of the protecting power.

13-8. Penal and Disciplinary Sanctions.[18] One of the most important chapters in the Convention is that relating to penal and disciplinary sanctions (Arts 82-108). One key principle is that detainees are subject to the laws, regulations and orders in force for the detaining power's armed forces. This chapter sets forth the circumstances under which PWs may be tried for various infractions of the laws and regulations of the detaining power; establishes maximum punishments for disciplinary offenses including attempted escapes; provides specific safeguards and guarantees of a fair judicial proceeding; and prohibits procedures and punishments contrary to those set out in the Convention.

Article 82 provides that acts punishable by the laws of the detaining power, but which are not punishable if committed by a member of that state's forces, shall entail only disciplinary punishment. This provision is reinforced by Article 87, which excludes the application to PWs of any penalties other than those provided for the same acts in respect of members of the armed forces of the detaining power. Women PWs may not be more severely treated or punished than female or male members of the detaining power's own forces for like offenses (Art 88). No PW may be tried or sentenced for an act which is not forbidden by the law of the detaining power or by international law in force at the time the act was committed (Art 99)—a provision of particular significance in view of criticism voiced against the alleged *ex post facto* nature of certain post WW II war crimes proceedings.

Under Article 84, a PW has the right to be tried by a military court unless the existing laws of the detaining power expressly permit the civil courts to try members of that state's own forces in respect of the offenses alleged. In no event may he be tried by any court not offering the essential guarantees of independence and impartiality generally recognized, nor under procedure

which fails to accord the rights of defense set forth in Article 105. The latter article gives him the right to counsel of his choice, to the calling of witnesses, and to the services of a competent interpreter. Should he or the protecting power fail to select counsel, the detaining power must find one for him. Other provisions ensure that his counsel will have the opportunity to prepare an adequate defense, and grant him the right of appeal (Arts 106–107).

One of the most extensively debated subjects at the 1949 Geneva Conference was whether a PW who is prosecuted for a precapture crime—in particular, offenses against the laws of war— should enjoy the benefits of the Convention.[19] Article 85 provides,

> Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

The article was adopted over the opposition of the Soviet Union and associated states, which attached a reservation thereto at the time of signature. A typical reservation to this article is worded,

> The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.

In the light of the practice adopted by Communist forces in Korea and North Vietnamese forces in the Southeast Asia conflict of calling PWs "war criminals," there is always the possibility that reserving countries might adopt the general attitude of regarding a significant number of the combatants opposing them as *ipso facto* war criminals, not entitled to the guarantees provided for PWs.

The United States has, on many occasions, made it clear that it does not accept these reservations. However, the US did enter into treaty relations with the reserving countries with respect to the remaining, unreserved parts of the Conventions. In the event of armed conflict if any of those countries exploit reservations in an unwarranted manner so as to nullify the broad purposes of the Conventions, such action would alter the legal situation for the US; and this Government would be free to reconsider its position. It is hoped that reserving members may one day find it possible to withdraw their reservations, or will at least construe and apply them in a manner compatible with their legal and humanitarian obligations. In the meantime, by having treaty relations, the US has obtained agreement to the best standards of treatment, and is in the soundest position to protect its nationals.

Article 86 prohibits punishing PWs more than once for the same offense (*non bis in idem.*) Article 102 requires that trials be by the same court as in the case of members of the armed forces of the detaining power. Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight, and any form of torture or cruelty are prohibited.

Article 89 lists the only types of disciplinary penalties which may be applied to PWs. In no case may such punishments be inhuman, brutal or dangerous to the prisoner's health.

13–9. Escape.[20] Articles 91–95 detail the consequences of attempted escapes and define the conditions which must be met before an escape can be regarded as successful (Art 91), an important provision because of the effects produced by a successful escape. Article 96 prohibits camp commanders from delegating their disciplinary powers to PWs, and requires a record

to be kept of disciplinary punishments open to inspection by representatives of the protecting power.

13–10. Release and Repatriation.[21] Articles 109–116 deal with direct repatriation and accommodation of prisoners in neutral countries. Articles 109–110 set forth principles under which parties to the conflict are obligated to repatriate seriously wounded and sick PWs. Specified categories may also be accommodated in neutral countries after agreement with the latter. No wounded and sick PW eligible for repatriation may be repatriated against his will during hostilities. Article 117 prohibits subsequent participation of repatriated PWs in active hostilities against the enemy.[22]

Articles 118–121 contain provisions on the release and repatriation of PWs at the close of hostilities, and on matters relating to deceased PW's death certificates, burial and cremation, and the transmittal of wills to the protecting power. Article 118 requires that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities," a principle which occasioned dispute during the Korean armistice negotiations as to whether a belligerent was obligated to repatriate prisoners against their will.[23] The US position was that over-riding humanitarian considerations precluded repatriation of persons against their will in the Korean conflict. Nonetheless, during World War II, many PWs were repatriated against their will. Repatriation issues, at the close of hostilities, are likely to raise intense political issues and are often settled on that basis. However, the obligation to repatriate, expressed in the conventions, is clear and can not be *legally* qualified or modified by using PWs as bargaining chips in negotiations to settle other issues. Finally, under Article 121, whenever death or serious injury of a PW is caused by a sentry or any other person or is due to unknown causes, an official inquiry must be held by the detaining power, and measures taken to prosecute the guilty. Articles 122 through 125 govern the Information Bureaus and Relief Societies. The remaining articles govern execution of the Convention, implementation of its provisions and other articles common to the four Conventions.[24]

13–11. Neutral Countries. Traditional international law imposed obligations on neutrals to exclude combatants from their territory and to intern them if they in fact entered neutral territory during the course of a conflict.[25] If required to be interned under international law, such persons must generally at a minimum receive the benefits of GPW treatment.[26] Special provisions are made for sick and wounded, including those brought by medical aircraft.[27] However, escaped PWs are generally not interned.[28]

FOOTNOTES

[1] On international armed conflict and internal conflict, see chapter 1. Article 3, common to the four 1949 Geneva Conventions, applies to purely internal conflicts. See chapter 11, this publication.

[2] Articles 4–20, HR, AFP 110–20, at 2–6; Convention Relating to the Treatment of Prisoners of War, Geneva, 27 July 1929, 47 Stat. 2021; TS 846; 2 Bevans 932; 118 LNTS 343 (1932).

The 1949 GPW complements the 1907 Hague Regulations but replaces the 1929 GPW as between parties to the 1949 GPW. (Articles 134–135 GPW). The 1907 Hague Regulations are derived from the 1874 Brussels Rules and the 1863 Lieber Code (*Instructions for the Government of Armies of the United States in the Field*), and customary law. On prior sources, see 1 *The Law of War, A Documentary History* (Friedman ed. 1972).

WW II: The functioning of the 1929 GPW during WW II is discussed in Greenspan, *Modern Law of Land Warfare* 5, 23 (1959); ICRC, *Commentary, Geneva Convention Relative to the Treatment of Prisoners of War* (Pictet ed. 1960), [herein ICRC, Commentary]; 15 *Digest, UN War Crimes Reports* (1949). Japan was not a party to the 1929 GPW, although it agreed to apply the Convention to the extent others did. The USSR was not a party to the 1929 GPW, but is a party to the 1949 GPW.

Korea. During Korea, the 1949 GPW was not in force or effect (though all parties generally asserted the principles would be applied). Neither Korea, nor the PRC was a party to the 1929 GPW although "China" was a party. Greenspan, *Modern Law of Land Warfare* 611 (1959).

Vietnam. All parties to the conflict [except the Provisional Revolutionary Government (PRG) who were bound in any event] were parties to the 1949 GPW. On 11 June 1965, the ICRC determined that the 1949 Geneva Conventions (including GPW) were applicable to SE Asia hostilities (i.e., it was in fact and law an international armed conflict). The US agreed (on the basis that it had been applying and expected other parties to do so): South Vietnam (RVN) also agreed, but the North Vietnam (DRV) position was always ambiguous. For ICRC, US & RVN statements, see 4 *International Legal Materials* 1173 (1965) [herein *ILM*]; for DRV reply, see 5 *ILM* 124 (1966). The US position against Declaration of "war" is found in 5 *ILM* 792 (1966): "The legal rules of international law concerning the conduct of armed conflicts apply to all armed conflicts without regard to the presence or absence of declarations of war. All that is required is armed conflict between two or more international entities. The 1949 Geneva Conventions for the Protection of War Victims were specifically made applicable to 'any armed conflict of an international character' between two or more of the parties. The rules of war embodied in the Hague Conventions formulated in the early years of this century are considered, in general, to be part of customary international law binding on all states, and their applicability is unrelated to declarations of war." 5 *ILM* 792 (1966). For discussion, see Analysis No. 26, 91st Cong., 2nd Sess., 28 December 1970.

[3] See authorities above.

[4] Examples: Persons not entitled to PW status under Article 4, GPW are governed by the 1949 GC (Art 4) whose protections parallel the 1949 GPW Convention in important particulars. PWs who are sick or wounded are protected by Art 12, GWS and Art 12, GWS-SEA, as well as 1949 GPW. Article 20, GWS prohibits attacks from land against hospital ships which are otherwise protected under GWS SEA. The provisions of all four Geneva Conventions, as well as the 1907 Hague Regulations, are all interrelated. For provisions common to the 1949 Geneva Conventions, see chapter 11, this publication.

[5] Chapter 11, common provisions; chapter 3, lawful and unlawful combatants (entitlement to PW status); chapter 1, application of the Conventions to international/internal conflicts; chapter 15, grave breaches of the Conventions. Other provisions of the 1949 Geneva Conventions are discussed elsewhere as appropriate in this publication particularly chapters 4, 5, 8, 10, 11, 12, and 14.

[6] *Discussion of 1949 GPW Convention*: See Draper, *The Red Cross Conventions* (1958); ICRC, Commentary; Esgain and Solf, "The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations and Deficiencies," 41 *No. Car. L. Rev.* 545 (1963); "Geneva Convention and the Treatment of Prisoners of War in Vietnam," 80 *Harv. L. Rev.* 851 (1967); US Army, FM 27–10, *Law of Land Warfare* (1956). [herein FM 27–10].

On the problem in Vietnam, see Levie, "International Law Aspects of Repatriation of Prisoners of War During Hostilities," 67 *Am. J. Int'l. L.* 693 (1973); Kronmiller, "Procedures for Asserting the Rights of Prisoners of War Through the International Court of Justice," 13 *Va. J. Int'l. L.* 226 (1972); Levie, "Maltreatment of Prisoners of War in Vietnam," 48 *B.U.L. Rev.* 323 (1968); Smith, "The Geneva Prisoner of War Convention: An Appraisal," 42 *N.Y.U. L. Rev. 881 (1967); Hooker and Savasten, "The Geneva Convention of 1949: Application in the Vietnam Conflict," 5 Va. J. Int'l. L.* 423 (1965); 10 Whiteman, *Digest of International Law* 214–235 (1968).

Code of Conduct/International Law. Smith, "The Code of Conduct in Relation to International Law," 31 *Mil. L. Rev.* 85 (1966).

Study of Application. See US Army, Prisoner of War Study, *Functioning of the Law* (Harbridge House, 1969) (comprehensive historical analysis).

Internal Conflicts: Bond, *Rules of Riot* (1974); Falk, *The International Law of Civil War* (1971) (discusses *inter alia* Spain, Congo, US Civil War); Levie, *op. cit.*, 323–354; and authorities in chapter 3, this publication, discussing guerrilla warfare.

[7] This is an important principle also found in Art 4, HR. "The only right that war gives over a captive is to secure his safekeeping and prevent him from doing harm" Montesquieu, *The Spirit of the Law* (book 15, chapter 2); ". . .War is a relation— not between man and man, but between state and state, in which individual combatants are only casually and accidentally enemies, not as men, or as citizens, but as soldiers." Jean Jacques Rousseau, quoted from Davis, "The Prisoner of War," 7 *Am. J. Int'l. L.* 528 (1915). Article 12, GPW, also provides "Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them."

[8] As to sick and wounded PWs, see also Art 12, GWS; On omission, see Levie, "Penal Sanctions for Maltreatment of Prisoners of War," 56 *Am. J. Int'l. L.* 453 (1962); The Essen Lynching Case, 3 *UN War Crimes Reports* 62 (1949); and Trial of Kurt Maelzer, 11 *UN War Crimes Reports* 53 (1949), 2 Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* 116 (1968).

[9] FM 27–10, *supra* note 6, at 35; Castren, *The Present Law of War and Neutrality* 161 (1954); McDougal and Feliciano, *Law and Minimum World Public Order* 87 (1961); Digest of Laws and Cases, 15 *UN War Crimes Reports* 99 (1949).

[10] DD Form 2 AF qualifies under the Geneva Conventions. See DOD Instruction 1000.1, 30 January 1974.

[11] "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them any information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." Art 17, GPW. Interrogators are not prohibited from asking questions beyond name, rank, and service number and dob; the problem is not the question asked but the manner employed in obtaining an answer. Glod and Smith, "Interrogation Under the 1949 Prisoners of War Convention," 21 *Mil. L. Rev.* 145, 148 (1963).

[12] For example, on 3 July 1970, DOD Policy was announced in a letter to the Armed Forces, "The U.S. approves any honorable release and prefers sick and wounded and long term prisoners first." Additionally, limited parole against escape is permitted for specific limited purposes as authorized by the senior officer exercising command authority. FM 27–10, *supra* note 6, at 73. The predecessor provision to the GPW Article on the subject was Article 10, HR.

[13] *On food*, the 1949 Geneva Conventions abandoned an earlier "national standard" in favor of minimum absolute standards. For discussion, see Draper, *supra* note 6, at 58; Pictet, "The New Geneva Conventions for the Protection of War Victims," 45 *Am. J. Int'l. L.* 462, 472–473 (1951); ICRC, Commentary 199; Greenspan, *Modern Law of Land Warfare* 112 (1959).

[14] See paragraph 12–2b, this publication. Article 33, GPW also provides, *inter alia*, "They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide for the medical care of, and religious ministration to prisoners of war," Article 33 also regulates other matters with respect to medical personnel and chaplains who are "retained personnel." By virtue of their protected status, such personnel should normally be repatriated since retention is an exceptional measure. ICRC, Commentary at 218. Medical personnel and chaplains as noncombatants, see chapter 3, this publication; ICRC, Commentary at 223; Greenspan, *supra* note 13, at 78.

[15] See also Greenspan, *supra* note 13, at 118; ICRC, Commentary at 259; Esgain and Solf, *supra* note 6, at 571; Levie, "Employment of Prisoners of War," 57 *Am. J. Int'l. L.* 318 (1963).

[16] See also Greenspan, *supra* note 13, at 121; ICRC, Commentary at 299.

[17] *Prisoners representatives* (in officers camps the senior officer present) have duties and responsibilities under Art 78–81, 98, 104, 107, 125 and 127, GPW. ICRC, Commentary 387. *Correspondence*. The Universal Postal Convention provides that letter post items, insured letters and boxes, parcel post, (up to 5 KG) and postal money orders addressed to or sent by prisoners of war and interned civilians are exempt from postal charges (subject, however, to air mail surcharge.) To enjoy these privileges the article must bear the notation "Service des internes" (Internees Service) at the top left hand corner. It can be followed by a translation. FM 27–10, *supra* note 6, at 58; Articles 14, 56, Universal Postal Convention of 14 Nov 1969, Article 115, Regulations, 22 UST 1085; TIAS 7150 (1971 Additional Protocol to the Constitution of the Universal Postal Union of 10 July 1964 (TIAS 5881). (Discussed historically by Spencer, "Franking Privileges for Communication with Prisoners of War," 35 *Am. J. Int'l. L.* 365 (1941). On the Code of Conduct under GPW, see Manes, "Barbed Wire Command: The Legal Nature of the Command Responsibilities of the Senior Prisoner in

a Prisoner of War Camp," *Mil. L. Rev.* 1 (Oct 1960) and Smith, "The Code of Conduct in Relation to International Law," 31 *Mil. L. Rev.* 85 (1966).

[18] US personnel in foreign captivity are subject to trial, after repatriation, under the UCMJ for criminal acts committed while PWs. UCMJ §105; 10 U.S.C. §905; Winthrop, *Military Law and Precedent* 91 (1920); United States v. Batchelor, 19 CMR 452, 502 (ABR 1954), affirmed 7 USCMA 354, 22 CMR 144 (1956).

Penal and Disciplinary sanctions (which limit and enforce the principle of assimilation) are discussed in Greenspan, *supra* note 13, at 131; FM 27–10, at 62; ICRC, Commentary 406; Esgain and Solf, *supra* note 6, at 571.

[19] Vietnam, see Analysis, *supra* note 2; and authorities *supra* note 6. The DRV reservation states:

> The Democratic Republic of Vietnam declares that prisoners of war prosecuted for and convicted of war crimes or crimes against humanity, in accordance with the principles established by the Nuremberg Tribunal, will not enjoy the benefits of the provisions of the present Convention as provided in Article 85. (274 UNTS 340 (1957))

No US PWs were prosecuted by the North Vietnamese, hence the Reservation was not applicable. However, US air crew members were prosecuted (and some executed) during WW II by Japan for precapture "war crimes" involving bombardment. Glines, *Doolittle's Tokoyo Raiders* (1964); Spaight, *Air Power and War Rights* 58 (1947). On reservations to the Conventions generally, see AFP 110–20, at 1–101 and latest edition, U.S. Dept. of State, *Treaties in Force*, published annually.

[20] Article 93 clearly indicates the intention of the Geneva Conventions to leave the PW out of the conflict (other than detention to prevent escape) in noting that, "In conformity with the principle [of leniency (Art 83)] offenses committed by prisoners of war with the sole intention of facilitating their escape and which do not entail any violence against life or limb, such as offenses against public property, theft without intention of self-enrichment, the drawing up or use of false papers, or the wearing of civilian clothing, shall occasion disciplinary punishment only." For discussion, see Greenspan, *supra* note 13, at 135; ICRC, Commentary at 444, 448. "A prisoner of war can legitimately try to escape from his captors . . .once escape has succeeded, the Detaining Power no longer has any authority over the prisoner of war . . ." While still an escaping prisoner, he is not a combatant hence "It is absolutely forbidden for him to commit any belligerent act, to carry weapons, or to engage in armed resistance . . ." ICRC, Commentary 454. See also 2 Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* 123 (1968); Article 42, GPW, states:

> 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.

[21] See authorities cited *supra* note 6 as well as ICRC, Commentary 506 (noting extensive repatriations of sick and wounded during WW II); Greenspan, *supra* note 13, at 142.

[22] Article 117 requires "No repatriated person may be employed on active military service." (derived from Art 74, 1929 GPW and Article 6, 1864 GWS); ICRC, Commentary 538 notes that this covers PWs under 109 and 110 during " . . . the whole duration of the hostilities in the course of which military personnel were captured and subsequently released, but only for the duration of the hostilities." In interpreting active military service, the spirit of the Convention should apply " . . . as broadly covering any participation, whether direct or indirect, in armed operations against the former Detaining Power or its allies," ICRC, Commentary at 539; FM 27–10, at 25, 76. Thus the term "active military service" is not equivalent to active duty, a common misconception.

[23] Draper, *supra* note 6, at 69; Baxter, "Asylum to Prisoners of War," 30 *Brit. Y. B. Int'l. L.* 489 (1953); Charmatz and Wit, "Repatriation of POW's and the 1949 Geneva Convention," 62 *Yale L. J.* 391 (1953); Esgain and Solf, *supra* note 6, at 592; Mayda "The Korean Repatriation Problem and International Law," 47 *Am. J. Int'l. L.* 414 (1953); 10 Whiteman, *Digest of International Law* 203, 257, 503 (1968).

[24] See chapter 11. Also see paragraph 15–2 for implementation provisions.

[25] Articles 11 and 12, Hague V. For discussion, see 11 Whiteman, *Digest of International Law* 265 *et seq.* (1968); Greenspan, *supra* note 13, at 74. Also see Hague XIII, Art 24.

[26] Article 4B(2), GPW.

[27] *Sick and wounded by own government.* Article 14, Hague V; Article 37, GWS; 11 Whiteman, *Digest of International Law* 386 (1968). (Not interned if not stay)

Sick and wounded by captor. Article 14, Hague V (must be interned), see also Articles 15, 17, GWS-SEA.

[28] Article 13, Hague V (left at liberty). This applies also to PWs brought into neutral territory by troops taking refuge.

Chapter 14

THE GENEVA CONVENTION PROTECTING CIVILIANS

14-1. Introduction.[1] The 1949 Geneva Convention protecting civilians (GC) represents a milestone in the international law regulating armed conflict. The 1907 Hague Regulations contain general protections applicable in war zones and specific protections applicable in occupied territory. The 1949 GC extends these protections in detail and applies specific protections to civilians in the hands of a Party to the conflict of which they are not nationals wherever they may be. The lack of any detailed treaty delineating the rights of civilians and the obligations of combatants toward civilians was viewed as a major defect in international treaty law regulating armed conflict, especially in light of the excesses of the Axis governments during World War II. The Fourth Geneva Convention (GC) was created to remedy this defect.

The 1949 Geneva Convention, broader in scope than earlier law, created a number of substantial international obligations for the parties. It therefore merits careful examination. What follows is only a brief description of its more important provisions. The Convention itself is complex and must be consulted as the authoritative formulation of its requirements.

14-2. Scope and Coverage of the Convention. Part I of the Convention contains general provisions relative to the entire Convention.

Part II of the Convention (Arts 13-26) deals with the general protection of populations against certain consequences of war.

Part III is the largest and most important portion of the Convention (Arts 27-141). It sets forth the principal obligations of the parties with respect to the two broad categories of persons which it protects: (a) aliens and other protected persons within the territory of a party to the conflict (Sec II) and (b) persons residing in territory which is occupied by the enemy (Sec III).

Article 4 identifies as a person protected by the Convention anyone who, during a conflict or military occupation, is in the hands of a power of which he is not a national.[2] The Convention does not protect nationals of a state not bound by it, nor does it protect nationals of a neutral state found within belligerent territory as long as the neutral state maintains diplomatic representation with the belligerent. Individuals protected by the other three 1949 Geneva Conventions are also excluded from the protection of the Fourth Convention.

Under Article 5, protected persons definitely suspected of hostile activities within the territory of a party lose only such rights and privileges under the Convention necessary for preservation of the state's security. Similarly, protected persons in occupied territory who are detained for spying or sabotage, or as persons under definite suspicion of activity hostile to the security of the occupying power, may be deprived of all rights of communication under the Convention (permitting contacts with relatives and the protecting power) where absolute military security so requires. However, such persons must be treated humanely and are guaranteed the right to a fair trial. In addition, they are to be granted the full rights and privileges of a protected person at the earliest date consistent with the security of the state or occupying power.

Articles 1-3 and 8-12 are those common articles already discussed in chapter 11 which concern the applicability of the Convention to undeclared war, protecting powers, internal conflicts and related matters.

14-3. General Protection of Civilians.[3] Article 14 encourages the parties to establish within their territories hospitals and safety

zones in order to protect and shelter young children, the aged, wounded and sick, and expectant mothers from the effects of war. Neutralized zones may be established, upon agreement between the parties, in regions where fighting is going on, for wounded and sick, or for civilian persons not participating in the hostilities (Art 15). The wounded and sick, as well as the infirm, and expectant mothers must be the object of particular protection and respect. The parties agree to facilitate measures taken to search for killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment (Art 16). Removal of wounded, sick, infirm or aged persons, children and expectant mothers from besieged or encircled areas is encouraged (Art 17).

Articles 18 to 23 contain various provisions which have been generally discussed previously such as the immunity of hospitals from attack (see chapter 5), the use of the Red Cross emblem (see chapters 5 and 8), and medical aircraft (see chapter 4).

Articles 24–26 relate to the welfare of children under the age of 15 and measures for facilitating the establishment of contact between members of a family who have been separated because of the war.

14–4. Provisions Applicable to Both National and Occupied Territories.[4] Certain common provisions applicable to all protected persons under Article 4 of the Convention are set forth in Articles 27–34 (Part III, Sec I). These common articles provide for humane treatment of the individuals protected and bind the parties to respect their person, honor, family rights and religious customs. For example, women are to be protected against sexual attack and enforced prostitution. Any distinction in treatment based upon race, religion or political opinion is specifically forbidden. It is, however, recognized that a party may be justified in taking such measures of control and security in regard to protected persons as may be required by the conflict. Article 29, discussed in chapter 10, confirms the principle of state responsibility for violations irrespective of individual responsibility.

Article 30 seeks to put teeth into the Geneva protections by requiring the parties to give protected persons every facility for making application to the protecting powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them. Detaining powers must facilitate visits by other humanitarian or relief organizations to persons in their custody.

Coercion of any kind to elicit information from protected persons is prohibited (Art 31), as are any measures causing the physical suffering or death of such persons, including mutilation or medical or scientific experiments not necessitated by medical treatment of the protected person (Art 32). Article 33 prohibits collective penalties (punishment of a protected person for offenses which he has not personally committed) and pillage (also prohibited in Art 47, HR). Reprisals, as discussed in chapter 10, this publication, are also prohibited.

14–5. Aliens in Territory of a Party to the Conflict.[5] The Convention grants to any protected person during a conflict the right of voluntary departure unless contrary to the national interests of the state. In the event that permission to leave is denied, the applicant's request is reconsidered by an appropriate court or administrative board designated by the detaining power (Art 35). This is analogous to the United States practice during World War II in giving interned enemy aliens hearings before advisory boards which recommended to the Attorney General, release, parole, or continued internment. Persons permitted to leave are entitled to take with them necessary funds for expenses and reasonable amounts of personal effects.

Articles 27 and 38 require protected persons in the territory of a belligerent to be treated humanely, even while confined pursuant to a sentence involving loss of liberty

(Art 37). Apart from the special measures of security and control contemplated by Articles 27 and 41, their situation continues to be regulated in principle by the provisions concerning aliens in time of peace. In any case they are entitled to receive individual or collective relief sent to them, to obtain medical attention if needed, and to practice their religion and certain other rights. Children under 15, pregnant women and mothers of children under 7 enjoy the same preferential treatment provided for the nationals of the state concerned (Art 38).

Protected persons who have lost their employment as a result of the war must be permitted to find paid work on the same basis as nationals, except for security requirements. If they cannot support themselves as a result of security measures, the detaining power must insure their support and that of their dependents (Art 39). On the other hand, they may be compelled to work only to the same extent and under the same conditions as nationals of the territory. Alien enemies, however, may only be compelled to do work normally necessary to insure the feeding, sheltering, clothing, transport and health of human beings, and not related directly to the conduct of military operations (Art 40).

Under Article 42, the internment or placing in assigned residence of protected persons may be ordered only if the security of the detaining power makes it absolutely necessary. If such internment is maintained, the internee is entitled to periodic review of his case by an appropriate court or administrative board at least twice yearly.

Article 43 introduces, with respect to internees, the concept of the protecting power. Unless the individual himself objects, the detaining power must give to the protecting power the names of any protected persons who have been interned or thereafter released. Internees are provided opportunities to communicate with the protecting power similar to those enjoyed by PWs. Protected persons may not be transferred to a power not a party to the Convention (Art 45), nor may the detaining power automatically treat as enemy aliens those refugees who, in fact, have no governmental protection.

14–6. Occupied Territories.[6] Articles 47–78 of the Convention deal with the highly important subject of the treatment of inhabitants of occupied territory by the occupying power. In that connection, it should be noted that Articles 27–34, which have already been discussed, are common both to this portion of the Convention and that dealing with enemy aliens in belligerent territory.

This portion of the Convention is primarily a refinement, expansion and clarification of the Hague Regulations (HR) annexed to Hague Convention IV of 1907. The 1949 Geneva Convention provisions do *not* replace the Hague rules but are supplementary to them as between powers which are bound by the 1899 or 1907 Conventions, and are also parties to the 1949 Geneva Convention (Art 154, GC).

Thus, the 1949 GC omits, in part, certain important customary law obligations reflected in the Hague Regulations. Insofar as they concern obligations applicable regardless of whether there is an occupation, they have been generally discussed elsewhere in this publication.[7] Important obligations in the Hague Regulations not fully included in the 1949 GC and applicable during occupation follow below.[8]

a. **Hague Rules** Article 23, HR, which is applicable in the territory of all belligerent countries, states that it is prohibited,

> To declare abolished, suspended, or inadmissable in a Court of law the rights and actions of the nationals of the hostile party. Article 23(h), HR.

The second paragraph, HR Article 23, forbids compelling nationals of the hostile party to take part in the operations of war directed against their own country. With respect to occupied territory, this provision is further extended in Article 51, GC.

Article 43, HR, concerns the obligation of the occupying power to take measures to restore and ensure public order and safety

while respecting, unless absolutely prevented, the laws in force in the country. Laws in force, as they deal with civilian persons, are greatly elaborated on in Articles 51, 55, 56, 58 and 64 of the 1949 GC.

Article 45, HR, forbids compelling the inhabitants of occupied territory to swear allegiance to the hostile power. Although not found in the 1949 GC, as such, provisions in Articles 27 and 68, GC, which concern respect for honour and the lack of a duty of allegiance, are relevant.

Article 46, HR, confirms that private property ". . . must be respected" and that "Private property cannot be confiscated." Other provisions in Article 46, HR, concerning respect for family honour and rights, religious convictions and practice, and the lives of persons are developed at length in the 1949 GC.

Provisions concerning taxes and money contributions which are found in Articles 48, 49, and 51 of the HR have no direct counterpart in the 1949 GC because they do not concern directly the civilian population.

Article 52, HR, deals with requisitions in kind and services and has been supplemented by Article 51, GC. The Hague Rule remains valid in its requirement that the requisition of services be in proportion to the resources of the country and only demanded on the authority of the locality commander. Article 53, HR, restricts what property can be seized. Article 54, HR, concerns seizure of submarine cables. Article 55, HR, concerns obligations toward any seized property. Article 56, HR, states obligations toward certain public property as well as institutions devoted to religion, charity and education. The latter article remains valid, but it has been replaced, as regards hospitals, with more elaborate provisions in Articles 18–20 and 56 to 57, GC.

b. **Geneva Rules.** Article 47, GC, prohibits the occupying power from depriving protected persons in occupied territory of the benefits of the Convention by any change it may attempt to make in the government of that territory or its institutions, or by agreements between the occupying power and the authorities of the occupied territory, or by annexation in whole or part. Protected persons found therein who are not nationals of the dispossessed power must be given an opportunity to depart in accordance with procedure established pursuant to Article 35, GC (Art 48). Article 49, GC, prohibits individual or mass forcible transfers and deportations of protected persons from occupied territory to another country. Evacuation of specific areas is permissible for imperative military reasons or the security of the population (Art 49). Specific measures to insure the care, health, and education of children and prohibiting changes in their personal status are set forth in Article 50. Compulsory military service by protected persons in the armed forces of the occupant is prohibited, as is pressure or propaganda aimed at inducing voluntary enlistment. Forced labor of protected persons is forbidden unless they are over 18 years of age, and must be limited to work necessary either for the needs of the army of occupation, public utility services, or for the feeding, sheltering, clothing, transportation and health of the inhabitants. Compulsory work in connection with military operations is excluded (Art 51).

Article 53, GC, strictly forbids destruction of property owned publicly or by private persons ". . . except where such destruction is rendered absolutely necessary by military operations." This is comparable to Article 23(g), HR.

Article 55, GC, confirming extensive responsibility for the welfare of the occupied territory, imposes upon the occupying power the duty of ensuring food and medical supplies for the population to the best of its capabilities, even if it has to bring these in from outside the territory. Foodstuffs, articles or medical supplies may be requisitioned for the use of occupation forces and administrative personnel, but only if the requirements of the civilian population have been taken into account.

Articles 56–63, GC, set forth obligations relative to the maintenance of hospital and medical establishments, the prevention of

disease, relief consignments and their distribution, and the activities of Red Cross Societies.

Article 64 provides that the penal laws of the occupied territory shall remain in force, unless they constitute a threat to the occupying power's security or an obstacle to applying the Convention.[9] Local tribunals will continue their functions with respect to offenses covered by such laws. Penal laws enacted by the occupant may not be retroactive (Art 65). The occupying power is authorized to try offenses against such laws by its properly constituted, nonpolitical military courts, provided they sit within the territory (Art 66). Only provisions of law applicable prior to the offense and in accordance with general principles of law may be applied by the courts (Art 67). With some qualifications, internment or simple imprisonment of a proportionate nature is the maximum penalty which may be applied to offenses intended solely to harm the occupying power (Art 68). Article 68 further specifies that penal provisions promulgated by the occupying power may impose the death penalty upon protected persons only for cases of espionage, specified acts of sabotage, or intentional offenses causing death to one or more persons punishable by death under the law of the occupied territory. A United States formal reservation to Article 68 permits the death penalty without regard to whether the offense was punishable by death under preoccupation law.

Articles 70–77, GC, safeguard the rights of protected persons arrested for criminal offenses. Protected persons would include, for example, spies or saboteurs, or any person under suspicion of hostile activity, as specified in Article 5, GC. Among other rights, accused persons are assured the right to be informed promptly of the charges against them, call witnesses and present evidence, obtain defense counsel and an interpreter, appeal, and have the protecting power notified of particulars of the proceedings. No person condemned to death may be deprived of the right to petition for pardon or reprieve, and except in grave emergencies, execution of the death sentence may not be carried out before the expiration of 6 months from the date of receipt by the protecting power of notification of final judgment confirming such sentence (Art 75). Article 76, GC, provides that protected persons accused of offenses shall be detained in the occupied country and serve their sentences there if convicted. Under Article 77, protected persons, accused of offenses or convicted by the courts in occupied territory, are handed over at the close of occupation, with all relevant records, to the authorities of the liberated country.

14–7. Treatment of Internees.[10] Regulations for the treatment of internees, contained in Articles 79–135, are similar in a great many respects to GPW provisions protecting PWs and need not be recatalogued here. They embrace such matters as places of internment, food and clothing, hygiene and medical attention, religious, intellectual, physical activities, personal property and financial resources, administration and discipline, relations with the exterior, penal and disciplinary sanctions, transfers of internees, deaths and release and repatriation. A final section (Arts 136–141) concerning information bureaus and a Central Information Agency also closely follows provisions on the same subject in the GPW Convention.

Attention is particularly drawn to Articles 35, 43 and 78 of the GC. Under Article 35, a protected person (enemy alien) who has been denied permission to leave the jurisdiction may have such denial reconsidered by an appropriate court or administrative board designated for that purpose by the detaining power. A similar right is provided by Article 43 for protected persons interned or placed in assigned residence in a party's home territory. Article 78 likewise provides that persons placed in internment or assigned residence in occupied territory are entitled to a review or reconsideration by a "competent body." The administrative boards and the competent bodies contemplated by the three Articles to reconsider decisions in these

cases may be created with advisory functions only, leaving the final decision to a high official or officer of the government.

The internment provisions of the Geneva Convention do not require a belligerent government to hold a hearing *before* it interns an alien enemy in time of crisis. However, they do require that internment be used with discrimination, common sense and in accordance with certain restrictions, *e.g.*, opportunities for reconsideration must be provided as a safeguard against mistakes.

FOOTNOTES

[1] For background discussion of the GC Convention, see Draper, *The Red Cross Conventions* (1958); Greenspan, *Soldier's Guide to the Law of War* (1969); ICRC, *Commentary to the Fourth Convention Relative to the Protection of Civilian Persons in Time of War* (Pictet ed. 1958); McDougal and Feliciano, *Law and Minimum World Public Order* 732 (1961); US Army, FM 27–10, *Law of Land Warfare* (1956); 2 Schwarzenberger, *International Law, International Courts, The Law of Armed Conflict* (1968); as well as sources *supra, chapter 11, note 1. For a discussion from the vantage point of the Vietnam War, see Bond, "Protection of Non-Combatants in Guerrilla Wars," 12 Wm. & Mary L. Rev.* 787 (1971).

[2] Excluding matters of detail, Article 4 defines two broad classes of protected persons: (1) *enemy* nationals within the national territory of each of the parties to the conflict and (2) the *whole* population of occupied territories (aside from nationals of occupying powers). ICRC, Commentary, *supra* note 1, at 46. Part II of the Convention, however, is much broader and protects generally the *whole* population of the countries in conflict physically in the territory of a party to the conflict including neutrals, alien enemies not in one's control and a State's own nationals (Article 13). Part III, Section 1, protects classes (1) and (2) above (enemy nationals in one's own and in occupied territories). Part III, Section 2, is designed to protect class (1) above, (enemy nationals in one's territory). Part III, Section 3, is designed to protect all persons (aside from occupying nationals) in occupied territory. Article 64, of the Draft ICRC Protocol I of 1973, would also extend protections of Part I and Part III of the GC Convention to stateless persons and certain refugees.

[3] Part II, GC, applies to protect civilians in general from the consequences of armed conflict, *supra* note 2. Chapter 5 on aerial bombardment is accordingly directly relevant. Various provisions of the 1973 ICRC Draft Protocol I to the 1949 Geneva Conventions also directly relate to effective protection of the civilian population. For example, Articles 61 and 62 of the 1973 ICRC Draft Protocol expand significantly the obligations of parties to supply humanitarian relief.

[4] GC, Part III, Section I. This Section, in view of its broad applicability to the protected persons under Article 4, contains general principles of Geneva Law. Article 27 and Articles 31 through 34 were at one time proposed for inclusion in a preamble but ultimately were included in the text. ICRC, Commentary, *supra* note 1, at 200. Article 28 confirms the general principle discussed in chapter 5 prohibiting use of civilians to immunize areas from military operations. The prohibition of reprisals in Article 33 is discussed in chapter 10. It should be noted that Articles 64 through 69 of the 1973 ICRC Draft Protocol contain several protective guarantees supplementary to this Section.

[5] GC, Part III, Section II. See also Kelsen, *Principles of International Law* 196 (2nd rev ed Tucker 1966); McDougal and Feliciano, "International Coercion and World Public Order: The General Principles of the Law of War," 67 *Yale L. Rev.* 840 (1958). International law has always provided protective guarantees to aliens abroad under the general principles of State responsibility. Bishop, *International Law, Cases and Materials* (3rd ed 1971); and O'Connell, *International Law* 941 (2nd ed 1970). The principles of State responsibility for protection of aliens have been derived over time from adjudications and international claims and are also reinforced in bilateral contexts by Friendship, Commerce and Navigation (FCN) treaties.

[6] GC, Part III, Section III. The obligations during occupation are discussed extensively in FM 27–10, *supra* note 1, and other sources, *supra* note 2.

[7] See, for example, chapter 3 on combatants, chapter 9 as regards spies and saboteurs.

[8] For authoritative discussion, see US Army FM 27–10, *supra* note 1, and ICRC Commentary, *supra* note 1, at 614. Other discussion is found in standard sources such as Greenspan, *Modern Law of Land Warfare* (1959); McDougal and Feliciano, *Law and Minimum World Public Order* (1961); and Schwarzenberger, *supra* note 1. On the 1907 Hague Regulations as customary law, see authorities cited in chapters 1 and 5.

[9] The "Justice Trial", *United States* v. *Alstoetter*, was the inspiration for the movie "Judgment at Nuremberg." This trial, concerning a war crimes trial of Nazi lawyers, judges and ministry of justice officials for offenses relating to the operation of criminal law in occupied territories during World War II, provides the background for the necessity of Articles 64 through 68. These GC provisions would be further strengthened by Article 65, ICRC Draft Protocol I to the 1949 Geneva Conventions which provides other guarantees of a fair trial.

[10] GC, Part III, Section IV. Internees include not only protected persons in areas of occupation, but also enemy aliens and other classes of persons referenced in Article 4 in the territory of parties to a conflict who are detained or interned.

Chapter 15

STATE RESPONSIBILITY AND INDIVIDUAL RESPONSIBILITY

15-1. Introduction. This chapter examines state obligations to observe and enforce the law. It also surveys individual criminal responsibility for acts violating the law of armed conflict, particularly violations of the 1949 Geneva Conventions. The nature of command responsibility and US enforcement techniques are discussed. Normally states impose criminal responsibility against their own personnel pursuant to national means of enforcement for breaches of military discipline. International criminal responsibility was imposed in the post-World War II war crimes trials. In addition national enforcement is common against adversary personnel not qualified as lawful combatants.

15-2. State Responsibility:

a. **Pressures for observance.**[1] The armed forces of a state act on behalf of its government and its citizens; cruelties and excesses during armed conflict may weigh heavily on the conscience of governmental leaders and citizens. Moreover, every nation is sensitive, to some degree, to the reaction of others to its policies; the good will and support of other governments and peoples are important in the overall conduct of foreign policy and achievement of national goals. Reciprocity is a critical factor. If a state fails in the first instance to insure respect for basic humanitarian rights—its conduct provokes violations by an adversary. Moreover, international standing to complain about violations by an adversary is seriously compromised. Civilian loyalties may be at stake and compromised by excesses and cruelty. History demonstrates also that the successful negotiation or termination of hostilities may be prolonged or complicated by antagonisms and alienation heightened by atrocity violations. The political context, in which all armed conflict occurs, prominently features propaganda asserting adversary violations of law and basic humanitarian norms. Unfortunately, states, particularly during periods of active armed conflict, often fail to perceive accurately their own national self-interests. Violations then occur as deliberate state policy or through failure to take adequate preventive measures. State responsibility exists in both cases.[2]

b. **State Obligations.** Many failures to observe the law of armed conflict do not arise from formal state policy. In fact, states customarily take elaborate steps to demonstrate the legitimacy of their acts under international law or, at minimum, to deny or conceal violations.[3] States, however, have important customary and treaty obligations to follow the law not only as national policy but to ensure its implementation, observance and enforcement by its own combatant personnel. For example, Article 1, Hague IV, requires parties to issue instructions in conformity with the Hague Regulations. Article 3 concerns a state's obligation to pay compensation for acts committed by its Armed Forces which violate the Hague Regulations.[4] The 1949 Geneva Conventions contain a variety of such obligations. States are required to enact domestic legislation necessary to provide effective penal sanctions for persons who commit or order any grave breach of the 1949 Geneva Conventions.[5] Grave breaches are defined:

GWS and GWS SEA

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. (Art. 50,

GWS; Art. 51, GWS-SEA).

GPW

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention. (Art. 130, GPW)

GC

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. (Art. 147, GC)

There are express obligations to search for persons alleged to have committed grave breaches, to bring them to trial or extradite them, to take measures necessary to suppress all acts contrary to the Conventions and to implement all obligations.[6] Parties to a conflict are required through their respective Commanders-in-Chief to ensure the detailed implementation of the Conventions.[7] All states must include the text of the Conventions in programs of military, and if possible, civil instruction.[8] The United States has for many years urged measures on the international scene to improve the implementation and better observance of the law of armed conflict.[9]

c. **Foundation of Law.** The Geneva Conventions, and the preceding Hague Conventions and Regulations, as well as the principles and rules of customary international law are not designed and formulated as criminal statutes.[10] They do prohibit and obligate states to prohibit conduct unnecessarily destructive of minimum values of civilization. In this context, they are the subject of conflicting national claims, both generally and during specific conflicts.[11] Frequently expressed in general terms, the law of armed conflict often omits critical elements of individual criminal responsibility such as intentional and deliberate acts.[12] Frequently, the language is not sufficiently precise enough to provide adequate knowledge to individuals of the exact conduct proscribed. These calculated omissions must be accounted for by the fact that the law primarily emphasizes the behavior expected of nations and combatants—not the responsibility of individuals for its violation. Moreover, if the law of armed conflict were couched in terms of intentional wrongs it would lose much of its efficacy; the issue then would be a state's intent, a troublesome concept to apply. From the perspective of the victim—civilian, PW or other *hors de combat* personnel—the wrongful act has the same result whether done intentionally or inadvertently. However, individual criminal responsibility does *require* purposeful behavior or intention, frequently expressed as *mens rea* or a guilty mind, an absolute prerequisite for individual criminal responsibility under the law of armed conflict.[13]

d. **Command Responsibility.**[14] An important illustration of the *mens rea* requirement relates to a commander's responsibility to maintain discipline and preclude violations by members of his command. The US Supreme Court in *In Re Yamashita* stated:

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost cer-

> tainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would be largely defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.[15]

Command responsibility for acts committed by subordinates arises when the specific wrongful acts in question are knowingly ordered or encouraged. In addition, the Commander is responsible if he has actual knowledge, or should have had knowledge through reports received by him or through other means, that combatants under his control have or are about to commit criminal violations, and he culpably fails to take reasonably necessary steps to ensure compliance with the law and punish violators thereof.

e. **United States Enforcement.** The US currently ensures observance and enforcement through a variety of national means including close command control, military regulations, rules of engagement, the Uniform Code of Military Justice and other national enforcement techniques. Violations are breaches of military discipline and prosecuted as such.[16] Hence, whether there is a violation of the law of armed conflict is not directly relevant. Rules of engagement, which are operational restrictions adopted by the US and issued by the Commander-in-Chief or his designated representative, are not equivalent to the law of armed conflict. Although failure to follow a rule of engagement may be punishable as a failure to obey lawful orders, it would not necessarily constitute a violation of the law of armed conflict. An important function of rules of engagement is to avoid or minimize such allegations. Other states have similar enforcement techniques.[17]

15-3. Individual Responsibility:

a. **Nature of Individual Responsibility.**[18] Generally international law creates rights and imposes obligations only upon states. The law of armed conflict is an important exception to this international law principle.[19] The rights and responsibilities of combatants and others derived from international law must be distinguished from their enforcement which is a matter of State responsibility. Because the Axis Powers during WW II failed to fulfill their obligations to observe and enforce the law, and adopted criminal violations as national policies, the international community of states took corrective action including the creation of *ad hoc* military tribunals.[20] Within the Geneva Conventions system, state responsibility to repress breaches is stressed, and no provision is made for international tribunals within the Conventions.

b. **Individual Responsibility Does not Parallel State Responsibility.** The obligations and liabilities of combatants do not necessarily parallel those of his state or the party to the conflict to which he belongs.[21] For example, breaches of military discipline (including rules of engagements) which are punished may or may not constitute violations of the law of armed conflict. Failures to observe treaty rules or other international law rules may occur for which there may be general state responsibility without any individual criminal responsibility.[22] Moreover, members of the armed forces are not held accountable for the political actions of their government provided their own conduct is not criminal. For example, a serviceman is not called upon, under the law of armed conflict, to determine whether the decision to engage in armed conflict is proper under international law. Even if it were authoritatively determined it was improper, his conduct would still not be criminal because he was a combatant in the conflict.[23] Conversely, an individual cannot use his privileged status as a lawful combatant as a shield from responsibility for his own criminal misconduct.[24]

c. **Acts Involving Individual Criminal Responsibility.** In addition to the grave breaches of the Geneva Conventions of 1949,[25] the following acts are representative of situations involving individual criminal responsibility:[26]

(1) Deliberate attack on protected medical aircraft, hospital ships, medical establishments, units, or personnel (including shipwrecked survivors) protected by the Conventions;
(2) Wilful misuses of the Red Cross or a similar protective emblem;
(3) Treacherous request for quarter or truce, deliberate refusal of quarter or deliberate firing on or abuse of the flag of truce;
(4) Aerial bombardment for the deliberate purpose of killing protected civilians or destroying protected areas, buildings or objects;
(5) Wilful or wanton destruction and devastation not justified by military necessity;
(6) Intentional use of civilian clothing to conceal military identity during battle;
(7) Wilful and improper use of privileged buildings or localities for military purposes;
(8) Plunder or pillage of public or private property;
(9) Wilfully compelling civilians or PWs to perform prohibited labor;
(10) Wilfully killing without trial persons in custody who have committed hostile acts; and
(11) Deliberate deprivation of fair trial rights to any protected persons.

d. **Relationship to Military Discipline.**[27] The law of armed conflict is closely related to military discipline, which is an indispensable requirement for a militarily effective armed force. The concept of regulated force is central to each. An important function of military discipline is to insure compliance with the law of armed conflict. Historically, states have upheld criminal responsibility for breaches of discipline including wartime excesses by members of its own force. A disciplined armed force cannot tolerate violations of discipline during wartime any more than it can tolerate breaches of discipline and domestic law during peacetime. Acts for which servicemen are held criminally responsible in this area of law by national authorities most often result from savagery, brutality, self-gratification, individual abandonment of the concept of regulated force, or activities unworthy of traditional military professionalism.

e. **Law and Effective Military Action.**[28] The law of armed conflict has been heavily influenced by long standing traditional concepts of military necessity and doctrine, and customary guides to effective military action, as well as basic humanitarian values. The honor and integrity of the military profession, the basic concepts of regulated force and economy of force, as well as political efficacy, all reinforce its observance. Its routine observance by parties to a conflict is frequently overlooked while great attention is paid to violations in the propaganda struggle which inevitably accompanies armed conflict.

15–4. Criminal Enforcement:

a. **Jurisdiction.**[29] Except for war crimes trials conducted by the Allies after World War II, the majority of prosecutions, for acts which violate the law of armed conflict, have been trials of one's own forces for breaches of military discipline. Although jurisdiction extends to adversary personnel, trials have, with rare exception, been limited to those against various unlawful combatants, such as spies, saboteurs or those acting without state sanction for private ends.[30] In the United States, jurisdiction is not limited to offenses against US nationals but extends to offenses against victims of other nationalities. Violations by adversary personnel, when appropriate, are tried as offenses against international law which forms part of the law of the United States. In occupied territories trials are usually held under occupation law. Trials of such personnel have been held in regular military courts, military commissions, provost courts, military government courts, and other military tribunals

of the United States, as well as in international tribunals.

b. **Trials During Hostilities.** The international practice of states has recognized the nonutility of trials of opposing lawful combatants while hostilities are in process.[31] Although threatened from time to time, such threats are not often carried out because it would inevitably prolong hostilities, provoke undesirable actions from an adversary and complicate humanitarian protections applicable to one's own nationals. Equally recognized in international practice is the difficulty of combatants receiving a fair trial in the hands of an adversary while hostilities are in progress.[32] Trials of unlawful combatants have been held.[33] Yet, for similar reasons, they may be less than rigorously pursued during the course of hostilities.[34]

c. **Trials After Hostilities.** Imposition of criminal responsibility by trials of adversary personnel, except for unlawful combatants, has not been a prominent feature of international conflicts for many centuries.[35] After World War I, responsibility for initiating that conflict was formally assigned to Kaiser Wilhelm, and an extensive report of the atrocities committed was prepared. Some trials were held by German authorities of German personnel as required by the Allies.[36] Due to the gross excesses of the Axis Powers during WW II, involving not only initiation of aggressive war but also wholesale execution of ethnic groups and enslavement of occupied territories, the United Nations determined that large scale assignment of individual criminal responsibility was necessary. Individual combatants were not an important segment of the persons tried. The principal offenses against combatants directly related to combat activities were the wilful killing of prisoners and others in temporary custody. Crimes against peace and crimes against humanity were charges against the principal political, military and industrial leaders responsible for the initiation of the war and various inhumane policies.[37] Since World War II, state practice has generally avoided prosecutions after conflicts have terminated.[38]

d. **Relevant Defenses.**[39] Individual responsibility, enforceable if necessary by criminal process, is inherent in the concepts of regulated force, military discipline, military necessity and proportionality central to the law of armed conflict and the effective application of military force. The privileges secured to combatants extend to acts that serve a national military purpose and not private ends and are proportionate to the military advantage attempted to be secured.

In discussing military necessity as a defense, a US Military Tribunal noted:

> Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation

> of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.[40]

The fact that an act was committed pursuant to military orders is an acceptable defense only if the accused did not know or could not reasonably have been expected to know that the act ordered was unlawful. Members of the armed forces are bound to obey only lawful orders. For example, the Manual for Courts-Martial, 1969, (Rev.), states:

> d. *Obedience to apparently lawful orders.* An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.[41]

Nevertheless, in all cases, the fact that an individual was acting pursuant to orders may be considered a mitigating factor in determining punishment.

The following examples illustrate these principles:

Case 1: The deliberate target selection of a hospital protected under the Geneva Conventions for aerial bombardment would be a violation of law. Although the person making the selection would be criminally responsible, a pilot given such coordinates would not be criminally responsible unless he knew the nature of the protected target attacked.

Case 2: Faulty intelligence may cause targets to be attacked which are not in fact military objectives. No criminal responsibility would result in this event unless the attack was pursued after the correct intelligence was received and communicated to the attacking force.

Case 3: A pilot attacks, admittedly in a negligent manner, and consequently misses his target, a military objective, by several miles. The bombs fall on civilian objects unknown to the pilot. No deliberate violation of international law occurred. However, he might be subject to possible criminal punishment under his own state's criminal code for dereliction of duty. He could not be charged with a violation of the law of armed conflict.

FOOTNOTES

[1] See chapter 1 for discussion and authorities. Pressures for nonobservance vary with the intensity of the conflict, adversary violations, and on occasion unrealistic restrictions, as occurred with maritime warfare, discussed paragraph 4-4. Pressures for nonobservance frequently are irrational momentary self-gratifications heightened by the passions of conflict, or temporary expedients adopted without due regard for long term adverse military and political consequences.

[2] On State responsibility in international law, see Bishop, *International Law, Cases and Materials* 742 (1971); Brownlie, *Principles of Public International Law* 418 (1973); Friedmann, Lissitzyn and Pugh, *International Law* 745 (1969); 2 O'Connell, *International Law* 962 (1970).

[3] An example of attempted justification includes the N. Vietnam position on application of the 1949 Geneva Conventions, discussed chapter 13; such justifications are also found in *U.S.* v. *Alstoetter*, 3 U.S. *Trials Before The Nuremberg Military Tribunals under Control Council Law No. 10* (1949), discussed in Miles, "The Justice Trial," 17 AFLR 16 (Spring 1975); and the infamous "Commando Order" attempting to justify the execution of Allied Commandoes captured behind battle zones even though in uniform. *See* also the literature, *infra* note 37.

[4] Compensation is discussed in paragraph 10-4, this publication. The Hague Regulations are minimal guarantees of customary law. US Army, FM 27-10, *Law of Land Warfare* 6 (1956) [herein FM 27-10]; US Navy, NWIP 10-2, *Law of Naval Warfare* 2-9 (footnote 2) (1959) [herein NWIP 10-2].

[5] "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

"Each High Contracting Party shall be under the obligation to search for persons, alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

"Each High Contracting Party shall take measures for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

"In all circumstances, the accused persons shall benefit by safeguards of proper trial and defense, which shall not be less favourable than those provided by Article 105 and those following of [the GPW]." Common Article found in Art 49, GWS; Art 50, GWS-SEA; Art 129, GPW; Art 146, GC. The principles of these Articles declare customary law obligations to suppress violations of the law of armed conflict including particularly those committed by one's own armed forces. FM 27-10, at 181; NWIP 10-2, at 3-5; Greenspan, *Law of Land Warfare* 93 (1959).

[6] See authorities note 5 *supra*.

[7] "Each Party to the conflict, acting through its commanders-in-chief, shall ensure the detailed execution of the preceding Articles and provide for unforseen cases, in conformity with the general principles of the present Convention." Art 45, GWS; Art 46, GWS-SEA.

"The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof." Art 128, GPW; Art 145, GC.

[8] "The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the *principles* thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains." Art 47, GWS; Art 48, GWS-SEA; Art 127, GPW; Art 144, GC (emphasis added).

"Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be *specially instructed* as to its provisions." Art 127, GPW. (emphasis added.)

"Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be *specially instructed* as to its provisions." Art 144, GC. (emphasis added.)

[9] See, *e.g.*, DOD Directive 5100.77, and Report of US Delegation, *Diplomatic Conference on Humanitarian Law Applicable in Armed Conflict*. 1st Sess. (1974) and 2nd Sess (1975).

[10] The earlier Hague Conventions and Regulations were formulated in much simpler terms. Succeeding Conventions grew more complicated. Some provisions are addressed to both combatants and states, and others are primarily or exclusively addressed to states.

[11] Discussions of the law are then addressed in the context of competing claims. See, for example, McDougal and Feliciano, *Law and Minimum World Public Order* (1961); US Navy War College, "Submarines in General and Limited War," 1966 *International Law Studies* (1968). Am. Soc. Int'l. L., *The Vietnam War and International Law*, 3 Volumes (Falk ed. 1968–72). However, the scope of claims around treaties and longstanding customary norms is limited.

[12] This is not to deny that intention is not involved in some formulations. For example, Art 18, GC, protecting civilian hospitals refers to being "objects of attack", whereas Art 21, GWS, protecting military hospitals, makes no such reference, nor does, for example, Art 20, GWS (hospital ships); Art 12, GWS (wounded and sick); Art 24, (medical personnel); Art 36, GWS (medical aircraft). These examples demonstrate that the law is not principally formulated with any view to individual criminal responsibility but rather to state responsibility. The protection of hospitals, for example, contemplates provisions for marking and avoiding location near military objectives, as well as a prohibition on attacking them. Arts 19, 42, GWS; Art 18 GC. The Geneva Convention articles describing *grave* breaches connote *mens rea* through the words "willful" and "wanton" (quoted in text at paragraph 15–2b).

[13] "In international law as in municipal law intention to break the law—*mens rea* or negligence so gross as to be the equivalent of criminal intent is the essence of the offense. A bombing pilot cannot be arraigned for an error of judgment . . . it must be one which he or his superiors either knew to be wrong or which was, *in se*, so palpably and unmistakenly a wrongful act that only gross negligence or deliberate blindness could explain their being unaware of its wrongness." Spaight, *Air Power and War Rights* 57, 58 (1947).

[14] See In Re Yamashita, 327 US 1 (1946); Decision of U.S. Military Commission at Manila, Dec 7, 1945, found 2 *The Law of War* 1596 (Friedman ed. 1972); U.S. v. Leeb, "The High Command Case", 10 *Trials of War Criminals* (Nuremberg) 1 (1951); U.S. v. List, "The Hostage Case", 11 *Trials of War Criminals* (Nuremberg) 759 (1950); FM 27–10, at 178. For discussion, see Parks, "Command Responsibility for War Crimes," 62 *Mil. L. Rev.* 1 (1973); Kelsen, *Principles of International Law* 153 (Tucker ed., 1970); Kunz, *Changing Laws of Nations* 914 (1968); Levie "Penal Sanctions for Mistreatment of Prisoners of War," 56 *Am. J. Int'l. L.* 466 (1962); Glahn, *Law Among Nations* 699 (1965); Taylor, *Nuremberg and Vietnam* 92 (1970).

[15] In Re Yamashita, 327 US 1, at 15 (1946).

[16] On U.S. implementation, see Hearings, Committee on Foreign Relations, U.S. Senate, 84th Cong., 1st Sess., Geneva Conventions For the Protection of War Victims; DOD Directive 5100.77, 5 Nov 1974; Esgain and Solf, "The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations and Deficiencies," 41 *N. Car. L. Rev.* 577 (1963); Paust "My Lai and Vietnam: Norms, Myths and Leader Responsibility," 57 *Mil. L. Rev.* 99 (1972). Under the US Constitution, Art 1, Section 8, the Congress has power . . .

"To define and punish Piracies and Felonies committed on the high Seas, and Offenses Against the Law of Nations;

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

* * * * *

"To make Rules for the Government and Regulation of the land and naval Forces."

[17] See O'Connell, "International Law and Contemporary Naval Operations," 1970 *Brit. Y. B. Int'l. L.* 19, at 22 (1971). See, *e.g.*, Report submitted by the International Committee of the Red Cross, 22nd International Conference of the Red Cross, Teheran, Nov 1973, *Implementation and Dissemination of the Geneva Conventions*; Report submitted by the International Society for Military Law and the Law of War, The 5th International Congress at Dublin, May 25–30, 1970, *Military Obedience in regard to the Internal Criminal Laws and to the Law of War*; and International Committee of the Red Cross, *Questionnaire Concerning Measures Intended to Reinforce the Implementation of the Geneva Conventions of August 12, 1949, Replies sent by Governments* (1972).

[18] Brownlie, *Principles of Public International Law* 534 (1973); 1 O'Connell, *International Law* 108 (1970).

[19] See chapter 1 for discussion of international law as part of US law and the domestic legal effect given to treaties receiving the advice and consent of the Senate.

[20] See Charter of the International Military Tribunal, 8 Aug 1945, 59 Stat 1544; EAS 472; 3 Bevans 1238; 82 UNTS 279 (1945), reprinted AFP 110–20, at 11–18.

[21] One prominent example is the treatment of spies, saboteurs or other unprivileged combatants discussed in chapter 3 and 9, this publication. Although there may be no violation of international law involving state responsibility, it is clear that criminal enforcement, including that against such unlawful combatants, is not prohibited and frequently taken, most notably to encourage the demarcation between lawful combatants and noncombatants. For discussion, see Baxter "So-Called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs," 1951 *Brit. Y. B. Int'l. L.*323 (1952) and Castren, *Present Law of War and Neutrality* 86 (1954). State responsibility is involved in the prohibition against perfidy, discussed chapter 8, prohibit-

ing using civilian clothing in hostilities. The difference between rules of engagement and the law of armed conflict is illustrated by one famous case. When General John D. Lavelle, USAF, allegedly ordered unauthorized raids against N. Vietnam, he may have exceeded his authority to do so. However, no violation of the law of armed conflict was involved since the strikes were solely against military objectives.

[22] A reading of the 1949 Geneva Conventions establishes the technical nature of many of the rules (example: possession of a copy of the text of the Conventions, *supra* note 8) which are formulated and directed at States.

[23] "No soldier who merely executed government policy should be regarded as criminal, as guilty of the crime against peace. The duty of an army is to be loyal. Soldiers nor sailors, generals nor admirals should be charged with the crime of initiating or waging aggressive war, in case they merely performed their military duty of fighting in a war waged by their government." Prosecution Statement, International Military Tribunal Far East. April 1948. 11 Whiteman, *Digest of International Law* 993 (1968). "Moreover, a soldier who merely performs his military duty cannot be said to have *waged* the war . . . [O]nly the government, and those authorities who carry out governmental functions and are instrumental in formulating policy, *wage* the war" *Ibid* at 993–994. For discussion, see McDougal and Feliciano, *Law and Minimum World Public Order* 331 (1961) ("[T]he most important target selection principle that emerged from the decisions in post World War II cases is that only individuals who ranked in the top policy formulating levels of the authority and control structures of the violator state should be held liable to these deprivations."); Greenspan, *supra* note 5, at 449; Castren, *supra* note 21, at 84.

[24] See authorities *supra* note 14. The concept of lawful combatant is discussed in chapter 3.

[25] See footnote 5, *supra* and accompanying text. Grave breaches are not excusable: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article."Article 51, GWS; Art 52, GWS-SEA; Art 131, GPW; Art 148, GC.

[26] NWIP 10–2, at 3–4; FM 27–10, at 180. For discussion of treachery or perfidy, including misuse of protective emblems or wearing of civilian clothing, see chapter 8. On air bombardment including misuse of protected buildings, see chapter 5. On the Geneva Conventions in general, see chapters 11–14.

[27] See authorities *supra* footnote 14, and chapters 1 and 3 this publication. Also MCM, 1969, paragraph 1, "The sources of military jurisdiction include the Constitution and International Law. International Law includes the law of war," and paragraph 147(a) (judicial notice). See also Winthrop, *Abridgment of Military Law* 316 (1893); *Winthrop's Military Law and Precedents* 778 (2nd ed. reprint, 1920); Walker, *Military Law* 520 (1954).

[28] See authorities chapter 1 and 5. "The state is represented in active war by its contending army, and the laws of war justify the killing or disabling of members of the one army by those of the other in battle or hostile operations . . . But it is forbidden by the usage of civilized nations, and it is a crime against the modern law of war, to take the lives of, or commit violence against, noncombatants and private individuals not in arms, including women and children and the sick, as also persons taken prisoners or surrendering in good faith." The observance of the rule protecting from violence the unarmed population is especially to be enforced by commanders in occupying or passing through towns or villages of the enemy country. *Winthrop*, (1920), *supra* note 27, at 778–779.

[29] On U.S. Jurisdiction over enemy nationals, see UCMJ Article 18; MCM, 1969, at pp. 1–1, 4–3, 4–4, 27–48; FM 27–10, at 180; NWIP 10–2, at 3–5.

[30] Winthrop, (1920), *supra* note 27, at 783; Castren, *The Present Law of War and Neutrality* 87 (1954); Greenspan, *Modern Law of Land Warfare* 502–511 (1959); McDougal and Feliciano, *Law and Minimum World Public Order* 704 (1961). Historically, unlawful combatants were often not afforded the benefit of trials although this is now required by the 1949 Geneva Conventions. Ex Parte Quirin, 317 US 1 (1942), was a trial of unlawful combatants who were German soldiers smuggled into US via submarine who *discarded uniforms* upon entry but were captured prior to committing acts of sabotage.

On Historical precedents for war crime trials of adversary personnel, particularly unlawful combatants, see Winthrop (1920), *supra* note 27, at 783. Cowles in "Universality of Jurisdiction over War Crimes," 33 *Cal. L. Rev.* 177, 203 (1945) notes: " . . . War criminals . . . are especially found among irregular combatants and former soldiers who have quit their posts to plunder and pillage . . . such as banditti, brigands, buccaneers, bushwackers, filibusters, franctireurs, free-booters, guerrillas, ladrones, marauders, partisans, pirates and robbers . . . Historically, brigandage has been to a large extent international in character . . . Brigandage is a thriving byproduct of war. . . . The object . . . is to bring out the connection between the past and the present . . . It is not meant to be suggested that war crimes committed by members of regularly constituted units are any less amenable to such jurisdiction."

[31] Exceptions include limited Russian trials in 1943, McDougal, *supra* note 23, at 704 and trial of Doolittle raiders in Japan discussed in chapter 13, this publication. This is not to deny atrocities

against PWs etc., but only to suggest that forms of law are not routinely employed against lawful combatants.

[32] Art 85, GPW, discussed chapter 13, does not prohibit such trials but does require that PWs retain, even if convicted, the benefits of the GPW Convention.

[33] See authorities, *supra* note 30, and chapters 3, 7, and 9 this publication.

[34] See chapters 3 and 13.

[35] As to unlawful combatants this was frequently done by punishment without trial, see Cowles and Winthrop, *supra* note 30, as well as general authorities in chapters 3 and 9. The term "unlawful combatants" is explained in chapter 3; traditionally, the term is "unlawful belligerency."

[36] Treaty of Peace Between the Allied and Associated Powers and Germany, Versailles, June 28, 1919 found 1 *The Law of War* 417 (Friedman ed. 1972); "Commission on the Responsibility of the Authors of the War and On Enforcement of Penalties," 14 *Am. J. Int'l. L.* 95 (1920); Mullins, *The Leipzig Trials* (1921); Woetzel, The Nuremberg Trials in International Law 27 (1962); Glueck, *War Criminals, Their Prosecution and Punishment* 19 (1944); UN Secy. Gen. Memorandum, Historical Survey of the Questions of International Criminal Jurisdiction, A/CN.4/7/Rev 1 (1949).

[37] Only a brief representative sample of the literature is given here:

Views on the Trials: Bosch, *Judgment on Nuremberg* (1970) (survey of views of others); *Nuremberg, German Views of the War Trials* (Benton and Grimm ed., 1955); Knieriem, *The Nuremberg Trials* (1959) (German); Vogt, *The Burden of Guilt* (1964) (German); Maugham, *UNO and War Crimes* (1951)(English); Morgan, *The Great Assize* (1948) (English); Klafkowski, *The Nuremberg Principles and the Development of International Law* (1966) (Polish); Ginsberg, "Laws of War and War Crimes on the Russian Front: The Soviet View," 11 *Soviet Studies* 253 (1960).

Bibliographies: Garsse, *Genocide, Crimes Against Humanity, War Crimes Trials: A Bibliography* (1951); US Library of Congress, *The Nazi State, War Crimes and War Criminals* (1954).

Summaries of cases are found in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, 15 Volumes (1949); Appleman, *Military Tribunals and International Crimes* (1954); US Govt., *Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10* (1946–1949) (principal U.S. trials subsequent to International Military Tribunal); 11 Whiteman, *Digest of International Law* 884 (1968).

Judgments: "International Military Tribunal (Nuremberg), Judgment and Sentence," 41 *Am. J. Int'l. L.* 172 (1947); also International Military Tribunal, *Nazi Conspiracy and Aggression, Opinion and Judgment* (1947); *International Military Tribunal for the Far East, Judgment,* 3 parts (1948).

General Literature: Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10* (1949); Appleman, *Military Tribunals and International Crimes*(1954); Davidson, *The Trial of the Germans: An Account of the Twenty-two Defendants Before the International Military Tribunal at Nuremberg* (1966); Jackson, *The Case Against the Nazi War Criminals* (1946); Jackson, *The Nuremberg Case* (1947); Keeshan, *Justice at Nuremberg* (1946); Woetzel, *The Nuremberg Trials and International Law* (1962).

[38] As an example, see "Agreement on the Repatriation of Prisoners of War and Civilian Internees," paragraph 15, signed by Bangladesh, India and Pakistan 9 April 1974, in 13 *Int. Leg. Materials* 505 (1974).

[39] On defenses, see as follows:

Superior Orders: Brand, "War Crimes Trials and the Laws of War," 26 *Brit. Y. B. Int'l. L.* 416 (1949); Dinstein, *The Defense of Obedience to Superior Orders in International Law* (1965); Dunbar, "Some Aspects of the Problem of Superior Orders," 63 *Jud. Rev.* 234 (1951); Green, "Superior Orders and the Reasonable Man," *Can. Y. B. Int'l. L.* 61 (1970); McDougal and Feliciano, "International Coercion and World Public Order: The General Principles of the Law of War," 67 *Yale L.J.* 833 (1958); Norene, *Obedience to Superior Orders* (Army JAG School, 1971); Paston, *Superior Orders* (1946).

U.S.: UCMJ §92, 10 U.S.C. §892; MCM, 1969, paragraph 171; FM 27–10, at 182; NWIP 10–2, Section 330b(1).

Case Law: Martin v. Mott, 12 Wheat. 19, 30 (1827); Mitchell v. Harmony, 13 How. 115, 136 (1851); Despan v. Oleny, 7 Fed. Case 534 (Case No. 3822, 1852); *Winthrop's* (1920), *supra* note 27, at 296.

Act of State: FM 27–10, at 183; Manner, "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War," 37 *Am. J. Int'l. L.* 407 (1943); Wright "Law of Nuremberg," 41 *Am. J. Int'l. L.* 38 (1947).

Acts Obligatory or Not Punished Under Domestic Law: FM 27–10, at 183; NWIP 10–2, at paragraph 330.

Military Necessity, see chapter 1 for authorities and discussion.

[40] The Hostage Case, United States v. List, 11 *Trials of War Criminals Before the Nuremberg Military Tribunals* 1253–4 (1950).

[41] Paragraph 216d, MCM 1969. Also see United States v. Calley, 22 USCMA 534, 48 CMR 19 (1973).

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

DAVID C. JONES, General, USAF
Chief of Staff

JAMES J. SHEPARD, Colonel, USAF
Director of Administration

Abbreviations

GC	Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
GP I	Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts.
GP II	Draft Protocol Additional to Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.
GPW	Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.
GWS	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949.
GWS-SEA	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 12 August 1949.
Hague III	Hague Convention No. III Relative to the Opening of Hostilities, 18 October 1907.
Hague IV	Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 October 1907.
HR	Hague Regulations Respecting the Laws and Customs of War on Land, 18 October 1907. Annex to Hague Convention IV.
Hague V	Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907.
Hague VIII	Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907.
Hague IX	Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War, 18 October 1907.
Hague XI	Hague Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval Warfare, 18 October 1907.
Hague XIII	Hague Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907.
ICRC	International Committee of the Red Cross.
MCM, 1969	The Manual for Courts-Martial, United States, 1969, (Revised Edition).
Roerich Pact	Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, 15 April 1935.
UCMJ	Uniform Code of Military Justice [64 Stat. 108; 10 U.S.C. 801-940 (1970)].

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