

UNITED STATES: DEPARTMENT OF DEFENSE REPORT TO CONGRESS ON
THE CONDUCT OF THE PERSIAN GULF WAR - APPENDIX ON THE
ROLE OF THE LAW OF WAR*

[April 10, 1992]

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I.L.M. Background/Content Summary

The text reproduced below is an Appendix to the Final Report of Secretary of Defense Cheney to Congress on the conduct of the Persian Gulf conflict. The Report was provided to Congress on April 10, 1992, pursuant to Title V of Public Law 102-25, the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991. Sec. 501 (b)(12) of the act specifies that the Report shall contain a discussion of:

The role of the law of armed conflict in the planning and execution of military operations by United States forces and the other coalition forces and the effects on operations of Iraqi compliance or noncompliance with the law of armed conflict, including a discussion regarding each of the following matters:

- (A) Taking of hostages.
- (B) Treatment of civilians in occupied territory.
- (C) Collateral damage and civilian casualties.
- (D) Treatment of Prisoners of war.
- (E) Repatriation of prisoners of war.
- (F) Use of ruses and acts of perfidy.
- (G) War crimes.
- (H) Environmental terrorism.
- (I) Conduct of neutral nations.

The preface to the Report notes that is divided into three volumes. The first volume deals with the nature of Iraqi forces, Operation Desert Shield, the Maritime Interception Operations and Operation Desert Storm. Discussion in that volume focuses on how the threat in the Persian Gulf developed and how the United States and its Coalition partners responded to that threat at the strategic, operational and tactical levels. The narrative is chronological to the extent possible. In this sense, it touches on issues such as logistics, intelligence, deployment, the law of armed conflict, and mobilization, among others, only as those issues have a bearing on the overall chronicle. The second and third volumes contain appendices dealing with specific issues. The role of the law of war appears in Appendix "O".

*[Reproduced from the text provided by the U.S. Department of Defense. Among the documents discussed in the Appendix are Protocols I and II Additional to the 1949 Geneva Convention, which relate, respectively, to the protection of victims of international armed conflicts and to the protection of victims of non-international armed conflicts; they entered into force December 7, 1978. Protocol I appears at 16 I.L.M. 1391 (1977), Protocol II appears at 26 I.L.M. 561 (1987). United Nations Security Council Resolution 644 (1990), regarding third-country nationals in Iraq and Kuwait, was adopted August 18, 1990, and is reproduced at 29 I.L.M. 1328 (1990).]

TEXT OF APPENDIX - I.L.M. Page 615

BACKGROUND - I.L.M. Page 615

[Defense Department definition of law of war. International treaties applicable to the Persian Gulf War: Hague Convention, Geneva Conventions and Protocol. Signatories to conventions and protocols and the status of customary international law]

ROLE OF LEGAL ADVISERS - I.L.M. Page 617

[Office of General Counsel of the Department of Defense, Chief DOD legal office, provided legal advice on Operations Desert Shield and Desert Storm. Advice included issues pertaining to the law of war, the rules of engagement, the rules pertinent to maritime interception operations, and sensitive intelligence matters]

TAKING OF HOSTAGES - I.L.M. Page 617

[Hostage taking is prohibited by the Geneva Convention. U.N. Resolution 664 defined the legal status of noncombatants. Categories of hostage taking. Role of "human shields", U.S. and other hostages in Iraq, and coalition POWs placed in military installations violated the Geneva Convention. Presence of Kuwaiti nationals in Iraq did not affect coalition force planning or execution of military operations]

TREATMENT OF CIVILIANS IN OCCUPIED TERRITORY - I.L.M. Page 619

[Iraq as an occupying power violated the Hague IV convention, the Geneva Convention, the 1954 Hague Cultural Property Convention, and several elements of the Genocide Convention. Iraq violated the Geneva Convention by the torture and murder of civilians, and the application of collective punishment. Relief agencies impeded the efforts of coalition forces during the latter phases of the operation]

TARGETING, COLLATERAL DAMAGE AND CIVILIAN CASUALTIES - I.L.M. Page 628

[Law of war necessitates distinguishing between combatants and noncombatants and between military targets and civilian objects. Principle of proportionality applied on a target-by-target basis. Coalition forces adhered to minimizing collateral damage and injury. Iraq conveyed disinformation on coalition bombing. Iraq violated law of war obligations by commingling military objects with civilian population]

ENEMY PRISONER OF WAR PROGRAM - I.L.M. Page 627

[Coalition care of enemy prisoners of war was in compliance with the Geneva Convention on the treatment of Prisoners of War. Displaced civilians were treated in accordance with the Geneva Convention for the Protection of War Victims]

TREATMENT OF PRISONERS OF WAR - I.L.M. Page 630

[Placement of coalition prisoners of war in military Targets violated the Geneva Convention. Iraq violated the Geneva Convention by depriving POWs of food, providing POWs with inadequate weather protection, and by physically abusing them]

REPATRIATION OF PRISONERS OF WAR - I.L.M. Page 631

[POWs were repatriated in accordance with the Geneva Convention]

USES OF RUSES AND ACTS OF PERFIDY - I.L.M. Page 631

[Ruses of war are not prohibited. Perfidy is prohibited. Legitimate ruses were used by coalition forces, thus minimizing coalition and Iraqi casualties. Individual acts of perfidy by Iraqi soldiers did occur, but no systematic policy of perfidy was practiced by Iraq]

WAR CRIMES - I.L.M. Page 637

[Iraqi war crimes violated the Geneva Convention, Hague IV, the 1954 Hague Cultural Property Convention, customary international law, Hague VIII, the Annex to Hague IV, the U.N. Charter, and of resolutions of the Council and of international law]

ENVIRONMENTAL TERRORISM - I.L.M. Page 636

[Iraqi destruction of millions of barrels of oil and oil wells violated the law of war: the Annex to Hague IV and the Geneva Convention]

CONDUCT OF NEUTRAL NATIONS - I.L.M Page 637

[U.N. resolution consistent with the U.N. Charter obligated all nations, regardless of assertions of neutrality, to avoid hindrance of coalition operations. Coalition forces took measures to decrease collateral damage and injury to civilians failing to comply with U.N. sanctions]

THE CONCEPT OF "SURRENDER" IN THE CONDUCT OF COMBAT OPERATIONS - I.L.M. Page 641

[A gap exists in the law of war in defining when surrender takes effect and how it is accomplished]

OBSERVATIONS - I.L.M. Page 644

[Adherence to the law of war did not impede coalition planning or execution of operations]

APPENDIX O

THE ROLE OF THE LAW OF WAR

"Decisions were impacted by legal considerations at every level, [the law of war] proved invaluable in the decision-making process."

General Colin Powell,
Chairman, Joint Chiefs of Staff

BACKGROUND

The United States, its Coalition partners, and Iraq are parties to numerous law of war treaties intended to minimize unnecessary suffering by combatants and noncombatants during war. The US military's law of war program is one of the more comprehensive in the world. As indicated in this appendix, it is US policy that its forces will conduct military operations in a manner consistent with US law of war obligations. This appendix discusses the principal law of war issues that arose during Operation Desert Storm.

As defined in Joint Publication 1-02, Department of Defense (DOD) Dictionary of Military and Associated Terms (1 December 1989), the law of war is "That part of international law that regulates the conduct of armed hostilities. It is often termed the law of armed conflict." While the terms are synonymous, this appendix will use "law of war" for consistency. Both concepts of *jus ad bellum* and *jus in bello* are covered in this appendix.

In addition to the United Nations Charter, with its prohibition against the threat or use of force against the territorial integrity or political independence of any state, treaties applicable to the Persian Gulf War include:

- Hague Convention IV and its Annex Respecting the Laws and Customs of War on Land of 18 October 1907 ("Hague IV").
- Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907 ("Hague V").
- Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines of 18 October 1907 ("Hague VIII").
- Hague Convention IX Concerning Bombardment by Naval Forces in Time of War of 18 October 1907 ("Hague IX").
- Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925 ("1925 Geneva Protocol").
- Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ("the Genocide Convention").

● The four Geneva Conventions for the Protection of War Victims of August 12, 1949:

- Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field ("GWS").

- Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter "GWS [Sea]").

- Geneva Convention Relative to the Treatment of Prisoners of War ("GPW").

- Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("GC").

- Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 ("1954 Hague"). Since Iraq, Kuwait, France, Egypt, Saudi Arabia, and other Coalition members are parties to this treaty, the treaty was binding between Iraq and Kuwait, and between Iraq and those Coalition members in the Persian Gulf War. Canada, Great Britain, and the United States are not parties to this treaty. However, the armed forces of each receive training on its provisions, and the treaty was followed by all Coalition forces in the Persian Gulf War.

The United States is a party to all of these treaties, except the 1954 Hague Cultural Property Convention. While Iraq is not a party to Hague IV, the International Military Tribunal (Nuremberg, 1946) stated with regard to it that:

The rules of land warfare expressed in . . . [Hague IV] undoubtedly represented an advance over existing International Law at the time of their adoption . . . but by 1939 these rules...were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.

As customary international law, its obligations are binding upon all nations. Neither is Iraq a party to Hague V, Hague VIII, or Hague IX. However, the provisions of each cited herein are regarded as a reflection of the customary practice of nations, and therefore binding upon all nations.

The United States, other Coalition members, and Iraq are parties to the 1925 Geneva Protocol which prohibits the use of chemical (CW) or bacteriological (biological) weapons (BW) in time of war. Both Iraq and the United States filed a reservation to this treaty at the time of their respective ratifications. Iraq's reservation accepted the 1925 Geneva Protocol as prohibiting first use of CW or BW weapons; the United States, having unilaterally renounced the use of BW in 1969, accepted without reservation the prohibition on BW and first use of CW. (The United States also is a party to the Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological [Biological] and Toxin Weapons and on Their Destruction of 10 April 1972; Iraq is not.) All nations party to the Persian Gulf conflict, including Iraq, are parties to the four 1949 Geneva Conventions for the protection of war victims. The precise applicability of these treaties will be addressed in the discussion of each topic in this appendix.

Three other law of war treaties were not legally applicable in the Persian Gulf War, but nonetheless bear mention. They are:

- 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("ENMOD Convention"). While the United States and many of its Coalition partners are parties to this treaty, Iraq has signed

but not ratified the ENMOD Convention; therefore it was not legally applicable to Iraqi actions during the Persian Gulf War.

- 1977 Protocol I Additional to the Geneva Conventions of 12 August 1949 ("Protocol I"). From 1974 to 1977 the United States and more than 100 other nations participated in a Diplomatic Conference intended to supplement the 1949 Geneva Conventions and modernize the law of war. That conference produced two new law of war treaties: Protocol I deals with the law of war in international armed conflicts, while Protocol II addresses the law of war applicable to internal armed conflicts. Iraq and several Coalition members, including the United States, Great Britain, and France, are not parties to Protocol I; therefore it was not applicable during the Persian Gulf War. For humanitarian, military, and political reasons, the United States in 1987 declined to become a party to Protocol I; France reached a similar decision in 1984.

- 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. Iraq and most of the Coalition partners, including the United States, are not parties to this treaty; it had no applicability in the Persian Gulf War. However, US and Coalition actions were consistent with its language. Iraqi actions were consistent with the treaty except as to its provisions on land mines and booby traps.

ROLE OF LEGAL ADVISERS

The Office of General Counsel of the Department of Defense (DOD), as the chief DOD legal office, provided advice to the Secretary of Defense, the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, other senior advisers to the Secretary and to the various components of the Defense legal community on all matters relating to Operations Desert Shield and Desert Storm, including the law of war. For example, the Secretary of Defense tasked the General Counsel to review and opine on such diverse issues as the means of collecting and obligating for defense purposes contributions from third countries; the Wars Powers Resolution; DOD targeting policies; the rules of engagement; the rules pertinent to maritime interception operations; issues relating to the treatment of prisoners of war; sensitive intelligence and special access matters; and similar matters of the highest priority to the Secretary and DOD. In addition, military judge advocates and civilian attorneys with international law expertise provided advice on the law of war and other legal issues at every level of command in all phases of Operations Desert Shield and Desert Storm. Particular attention was given to the review of target lists to ensure the consistency of targets selected for attack with United States law of war obligations.

TAKING OF HOSTAGES

Whatever the purpose, whether for intimidation, concessions, reprisal, or to render areas or legitimate military objects immune from military operations, the taking of hostages is unequivocally and expressly prohibited by Article 34, GC.¹

¹ The United States is party to the International Convention Against Taking of Hostages of 17 December 1979, under which hostage taking is identified as an act of international terrorism.

Applicability of the GC was triggered by Iraq's invasion of Kuwait on 2 August; thereafter Iraq was an Occupying Power in Kuwait, with express obligations. Under articles 5, 42, and 78, GC, Iraq could intern foreign nationals only if internal security made it "absolutely necessary" (in Iraq) or "imperative" (in Kuwait). Iraq asserted no rights under any of these provisions in defense of its illegal taking of hostages in Iraq and Kuwait.

United Nations Security Council (UNSC) Resolution 664 (18 August) overrode authority inconsistent with its obligations under the GC that Iraq might have claimed to restrict the departure of US citizens and other third-country nationals in Kuwait or Iraq, and clarified the legal status of noncombatants.

Hostage taking by Iraq can be divided into four categories:

- The taking of Kuwaiti nationals as hostages and individual and mass forcible deportations to Iraq, in violation of Articles 34 and 49, GC;
- The taking of third-country nationals in Kuwait as hostages and individual and mass forcible deportations from Kuwait to Iraq, in violation of Articles 34 and 49, GC;
- The taking of foreign nationals within Iraq as hostages, with individual and mass forcible transfers, in violation of Articles 34 and 35, GC; and
- Compelling Kuwaiti and other foreign citizens to serve in the armed forces of Iraq, in violation of Article 51, GC.

The taking of hostages, their unlawful deportation, and compelling hostages to serve in the armed forces of Iraq constitute Grave Breaches (that is, major violations of the law of war) under Article 147, GC.

US and other hostages in Iraq, including civilians forcibly deported from Kuwait, were placed in or around military targets as "human shields", in violation of Articles 28 and 38(4), GC. Use of Coalition prisoners of war (POWs) to shield military targets from attack will be considered in the section of this appendix on the treatment of POWs; other abuses of protected civilians will be addressed in the sections on Treatment of Civilians in Occupied Territory and War Crimes.

Iraq released US and other third-party hostages (i.e., other than Kuwaiti citizens) held in either Kuwait or Iraq in December. Because they were permitted to depart well before offensive combat operations began, Iraq's initial taking of hostages from such nations had no effect on US or Coalition force planning or execution of military operations.

Although it was known that some Kuwaiti nationals were being held in Iraq before offensive combat operations began, their presence did not appreciably affect Coalition force planning or execution of military operations. Thus, although the President had declared the United States would not be deterred from attacking legitimate targets because Iraq may have placed protected persons in their vicinity, it does not appear that any Kuwaiti nationals were placed at risk in that fashion after Iraqi release of its third party hostages. Iraq did use its own civilian population for this purpose, however, as will be explained in the section on targeting, collateral damage and collateral civilian casualties.

Kuwaiti nationals (and other residents of Kuwait) were taken hostage and forcibly deported from Kuwait to Iraq by retreating Iraqi troops as the Coalition

forces' liberation of Kuwait reached its final phase. Although the plight of those hostages was a source of great concern to US and other Coalition forces, the fact of their seizure did not have a significant effect on the planning or execution of Coalition military operations.

TREATMENT OF CIVILIANS IN OCCUPIED TERRITORY

The GC governs the treatment of civilians in occupied territories. As previously indicated, all parties to the conflict, including Iraq, are parties to this convention. The treaty's application was triggered by the Iraqi invasion, and was specifically recognized in UNSC resolutions that addressed that crisis.

An earlier law of war treaty that remains relevant is Hague IV, which contains regulations relating to the protection of civilian property (public and private) in occupied territory; in contrast, the GC sets forth the obligations of an occupying power in providing protection for civilians in occupied territory. Cultural property in Kuwait also was protected by the 1954 Hague Cultural Property Convention.

Iraqi actions read like a very long list of violations of Hague IV, GC, and the 1954 Hague Cultural Property Convention. From the beginning of its invasion of Kuwait, Iraq exhibited an intent not only to refuse to conduct itself as an occupying power, but to deny that it was an occupying power. Its intention was to annex Kuwait as a part of Iraq, and remove any vestige of Kuwait's previous existence as an independent, sovereign nation. (Its transfer of a part of its own civilian population into occupied Kuwait for the purpose of annexation and resettlement constitutes a violation of Article 49, GC.)

A case can be made that Iraqi actions may violate the Genocide Convention, which defines genocide as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group; or
- Forcibly transferring children of the group to another group.

Iraq carried out every act of the types condemned by the Genocide Convention, except for forcibly transferring children. Many Kuwaiti citizens were deported forcibly to Iraq; many others were tortured and/or murdered. There were instances of Kuwaiti women of child-bearing age being brutally rendered incapable of having children. Collective executions of innocent Kuwaiti civilians took place routinely. Kuwaiti public records were removed or destroyed, apparently to prevent or impede the reconstitution of Kuwait if Kuwait were liberated. Kuwaiti identification cards and license plates were revoked and replaced with Iraqi credentials, identifying Kuwait as Iraq's 19th province.

In violation of Hague IV and the 1954 Hague Cultural Property Convention, cultural, private and public (municipal and national) property was confiscated; pillage was widespread. (Confiscation of private property is prohibited under any circumstance, as is the confiscation of municipal public property. Confiscation of movable national public property is prohibited without military need and cash compensation, while immovable national public property may be temporarily confiscated under the concept of usufruct – the right to use another's property so long as it is not damaged.)

Iraqi confiscation appears to have been primarily, if not entirely, part of a program:

- Of erasing any record of the sovereign state of Kuwait;
- Of looting directed by the Iraqi leadership to provide consumer goods for the Iraqi public; and
- Of looting by individual Iraqi soldiers, which was tolerated by Iraqi military commanders and higher civilian and military authorities.

Civilians who remained in Kuwait were denied the necessities for survival, such as food, water, and basic medical care, in violation of Articles 55 and 56, GC. Kuwaiti doctors were forcibly deported to Iraq; Filipino nurses working in the hospitals were raped repeatedly by Iraqi soldiers. Kuwaiti civilians were not permitted any medical care unless they presented Iraqi identification cards; presentation of an Iraqi identification card by a Kuwaiti citizen seldom resulted in any genuine medical care. Medical supplies and equipment in Kuwaiti hospitals necessary for the needs of the civilian population of Kuwait were illegally taken, in violation of Article 57, GC, in brutal disregard for Kuwaiti lives. For example, there are reports that infants died in Kuwaiti hospitals after Iraqis removed them from their incubators, which were shipped to Iraq.

The slightest perceived offense could lead to torture and execution of the purported offender, often in front of family members. Torture and murder of civilians is prohibited by Article 32, GC. Iraqi policy provided for the collective punishment of the family of any individual who served in or was suspected of assisting the Kuwaiti resistance. This punishment routinely took the form of destruction of the family home and execution of all family members. Collective punishment is prohibited expressly by Article 33, GC.

The Iraqi occupation remained brutal until the very end; civilians were murdered in the final days of that occupation to eliminate witnesses to Iraqi repression. The Government of Kuwait estimates that 1,082 civilians were murdered during the occupation. Many more were forcibly deported to Iraq; several thousand remain missing. On their departure, Iraqi forces set off previously placed explosive charges on Kuwait's oil wells, a vengeful act of wanton destruction.

Coalition forces acted briefly as an occupying power. When the Operation Desert Storm ground offensive began, Coalition forces moved into Iraq. Physical seizure and control of Iraqi territory triggered the application of Hague IV and the GC. Both treaties initially had little practical application, since Coalition forces occupied uninhabited desert. As hostilities diminished, the internal conflict that erupted in Iraq caused thousands of civilians to flee the fighting (such as in Al-Basrah, between Iraqi military units and Shi'ite forces) and to enter territory held by Coalition forces. Allied forces provided food, water and medical care to these refugees. As Coalition forces prepared to withdraw from Iraq, no international relief

agency was ready to assume this relief effort. Consequently, refugees were offered the opportunity to move to the refugee camp at Rafha, Saudi Arabia. Approximately 20,000 refugees (including more than 8,000 from the Safwan area) accepted this offer.

In the conflict's latter phases, public and private international relief agency representatives entered the area of conflict, often without sufficient advance notification and coordination with Coalition authorities. While relief agencies undoubtedly were anxious to perform humanitarian missions, their entry onto the battlefield without the advance consent of the parties to the conflict is not consistent with Article 9, GWS (a provision common to all four 1949 Geneva Conventions), Article 125, GPW, and Article 63, GC. It impeded Coalition efforts to end hostilities as rapidly as possible, and placed these organizations' members at risk from the ongoing hostilities. Coalition aviation units searching for mobile Scud missile launchers in western Iraq were inhibited in their efforts to neutralize that threat by vehicles from those organizations moving through Scud missile operating areas that otherwise were devoid of civilians. The lack of timely, proper coordination by relief agencies with Coalition forces adversely affected air strikes against other Iraqi targets on other occasions. While well-intentioned, these intrusions required increased diligence by Coalition forces, placed Coalition forces at increased risk, and were factors in the failure to resolve the Scud threat.

Whether in territory Coalition forces occupied or in parts of Iraq still under Iraqi control, US and Coalition operations in Iraq were carefully attuned to the fact those operations were being conducted in an area encompassing "the cradle of civilization," near many archaeological sites of great cultural significance. Coalition operations were conducted in a way that balanced maximum possible protection for those cultural sites against protection of Coalition lives and accomplishment of the assigned mission.

While Article 4(1) of the 1954 Hague Convention provides specific protection for cultural property, Article 4(2) permits waiver of that protection where military necessity makes such a waiver imperative; such "imperative military necessity" can occur when an enemy uses cultural property and its immediate surroundings to protect legitimate military targets, in violation of Article 4(1). Coalition forces continued to respect Iraqi cultural property, even where Iraqi forces used such property to shield military targets from attack. However, some indirect damage may have occurred to some Iraqi cultural property due to the concussive effect of munitions directed against Iraqi targets some distance away from the cultural sites.

Since US military doctrine is prepared consistent with US law of war obligations and policies, the provisions of Hague IV, GC, and the 1954 Hague Convention did not have any significant adverse effect on planning or executing military operations.

TARGETING, COLLATERAL DAMAGE AND CIVILIAN CASUALTIES

The law of war with respect to targeting, collateral damage and collateral civilian casualties is derived from the principle of discrimination; that is, the necessity for distinguishing between combatants, who may be attacked, and noncombatants, against whom an intentional attack may not be directed, and between legitimate military targets and civilian objects. Although this is a major part of the foundation on which the law of war is built, it is one of the least codified portions of that law.

As a general principle, the law of war prohibits the intentional destruction of civilian objects not imperatively required by military necessity and the direct, intentional attack of civilians not taking part in hostilities. The United States takes these proscriptions into account in developing and acquiring weapons systems, and in using them in combat. Central Command (CENTCOM) forces adhered to these fundamental law of war proscriptions in conducting military operations during Operation Desert Storm through discriminating target selection and careful matching of available forces and weapons systems to selected targets and Iraqi defenses, without regard to Iraqi violations of its law of war obligations toward the civilian population and civilian objects.

Several treaty provisions specifically address the responsibility to minimize collateral damage to civilian objects and injury to civilians. Article 23(g) of the Annex to Hague IV prohibits destruction not "imperatively demanded by the necessities of war," while Article 27 of that same annex offers protection from intentional attack to "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." Similar language is contained in Article 5 of Hague IX, while the conditions for protection of cultural property in the 1954 Hague Cultural Property Convention were set forth in the preceding discussion on the treatment of civilians in occupied territory. In summary, cultural and civilian objects are protected from direct, intentional attack unless they are used for military purposes, such as shielding military objects from attack.

While the prohibition contained in Article 23(g) generally refers to intentional destruction or injury, it also precludes collateral damage of civilian objects or injury to noncombatant civilians that is clearly disproportionate to the military advantage gained in the attack of military objectives, as discussed below. As previously indicated, Hague IV was found to be part of customary international law in the course of war crimes trials following World War II, and continues to be so regarded.

An uncodified but similar provision is the principle of proportionality. It prohibits military action in which the negative effects (such as collateral civilian casualties) clearly outweigh the military gain. This balancing may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives. CENTCOM conducted its campaign with a focus on minimizing collateral civilian casualties and damage to civilian objects. Some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological and religious sites, to civilian objects.

Coalition forces took several steps to minimize the risk of injury to noncombatants. To the degree possible and consistent with allowable risk to aircraft and aircrews, aircraft and munitions were selected so that attacks on targets within populated areas would provide the greatest possible accuracy and the least risk to civilian objects and the civilian population. Where required, attacking aircraft were accompanied by support mission aircraft to minimize attacking aircraft aircrew distraction from their assigned mission. Aircrews attacking targets in populated areas were directed not to expend their munitions if they lacked positive identification of their targets. When this occurred, aircrews dropped their bombs on alternate targets or returned to base with their weapons.

One reason for the maneuver plan adopted for the ground campaign was that it avoided populated areas, where Coalition and Iraqi civilian casualties and damage to civilian objects necessarily would have been high. This was a factor in deciding against an amphibious assault into Kuwait City.

The principle of proportionality acknowledges the unfortunate inevitability of collateral civilian casualties and collateral damage to civilian objects when noncombatants and civilian objects are mingled with combatants and targets, even with reasonable efforts by the parties to a conflict to minimize collateral injury and damage.

This proved to be the case in the air campaign. Despite conducting the most discriminate air campaign in history, including extraordinary measures by Coalition aircrews to minimize collateral civilian casualties, the Coalition could not avoid causing some collateral damage and injury.

There are several reasons for this. One is the fact that in any modern society, many objects intended for civilian use also may be used for military purposes. A bridge or highway vital to daily commuter and business traffic can be equally crucial to military traffic, or support for a nation's war effort. Railroads, airports, seaports, and the interstate highway system in the United States have been funded by the Congress in part because of US national security concerns, for example; each proved invaluable to the movement of US military units to various ports for deployment to Southwest Asia (SWA) for Operations Desert Shield and Desert Storm. Destruction of a bridge, airport, or port facility, or interdiction of a highway can be equally important in impeding an enemy's war effort.

The same is true with regard to major utilities; for example, microwave towers for everyday, peacetime civilian communications can constitute a vital part of a military command and control (C2) system, while electric power grids can be used simultaneously for military and civilian purposes. Some Iraqi military installations had separate electrical generators; others did not. Industries essential to the manufacturing of CW, BW and conventional weapons depended on the national electric power grid.

Experience in its 1980-1988 war with Iran caused the Government of Iraq to develop a substantial and comprehensive degree of redundancy in its normal, civilian utilities as back-up for its national defense. Much of this redundancy, by necessity, was in urban areas. Attack of these targets necessarily placed the civilian population at risk, unless civilians were evacuated from the surrounding area. Iraqi authorities elected not to move civilians away from objects they knew were legitimate military targets, thereby placing those civilians at risk of injury incidental to Coalition attacks against these targets, notwithstanding efforts by the Coalition to minimize risk to innocent civilians.

When objects are used concurrently for civilian and military purposes, they are liable to attack if there is a military advantage to be gained in their attack. ("Military advantage" is not restricted to tactical gains, but is linked to the full context of a war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait.)

Attack of all segments of the Iraqi communications system was essential to destruction of Iraqi military C2. C2 was crucial to Iraq's integrated air defense system; it was of equal importance for Iraqi ground forces. Iraqi C2 was highly centralized. With Saddam Hussein's fear of internal threats to his rule, he has discouraged individual initiative while emphasizing positive control. Iraqi military commanders were authorized to do only that which was directed by highest authority. Destruction of its C2 capabilities would make Iraqi combat forces unable to respond quickly to Coalition initiatives.

Baghdad bridges crossing the Euphrates River contained the multiple fiber-optic links that provided Saddam Hussein with secure communications to his

southern group of forces. Attack of these bridges severed those secure communication links, while restricting movement of Iraqi military forces and deployment of CW and BW warfare capabilities. Civilians using those bridges or near other targets at the time of their attack were at risk of injury incidental to the legitimate attack of those targets.

Another reason for collateral damage to civilian objects and injury to civilians during Operation Desert Storm lay in the policy of the Government of Iraq, which purposely used both Iraqi and Kuwaiti civilian populations and civilian objects as shields for military objects. Contrary to the admonishment against such conduct contained in Article 19, GWS, Articles 18 and 28, GC, Article 4(1), 1954 Hague, and certain principles of customary law codified in Protocol I (discussed below), the Government of Iraq placed military assets (personnel, weapons, and equipment) in civilian populated areas and next to protected objects (mosques, medical facilities, and cultural sites) in an effort to protect them from attack. For this purpose, Iraqi military helicopters were dispersed into residential areas; and military supplies were stored in mosques, schools, and hospitals in Iraq and Kuwait. Similarly, a cache of Iraqi Silkworm surface-to-surface missiles was found inside a school in a populated area in Kuwait City. UN inspectors uncovered chemical bomb production equipment while inspecting a sugar factory in Iraq. The equipment had been moved to the site to escape Coalition air strikes. This intentional mingling of military objects with civilian objects naturally placed the civilian population living nearby, working within, or using those civilian objects at risk from legitimate military attacks on those military objects.

The Coalition targeted specific military objects in populated areas, which the law of war permits; at no time were civilian areas as such attacked. Coalition forces also chose not to attack many military targets in populated areas or in or adjacent to cultural (archaeological) sites, even though attack of those military targets is authorized by the law of war. The attack of legitimate Iraqi military targets, notwithstanding the fact it resulted in collateral injury to civilians and damage to civilian objects, was consistent with the customary practice of nations and the law of war.

The Government of Iraq sought to convey a highly inaccurate image of indiscriminate bombing by the Coalition through a deliberate disinformation campaign. Iraq utilized any collateral damage that occurred – including damage or injury caused by Iraqi surface-to-air missiles and antiaircraft munitions falling to earth in populated areas – in its campaign to convey the misimpression that the Coalition was targeting populated areas and civilian objects. This disinformation campaign was factually incorrect, and did not accurately reflect the high degree of care exercised by the Coalition in attack of Iraqi targets.

For example, on 11 February, a mosque at Al-Basrah was dismantled by Iraqi authorities to feign bomb damage; the dome was removed and the building dismantled. US authorities noted there was no damage to the minaret, courtyard building, or dome foundation which would have been present had the building been struck by Coalition munitions. The nearest bomb crater was outside the facility, the result of an air strike directed against a nearby military target on 30 January. Other examples include use of photographs of damage that occurred during Iraq's war with Iran, as well as of prewar earthquake damage, which were offered by Iraqi officials as proof of bomb damage caused by Coalition air raids.

Minimizing collateral damage and injury is a responsibility shared by attacker and defender. Article 48 of the 1977 Protocol I provides that:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Paragraph one of Article 49 of Protocol I states that "'Attacks' means acts of violence against the adversary, whether in offense or defense." Use of the word "attacks" in this manner is etymologically inconsistent with its customary use in any of the six official languages of Protocol I. Conversely, the word "attack" or "attacks" historically has referred to and today refers to offensive operations only. Article 49(1) otherwise reflects the applicability of the law of war to actions of both attacker and defender, including the obligation to take appropriate measures to minimize injury to civilians not participating in hostilities.

As previously indicated, the United States in 1987 declined to become a party to Protocol I; nor was Protocol I in effect during the Persian Gulf War, since Iraq is not a party to that treaty. However, the language of Articles 48 and 49(1) (except for the erroneous use of the word "attacks") is generally regarded as a codification of the customary practice of nations, and therefore binding on all.

In the effort to minimize collateral civilian casualties, a substantial responsibility for protection of the civilian population rests with the party controlling the civilian population. Historically, and from a common sense standpoint, the party controlling the civilian population has the opportunity and the responsibility to minimize the risk to the civilian population through the separation of military objects from the civilian population, evacuation of the civilian population from near immovable military objects, and development of air raid precautions. Throughout World War II, for example, both Axis and Allied nations took each of these steps to protect their respective civilian populations from the effects of military operations.

The Government of Iraq elected not to take routine air-raid precautions to protect its civilian population. Civilians were not evacuated in any significant numbers from Baghdad, nor were they removed from proximity to legitimate military targets. There were air raid shelters for less than 1 percent of the civilian population of Baghdad. The Government of Iraq chose instead to use its civilians to shield legitimate military targets from attack, exploiting collateral civilian casualties and damage to civilian objects in its disinformation campaign to erode international and US domestic support for the Coalition effort to liberate Kuwait.

The presence of civilians will not render a target immune from attack; legitimate targets may be attacked wherever located (outside neutral territory and waters). An attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population or damage to civilian objects, consistent with mission accomplishment and allowable risk to the attacking forces. The defending party must exercise reasonable precautions to separate the civilian population and civilian objects from military objectives, and avoid placing military objectives in the midst of the civilian population. As previously indicated, a defender is expressly prohibited from using the civilian population or civilian objects (including cultural property) to shield legitimate targets from attack.

The Government of Iraq was aware of its law of war obligations. In the month preceding the Coalition air campaign, for example, a civil defense exercise was conducted, during which more than one million civilians were evacuated from Baghdad. No government evacuation program was undertaken during the Coalition

air campaign. As previously indicated, the Government of Iraq elected instead to mix military objects with the civilian population. Pronouncements that Coalition air forces would not attack populated areas increased Iraqi movement of military objects into populated areas in Iraq and Kuwait to shield them from attack, in callous disregard of its law of war obligations and the safety of its own civilians and Kuwaiti civilians.

Similar actions were taken by the Government of Iraq to use cultural property to protect legitimate targets from attack; a classic example was the positioning of two fighter aircraft adjacent to the ancient temple of Ur (as depicted in the photograph in Volume II, Chapter VI, "Off Limits Targets" section) on the theory that Coalition respect for the protection of cultural property would preclude the attack of those aircraft. While the law of war permits the attack of the two fighter aircraft, with Iraq bearing responsibility for any damage to the temple, Commander-in-Chief, Central Command (CINCCENT) elected not to attack the aircraft on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple. Other cultural property similarly remained on the Coalition no-attack list, despite Iraqi placement of valuable military equipment in or near those sites.

Undoubtedly, the most tragic result of this intentional commingling of military objects with the civilian population occurred in the 13 February attack on the Al-Firdus Bunker (also sometimes referred to as the Al-'Amariyah bunker) in Baghdad. Originally constructed during the Iran-Iraq War as an air raid shelter, it had been converted to a military C2 bunker in the middle of a populated area. While the entrance(s) to a bomb shelter permit easy and rapid entrance and exit, barbed wire had been placed around the Al-Firdus bunker, its entrances had been secured to prevent unauthorized access, and armed guards had been posted. It also had been camouflaged. Knowing Coalition air attacks on targets in Baghdad took advantage of the cover of darkness, Iraqi authorities permitted selected civilians – apparently the families of officer personnel working in the bunker – to enter the Al-'Amariyah Bunker at night to use the former air raid shelter part of the bunker, on a level above the C2 center. Coalition authorities were unaware of the presence of these civilians in the bunker complex. The 13 February attack of the Al-'Amariyah bunker – a legitimate military target – resulted in the unfortunate deaths of those Iraqi civilians who had taken refuge above the C2 center.

An attacker operating in the fog of war may make decisions that will lead to innocent civilians' deaths. The death of civilians always is regrettable, but inevitable when a defender fails to honor his own law of war obligations – or callously disregards them, as was the case with Saddam Hussein. In reviewing an incident such as the attack of the Al-'Amariyah bunker, the law of war recognizes the difficulty of decision making amid the confusion of war. Leaders and commanders necessarily have to make decisions on the basis of their assessment of the information reasonably available to them at the time, rather than what is determined in hindsight.

Protocol I establishes similar legal requirements. Articles 51(7) and 58 of the 1977 Protocol I expressly prohibit a defender from using the civilian population or individual civilians to render certain points or areas immune from military operations, in particular in an attempt to shield military objectives from attack or to shield, favor or impede military operations; obligate a defender to remove the civilian population, individual civilians and civilian objects under the defender's control from near military objectives; avoid locating military objectives within or

near densely populated areas; and to take other necessary precautions to protect the civilian population, individual civilians and civilian objects under its control against the dangers resulting from military operations.

It is in this area that deficiencies of the 1977 Protocol I become apparent. As correctly stated in Article 51(8) of Protocol I, a nation confronted with callous actions by its opponent (such as the use of "human shields") is not released from its obligation to exercise reasonable precaution to minimize collateral injury to the civilian population or damage to civilian objects. This obligation was recognized by Coalition forces in the conduct of their operations. In practice, this concept tends to facilitate the disinformation campaign of a callous opponent by focusing international public opinion upon the obligation of the attacking force to minimize collateral civilian casualties and damage to civilian objects – a result fully consistent with Iraq's strategy in this regard. This inherent problem is worsened by the language of Article 52(3) of Protocol I, which states:

In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, 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.

This language, which is not a codification of the customary practice of nations, causes several things to occur that are contrary to the traditional law of war. It shifts the burden for determining the precise use of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts, i.e., from defender to attacker. This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat. It also encourages a defender to ignore its obligation to separate the civilian population, individual civilians and civilian objects from military objectives, as the Government of Iraq illustrated during the Persian Gulf War.

In the case of the Al-Firdus bunker, for example – repeatedly and incorrectly referred to by the Government of Iraq and some media representatives as a "civilian bomb shelter" – the Coalition forces had evidence the bunker was being used as an Iraqi command and control center and had no knowledge it was concurrently being used as a bomb shelter for civilians. Under the rule of international law known as military necessity, which permits the attack of structures used to further an enemy's prosecution of a war, this was a legitimate military target. Coalition forces had no obligation to refrain from attacking it. If Coalition forces had known that Iraqi civilians were occupying it as a shelter, they may have withheld an attack until the civilians had removed themselves (although the law of war does not require such restraint). Iraq had an obligation under the law of war to refrain from commingling its civilian population with what was an obviously military target. Alternatively, Iraq could have designated the location as a hospital, safety zone, or a neutral zone, as provided for in Articles 14 and 15, GC.

ENEMY PRISONER OF WAR PROGRAM

This section contains similar information to that contained in Appendix L, but is a more condensed version of that appendix, with emphasis on the legal aspects of the Enemy Prisoner of War (EPW) program. Appendix L used the same base information as Appendix O, but expands to include more operational issues.

Coalition care for EPWs was in strict compliance with the 1949 Geneva convention relative to the treatment of Prisoners of War (hereafter "GPW").

Centralized management of EPW operations began during Operation Desert Shield and continued throughout Operation Desert Storm. The US National Prisoner of War Information Center (NPWIC) became operational before ground operations began and a new automated information program for preserving, cataloging, and accounting for captured personnel (as required by the GPW) was fielded in Operation Desert Shield. Trained Reserve Component (RC) EPW units were activated, and camp advisory teams were sent to Saudi Arabia to account for and to provide technical assistance on custody and treatment of US-transferred EPWs.

EPWs captured by Coalition forces during Operations Desert Shield and Desert Storm were maintained in either a US or Saudi EPW camp. The United States accepted EPWs captured by the United Kingdom (UK) and France, while Saudi Arabia managed a consolidated camp for those EPWs captured by the remaining Coalition forces.

The Army, as the DOD Executive Agent for EPW operations, processed 69,822 Iraqi EPWs captured by British, French, and US forces between 18 January, when the first EPW was captured, and 2 May, when the last EPW in US custody was transferred to Saudi Arabian control. In terms of campaign length vis-a-vis EPWs captured, this was the most extensive US EPW operation since World War II. US forces captured 62,456 EPWs during the conflict. Additionally, 1,492 displaced civilians were evacuated to Saudi Arabia through EPW channels. Some of these initially were believed to be EPWs; others were evacuated for their own safety. French and British forces captured an additional 5,874 EPWs and transferred them to US control. The Arab Command captured 16,921 EPWs. Always of international interest and concern, the humane treatment of and full accountability for EPWs and displaced civilians during this conflict received heightened attention because of religious and cultural sensitivities.

US and other Coalition forces treated EPWs and displaced civilians in accordance with the 1949 Geneva Conventions for the Protection of War Victims. The first three conventions mandate humane treatment and full accountability for all prisoners of war from the moment of capture until their repatriation, release, or death. The fourth convention (GC) requires humane treatment for displaced civilians. The International Committee of the Red Cross (ICRC) was provided access to Coalition EPW facilities and reviewed their findings with Coalition representatives in periodic meetings in Riyadh, Saudi Arabia. While US and Coalition forces worked closely with the ICRC on EPW matters throughout Operation Desert Storm, neither the ICRC nor any other human rights organization played any other role affecting the course of the war. The ICRC was ineffective in providing any protection for US and Coalition POWs in Iraq's custody.

NPWIC was established at the Pentagon during Operation Desert Shield using active duty personnel and became fully operational with Reserve staffing on 21 January. Its mission was to account for EPWs in US custody and to ensure compliance with the 1949 Geneva Conventions. Article 122, GPW requires a captor to establish a National Information Bureau within the shortest time possible after the onset of hostilities. The NPWIC, manned by Army Reserve Individual Mobilization Augmentees, volunteer Reservists and retired personnel, served as a central repository for information relative to EPWs captured by or transferred to US forces, and coordinated information pertaining to EPWs and US POWs in Iraqi hands with the ICRC.

The US and Saudi governments concluded an agreement which allowed the US to transfer captured EPWs to Saudi control after processing by US EPW elements. This agreement was applicable to EPWs captured by the French and British, as those

EPWs were processed and maintained in US EPW camps. The US provided camp advisory teams to work with the Government of Saudi Arabia to assist in compliance with the 1949 Geneva Conventions, to facilitate logistic and administrative cooperation, and to maintain accountability for US-transferred EPWs. The size of the host nation EPW camps limited the number of EPWs the United States could transfer, and required that EPWs remain longer in US EPW camps. After active hostilities ended, in order to transfer all EPWs still under US control, the Brooklyn (West) EPW camp, along with its EPWs, was transferred to the Saudi Arabian National Guard.

To help accomplish its multiple missions, the NPWIC and theater EPW units used the Prisoner of War Information System (PWIS-2), an automated system to speed processing and to provide a database of information on captured personnel. The development of PWIS-2 was accelerated during Operation Desert Shield to allow the US to process the massive numbers of EPWs projected from the Kuwaiti Theater of Operations. The system arrived in the field in November with the first EPW unit in SWA. Under the previous manual system, an average of eight EPW could be fully processed per hour per camp. With PWIS-2, EPW units were processing up to 1,500 EPWs per day per camp. Accuracy was at an unprecedented level of 99.9 percent.

Eight EPWs died while in US custody, all as a result of injuries or sickness contracted before capture. One died of malnutrition/dehydration, five as a result of injuries or wounds, and two from unknown causes. Three US-transferred EPWs died in Saudi Arabian camps from wounds received in the Saudi camp, either during an EPW riot or inflicted by another EPW. These deaths were investigated and reported to the ICRC, as required by Articles 120, 122, and 123, GPW.

When Operation Desert Storm began, psychological operations were undertaken to encourage maximum defection or surrender of Iraqi forces. Leaflets to be used as safe conduct passes were widely disseminated over and behind Iraqi lines with great success.

Photographs and videotapes of the first Iraqi EPWs captured were taken and shown by the public media. The capture or detention of EPWs is recognized as newsworthy events and, as such, photography of such events is not prohibited by the GPW. However, Article 13, GPW does prohibit photography that might humiliate or degrade any EPW. Media use of photographs of EPWs raised some apprehension in light of formal US condemnation of the forced videotapes of US and Coalition POWs being made and shown by Iraq. CENTCOM and other DOD officials also expressed concern for the safety of the family of any Iraqi defector who might be identified from media photographs by Iraqi officials. Because of these sensitivities, and consistent with Article 13, GPW, DOD developed guidelines for photographing EPWs. These guidelines limited both the opportunities for photography and the display of EPW photographs taken, while protecting Iraqi EPWs and their families from retribution by the Government of Iraq.

Operation Desert Storm netted a large number of persons thought to be EPWs who were actually displaced civilians. Subsequent interrogations determined that they were innocent civilians who had taken no hostile action against Coalition forces. In some cases, individuals had surrendered to Coalition forces to receive food, water, and lodging, while others were captured because they appeared to be part of hostile forces. Tribunals were conducted to verify the status of detainees. Upon determination of their status as innocent civilians, detainees were transferred from US custody to Safwan, a US-operated refugee camp, or to Rafha, a Saudi Arabian refugee camp.

In March, Coalition forces and Iraqi military representatives signed an agreement for the repatriation of prisoners of war, to be conducted under ICRC auspices. Repatriation of EPWs not in medical channels occurred at Judaydat 'Ar-'ar, near the Jordanian border. Those in medical channels were flown directly to Baghdad on ICRC aircraft.

TREATMENT OF PRISONERS OF WAR

US and Coalition personnel captured by Iraq were POWs protected by the GWS (if wounded, injured, or sick) and GPW. All US POWs captured during the Persian Gulf War were moved to Baghdad by land after their capture. With some exceptions, depending on their location at the time of capture, their route usually was through Kuwait City to Al-Basrah and then on to Baghdad. Those taken to Kuwait City and Al-Basrah usually were detained there for no more than a few hours or overnight. Limited interrogation of POWs occurred in these cities. Although some were physically abused during their transit to Baghdad, most were treated reasonably well.

On arrival in Baghdad, most Air Force, Navy, and Marine POWs were taken immediately to what the POWs referred to as "The Bunker" (most probably at the Directorate of Military Intelligence) for initial interrogation. They then were taken to what appeared to be the main long-term incarceration site, located in the Iraqi Intelligence Service Regional Headquarters (dubbed "The Biltmore" by the POWs). Since this building was a legitimate military target, the detention of POWs in it was a violation of Article 23, GPW; POWs thus were unnecessarily placed at risk when the facility was bombed on 23 February.

In contravention of Article 26, GPW, all US POWs incarcerated at the "Biltmore" experienced food deprivation. US POWs also were provided inadequate protection from the cold, in violation of Article 25, GPW.

After the 23 February bombing of the "Biltmore" by Coalition aircraft, the POWs were relocated to either Abu Ghurayb Prison (dubbed "Joliet Prison") or Al-Rashid Military Prison ("The Half-Way House"), both near Baghdad. The Army POWs, on the other hand, were believed to have been sent directly to the Al-Rashid Military Prison, where they remained until their repatriation. All US POWs were repatriated from the Al-Rashid Military Prison. The detention of prisoners of war in a prison generally is prohibited by Article 22, GPW.

All US POWs suffered physical abuse at the hands of their Iraqi captors, in violation of Articles 13, 14, and 17, GPW. Most POWs were tortured, a grave breach, in violation of Article 130, GPW. Some POWs were forced to make public propaganda statements, in violation of Article 13. In addition, none was permitted the rights otherwise afforded them by the GPW, such as the right of correspondence authorized by Article 70. Although the ICRC had access to Iraqi EPWs captured by the Coalition, ICRC members did not see Coalition POWs until the day of their repatriation.

Lack of access to non-US Coalition POW debriefs precludes comment on their treatment. From US POW debriefings, it is known that several Coalition POWs, especially the Saudi and Kuwaiti pilots, were abused physically by their Iraqi captors, in violation of Articles 13 and 17, GPW.

Iraqi POW handling procedures and treatment of Coalition POWs were reasonably predictable, based on a study of Iraqi treatment of Iranians during the eight-year Iran-Iraq war. Iraqi mistreatment of Coalition POWs constituted a Grave Breach of the GPW, as set forth in Article 130 of that treaty.

REPATRIATION OF PRISONERS OF WAR

Article 118, GPW, establishes a POW's right to be repatriated. In conflicts since the GPW's adoption, this principle has become conditional: Each POW must consent to repatriation rather than being forced to return. This proved to be the case after hostilities in this war ended.

No EPW was forcibly repatriated. Coalition forces identified to the ICRC those Iraqi EPWs not desiring repatriation. Once an Iraqi EPW scheduled for repatriation reached the repatriation site, the ICRC reconfirmed his willingness to be repatriated. Those who indicated they no longer desired to return to Iraq were returned to the custody of the detaining power.

On 4 March, Iraq released the first group of 10 Coalition prisoners of war, six of whom were US personnel. The United States simultaneously released 294 Iraqi EPWs for repatriation to Iraq. Of the 294, 10 refused repatriation at the repatriation site and were returned to US custody.

Iraq and the Coalition forces continued repatriation actions through August 1991, at which time 13,318 Iraqi EPWs who refused repatriation remained under Saudi control. On 5 August 1991, Iraqi EPWs still refusing repatriation were reclassified as refugees by the United States (in coordination with Saudi Arabia and the ICRC), concluding application of the GPW.

When US custody of Iraqi EPWs ended, ICRC officials informed the 800th Military Police Brigade (PW) that the treatment of Iraqi EPWs by US forces was the best compliance with the GPW by any nation in any conflict in history. Coalition measures to comply with the GPW had no adverse effect on planning and executing military operations; if anything, by encouraging the surrender of Iraqi military personnel, they improved those operations.

USE OF RUSES AND ACTS OF PERFIDY

Under the law of war, deception includes those measures designed to mislead the enemy by manipulation, distortion, or falsification of evidence to induce him to react in a manner prejudicial to his interests. Ruses are deception of the enemy by legitimate means, and are specifically allowed by Article 24, Annex to Hague IV, and Protocol I. As correctly stated in Article 37(2) of Protocol I:

Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of [the law of war] and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of ruses: the use of camouflage, decoys, mock operations and misinformation.

Coalition actions that convinced Iraqi military leaders that the ground campaign to liberate Kuwait would be focused in eastern Kuwait, and would include an amphibious assault, are examples of legitimate ruses. These deception measures were crucial to the Coalition's goal of minimizing the number of Coalition casualties and, in all likelihood, resulted in fewer Iraqi casualties as well.

In contrast, perfidy is prohibited by the law of war. Perfidy is defined in Article 37(1) of Protocol I as:

Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the [law of war], with intent to betray that confidence

Perfidious acts include the feigning of an intent to surrender or negotiate under a flag of truce, or the feigning of protected status through improper use of the Red Cross or Red Crescent distinctive emblem.

Perfidious acts are prohibited on the basis that perfidy may damage mutual respect for the law of war, may lead to unnecessary escalation of the conflict, may result in the injury or death of enemy forces legitimately attempting to surrender or discharging their humanitarian duties, or may impede the restoration of peace.

There were few examples of perfidious practices during the Persian Gulf War. The most publicized were those associated with the battle of Ras Al-Khafji, which began on 29 January. As that battle began, Iraqi tanks entered Ras Al-Khafji with their turrets reversed, turning their guns forward only at the moment action began between Iraqi and Coalition forces. While there was some media speculation that this was an act of perfidy, it was not; a reversed turret is not a recognized indication of surrender *per se*. Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage Iraqi forces only upon clear indication of hostile intent, or some hostile act.

However, individual acts of perfidy did occur. On one occasion, Iraqi soldiers waved a white flag and laid down their weapons. When a Saudi Arabian patrol advanced to accept their surrender, it was fired upon by Iraqi forces hidden in buildings on either side of the street. During the same battle, an Iraqi officer approached Coalition forces with his hands in the air, indicating his intention to surrender. When near his would-be captors, he drew a concealed pistol from his boot, fired, and was killed during the combat that followed.

Necessarily, these incidents instilled in Coalition forces a greater sense of caution once the ground offensive began. However, there does not appear to have been any centrally directed Iraqi policy to carry out acts of perfidy. The fundamental principles of the law of war applied to Coalition and Iraqi forces throughout the war. The few incidents that did occur did not have a major effect on planning or executing Coalition military operations.

WAR CRIMES

Iraqi war crimes were widespread and premeditated. They included the taking of hostages, forcible deportation, torture and murder of civilians, in violation of the GC; looting of civilian property in violation of Hague IV; looting of cultural property, in violation of the 1954 Hague Cultural Property Convention;

indiscriminate attacks in the launching of Scud missiles against cities rather than specific military objectives, in violation of customary international law; violation of Hague VIII in the method of using sea mines; and unnecessary destruction in violation of Article 23(g) of the Annex to Hague IV, as evidenced by the unlawful and wanton release of oil into the Persian Gulf and the unlawful and wanton sabotage of hundreds of Kuwaiti oil wells. The latter acts also constitute a violation of Article 53, GC and a Grave Breach under Article 147, GC.

As indicated earlier, the United States, Iraq, and the members of the Coalition that liberated Kuwait are parties to several law of war treaties. Each assumes good faith in its application and enforcement. Common Article 1 of the four 1949 Geneva Conventions for the Protection of War Victims requires that parties to those treaties "respect and ensure respect" for each of those treaties. The obligation to "respect and ensure respect" was binding upon all parties to the Persian Gulf War. It is an affirmative requirement to take all reasonable and necessary steps to bring individuals responsible for war crimes to justice. In a separate article common to the four 1949 Geneva Conventions, no nation has the authority to absolve itself or any other nation party to those treaties of any liability incurred by the commission of a Grave breach (Article 50, GWS; Article 51, GWS (Sea); Article 130, GPW; and Article 147, GC).

The United States has one of the more comprehensive law of war programs in existence. DOD Directive 5100.77 is the foundation for the US military law of war program. It contains four policies:

- The law of war and obligations of the US Government under that law . . . [will be] observed and enforced by the US Armed Forces.
- A program, designed to prevent violations of the law of war . . . [will be] implemented by the US Armed Forces.
- Alleged violations of the law of war, whether committed by or against US or enemy personnel, . . . [will be] promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.
- Violations of the law of war alleged to have been committed by or against allied military or civilian personnel shall be reported through appropriate military command channels for ultimate transmission to appropriate agencies of allied governments.

The Joint Staff, each military department, the unified and specified commands, and subordinate commands have issued implementing directives. It is within this framework that war crimes investigations were conducted in the course of Operations Desert Shield and Desert Storm.

Each service has issued directives to implement DOD Directive 5100.77 with respect to the reporting and investigation of suspected violations of the law of war committed by or against its personnel. DOD Directive 5100.77 appoints the Army as the DOD Executive Agent for administering the DOD Law of War Program with respect to alleged violations of the law of war committed against US personnel. Army Chief of Staff Regulation 11-2 assigns to the Army Judge Advocate General (JAG) responsibility for investigating, collecting, collating, evaluating, and reporting in connection with war crimes alleged to have been committed against US personnel.

Collection of information on Iraqi war crimes began on 3 August, after media reports that US citizens in Kuwait had been taken hostage by Iraqi forces and forcibly deported to Iraq. As previously indicated, these acts constitute a Grave Breach of the GC. Collection of information continued as reports of other Iraqi war crimes were received.

Interagency meetings in late August established a process for informal coordination on war crimes issues, and ensured policy makers were kept informed. On 15 October, the President warned Iraq of its liability for war crimes. The United States was successful in incorporating into UNSC Resolution 674 (29 October) language regarding Iraq's accountability for its war crimes, in particular its potential liability for Grave Breaches of the GC, and inviting States to collect relevant information regarding Iraqi Grave Breaches and provide it to the Security Council.

Initial collection of information on Iraqi war crimes was carried out by the Army JAG's International Affairs Division and CENTCOM's Staff Judge Advocate in Riyadh. Although US hostages in Iraq were released in December, Iraqi abuses in Kuwait continued at such a pace that it became apparent a greater effort would be necessary with regard to collection of evidence and investigation of war crimes. The Army JAG accordingly recommended the mobilization of two Reserve Component Judge Advocate international law detachments. The 199th JAG Detachment was deployed to SWA, while the 208th JAG Detachment served within the Office of the JAG as the War Crimes Documentation Center. The former, in cooperation with the governments of Saudi Arabia and Kuwait, collected information on war crimes committed in Kuwait. The latter collected information from a variety of sources, including other agencies of the US Government, the media, and private sources.

Following Iraq's breach of international peace and security by its invasion of Kuwait, the UNSC, in Resolution 667, decided to take further concrete measures "in response to Iraq's continued violation of the [UN] Charter, of resolutions of the Council and of international law." Specific Iraqi war crimes include:

- The taking of Kuwaiti nationals as hostages, and their individual and mass forcible deportation to Iraq, in violation of Articles 34, 49 and 147, GC.
- The taking of third-country nationals in Kuwait as hostages, and their individual and mass forcible deportation to Iraq, in violation of Articles 34, 49, and 147, GC.
- The taking of third-country nationals in Iraq as hostages, and their individual and mass forcible transfer within Iraq, in violation of Articles 34, 35, and 147, GC.
- Compelling Kuwaiti and other foreign nationals to serve in the armed forces of Iraq, in violations of Articles 51 and 147, GC.
- Use of Kuwaiti and third country nationals as human shields in violation of Articles 28 and 38(4), GC.
- Inhumane treatment of Kuwaiti and third country civilians, to include rape and willful killing, in violation of Articles 27, 32 and 147, GC.
- As noted previously, possible violation of the Genocide Convention, through acts committed with the intent to destroy, in whole or in part, a national group (that is, the Kuwaiti people).

- The transfer of its own civilian population into occupied Kuwait, in violation of Article 49, GC.
- Torture and other inhumane treatment of POWs, in violation of Articles 13, 17, 22, 25, 26, 27, and 130, GPW.
- Using POWs as a shield to render certain points immune from military operations, in violation of Article 23, GPW.
- Unnecessary destruction of Kuwaiti private and public property, in violation of Article 23 (g), Annex to Hague IV.
- Pillage, in violation of Article 47, Annex to Hague IV.
- Illegal confiscation/inadequate safeguarding of Kuwaiti public property, in violation of Article 55, Annex to Hague IV, and Article 147, GC.
- Pillage of Kuwaiti civilian hospitals, in violation of Articles 55, 56, 57, and 147, GC.
- In its indiscriminate Scud missile attacks, unnecessary destruction of Saudi Arabian and Israeli property, in violation of Article 23 (g), Annex to Hague IV.
- In its intentional release of oil into the Persian Gulf and its sabotage of the Al-Burqan and Ar-Rumaylah oil fields in Kuwait, unnecessary destruction in violation of Articles 23 (g) and 55, Annex to Hague IV, and Articles 53 and 147, GC.
- In its use of drifting naval contact mines and mines lacking devices for their self-neutralization in the event of their breaking loose from their moorings, in violation of Article 1, Hague VIII.

Iraq is a party to the 1925 Geneva Protocol, which prohibits use of CW/BW. Iraq, through its reservation at the time of ratification, pledged no first use of either CW or BW. Although Iraq did not use CW/BW in this war, it violated this treaty in its 1980-88 war against Iran. During the Persian Gulf War, Iraq threatened the use of CW/BW and deployed CW. Although prepared to do so, Iraqi forces did not use either of these weapons of mass destruction during this conflict, perhaps in part due to the success of Coalition efforts to destroy Iraqi CW/BW capabilities, Iraqi C2, and Iraq's inability to move its weapons to forward sites.

Article 29, GC, states that "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." Similarly, Article 12, GPW, declares that "Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them." Responsibility for the treatment (and mistreatment) of civilian detainees and POW in Iraqi hands, clearly lay with the Government of Iraq and its senior officials.

Criminal responsibility for violations of the law of war rests with a commander, including the national leadership, if he (or she):

- Orders or permits the offense to be committed, or

- Knew or should have known of the offense (s), had the means to prevent or halt them, and failed to do all which he was capable of doing to prevent the offenses or their recurrence.

In addition, the invasion of Kuwait was ordered by Saddam Hussein and is a crime against peace for which he, as well as the Ba'ath Party leadership and military high command, bear direct responsibility.

The crimes committed against Kuwaiti civilians and property, and against third party nationals, are offenses for which Saddam Hussein, officials of the Ba'ath Party, and his subordinates bear direct responsibility. However, the principal responsibility rests with Saddam Hussein. Saddam Hussein's C2 of Iraqi military and security forces appeared to be total and unequivocal. There is substantial evidence that each act alleged was taken as a result of his orders, or was taken with his knowledge and approval, or was an act of which he should have known.

It is important to note that, with the possible exception of the Coalition's need to direct considerable effort toward the hunt for Iraqi Scud missiles, no Iraqi action leading to or resulting in a violation of the law of war gained Iraq any military advantages. This "negative gain from negative actions" in essence reinforces the validity of the law of war.

ENVIRONMENTAL TERRORISM

Between seven and nine million barrels of oil were set free in the Gulf by Iraqi action. Five hundred ninety oil well heads were damaged or destroyed. 508 were set on fire, and 82 were damaged so that oil was flowing freely from them.

There has been international examination of these acts. From 9 to 12 July 1991, the Government of Canada, working with the UN Secretary General, hosted a conference of international experts in Ottawa to consider Iraq's wanton acts of destruction and their law of war implications. There was general agreement the actions constituted violations of the law of war, namely:

- Article 23g of the Annex to Hague IV, which forbids the destruction of "enemy property, unless . . . imperatively demanded by the necessities of war;" and
- Article 147 of the GC, which makes a Grave Breach the "extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly."

The Ottawa Conference of Experts also noted UNSC Resolution 687 (3 April 1991), which reaffirmed that Iraq was liable under international law to compensate any environmental damage and the depletion of natural resources.

Other treaties the Conference of Experts considered were the ENMOD Convention and the 1977 Protocol I, articles 35 and 55 of which contain provisions for the protection of the environment. It was the general conclusion of the experts that the former did not apply to actions of the kinds perpetrated by Iraq, while the latter was not applicable during the Persian Gulf War for reasons previously stated.

Even had Protocol I been in force, there were questions as to whether the Iraqi actions would have violated its environmental provisions. During that treaty's

negotiation, there was general agreement that one of its criteria for determining whether a violation had taken place ("long term") was measured in decades. It is not clear the damage Iraq caused, while severe in a layman's sense of the term, would meet the technical-legal use of that term in Protocol I. The prohibitions on damage to the environment contained in Protocol I were not intended to prohibit battlefield damage caused by conventional operations and, in all likelihood, would not apply to Iraq's actions in the Persian Gulf War.

The Ottawa Conference of Experts did not conclude that new laws or treaties were required; rather, it was the belief of those present that respect for and enforcement of the existing law of war was of greatest importance.

It is not clear why Iraq released oil into the Persian Gulf. Conceivably, Iraq had hoped to interfere with Coalition naval operations in the Gulf, perhaps to impede expected amphibious operations. By threatening desalinization plants, Iraq also may have hoped to disrupt Coalition military operations and Saudi civilian life dependent on a steady flow of fresh water. As it turned out, the cooperative efforts of the Coalition members, the US Coast Guard, and the US National Oceanic and Atmospheric Administration resulted in the oil slick's having a negligible effect on the operations of Coalition naval forces.

Perversely, Iraq's actions did necessitate responsive Coalition operations to protect the environment that inflicted further damage on Kuwaiti property. Specifically, the flow from the Al-Ahmadi terminal was stopped by aerial destruction of vital equipment near the terminal.

As the first Kuwaiti oil wells were ignited by Iraqi forces, there was public speculation the fires and smoke were intended to impair Coalition forces' ability to conduct both air and ground operations, primarily by obscuring visual and electro-optical sensing devices. Review of Iraqi actions makes it clear the oil well destruction had no military purpose, but was simply punitive destruction at its worst. For example, oil well fires to create obscurants could have been accomplished simply through the opening of valves; instead, Iraqi forces set explosive charges on many wells to ensure the greatest possible destruction and maximum difficulty in stopping each fire. Likewise, the Ar-Rumaylah oil field spreads across the Iraq-Kuwait border. Had the purpose of the fires been to create an obscurant, oil wells in that field on each side of the border undoubtedly would have been set ablaze; Iraqi destruction was limited to oil wells on the Kuwaiti side only. As with the release of oil into the Persian Gulf, this aspect of Iraq's wanton destruction of Kuwaiti property had little effect on Coalition offensive combat operations. In fact, the oil well fires had a greater adverse effect on Iraqi military forces.

CONDUCT OF NEUTRAL NATIONS

Neutrality normally is based on a nation's proclamation of neutrality or assumption of a neutral posture with respect to a particular conflict. Iran and Jordan each issued proclamations of neutrality during the Persian Gulf crisis and, as described, refrained from active participation in the war. Other nations, such as Austria and Switzerland, enjoy relative degrees of international guarantees of their neutrality.

Neutrality in the Persian Gulf War was controlled in part by the 1907 Hague V Convention; but traditional concepts of neutral rights and duties are substantially modified when, as in this case, the United Nations authorizes collective action against an aggressor nation.

It was the US position during the Persian Gulf crisis that, regardless of assertions of neutrality, all nations were obligated to avoid hindrance of Coalition operations undertaken pursuant to, or in conjunction with, UNSC decisions, and to provide whatever assistance possible. By virtue of UNSC Resolution 678 (29 November), members were requested "to provide appropriate support for the actions undertaken" by nations pursuant to its authorization of use of all necessary means to uphold and implement prior resolutions. The language of UNSC Resolution 678 is consistent with Articles 2(5), 2(6), 25, and 49 of the UN Charter. Article 2(5) states:

All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

Article 2(6) provides:

The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

Article 25 provides:

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

Article 49 declares:

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

This section focuses on the conduct of Jordan, Iran, India and traditionally neutral European nations (primarily Austria and Switzerland) during the course of the hostilities, and the effect of Coalition maritime interceptions on neutral shipping.

UNSC Resolution 661, which called for an economic embargo of Iraq, pursuant to Article 41 of the UN Charter, obligated all member nations to refrain from aiding Iraq. The declarations of "neutrality" by Jordan and Iran were subordinate to their obligation as UN members to comply with UNSC resolutions. Although Jordan's attitude toward Iraq and the Coalition appeared inconsistent with its UN obligations, mere sympathy for one belligerent does not constitute a violation of traditional neutral duties, nor even a rejection of the obligations imposed by the UNSC resolutions cited. Conduct is the issue.

There were reports that Jordan supplied materials (including munitions) to Iraq during Operations Desert Shield and Desert Storm. Furnishing supplies and munitions to a belligerent traditionally has been regarded as a violation of a neutral's obligations. In this case, it would have been an even more palpable contravention of Jordan's obligations – both because of the request of UNSC Resolution 678 that all States support those seeking to uphold and implement the relevant resolutions, and because the sanctions Resolution 661 established expressly prohibited the supply of war materials to Iraq.

As the US became aware of specific allegations of Jordanian failure to comply with UNSC sanctions, they were raised with the Government of Jordan. Some were

without foundation; some were substantiated. Regarding the latter, the Government of Jordan acted to stop the actions and reassured the United States those instances had been the result of individual initiative rather than as a result of government policy. Such logistical assistance as Jordan may have provided Iraq did not substantially improve Iraq's ability to conduct operations, nor did it have an appreciable effect on Coalition forces' operational capabilities.

During actual hostilities, Saudi Arabia stopped pumping oil to Jordan; Jordan obtained petroleum from Iraq, taking delivery by truck. Although not a violation of a neutral's duties under traditional principles of international law, such purchases were inconsistent with UNSC Resolutions 661 and 678.

While the Jordanian importation of oil products from Iraq did not substantially affect Coalition military operations, additional steps were required by Coalition forces to protect Iraqi and Jordanian civilians from the risks of military operations. Jordan imported Iraqi oil by truck across roads in western Iraq during the day and night. These oil trucks were commingled with military and civilian vehicles. At night, some oil trucks were mistaken for mobile Scud launchers or other military vehicles; other trucks and civilian vehicles were struck incidental to attack of legitimate military targets.

This collateral damage and injury, which occurred despite previously described Coalition efforts to minimize damage to civilian objects and injury to noncombatant civilians, is attributable to Jordan's failure to ensure adherence to UNSC sanctions and to warn its nationals of the perils of travel on main supply routes in a combat zone. It also is attributable to mixing of Iraqi military vehicles and convoys with Jordanian civilian traffic traveling in Iraq. Coalition forces continued to take reasonable precautions to minimize collateral damage to civilian vehicles and incidental injury to noncombatant civilians. As a result, the ability to target Iraqi military vehicles and convoys, including mobile Scud missile launchers and support equipment, was impeded.

Iran's conduct during Operations Desert Shield and Desert Storm essentially was consistent with that expected of a neutral under traditional principles of international law, including Hague V. Immediately after the Operation Desert Storm air campaign began, many Iraqi civil and military aircraft began fleeing to Iran, presumably to avoid damage or destruction by Coalition air forces. Under Article 11 of Hague V and traditional law of war principles regarding neutral rights and obligations, when belligerent military aircraft land in a nation not party to a conflict, the neutral must intern the aircraft, aircrew, and accompanying military personnel for the duration of the war. Both Switzerland and Sweden took such actions in the course of World War II, for example, with respect to Allied and German aircraft and aircrews. Some civil (and possibly some military) transport aircraft may have returned to Iraq. With respect to tactical aircraft, however, it appears Iran complied with the traditional obligations of a neutral. US forces nonetheless remained alert to the possibility of a flanking attack by Iraqi aircraft operating from Iran.

Although the situation never arose, the United States advised Iran that, in light of UNSC Resolution 678, Iran would be obligated to return downed Coalition aircraft and aircrew, rather than intern them. This illustrates the modified nature of neutrality in these circumstances. It also was the US position that entry into Iranian (or Jordanian) airspace to rescue downed aviators would be consistent with its international obligations as a belligerent, particularly in light of Resolution 678.

On several occasions, Iran protested alleged entry of its airspace by Coalition aircraft or missiles. The United States expressed regret for any damage that may

have occurred within Iranian territory by virtue of inadvertent entry into Iranian airspace. The US replies did not, however, address whether Iranian expectations of airspace inviolability were affected by UNSC Resolution 678.

Although military aircraft must gain permission to enter another State's airspace (except in distress), both Switzerland and Austria routinely granted such clearance for US military transport aircraft prior to the Iraqi invasion of Kuwait. Early in the Persian Gulf crisis, the United States approached the Governments of Austria and Switzerland, seeking permission for overflight of US military transport aircraft carrying equipment and personnel to SWA. Despite initial misgivings, based upon their traditional neutrality, each nation assented. That there was a reluctance to grant permission early in the crisis – that is, when the United States was not involved in the hostilities, and thus not legally a belligerent – demonstrates that the view by these two States of neutrality may be more expansive than the traditional understanding of the role of neutrality in the law of war. At the same time, while Switzerland is not a UN member, its support for the US effort (through airspace clearances for US military aircraft) preceded UNSC Resolution 678.

Given their reluctance to permit pre-hostilities overflights, it was natural to expect that Switzerland and Austria would weigh very carefully any requests for overflights once offensive actions began, which each did. In light of the UNSC request that all States support the efforts of those acting to uphold and implement UNSC resolutions, each government decided that overflights by US military transport aircraft would not be inconsistent with its neutral obligations. Accordingly, permission for overflights was granted, easing logistical support for combat operations.

In contrast, overflight denial by the Government of India required Marine combat aviation assets in the Western Pacific to fly across the Pacific, the continental US, the Atlantic, and through Europe to reach SWA, substantially increasing the transit route. Air Force transport aircraft delivering ammunition to the theater of operations also were denied overflight permission.

UNSC Resolution 661 directed member states to prevent the import or transshipment of materials originating in Iraq or Kuwait, and further obligated member states to prevent imports to or exports from Iraq and Kuwait. In support of Resolution 661, on 16 August, the United States ordered its warships to intercept all ships believed to be proceeding to or from Iraq or Kuwait, and all vessels bound to or from ports of other nations carrying materials destined for or originating from Iraq or Kuwait. On 25 August, the Security Council adopted Resolution 665, which called upon UN members to enforce sanctions by means of a maritime interception operation. This contemplated intercepting so-called "neutral" shipping as well as that of non-neutral nations. These resolutions modified the obligation of neutral powers to remain impartial with regard to Coalition UN members.

The law of war regarding neutrality traditionally permits neutral nations to engage in non-war-related commerce with belligerent nations. During the Persian Gulf crisis, however, the Coalition Maritime Interception Force (MIF) was directed to prevent all goods (except medical supplies and humanitarian foodstuffs expressly authorized for Iraqi import by the UNSC Sanctions Committee) from leaving or entering Iraqi-controlled ports or Iraq, consistent with the relevant UNSC resolutions. The claim of neutral status by Iran and Jordan, or any of the traditional neutral nations, did not adversely affect the conduct of the Coalition's ability to carry out military operations against Iraq.

THE CONCEPT OF "SURRENDER" IN THE CONDUCT OF COMBAT OPERATIONS

The law of war obligates a party to a conflict to accept the surrender of enemy personnel and thereafter treat them in accordance with the provisions of the 1949 Geneva Conventions for the Protection of War Victims. Article 23(d) of Hague IV prohibits the denial of quarter, that is the refusal to accept an enemy's surrender, while other provisions in that treaty address the use of flags of truce and capitulation.

However, there is a gap in the law of war in defining precisely when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or an individual soldier) and an ability to accept on the part of his opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon – an attempt at surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.

A combatant force involved in an armed conflict is not obligated to offer its opponent an opportunity to surrender before carrying out an attack. To minimize Iraqi and Coalition casualties, however, the Coalition engaged in a major psychological operations campaign to encourage Iraqi soldiers to surrender before the Coalition ground offensive. Once that offensive began, the Coalition effort was to defeat Iraqi forces as quickly as possible to minimize the loss of Coalition lives. In the process, Coalition forces continued to accept legitimate Iraqi offers of surrender in a manner consistent with the law of war. The large number of Iraqi prisoners of war is evidence of Coalition compliance with its law of war obligations with regard to surrendering forces.

Situations arose in the course of Operation Desert Storm that have been questioned by some in the post-conflict environment. Two specific cases involve the Coalition's breach of the Iraqi defensive line and attack of Iraqi military forces leaving Kuwait City. Neither situation involved an offer of surrender by Iraqi forces, but it is necessary to discuss each in the context of the law of war concept of surrender.

As explained in Chapter VIII, rapid breach of the Iraqi defense in depth was crucial to the success of the Coalition ground campaign. When the ground campaign began, Iraq had not yet used its air force or extensive helicopter fleet in combat operations, the Iraqi Scud capability had not been eliminated, and most importantly, chemical warfare by Iraq remained a distinct possibility. It was uncertain whether the Coalition deception plan had worked or whether the Coalition effort had lost the element of surprise and there was also no definitive information about the strength and morale of the defending Iraqi soldiers. Because of these uncertainties, and the need to minimize loss of US and other Coalition lives, military necessity required that the assault through the forward Iraqi defensive line be conducted with maximum speed and violence.

The VII Corps main effort was the initial breaching operation through Iraqi defensive fortifications. This crucial mission was assigned to the 1st Infantry Division (Mechanized). The Division's mission was to conduct a deliberate breach of the Iraqi defensive positions as quickly as possible to expand and secure the breach site, and to pass the 1st UK Armored Division through the lines to continue the attack against the Iraqi forces.

To accomplish the deliberate breaching operation, the 1st Infantry Division (Mechanized) moved forward and plowed through the berms and mine fields erected by the Iraqis. Many Iraqis surrendered during this phase of the attack and were taken prisoner. The division then assaulted the trenches containing other Iraqi soldiers. Once astride the trench lines, the division turned the plow blades of its tanks and combat earthmovers along the Iraqi defense line and, covered by fire from its M-2/-3 armored infantry fighting vehicles, began to fill in the trench line and its heavily bunkered, mutually supporting fighting positions.

In the process, many more Iraqi soldiers surrendered to division personnel; others died in the course of the attack and destruction or bulldozing of their defensive positions.

By nightfall, the division had breached the Iraqi defenses, consolidated its position, and prepared to pass the 1st UK Armoured Division through the lines. Hundreds of Iraqi soldiers had been taken prisoner; US casualties were extremely light.

The tactic used by the 1st Infantry Division (Mechanized) resulted in a number of Iraqi soldiers' dying in their defensive positions as those positions were bulldozed. Marine Corps breaching operations along its axis of attack into Kuwait used different, but also legally acceptable, techniques of assault by fire, bayonet, and the blasting of enemy defensive positions. Both tactics were entirely consistent with the law of war.

Tactics involving the use of armored vehicles against dug-in infantry forces have been common since the first use of armored vehicles in combat. The tactic of using armored vehicles to crush or bury enemy soldiers was briefly discussed in the course of the UN Conference on Certain Conventional Weapons, conducted in Geneva from 1978 to 1980 and attended by the United States and more than 100 other nations. It was left unregulated, however, as it was recognized by the participants to be a common long-standing tactic entirely consistent with the law of war.

In the case in point, military necessity required violent, rapid attack. Had the breaching operation stalled, the VII Corps main effort would have been delayed or, at worst, blunted. This would have had an adverse effect on the entire ground campaign, lengthening the time required to liberate Kuwait, and increasing overall Coalition casualties.

As first stated in US Army General Orders No. 100 (1863), otherwise known as the Lieber Code, military necessity "consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war...[It] admits of all direct destruction of life or limb of armed enemies." As developed by the practice of nations since that time, the law of war has placed restrictions on the application of force against enemy combatants in very few circumstances (e.g., the first use of chemical or biological weapons). None of these restrictions were at issue during the breaching operations during Operation Desert Storm.

The law of war principle complementary to military necessity is that of unnecessary suffering (or superfluous injury). That principle does not preclude combat actions that otherwise are lawful, such as that used by the 1st Infantry Division (Mechanized).

In the course of the breaching operations, the Iraqi defenders were given the opportunity to surrender, as indicated by the large number of EPWs taken by the

division. However, soldiers must make their intent to surrender clear and unequivocal, and do so rapidly. Fighting from fortified emplacements is not a manifestation of an intent to surrender, and a soldier who fights until the very last possible moment assumes certain risks. His opponent either may not see his surrender, may not recognize his actions as an attempt to surrender in the heat and confusion of battle, or may find it difficult (if not impossible) to halt an onrushing assault to accept a soldier's last-minute effort at surrender.

It was in this context that the breach of the Iraqi defense line occurred. The scenario Coalition forces faced and described herein illustrates the difficulty of defining or effecting "surrender." Nonetheless, the breaching tactics used by US Army and Marine Corps forces assigned this assault mission were entirely consistent with US law of war obligations.

In the early hours of 27 February, CENTCOM received a report that a concentration of vehicles was forming in Kuwait City. It was surmised that Iraqi forces were preparing to depart under the cover of darkness. CINCCENT was concerned about the redeployment of Iraqi forces in Kuwait City, fearing they could join with and provide reinforcements for Republican Guard units west of Kuwait City in an effort to stop the Coalition advance or otherwise endanger Coalition forces.

The concentration of Iraqi military personnel and vehicles, including tanks, invited attack. CINCCENT decided against attack of the Iraqi forces in Kuwait City, since it could lead to substantial collateral damage to Kuwaiti civilian property and could cause surviving Iraqi units to decide to mount a defense from Kuwait City rather than depart. Iraqi units remaining in Kuwait City would cause the Coalition to engage in military operations in urban terrain, a form of fighting that is costly to attacker, defender, innocent civilians, and civilian objects.

The decision was made to permit Iraqi forces to leave Kuwait City and engage them in the unpopulated area to the north. Once departed, the Iraqi force was stopped by barricades of mines deployed across the highway in front of and behind the column. Air attacks on the trapped vehicles began about 0200. The following morning, CENTCOM leadership viewed the resulting damage. More than two hundred Iraqi tanks had been trapped and destroyed in the ambush, along with hundreds of other military vehicles and various forms of civilian transportation confiscated or seized by Iraqi forces for the redeployment. The vehicles in turn were full of property pillaged from Kuwaiti civilians: appliances, clothing, jewelry, compact disc players, tape recorders, and money, the last step in the Iraqi looting of Kuwait.

Throughout the ground campaign Coalition leaflets had warned Iraqi soldiers that their tanks and other vehicles were subject to attack, but that Iraqi soldiers would not be attacked if they abandoned their vehicles – yet another way in which the Coalition endeavored to minimize Iraqi casualties while encouraging their defection and/or surrender. When the convoy was stopped by the mining operations that blocked the Iraqi axis of advance, most Iraqi soldiers in the vehicles immediately abandoned their vehicles and fled into the desert to avoid attack.

In the aftermath of Operation Desert Storm, some questions were raised regarding this attack, apparently on the supposition that the Iraqi force was retreating. The attack was entirely consistent with military doctrine and the law of war. The law of war permits the attack of enemy combatants and enemy equipment at any time, wherever located, whether advancing, retreating, or standing still. Retreat does not prevent further attack. At the small-unit level, for example, once an objective has been seized and the position consolidated, an attacking force is trained to fire upon the retreating enemy to discourage or prevent a counterattack.

Attacks on retreating enemy forces have been common throughout history. Napoleon suffered some of his worst losses in his retreat from Russia, as did the German Wermacht more than a century later. It is recognized by military professionals that a retreating force remains dangerous. The 1st Marine Division and its 4,000 attached US Army forces and British Royal Marines, in the famous 1950 march out of the Chosin Reservoir in North Korea, fighting outnumbered by a 4:1 margin, turned its "retreat" into a battle in which it defeated the 20th and 26th Chinese Armies trying to annihilate it, much as Xenophon and his "immortal 10,000" did as they fought their way through hostile Persian forces to the Black Sea in 401 BC.

In the case at hand, neither the composition, degree of unit cohesiveness, nor intent of the Iraqi military forces engaged was known at the time of the attack. At no time did any element within the formation offer to surrender. CENTCOM was under no law of war obligation to offer the Iraqi forces an opportunity to surrender before the attack.

OBSERVATIONS

Accomplishments

- DOD-mandated instruction and training in the law of war were reflected in US operations, which were in keeping with historic US adherence to the precepts of the law of war. Adherence to the law of war impeded neither Coalition planning nor execution; Iraqi violations of the law provided Iraq no advantage.
- CINCCENT conducted a theater campaign directed solely at military targets. As frequently noted during the conduct of the conflict, exceptional care was devoted to minimize collateral damage to civilian population and property.
- The special trust and confidence reposed in the professional capabilities of military commanders by the National Command Authorities permitted commanders at all levels to accomplish their respective missions in an unconstrained manner that simultaneously was consistent with the law of war.
- The willingness of commanders to seek legal advice at every stage of operational planning ensured US respect for the law of war throughout Operations Desert Shield and Desert Storm.

Issue

- A strategy should be developed to respond to Iraqi violations of the law of war, to make clear that a price will be paid for such violations, and to deter future violators.