

CHAPTER 6

Adherence and Enforcement

6.1 ADHERENCE TO THE LAW OF ARMED CONFLICT

Nations adhere to the law of armed conflict not only because they are legally obliged to do so¹ but for the very practical reason that it is in their best interest to be governed by consistent and mutually acceptable rules of conduct.² The law of armed conflict is effective

¹ Under Common article 1, each nation has an affirmative duty at all times not only to respect the requirements of the 1949 Geneva Conventions, but also to ensure respect for them by its armed forces. *Nicaragua Military Activities Case*, 1986 I.C.J. 114; 25 Int'l Leg. Mat'ls 1073 (para. 220) (holding this duty is a general principle of international law). Further, under GWS 1929, arts. 28-30, & 49-54; GWS-Sea, arts. 50-53; GPW, arts. 129-132; GC, arts. 146-149 (and GP I, arts. 85-87, for nations bound thereby -- see Table A5-1 (p. 5-24)), every such nation has an obligation to seek out and cause to be prosecuted violators of the Geneva Conventions irrespective of their nationality, and to otherwise encourage compliance of the Conventions by any other country or its armed forces including those of its allies. The United States supports the principle, detailed in GP I, arts. 85-89, that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 428 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson). This self-interest is reflected in the following:

Any government which, while not itself involved in a conflict, is in a position to exert a deterrent influence on a government violating the laws of war, but refrains from doing so, shares the responsibility for the breaches. By failing to react while able to do so, it fosters the process which could lead to its becoming the victim of similar breaches and no longer an accessory by omission.

ICRC Appeal, 1985 Int'l Rev. Red Cross 33 & 289-90.

As of 1 November 1997, only Eritrea, the Marshall Islands and Nauru of the 185 U.N. members were not party to the 1949 Geneva Conventions. See Table A5-1 (p. 5-24).

² Discipline in combat is essential. Violations of the law of armed conflict detract from the commander's ability to accomplish his mission. Violations of that law also have an adverse impact on national and world public opinion. Violations on occasion have served to prolong a conflict by inciting an opponent to continue resistance.

Violations of commitments under the law of armed conflict can seriously hamper the willingness and political ability of allies to support military activities within and outside the alliance. This is particularly true of the United States and other nations with democratic forms of government. In contrast, dictatorships, depending primarily on the deployment of military forces, with total control of internal mass media and allowing no political dissent, may disregard legal commitments without equivalent impact on their overall political and strategic position. Our posture is strengthened by our continued respect for the law of armed conflict, while theirs may be strengthened in some cases by their willingness to disregard those laws for temporary tactical advantage. Therefore, an opponent's disregard of the law is not a sound basis for the United States to take a similar callous attitude. Rather, the sharper the distinction between our respect for the sensitivities and individuality of our allies, supported by our respect for the law, and our opponent's disregard of the interests of their allies and the law, the better for our overall posture. Compliance will also assure the U.S. of the moral high ground, maintain and enhance support from our allies, and foster sympathy for our cause among neutrals. In short, U.S. armed forces are committed to

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to the extent that it is obeyed. Occasional violations do not substantially affect the validity of a rule of law, provided routine compliance, observance, and enforcement continue to be the norm. However, repeated violations not responded to by protests, reprisals, or other enforcement actions may, over time, indicate that a particular rule is no longer regarded as valid.

6.1.1 Adherence by the United States. The Constitution of the United States provides that treaties to which the U.S. is a party constitute a part of the "supreme law of the land" with a force equal to that of law enacted by the Congress.³ Moreover, the Supreme Court of the United States has consistently ruled that where there is no treaty and no controlling executive, legislative, or judicial precedent to the contrary, customary international law is a fundamental element of U.S. national law.⁴ Since the law of armed conflict is based on international agreements to which the U.S. is a party and customary law, it is binding upon the United States, its citizens, and its armed forces.⁵

6.1.2 Department of the Navy Policy. SECNAVINST 3300.1A states that the Department of the Navy will comply with the law of armed conflict in the conduct of military operations and related activities in armed conflicts.⁶ Article 0705, U.S. Navy Regulations, 1990, provides that:

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combat to protect fundamental values, not to abandon them.

Accordingly, violations of the law by U.S. armed forces may have greater impact on American and world public opinion than would similar violations by our adversaries. *See* AFP 110-31, para. 1-6; Brittin, *International Law for Seagoing Officers* 227 (5th ed. 1986).

³ U.S. Const., art. VI, cl. 2.

⁴ *E.g.*, *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 299 (1900); *Reid v. Covert*, 354 U.S. 1, 18, 77 S.Ct. 1222, 1231 (1957). *See also* 1 Restatement (Third), sec. 111, Reporters' Notes 2 & 3, and Introductory Note.

⁵ The law of armed conflict is part of U.S. law which every servicemember has taken an oath to obey. This obligation is implemented for the armed forces in DOD Directive 5100.77, Subj: DOD Law of War Program, and the Uniform Code of Military Justice.

⁶ SECNAVINST 3300.1 (series), Subj: Law of Armed Conflict (Law of War) Program to Insure Compliance by the Naval Establishment, para. 4a. Similar directions have been promulgated by the operational chain of command, *e.g.*, MJCS 0124-88, 4 August 1988, Subj: Implementation of the DOD Law of War Program; USCINCLANTINST 3300.3 (series), Subj: DOD Law of War Instruction; CINCPACFLTINST 3300.9 (series), Subj: Implementation of the DOD Law of War Program.

At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized.⁷

It is the responsibility of the Chief of Naval Operations and the Commandant of the Marine Corps (see OPNAVINST 3300.52 and MCO 3300.3) to ensure that:

1. The U.S. Navy and Marine Corps observe and enforce the law of armed conflict at all times. International armed conflicts are governed by the law of armed conflict as a matter of law. However, not all situations are "international" armed conflicts. In those circumstances when international armed conflict does not exist (e.g. internal armed conflicts), law of armed conflict principles may nevertheless be applied as a matter of policy.⁸

2. Alleged violations of the law of armed conflict, whether committed by or against United States or enemy personnel, are promptly reported, thoroughly investigated, and where appropriate, remedied by corrective action.⁹

⁷ Other arts. of U.S. Navy Regulations, 1990, concerned with international law and with international relations in armed conflict, include:

<i>Article</i>	<i>Title</i>
0406(5)	Designation of Hospital Ships and Medical Aircraft
0829	Prisoners of War
0854	Hospital Ship or Medical Aircraft
0912	Communication with Foreign Officials
0914	Violations of International Law and Treaties
0920	Protection of Commerce of the United States
0924	Medical or Dental Aid to Persons Not in the Naval Service
0925	Assistance to Persons, Ships and Aircraft in Distress
0939	Granting of Asylum and Temporary Refuge
1063	Detail of Persons Performing Medical or Religious Services
1135	Relations with Foreign Nations

⁸ Para. 3a of the draft revision of DOD Directive 5100.77 (paragraph 6.1.1, note 5 (p. 6-2)) provides:

3. The Heads of the DOD Components shall:

a. Ensure that the armed forces of the United States will comply with the law of war during armed conflict however such conflicts are characterized and with the principles and spirit of the law of war during all other operations.

⁹ Essential, therefore, is reporting of the facts by all persons with knowledge of suspected violations up the chain of command to the NCA. In the Department of the Navy, SECNAVINST 3300.1 (series) requires the reporting of all suspected violations of the law of armed conflict. See Annex A6-1 (p. 6-37), replicating enclosure (2) to SECNAVINST 3300.1 (series), for an illustrative list of reportable violations. Arts. 87(1) and (3) of GP I require State parties to require military commanders at all levels to report to competent authorities breaches of the 1949 Geneva Conventions and GP I by or against (continued...)

3. All service members of the Department of the Navy, commensurate with their duties and responsibilities, receive, through publications, instructions, training programs and exercises, training and education in the law of armed conflict.¹⁰

Navy and Marine Corps judge advocates responsible for advising operational commanders are specially trained to provide officers in command with advice and assistance in the law of armed conflict on an independent and expeditious basis. The Chief of Naval Operations and the Commandant of the Marine Corps have directed officers in command of the operating forces to ensure that their judge advocates have appropriate clearances and access to information to enable them to carry out that responsibility.¹¹

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members of the armed forces under their command and other persons under their control, to take the necessary steps to prevent violations, and where appropriate, to initiate disciplinary "or penal" action against the violators. The United States supports this principle as one that should be observed and in due course recognized as customary law. Matheson, Remarks, paragraph 6.1, note 1 (p. 6-1), at 422 & 428.

¹⁰ SECNAVINST 3300.1 (series), para. 4b. OPNAVINST 3300.52, Subj: Law of Armed Conflict (Law of War) Program to Ensure Compliance by the U.S. Navy and Naval Reserve; and MCO 3300.3, Subj: Marine Corps Law of War Program, define, respectively, the U.S. Navy and U.S. Marine Corps law of armed conflict training programs. Annex A6-2 (p. 6-40) provides the fundamental rules for combatants, suitable for a basic training program.

The law of armed conflict has long recognized that knowledge of the requirements of the law is a prerequisite to compliance with the law and to prevention of violations of its rules, and has therefore required training of the armed forces in this body of law. On dissemination, *see* Hague IV, art. 1; Hague X, art. 20; GWS 1929, art. 29; GWS, art 47; GWS-Sea, art. 48; GPW, art. 127; GC, art. 144; and for States party thereto, the 1954 Hague Convention on Cultural Property, arts. 7 & 25; GP I, arts. 83 & 87(2); GP II, art. 19; and the 1980 Conventional Weapons Convention, art. 6. The United States supports the principle in GP I, art. 83, that study of the principles of the law of armed conflict be included in programs of military instruction. Matheson, Remarks, paragraph 6.1, note 1 (p. 6-1), at 428. *See also* Meyrowitz, The Function of the Laws of War in Peacetime, 1986 Int'l Rev. Red Cross 77; Hampson, Fighting by the Rules: Instructing the Armed Forces in Humanitarian Law, 1989 *id.* 111; Green, The Man in the Field and the Maxim *Ignorantia Juris Non Excusat*, in *Essays on the Modern Law of War* 27 (1985). On legal advisers in armed forces, *see* GP I, art. 82; Parks, The Law of War Adviser, 31 JAG J. 1 (1980); Green, The Role of Legal Advisers in the Armed Forces, in *Essays on the Modern Law of War* 73 (1985). The United States supports the principle of art. 82, that legal advisers be made available, when necessary, to advise military commanders at the appropriate level on the application of these principles. Matheson, *id.*, at 428. JAGINST 3300.1 (series), note 11 (p. 6-4), details the operational law billets identified for U.S. Navy judge advocates. On the duty of commanders, *see* GP I, art. 87.

The manner of achieving these results is left to nations to implement. Various international bodies exist to assist, *e.g.*, the ICRC, Henry Dunant Institute in Geneva Switzerland, International Institute of Humanitarian Law at San Remo Italy, the International Society of Military Law and the Law of War, and the International Committee of Military Medicine and Pharmacy. *See* de Mullinen, Law of War Training Within Armed Forces: Twenty Years Experience, 1987 Int'l Rev. Red Cross 168. On the role of military manuals (such as this publication) in the dissemination of the law of armed conflict to military forces, *see* Reisman & Lietzau, Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict, in *Robertson* at 1-7.

¹¹ OPNAVINST 3300.52, para. 4.k.2. *See* JAGINST 3300.1 (series), Subj: JAG Billets Requiring Special or Detailed Knowledge of the Law of Armed Conflict and Training Objectives for Navy Judge Advocates in Such Billets; and JAGINST 3300.2 (series), Subj: Law of Armed Conflict Resource Materials. The Army Judge Advocate General's School has
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6.1.3 Command Responsibility. Officers in command are not only responsible for ensuring that they conduct all combat operations in accordance with the law of armed conflict; they are also responsible for the proper performance of their subordinates. While a commander may delegate some or all of his authority, he cannot delegate responsibility for the conduct of the forces he commands.¹² The fact that a commander did not order, authorize, or knowingly acquiesce in a violation of the law of armed conflict by a subordinate will not relieve him of responsibility for its occurrence if it is established that he failed to exercise properly his command authority or failed otherwise to take reasonable measures to discover and correct violations that may occur.¹³

¹¹(...continued)

developed a checklist for the review of operational plans to ensure compliance with the law of armed conflict, which is set forth in chap. 6 of the School's Operational Law Handbook.

¹² U.S. Navy Regulations, 1990, art. 0802.1.

¹³ A commander at any level is personally responsible for the criminal acts of warfare committed by a subordinate if the commander knew in advance of the breach about to be committed and had the ability to prevent it, but failed to take the appropriate action to do so. In determining the personal responsibility of the commander, the element of knowledge may be presumed if the commander had information which should have enabled him or her to conclude under the circumstances that such breach was to be expected. Officers in command are also personally responsible for unlawful acts of warfare performed by subordinates when such acts are committed by order, authorization, or acquiescence of a superior. Those facts will each be determined objectively. See Green, War Crimes, Crimes Against Humanity and Command Responsibility, Nav. War Coll. Rev., Spring 1997, 26-68; Levie, Command Responsibility, 8 USAFA J. Leg. Stu. __ (1998) (forthcoming).

Some military tribunals have held that, in suitable circumstances, the responsibility of commanding officers may be based upon the failure to acquire knowledge of the unlawful conduct of subordinates. In *The Hostages Case*, the United States Military Tribunal stated:

Want of knowledge of the contents of reports made to him [*i.e.*, to the commanding general] is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.

United States v. Wilhelm List et al., 9 TWC 127 (1950).

The responsibility of commanding officers for unlawful conduct of subordinates has not been applied to isolated offenses against the laws of armed conflict, but only to offenses of considerable magnitude and duration. Even in the latter instances, the circumstances surrounding the commission of the unlawful acts have been given careful consideration:

It is absurd . . . to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are wide-spread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawlessness of his troops, depending upon their nature and the circumstances surrounding them.

Trial of General Tomoyuki Yamashita, 4 LRTWC 35 (1948).

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6.1.4 Individual Responsibility. All members of the naval service have a duty to comply with the law of armed conflict and, to the utmost of their ability and authority, to prevent violations by others.¹⁴ They also have an affirmative obligation to report promptly violations of which they become aware. Members of the naval service, like military members of all nations, must obey readily and strictly all *lawful* orders issued by a superior.¹⁵ Under both

¹³(...continued)

The responsibility of a commanding officer may be based solely upon inaction. Depending upon the circumstances of the case, it is not always necessary to prove that a superior actually knew of the offense committed by his subordinates if it can be established that available information was such that he or she *should* have known. (GP I, art. 86, Failure to Act, confirms this rule.) See Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1 (1973); Green, *Essays on the Modern Law of War* 225-37 (1985). See also Levie, at 421-9 for a general discussion of command responsibility, and at 156-63 for an analysis of the Yamashita trial. The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia Since 1991, *reprinted in* 32 Int'l Leg. Mat'ls 1192 (1993) [hereinafter "Statute of the International Tribunal for Yugoslavia"], art. 7, establishes individual criminal responsibility for "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of grave breaches of the 1949 Geneva Conventions, the laws or customs of war, genocide or crimes against humanity. Art. 7(3) specifically provides:

3. The fact that any of the acts was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighboring States Between 1 January 1994 and 31 December 1994, *reprinted in* 33 Int'l Leg. Mat'ls 1598 (1994) [hereinafter "Statute of the International Criminal Tribunal for Rwanda"] contains essentially identical language at art. 6(3).

The Statute of the International Tribunal for Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda were adopted by the U.N. Security Council in U.N.S.C. Resolutions 827 (1993) (*reprinted in* 32 Int'l Leg. Mat'ls 1203 (1993)) and 955 (1994) (*reprinted in* 33 Int'l Leg. Mat'ls 1598 (1994)), respectively.

¹⁴ Where U.S. personnel are involved, military personnel with supervisory authority have a duty to prevent criminal acts. Any person in the naval service who sees a criminal act about to be committed must act to prevent it to the utmost of his or her ability and to the extent of his or her authority. 10 U.S. Code sec. 5947; U.S. Navy Regulations, 1990, arts. 1131 & 1137. Possible actions include moral arguments to dissuade, threatening to report the criminal act, repeating orders of superiors, stating personal disagreement, and asking the senior individual on scene to intervene as a means of preventing the criminal act. In the event the criminal act directly and imminently endangers a person's life (including the life of another person lawfully under his or her custody), force may be used to the extent necessary to prevent the crime. However, the use of deadly force is rarely justified; it may be used only to protect life and only under conditions of extreme necessity as a last resort when lesser means are clearly inadequate to protect life. Compare SECNAVINST 5500.29 (series), Subj: Use of Deadly Force and the Carrying of Firearms by Personnel of the Department of the Navy in Conjunction with Law Enforcement, Security Duties, and Personal Protection; OPNAVINST 3120.32 (series), Subj: Standard Organization and Regulations of the U.S. Navy, art. 412b, circumstances under which a weapon may be fired; and OPNAVINST C5510.83 (series), Subj: Navy Nuclear Weapons Security Manual.

¹⁵ U. S. Navy Regulations, 1990, art. 1132 and UCMJ, arts. 90-92, delineate offenses involving disobedience of lawful orders. Both SECNAVINST 3300.1 (series) and OPNAVINST 3300.52 (*see* paragraph 6.1.2, note 11 (p. 6-4)) are drafted as lawful general orders. See paragraph 6.2.5.5.1 (p. 6-34).

international law and U.S. law, an order¹⁶ to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an *unlawful* order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict. Only if the unlawfulness of an order is not known by the individual, and he could not reasonably be expected under the circumstances to recognize the order as unlawful, will the defense of obedience of an order protect a subordinate from the consequences of violation of the law of armed conflict.¹⁷

6.2 ENFORCEMENT OF THE LAW OF ARMED CONFLICT

Various means are available to belligerents under international law for inducing compliance with the law of armed conflict. To establish the facts, the belligerents may agree

¹⁶ The order may be direct or indirect, explicit or implied.

¹⁷ See paragraph 6.2.5.5.1 (p. 6-34) for a further discussion of the defense of superior orders. War crimes trials are discussed in paragraphs 6.2.5.1 (p. 6-30) and 6.2.5.2 (p. 6-31).

to an ad hoc enquiry.¹⁸ In the event of a clearly established violation of the law of armed conflict, the aggrieved nation may:¹⁹

1. Publicize the facts with a view toward influencing world public opinion against the offending nation²⁰

¹⁸ The Geneva Conventions have long authorized and encouraged belligerents to agree to objective enquiries into alleged violations of those Conventions. GWS 1929, art. 30; GWS, art. 52; GWS-Sea, art. 53; GPW, art. 132; GC, art. 149. (See paragraph 6.1.2 (p. 6-2) regarding national requirements to investigate alleged violations of the law of armed conflict.) No such *ad hoc* agreement has ever been concluded, in large measure because of mutual suspicions and hostilities.

The United Nations has established a team of experts to investigate allegations of such violations. See, e.g., Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General, January 1985, U.N. Doc. S/16962, 22 Feb. 1985; and Report of Group of Experts to Investigate Reports of the Alleged Use of Chemical Weapons, U.N. Doc. S/19823, 25 Apr. 1988, which led to vigorous condemnation of their use, albeit without assigning responsibility to one side, in Security Council Resolution 612, 9 May 1988, Dep't St. Bull., July 1988, at 69. See also U.N. General Assembly Resolution 46/59 (1991), Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, 31 Int'l Leg. Mat'ls 235 (1992).

An International Fact-Finding Commission has been established under GP I, article 90. See 1991 Int'l Rev. Red Cross 208-09, 411-12. By 15 October 1997, 50 nations had accepted the competence of the Commission, including the European neutrals (Austria, Finland, Sweden and Switzerland), and ten NATO countries (Belgium, Canada, Denmark, Germany, Iceland, Italy, Luxemburg, the Netherlands, Norway and Spain), Russia, Belarus, Ukraine, Australia and New Zealand. The Commission cannot act without the consent of the parties to the dispute, which can be given either on a permanent one-time basis or an *ad hoc* basis for a particular dispute. The members of the Commission, elected in mid-March 1992, may be found in ICRC Bulletin, April 1992, at 4. The fact that the former-Soviet Union (prior to its acceptance of the Commission's competence on 29 September 1989), and its allies and clients, were most reluctant to permit third-party supervision of the Geneva Conventions was another factor in the United States' refusal to seek ratification of GP I. Sofaer, Remarks, 2 Am. U.J. Int'l L. & Policy 470.

Belligerents not party to GP I, or States party to GP I which have not accepted the competence of the Fact Finding Commission, may request the Commission to investigate allegations of grave breaches or serious violations of the Convention. Bothe, Partsch & Solf at 543-44; Krill, The International Fact-Finding Commission--The Role of the ICRC, 1991 Int'l Rev. Red Cross 190, at 197; Roach, The International Fact-Finding Commission, *id.* at 176. See also Kalshoven, Noncombatant Persons, in Robertson at 306-07.

¹⁹ See Sachariew, States' Entitlement to Take Action to Enforce International Humanitarian Law, 1989 Int'l Rev. Red Cross 177.

Commanders are not usually required to make the policy decision as to the appropriate use of one or more of the remedial actions set forth in the text, although there are exceptional situations in which even junior commanders may be required to make protests and demands addressed directly to the commander of offending forces. It is also apparent that a government decision cannot be made intelligently unless all officers upon whom the responsibility for decision rests understand the available remedial actions and report promptly to higher authority those circumstances which may justify their use.

²⁰ Experience in the Southeast Asia conflict amply demonstrates the particular effectiveness of television in affecting knowledge of and popular (home) support for U.S. forces. Summers, Western Media and Recent Wars, Mil. Rev., May 1986, at 4; Mitchell, Television and the Vietnam War, Nav. War Coll. Rev., May-June 1984, at 42; Rinaldo, The Tenth Principle of War: Information, Mil. Rev., Oct. 1987, at 55; Walker, Truth is the Best Propaganda: A Study in Military Psychological Operations, National Guard Mag., Oct. 1987, at 26; Paddock, Psychological Operations, Special Operations, (continued...)

2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid²¹

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and US Strategy, in *Special Operations in US Strategy* 229 (Barnett, Tovar & Shultz eds. 1984). For the role of the media during Operations Desert Shield and Desert Storm, see Shell, *A Portrait of Pentagon's Media Strategy*, *Public Relations J.*, June 1991, at 9-11; Zoglin, *It Was a Public Relations Rout, Too*, *Time*, March 11, 1991, at 56-57; Holland, *Put the Brass on the Tube*, *U.S. Naval Inst. Proc.*, April 1991, at 48; Watson, *The Issue of Media Access to Information*, in *Military Lessons of the Gulf War* 202-11 (1991); Smith, *How CNN Fought the War* (1991); Arnett, *Live From Baghdad* (1992).

During Iraq's unlawful occupation of Kuwait, the Security Council invited all States to "collate substantiated information in their possession or submitted to them on the grave breaches by Iraq . . . and to make this information available to the Council." U.N.S.C. Res. 674, 29 Oct. 1990, *reprinted in U.S. Dep't of State, Dispatch*, 5 Nov. 1990, at 239-40. For a report submitted by the U.S. pursuant to Resolution 674, see U.N. Doc. S/21987, 7 Dec. 1990 (USA). See also U.N. Docs. S/22535 and S/22536, 29 April 1991 (reports of the Secretary-General).

Additionally, private individuals and nongovernmental organizations can be expected to attempt to ascertain and publicize the facts pertaining to alleged violations of the Conventions. Other organizations that have provided supervision of the application of the law of armed conflict include, among others, Amnesty International, Commission Medico-Juridique de Monaco, Human Rights Watch, ICRC, International Commission of Jurists, International Committee of Military Medicine and Pharmacy, International Law Association and the World Veterans Federation. All of these organizations have been effective in bringing private and public pressure to bear on governments regarding the conduct of their armed forces in armed conflicts.

²¹ Such protest and demand for punishment may be communicated directly to an offending belligerent or to the commander of the offending forces. On the other hand, an offended belligerent may choose to forward its complaints through a Protecting Power, a humanitarian organization acting in the capacity of a Protecting Power, or any nation not participating in the armed conflict.

Hague IV, art. 3, states:

A belligerent party which violates the provisions of the said [Hague] Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

See *Affaire des Biens Britannique au Maroc Espagnol (Spain v. U.S.)*, Report III (Oct. 23, 1924), at 2 UNRIAA 645 (1949) and Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces*, 40 *I.C.L.Q.* 827 (1991). It is now generally established that the principle laid down in art. 3 is applicable to the violation of any rule regulating the conduct of hostilities and not merely to violations of the Hague Regulations. See Sandoz, *Unlawful Damage in Armed Conflicts and Redress Under International Humanitarian Law*, 1982 *Int'l Rev. Red Cross* 131, 136-137. This customary rule is repeated in GP I, art. 91, and is discussed in useful detail in ICRC, *Commentary* 1053-58. For an excellent discussion of State responsibility and reparations for violations of the law of armed conflict pertaining to environmental damage, see Greenwood, *State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations*, in Grunawalt, King & McClain at 397-415; and Green, *State Responsibility and Civil Reparation for Environmental Damage*, *in id.* at 416-39.

Recent demands for compensation involving U.S. forces include the following:

Iraq agreed to give compensation for "the loss of life, personal injuries and material damages" resulting from the attack on USS STARK on 17 May 1987. Exchange of Notes, 20 & 21 May 1987, 26 *Int'l Leg. Mat'ls* 1427-28 (1987). Detailed claims for the wrongful deaths were submitted to Iraq in April 1988, *Dep't St. Bull.*, Oct. 1988, at 59; Iraq paid \$27.3 million, *Dep't St. Bull.*, May 1989, at 67; 28 *Int'l Leg. Mat'ls* 644, 83 *Am. J. Int'l L.* 561 (1989).

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For almost two hours on 8 June 1967, Israeli aircraft and torpedo boats attacked USS LIBERTY (AGTR-5) on the high seas of the Mediterranean about 15 NM west of the Gaza strip, just as Israel was concluding the Six-Day War. On 27 May 1968, Israel paid the United States \$3,323,500, the full amount of compensation claimed on behalf of the 34 U.S. Navy men killed in the attack. Dep't St. Bull., 17 June 1968, at 799. On 28 April 1969, Israel paid \$3,566,457 in settlement of the United States' claims on behalf of the additional 171 U.S. Navy members wounded in the attack. Dep't St. Bull., 2 June 1969, at 473. On 17 December 1980, Israel agreed to pay \$6 million, in three installments, for its damages to LIBERTY (albeit without conceding liability). 32 U.S.T. 4434, T.I.A.S. 9957; 1980 Digest of U.S. Practice in International Law 747-48. The factual and legal issues of the attack are carefully examined in Jacobsen, A Juridical Examination of the Israeli Attack on the *USS Liberty*, 36 Nav. L. Rev. 1 (1986).

On 11 July 1988, the United States offered to compensate *ex gratia* the families of those lost in the downing of Iranian Airbus flight 655 on 3 July 1988. 24 Weekly Comp. Pres. Docs. 912 (18 July 1988). See Friedman, The Vincennes Incident, U.S. Naval Inst. Proc., May 1989, at 72-79, and Agora: The Downing of Iran Air Flight 655, 83 Am. J. Int'l L. 318-41 (1989). The ICAO report of investigation and ICAO Council actions are reproduced in 28 Int'l Leg. Mat'ls 896 (1989). Iran's application against the United States before the I.C.J. appears at 28 *id.* 842. See also 83 Am. J. Int'l L. 912-13 (1989).

On 25 October 1983, at a time when the People's Revolutionary Army of Grenada was using a group of buildings inside Fort Matthew, St. George's, Grenada, as a military command post 143 feet away from the Richmond Hill Insane Asylum, a bomb from a Navy A-7 aircraft accidentally struck the Asylum, killing sixteen patients and injuring six. A complaint against the United States deemed admissible by the Inter-American Commission on Human Rights. See Weissbrodt & Andrus, The Right to Life During Armed Conflict: Disabled Peoples' International v. United States, 29 Harv. Int'l L.J. 59 (1988). The claim was subsequently withdrawn. While the U.S. Agency for International Development provided *ex gratia* compensation to individual victims and to rebuild the hospital, the U.S. maintained that it had no legal obligation to do so since its actions were in compliance with the law of armed conflict. *Richmond Hill v. United States*, Case 9213, Report No. 3/96, Inter-Am. C.H.R., OEA/Ser. L/V/II.91 Doc. 7 at 201 (1996). See also paragraph 8.1.2.1 (p. 8-4) regarding incidental injury and collateral damage.

See also the Japanese acceptance of responsibility for the 12 December 1937 sinking in the Yangtze River of the U.S. gunboat USS PANAY by Japanese aircraft (38 U.S. Naval War College, International Law Situations, with Situations and Notes, 1938, at 129-50 (1940); Swanson, The *Panay* Incident: Prelude to Pearl Harbor, U.S. Naval Inst. Proc., Dec. 1967, at 26), and the United States acceptance of responsibility for the sinking on 1 April 1945 of the Japanese passenger-cargo vessel AWA MARU on a voyage in which she had been given assurances of safe passage, Agreement and Agreed Terms of Understanding on the Settlement of *Awa Maru* Claim, Tokyo, 14 April 1949, 9 Bevans 467.

During the course of the afternoon of 8 June 1982, near the end of the Falklands/Malvinas war, the Liberian flag tanker HERCULES, in ballast, was attacked three times by Argentinian military aircraft about 600 miles east of Argentina and nearly 500 miles from the Falklands in the South Atlantic. The bombing and rocket attacks damaged her decks and hull and left one undetonated bomb lodged in her starboard side. The owners decided it was too dangerous to attempt to remove this bomb and had her scuttled 250 NM off the Brazilian coast. The vessel owner and time charter sued Argentina in U.S. Federal District Court which held that under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. sec. 1330, 1602-1611, the District Court did not have subject-matter jurisdiction over the claim. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986). The Court of Appeals reversed, holding that the facts alleged, if proven, would constitute clear violations of international law (*e.g.*, 1958 High Seas Convention, Hague XIII) cognizable under the Alien Tort Statute, 28 U.S.C. sec. 1350, which the Foreign Sovereign Immunities Act did not change. 830 F.2d 421, 26 Int'l Leg. Mat'ls 1375 (2d Cir. 1987), discussed in Recent Developments, 28 Va. J. Int'l L. 221 (1988) and Morris, Sovereign Immunity for Military Activities on the High Seas: *Amerada Hess v. Argentine Republic*, 23 Int'l Lawyer 213 (1989). The U.S. Supreme Court reversed, holding the FSIA provides the sole basis for obtaining jurisdiction over a foreign
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3. Seek the intervention of a neutral party, particularly with respect to the protection of prisoners of war and other of its nationals that have fallen under the control of the offending nation²²
4. Execute a belligerent reprisal action (see paragraph 6.2.3)²³
5. Punish individual offenders either during the conflict or upon cessation of hostilities.²⁴

6.2.1 The Protecting Power. Under the Geneva Conventions of 1949, the treatment of prisoners of war, interned civilians, and the inhabitants of occupied territory is to be monitored by a neutral nation known as the Protecting Power.²⁵ Due to the difficulty of

²¹(...continued)

nation in U.S. courts, and the District Court correctly dismissed the action, 109 S.C. 683, 57 U.S.L.W. 4121, 28 Int'l Leg. Mat'ls 382 (1989), 83 Am. J. Int'l L. 565 (1989).

In para. 13 of Resolution 669 (1990), the U.N. Security Council reaffirmed that Iraq is "liable under the [Fourth Geneva] Convention in respect of the grave breaches committed by it, as are individuals who commit or order the commission of grave breaches." U.S. Dep't of State Dispatch, 1 Oct. 1990, at 129. By para. 8 of Resolution 674 (1990), the U.N. Security Council reminded Iraq of its liability under international law for "any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq." *Id.*, 5 Nov. 1990, at 240. *See also* U.N.S.C. Resolution 687 (1991) *reprinted in* 30 Int'l Leg. Mat'ls 846 (1991), which established a compensation commission to administer a fund from which claims against Iraq would be paid.

²² *See, e.g.*, Report of the Mission Dispatched by the Secretary-General on the Situation of Prisoners of War in the Islamic Republic of Iran and Iraq, U.N. Doc. S/20147, 24 Aug. 1988. Diplomatic pressure applied through neutral States or through international organizations has become a major factor in enforcing the law of armed conflict. During the Southeast Asia conflict, for example, the United States conducted a successful diplomatic effort through neutral States to prevent political "show trials" of our prisoners of war. Levie, *Maltreatment of Prisoners of War in Vietnam*, 48 Boston U.L. Rev. 323, 344-45 (1968), *reprinted in* 2 *The Vietnam War and International Law* 361, 382-83 (Falk ed. 1969). Accurate, thorough investigation of enemy violations greatly help in pursuing such diplomatic activity. *See* paragraph 6.2, note 18 (p. 6-8).

²³ *See* paragraph 6.2.3 (p. 6-16).

²⁴ *See* paragraph 6.2.5 (p. 6-21).

²⁵ GWS, art. 8; GWS-Sea, art. 8; GPW, art. 8, GC, art. 9; GP I, arts. 2(c) & 5; de Preux, *Synopsis I: Protecting Power*, 1985 Int'l Rev. Red Cross 86. The United States strongly supports the principle that Protecting Powers be designated and accepted without delay from the beginning of any conflict. Matheson, *Remarks*, paragraph 6.1, note 1 (p. 6-1), at 428-29. That principle is contained in GP I, art. 5, but not unequivocally, and is still subject, in the last instance, to refusal by the nation in question. *Id.* The United States thus failed to obtain one of its "basic objectives" in the negotiations that produced art. 5. Sofaer, *Remarks*, paragraph 6.2, note 18 (p. 6-8), at 469-70.

Prior to its entry into World War II, the United States acted as protecting power for British prisoners of war in Europe. Subsequently, the Swiss assumed this duty for both the United States and Great Britain. Since World War II, the protecting power system has not worked well because some countries refuse to permit on-site inspection. There was no protecting
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finding a nation which the opposing belligerents will regard as truly neutral, international humanitarian organizations, such as the International Committee of the Red Cross, have been authorized by the parties to the conflict to perform at least some of the functions of a Protecting Power.²⁶

6.2.2 The International Committee of the Red Cross (ICRC). The ICRC is a private, nongovernmental, humanitarian organization based in Geneva, Switzerland. The ruling body of the ICRC is composed entirely of Swiss citizens and is staffed mainly by Swiss nationals.²⁷ (The ICRC is distinct from and should not be confused with the various national Red Cross societies such as the American National Red Cross.)²⁸ Its principal purpose is to provide protection and assistance to the victims of armed conflict.²⁹ The Geneva

²⁵(...continued)

power for U.S. prisoners of war during the conflicts in Korea, Southeast Asia, or Kuwait/Iraq. In fact, since 1949, a Protecting Power (Switzerland) was appointed only in the following cases: the Suez conflict in 1956, the Goa conflict in 1961 and the war between India and Pakistan in 1971-1972 (although in the latter case the mandate of Switzerland was not understood in the same way by both parties). Hay, *The ICRC and International Humanitarian Issues*, 1984 *Int'l Rev. Red Cross* 3, 5. During the Falklands/Malvinas conflict, Switzerland and Brazil, although not formally appointed as Protecting Powers for the United Kingdom and Argentina respectively, exercised functions of an intermediary and communicated information. Junod, *Protection of the Victims of Armed Conflict, Falkland-Malvinas Islands* (1982), at 20 (1984); ICRC, *Commentary* 77 n.2.

²⁶ The Conventions allow the ICRC to perform some duties of the Protecting Power if such a power cannot be found and if the detaining power allows it to so act. GWS, art. 10; GWS-Sea, art. 10; GPW, art. 10; GC, art. 11; GP I, art. 5; *see* Peirce, *Humanitarian Protection for the Victims of War: The System of Protecting Powers and the Role of the ICRC*, 90 *Mil. L. Rev.* 89 (1980).

In Korea and in Southeast Asia, for example, the ICRC acted in its traditional humanitarian role for North Korean, Chinese, Viet Cong and North Vietnamese prisoners in the hands of the United States and its allies notwithstanding refusal by North Korea and North Vietnam to provide ICRC access to prisoners in their hands. Levie, *Maltreatment of Prisoners of War in Vietnam*, 48 *Boston U. L. Rev.* 323 (1968), *reprinted in* Schmitt & Green at chap. V; Levie, 2 *Code of International Armed Conflict* 312; *The International Committee and the Vietnam Conflict*, 1966 *Int'l Rev. Red Cross* 399; *Activities of the ICRC in Indochina from 1965 to 1972*, 1973 *Int'l Rev. Red Cross* 27.

The ICRC also visited Iraqi POWs held by Coalition Forces in Saudi Arabia during the Gulf War. Iraq, however, refused ICRC access to Coalition POWs held in Iraq. *ICRC Bulletin*, March 1991, at 2.

²⁷ Given the increase in the number of situations in which the ICRC is being called upon to act, it is becoming common for the ICRC to appoint non-Swiss nationals as post and field officers.

²⁸ Statutes of the International Red Cross and Red Crescent Movement, arts. 1 & 5 (1986), *reprinted in* 1987 *Int'l Rev. Red Cross* 29, 32. The ICRC bases its activities on the principles of neutrality and humanity, and is part of the International Red Cross and Red Crescent Movement. Some national Red Cross societies are under government control.

²⁹ Statutes of the International Red Cross and Red Crescent Movement, art. 5(2)(d) (1986), 1987 *Int'l Rev. Red Cross* 33. *See* While & Raymer, *A Little Humanity: the International Committee of the Red Cross*, 170 *National Geographic*, November 1986, at 647-79.

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Conventions recognize the special status of the ICRC and have assigned specific tasks for it to perform, including visiting and interviewing prisoners of war,³⁰ providing relief to the civilian population of occupied territories,³¹ searching for information concerning missing persons,³² and offering its "good offices" to facilitate the establishment of hospital and safety zones.³³ Under its governing statute, the ICRC is dedicated to work for the faithful application of the Geneva Conventions, to endeavor to ensure the protection of military and civilian victims of armed conflict, and to serve as a neutral intermediary between belligerents.³⁴

²⁹(...continued)

The ICRC's responsibility to endeavor to ensure the protection of victims extends not only to international and non-international armed conflicts and their direct results, but also to internal strife. Red Cross Movement Statute, art. 5(2)(d). Art. 5 also tasks the ICRC with a number of other functions.

³⁰ The ICRC is also authorized to visit and interview detained or interned civilians in international armed conflicts. All such interviews must be without witnesses present. GPW, art. 126; GC, arts. 30(3), 76(6), 126 & 143(2).

³¹ GC, arts. 59, 61 & 142.

³² GPW, art. 123, and GC, art. 140; GP I, art. 33, for State party thereto. The ICRC is also responsible under these articles for transmitting family messages to PWs and interned civilians.

³³ GWS, art. 23(3); GC, art. 14(3). The ICRC is also entitled to receive requests for aid from protected persons (GC art. 30) and to exercise its right of initiative (Red Cross Movement Statute, art. 5(3)). The ICRC may ask the parties to a conflict to agree to its discharging other humanitarian functions in the event of non-international armed conflicts (common article 3) and international armed conflicts (GWS, art. 9; GWS-Sea, art. 9; GPW, art. 9; GC, art. 10). Hay, paragraph 6.2.1, note 25 (p. 6-11) at 6. The ICRC is now also authorized to act in cases of internal strife. Red Cross Movement Statute, art. 5(2)(d).

³⁴ The 1986 Red Cross Movement Statute (art. 5(2)(c)) expanded the ICRC's mandate to include working for the "faithful application of international humanitarian law applicable in armed conflicts." See Forsythe, Human Rights and the International Committee of the Red Cross, 12 Human Rights Q. 265 (1990).

The ICRC has defined "international humanitarian law applicable in armed conflicts" as:

[I]nternational rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or noninternational armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict. The expression "international humanitarian law applicable in armed conflicts" is often abbreviated to "international humanitarian law" or "humanitarian law."

1981 Int'l Rev. Red Cross 76.

These rules are derived from the Law of the Hague and the Law of Geneva. The Law of the Hague deals principally with weapons and methods of warfare and was codified by the 1899 and 1907 Hague Peace Conferences. The law relating to the protection of war victims has been contained in the various Geneva Conventions (of 1864, 1906, 1929, and 1949). The two traditions (Hague and Geneva) have been somewhat merged in GP I, since Part III of GP I deals with methods and means of warfare. As a result, a new term, "rules of international law applicable in armed conflict," was introduced by GP I to encompass "the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict

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³⁴(...continued)

are Parties and the generally recognized principles and rules of international law applicable in armed conflict" (GP I, art. 2(b)). Although this term has substantially the same meaning as the ICRC's terms, the ICRC's role does not extend to supervision of the conduct of hostilities.

The ICRC has issued the following internal guidelines to govern its activities in the event of breaches of the law:

1. Steps taken by the ICRC on its own initiative

General rule: The ICRC shall take all appropriate steps to put an end to violations of international humanitarian law or to prevent the occurrence of such violations. These steps may be taken at various levels according to the gravity of the breaches involved.

However, they are subject to the following conditions:

Confidential character of steps taken: In principle these steps will remain confidential.

Public statements: The ICRC reserves the right to make public statements concerning violations of international humanitarian law if the following conditions are fulfilled:

- the violations are major and repeated;
- the steps taken confidentially have not succeeded in putting an end to the violations;
- such publicity is in the interest of the persons or populations affected or threatened;
- the ICRC delegates have witnessed the violations with their own eyes, or the existence and extent of those breaches were established by reliable and verifiable sources. . . .

1981 Int'l Rev. Red Cross 81-83.

The ICRC made overt representations regarding the Iran-Iraq War. *See* 1983 Int'l Rev. Red Cross 220-22 (press release of 11 May 1983 describing appeal of 7 May 1983 to the nations party to the Geneva Conventions); 1984 *id.* 113-15 (press release of 15 Feb. 1984 regarding appeal to governments of 10 Feb. 1984); 1984 *id.* 357-58 (press release describing appeal to governments of 24 Nov. 1984). The ICRC issued a press release regarding misuse of the Red Cross emblem in Lebanon, 1985 Int'l Rev. Red Cross 316-17; a press release regarding the Afghan Conflict on 20 May 1984, 1985 *id.* 239-40; and a press release (no. 1705) regarding the escalation of fighting in Bosnia-Herzegovina on 10 April 1992.

The ICRC Guidelines provide:

Special rule: The ICRC does not as a rule express any views on the use of arms or methods of warfare. It may, however, take steps and, if need be, make a public statement if it considers that the use or the threat to make use of a weapon or method of warfare gives rise to an exceptionally grave situation.

Such situations arose during the course of the Iran-Iraq War. ICRC, Annual Report 1984, at 60-61 (7 March 1984 report on the use of prohibited weapons, and 7 June 1984 press release on the bombing of Iraqi and Iranian cities); 1987 Int'l Rev. Red Cross 217 (appeal of 11 Feb. 1987 regarding bombing of cities); ICRC Bull., April 1988, at 4 (10 March 1988 press release protesting against bombing of cities, and 23 March 1988 press release condemning use of chemical weapons in the province of Sulaymaniyah).

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³⁴(...continued)

For the appeals and notes verbale issued by the ICRC to the parties to the Persian Gulf Conflict, *see* 1990 Int'l Rev. Red Cross 444, 1991 *id.* 22-30 and 211-14.

The ICRC Guidelines continue:

2. Reception and transmission of complaints

Legal basis: In conformity with article 6(4) of the Statutes of the International Red Cross, the ICRC is entitled to take cognizance of "complaints regarding alleged breaches of the humanitarian Conventions".

Complaints from a party to a conflict or from the National Society of a party to a conflict: The ICRC shall not transmit to a party to a conflict (or to its National Red Cross or Red Crescent Society) the complaints raised by another party to that conflict (or by its National Society) unless there is no other means of communication and, consequently, a neutral intermediary is required between them.

Complaints from third parties: Complaints from third parties (governments, National Societies, governmental or nongovernmental organizations, individual persons) shall not be transmitted.

If the ICRC has already taken action concerning a complaint it shall inform the complainant inasmuch as it is possible to do so. If no action has been taken, the ICRC may take the complaint into consideration in its subsequent steps, provided that the violation has been recorded by its delegates or is common knowledge, and insofar as it is advisable in the interest of the victims.

The authors of such complaints may be invited to submit them directly to the parties in conflict.

Publicity given to complaints received: As a general rule the ICRC does not make public the complaints it receives. It may publicly confirm the receipt of a complaint if it concerns events of common knowledge and, if it deems it useful, it may restate its policy on the subject.

3. Requests for inquiries

The ICRC can only take part in an inquiry procedure if so required under the terms of a treaty or of an *ad hoc* agreement by all the parties concerned. It never sets itself up, however, as a commission of inquiry and limits itself to selecting, from outside the institution, persons qualified to take part in such a commission.

The ICRC shall moreover not take part in an inquiry procedure if the procedure does not offer a full guarantee of impartiality and does not provide the parties with means to defend their case. The ICRC must also receive an assurance that no public communications on an inquiry request or on the inquiry itself shall be made without its consent.

As a rule, the ICRC shall only take part in the setting up of a commission of inquiry, under the above-stated conditions, if the inquiry is concerned with infringements of the Geneva Conventions or of their 1977 Protocols. It shall on no account participate in the organization of a commission if to do so would hinder or prevent it from carrying out its traditional activities for the victims of armed conflicts, or if there is a risk of jeopardizing its reputation of impartiality and neutrality. . . .

4. Requests to record violations

If the ICRC is asked to record the result of a violation of international humanitarian law, it shall only do so if it considers that the presence of its delegates will facilitate the discharge of its humanitarian tasks, especially if it is necessary to assess victims' requirements in order to be able to help them. Moreover, the

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6.2.3 Reprisal. A reprisal is an enforcement measure under the law of armed conflict consisting of an act which would otherwise be unlawful but which is justified as a response to the unlawful acts of an enemy.³⁵ The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict. Reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property.³⁶

³⁴(...continued)

ICRC shall only send a delegation to the scene of the violation if it has received an assurance that its presence will not be used to political ends.

These guidelines do not deal with violations of international law or humanitarian principles to the detriment of detainees whom they have to visit as part of the activities which the ICRC's mandate requires it to carry out in the event of internal disturbances or tensions within a given State. Since this type of activity is based on *ad hoc* agreements with governments, the ICRC follows specific guidelines in such situations.

1981 Int'l Rev. Red Cross 81-83. *See also* ICRC Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law, 1988 *id.* 9-37.

³⁵ Kalshoven, *Belligerent Reprisals* 33 (1971). McDougal and Feliciano have defined reprisal during armed conflict as follows:

Legitimate war reprisals refer to acts directed against the enemy which are conceded to be generally unlawful, but which constitute an authorized reaction to prior unlawful acts of the enemy for the purpose of deterring repetition of such antecedent acts. The doctrine of reprisal thus permits the use of otherwise lawless violence as a response to the lawless violence.

McDougal & Feliciano 679-80.

³⁶ Reprisals may lawfully be taken against enemy individuals who have not yet fallen into the hands of the forces making the reprisals. Under customary international law, members of the enemy civilian population are legitimate objects of reprisals. The United States nonetheless considers reprisal actions against civilians not otherwise legitimate objects of attack to be inappropriate in most circumstances. For nations party to GP I, enemy civilians and the enemy civilian population are prohibited objects of reprisal. The United States has found this new prohibition to be militarily unacceptable because renunciation of the option of such attacks "removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict." Sofaer, *Remarks*, paragraph 6.2, note 18 (p. 6-8) at 469. For a contrary view, *see* Kalshoven, *Noncombatant Persons*, in Robertson at 306. *See* paragraph 6.2.3.2 (p. 6-18) for a further discussion of immunity from reprisals.

Collective loss of rights for residents of occupied territory is clearly prohibited by art. 33 of GC. Internment and assigned residence, whether in the occupying power's natural territory or in occupied territory, are "exceptional" measures to be taken only after careful consideration of each individual case. These strict limitations are a direct reaction to the abuses which occurred during World Wars I and II. *See* 4 Pictet 256-58. *See also* Terry, *State Terrorism: A Juridical Examination in Terms of Existing International Law*, 10 J. Pal. Studies 94 (1980) for a thorough discussion of illegal collective measures in occupied territory.

Paragraph 6.2.3 deals only with reprisals taken by one belligerent in response to illegal acts of warfare performed by the armed forces of an enemy. Paragraph 6.2.3 does not deal with the collective measures an occupying power may take against the population of an occupied territory in response to illegitimate acts of hostility committed by the civilian population. Although art. 50 of HR provided that no general penalty, pecuniary or otherwise, may be inflicted upon the population of
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6.2.3.1 Requirements for Reprisal. To be valid, a reprisal action must conform to the following criteria:

1. Reprisal must be ordered by an authorized representative of the belligerent government.³⁷ (For the rule applicable to the United States, see paragraph 6.2.3.3).
2. It must respond to illegal acts of warfare committed by an adversary government, its military commanders, or combatants for which the adversary is responsible. Anticipatory reprisal is not authorized.³⁸
3. When circumstances permit, reprisal must be preceded by a demand for redress by the enemy of his unlawful acts.³⁹

³⁶(...continued)

occupied territory on account of acts of individuals "for which they cannot be regarded as jointly and severally responsible," and contemplated that *bona fide* fines, in a reasonable amount, intended to insure respect for the rules and decrees in force, were lawful (Levie, 2 The Code of International Armed Conflict 743). GC, art. 33(1) provides that penal liability is personal:

No protected person may be punished for an offense he or she has not personally committed. Collective penalties . . . are prohibited.

Although the collective measures taken by an occupying power against the population of an occupied territory are frequently referred to as "reprisals," they should be clearly distinguished from reprisals between belligerents dealt with here. Nevertheless, it should be remembered that GC arts. 4 & 33(3) prohibit reprisals against civilians in occupied territory. Thus, those acts permitted cannot amount to penal punishments or reprisals. *See also* Lowe, The Commander's Handbook on the Law of the Naval Operations and the Contemporary Law of the Sea, in Robertson at 133-34.

³⁷ *See* AFP 110-31, para. 10-7c(8). *See also* paragraph 6.2.3.3 (p. 6-19).

³⁸ A careful inquiry by the injured belligerent into the alleged violating conduct should precede the authorization of any reprisal measure. This is subject to the important qualification that, in certain circumstances, an offended belligerent is justified in taking immediate reprisals against illegal acts of warfare, particularly in those situations where the safety of his armed forces would clearly be endangered by a continuance of the enemy's illegal acts. *See* paragraph 6.2.3.3 (p. 6-19) regarding authority to order reprisals.

³⁹ There must be reasonable notice that reprisals will be taken. Green, The Contemporary Law of Armed Conflict (1993) at 119. The degree of notice required will depend upon the particular circumstances of each case. Notice is normally given after the enemy's violation but may, in appropriate circumstances, predate an imminent violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be taken otherwise. *See also* FM 27-10, para. 497b.

4. Its purpose must be to cause the enemy to cease its unlawful activity. Therefore, acts taken in reprisal should be brought to the attention of the enemy in order to achieve maximum effectiveness.⁴⁰ Reprisal must never be taken for revenge.⁴¹

5. Reprisal must only be used as a last resort when other enforcement measures have failed or would be of no avail.⁴²

6. Each reprisal must be proportional to the original violation.⁴³

7. A reprisal action must cease as soon as the enemy is induced to desist from its unlawful activities and to comply with the law of armed conflict.⁴⁴

6.2.3.2 Immunity From Reprisal. Reprisals are forbidden to be taken against:

1. Prisoners of war⁴⁵ and interned civilians⁴⁶

⁴⁰ Acts taken in reprisal may also be brought to the attention of neutrals if necessary to achieve maximum effectiveness. Since reprisals are undertaken to induce an adversary's compliance with the recognized rules of armed conflict, any action taken as a reprisal must be announced as a reprisal and publicized so that the adversary is aware of its obligation to abide by the law and to ensure that the reprisal action is not, itself, viewed as an unlawful act. *See* McDougal & Feliciano 689 and AFP 110-31, para. 10-7c.

⁴¹ FM 27-10, para. 497d.

⁴² *Id.*, para. 497b.

⁴³ This rule is not one of strict equivalence because the reprisal will usually be somewhat greater than the initial violation that gave rise to it. However, care must be taken that the extent of the reprisal is measured by some degree of proportionality and not solely by effectiveness. Effective but disproportionate reprisals cannot be justified by the argument that only an excessive response will forestall a further transgression. *Compare* McDougal & Feliciano 682-83.

The acts resorted to by way of reprisal need not conform in kind to those complained of by the injured belligerent. The reprisal action taken may be quite different from the original act which justified it, but should not be excessive or exceed the degree of harm required to deter the enemy from continuance of his initial unlawful conduct. McDougal & Feliciano 682.

If an act is a lawful reprisal, it cannot lawfully be a basis for a counter-reprisal. Under international law, there can be no reprisal against a lawful reprisal.

⁴⁴ When, for example, one party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, then any action taken by another party to "right" the situation cannot be justified as a lawful reprisal.

⁴⁵ GPW, art. 13(3); GPW 1929, art. 2(3). Prisoners of war are defined in GPW, art. 4A; *see* paragraph 11.7 (p. 11-9). In light of the wide acceptance of the 1949 Geneva Conventions by the nations of the world today, this prohibition is part of customary law. Meron, *The Geneva Conventions as Customary Law*, 81 Am. J. Int'l L. 348 (1987); Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989). *Compare* NWIP 10-2, para. 310e(1) n.8 ("War crimes tribunals have considered the rule forbidding reprisals against prisoners of war as a codification of existing customary law. Hence, this (continued...)

2. Wounded, sick, and shipwrecked persons⁴⁷

3. Civilians in occupied territory⁴⁸

4. Hospitals and medical facilities, personnel,⁴⁹ and equipment, including hospital ships, medical aircraft, and medical vehicles.⁵⁰

6.2.3.3 Authority to Order Reprisals. The President alone may authorize the taking of a reprisal action by U.S. forces.⁵¹ Although reprisal is lawful when the foregoing requirements are met, there is always the risk that it will trigger retaliatory escalation

⁴⁵(...continued)

prohibition may be regarded as binding upon all States regardless of whether or not they are parties to the 1949 Convention.") with Levie, *Prisoners of War* 366-69 (describing contrary State practice during both World Wars and the Korean and Vietnam conflicts). The taking of prisoners by way of reprisal for acts previously committed (so-called "reprisal prisoners") is likewise forbidden.

⁴⁶ GC, art. 33(3); *see also* paragraph 11.8 (p. 11-15).

⁴⁷ GWS, art. 46, GWS-Sea, art. 47, as defined in GPW, art. 4A.

⁴⁸ GC, art. 33, as defined in GC, art. 4. Also immune from reprisals under the Geneva Conventions are the property of such inhabitants, enemy civilians in a belligerent's own territory, and the property of such civilians. GC, art. 33, as defined in GC, art. 4.

Civilians not protected from reprisal under these provisions are nationals of a nation not bound by the GC, nationals of a neutral nation in the territory of a belligerent, and nationals of a cobelligerent so long as their nation has normal diplomatic relations with the nation in whose territory they are. These exceptions are eliminated under GP I for nations bound thereby.

⁴⁹ GWS, art. 46, GWS Sea, art. 47. Medical personnel are defined in GWS, arts. 24-26 and GWS-Sea, art. 36. *See* paragraph 11.5 (p. 11-6). Chaplains attached to the armed forces (GWS, art. 46, GWS-Sea, art. 47) as set forth in GWS, art. 24 and GWS-Sea, art. 36, are also immune from reprisal. *See also* Green, *Essays on the Modern Law of War* (1985) at chap VI.

⁵⁰ Fixed establishments and mobile medical units of the medical service, hospital ships, coastal rescue craft and their installations, medical transports, and medical aircraft are immune from reprisal under GWS, art. 46, GWS-Sea, art. 47, as set forth in GWS, arts. 19, 20, 35 & 36; GWS-Sea, arts. 22, 24, 25, 27 & 39.

McDougal and Feliciano, in commenting on the question of immunity from reprisal, argue that:

The cumulative effect of the Geneva Conventions of 1949 is that all enemy persons who find themselves within a belligerent's effective control are immunized as targets of reprisal. Practically the only enemy persons who may be lawfully subjected to reprisals are those on the high seas and in the enemy's own territory.

McDougal & Feliciano 684.

⁵¹ *See also* paragraph 6.2.3.1 (p. 6-17).

(counter-reprisals) by the enemy.⁵² The United States has historically been reluctant to

⁵² McDougal & Feliciano 689. Other factors which governments will usually consider before taking reprisals include the following:

1. Reprisals may have an adverse influence on the attitudes of governments not participating in an armed conflict.
2. Reprisals may only strengthen enemy morale and underground resistance.
3. Reprisals may only lead to counter-reprisals by an enemy, in which case the enemy's ability to retaliate effectively is an important factor.
4. Reprisals may render enemy resources less able to contribute to the rehabilitation of an area after the cessation of hostilities.
5. The threat of reprisals may be more effective than their actual use.
6. Reprisals, to be effective, should be carried out speedily and should be kept under control. They may be ineffective if random, excessive, or prolonged.
7. In any event, the decision to employ reprisals will generally be reached as a matter of strategic policy. The immediate advantage sought must be weighed against the possible long-range military and political consequences.

AFP 110-31, para. 10-7d, *citing* NWIP 10-2, ch. 3, n. 6.

Many attempted uses of reprisals in past conflicts have been unjustified either because the reprisals were not undertaken to deter violations by an adversary or were disproportionate to the preceding unlawful conduct. In addition to the legal requirements which regulate resort to reprisals, there are various practical factors which governments will consider before taking reprisals. For example, when appeal to the enemy for redress has failed, it may be a matter of policy to consider before resorting to reprisals, whether the opposing forces are not more likely to be influenced by a steady adherence to the law of armed conflict. The relative importance of these political and practical factors depends upon the degree and kind of armed conflict, the character of the adversary and its resources, and the importance of nations not participating in hostilities. *See* Colbert, *Retaliation in International Law* (1948); 10 *Whiteman* 317-39; Kalshoven, *Belligerent Reprisals* (1971); and Greenwood, *Reprisals and Reciprocity in the New Law of Armed Conflict*, *in* *Armed Conflict and the New Law* (Meyer ed. 1989) at 227 for thorough discussions of reprisals.

The following activities, otherwise prohibited under the law of armed conflict, are among those which may lawfully be taken in reprisal:

1. Restricted means and methods of warfare set forth in the Hague Conventions of 1907 and, for parties thereto, in GP I, unless specifically prohibited as a means of reprisal. Among the otherwise unlawful means and methods of warfare that may be employed as reprisal are:
 - a. employing poison or poisoned weapons;
 - b. killing, wounding or capturing treacherously or perfidiously individuals belonging to the hostile nation or army, such as by feigning incapacitation by wounds or sickness or of civilian noncombatant status;
 - c. killing or wounding an enemy who, having laid down his arms, or having no longer a means of defense, has surrendered at discretion;

(continued...)

resort to reprisal for just this reason.

6.2.4 Reciprocity. Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them.⁵³ A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to humanitarian rules of law that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions.⁵⁴ The decision to consider the United States released from a particular obligation following a major violation by the enemy will be made by the NCA.

6.2.5 War Crimes Under International Law. For the purposes of this publication, war crimes are defined as those acts which violate the law of armed conflict, that is, the rules established by customary and conventional international law regulating the conduct of

⁵²(...continued)

d. declaring that no quarter will be given;

e. employing weapons, projectiles, or material or methods of warfare of a nature to cause superfluous injury or unnecessary suffering;

f. making improper use of a flag of truce, of the national, or neutral flag or of the military insignia and uniform of the enemy as well as the distinctive badges of the Geneva Conventions;

g. use of unanchored submarine contact mines or mines and torpedoes which do not render themselves harmless within one hour after they have broken loose from their moorings or have been fired.

2. Military or other hostile use of environmental modification techniques prohibited by the 1977 Environmental Modification Convention.

3. For nations party thereto, the use of weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays, in violation of Protocol I to the 1980 Conventional Weapons Convention.

4. For nations party thereto, the use of mines, booby traps and other devices, in violation of Protocol II to the Conventional Weapons Convention.

5. For nations party thereto (not including the United States), the use of incendiary weapons in a manner which violates Protocol III to the Conventional Weapons Convention.

For a discussion of U.S. objections to new restrictions on reprisal set forth in GP I, *see* paragraph 6.2.3, note 36 (p. 6-16). *Compare* Hampson, *Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949*, 37 *Int'l & Comp. L.Q.* 818 (1988). *See also* Aldrich, *Compliance with International Humanitarian Law*, 1991 *Int'l Rev. Red Cross* 294, 301-03, who examines the need for States contemplating ratification of GP I, with and without accepting the competence of the Fact Finding Commission, to reserve one or more of the provisions on reprisals.

⁵³ Most truces and armistices are of this nature.

⁵⁴ Vienna Convention on the Law of Treaties, art. 60(5) *reprinted in* 8 *Int'l Leg. Mat'ls* 679 (1969); de Preux, *The Geneva Conventions and Reciprocity*, 1985 *Int'l Rev. Red Cross* 25 (those portions of GP I & II supplementing the 1949 Geneva Conventions are also not subject to the principle of reciprocity).

warfare, and which have been generally recognized as war crimes. Acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population.⁵⁵ Belligerents have the obligation under international law to punish

⁵⁵ War crimes, as defined in paragraph 6.2.5, are distinguished from "crimes against peace" and "crimes against humanity." This distinction may be seen from art. 6 of the Charter of the International Military Tribunal at Nuremberg, which defined the Tribunal's jurisdiction as follows:

The following acts, or any one of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility [see paragraph 6.1.4 (p. 6-6)]:

(a) *Crimes against peace*: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment, or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

U.S. Naval War College, *International Law Documents 1944-45*, at 254 (1946); AFP 110-20, at 3-183.

Although the distinction between crimes against peace and war crimes is readily apparent, there is a certain difficulty in distinguishing war crimes from crimes against humanity. The precise scope of those acts included within the category of crimes against humanity is not entirely clear from the definition given in art. 6 of the Charter of The International Military Tribunal at Nuremberg. A survey of the judgments of the various tribunals which tried individuals for crimes against humanity committed during World War II may be summarized in the following manner:

1. Certain acts constitute both war crimes and crimes against humanity and may be tried under either charge.
2. Generally, crimes against humanity are offenses against the human rights of individuals, carried on in a widespread and systematic manner. Thus, isolated offenses have not been considered as crimes against humanity, and courts have usually insisted upon proof that the acts alleged to be crimes against humanity resulted from systematic governmental action.
3. The possible victims of crimes against humanity constitute a wider class than those who are capable of being made the objects of war crimes and may include the nationals of the State committing the offense as well as stateless persons.
4. Acts constituting crimes against humanity must be committed in execution of, or in connection with, crimes against peace, or war crimes.

See Schwelb, *Crimes Against Humanity*, 23 *Brit. Y.B. Int'l L* (1946) 178; Dinstein, *Crimes Against Humanity*, in *Theory of International Law at the Threshold of the 21st Century* (Makarczyk ed. 1996); Levie, *Violation of Human Rights as War Crimes*, 1995 *Isr. Y.B. Human Rights* 119.

(continued...)

⁵⁵(...continued)

On 21 November 1947, the United Nations General Assembly adopted Resolution 177(II) affirming "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" and directing the International Law Commission of the United Nations to:

- (a) Formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, and
- (b) Prepare a draft code of offenses against the peace and security of mankind

The text of the principles formulated by the United Nations International Law Commission, with a commentary, is *reprinted in* Report of the International Law Commission Covering its Second Session, General Assembly Official Records: Fifth Session, Supp. No. 12 (A/1316), Pt. III, pp. 11-14 (1950); Yearbook of the International Law Commission 1950, at 374-80; and Schindler & Toman 923-24. That text reads as follows:

Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI. The crimes hereinafter set out are punishable as crimes under international law: [Here follow substantially similar definitions of crimes against peace, war crimes and crimes against humanity, as are given in art. 6 of the Charter of the International Military Tribunal at Nuremberg, quoted at the beginning of this note.]

Principle VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

For a discussion of difficulties in punishing war crimes committed in non-international armed conflicts, *see* Plattner, The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts, 1990 Int'l Rev. Red Cross 409. *See also* Meron, International Criminalization of Internal Atrocities, 89 Am. J. Int'l L. 554 (1995); Bothe, War Crimes in Non-International Conflicts *in* War Crimes in International Law (Dinstein & Tabory eds. 1996) at 293-306. For a comprehensive and chilling analysis of crimes against humanity committed by governments against their own populations, *see* Rummel, Death by Government (1994).

The International Tribunal for Yugoslavia, established in 1993 pursuant to U.N.S.C. Resolution 829 (*See* paragraph 6.1.3, note 13 (p. 6-5)), was empowered to prosecute persons for:

(continued...)

⁵⁵(...continued)

- a. Grave breaches of the Geneva Conventions of 1949;
- b. Violations of the laws or customs of war;
- c. Genocide; and
- d. Crimes against humanity.

In contrast, and reflecting the differing factual and legal setting between the conflict in the former Yugoslavia and that in Rwanda, the International Criminal Tribunal for Rwanda, established in 1994 pursuant to U.N.S.C. Resolution 955 (*See* paragraph 6.1.3, note 13 (p. 6-5)), was empowered to prosecute persons for:

- a. Genocide
- b. Crimes against humanity
- c. Violations of common article 3 and of GP II

Crimes against humanity are identically defined in art. 5 of the Statute for the International Tribunal for Yugoslavia and in art. 3 of the Statute for the International Criminal Tribunal for Rwanda as:

... the following crimes committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

The inclusion of rape on this listing of crimes against humanity represents a departure from Nuremberg where rape was neither mentioned in the Nuremberg Charter nor prosecuted as a war crime. However, GC, art. 27, provides that:

Women shall be especially protected against any attack on their honor, in particular against rape

The United States considers that GC, art. 27, and comparable provisions of GPW (arts. 13 & 14), establish rape as a war crime. *See* Meron, Comment: Rape as a Crime Under International Humanitarian Law, 87 Am. J. Int'l L. 425 (1993).

Genocide is defined in both Statutes (Yugoslavia, art. 4; Rwanda, art. 2) as:

... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

(continued...)

their own nationals, whether members of the armed forces or civilians, who commit war crimes.⁵⁶ International law also provides that belligerents have the right to punish enemy armed forces personnel and enemy civilians who fall under their control for such offenses.⁵⁷

The following acts are representative war crimes:⁵⁸

⁵⁵(...continued)

This definition is identical to that set forth in art. II of the U.N. Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 12 January 1951, 78 U.N.T.S. 277, *reprinted in* 11 Whiteman 849 [hereinafter Genocide Convention]. The Genocide Convention entered into force for the U.S. on 23 February 1989. The Genocide Convention Implementation Act of 1987, Pub. L. 100-606 of Nov. 4 1988, with commentary, is *reprinted in* 28 Int'l Leg. Mat'ls 754 (1989). It is important to note that genocide "whether committed in time of peace or in time of war is a crime under international law." (Genocide Convention, art. I).

⁵⁶ The most recent action of the United States with respect to this obligation occurred on 21 August 1996 when President Clinton signed into law the War Crimes Act of 1996. Pub. L. 104-192, 110 Stat. 2184, 18 U.S.C. 2401 *reprinted in* 35 Int'l Leg. Mat'ls 1539 (1996). The Act provides:

2401. War Crimes

(a) OFFENSE.-Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) CIRCUMSTANCES.-The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such breach is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) DEFINITIONS.-As used in this section, the term 'grave breach of the Geneva Conventions' means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party.

For a comprehensive discussion of military jurisdiction over war crimes committed by foreign nationals *see* Newton, Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes, 153 Mil. L. Rev. 1 (Summer 1996).

⁵⁷ With respect to "grave breaches" (*see* following note), parties to the Geneva Conventions of 1949 are obliged to search out, bring to trial and to punish all persons, regardless of nationality, who have committed or ordered to be committed, a grave breach of the Conventions. GWS, art. 49(2); GWS-Sea, art. 50(2); GPW, art. 129(2); GC, art. 146(2). *See* Flores, Repression of Breaches of the Law of War Committed by Individuals, 1991 Int'l Rev. Red Cross 247.

The cases of misconduct by U.S. combatants in Vietnam are analyzed through examination of court-martial convictions in Parks, Crimes in Hostilities, Marine Corps Gazette, Aug. 1976, at 16-22 & Sep. 1976, at 33-39.

⁵⁸ While any violation of the law of armed conflict is a war crime, certain crimes are defined as "grave breaches" by GWS, art. 50; GWS-Sea, art. 51; GPW, art. 130; GC, art. 147 if committed against persons or property protected by the Conventions. They include:

(continued...)

⁵⁸(...continued)

1. Willful killing, torture or inhuman treatment of protected persons;
2. Willfully causing great suffering or serious injury to body or health of protected persons;
3. Taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
4. Unlawful deportation or transfer or unlawful confinement of a protected person;
5. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; and,
6. Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial prescribed in the Geneva Conventions.

GP I, arts. 11(4) & 85(2-4), codify in greater detail the two separate categories of grave breaches. The first category relates to combat activities and medical experimentation and provides for the first time a meaningful standard by which such acts can be judged. A breach within this category requires (1) *willfulness* and (2) that *death or serious injury to body or health be caused* (art. 85(3)).

GP I provides that the following acts constitute grave breaches:

1. Making the civilian population or individual civilians the object of attack;
2. Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause extensive loss of life, injury to civilians and damage to civilian objects, as defined in article 57, paragraph 2(a)(iii);
3. Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2(a)(iii);
4. Making non-defended localities and demilitarized zones the object of attack;
5. Making a person the object of attack in the knowledge that he is *hors de combat*;
6. The perfidious use, in violation of article 37, of the distinctive emblem of the red cross, red crescent, or other protective sign recognized by the Conventions or this Protocol;
7. Physical mutilations;
8. Medical or scientific experiments; and,
9. Removal of tissue or organs for transplantation, except where these acts are justified in conformity with the state of health of the person or consistent with medical practice or conditions provided for in the Conventions.
 - (a) Exceptions may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

(continued...)

1. Offenses against prisoners of war, including killing without just cause; torture or inhuman treatment; subjection to public insult or curiosity; unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and denial of fair trial for offenses⁵⁹
2. Offenses against civilian inhabitants of occupied territory, including killing without just cause, torture or inhuman treatment, forced labor, deportation, infringement of religious rights, and denial of fair trial for offenses⁶⁰

⁵⁸(...continued)

- (b) Any willful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions above or fails to comply with these requirements is a grave breach of Protocol I.

The second category of grave breaches defined by GP I is in art. 85(4). The only requirement to be satisfied with respect to these offenses is *willfulness*.

1. The transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of article 49 of the [GC];
2. Unjustified delay in the repatriation of prisoners of war or civilians;
3. Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
4. Making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of article 53, subparagraph (b), and when such historic monuments, works of art and places or worship are not located in the immediate proximity of military objectives, and,
5. Depriving a person protected by the Conventions or referred to in paragraph 2 of Article 85 of fair and regular trial.

See also Levie, 2 The Code of International Armed Conflict 857-71; Burgos, The Taking of Hostages and International Humanitarian Law, 1989 Int'l Rev. Red Cross 196; and International Convention Against the Taking of Hostages, New York, December 17, 1979, 1316 U.N.T.S. 205, T.I.A.S. 11081.

⁵⁹ Principle VI(b), 1950 Nuremberg Principles (*see* note 55 (p. 6-22)); GPW, arts. 13, 17(4), 34-37, 52, 84, 87(3), 105 & 130; GP I, art. 75(2)(a).

⁶⁰ Principle VI(b), 1950 Nuremberg Principles; GC, arts. 27(1), 31-32, 49(6), 95(3), 100, 118(1) & 147; GP I, art. 75(2)(a); GP II, art. 4(2)(a).

3. Offenses against the sick and wounded, including killing, wounding, or mistreating enemy forces disabled by sickness or wounds⁶¹

4. Denial of quarter (i.e., killing or wounding an enemy *hors de combat* or making a genuine offer of surrender) and offenses against combatants who have laid down their arms and surrendered⁶²

5. Offenses against the survivors of ships and aircraft lost at sea, including killing, wounding, or mistreating the shipwrecked; and failing to provide for the safety of survivors as military circumstances permit⁶³

⁶¹ Lieber Code, art. 71; HR, art. 23(c); GWS, arts. 12(2) & 50; GP I, arts. 10, 41 & 85(3); GP II, arts. 4(1) & 7(1).

⁶² HR, arts. 23(c) & 23(d); GP I, art. 40; GP II, art. 4(1); *Trial of Von Ruchteschell*, 9 LRTWC 82 (British military court, Hamburg, 1947) (denial of quarter at sea). See paragraph 11.9.5 (p. 11-19) regarding use of the white flag.

⁶³ Principle VI(b), 1950 Nuremberg Principles; GWS-Sea, arts. 12(2) & 51. This rule was applied in the 1921 case of the *Llandovery Castle*, 16 Am. J. Int'l L. 708 (1922); and in a number of World War II cases, including *The PELEUS Trial*, 1 LRTWC 1 (British Military Court, Hamburg, 1945), *The Trial of Moehle*, 9 LRTWC 75 (British Military Court, Hamburg, 1946) and in the *Trial of Helmuth Von Ruchteschell*, 9 LRTWC 92 (1949). The PELEUS and Von Ruchteschell cases are summarized in Mallison 133-43 and in Jacobsen, A Juridical Examination of the Israeli Attack on the *U.S.S. Liberty*, 36 Nav. L. Rev. 48 & 50 (1986). Jacobsen 45-51 argues the Israeli machinegunning of liferafts on board and thrown from USS LIBERTY, after the attack on the LIBERTY was completed, falls within this prohibition. See paragraph 11.4 (p. 11-4). There was no prosecution of U.S. and Australian forces for the systematic killing of the Japanese survivors of the March 1943, Battle of the Bismark Sea, who were in lifeboats or clinging to wreckage. See 6 Morison, History of the United States Naval Operations in World War II, 62 *et seq.* (1950); Spector, Eagle Against the Sun 227-28 (1985); Dower, War Without Mercy: Race & Power in the Pacific War 67 (1986). Indeed the Commanding Officer of USS WAHOO was awarded the Navy Cross and an Army Distinguished Service Cross following his January 1943 patrol notwithstanding his slaughter of the survivors of WAHOO's torpedoing of a convoy of two freighters and a large transport. 2 Blair, Silent Victory 357-60 (1975); Dower 66-67 & n.94. Blair notes that, although the Commanding Officer

[D]escribed the killing of the hundreds (or thousands) of survivors of the transport . . . no question was raised about it in the glowing patrol report endorsements, where policy was usually set forth. Many submariners interpreted this--and the honors and publicity showered on [Captain] Morton and *Wahoo*--as tacit approval from the submarine high command. In fact, neither Lockwood [Commander Submarine Force Pacific] nor Christie [Commander Task Force 51] nor Fife [Commander Task Force 42] ever issued a policy statement on the subject. Whether other skippers should follow Morton's example was left up to the individual. Few did.

Blair 359-60. The following language of GWS-Sea, art. 12, makes clear that since the coming into force of the 1949 Geneva Conventions, such acts are unlawful:

Article 12

Members of the armed forces . . . who are at sea and who are . . . shipwrecked, shall be respected and protected in all circumstances, it being understood that the term "shipwreck" means shipwreck from any cause . . .

See Doswald-Beck at 136.

(continued...)

6. Wanton destruction of cities, towns, and villages or devastation not justified by the requirements of military operations; and bombardment, the sole purpose of which is to attack and terrorize the civilian population⁶⁴
7. Deliberate attack upon medical facilities, hospital ships, medical aircraft, medical vehicles, or medical personnel⁶⁵
8. Plunder and pillage of public or private property⁶⁶
9. Mutilation or other mistreatment of the dead⁶⁷
10. Employing forbidden arms or ammunition⁶⁸
11. Misuse, abuse, or firing on flags of truce or on the Red Cross device, and similar protective emblems, signs, and signals⁶⁹
12. Treacherous request for quarter (i.e., feigning surrender in order to gain a military advantage).⁷⁰

⁶³(...continued)

See also Hastings & Jenkins, *The Battle for the Falklands* 204 (1983); Middlebrook, *Operation Corporate: The Falklands War*, 1982, at 214 (1982); Middlebrook, *The Fight for the 'Malvinas'* 147 (1989) (shooting at shipwrecked British airmen at Port San Carlos 21 May 1982).

⁶⁴ HR, arts. 23(g) & 25; Hague IX, art. 1(1); Principle VI(b), 1950 Nuremberg Principles; GP I, art. 51(2); GP II, art. 13(2).

⁶⁵ GWS, arts. 19(1), 20 & 36(1); GWS-Sea, arts. 22-27 & 39(1); GC, arts. 18(1), 21, 22(1); GP I, arts. 12 & 22; GP II, art. 11; *Llandoverly Castle Case of Dithmar and Boldt*, German Reichgericht, 16 July 1921, 16 Am. J. Int'l L. 708 (1922).

⁶⁶ HR, arts. 28, 47 & 56; Hague IX, art. 7; Principle VI(b), 1950 Nuremberg Principles; GWS, art. 15(1); GWS-Sea, art. 18(1); GC, arts. 16(2) & 33(2); GP II, arts. 4(2)(g) & 8.

⁶⁷ GWS, art. 15(1); GWS-SEA, art. 18(1); GC, art. 16(2); GP I, art. 34(1); GP II, art. 8.

⁶⁸ HR, arts. 23(a) & 23(e); GP I, art. 35(2).

⁶⁹ HR, arts. 23(f) & 32-34; 1923 Radio Rules, art. 10 (*reprinted in* 32 Am. J. Int'l L. Suppl. 10, (1938)); Levie, 2 *The Code of International Armed Conflict* 871 (distress signals); GP I, arts. 37(1), 38(1) & 85(3)(f); GWS, arts. 53 & 54; GWS-Sea, arts. 43 & 45; GP I, arts. 18(8), 38 & 85(3)(f); *Trial of Heinz Hagendorf*, 11 LRTWC 146 (U.S. military court at Dachau, 1946). See 10 Whiteman 398 (white flag lawfully fired on during Korean War); Higginbotham, *Case Studies in the Law of Land Warfare II: The Campaign in the Falklands*, *Military Rev.*, Oct. 1984, at 53.

⁷⁰ HR, art. 23(b); GP I, art. 40.

6.2.5.1 Trials During Hostilities. Although permitted under international law, nations rarely try enemy combatants while hostilities are in progress.⁷¹ Such trials might provoke undesirable actions from an enemy and complicate humanitarian protections applicable to one's own nationals.⁷² Trials of unlawful combatants have been held.⁷³ Yet, for similar reasons, such trials may be less than rigorously pursued during the course of hostilities. (Regarding trials of a nation's own forces, see paragraph 6.2.5.3.)

⁷¹ Exceptions include limited Russian trials in 1943 (McDougal & Feliciano 704) and the trial of Doolittle's raiders in Japan (Glines, *Doolittle's Raiders* (1964); Schultz, *The Doolittle Raid* 305-17, 347-48 (1988); and Spaight 58). This is not to deny that atrocities were committed against prisoners of war, but only to suggest that this method of adjudication is not routinely employed against lawful combatants.

⁷² GPW art. 85 does not prohibit such trials, but does require that prisoners of war retain, even if convicted, the benefits of that Convention. Many former Communist nations reserved art. 85, in various forms, *e.g.*:

The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.

The United States explicitly rejected these reservations while accepting treaty relations with the reserving countries as to the remaining unreserved provisions. The reservations are *quoted in* Schindler & Toman 563-94. The reservations to art. 85 are *analyzed in* Pilloud, *Reservations to the Geneva Conventions of 1949*, 1976 *Int'l Rev. Red Cross* 170-80.

For the United States reaction to the threat by the North Vietnamese Government to try U.S. prisoners of war, *see* the 13 July 1966 memorandum of the Assistant Legal Adviser, Department of State, *reprinted in* 10 *Whiteman* 231 and Moore, *Law and The Indo-China War* 635 (1972).

⁷³ *See* paragraphs 6.2.5.3 (p. 6-32) and 12.7.1 (p. 12-8) and 10 *Whiteman* 150-95.

Historically, unlawful combatants were often not afforded the benefit of trials although this is now required by GWS, art. 49; GWS-Sea, art. 50; GPW, art. 129; GC, art. 146; and, for nations party thereto, GP I, art. 75. *Ex Parte Quirin*, 317 U.S. 1 (1942), involved the trial of unlawful combatants who were German soldiers smuggled into the United States via submarine who discarded their uniforms upon entry, but were captured prior to committing acts of sabotage (*see* paragraph 12.5.3 (p. 12-6)).

On historical precedents for war crime trials of adversary personnel, particularly unlawful combatants, *see* Cowles, *Universality of Jurisdiction over War Crimes*, 33 *Cal. L. Rev.* 177, 203 (1945). He notes:

War criminals . . . are especially found among irregular combatants and former soldiers who have quit their posts to plunder and pillage . . . such as bandits, brigands, buccaneers, bushwackers, filibusters, franc-tireurs, free-booters, guerrillas, ladrones, marauders, partisans, pirates and robbers . . . Historically, brigandage has been to a large extent international in character . . . Brigandage is a thriving byproduct of war. The object . . . is to bring out the connection between the past and the present . . . It is not meant to be suggested that war crimes committed by members of regularly constituted units are any less amenable to such jurisdiction.

6.2.5.2 Trials After Hostilities. Even after the close of hostilities, criminal trials against lawful enemy combatants have been the exception, not the rule.⁷⁴ After World War I, responsibility for initiating that conflict was formally assigned to Kaiser Wilhelm, and an extensive report of alleged atrocities committed by German troops was prepared by the Allies. No international trials were held against World War I combatants. Some trials were held by German authorities of German personnel as required by the Allies.⁷⁵ Due to the gross excesses of the Axis Powers during World War II, involving not only initiation of aggressive war but also wholesale execution of ethnic groups and enslavement of occupied territories, the Allied Powers determined that large scale assignment of individual criminal responsibility was necessary. Crimes against peace and crimes against humanity were charges against the principal political, military and industrial leaders responsible for the initiation of the war and various inhumane policies. The principal offenses against combatants directly related to combat activities were the willful killing of prisoners and others in temporary custody.⁷⁶ Since World War II such prosecutions after conflicts have not occurred.⁷⁷

⁷⁴ As to unlawful combatants, this was frequently done by summary punishment without benefit of trial. See Cowles, *Universality of Jurisdiction over War Crimes*, 33 Cal. L. Rev. 177 (1945).

⁷⁵ Treaty of Peace Between the Allied and Associated Powers and Germany, Versailles, June 28, 1919, in 1 *The Law of War* 417 (Friedman ed. 1972); Commission on the Responsibility of the Authors of the War and On Enforcement of Penalties, 14 Am. J. Int'l. L. 95 (1920); Judgments of the Supreme Court at Leipzig of the [World War I] German War Trials, 16 Am. J. Int'l L. 674-724 (1922); Mullins, *The Leipzig Trials* (1921); Woetzel, *The Nuremberg Trials in International Law* 27 (1962); Glueck, *War Criminals, Their Prosecution and Punishment* 19 (1944); U.N. Sec'y Gen. Memorandum, *Historical Survey of the Questions of International Criminal Jurisdiction*, A/CN4/7/Rev.1 (1949). Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 Br. Y.B. Int'l L. 58, at 84 (1944) notes that of the 901 cases heard before the Leipzig Supreme Court in 1923-24, only 13 ended in convictions.

⁷⁶ A representative sample of the literature is given:

Views on the World War II Trials: Bosch, *Judgment on Nuremberg* (1970) (survey of views of others); Nuremberg, *German Views of the War Trials* (Benton and Grimm ed. 1955); Knieriem, *The Nuremberg Trials* (1959) (German); Vogt, *The Burden of Guilt* (1964) (German); Maugham, *UNO and War Crimes* (1951) (English); Morgan, *The Great Assize* (1948) (English); Klafkowski, *The Nuremberg Principles and the Development of International Law* (1966) (Polish); Ginsberg, *Laws of War and War Crimes on the Russian Front: The Soviet View*, 11 *Soviet Studies* 253 (1960); Green, *Superior Orders in National and International Law* (1976); Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970); Doenitz at Nuremberg: *A Reappraisal* (Thompson & Strutz eds. 1976); Conot, *Justice at Nuremberg* (1983); Tusa & Tusa, *The Nuremberg Trial* (1984).

On the Tokyo war crimes trials, see Minear, *Victors' Justice: The Tokyo War Crimes Trial* (1971); Shiroyama, *War Criminal: The Life and Death of Hirota Koki* (1974, Bester transl. 1977); and Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (1987). As to Japanese atrocities during WWII generally, see Tanaka, *Hidden Horrors: Japanese War Crimes in World War II* (1996).

Bibliographies: Garsse, *Genocide, Crimes Against Humanity, War Crimes Trials: A Bibliography* (1951); U.S. Library of Congress, *The Nazi State, War Crimes and War Criminals* (1954).

Summaries of cases are found in U.N. War Crimes Commission, *Law Reports of Trials of War Criminals*, 15 volumes (1949); Appleman, *Military Tribunals and International Crimes* (1954); U.S. Gov't, *Trials of War Criminals Before The* (continued...)

6.2.5.3 Jurisdiction over Offenses.⁷⁸ Except for war crimes trials conducted by the Allies after World War II, the majority of prosecutions for violations of the law of armed conflict have been trials of one's own forces for breaches of military discipline. Violations of the law of armed conflict committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.⁷⁹

⁷⁶(...continued)

Nuremberg Military Tribunals Under Control Council Law No. 10 (1946-1949) (principal U.S. trials subsequent to International Military Tribunal); 11 Whiteman, *Digest of International Law* 884 (1968).

Judgments: International Military Tribunal (Nuremberg). Judgment and Sentence, 41 *Am. J. Int'l L.* 172 (1947), International Military Tribunal, Nazi Conspiracy and Aggression, Opinion and Judgment (1947), *excerpted in* U.S. Naval War College, *International Law Documents 1946-1947*, at 241-307 (1948); International Military Tribunal for the Far East, Judgment, 3 parts (1948), *excerpted in* U.S. Naval War College, *International Law Documents 1948-1949*, at 76-106 (1950).

General Literature: Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10 (1949); Appleman, *Military Tribunals and International Crimes* (1954); Davidson, *The Trial of the Germans: An Account of the Twenty-two Defendants Before the International Military Tribunal at Nuremberg* (1966); Jackson, *The Case Against the Nazi War Criminals* (1946); Jackson, *The Nuremberg Case* (1947); Keeshan, *Justice at Nuremberg* (1946); Woetzel, *The Nuremberg Trials and International Law* (1962); Weingartner, *Crossroads of Death: The Story of the Malmedy Massacre and Trial* (1979); de Zayas, *The Wehrmacht War Crimes Bureau, 1939-1945* (1989); Levie, *Terrorism in War—The Law of War Crimes* (1992); *War Crimes in International Law* (Dinstein & Tabory eds. 1996).

Vietnam: Bilton & Sim, *Four Hours in My Lai* (1992); Peers, *The My Lai Inquiry* (1979); *The My Lai Massacre and its Cover-up* (Goldstein, Marshall & Schwartz, eds. 1976) (the 1970 Peers Report); Hersh, *Cover-Up* (1972); McCarthy, Medina (1972); Everett, Johnson & Rosenthal, Calley (1971).

⁷⁷ As an example, *see* Agreement on the Repatriation of Prisoners of War and Civilian Internees, para. 15, signed by Bangladesh, India and Pakistan 9 April 1974, *in* 13 *Int'l Leg. Mat'ls* 505 (1974). Despite the collection by the U.S. and other nations pursuant to U.N.S.C. Resolution 674 (1990) (*see* paragraph 6.2, note 20 (p. 6-8)) of extensive evidence of Iraqi war crimes committed during the 1990-91 Gulf War, no prosecutions ensued from that effort. *See* McNeill, Panel Discussion, *in* Grunawalt, King & McClain at 619-20 for a brief account of political difficulties that apparently sidetracked that effort. However, international support for the concept of post-conflict trials is again apparent, as evidenced by the recently established International Tribunal for Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994). *See* paragraph 6.2.5, note 55 (p. 6-22).

⁷⁸ *See* GWS, art. 49; GWS-Sea, art. 50; GPW, art. 129; GC, art. 146. On U.S. jurisdiction over enemy nationals, *see* UCMJ, art. 18, which creates jurisdiction in general courts-martial to try "any person" who by the law of armed conflict is subject to trial by a military tribunal; R.C.M. 201(f)(1)(B), MCM, 1984; FM 27-10, para. 505d; and AFP 110-31, para. 15-4a. *See also* Newton, paragraph 6.2.5, note 56 (p. 6-25).

⁷⁹ U.S. military personnel tried by court-martial for offenses that constitute war crimes are either charged with the U.S. domestic equivalent of such offenses, *e.g.*, murder (art. 118), rape (art. 120), assault (art. 128), cruelty and maltreatment (art. 93); with law-of-war specific offenses, *e.g.*, looting and pillaging (art. 103); with conduct prejudicial to good order and discipline (art. 134); or with violation of a lawful general order (art. 92), such as art. 0705, U.S. Navy Regulations, 1990 (*see* paragraph 6.1.2 (p. 6-2)). *See also* Solis, *Marines and Military Law in Vietnam: Trial by Fire* 32-33 (1989).

Although jurisdiction extends to enemy personnel, trials have almost exclusively been against unlawful combatants, such as persons who take part in combat operations without distinguishing themselves clearly from the civilian population during battle or those acting without state sanction for private ends.⁸⁰

In the United States, its territories and possessions, jurisdiction is not limited to offenses against U.S. nationals, but extends to offenses against persons of other nationalities. Violations by enemy nationals may be tried as offenses against international law, which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in military courts, military commissions, provost courts, military government courts, and other military tribunals.⁸¹ There is no statute of limitations on the prosecution of a war crime.⁸² (On jurisdiction generally, see paragraph 3.11.1.)

6.2.5.4 Fair Trial Standards. The law of armed conflict establishes minimum standards for the trial of foreign nationals charged with war crimes.⁸³ Failure to provide a fair trial for the alleged commission of a war crime is itself a war crime.⁸⁴

⁸⁰ See Castren, *The Present Law of War and Neutrality* 87 (1954) and Greenspan 502-511. The United States normally punishes war crimes, including "grave breaches," as such only if they are committed by enemy nationals or by persons serving the interests of enemy nations. Violations of the law of armed conflict committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law.

⁸¹ Although UCMJ, art. 21, establishes concurrent jurisdiction with general courts-martial in military commissions, provost courts or other military tribunals for offenses that by the law of armed conflict may be tried by such commissions or tribunals, GPW, art. 85 provides that POWs who are prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of that Convention. One benefit of GPW appears in art. 102 that POWs can be validly sentenced only if such sentences have been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power. A POW in United States custody would enjoy the same procedural safeguards afforded to U.S. armed forces personnel under the UCMJ for offenses committed whether before or after capture. These provisions seem to preclude future use of the type of military commission that tried General Yamashita. See McDougal & Feliciano 730-31.

⁸² 1977 Digest of United States Practice in International Law 927; UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 Nov. 1968, entered into force 11 Nov. 1970, not in force for the United States, 8 Int'l Leg. Mat'ls 68 (1969). While not opposed to the basic purposes of this convention, the United States voted against its adoption because it redefined crimes against humanity in a legally unsatisfactory way and had retroactive application in nations in which existing limits had expired. Dep't St. Bull., 17 Feb. 1969, at 153. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, 65 Am. J. Int'l L. 476 (1971) examines the *travaux préparatoires* of this convention.

⁸³ GPW arts. 82-108, GC, arts. 64-75 & 117-26, GP II, art. 6, and for nations party thereto GP I, art. 75. The United States supports "in particular" the fundamental guarantees contained in GP I, art. 75, as ones that should be observed and in due course recognized as customary law even if they have not already achieved that status. Matheson, Remarks, paragraph 6.1, note 1 (p. 6-1) at 422 & 427.

⁸⁴ GWS, art. 50; GWS-Sea, art. 51; GPW, art. 130; GC, art. 147; GP I, art. 85(4)(e) (for States party thereto).

6.2.5.5 Defenses

6.2.5.5.1 Superior Orders. The fact that a person committed a war crime under orders of his military or civilian superior does not relieve him from responsibility under international law. It may be considered in mitigation of punishment.⁸⁵ To establish responsibility, the person must know (or have reason to know) that an act he is ordered to perform is unlawful under international law.⁸⁶ Such an order must be manifestly illegal.⁸⁷ The standard is

⁸⁵ See paragraph 6.1.4 (p. 6-6). The Charter of the International Military Tribunal at Nuremberg, art. 8, stated:

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

U.S. Naval War College, *International Law Documents, 1944-45*, 255 (1946).

Despite efforts to include a provision on the defense of superior orders in the 1949 Geneva Conventions, and in GP I, nations could not agree on the balance between military discipline and the requirements of humanitarian law, and thus left unchanged the international law on the defense of superior orders. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions: Supplement* (1985), provides the negotiating history of the effort to include a provision on the defense of superior orders in GP I. See also Levie, *The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders*, 30 *Revue De Droit Militaire Et De Droit De La Guerre* 183 (1991), reprinted in Schmitt & Green at chap. XV. Note that the Statute for the International Tribunal for Yugoslavia and the Statute for the International Criminal Tribunal for Rwanda (see paragraph 6.2.5, note 55 (p. 6-22)) provide (in arts. 7(4) & 6(4) respectively) the following:

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in anticipation of punishment if the Tribunal determines that justice so requires.

⁸⁶ The following statement indicates those circumstances in which the plea of superior orders may serve as a defense:

Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime.

2 Oppenheim-Lauterpacht 568-69.

As to the general attitude taken by military tribunals toward the plea of superior orders, the following statement is representative:

It cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the

(continued...)

whether under the same or similar circumstances a person of ordinary sense and understanding would know the order to be unlawful.⁸⁸ If the person knows the act is unlawful and only does it under duress, this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.⁸⁹

⁸⁶(...continued)

inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the interior [*sic*] will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice.

The Hostage Case (United States v. Wilhelm List et al.), 11 TWC 1236.

⁸⁷ See *U.S. v. Calley*, 46 CMR 1131, 48 CMR 19 (1969, 1971). UCMJ, art. 92, requires members of the armed forces to obey only lawful orders. An order that directs the commission of a crime is a patently illegal order. Para. 14c(2)(a)(i), Part IV, MCM, 1984.

⁸⁸ R.C.M. 916(d); *U.S. v. Calley*, 48 CMR 29 (opinion of J. Quinn), 30 (concurring opinion of J. Duncan); Green, *Superior Orders in National and International Law* 142 (1976). R.C.M. 916(d) provides:

Obedience to orders. It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

See Green, *Superior Orders and the Reasonable Man*, in *Essays on the Modern Law of War* (1985) at chap. III.

⁸⁹ An individual may plead duress if he can establish that he acted only under pain of an immediate threat, *e.g.*, the immediate threat of physical coercion, in the event of noncompliance with the order of a superior. In the judgment of one tribunal, it was declared that:

[T]here must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.

The High Command Case (United States v. Wilhelm von Leeb et al.), 11 TWC 509.

The International Military Tribunal at Nuremberg declared in its judgment that the test of responsibility for superior orders "is not the existence of the order, but whether moral choice was in fact possible." 1 Trial of Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945- 1 October 1946, at 224 (1947), *excerpted in U.S. Naval War College, International Law Documents, 1946-1947*, at 260 (1948).

The following examples illustrate these principles:

Case 1: The deliberate target selection of a hospital protected under the Geneva Conventions for aerial bombardment would be a violation of law. Although the person making the selection would be criminally responsible, a pilot given such coordinates would not be criminally responsible unless he knew the nature of the protected target attacked and that circumstances (*e.g.*, see paragraph 8.5.1.4 (p. 8-25)) did not otherwise justify the attack.

Case 2: Faulty intelligence may cause attacks on targets which are not in fact military objectives. No criminal responsibility would result in this event unless the attack was pursued after the correct intelligence was received and communicated to the attacking force.

(continued...)

6.2.5.5.2 Military Necessity. The law of armed conflict provides that only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied. This principle, often referred to as "military necessity," is a fundamental concept of *restraint* designed to limit the application of force in armed conflict to that which is in fact required to carry out a lawful military purpose. Too often it is misunderstood and misapplied to support the application of military force that is excessive and unlawful under the misapprehension that the "military necessity" of mission accomplishment justifies the result. While the principle does recognize that some amount of collateral damage and incidental injury to civilians and civilian objects may occur in an attack upon a legitimate military objective, it does *not* excuse the wanton destruction of life and property disproportionate to the military advantage to be gained from the attack.⁹⁰

6.2.5.5.3 Acts Legal or Obligatory Under National Law. The fact that national law does not prohibit an act which constitutes a war crime under international law does not relieve the person who committed the act from responsibility under international law.⁹¹ However, the fact that a war crime under international law is made legal and even obligatory under national law may be considered in mitigation of punishment.⁹²

6.2.5.6 Sanctions. Under international law, any punishment, including the death penalty, may be imposed on any person found guilty of a war crime.⁹³ United States policy requires that the punishment be deterrent in nature and proportionate to the gravity of the offense.⁹⁴

⁸⁹(...continued)

Case 3. A naval pilot attacks, admittedly in a negligent manner, and consequently misses his target, a military objective, by several miles. The bombs fall on civilian objects unknown to the pilot. No deliberate violation of international law occurred. However, he might be subject to possible criminal punishment under his own nation's criminal code for dereliction of duty. He could not properly be charged with a violation of the law of armed conflict.

⁹⁰ See Stone 352; McDougal & Feliciano 72 & 528; FM 27-10, para. 3; Note, Military Necessity in War Crimes Trials, 29 Brit. Y.B. Int'l L. 442 (1953); Greenspan 279; and 3 Hyde 1801. Compare paragraph 5.2, note 6 (p. 5-4). See also De Mulinen, Handbook on the Law War For Armed Forces (1987) at 352-55.

⁹¹ Principle II, paragraph 6.2.5, note 55 (p. 6-23); FM 27-10, para. 511.

⁹² DA Pam 27-161-2, at 249, and sources cited therein.

⁹³ Levie, 2 The Code of International Armed Conflict 907.

⁹⁴ FM 27-10, para. 508. For a recent general discussion of issues relating to war crimes trials, defenses, and other developments regarding international tribunals, see Albany Law Review Annual Symposium: Conceptualizing Violence: Present and Future Developments in International Law, in 60 Albany L. Rev. 565-1079 (1997).

ANNEX A6-1

REPORTABLE VIOLATIONS

SECNAVIST 3300.1 (series), OPNAVINST 3300.52 (Navy) and MCO 3300.3 (Marine Corps), require each person in the Department of the Navy who has knowledge of or receives a report of an apparent violation of the law of armed conflict to make that incident known to his immediate commander, commanding officer, or to a superior officer as soon as is practicable, and requires commanders and commanding officers receiving reports of noncompliance with or breaches of the law of armed conflict to report the facts promptly to the National Military Command Center. The 1949 Geneva Conventions for the Protection of War Victims (and the 1977 Protocol I Additional to those Conventions for nations bound thereby) proscribe certain acts which are commonly accepted as violations of the law of armed conflict. *See* paragraph 6.1.2, note 9 (p. 6-3) and accompanying text.

The following are examples of those incidents which must be reported:

1. Offenses against the wounded, sick, survivors of sunken ships, prisoners of war, and civilian inhabitants of occupied or allied territories including interned and detained civilians: attacking without due cause; willful killing; torture or inhuman treatment, including biological, medical or scientific experiments; physical mutilation; removal of tissue or organs for transplantation; any medical procedure not indicated by the health of the person and which is not consistent with generally accepted medical standards; willfully causing great suffering or serious injury to body or health or seriously endangering the physical or mental health; and taking as hostages.

2. Other offenses against prisoners of war (POW): compelling a POW to serve in the armed forces of the enemy; causing the performance of unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and deprivation of the right to a fair and regular trial.

3. Other offenses against survivors of sunken ships, the wounded or sick: when military interests do permit, failure to search out, collect, make provision for the safety of, or to care for survivors of sunken ships, or to care for members of armed forces in the field who are disabled by sickness or wounds or who have laid down their arms and surrendered.

4. Other offenses against civilian inhabitants, including interned and detained civilians of, and refugees and stateless persons within, occupied or allied territories: unlawful deportation or transfer, unlawful confinement, compelling forced labor, compelling the civilian inhabitants to serve in the armed forces of the enemy or to participate in military operations, denial of religious rights, denaturalization, infringement of property rights, and denial of a fair and regular trial.

5. Attacks on individual civilians or the civilian population, or indiscriminate attacks affecting the civilian population or civilian property, knowing that the attacks will cause loss of life, injury to civilians or damage to civilian property that would be excessive or disproportionate in relation to the concrete and direct military advantage anticipated, and which cause death or serious injury to body or health.

6. Deliberate attacks upon medical transports including hospital ships, coastal rescue craft, and their lifeboats or small craft; medical vehicles; medical aircraft; medical establishments including hospitals; medical units; medical personnel or crews (including shipwrecked survivors); and persons parachuting from aircraft in distress during their descent.

7. Killing or otherwise imposing punishment, without a fair trial, upon spies and other persons suspected of hostile acts while such persons are in custody.

8. Maltreatment or mutilation of dead bodies.

9. Willful or wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; aerial or naval bombardment whose sole purpose is to attack and terrorize the civilian population, or to destroy protected areas, buildings or objects (such as buildings used for religious, charitable or medical purposes, historic monuments or works of art); attacking localities which are undefended, open to occupation, and without military significance; attacking demilitarized zones contrary to the terms establishing such zones.

10. Improper use of privileged buildings or localities for military purposes.

11. Attacks on facilities--such as dams and dikes, which, if destroyed, would release forces dangerous to the civilian population--when not justified by military necessity.

12. Pillage or plunder of public or private property.

13. Willful misuse of the distinctive emblem (red on a white background) of the red cross, red crescent or other protective emblems, signs or signals recognized under international law.

14. Feigning an intent to negotiate under a flag of truce or surrender; feigning incapacitation by wounds or sickness; feigning civilian non-combatant status; feigning protected status by use of signs, emblems or uniforms of the United Nations or a neutral or other nation not a party to the conflict or by wearing civilian clothing to conceal military identity during battle.

15. Firing upon a flag of truce.

16. Denial of quarter, unless bad faith is reasonably suspected.
17. Violations of surrender or armistice terms.
18. Using poisoned or otherwise forbidden arms or ammunition.
19. Poisoning wells, streams or other water sources.
20. Other analogous acts violating the accepted rules regulating the conduct of warfare.

Source: SECNAVINST 3300.1A (series)

ANNEX A6-2

RULES FOR COMBATANTS

U.S. NAVY FUNDAMENTAL RULES OF HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS

1. Fight only enemy combatants.
2. Destroy no more than your mission requires.
3. Do not attack enemy soldiers, sailors, airmen or marines who surrender. Disarm them and turn them over to your superior.
4. Prisoners of war and other detainees shall never be tortured or killed.
5. Collect and care for the wounded, sick and shipwrecked survivors, whether friend or enemy, on land or at sea.
6. Medical personnel and chaplains, medical and religious facilities and medical transportation are protected. Respect them and do not attack them.
7. Treat all civilians humanely and respect their property. Do not attack them.
8. Do your best to prevent any violation of the above rules. Report any violations to the appropriate authority promptly.
9. You cannot be ordered to violate these rules.
10. Discipline in combat is essential. Disobedience of the law of armed conflict dishonors your nation, the Navy, and you. Far from weakening the enemy's will to fight, such disobedience strengthens it. Disobedience of the law of armed conflict is also a crime punishable under the Uniform Code of Military Justice (UCMJ).

Source: OPNAVINST 3300.52

**U.S. MARINE CORPS
LAW OF WAR PRINCIPLES**

Discipline in combat is essential. Disobedience to the law of war dishonors the Nation, the Marine Corps, and the individual Marine; and far from weakening the enemy's will to fight, it strengthens it. The following principles require the Marine's adherence in the accomplishment of any mission. Violations have an adverse impact on public opinion both national and international and have on occasion served to prolong conflict by inciting an opponent to continue resistance and in most cases constitute violations of the UCMJ. Violations of these principles prejudice the good order and discipline essential to success in combat.

1. Marines fight only enemy combatants.
2. Marines do not harm enemies who surrender. They must disarm them and turn them over to their superior.
3. Marines do not kill or torture prisoners.
4. Marines collect and care for the wounded, whether friend or foe.
5. Marines do not attack medical personnel, facilities, or equipment.
6. Marines destroy no more than the mission requires.
7. Marines treat all civilians humanely.
8. Marines do not steal. Marines respect private property and possessions.
9. Marines should do their best to prevent violations of the law of war. They must report all violations of the law of war to their superior.

Source: Marine Corps Institute Order P1500.44C