

THE JUDGE ADVOCATE GENERAL'S SCHOOL, U. S. ARMY
Charlottesville, Virginia

MATERIALS ON THE LAW OF WAR

BASIC RULES

AND

PRINCIPLES

I. The Meaning of the Term "War."

A. The Three Elements of War.

1. First Element - A Hostile Contention.
2. Second Element - By Means of Armed Forces.
3. Third Element - Carried on Between States.
 - a. War and Politics.
 - b. War and the Struggle for Power.
 - c. All Power as Ultimately War Power?

B. War - A Factual Concept.

C. A Framework for the Law of War.

1. Jus ad Bellum.

2. Jus in Bello.

a. Protection of the Helpless.

b. Control of the Means and Methods of Destruction.

3. Neutrality.

II. War: 1648-1792 (Limited War).

A. The Hostile Contention.

B. The Armed Forces.

C. The State.

III. War: 1792-1914 (Transition).

A. The Vanishing Limits on War.

1. The Hostile Contention.

2. The Armed Forces.

3. The State.

B. Attempts at Reimposition of Limits on War.

1. Declaration of Paris, 1856.

2. The Lieber Manual, 1863.

3. Geneva Conventions of 1864 and 1868.

4. The St. Petersburg Convention of 1868.

5. The Brussels Conference of 1874.

6. The Hague Conventions of 1899 and 1907.

C. The Stumbling Block of "Necessity."

IV. War: 1914-1945 (Total War).

A. Inadequate Restraints on Conduct of World War I.

1. Positive International Law.

a. Economic Warfare.

(1) Distinction Between Combatants and Noncombatants.

(2) Distinction Between Neutrals and Belligerents.

b. Weapons of Warfare.

(1) Distinction Between Combatants and Noncombatants.

(2) Distinction Between Neutrals and Belligerents.

2. General Principles of International Law.

3. Moral Law, Public Opinion and Chivalry.

B. New Efforts to Limit War in the Interwar Period.

1. Codification.

a. Washington Conference, 1921-1922.

b. Geneva Protocol of 1925.

c. Geneva Conventions of 1929.

d. London Naval Agreement, 1930.

2. Disarmament.

3. Reorganization of the World Community.

a. League of Nations and Collective Security.

b. Specific Attempts at Strengthening the Collective Security System.

(1) Draft Treaty of Mutual Assistance of 1923.

(2) Geneva Protocol of 1924.

(3) Locarno Treaties of 1925.

(4) General Treaty for the Renunciation of War
(Kellogg - Briand Pact) of 1928.

(5) General Act of 1928.

4. The Prohibition of Aggressive War.

C. Inadequate Restraints on the Conduct of World War II.

1. The Hostile Contention.

2. On the Make Up of the Armed Forces.

3. On the State.

V. War in the Contemporary Period (Limited War and Total Conflict).

A. Old Formulas Retired.

1. Collective Security.

2. Codification.

B. Relativity of War and Peace.

1. War as a Legal Concept.

2. The Cold War.

C. Limited War.

INTERNATIONAL LAW

ASSIGNMENT M-1

CAPTOR AND CAPTIVE IN INTERNATIONAL LAW

REQUIRED READING:

1. "Legal Aspects of Counterinsurgency." (Copy attached)
2. U.S. Dep't of Army Pam 27-161-2, International Law, Vol. II, 69-76, 53-64 (1962).

SUGGESTED READING:

1. Baxter, So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs, 28 Brit. Yb. Int'l L. 323 (1951).
2. Fall, The Theory and Practice of Insurgency and Counterinsurgency, 18 Naval War College Rev. 21 (Apr. 1965).
3. III Pictet, Commentary, Geneva Convention Relative to the Treatment of Prisoners of War 17-78 (1960).
4. Nurick and Barrett, Legality of Guerrilla Forces Under the Laws of War, 40 Am. J. Int'l L. 563 (1946).
5. Garner, General Order 100 Revisited, 27 Mil. L. Rev. 1 (1965).

I. THE GROUP

A. Gangs

"The second feature, of course, is the attitude of the Vietnamese concerning the [Geneva] Conventions -- 'They are as applicable to VC as they would be to you US people if you applied them to the Mafia in Chicago,' was the response one Vietnamese gave me." Prugh, "JA Functions in Vietnam" (unpublished).

Requirement: Be prepared to discuss in class the provisions of international law that bear on the disposition that the Chicago police may make of captured members of the Mafia; and that the Mafia may make of captured Chicago policemen.

B. Insurgents

1. How would you define the term "insurgents"? Examples?
2. What do insurgents have in common with gangsters?

"The band [of robbers] has all the characteristics of a guerrilla army; homogeneity, respect for the chief, bravery, knowledge of the terrain and even, in many cases, complete understanding of the tactics to be used. The band lacks only the support of the people." Che Guevara.

3. What distinguishes insurgents from gangsters? The uniform they wear?

"This formula [RW = G + P] for revolutionary warfare is the result of the application of guerrilla methods to the furtherance of an ideology or a political system." Bernard

B. Fall in the Naval War College Review, Apr. 65.

4. Who is the patriot -- the insurgent or the counterinsurgent (loyalist)?
5. As a practical matter, what difference does it make whether the label insurgents or common criminals (gangsters) is used?
 - a. From standpoint of loyalists.
 - b. From standpoint of other states.

6. Considerations of international law:

a. Prior to the 1949 Geneva Conventions

- (1) Captured insurgents
- (2) Captured loyalists
- (3) Captured foreigners
 - (a) by the insurgents
 - (b) by the loyalists
 - (i) private individuals
 - (ii) uniformed "advisors"

b. The question of the applicability of common Article 3, Geneva Conventions of 1949 (see page 28, DA Pam 27-161-2, International Law, Vol. II).

- (1) What does Art. 3 prohibit?
- (2) What does Art. 3 require?
- (3) What does Art. 3 not (prohibit) (require)?
- (4) What does Art. 3 encourage?
- (5) To whom is Art. 3 addressed?
 - (a) Addressed to "foreigners"?
 - (b) Are "foreigners" beneficiaries?
- (6) When does Art. 3 apply?
 - (a) Travaux preparatoires
 - (b) Viewpoint of commentators
 - (c) Viewpoint of International Red Cross

(d) 1965 viewpoint of U.S.

"The VC is almost never seen close up; he leads a shadowy existence in deep forests and grottoes, displays no unit insignia even when he wears a uniform, carries no dog-tags by which to identify him, manages to bury his weapon before he is found dead on the battlefield; and pushes his uncooperativeness with our side to the point where he -- contrary to more normal armies, including the North Vietnamese when they were fighting the French -- constantly changes unit numbers." Bernard B. Fall in The New Republic, 9 Oct. 1965.

(7) What is the significance of the last paragraph of Art. 3?

"Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the de jure Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion by all the means--including arms--provided by its own laws; nor does it in any way affect that Government's right to prosecute, try and sentence its adversaries, according to its own laws." Pictet, Geneva Convention Relative to the Treatment of Prisoners of War 43 (1960).

c. What difference does it make whether or not Article 3 applies to insurgencies -- legally, politically and militarily?

"A fundamental part of guerrilla tactics is the manner of treating inhabitants of the region. The treatment of the enemy is also important. Toward the enemy the rule to follow should be one of absolute ruthlessness at the time of attack, absolute implacability toward all contemptible persons engaging in betrayals and assassinations; but the greatest possible clemency toward soldiers who in fighting are fulfilling, or believe they are fulfilling, their military duty. It is a good rule, so long as there are no important bases of operations or impregnable positions, not to take prisoners. Survivors should be left at liberty; wounded enemy should be given all care possible at the time of the action. Conduct toward the civilian populace should be governed by great respect for their traditions and customs, in order to demonstrate effectively the moral superiority of the guerrilla soldiers over their opponents. Except in special circumstances, there should be no executions without giving the accused person an opportunity to clear himself of the charges." Che Guevara

C. Belligerents

1. How would you define the term "belligerents"? Examples?
2. What is the difference between "insurgents" and "belligerents"?
 - a. Conceptually
 - b. Practically
3. What is the function of the act of recognition? Who is bound by the act?
4. What is the consequence, in legal context, of the loyalists recognizing the insurgents as belligerents? See para. 11a, FM 27-10.
5. Where may the customary international laws of war be found? In what book? See para. 6, FM 27-10.

D. The Challenge of the Insurgency-Belligerency Legal Dichotomy

1. If the concepts of insurgency and belligerency, and the proper interpretation of Article 3, and the content of customary international war law are, as here suggested, replete with legal-political subtleties, what practical guidance is to be given our soldiers and their officers engaged in hostilities against an "enemy"?

a. The War Between the States, 1861-1865

(1) Lieber Code (G.O. No. 100, Apr. 24, 1863)

(2) "To the Confederate army was, however, conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged under the laws of nations to the armies of independent governments engaged in war against each other, -- that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, 'on the footing of those engaged in lawful war,' and exempting 'them from liability for acts of legitimate warfare.'" Ford v. Surget, 97 US 594, 605 (1878).

b. Philippine Insurrection, 1900-1901

(1) The case of Braganza in Cowles, Universality of Jurisdiction Over War Crimes, 33 Calif. L. Rev. 177, 211-12 (1945).

(2) G.O. of 20 Dec. 1900; Gumban case in Nurick and Barrett, Legality of Guerrilla Forces Under the Laws of War, 40 Am. J. Int'l L. 563, 576-7 (1946).

c. Viet-Nam, 1965

(1) Extracts from FM 100-20, Apr. 1964

60.

a. LAW OF WAR. Military operations to counter insurgency are conducted in accordance with the international law of war. (See in particular applicable provisions of the Geneva Conventions of 1949, Annex to Hague Convention No. IV of 1907, and FM 27-10.)

....

61. (U) LEGAL PROTECTION FOR PARTICIPANTS IN COUNTER-INSURGENCY AND INSURGENCY

a.

b.

(1) U.S. forces counterinsurgency will apply the above provisions to prisoners captured by them; will encourage their local allies to do likewise; and will urge local insurgents and counterinsurgency forces to agree to apply the full Geneva Prisoner of War Convention, asking International Red Cross assistance to this end.

(2)

c. REPRISALS. Reprisals, taking hostages, and a reciprocal refusal to accord the required treatment will not be adopted by U.S. forces.

(2) Bernard B. Fall in The New Republic, 9 Oct. 1965.

"As personal questions to both American and Vietnamese unit commanders have shown (and I made a point of touching on the subject with most of them), there is only the vaguest idea among them as to what exactly is covered by the 1949 Convention; in the few cases where the terms 'rules of war' meant anything at all, the officer concerned very often confused the rules of land warfare of The Hague with the Geneva Convention on Prisoners of War of 1929, the 1949 Convention, the Red Cross Convention and the American Code of the Fighting Man. Several officers would argue that the VC were all 'traitors' and thus

could be shot out of hand, in yet another misinterpretation of the laws covering treason. But in that case, following the logic of the State Department's assertion that the North Vietnamese were 'foreign aggressors,' North Vietnamese regulars caught inside South Vietnam would have to be treated as regular POW's, as were American pilots until now if shot down over North Vietnam. Needless to say, no such distinction was made between North Vietnamese regulars and VC regulars, nor between both of them and the VC guerrillas: they are all being treated under the same appalling conditions. The attitude of 'this isn't our war; it's a Vietnamese war' could hold as long as US combat troops were not operating on their own and taking prisoners all by themselves. Now, this is no longer possible and the Viet Cong are in the position of virtually bulldozing the United States into accepting responsibility for what happens to prisoners; they can shoot in reprisal American POW's whom they hold whenever America's Vietnamese ally executes VC prisoners, as just happened in Danang....

"Before I went on a napalm-bombing mission in Vietnam aboard a US Air Force 'Skyraider,' I was given a full briefing on 'E-and-E' (evasion and escape) procedures. I noted that among the items of the E-and-E kit there was a card with a copy of the Geneva Convention of 1929, informing the American pilot of his rights as a possible prisoner and of the obligations of the enemy toward him. It should not be impossible to provide every American serviceman in Vietnam (not just the pilots) with a handy resume of his obligations under the existing laws and treaties toward the hapless civilian population as well as toward the enemy combatant. And while we're at it, a half-million copies in Vietnamese could be printed up for the Arvins to read at their leisure."

(3) Colonel Prugh memo of a 9 July 1965 meeting with JA, RVNAF.

"It was stressed that mention of the Conventions, and even their application, was of relatively little value at this point. What did count was the practical problem of how best to deal with captives. On this basis all concurred that there should be a compound in each Corps, meeting Geneva Conventions standards, where PAVN and military VC could be processed, interrogated, and kept."

2. Question No. 1 above, is a vital question to which we shall return later in the outline.

E. Prisoners of War: The Geneva Prisoners of War Convention of 1949

1. When applicable?

"In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

"The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." (Art. 2, GPW.)

2. To whom applicable?

"Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof." (Art. 2, GPW.)

3. But what if war has not been declared? See para. 9, FM27-10.

a. Washington Post, 30 July 1965

"The following article was written for the London Observer by Mrs. Verdun Perl, a British housewife who twice has run for Parliament as a Liberal and who visited North Vietnamese President Ho Chi Minh in Hanoi on July 8 as a delegate for the Communist-dominated World Council of Peace.

"Our meeting with two captured U.S. Air Force officers was the most disturbing experience of my visit. Many of us in the delegation felt keenly our own equivocal position. My fears deepened when, before the interview began, I saw that our chairs had been provided with tables laden with tea, fruit, sweets and other

delicacies, whereas the prisoners were assigned wooden chairs behind bare tables. However, the Vietnamese commandant immediately offered them a choice of drinks, and they chose beer.

"Addressing the commandant throughout as 'Sir,' the senior U.S. officer, whose aircraft had been shot down in February, wanted to know exactly what his status was under international law.

"The commandant replied that since the United States had not declared war, prisoners were being held not as prisoners of war, but as murderers."

b. Letter of 11 June 1965 from International Red Cross to Secretary Rusk.

"The hostilities raging at the present time in Viet Nam - both North and South of the 17th parallel - have assumed such proportions recently that there can be no doubt they constitute an armed conflict to which the regulations of humanitarian law as a whole should be applied.

"All parties to the conflict, the Republic of Viet Nam, the Democratic Republic of Viet Nam and the United States of America, are bound by the four Geneva Conventions of August 12, 1949, for the protection of the victims of war, having ratified them and having adhered thereto. The National Liberation Front too is bound by the undertakings signed by Viet Nam.

"In keeping with its humanitarian tradition, the International Committee of the Red Cross in Geneva reminds the governments of the aforesaid countries and the National Liberation Front of their obligations pursuant to the Geneva Conventions.

"It is incumbent on them to implement the provisions thereof and to permit the ICRC to carry out its mission as a neutral intermediary, as laid down in these Conventions."

c. Baltimore Sun, 14 August 1965

"Some of the legalistic complications growing out of the East-West struggle over Vietnam were pointed up in the United States Government's reply today to an International Red Cross

appeal for observance of certain 'war' conventions in the conflict.

"Although President Johnson on July 28 specifically defined the struggle as a 'war,' there has been no formal declaration of war by any of the parties, including the United States.

"In consequence, the reply Dean Rusk, Secretary of State, made in President Johnson's behalf to the International Red Cross appeal painstakingly avoided reference to 'war' or 'belligerents.' It similarly avoided reference to 'prisoners of war'--the subject of two of the conventions--and spoke instead to 'captives taken in combat.'"

4. But what if the enemy is not legally bound by GPW?

"7. Force of the Law of War

"a. Technical Force of Treaties and Position of the United States. Technically, each of the lawmaking treaties regarding the conduct of warfare is, to the extent established by its terms, binding only between the States that have ratified or acceded to, and have not thereafter denounced (withdrawn from), the treaty or convention and is binding only to the extent permitted by the reservations, if any, that have accompanied such ratification or accession on either side....

"These treaty provisions are in large part but formal and specific applications of general principles of the unwritten law. While solemnly obligatory only as between the parties thereto, they may be said also to represent modern international public opinion as to how belligerents and neutrals should conduct themselves in the particulars indicated.

"For these reasons, the treaty provisions quoted herein will be strictly observed and enforced by United States forces without regard to whether they are legally binding upon this country. Military commanders will be instructed which, if any, of the written rules herein quoted are not legally binding as between the United States and each of the States immediately concerned, and which, if any, for that reason are not for the time being to be observed or enforced.

"b.

"c. Force of Customary Law. The unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces, subject only to such exceptions as shall have been directed by competent authority by way of legitimate

reprisals for illegal conduct of the enemy (see par. 497). The customary law of war is part of the law of the United States, and, insofar as it is not inconsistent with any treaty to which this country is a party or with a controlling executive or legislative act, is binding upon the United States, citizens of the United States, and other persons serving this country." (Para. 7, FM 27-10.)

5. But what if the enemy, the legally bound by GPW, does not in fact observe and enforce it?

a. See para. 7, FM 27-10, above.

b. See paras. 495-497, FM 27-10.

c. "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." (Art. 1, GPW.)

"...By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties....

"The words 'in all circumstances' refer to all situations in which the Convention has to be applied and these are defined in Article 2. It is clear, therefore, that the application of the Convention does not depend on whether the conflict is just or unjust. Whether or not it is a war of aggression, prisoners of war belonging to either party are entitled to the protection afforded by the Convention." (III Pictet, supra, 17-18.)

6. What if the enemy denounces GPW at the outset of hostilities? See Art. 142, GPW.

7. The nexus between combat and GPW, 1949:

a. "It is especially forbidden...to declare that no quarter will be given." Art. 23d, HR.

b. "It is especially forbidden...to kill or wound an enemy who having laid down his arms, or having no longer means of defense, has surrendered at discretion." Art. 23c, HR.

(1) "The law of war does not prohibit firing upon paratroops or other persons who are or appear to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute from disabled aircraft may not be fired upon." Para. 30, FM 27-10.

(2) "It is forbidden to refuse quarter to any enemy who has surrendered in good faith. In particular, it is forbidden either to continue to attack enemy warships and military aircraft which have clearly indicated a readiness to surrender or to fire upon the survivors of such vessels and aircraft who no longer have the means to defend themselves." Art. 51c, Law of Naval Warfare.

(3) The case of the Seal, 1940, in Spaight, Air Power and War Rights 133 (3rd ed. 1947).

8. When effective?

a. "The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation***. (GPW, Art. 5; see par. 71 herein.)

"b. Power of the Enemy Defined. A person is considered to have fallen into the power of the enemy when he has been captured by, or surrendered to members of the military forces, the civilian police, or local civilian defense organizations or enemy civilians who have taken him into custody." Para. 84, FM 27-10.

/"***or enemy civilians who have taken him into custody"? ? Legal for civilians to capture combat personnel?/

b. Status of deserters and/or defectors.

9. The significance of POW status:

a. Humane treatment. Art. 13, GPW and para. 85, FM 27-10.

b. Reprisals against prohibited. Art. 13, GPW.

c. Collective punishment of forbidden. Art. 87, GPW.

d. Neither compulsory nor voluntary service in armed forces of captor permitted. Arts. 130 and 7, GPW.

e. The intent of Art. 1, GPW, supra.

10. "Privileged" belligerents vs "Unprivileged" belligerents.

"The controversies respecting permissible combatancy may be most generally described in terms of the contraposition of, on the one hand, primary claims to exercise violence through the employment of differing groups of persons organized in varying degrees and ways, and, on the other, of opposed claims to counter and safeguard against the activities of such groups by denying to them upon capture the privileged treatment of prisoners of war. We mean by 'permissible combatants' those persons who, upon capture, must be accorded all the rights conventionally provided for prisoners of war. 'Nonpermissible combatants' refers to those persons whose activities are assumed to pose special dangers to the opposing belligerent and upon whom, in the event of capture, the opposing belligerent is regarded as authorized, after certain procedures of identification, to impose execution or lesser deprivation." McDougal and Feliciano, Law and Minimum World Public Order 542-3 (1961).

a. Categories of "privileged" belligerents.

(1) "Members of the armed forces of a party to the conflict...." Art. 4A(1), GPW.

"In particular the life of any combatant taken prisoner, wearing uniform or bearing an emblem clearly indicating his membership of the armed forces, shall be spared, he shall be treated humanely as a prisoner of war, lists of combatants taken prisoner shall be communicated without delay to the International Committee of the Red Cross (Central Information Agency), and the delegates of the ICRC shall be authorized to visit prison camps." Extract of letter from Pres., IRC to Secy Rusk, dtd 11 June 1965.

"The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as

such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians. The Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt." III Pictet, supra, 52.

(2) "***as well as members of militias or volunteer corps forming a part of such armed forces." Art. 4A(1), GPW.

"It had been proposed that the mention of militias or volunteer corps forming part of the armed forces should be deleted, as these were covered by the expression 'armed forces'. The Conference of Government Experts pointed out, however, that certain countries still had militias and volunteer corps which, although part of the armed forces, were quite distinct from the army as such." III Pictet, supra, 51-2.

(3) "Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements fulfil the following conditions:

"(a) that of being commanded by a person responsible for his subordinates;

"(b) that of having a fixed distinctive sign recognizable at a distance;

"(c) that of carrying arms openly;

"(d) that of conducting their operations in accordance with the laws and customs of war." (Emphasis supplied) Art. 4A(2), GPW.

(a) The roots of Art. 4A(2), GPW.

(b) The sole change made in 1949. The reason therefor.

(c) Analysis of the four qualifications. Para. 64, FM 27-10.

(d) The practice of states

- (i) The Peninsula Campaign, 1828-40, --
Spanish Maquis
- (ii) Mexican War, 1847
G. O. 372
- (iii) The War Between the States, 1861-65, --
Partisan rangers

Integrated and uniformed

Lieber Code
- (iv) Franco-Prussian War, 1870-71, --
Franc-tireur

Written authorization
- (v) Boer War, 1899-1902

"The entire army wore civilian clothing. Officers wore business suits and bowler hats." Vincent, The Juridical Basis of the Distinction Between Lawful Combatant and Unprivileged Belligerent (unpublished).

- (vi) Philippine Insurrection, 1900-01
Aguinaldo
- (vii) WW I

Lawrence of Arabia
- (viii) WW II - Partisans

1944 IRC intercession

War Crimes trials

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

(a) Examples.

(b) Distinguished from "resistance movements."

(5) Accompanying civilians. Art. 4A(4), GPW.

(6) Merchant mariners and civil aircraft crewmen.
Art. 4A(5), GPW.

(7) Levée en masse. Art. 4A(6), GPW, and para. 65,
FM 27-10.

(a) Contrasted with "partisans"

(b) From viewpoint of invader.

b. Categories of "unprivileged" belligerents

(1) "It is different, if we understand guerrilla parties, self-constituted sets of armed men, in times of war, who form no integrant part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war (guerrilla) chiefly by raids, extortion, destruction, and massacre, and who cannot encumber themselves with many prisoners, and will therefore generally give no quarter." Lieber, Guerrilla Parties, 1862.

(2) The uniformed "advisor." Consider, para. 500, FM 27-10, and Spaight, Air Power and War Rights 310-13 (3rd ed. 1947).

(3) Women?

11. Doubtful cases

a. What is a doubtful case? See para. 71b, FM 27-10

b. Disposition of doubtful cases:

(1) Refer to a board of officers. See para. 71, FM 27-10.

(2) Give them the benefit of the doubt. See para. 70,
FM 27-10.

"But when guerrilla parties aid the main army of a belligerent, it will be difficult for the captor of guerrilla-men to decide at once whether they are regular partisans, distinctly authorized by their own government; and it would seem that we are borne out by the conduct of the most humane belligerents in recent times, and by many of the modern writers, if the rule be laid down, that guerrilla-men, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of places, are proved upon them; leaving the question of self-constitution unexamined." Lieber, Guerrilla Parties, 1862.

12. Disposition of "unprivileged" belligerents.

- a. Subject to trial and execution. See para. 80, FM 27-10.
- b. Trial is of a "protected person," however. See para. 73, FM 27-10.
- c. Prolonged detention without trial. Art. 5, GPW.

II. THE INDIVIDUAL

A. "Privileged" or "Unprivileged" Belligerent?

- 1. Uniformed soldier
 - a. The scout
 - b. "****even if they operate singly." Compare paras. 63 and 74, FM 27-10 with para. 31, FM 27-10. See Kelly, Assassination In War Time, 30 Mil. L. Rev. 101 (1965).
 - c. Hitler's "Commando Order" of 1942.
 - d. The picket (Lieber Code).
 - e. The brigand
- 2. The soldier not in uniform.
 - a. So-called "war traitor." See para. 74, FM 27-10.

(1) Penetration in disguise.
(2) Penetration in uniform; Ex parte Quirin, 317 US 1
(1942).

(3) Disposition on capture
Type of tribunal.

b. Spy

- (1) penetration
- (2) disguise
- (3) intent (note para. 78b, FM 27-10)
- (4) "zone of operations" of Art. 29, HR (see para. 75, FM 27-10); municipal extensions. (See para. 76, FM 27-10.)
- (5) disposition of captured spy
 - (a) theory of illegality
 - (b) type of tribunal
- (6) statute of limitations

3. The civilian

a. So-called "war traitor" or "war rebel"

- (1) Examples of hostile activity (see paras. 80 and 81, FM 27-10).
- (2) Disposition
 - (a) in zone of operations (see para. 248, FM 27-10).
 - (b) in enemy territory (see para. 248, FM 27-10).
 - (c) in occupied territory (see paras. 248 and 438, FM 27-10).

(3) Benefits from "statute of limitations"?

b. The spy

(1) false pretense

(2) benefits from "statute of limitations"?

III. RESUME

A. International Conventional and Customary War Law

1. What function is their content intended to serve?

2. What responsibilities do their content impose upon whom?
When?

3. As a practical matter, how best may these responsibilities be discharged? Does FM 27-10 do it? Does this course of instruction do it? If not, why not?

4. What are the implications of a discharge of these responsibilities upon military personnel in peacetime? In times of combat, or potential combat overseas? Here in USA?

5. What is needed? Does the US Navy have the answer? See Art. 110(2), Law of Naval Warfare.

B. International Law, National Law, American Military Tradition, and Military Discipline

1. Are these sources and needs interrelated?

2. If so, where may the "law" for conducting hostilities be found?

3. Should it be stated? How? What is the lawyer's role in its statement? See Colby, How to Fight Savage Tribes, 21 Am. J. Int'l L. 279 (1927).