

# **Chapter- IX**

## **THE LAW OF WAR AND MILITARY OPERATIONS**

### **OTHER THAN WAR**

#### **I. INTRODUCTION.**

##### **A. Military Operations Other than War (MOOTW).**

1. MOOTW encompass a wide range of activities where the military instrument of national power is used for purposes other than the large-scale combat operations usually associated with war.

Doctrine for Joint Operations:<sup>416</sup> While there are various types of MOOTW (see FM 100-5), peace operations have spawned the majority of law of war related issues.

##### **B. Law of War.**

1. Traditional law of war regimes do not technically apply to MOOTW Examples include the followings:

a. *Operation Just Cause (Panama)*: "Inasmuch as there was a regularly

constituted government in Panama in the course of JUST CAUSE, and U.S. forces were deployed in support of that government, the Geneva Conventions did not apply ...nor did the U.S. at any time assume the role of an occupying power as that term is used in the Geneva Conventions." Memorandum from W. Hays Parks to the Judge Advocate General of the Army of 10/1/90.

b. *Operation Restore Hope (Somalia)*: The 1949 Geneva Conventions do not apply because an international "armed conflict" does not exist."

Operation Restore Hope After Action Report, Office of the Staff Judge,

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<sup>416</sup> Joint Pub 3.0 (Feb 1995) hereinafter JP 3.01. See also, Dep't of Army, Field Manual 100-5, Operations (14 June 1993) [hereinafter FM 100-5].

Unified Task Force Somalia (12 Apr 1993).

c. *Operation Uphold Democracy (Haiti)*: "The mandate of the MNF in Haiti was not military victory or occupation of hostile territory; rather it was "to establish and maintain a secure and stable environment." Moreover, the Carter-Jonassaint agreement -and the Aristide government's assent to that agreement -resulted in an entry that was based on consent and not hostilities between nations. Under these circumstances, the treaties and customary legal rules constituting the law of armed conflict do not strictly apply.<sup>417</sup>

d. *Operation Joint Endeavor (Bosnia-Herzegovina)*. In preparation to deploy to Bosnia, the commanders of the 1st Armored Division spent a great deal of time preparing to meet the civilian challenge "posed by stability operations . . . those operations that exist outside the scope of armed conflict, but place soldiers in situations where they must simultaneously act to protect civilians and protect themselves from civilians."<sup>418</sup>

2. Although not falling under the rubric of "international armed conflict," MOOTW consistently involve the potential, if not actual, employment of military force. This "disconnect" mandates that JA's search for legal standards to guide the treatment of traditional victims of conflict, e.g. wounded, detainees, and civilians.

a. This search begins with Dep't of Def. Directive 5100.77, DOD Law of War Program, (9 December 1998), which establishes the POLICY that "The Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized." (The

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<sup>417</sup> LAW AND MILITARY IN HAITI, 1994 OPERATIONS -1995: LESSONS

LEARNEDFOR JUDGEADVOCATES, Center for Law and Military Operations 47 (11 December 1995) (quoting Theodore Meron, Extraterritoriality of Human Rights Treaties, 89 Am. J. Int'l L. 78-82 (1995)).

<sup>418</sup> See Jim Tice, The Busiest Major Command, Army Times, Oct. 30, 1995, at 22-23.

United Nations employs a similar standard to guide the actions of personnel deployed on its operations, discussed infra).

b. Because in many cases US. forces simply do not have the resources to fully comply with all the requirements of the law of war, this policy has been interpreted to require U.S. forces "to apply the provisions of those treaties [the Geneva Conventions] to the extent practicable and feasible."<sup>419</sup>

3. Recent MOOTW demonstrate that compliance with such a policy still results in "gaps" for the JA looking for standards of treatment for the various individuals encountered during such operations. What follows is a discussion of the legal standards, both international and domestic, applicable either expressly or by analogy to the treatment of civilians, detainees, and the sick and wounded during MOOTW.

### **THE IMPACT OF THE NATURE OF OPERATIONS.**

A. THE: CONFLICT SPECTRUM. Contemporary military operations cover a broad spectrum of "hostilities."

1. At one extreme is invasion, MOOTW cover the rest of the spectrum, from "coerced invitation" to port calls.

2. Applicability of specific LOW Conventions is, as a result of the TRIGGERING ARTICLES of these Conventions, contingent on the nature of any given operation.

a. INTERNATIONAL ARMED CONFLICT. According to Common Article 2 of the four Geneva Conventions, any contention between states leading to the intervention of armed force satisfies the definition of international armed conflict.

(1) International Armed Conflict" is the TECHNICAL TRIGGER for application of the LOW.

(2) This is an extremely broad definition, intended to ensure expansive

application of humanitarian law.

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<sup>419</sup> W. Hays Parks memorandum, supra.

b. UNCOERCED INVITATION. If the armed forces of one country enter

another country by truly voluntary invitation, the LOW is TECHNICALLY not triggered. As a matter of Public International Law, host nation law normally governs the conduct of the visiting armed force during such operations.

(I) U.S. practice is to employ SOFAS as a mechanism for ensuring application of host nation law does not operate to the detriment of U.S. forces.

(2) There is no legal requirement for the application of the LOW to such situations.

c. MOOTW (Coerced Invitation?). Many MOOTW are found at the center of the CONFLICT SPECTRUM.

(I) U.S. forces enter the host nation without invitation, but under some

color of authority that serves to remove the operation from the realm of "international armed conflict." [e.g. a Chapter VI Peacekeeping mission].

(2) Although such operations involve the risk, and often the reality, of

hostilities between U.S. forces and host nation forces, the purported authority underlying the presence of U.S. forces removes the dispute element of the "international armed conflict" definition.

(3) This situation results in a vacuum of legal authority governing the conduct of U.S. forces in such situations.

(a) The "semi-permissive" nature of the operation acts to displace host

nation law;

(b) The lack of a "dispute between states" acts to prevent triggering of

the LOW.

(4) This vacuum of legal authority is not accompanied by a coordinate absence of legal issues facing the force.

(a) MOOTW have consistently involved substantial legal issues which, if present in the context of an international armed conflict, would be resolved by application of the LOW.

(b) These issues generally fall under the same categories as legal issues related to traditional military operations:

- (i) Targeting;
- (ii) Treatment of captured personnel;
- (iii) Treatment of civilians;
- (iv) Treatment of the wounded and sick.

B. There is a natural tension between the law and policy which dictate the justification for a military operation and the legal standards which we apply in the context of the operations.

- 1. Public International Law governs the conduct of states vis-a-vis other states.
- 2. The Law of War governs the conduct of combatants in warfare and provides protections for the victims of war.
- 3. The result of this tension, or conflict of purpose, is that the Law of War (because of its truly humanitarian purpose) becomes a default position, or guide, for our conduct.

## **THE ANALYTICAL RESPONSE**

A. The JA must craft resolutions to these legal issues using systematic and innovative analytical approach based on an amalgamation of four primary sources of law.

- 1. Fundamental Human Rights under International Law;
- 2. Host Nation Law;
- 3. Conventional Law -Treaty Law agreed upon by states (specific protections for specific individuals); and
- 4. Domestic Law and Policy (including extension "by analogy" of other sources of law not technically applicable).

## **MOOTW AND TARGETING ISSUES.**

- A. As a general rule, there is no modification of general LOW targeting principles during MOOTW.
  - 1. Rules of Engagement will normally determine the legally justified uses of force during MOOTW.
  - 2. In accordance with DoD Instruction 5 100.77, and CJCS Instruction 5810.01, as a matter of policy, the U.S. complies with LOW principles during all conflicts and Military Operations Other Than War.
- B. What about United Nations Operations?
  - 1. During other peace operations, e.g. peacekeeping operations, the UN position is that its forces will comply with the "principles and spirit" of International Humanitarian Law (Law of War). This is reflected in the model United Nations SOMA, which essentially utilizes this same law by analogy approach to regulating the conduct of the military forces executing United Nations missions.
    - a. The Status of Forces Agreement between the UN and Haiti for the UN Mission in Haiti is an example of this policy: "The UN will ensure that UNMIH carries out its mission in Haiti in such a manner as to respectfully the principles and spirit of the general international conventions on the conduct of military personnel. These international conventions include the four Geneva Conventions, the Additional Protocols, and the 1954 Hague Cultural Property Convention."
- C. JAs must ensure that Rules of Engagement are consistent with general LOW targeting principles.

## **MOOTW AND CAPTURED PERSONNEL**

- A. Combatants Captured by U.S. Forces.
  - 1. U.S. policy is to treat all captured personnel in accordance with the

provisions of the Geneva Convention Relative to the Treatment of Prisoners of War.

a. This policy is focused on ensuring such captives are "respected and

protected" in accordance with the spirit of the Convention.

b. U.S. forces will often lack the capability to comply with every detailed provision of the PW Convention. JAs should bear in mind that these provisions are not legally binding during MOOTW. Focus on ensuring a "respect and protect" mentality among the force. Law by analogy (application of GPW where possible) offers the solution to most MOOTW detainee issues.

2. Host nation personnel will normally be handed over to the legitimate

government, once such government is established or assumes functional control of the country.

3. Host nation law may offer a guide to treatment of detainees, during a permissive or semi-permissive intervention. [e.g. Haiti].

B. Treatment of "Friendly" Personnel Detained by a Hostile Party: Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994.<sup>420</sup>

1. Signed by 43 countries, including the U.S., as of May 1997. It entered into force on 15 January 1999.

2. A response to the rising casualty figures among UN personnel deployed in support of peace operations (130 killed in 1993).<sup>421</sup>

3. UN and associated personnel and UN operations are broadly defined so as to include associated military contingents, NGOs,

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<sup>420</sup> 34 I.L.M. 842.

<sup>421</sup> Evan Bloom, Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel, 89 A.J.I.L. 621 (1995).

contractors, and others. Forces such as the NATO force in Bosnia and UNMIH qualify for protection.<sup>422</sup>

4. Scope of Application: All cases involving UN and associated personnel and UN operations outside of those Chapter VII enforcement actions in which any UN forces are engaged as combatants against organized armed forces and to which the international law of armed conflict applies.

a. Refer to UN Security Council Resolution to determine if the operation is a Chapter VII operation.

b. Determining whether the operation is an enforcement action that requires a review of the object and purposes of the resolution, e.g. is the use of force authorized? Is the action undertaken regardless of the Parties to conflict's consent?<sup>423</sup>

c. Finally, are UN personnel engaged as combatants? As discussed above, this is a difficult determination to make. The UN and U.S. position was that UN forces in Somalia and in Bosnia did not become combatants. No clear guidance as to when UN forces become combatants currently exists. Operation Desert Storm and traditional peacekeeping missions provide clear examples of non-applicability of the convention (i.e., LOW applies) and applicability (UN Convention applies), respectively.

5. Main goal of the Convention is to provide for universal criminal jurisdiction for those committing serious offenses against these personnel.

a. Prosecute or extradite standard. Designed to put pressure on governments to take more responsible action in protecting UN personnel. Denies "safe haven" to the attackers.<sup>424</sup>

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<sup>422</sup> Statement of U.S. Ambassador Karl F. Inderfurth to the UN General Assembly of 12/9/94.

<sup>423</sup> Bloom at 94.

<sup>424</sup> Mahnoush H. Arsanjani, Protection of United Nations Personnel (draft), speech to Duke University Conference on Strengthening Enforcement of Humanitarian Law, 311 01%.

b. Consequently, this convention and the grave breach provisions of the Geneva conventions provide seamless protection to the participants.<sup>425</sup>

6. Crimes enumerated in the convention include murder, kidnapping, or other attacks on the person or premises of UN and associated personnel.

7. If captured, these personnel are not to be interrogated and are to be promptly released. Pending their return, they are to be treated consistently with principles and spirit of the Geneva Convention.

8. UN and associated personnel always retain their right of self-defense.

## **MOOTW AND THE TREATMENT OF CIVILIANS**

A. CIVILIAN PROTECTION LAW (CPL). CPL is an "analytical template" developed to describe the process for establishing protection for civilians across the operational spectrum. The CPL analytical process rests on the four "tiers" of legal authority:

B. TIER 1: Fundamental Human Rights Recognized as Binding International Law by the United States.

1. APPLICATION. All civilians, regardless of their status, are entitled to first tier protections. This first tier provides a foundation for JAs that represents the starting point for the legal analysis involved in the protection of civilians. Because this "core of rights" never changes, it also serves as an excellent Default start point for soldier training prior to deployment.

2. COMPOSITION. This tier is composed of those basic protections for individuals amounting to fundamental rights recognized as international law. These rights are reflected within numerous international declarations and treaties which reflect customary international law.

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<sup>425</sup> Inderfurth statement, *supra*.

a. The Restatement Standard. According to tj 702 of the Restatement of the Foreign Relations Law of the United States, "[A] state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (1) Genocide,
- (2) Slavery or slave trade,
- (3) The murder or causing the disappearance of individuals,
- (4) Torture or other cruel, inhuman, or degrading treatment or punishment,
- (5) Prolonged arbitrary detention,
- (6) Systematic racial discrimination, or
- (7) A consistent pattern of gross violations of internationally recognized human rights'

b. The Common Article 3 Standard. Originally intended to serve as the

preface to the Geneva Conventions (it was to provide the purpose and

direction statement for the four conventions), it was instead adopted as the law to regulate the controversial "non-international conflicts."

(1) Common Article 3 is technically a component of humanitarian law, not human rights law. However, the international community now considers the protections established by this provision so fundamental

that they have essentially "crossed over" to status as human rights.

(a) ICJ Position: In 1986, the International Court of Justice ruled that Common Article 3 serves as a "minimum yardstick of protection" in all conflicts, not just internal conflicts.'

(b) More expanded Common Article 3. Many experts assert Common Article 3 is applicable to any type of operation, regardless of whether or not such an operation can be described as a conflict. This mirrors U.S. practice in recent operations.

(2) Common Article 3 forbids:

- (a) Torture;
- (b) All violence to life or limb;

While this provision seems to open the door to limitless argument as to what falls within this category, the comment to the Restatement indicates that to trigger this category, the violations must be the result of state policy. The rights in this category are reflected in the Universal Declaration of Human Rights and other international covenants. However, violations must not only be in accordance with state policy, but must be repeated and notorious. As a practical matter, few states establish policies in violation of such rights, even if de facto violations occur. 'Military and Paramilitary Activities.<sup>426</sup>

- (c) Taking of hostages;
- (d) Degrading/humiliating treatment;
- (e) Punishment without fair and regular trials; and
- (f) Failure to care for and protect the wounded and sick.

### (3) Relationship between Humanitarian Law and Human Rights Law.

Military practitioners must recognize these two terms are not interchangeable (or entirely consistent).

(a) Humanitarian Law refers to those conventions from the law of war that protect the victims of war (primarily the Geneva Conventions). Human Rights Law refers to a small core of basic individual rights embraced by the international community during the past forty years as reflected in various declarations, treaties, and other international provisions beginning with the UN Charter and Universal Declaration of Human Rights.

(b) International humanitarian law regulates the conduct of state vis-a-vis state, whereas human rights law regulates the conduct of state vis-a-vis individual. The right to protection under humanitarian law is vested not in the individual, but in the state. Under human rights law, the protection flows to the individual directly, and theoretically

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<sup>426</sup> (*Nicar. v. U.S.*), 1986 I.C.J. 4 (June 27).

protects individuals from their own state, which was a radical transition of international law.

(i) Traditional View: Displacement. At the outbreak of armed conflict, human rights law, generally considered a component of The Law of Peace, is displaced by Humanitarian Law, which is generally considered a component of the Law of War.

(ii) Emerging View: Dual Application. At the outbreak of armed conflict, human rights law remains applicable and supplements humanitarian law (human rights law is said to apply to human conduct regardless of where along the peace, conflict, war continuum such conduct is found, and regardless of what state commits the violation).

c. The Amalgamated List. While there are some distinctions between the Restatement list and the Common Article 3 list, the combination results in the following well accepted human rights protected by international law:

- (1) Freedom from slavery or genocide;
- (2) The right to a fair and regular trial;
- (3) The right to be cared for when sick;
- (4) The right to humane treatment when in the hands of a state;
- (5) Freedom from torture and cruel, inhuman, or degrading treatment;
- (6) Freedom from murder, kidnapping, and other physical violence;
- (7) Freedom from arbitrary arrest and detention;
- (8) The right to be properly fed and cared for when detained or under the protection of a nation;
- (9) Freedom from systematic racial discrimination (to include religious discrimination);
- (10) Freedom from violation of other internationally recognized human rights if the violation occurs as a result of state policy. (Examples of

such violations include systematic harassment, invasion of the privacy

of the home, denial of fair trial, grossly disproportionate punishment, etc.)

d. The Statutory Reinforcement. The prohibition under international law against violation of these "Tier 1" rights is reinforced by various domestic statutes intended to ensure U.S. policy does not support nations which violate such rights. These include: (1) United States Foreign Assistance Act: no assistance may be provided "to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of the person . . ."<sup>427</sup>

(2) The Agricultural Trade Development and Assistance Act of 1954, as

amended 7 U.S.C. § 1712 (precluding agreement to finance sale of agricultural commodities to such governments);

(3) International Financial Institutions Act of 1977, 22 U.S.C. §§ 262d and 262(1) (establishing United States policy to oppose assistance to such governments by international financial institutions).

e. Universal Declaration Reinforcement.

(1) The Universal Declaration of Human Rights, adopted unanimously by the United Nations General Assembly in 1948. It is not a treaty, however many provisions have attained the level of customary international law.

(2) U.S. position and that of most commentators is that only the core articles within the Declaration have achieved status as customary international law. These articles include:

(a) The Common Article 3 "type" protections; and

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<sup>427</sup> 22 U.S.C. § 2151n.(a);

(b) Provisions that relate to prohibiting "any state policy to practice, encourage, or condone genocide; slavery; murder; torture; or cruel, inhuman or degrading treatment; prolonged arbitrary detention; [the denial of equal treatment before the law.]"

(c) Whether Declaration provisions which guarantee the right to private property reflect customary international law is less clear. The U.S. does recognize the customary status of at least the Declaration's "core of rights to private property."

(3) Distinguish between saying we are applying Common Article 3 type

protections and providing protections "consistent with" the Declaration.

(a) Less flexibility. The Declaration's core articles are reflections of customary law and must be observed. No caveat of "acting consistent with" will insulate U.S. from future obligations to comply with these provisions.

(b) Declaration provisions the U.S. does not consider reflective of customary international are technically not binding on the U.S.<sup>428</sup> However, these may nonetheless be integrated into the planning phase of operations and serve as guidance. The U.S. supports the spirit of the Declaration and acts consistent with all provisions unless doing so is wholly impractical.

#### C. TIER 2: Host Nation (HN) Law Providing Specific Rights to an Indigenous Population.

1. APPLICATION. U.S. policy and international law require the observance of host nation law unless such law "constitutes a threat to ... security or an obstacle to the application of [international law]." Therefore, these laws must be observed so long as they are not displaced as a result of the nature of the operation, or conflict with binding international law obligations (in most cases such an

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<sup>428</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at 5 702. Id. 3 702 k. 251

obligation would come from Tier 1). The traditional rule is that host nation law applies unless:

- a. Waived by international agreement, SOFA, or SOMA (in which case there is conventional international law in the form of an agreement which displaces the host nation law);
- b. U.S. forces engage in combat with host nation forces (in which case international humanitarian law displaces host nation law); or
- c. U.S. forces enter under the auspices of a U.N. sanctioned security enforcement mission (a Chapter VII action without the consent of the host nation).

2. COMPOSITION. Second tier protections include any protections afforded by host nation law that retain viability after the entry of U.S. forces. The most common forms of host nation protections involve rules that regulate deprivation of property and liberty.

3. SOURCES. The host nation's (1) constitution, (2) criminal code (both substantive and procedural rules), (3) environmental protection regime, and (4) civil codes that deal with use of property. In addition, any (5) SOFAS, SOMAS, or international agreements that impact the application of host nation law.

a. If host nation law applies to U.S. forces during a MOOTW, this includes ALL host nation law. JA's must be alert to international human rights<sup>429</sup> obligations of the host nation, even if not binding under U.S. law, because such obligations become binding as host nation law.

b. JAs should seek information on host nation law and applicable international agreements from the unified command.

(1) Attempt to identify those countries whose host nation law may be applicable to our operations during OPLAN review.

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<sup>429</sup> FM 27-10, supra note 9, at para. 369 and GC, supra note 3, at art. 64.

(2) Attempt to gain information regarding host nation laws from sources such as Civil Affairs units and higher headquarters. Work with Civil Affairs staff elements to develop soldier guides for host nation law.

4. THE CONFLICT SPECTRUM. Applicability of host nation law may be contingent on the nature of the operation, and range from no host nation law application (armed conflict) to total control of host nation law (presence by invitation).

a. MOOTW (Coerced Invitation?). U.S. forces enter the host nation as neither invaders or guests. Therefore, the obligation to follow host nation law is questionable. The response: sensitivity to host nation law, but refusal to treat such law as absolutely binding on U.S. forces. Operations UPHOLD DEMOCRACY and JOINT ENDEAVOR are examples of this type of status. (Adherence to Tier 1 obligations should help to ensure our forces retain the moral high ground even if they are not in full compliance with host nation law).

D. TIER 3: Conventional Law (The Hard Law).

1. APPLICATION. The third tier of protections is based on international

obligations imposed upon U.S. forces by treaties or functional equivalent instruments. These obligations may often depend on the circumstances that surround the operation and the particular status of the civilians.

a. Example: Third tier protections bestowed upon a person who satisfies the definitional requirements necessary to be considered a "refugee." The "refugee" is entitled to a protected status by operation of conventional law (The Refugee Protocol).

2. COMPOSITION. This tier includes protections bestowed by treaties and other international agreements imposing binding obligations on U.S. forces, either directly or through executing legislation. Such treaties provide protections to specific groups of persons under specific circumstances. The conventions of the third tier, when

triggered, are viewed to bind absolutely the conduct of the United States. During any period of armed conflict involving U.S. forces, all Law of War Conventions fall within this category.

3. SOURCES. The sources of law differ depending upon the type of operation and the status of the person. For example, the 1967 Refugee Protocol and the Refugee Act of 1980 provide protections for individuals granted that status. Third Tier law includes the various Law of War conventions. The most significant of these conventions are the Hague Regulations, the Geneva Convention Relative to the Protection of Civilian Persons, and Protocols I and II Additional to the Geneva and include the Hague convention.

- a. Although not ratified by the U.S., we acknowledge many provisions of the Protocols reflect customary international law.
- b. Because we do not want our practice to contradict our refusal to ratify these protocols, we characterize our compliance with the principles represented therein as either compliance with customary international law, or application of law by analogy.

4. HUMAN RIGHTS TREATIES: ASPIRATION v. OBLIGATION: Not included within this group of conventions are the various human rights

conventions ratified by the United States. Although the United States aspires to act in compliance with such treaties, certain domestic legal doctrines render these treaties non-obligatory during military operations outside U.S. territory.

a. The "decade of ratification." In the past decade Presidents Reagan, Bush and Clinton have ratified a number of important human rights treaties potentially impacting the conduct of U.S. forces during future military operations.

(1)These treaties include the International Covenant on Civil and Political Rights (ratified in 1992); the Convention on the Prevention and Punishment of the Crime of Genocide (ratified in 1988); and the These protections, however, apply only in a very narrow set of

circumstances. First, hostilities that satisfy the GC, article 2 definition of armed conflict (Common Article 2) must be present. Second, the civilians must be situated under the even narrower circumstances required by each of the individual subparts of the foregoing treaties. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment (ratified in 1994).

b. Domestic Law of Treaty Obligation. The following two doctrines of treaty obligation explain why many of these human rights treaties are not binding on U.S. forces operating outside the U.S.

(1) Extraterritoriality. Although the United States has ratified a number of important human rights treaties, it has reduced the importance of these treaties by stating that these regimes do not have extraterritorial application. (The opposite view is espoused by other nations and a number of well-recognized international law authorities).

(a) Traditional presumption: human rights law is directed at regulating

the way nations treat their own population. Under this view, human rights treaties do not apply extraterritorially unless the parties agree to such application.

(b) Scope articles. Many treaties include articles specifically establishing the scope of application. For instance, article 2 of the International Covenant of Civil and Political Rights states that the treaty applies to "all individuals within [a party's] territory and subject to its jurisdiction."

(i) These provisions do not eliminate controversy, which turns on the meaning of "subject to their jurisdiction."

(ii) U.S. position is that this term does not include civilians in areas outside the U.S. where our forces conduct MOOTW. Many experts believe, however, this language extends jurisdiction to such persons.

(iii) This interpretation might dramatically alter the U.S. treaty obligation during the course of overseas operations. (The U.S. took

no reservation, and made no understanding or declarationin regard to this issue).

(2)Non-Self-Executing (NSE) Treaties. The U.S. has made a written NSE declaration during the ratification process, which it has appended to each of these treaties (interestingly, the U.S. did not take a formal NSE reservation to any of the treaties). This theoretically removes these treaties from consideration during the course of both domestic and overseas operations.

(a) Treaties considered non-self executing do not bind U.S. forces absent executing legislation.

(b) If "executed," the legislation, and not the treaty, binds U.S. forces.

(c) Although the U.S. has not enacted legislation to execute obligations

under these treaties, it does consider them during the planning and execution phases of overseas operations.

(i) This is a policy-based consideration and not a legally-obligated consideration. (Remember, however, that a provision of a treaty that reflects customary international law is binding on U.S. operations regardless of whether the treaty is self- executing).

(ii) Using non-obligatory provisions of such treaties to guide the development of policy for military operations falls under Tier 4: Law by Analogy Extension.

E. TIER 4: U.S. Domestic Law & Policy (Including Law by Analogy Extension).

1. APPLICATION. The 4thtier of protections emerges when JAs blend law by analogy and extension, common sense, and mission imperatives.

a. There are several sources of authority for the process of "law by analogy." Both DoD Dir. 5100.77 (DoD's Law of War Program) and the Standing Rules of Engagement (SROE) require that the Law of War and similar domestic law and policy be applied in all military

operations, even where not technically triggered, to the extent such application is feasible. Additionally, any other law that logically forms the basis of an analogy should be considered.

b. Recent operations demonstrate this process. During Operations PROVIDE COMFORT, RESTORE HOPE, and UPHOLD DEMOCRACY.

c. As dealt with the paradox of operations not considered international

armed conflict which nonetheless virtually satisfied the classical elements of formal occupation. Accordingly, many of the responsibilities, rights, protections, and obligations established by traditional occupation law were observed by analogy and extension.

(1) This process of using analogy to other bodies of civilian protection law to develop a structure for dealing with civilian populations is essential to fill the void of authority that results from the lag time for international law to develop standards to apply to such situations.

(2) The significance of applying such a process may extend beyond any given operation. Because international law emerges from the customary practice of nations, our conduct may in fact form a foundation for future international law standards.

2. COMPOSITION. JAs familiar with the nature and likely impact on civilians of any given operation must search for third tier conventions; domestic statutes, executive orders, and directives. The objective of this process is to ascertain sources-of law that will enable the force to meet mission requirements while providing civilian protection rules sufficient to maintain the legal legitimacy of the operation. Then, using third tier law as guidance, As synthesize lessons learned, common sense, operational realities, and mission imperatives to develop fourth tier rules.

a. These rules must then be translated into operational parameters and transmitted to the force.

b. Relative to most MOOTW, third tier protections become especially significant in this process. When policy makers and JAs begin the process of determining what rules will belong within a package of fourth tier protections, the third tier almost always provides a logical start point for conducting such an analysis.

(1) Using such law to create a "package" of rules for the protection of civilians is an example of the U.S. acting "consistent with" laws that are not technically obligatory. This is a critical caveat that must be included in fourth tier application of such law.

## MOOTW AND OBLIGATIONS TOWARD THE WOUNDED & SICK

### A. Medical activities as part of the MOOTW mission.

1. Medical activities may be undertaken as a primary mission during MOOTW. For example, health service support operations may be part of, if not the primary goal of, a larger humanitarian and civic assistance (HCA) program. In such cases, a primary mission is to seek out the sick and provide care to designated portions of the civilian population.<sup>430</sup>

2. Medical activities may also be focused primarily on supporting combat units. Law of war issues are most likely to arise under such circumstances. This raises the issue of what humanitarian standards are applicable.

a. The following discussion of such standards is drawn from the Geneva Wounded and Sick Convention (GWS) and experiences during Operation Restore Democracy.

b. Two excellent sources of lessons learned in this area are Memorandum from MG George A. Fisher, MNF Medical Rules of Engagement (ROE) Policy of 1/25/95, and Asbjorn Eide, Allan Rosas,

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<sup>430</sup> JOINT PUB 4-02, DOCT~E FOR HEALTHSERVICE IN JOINT OPERATIONS 1 -IV -2 (15 NOV. SUPPORT IV - 1994). See also MG George A. Fisher memorandum regarding Medical- Civil Action Guidelines of 1/25/95.

Theodor Meron Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards 89 A.J.I.L. 215 (1995) (discussing certain minimum humanitarian standards applicable to all situations).

#### B. Humanitarian Standards.

1. Respect and protect the wounded and sick (Article 12 GWS). The obligation not to attack the wounded and sick and to provide basic care. The type of basic care provided is discussed in terms of emergency care. The category of wounded and sick persons is generally considered to include civilians.
2. Search for and collect wounded and sick and the dead (Article 15, GWS). This standard does not translate well to MOOTW. At best it can be applied to the extent practicable and feasible.<sup>431</sup>
  - a. Note that even under the GWS, this requirement is subject to military practicability, i.e. the obligation is not absolute.
  - b. Furthermore, the obligation to search for civilian wounded under GC

Article 16 ("as far as military consideration allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded [civilians]) is not as strong as the obligation to search for those protected under the GWS (primarily members of the armed forces). This language recognizes the primacy of civilian authorities in the matter of caring for civilians.<sup>432</sup>

- c. Finally, consistent with the primacy of civilian authorities mentioned

above, there are also sovereignty issues at play in situations such as those encountered in Panama and Haiti. "Primary responsibility for the

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<sup>431</sup> W. Hays Parks memorandum, *supra*.

<sup>432</sup> See DEPT OF ARMY FIELD MANUAL 8-10, HEALTH SERVICE INA THEATER para. 3-17 (1 Mar 1991).

collection, burial, and accountability for the wounded and dead lay with the Government of Panama. U.S. assumption of any responsibility for the burial of deceased Panamanians, military or civilian, would have constituted a breach of Panama's sovereignty without its express

consent."<sup>433</sup>

d. Consequently, the U.S. policy in Haiti was to render emergency care

required to save life, limb, or eyesight to Haitian civilians. Thus, on site medical personnel were permitted to provide emergency stabilization, treatment, and to arrange transportation to civilian hospitals. Additionally, in Haiti, treatment was provided to those persons injured as a result of U.S. actions.<sup>434</sup>

3. Medical, religious and other humanitarian personnel shall be respected and protected. U.S. forces should have no difficulty complying with this standard.

**Sum Up:** The absence of an international legislature led some 19th-century philosophers to deny that international law was a real law. Nowadays, such a charge is directed towards international law because of the absence of sanctions, i.e., the absence of an obligatory Judicial authority and the absence of a centralized executive body to enforce judgments. In the opinion of many contemporary jurists, the hallmark of any system of law is that its rules and provisions are capable of being enforced against malefactors and since international law is not generally enforceable, it is not a true law. With regard to the law of war, the defect of unreality and artificially has been raised in greater dimensions. On the one hand, states are prohibited to use force and any weapons in

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<sup>433</sup> W. Hays Parks memorandum, *supra*.

<sup>434</sup> See MG Fisher memorandum, *supra*.

their relations. On the other hand, if such a rule has been violated and war has begun, they are only forbidden to resort to specially mentioned means and weapons. This strange change in legal consequences and application of different set of rules, has been construed as a "horrible situation' Herch Lauterpacht, a well-known scholar and judge ICJ observed: "if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law. Inadequate mechanisms for punishing and repletion of the guilty, has rendered difficult the effort of the international community to promote a set of rules regulating the use of violence in armed conflicts Because, no legal system can function unless those who disregard the established rules are punished. Some maintain that the rules of IHL are frequently respected as a question of routine or as a result of a cost-benefit. Irrespective of whether this is the case or not, the question which arises is whether it is true that the reality of any system of law, depends on the chances of its effective enforcement, and that the enforceable and effective at all. The absence of effective international implementation and enforcement machinery should not lead to the conclusion that there is no law. In the same way he extent of law should not be measured in the extent of enforcement when it is recognized that the law does exist. Not only the test of the binding quality of law is not the presence or absence of assured enforcement of its rules, but also enforcement may be irrelevant to such a binding quality. The mere fact that the rules of law come into being, in the manner accepted and recognized by states as authoritative, is sufficient to qualify them as "law', and "(t) the fact of enforcement may be a reason why individuals obey the law, but it is not the reason why it is actuality law. While it is not easy to exclude the law of war from such a meaning, the real question of the difficulty of its enforcement is another and different matter altogether. In fact, international law, of which the law of war

forms part, has evolved its own and different mechanisms of enforcement. They are defective and often fail, but that does not destroy this existence. A considerable body of international agreements recognizes the international criminal responsibility of those who perpetrate violations of the laws and customs of war. The law of war, however, lacks sufficient methods and mechanisms for its implementation and enforcement. There has never been an international court in continuous session, nor an international executive agency, comparable to that of municipal law, with the ability to enforce the court's decisions. None one can ignore or deny this gap in the present condition of development of the law of war. But, it would be wrong to say that the insufficiency of sanctions detracts from the peremptory character of the law. The law is not peremptory because it has sanctions; it has sanctions because it is peremptory. Although the law of war has never been wholly dependent on a system of institutionalized and centralized enforcement, the absence of "police force" or "compulsory court" does not mean that it is completely impotent. In fact, punishment of individuals takes on special meaning with regard to the enforcement of this body of law. There are some implementation and enforcement procedures which can ensure the compliance with the law, to a large extent. These means and mechanisms, relevant to suppression and repression of war crimes, are embodied and dealt with in that part of the law of war which can be referred to as the law of war crimes. Several<sup>1</sup> sanctions have traditionally been available to enforce compliance with the law of war if a Party to a conflict resort to unlawful behavior. These include diplomatic protest and publication of the facts to influence world opinion, demands for compensation, reprisals, and the punishment of individual offenders for war crimes. The prosecution and punishment of war criminals, as the primary concern of the law of war. This practice has been recognized by general international law, and the 1949 Geneva Conventions also

contain provisions in this regard. In addition, the Geneva law has recently developed specific international instruments to secure both domestic and interstate enforcement. Among these are the institutions of the Protecting Powers and the International Fact-Finding Commission.