

Chapter II

FRAMEWORK OF THE LAW OF WAR

The first step in understanding the law of war is to understand the "language" of the law. This refers to understanding several key terms and concepts that are woven through this body of law.

A. Sources of Law.

1. Customary International Law. This can be best understood as the "unwritten" rules that bind all members of the community of nations.

a. Customary law is defined as that law resulting from the general and consistent practice of states followed from a sense of legal obligation. Customary international law and treaty law are equal in stature, with the later in time controlling.

b. It is possible for a nation not to be bound by a customary norm of international law if that nation persistently objected to the norm as it was developing and continues to declare that it is not bound by that customary international law.

c. Many principles of the law of war fall into this category of international law. Customary international law can also provide background with which to understand later codification of laws of war into treaty. Restatement of the Law, Third, Foreign Relations Law of the United States. Therefore while much of the law of war is now codified, customary international law of war is still relevant.

2. Conventional International Law. This term refers to codified rules binding on nations based on express consent. The term "treaty" best captures this concept, although other terms are used to refer to these: Convention, Protocol, and Attached Regulations.

a. Norms of customary international law can either be codified by subsequent treaties, or emerge out of new rules created in treaties.

- b. Many law of war principles are both reflected in treaties, and considered customary international law. The significance is that once a principle attains the status of customary international law, it is binding on all nations, not just treaty signatories.

There are numerous law of war treaties in force today, most of them fall within two broad categories.

A. The Targeting Method. This prong of the law of war is focused on regulating the means and methods of warfare, i.e. tactics, weapons, and targeting decisions.

- a. This method is exemplified by the Hague law, consisting of the various Hague Conventions of 1899 as revised in 1907, plus the 1954 Hague Cultural Property Convention and the 1980 Conventional Weapons Convention.

- b. The rules relating to the methods and means of warfare are primarily derived from articles 22 through 41 of the Regulations Respecting the Laws and Customs of War on Land⁷ Article 22 states that the means of injuring the enemy are not unlimited.

- c. Treaties. The following treaties, limiting specific aspects of warfare, are another source of targeting guidance. Several of these treaties are discussed more fully in the Means and Methods Outline section on weapons.

- (1) **Gas:** Geneva Protocol of 1925 prohibits use in war of asphyxiating, poisonous, or other gases. The US reserved the right to respond with chemical weapons to a chemical attack by the other side. The more recent Chemical Weapons Convention (CWC), however, prohibits production, stockpiling, and use of chemical weapons (even in retaliation). The U.S. ratified the CWC in April 1997.

⁷ Hague Convention IV. HR, Art. 22-4 1.

(2) **Cultural Property:** The 1954 Hague Cultural Property Convention prohibits targeting cultural property, and sets forth conditions when cultural property may be attacked or used by a defender.

(3) **Biological Weapons:** The 1925 Geneva Protocol prohibits biological weapons. However, the 1972 Biological Weapons Convention prohibits their use in retaliation, as well as production, manufacture, and stockpiling.

(4) **Conventional Weapons:** The 1980 Conventional Weapons Treaty restricts or prohibits the use of certain weapons deemed to cause unnecessary suffering or to be indiscriminate: Protocol I -non-detectable fragments; Protocol II -mines, booby traps and other devices; Protocol III -incendiaries; and Protocol IV- laser weapons. The U.S. has ratified the treaty by ratifying Protocols I and 11. The Senate is currently reviewing Protocols III and IV for its advice and consent to ratification. The treaty is often referred to as the UNCCW - United Nations Convention on Certain Conventional Weapons. As of 1st January 2003,90 nations are now Party to the Treaty. Protocols I, II, III, and IV have entered into force.

B. The Protect and Respect Method. This prong of the law of war is focused on establishing non-derogable protections for the "victims of war."

a. This method is exemplified by the four Geneva Conventions of 1949. Each of these four "treaties" is devoted to protecting a specific category of war victims:

(1) GWS: Wounded and Sick in the Field.

(2) GWS Sea: Wounded, Sick, and shipwrecked at Sea.

(3) GPW: Prisoners of War.

(4) GC: Civilians.

b. The Geneva Conventions entered into force on 21 October 1950. The President transmitted the Conventions to the United States

Senate on 26 April 1951. The United States Senate gave its advice and consent to the Geneva Conventions on 2 August 1955.

The "Intersection." In 1977, two treaties were created to "supplement" the 1949 Geneva Conventions. These treaties are called the 1977 Protocols (GPI & GPII). Motivated by International Committee of the Red Cross' belief that the four Geneva Conventions and the Hague Regulations insufficiently covered certain areas of warfare in the conflicts following WWII, specifically aerial bombardments, protection of civilians, and wars of national liberation. While the purpose of these "treaties" was to supplement the Geneva Conventions, they in fact represent a mix of both the Respect and Protect method, and the Targeting method.

Member countries of the Conventions:

(1) As of December 2003, 161 nations have become Parties to GPI and 156 nations have become Parties to GPII.

(2) Unlike The Hague and Geneva Conventions, the U.S. has never ratified either of these Protocols. Portions, however, do reflect state practice and legal obligations --the key ingredients to customary international law.

Position of the USA:

(1) New or expanded areas of definition and protection contained in Protocols include provisions for: medical aircraft, wounded and sick, prisoners of war, protections of the natural environment, works and installations containing dangerous forces, journalists, protections of civilians from indiscriminate attack, and legal review of weapons.

(2) US views the following Protocol I articles as either customary law international law or acceptable practice though not legally binding:

- 5 (appointment of protecting powers);
- 10 (equal protection of wounded, sick, and shipwrecked);
- 11(guidelines for medical procedures);

- 12-34 (medical units, aircraft, ships, missing and dead persons);
- 35(1)(2) (limiting methods and means of warfare);
- 37 (perfidy prohibitions);
- 38 (prohibition against improper use of protected emblems);
- 45 (prisoner of war presumption for those who participate in the
- hostilities);
- 51 (protection of the civilian population, except para. 6 -- reprisals);
- 52 (general protection of civilian objects);
- 54 (protection of objects indispensable to the survival of the civilian population);
- 57-60 (precautions in attack, undefended localities, and demilitarized
- zones);
- 62 (civil defense protection);
- 63 (civil defense in occupied territories);
- 70 (relief actions);
- 73-89 (treatment of persons in the power of a party to the conflict;
- women and children; and duties regarding implementation of GPI).

(3)The US specifically objects⁸ to the following articles:

- 1(4) (applicability to certain types of armed conflicts);
- 35(3) (environmental limitations on means and methods of warfare);

⁸ See Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l & Pol'y 419, 420 (1987).

- 39(2) (use of enemy flags and insignia while engaging in attacks);
- 44 (combatants and prisoners of war (portions));
- 47 (non-protection of mercenaries);
- 55 (protection of the natural environment); and
- 56 (protection of works and installations containing dangerous forces).

4. Regulations. Implementing targeting guidance for US Armed Forces is found in both Joint and Service publications.⁹

Key Terms:

1. Part, Section, Article . . . Treaties, like any other "legislation," are broken into sub-parts. In most cases, the Article represents the specific substantive provision.

2. "Common Article." This is a critical term used in the law of war. It refers to a finite number of articles that are identical in all four of the 1949 Geneva Conventions. Normally these related to the scope of application and parties obligations under the treaties. Some of the Common Articles are identically numbered, while others are worded virtually the same, but numbered differently in various conventions. For example, the article dealing with special agreements is article 6 of the first three conventions, but article 7 of the Fourth Convention.

3. Treaty Commentaries. These are works by official recorders to the drafting conventions for these major law of war treaties¹⁰. These "Commentaries" provide critical explanations to many treaty provisions, and are therefore similar to "legislative history" in the domestic context.

Army Publications: There are three primary Army sources that reflect the rules that flow from "the big three:"

⁹ Joint Pub 3-60, FM 27- 10 (Army), NWP 1-14MRMFM 1-10 (Navy and Marine Corps).

¹⁰ Jean Pictet for the 1949 Geneva Conventions.

1. FM 27-10: The Law of Land Warfare. This is the "MCM for the law of war. It is organized functionally based on issues, and incorporates rules from multiple sources.
2. DA Pam 27-1. This is a verbatim reprint of The Hague and Geneva Conventions.
3. DA Pam 27- 1-1. This is a verbatim reprint of the 1977 Protocols to the Geneva Conventions.
4. Because these publications are no longer available, they have been compiled, along with many other key source documents, in the Law of War Documentary Supplement.

HOW THE LAW OF WAR IS TRIGGERED.

A. The Barrier of Sovereignty. Whenever international law operates to regulate the conduct of a state, it must "pierce" the shield of sovereignty.

1. Normally, the concept of sovereignty protects a state from "outside interference with internal affairs." This is exemplified by the predominant role of domestic law in internal affairs.

2. However, in some circumstances, international law "pierces the shield of sovereignty, and displaces domestic law from its exclusive control over issues. The law of war is therefore applicable only after the requirements for piercing the shield of sovereignty have been satisfied.

3. The law of war is a body of international law intended to dictate the conduct of state actors (combatants) during periods of conflict.

- a. Once triggered, it therefore intrudes upon the sovereignty of the regulated state.
- b. The extent of this "intrusion" will be contingent upon the nature of the conflict.

The Triggering Mechanism: The law of war includes a standard for when it becomes applicable. This standard is reflected in the Four Geneva Conventions.

1. **Common Article 2** --International Armed Conflict: "[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. "

a. This is a true de facto standard. The subjective intent of the belligerents is irrelevant. According to the Commentary, the law of war applies to: *"any difference arising between two States and leading to the intervention of armed forces."*

b. Article 2 effectively requires that the law be applied broadly and automatically from the inception of the conflict. The following two facts result in application of the entire body of the law of war:

(1) A dispute between states, and

(2) Armed conflict¹¹

De facto hostilities are what are required. The drafters deliberately avoided the legalistic term war in favor of the broader principle of armed conflict. According to Pictet, this article was intended to be broadly defined in order to expand the reach of the Conventions to as many conflicts as possible.

c. Exception to the "state" requirement: Conflict between a state and a rebel movement recognized as belligerency.

(1) Concept arose as the result of the need to apply the Laws of War to situations in which rebel forces had the de facto ability to wage war.

(2) Traditional Requirements:

(a) Widespread hostilities -civil war

(b) Rebels have control of territory and population

(c) Rebels have de facto government.

¹¹ (see FM 27- 10, paras. 8 & 9).

(d) Rebel military operations are conducted under responsible authority and observe the Law of War.

(e) Recognition by the parent state or another nation.

(3) Recognition of a belligerent triggers the application of the Law of War, including The Hague and Geneva Conventions. The practice of belligerent recognition is in decline in this century. Since 1945, full diplomatic recognition is generally extended either at the beginning of the struggle or after it is successful (EX: The 1997 recognition of Mr. Kabila in Zaire).

d. Controversial expansion of Article 2 --GPI.

(1) Expands Geneva Conventions application to conflicts previously considered internal ones: "[Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination." Art 1(4), GPI.(2) U.S. has not yet ratified this convention because of objections to article(4) and other articles. The draft of Protocol I submitted by the International Committee of the Red Cross to the 1974 Diplomatic Conference did not include the expansive application provisions.

e. Termination of Application (Article 5, GWS and GPW; Article 6, GC).

(1) Final repatriation (GWS, GPW).

(2) General close of military operations (GC).

(3) Occupation (GC) --The GC applies for one year after the general close of military operations. In situations where the Occupying Power still exercises governmental functions, however, that Power is bound to apply for the duration of the occupation certain key provisions of the GC.

2. The Conflict Classification Prong of Common Article 3 --

Conflicts which are not of an international character -internal armed

conflict: "Armed conflict not of an international character occurring in the territory of one of the High Contracting Parties"

a. These types of conflicts make up the vast bulk of the ongoing conflicts.

b. Providing for the interjection of international regulation into a purely internal conflict was considered a monumental achievement for international law in 1949. But, the internal nature of these conflicts explains the limited scope of international regulation.

(1) Domestic law still applies -guerrillas do not receive immunity for their war-like acts, as would such actions if committed during an international armed conflict.

(2)Lack of effect on legal status of the parties. This is an essential clause without which there would be no provisions applicable to internal armed conflicts within the Conventions. Despite the clear Language, states have been reluctant to apply Article 3 protections explicitly for fear of conferring a degree of international legitimacy on rebels.

c. What is an "Internal Armed Conflict?" Although no objective set of criteria exist for determining the existence of a non-international armed conflict, Pictet lists several suggested criteria:

(1)Some conflict is more like isolated acts of violence, riots or banditry.

(2)Pictet establishes non-binding criteria for determining whether any particular situation rises to the level of armed conflict:

(a) The group must have an organization,

(b)The members must be subject to some authority exercised within the organization,

(c) The group must control some territory,

(d)The group must demonstrate respect for the laws of war though this is more often accepted as the group must not demonstrate an unwillingness to abide by the laws of war, and

(e) The government must be forced to respond to the group with its own armed forces.

d. Protocol II, which was intended to supplement the substantive provisions of Common Article 3, formalized the criteria for the application of that convention to a non-international armed conflict.

(1) Under responsible command.

(2) Exercising control over a part of a nation so as to enable them to carry out sustained and concerted military operations and to implement the requirements of Protocol II.

How do the Protocols fit in?

1. As indicated, the 1977 Protocols to the Geneva Conventions of 1949 are supplementary treaties. Protocol I is intended to supplement the law of war related to international armed conflict, while Protocol II is intended to supplement the law of war related to internal armed conflict. Therefore:

a. When you think of the law related to international armed conflict, also think of Protocol I;

b. When you think of the law related to internal armed conflict, also think of Protocol II;

2. Although the U.S. has never ratified either of these Protocols, their relevance continues to grow based on several factors:

a. The U.S. has stated it considers many provisions of Protocol I, and almost all of Protocol II (all except for the limited scope of application in article I), to be customary international law.¹²

b. The argument that the entire body of Protocol I has attained the status of customary international law continues to gain strength.

c. These treaties bind virtually all of our coalition partners.

¹² See Michael J. Matheson, Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM.U. J. INT'L. POL'Y 419,429-431 (1987).

d. U.S. policy is to comply with Protocol I and Protocol II whenever feasible.

U.S. Policy is to apply the principles and spirit of the Law of War during all operations, whether international armed conflict, internal armed conflict or situations short of armed conflict.

1. DoD Directive 5 100.77 requires all members of the armed forces to "comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all operations."

2. CJCSI 5810.01B also states that "The Armed Forces of the U.S. . . . will comply with the law of war during all armed conflicts, however .

. . . characterized, and unless otherwise directed by competent authorities, principles and spirit . . . during OOTW."

What is the Relationship of the Law of War with Human Rights?

1. Human Rights Law refers to a totally distinct body of international law, intended to protect individuals from the arbitrary or cruel treatment of their government at all times.

2. While the substance of human rights protections may be synonymous with certain law of war protections, it is critical to remember these are two distinct bodies of international law. *The law of war is triggered by conflict. No such trigger is required for human rights law.*

a. These two bodies of international law are easily confused, especially

because of the use of the term "humanitarian law" to describe certain portions of the law of war.

Sum up: It has been often commented that creating laws for something as inherently crime-full and lawless as war seems since absurdity. However, based on the adherence to what amounted to customary international law, it was felt that codifying laws of war would be beneficial, but as the states are sovereign and law is void at the intersection of its boundary it will only be applicable after the requirement of piercing the shield of sovereignty have been satisfied. To this end, laws of war is intended to mitigate the evils of war-

- Protecting both combatants and non combatants from unnecessary suffering,
- Safeguarding certain fundamental rights of persons who falls into the hands of enemy particularly wounded sick and civilians
- Facilitating the restoration of peace.