8 What Is a "War Crime"?

8.0. Introduction

The foundation having been laid and the framework erected, we may examine specific law of armed conflict/international humanitarian law (LOAC/IHL) issues. Initially, what is a war crime? This is a basic question for, if there is law on the battlefield, then violations of that law are possible. What constitutes a war crime, and who may be charged with a violation?

8.1. Defining War Crimes

"[F]irst, there must be an armed conflict . . . "[1] An armed conflict, international or non-international, or involving an armed opposition group, is a prerequisite to war crimes and grave breaches. Whereas armed conflict is easily discernable in a common Article 2 context, it is not always so in a non-international situation. One test (there are many) for determining the existence of an armed conflict is set out in the *Tadić* Jurisdiction decision:

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a State . . . [I]nternational humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[2]

In armed conflict there are crimes – simple violations of a domestic code, such as the state's criminal or military codes; there are war crimes – violations of LOAC; and there are grave breaches – the more serious violations of LOAC/IHL, specified in the Geneva Conventions and Additional Protocol I. Genocide, crimes against humanity, and crimes against peace are offenses under international criminal law, not included in LOAC/IHL but there is more to "war crime" and "grave breach" than a definitional phrase.

The United Nations War Crimes Commission describes the laws and customs of war as the "rules of international law with which belligerents have customarily, or by

[1] *Prosecutor v. Haradinaj, et al.*, IT-04-84-T (3 April 2008), para. 36. *Haradinaj*, offers numerous examples of situations that rise to armed conflicts, well illustrating the test involved.

[2] *Prosecutor v Tadić*, IT-94-1-A, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction (2 Oct. 1995), at para. 70.

special conventions, agreed to comply in case of war."[3] A war crime is defined, in turn, as "a serious violation of the laws or customs of war which entails individual criminal responsibility under international law."[4] The 1956 U.S. field manual, *Law of Land Warfare*, defines a war crime as "the technical expression for a violation of the law of war by any person or persons, military or civilian. *Every* violation of the law of war is a war crime."[5] The last sentence, however, is an overbroad statement, and "such an assertion has never been supported in actual State practice."[6] The British law-of-war manual employs the more specific classic definition from the London Charter, which established the Nuremberg International Military Tribunal: **"Violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."**[7]

Article 8(2) of the 1998 Statute of the International Criminal Court (ICC) contains the most detailed definition, listing four categories of war crimes: "grave breaches"; "other serious violations of the laws and customs applicable in international armed conflict"; "serious violations of article 3 common to the four Geneva Conventions . . . " committed in armed conflicts not of an international character; and "other serious violations of the laws and customs applicable in armed conflicts not of an international character."

The International Committee of the Red Cross (ICRC) study of customary law simply says, "Serious violations of international humanitarian law constitutes war crimes."[8] In a formal written objection to the ICRC's study, the United States notes, "The national legislation cited in the commentary to [the ICRC's definition] employs a variety of definitions of 'war crimes,' only a few of which closely parallel the definition apparently employed by the Study, and none matches it exactly."[9] At the end of the day, as the study's commentary confirms, there is no single binding definition of "war crime."

Despite the broad range of acceptable definitions, courts still occasionally mistake what constitutes a war crime. In 2008, the Italian Court of Cassation, in an unreported case, initiated a criminal case against an American soldier (who was not present in court) over a 2005 incident at a Baghdad checkpoint. The soldier fired on a speeding

[3] United Nations War Crimes Commission (UNWCC), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: His Majesty's Stationery Office, 1948), 24.

[4] Id.

[5] FM 27–10, *The Law of Land Warfare* (Washington: GPO, 1956), para. 499, at 178. Emphasis supplied.

[6] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (New York: Cambridge University Press, 2004), 229. "As pointed out by H. Lauterpacht, 'textbook writers and, occasionally, military manuals and official pronouncements have erred on the side of comprehensiveness' in making 'no attempt to distinguish between violations of the rules of warfare and war crimes.'" Footnote omitted.

[7] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), para. 16.21, at 422.

[8] Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. II, *Practice*, Part 1 (Cambridge: Cambridge University Press, 2005), Rule 156, at 568. This definition is followed by six pages of discussion of the meaning of the nine-word definition.

[9] John B. Bellinger III and William J. Haynes II, "A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law," 866 *Int'l Rev. of the Red Cross* (June 2007), 443, 467.

approaching vehicle, killing a senior Italian intelligence officer, wounding the driver (another intelligence officer), and wounding a recently freed Iraqi insurgent kidnap victim, a female Italian reporter. The soldier was charged under Italian criminal law with voluntary murder and voluntary attempted murder.

At trial, the soldier's defense counsel urged jurisdictional immunity because he was acting in an official capacity as a state agent. The prosecution countered that if his act was a war crime the soldier would not enjoy such immunity. That led the court to describe war crimes as "odious and inhuman" acts, not isolated and individual acts, and acts that are intentional. Although the court's actual description of a war crime was lengthier, the elements it highlighted were in error. Not all war crimes are odious or inhuman acts: misuse of the Red Cross emblem or appropriating private property, for instance. Individual acts clearly may constitute war crimes, and intent is not indispensable to prosecution. If it were, intent would have to be established in each grave breach prosecution, which is not the case. Recklessness, as well as intent, is a sufficient prosecutorial basis, for example.

Finding the soldier's act not to have been a war crime, the court ruled that he was fulfilling official duties and enjoyed immunity; the Italian court lacked jurisdiction.[10]

Finally, war crimes are not subject to any statute of limitations.[11] "Once a war criminal, always a war criminal."[12] (Interestingly, the statutes of the International Criminal Tribunal for the Former Yugoslavia, the ICC, and the Nuremberg and Tokyo International Military Tribunals all omit mention of a statute of limitations or its absence.[13])

8.2. War Crimes in Recent History

There are breaches of the law of war that do not constitute grave breaches.[14] Such offenses are nevertheless violations of the laws and customs of war. A U.S. Marine Corps reference directs, "[h]owever, [war crimes] investigators should primarily concern themselves with violations that are serious in nature . . . and that have a nexus to armed conflict . . . "[15] Disciplinary or administrative offenses do not have penal significance or trigger the mandatory actions that grave breach offenses require.

> For example, would a third state have the right to prosecute a foreign army officer for failure to comply with Article 94 of the Third Geneva Convention, which requires notification on recapture of an escaped prisoner of war? Or with Article 96, which requires that a record of disciplinary punishment be kept by the camp commander? I think not . . . These technical breaches are not recognized by the community of nations as of universal concern . . . [16]

An example of a disciplinary war crime is *The Trial of Heinz Hagendorf* (Cases and Materials, Chapter 3), a 1946 military commission involving the misuse of the Red Cross

[10] Antonio Cassese, "The Italian Court of Cassation Misapprehends the Notion of War Crimes," 6–3 *J. of Int'l. Crim. Justice* (Nov. 2008), 1077.
[11] 1968 U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *UN Juridical Y.B.* (1968), 160–1.
[12] Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, supra, note 6, at 234.
[13] Antonio Cassese, ed., *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 522.
[14] 1949 Geneva Conventions common Article 49/50/129/146.
[15] Marine Corps Reference Publication (MCRP) 4–11.8B, *War Crimes* (6 Sept. 2005), 3.
[16] Theodor Meron, "International Criminalization of Internal Atrocities," 89–3 *AJIL* (July 1995), 554, 570–1.

emblem.[17] Another example is the *Trial of Christian Baus*, a 1947 post–World War II French military tribunal, in which the accused, Baus, was a German civilian transport contractor. As a land superintendent (*Bauerfuehrer*) in occupied France, he managed six French farms. Late in the war, during Germany's retreat from France, Baus stole a household of furniture and belongings from the owners of two farms he oversaw. Convicted of theft, pillage, and "abuse of confidence," Baus was sentenced to two years' confinement.[18] The theft and abuse charges were based on the French penal code, but, under the French law establishing jurisdiction in military tribunals (the Ordinance of 28th August 1944), military courts could incorporate such civil offenses. "[T]he Court had taken the view that misappropriation by abuse of confidence was in itself a war crime, and . . . a further illustration of war crimes against property, and of the laws and customs of war as understood by one country."[19]

In another 1947 French military tribunal, *Trial of Gustav Becker, Wilhelm Weber and 18 Others*,[20] twenty German officers, non-commissioned officers, and men of the Customs Commissariat in French Savoy arrested French civilians, badly mistreating some. Three victims later died in German captivity. The twenty officers were charged with the war crimes of illegal arrest and ill treatment. Are those war crimes? "Illegal arrest or detention does not appear in the list of war crimes drawn up by the 1919 Commission on Responsibilities [that sought to assign responsibility for beginning World War I]. Neither is it explicitly mentioned in the Hague Regulations respecting the Laws and Customs of War on Land, 1907. It has, however, emerged as a clear case of war crime . . . under the impact of the criminal activities of the Nazis and their satellites, during the second world war."[21] Once again, under French law, the acts of the accused were war crimes. One of the *Becker* accused was acquitted for lack of evidence. The other nineteen were convicted of illegal arrest and ill treatment, two were sentenced to two and three years' imprisonment, and seventeen others were sentenced to twenty years' confinement at hard labor.

"War crimes" is an elastic rubric, and necessarily so. No list of war crimes or grave breaches could embrace all possible violations. Cannibalism, for example, was never envisioned as a potential crime of war. Yet, following World War II at least nine Japanese combatants were convicted of cannibalism as a war crime.[22] Other undefined delicts are addressed by customary rules and national codes, like those in the French tribunals. "Customary rules have the advantage of being applicable to all parties to an armed conflict – State and non-State – independent of any formal ratification process. In substance, they fill certain gaps and regulate some issues that are not sufficiently addressed in treaty law."[23] Grave breach offenses are another matter.

[17] UNWCC, *Law Reports of Trials of War Criminals*, vol. XIII (London: H.M. Stationary Office, 1949), 146–8. (Footnotes omitted.)
[18] Id., vol. IX, at 68–71.
[19] Id., from "Notes on the nature of the case," at 70.
[20] Id., vol. VII, at 67–73. (Footnotes omitted.)
[21] Id., from "Notes on the case," at 68.
[22] Judgment, Tokyo International Military Tribunal, cited in: Leon Freidman, ed., *The Law of War: A Documentary History* (New York: Random House, 1972), 1029–183, 1088: "[T]his horrible practice was indulged in from choice and not of necessity." Also, Chester Hearn, *Sorties into Hell* (Westport, CN: Praeger, 2003), 181–92, relating two 1946 Guam military commission sentences; and "Japanese Officer's Cannibalism," *London Times*, Dec. 3, 1945, available at: http://forum.axishistory.com/viewtopic.php?t=21498.
[23] ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," 867 *Int'l Rev. of the Red Cross* (Sept. 2007), 719, 742.

8.3. Grave Breaches and Universal Jurisdiction

Grave breaches are defined in the 1949 Conventions and the 1977 Additional Protocols. Universal jurisdiction is a significant aspect of grave breaches. The Convention "lays the foundation of the system adopted for suppressing breaches of the Convention[s]. The system is based on three fundamental obligations, which are laid on each Contracting Party – namely the obligation to enact special legislation . . . the obligation to search for any person accused of violation . . . and the obligation to try such persons or, if the Contracting Party prefers, to hand them over for trial to another State concerned."[24] States ratifying the Geneva Conventions are obliged to enact criminal legislation that extends not only to its own nationals, but to any person who has committed a grave breach, including its enemies.[25]

> When charges are preferred against a war criminal, the overriding consideration in the matter of jurisdiction is that the crimes at issue are defined by international law itself. The governing principle is then universality: all States are empowered to try and punish war criminals. The upshot is that a belligerent State is allowed to institute penal proceedings against an enemy war criminal, irrespective of the territory where the crime was committed or the nationality of the victim. In all likelihood, a neutral State (despite the fact that it does not take part in the hostilities) can also prosecute war criminals.[26]

That is a statement of universal jurisdiction. The 1949 Conventions envisioned that grave breaches could be committed only in an international armed conflict and, until recently, that was the traditional view. However, under emergent state practice, bolstered by International Criminal Tribunal for the Former Yugoslavia (ICTY) opinions, grave breaches may be committed in non-international armed conflicts, as well.[27] (See Chapter 3, section 3.8.7.) ICTY opinions, buttressed by inconsistent State practice, however, do not rise to the extensive or uniform practice required to constitute customary international law. One International Court of Justice (ICJ) separate opinion finds that *absolute* universal jurisdiction – jurisdiction asserted over an offense committed elsewhere by an individual not present in the forum state and having no connection to the forum state – is not reflected in any current state legislation.[28]

Still, grave breaches are ostensibly subject to imposition of universal jurisdiction. Universal jurisdiction, usually seen as a supplementary or optional jurisdictional basis, negates the need for a link, such as nationality, between the accused and the state in which he is tried. The essence of universal jurisdiction is that some customary international

[24] Jean S. Pictet, *Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952), 362. Hereafter, *Commentary*, Geneva Convention I.

[25] Jean de Preux, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960), 623. Hereafter, *Commentary*, Geneva Convention III.

[26] Dinstein, *Conduct of Hostilities Under the Law of International Armed Conflict*, supra, note 6, at 236.

[27] Eve La Haye, *War Crimes in Internal Armed Conflicts* (New York: Cambridge University Press, 2008), 229. "... European states and newly independent republics of Eastern Europe ... have included war crimes committed in *internal* armed conflicts in their criminal codes and have also extended universal jurisdiction over such offenses. These countries include ... Colombia, Costa Rica ... Denmark ... France, Finland ... the Netherlands ... Norway, Portugal, the Republic of Congo, Sweden ... Spain, Switzerland ..." Footnotes omitted, emphasis supplied.

[28] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, judgment [2002], ICJ Rpts 3, joint separate opinion of Judges Higgins, Kooijmans, and Burgenthal, para. 20–1.

law offenses – piracy, slave trade, traffic in children and women, grave breaches – are so heinous that every state is considered to have an interest in their prosecution.*

Universal jurisdiction is not a universally shared goal. Henry Kissinger has written, "It has spread with extraordinary speed and has not been subjected to systematic debate . . . To be sure, human rights violations, war crimes, genocide, and torture have so disgraced the modern age . . . that the effort to interpose legal norms to prevent or punish such outrages does credit to its advocates. The danger lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments."[29] More immediately, "[t]he exercise of jurisdiction by one state on the basis of the universality principle may intrude upon the sovereignty of other states. For that reason it is generally assumed that states must have consented to the exercise of universal jurisdiction in a particular treaty, or that such exercise must follow from customary international law over a particular category of crimes."[30] Examples of cases involving universal jurisdiction are the 1962 *Adolf Eichmann*, 1981 *John Demjanjuk*, and, less constructively, the 1998–1999 *Augusto Pinochet* cases.[31]

Although there have been numerous worldwide prosecutions for grave breaches, prosecutions based on absolute universal jurisdiction are few. States are averse to the possible exercise of such jurisdiction against their citizens, seeing it as a threat to sovereignty, or they argue that the suspect can be adequately dealt with by their own domestic law, civil or military.[32] States rarely initiate a criminal proceeding on the basis of universal jurisdiction unless the suspect is present in the state – although, if the suspect is present, then the prosecution is not an *absolute* universal jurisdiction prosecution, but a *permissive* universal jurisdiction prosecution.[33]

In U.S. practice, the War Crimes Act of 1996 does not provide for universal jurisdiction.[34] Other countries – Denmark, Germany, the Netherlands, Spain, and Switzerland – have vigorous universal jurisdiction laws.[35] Spain applied pure universal jurisdiction when, in February 2008, it issued an indictment charging forty current and former Rwandan military officials, who were not present in Spain, with war crimes, terrorism, crimes against humanity, and genocide. "The Indictment cites . . . the [Spanish] Organic Law on the Judiciary to find that Spanish courts may exercise universal jurisdiction without any connection between the crimes and the *forum* state. This assertion

* Today, universal jurisdiction has been extended by treaty to a wide range of offenses, including aircraft hijacking, hostage-taking, apartheid, torture, mercenaries, counterfeiting, and theft of nuclear material. In each case, however, the presence of the accused in the territory of the charging state is required.

[29] Henry A. Kissinger, "The Pitfalls of Universal Jurisdiction," *Foreign Affairs* (July/August 2001).

[30] Sonja Boelaert-Suominen, "Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards A Uniform Enforcement Mechanism for All Armed Conflicts?" 5–1 *J. Conflict & Security L.* (June 2000), 63, 71–2.

[31] *Eichmann v. Attorney General of Israel*, 136 ILR 277 (1962); and, U.K. House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolitan District and Others, ex Parte Pinochet* (25 Nov. 1998 and 24 March 1999). Demjanjuk's conviction (and sentence to death) was overturned by the Israeli Supreme Court: *Demjanjuk v. Attorney General of Israel* (29 July 1993).

[32] Jaques Verhaegen, "Legal Obstacles to Prosecution of Breaches of Humanitarian Law," 261 *Int'l Rev. of the Red Cross* (Nov.–Dec. 1987), 607.

[33] See: La Haye, *War Crimes in Internal Armed Conflicts*, supra, note 27, at Chapter 5, for a discussion of universal jurisdiction and war crimes.

[34] 18 USC Part I, Chapter 118, §2441. *U.S. v. Ramzi Yousef and Others*, 327 F. 3rd 56 (2nd Cir., 2003), held that the crime of terrorism was not subject to universal jurisdiction.

[35] Luc Reydams, *Universal Jurisdiction* (Oxford: Oxford University Press, 2003), 157, 191, 201.

of 'unconditional' or 'absolute' universal jurisdiction is in line with the most recent jurisprudence of Spanish courts."[36] (In mid-2009, the Spanish Legislature limited the court's universal jurisdiction authority.) German case law, under the Code of Crimes Against International Law, has also embraced pure universal jurisdiction.[37]

Territorial jurisdiction remains the preferred jurisdictional basis for trial, but many, like Louise Arbour, see an expanding role for the prosecution of war crimes under universal jurisdiction.[38] Others disagree,[39] pointing to Belgium's ignominious retreat, under U.S. pressure, from its universal jurisdiction statute.[40]

The first domestic prosecution based on the grave breaches universal jurisdiction provisions of the Geneva Conventions was not until 1994, forty-five years after their enactment in the 1949 Conventions.[41] It remains to be seen if universal jurisdiction, absolute or permissive, will become a force in the prosecution of war crimes and grave breaches.

8.3.1. *Prosecuting War Crimes: The Required Nexus*

Defining war crimes or grave breaches is a first step in assessing individual criminal responsibility for LOAC/IHL breaches. Committing a well-defined grave breach, alone, is not sufficient. "It is not enough to sign a treaty. States also have to take positive steps to enact domestic law or otherwise ensure that the provisions of the international treaties are put into effect."[42] To allow prosecution, the war crime must be incorporated into a criminal code, a prosecutorial vehicle. That vehicle may be the military code of the state, such as the U.S. Uniform Code of Military Justice, or it may be a domestic civil or criminal code, such as the U.S. War Crimes Act. It may be the code of an *ad hoc* international tribunal, such as the Statute of the ICTY, or that of a standing international court, such as the Statute of the ICC.

Including war crimes and grave breaches in a criminal code is not the last consideration. "A great many crimes are committed in armed conflicts that do not constitute war crimes."[43] If a war crime or grave breach is charged, "the necessity of the connection between the conduct in question and the ongoing conflict – often called the nexus – is crucial in order to determine if one faces a violation of domestic law or a war crime."[44] As in the post–World War II *Baus* case, involving furniture theft, and in the *Becker* illegal arrest case, acts not usually thought of as war crimes, in a given context may be such.

[36] Commentator, "The Spanish Indictment of High-ranking Rwandan Officials," 6–5 *J. of Int'l Crim. Justice* (Nov. 2008), 1003, 1006.
[37] 2002 *Bundesgesetzblatt, Teil I*, at 2254, cited at id., 1007.
[38] Louise Arbour, "Will the ICC Have an Impact on Universal Jurisdiction," 1–3 *J. of Int'l Crim. Justice* (Dec. 2003), 585–8.
[39] George P. Fletcher, "Against Universal Jurisdiction," and Georges Abi-Saab, "The Proper Role of Universal Jurisdiction," both id., at 580–4, and 596–602, respectively.
[40] Luc Reydams, "Belgium Reneges on Universality," id., at 679.
[41] *The Prosecution v. Refik Saric*, unpublished (Denmark High Ct., 1994), referenced in *Prosecutor v Tadić*, Defense Motion on Jurisdiction, supra, note 2, at para. 83.
[42] Brigadier General Kenneth Watkin, "21st Century Conflict and International Humanitarian Law: Status Quo or Change?" in Michael N. Schmitt and Jelena Pejic, eds., *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Martinus Nijhoff, 2007), 264–96, 283.
[43] Guénaël Mettraux, *International Crimes and the* Ad Hoc *Tribunals* (Oxford: Oxford University Press, 2005), 38.
[44] La Haye, *War Crimes in Internal Armed Conflicts*, supra, note 27, at 110.

(One doubts that *Baus* and *Becker* would be considered war crimes in today's more tightly defined codification systems.) "In the judgments rendered so far, the ad hoc Tribunals [the ICTY and the International Criminal Tribunal for Rwanda (ICTR)] have used an objective test to determine the existance and character of an armed conflict, as well as the nexus to the conflict."[45]

> If, for instance, a civilian merely takes advantage of the general atmosphere of lawlessness created by the armed conflict to kill a hated neighbor or to steal his property without his acts being otherwise closely connected to the armed conflict, such conduct would not generally constitute a war crime . . . [T]here should be no presumption . . . that, because a crime is committed in time of war, it therefore automatically constitutes a war crime.[46]

Sometimes the determination is easily made. On a September 1966 night during the U.S.–Vietnam War, a nine-man patrol entered the Vietnamese hamlet of Xuan Gnoc (2). Led by Marine Corps Private First Class John Potter, the nine went on a criminal rampage. They raped two women and shot and killed the husband, sister, and child of one of the rape victims, the sister's child, and another villager. Found out by a suspicious company commander who disbelieved their patrol report, courts-martial of the patrol members followed. Potter was convicted of five counts of premeditated murder, rape, and attempted rape. He was sentenced to confinement at hard labor for life.[47] Were his acts war crimes, and what facts indicate the answer?

The crimes of the Potter patrol were grave breaches. They were committed in the midst of the conflict. The Marines were combatants, and the victims were noncombatants. Potter and his co-accuseds would not have been at the scene but for the patrol they were carrying out in furtherance of their military command's mission. The armed conflict played a substantial role in the perpetrators' ability to commit their crimes. All of these factors make clear that the crimes of the Potter patrol were war crimes and grave breaches.

SIDEBAR. In 1969, in South Vietnam, Army Sergeant Roy Bumgarner was charged with the premeditated murder of three Vietnamese civilian men. Bumgarner admitted the killings but urged that he had killed the three in combat. He was convicted at court-martial of the lesser offense of unpremeditated murder, times three, and was sentenced to reduction in rank to private, and forfeiture of $97 pay per month for twenty-four months. Shockingly, after convicting Bumgarner of three murders, the military jury imposed no punitive discharge and no confinement. Upon appellate review, error was found and the sentence was reduced to a reduction to private and loss of $97 pay per month for six months. Private Bumgarner was then reenlisted for further military duty. The case says much about the attitude that was sometimes taken toward Vietnamese crime victims.[48] Was this a war crime?

The "Kosovo War" (1996–1999) pitted Serbia and Yugoslavia against the Kosovo Liberation Army. That conflict was immediately followed by that of Yugoslavia against

[45] Knut Dörmann, *Elements of War Crimes* (Cambridge: ICRC/Cambridge University Press, 2003), 27.
[46] Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, supra, note 43, at 42.
[47] *U.S. v. John D. Potter*, 39 CMR 791 (NBR, 1968).
[48] *U.S. v. Plt. Sgt. Roy E. Bumgarner* (43 C.M.R. 559, ACMR, 1970).

North Atlantic Treaty Organization forces, the fighting ending in June 1999. In January 2000, in Vitina, Kosovo, a small Macedonian village, U.S. Army Staff Sergeant Frank Ronghi, an 82nd Airborne Division peacekeeper, kidnapped, raped, and murdered an eleven-year-old Kosovar girl. He was quickly apprehended, court-martialed, and sentenced to imprisonment for life without possibility of parole.[49] Were his acts war crimes? They were not. The armed conflict was over and his acts had no relation to any ongoing conflict. The armed conflict played no role in Rongi's ability to commit his crimes. There is no hard-and-fast rule that differentiates a war crime from a domestic crime, but there are guidelines. "What distinguishes a war crime from a purely domestic crime is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed."[50]

8.3.2. *Prosecuting War Crimes: Who?*

A final consideration before charging a war crime is whether the suspect is amenable to charges. Who can commit a war crime?

Members of the armies of the parties to the conflict obviously may be charged with LOAC violations under civil or military codes. When a combatant is accused of a war crime and the victim is alleged to be a civilian, the prosecution bears the burden of proof that the victim was a civilian.[51]

Civilian property can be the subject of a war crime prosecution, as well. Article 35 of the 1863 Lieber Code reminded Union soldiers that "Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury . . . " Today's roster of protected property is longer and more specific. (See Chapter 15.) If, during a period of occupation, a civilian vehicle, or other property belonging to civilians or civilian companies, is seized absent military necessity, or if cash, art, cultural objects, historic monuments, or spiritual objects belonging to the occupied state are taken or purposely damaged or destroyed without military necessity, a war crime has been committed.[52] The wanton extensive destruction and appropriation of property is a grave breach.[53] A too-frequent violation is, upon capture, the taking of a prisoner of war's (POW's) personal property.[54] Common sense indicates what and when civilian property may be seized, although common sense in occupied territory is sometimes in short supply. Though many of these breaches are disciplinary in nature, they nevertheless subject the violator to administrative or criminal disciplinary action.

Just as civilians can be the victims of war crimes, they can commit them. In convicting the makers of poison gas used by the Nazis in their World War II extermination camps, a British tribunal ruled in 1946, "[t]he decision of the Military Court in the present case is a clear example of . . . the rule that the provisions of the laws and customs of war are

[49] *U.S. v. Frank J. Ronghi*, 60 MJ 83 (CAAF, 2004), cert. den., 543 U.S. 1013 (2004).
[50] La Haye, *War Crimes in Internal Armed Conflicts*, supra, note 27, at 45. Footnote omitted.
[51] *Prosecutor v. Blaškić*, IT-95-14-A (29 July, 2004), para. 111.
[52] 1907 Hague Regulation IV, Articles 23(g) and 53; 1977 Additional Protocol I, Art. 53(a), and Additional Protocol II, Art. 16.
[53] 1949 Geneva Convention common Art. 50/51/130/147.
[54] 1949 Geneva Convention III, Relative to the Treatment of Prisoners of War, Art. 18. Hereafter: "Geneva Convention III."

addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist in their violation . . . [A]ny civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal."[55] The ICTY and ICTR have convicted many civilians, including unlawful combatants, of war crimes.[56]

In a common Article 3 non-international armed conflict, such as the U.S. "war on terrorism," can Taliban and al Qaeda members be charged with war crimes? Is it possible to charge nonstate actors with violations of the Geneva Conventions or Additional Protocol I, instruments to which they have never agreed and to which they may not become parties? Yes, although not directly. There are several approaches to prosecuting rebels who fight against their parent state.[57] Under international criminal law both organizations are criminal groups, and their members criminals. Like any other criminals, they may be prosecuted under the criminal law of the states in which they commit terrorist acts. Any LOAC/IHL violations they commit may be tried as the corresponding criminal acts made criminal by the domestic codes of the victim states. Just as members of the armed forces who commit grave breaches are tried under the state's military code, Taliban and al Qaeda members are tried under the state's penal code, or the state's authority to raise military tribunals to prosecute enemies for violations of LOAC. While in military custody, even in a common Article 3 conflict, they remain protected by common Article 3.

In short, *any*one can commit a war crime. Absent one of the usual exclusions for criminal responsibility, diminished responsibility and insanity, duress, mistake of fact, or mistake of law, both combatants and civilians may be charged.

8.4. Rape and Other Gender Crimes

Gender crimes, including rape and other forms of sexual violence, were long ignored in LOAC/IHL. That has changed dramatically. "The primary impetus for the new developments in redressing sex crimes was the establishment of the International Criminal Tribunal for the Former Yugoslavia . . . in 1993."[58]

The 1863 Lieber Code, Articles 44 and 47, specifies rape as a war crime. Still, rape was common in all combat theaters of World War II, committed by both Axis and Allied forces. "Rape has always been considered a war crime, although it was not mentioned as such in either the Nuremberg Charter or the Geneva Conventions, which probably reflects the fact that it was not always prosecuted with great diligence."[59] It is not specified

[55] *Trial of Bruno Tesch and Two Others* ("The Zyklon B Case"), U.N. War Crimes Commission, *LRTWC*, vol. I (London: UN War Crimes Comm., 1947), 93, 103.

[56] E.g., *Prosecutor v. Musema*, ICTR-96–13-A, trial judgment (27 Jan. 2000), at paras. 12, 279.

[57] See Lindsay Moir, *The Law of Internal Armed Conflict* (New York: Cambridge University Press, 2002), 52–8; and Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), 14–26.

[58] Kelly D. Askin, "A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003," 11–3 *Human Rights Brief* 16 (American U. Washington College of L., Spring 2004). The arc of cases described in this section is from Ms. Askin's perceptive article.

[59] William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 43.

as a grave breach in the 1949 Geneva Conventions, nor is it mentioned in common Article 3, although it is prohibited in Geneva Convention IV, Article 27, in relation to protected persons. It was first explicitly nominated a crime against humanity after World War II, in Control Council Law No. 10, the document that authorized Nuremberg's "subsequent proceedings," but, until recently, battlefield rape was viewed with little concern. In 1991, the conflict in the former Yugoslavia changed that. "Today it is firmly established that rape and other acts of sexual violence entail individual criminal responsibility under international law,"[60] and LOAC/IHL. In 1993, Theodor Meron wrote:

> That the practice of rape has been deliberate, massive and egregious, particularly in Bosnia-Hercegovina, is amply demonstrated . . . The special rapporteur appointed by the UN Commission on Human Rights . . . highlighted the role of rape both as an attack on the individual victim and as a method of "ethnic cleansing" "intended to humiliate, shame, degrade and terrify the entire ethnic group." Indescribable abuse of thousands of women in the territory of former Yugoslavia was needed to shock the international community into rethinking the prohibition of rape as a crime under the laws of war.[61]

The international community's shock led to a reinvigorated criminalization and prosecution of rape. Article 5 of the ICTY's Statute, based on 1907 Hague Regulation IV, lists rape as a crime against humanity. The Rome Statute of the ICC declares it a war crime and a violation of the laws and customs of both international and non-international armed conflict.[62] "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts."[63] In U.S. military practice, upon conviction of rape the maximum punishment (although not imposed in the last half century) is death.[64] Forced pregnancy is criminalized in ICC Articles 8 (2) (b) (xxii), and 8 (2) (e) (vi), relating to international and non-international armed conflicts, respectively. Domestic courts are also taking a newly invigorated stance toward gender crimes in armed conflict.[65] The U.N. Security Council, in 2008, condemned sexual violence in armed conflict, calling for prosecution and an end to its inclusion in conflict-ending amnesty provisions.[66]

The sea change in the approach to sexual crimes as war crimes, torture, and crimes against humanity is seen in five ICTR and ICTY cases: *Akayesu*, *Delalić*, *Furundžija*, *Kunarac*, and *Kvočka*.

[60] Wolfgang Schomburg and Ines Peterson, "Genuine Consent to Sexual Violence Under International Criminal Law," 101–1 *AJIL* (Jan. 2007), 121, 122.

[61] Theodor Meron, "Rape as a Crime Under International Humanitarian Law," 87–3 *AJIL* (July 1993), 424–8, 425. Footnotes omitted.

[62] Arts. 8.2.(b)(xxii) and 8.2.(e)(vi), respectively.

[63] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, supra, note 8, Rule 93, at 323.

[64] *Manual for Courts-Martial, United States* (GPO: Washington, 2008), Appendix 12, Table of Maximum Punishments, Art. 120, at A12–3. For a review of U.S. armed services' involvement with rape in World War II, see J. Robert Lilly, *Taken by Force: Rape and American GIs in Europe During World War II* (New York: Palgrave Macmillan, 2007).

[65] E.g., Angela J. Edman, "Crimes of Sexual Violence in the War Crimes Chamber of the State Court of Bosnia and Herzegovina: Successes and Challenges," 16–1 *Human Rights Brief* 21 (American U. Washington College of L., Spring 2004).

[66] S.C. Resolution 1820 (9 June 2008).

SIDEBAR. The leading decision confirming rape as a crime against humanity is the ICTR's *Akayesu* judgment.[67] The mayor of the Rwandan town of Taba was Jean-Paul Akayesu. His initial indictment did not charge sexual violence. "In the midst of the trial, a witness on the stand spontaneously testified about the gang rape of her 6-year-old daughter. A subsequent witness testified that she herself was raped and she witnessed or knew of other rapes. The sole female judge at the ICTR at that time, Judge Navanethem Pillay [a South African Tamil], was one of the three judges sitting on the case. Having extensive expertise in gender violence, Judge Pillay questioned the witness about these crimes. Suspecting that these were not isolated instances of rape, the judges invited the prosecution to consider . . . amending the indictment to include charges for the rape crimes."[68] The prosecution did so. At the resumed trial, several other witnesses described pervasive rape and forced nudity in Akayesu's presence and with his encouragement. The Trial Chamber held that sexual violence was widespread and systematic in Taba, committed by Hutus to humiliate, harm, and destroy Tutsis. Akayesu was convicted of, *inter alia*, rape as genocide and as a crime against humanity. He was sentenced to imprisonment for life.[69]

Akayesu was followed by the ICTY's *Prosecutor v. Delalić*[70] (also called the *Čelebić* case, for the Bosnian prison camp where the crimes occurred). Delalić was convicted of torture for the forcible penetrations that he committed while raping his victims multiple times. (See *Delalić*, paras. 475–90, Cases and Materials, Chapter 12, for further discussion of rape as war crime.)

Delalić was followed by *Furundžija*.[71] Anto Furundžija commanded the Jokers, a particularly repellant Croatian paramilitary group. He interrogated a civilian woman over the course of eleven days, while a co-accused raped her multiple times before an audience of laughing soldiers. Although Furundžija was not the soldier's superior, and although he did not touch the victim, the Trial Chamber found that he facilitated the rapes and was as responsible as if he had himself raped her. He was convicted as a coperpetrator of rape as torture and as a war crime.

Dragoljub Kunarac commanded a reconnaissance unit of the Bosnian Serb Army. He and two coaccused took civilian women from a detention camp in Foča, sexually enslaving them for weeks or months. He was convicted of rape and enslavement as crimes against humanity.[72] In *Kunarac* the Trial Chamber redefined the elements of rape in ICTY jurisprudence, as well.[73]

[67] *Prosecutor v. Akayesu*, ICTR-96-4-T (2 Sept. 1998).
[68] Askin, "A Decade of the Development of Gender Crimes," supra, note 58, at 17.
[69] Id.
[70] *Prosecutor v. Delalić et al.*, IT-96-21-T (16 Nov. 1998).
[71] *Prosecutor v. Furundžija*, IT-95-17/1-T (10 Dec. 1998).
[72] *Prosecutor v. Kunarac, et al.*, IT-96-23 and 23/1-A-T (22 February 2001).
[73] Id., at para. 460. That definition: " . . . [T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim. Force is merely one

> The Trial Chamber in *Kunarac* held that a definition of rape given in earlier judgments focused too narrowly on the element of coercion, force, or threats of force, thus failing to recognize other factors which may render an act of sexual penetration non-consensual or non-voluntary . . . The essence of rape as an international crime was therefore said to consist in the non-consensual aspect of the act, rather than the use of force or constraint.[74]

Miroslav Kvočka and four coaccused were convicted of sex crimes associated with their tenure at the notorious Omarska detention camp. *Kvočka* is significant for its holding regarding forced nudity, molestation, sexual slavery, sexual mutilation, forced prostitution, forced marriage, forced abortion, forced pregnancy, and forced sterilization, all held to be international crimes of sexual violence.[75]

Not only does rape constitute a crime against humanity but, because it involves severe pain or suffering, it also constitutes the war crime of torture.[76] Moreover, in an international criminal law context, because the offenses of rape and torture contain differing elements, an accused may be convicted of both offenses for the commission of a single act of rape.[77]

There have been numerous ICTY and ICTR[78] cases since the five mentioned that address gender war crimes, but those five established the precedents that ICTY trial chambers have followed. The Special Court for Sierra Leone, in its first trial judgment, found forced marriage a form of sexual slavery and an inhumane act under the Statute of the Special Court.[79] "Rape has now been explicitly recognized as an instrument of genocide, a crime against humanity, and a war crime . . . Sex crimes are justiciable as war crimes regardless of whether they are committed in international or internal armed conflict."[80]

8.5. War Crimes or Not?

Grave breaches are well-known and recognizable, being specified in the 1949 Conventions and Protocol I. War crimes are also usually apparent in their battlefield wrongfulness, but they are not always recognized. On other occasions, acts presumed to be war crimes are not, just as acts seemingly unrelated to the conflicts in which they occur are held to be war crimes. Several examples follow that illustrate the sometimes difficult assessments in recognizing possible LOAC violations. The bulk of the illustrations involve

indicia of the victim's lack of consent. *Prosecutor v. Kunarac*, IT-96-23/1-A-A (12 June 2002), at para. 125. It is not necessary for the prosecution to demonstrate that the victim consistently and genuinely resisted. This definition differs slightly from that in *Akayesu*, supra, note 67, at para. 688; see: Schomburg and Peterson, "Genuine Consent to Sexual Violence," supra, note 60, at 132. Also see *Prosecutor v. Kunarac*, id., at paras. 127–8; and *Prosecutor v. Akayesu*, supra, note 67, at para. 686.

74 Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, supra, note 43, at 108.

75 *Prosecutor v. Kvočka*, IT-98-30/1-T (2 Nov. 2001).

76 Id., at para. 150. "[S]ome acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act."

77 Id., at para. 557.

78 E.g., *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T (17 June 2004), at Chapter II.E., paras. 21, 34, 39. Mayor Sylvestre Gacumbitsi was convicted of directing and participating in the particularly heinous rape and murder of Tutsi women sheltering in a church.

79 *Prosecutor v. Alex Tamba Brima*, SCSL-04-16-T (20 June 2007), para. 701. Also see Neha Jain, "Forced Marriage as a Crime Against Humanity," 6–5 J. of *Int'l Crim. Justice* (Nov. 2008), 1013; and David J. Bederman, ed., "International Decisions," 103–1 *AJIL* (Jan. 2009), 97, 103.

80 Askin, "A Decade of the Development of Gender Crimes," supra, note 58, at 19.

U.S. combatants. It would be wrong to conclude, because of that, that American combatants are less respectful of LOAC/IHL than are the soldiers of other states. Because recent conflicts have often involved U.S. soldiers and Marines, and because research material involving U.S. forces is more readily available, they appear more frequently in these examples.

Are these acts war crimes? What makes them so, and how logical is the outcome? Each example (except the first) is based on events that occurred in the U.S. – Iraq armed conflict.

8.5.1. *Escaping Prisoners of War*

Is it either a war crime or a grave breach for a POW camp guard to shoot and kill an unarmed escaping POW?

It is neither. Because POW status is given, a common Article 2 armed conflict is involved. As to the use of deadly force, "The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances."[81] The *Commentary* to Convention III explains:

> Captivity is based on force, and . . . the Detaining Power has the right to resort to force in order to keep prisoners captive . . . 'An extreme measure' means that fire may be opened only when there is no other means of putting an immediate stop to the attempt. From the moment the person attempting to escape comes to a halt, he again places himself under the protection of the Detaining Power. . . . Even when there is justification for opening fire, the Convention follows the international custom . . . and gives prisoners of war one last chance to abandon the attempt and escape the penalty.[82]

The law of war recognizes that it would be odd indeed if the armed guards of POWs were not permitted to employ force, even deadly force, to keep them confined.* That permission to fire, even to kill, however, does not extend beyond the time of the discovered escape attempt.

In World War II, on the night of March 24–25, 1944, seventy-six British and Allied officer POWs escaped from *Stalag-Luft* III, located near Sagan, Germany.[83] One hundred twenty additional POWs did not make it out of the escape tunnels because of approaching daylight. (In mid-1943, U.S. Army Air Force POWs had been transferred to an adjoining

[81] Geneva Convention III, Art. 42.

[82] Jean S. Pictet, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960), 361. Hereafter, *Commentary*, Geneva Convention III.

* In December 1944, twenty-five German POWs tunneled their way out of their holding camp near Yuma, Arizona. All were recaptured and returned to the same POW camp within weeks, most within days. Their punishment: solitary confinement and bread and water rations for the same number of days as they had been escapees. John H. Moore, *The Faustball Tunnel* (Annapolis, MD: Naval Institute Press, 1978). Near the war's end, 425,871 enemy POWs were held in camps located within the continental U.S. – Dept. of the Army Pamphlet 20–213, *History of Prisoner of War Utilization by the United States Army 1776–1945* (Washington: GPO, 1955), 91.

[83] This account is based on the court opinion in *Trial of Max Wielen and 17 Others* (The Stalag Luft III Case), British Military Court, Hamburg, Germany (July-Sept. 1947), *LRTWC*, vol. XI (London: UN War Crimes Comm., 1949), 31–53, supplemented by: Dept. of the Army Pamphlet 27–161–2, *International Law*, vol. II (Washington: GPO, Oct. 1962), 90–1; and, Aidan Crawley, *Escape From Germany* (London: Collins, 1956).

camp, so no Americans were involved in the escape, although many worked on digging and concealing the four escape tunnels.) Three of the escapees successfully reached England. Seventy-three were recaptured; fifty of the seventy-three were murdered by the *Gestapo*. The event, popularized in a 1963 motion picture, has become known as "the Great Escape."

Hitler personally authorized the murder of the recaptured *Stalag-Luft* III POWs as a disincentive for future escapes. Ernst Kaltenbrunner, head of the *Sicherheitsdienst*, the Nazi Party security services (SD) and the *Gestapo*, directed that the excuse for the murders would be that the POWs were killed while attempting to escape, and that, in any event, their wearing of civilian clothes deprived them of the protection of the 1929 Geneva POW Convention. Nazi Major General Fritz von Graevenitz objected to Fieldmarshal Wilhelm Keitel that escape is a soldier's duty, and the directive to murder the escapees should not be obeyed. Keitel scoffed at Graevenitz's objection. Major General Adolf Westhoff daringly lodged a formal complaint with Kaltenbrunner. He too was ignored. Selection of the fifty to be murdered was made in Berlin by *Schutzstaffeln* (SS) General Artur Nebe, based on his ideas of who was too young, or who had too many children, to die. Most of the murders were carried out by the Breslau *Gestapo* office, commanded by Wilhelm Scharpwinkel, who escaped to Russia after the war.

The recaptured POWs were killed in ones and twos and, in one case, in a group of ten. "Their bodies were immediately cremated, and the urns containing their ashes were returned to the camp . . . "[84] Soon after the escape, the Commandant of *Stalag-Luft* III, *Luftwaffe* Lieutenant Colonel Friedrich von Lindeiner, was court-martialed by his Nazi superiors, along with ten other camp staff. All were convicted and sentenced to imprisonment, their sentences cut short only by the end of the war.

The murder of those recaptured was noted in the Judgment of the postwar Nuremberg International Military Tribunal as a war crime for which the accused were held to answer. "It was not contended by the defendants that this was other than plain murder, in complete violation of international law."[85]

The Allied investigation of the murders, conducted by a dedicated few members of the Royal Air Force's (RAF's) Special Investigations Branch, began in 1946, after many trails had gone cold. For two years the RAF investigators covered Europe looking for the killers. Seventy-two suspects were identified, but many had been killed in wartime air raids, or died after the war, never brought to justice. Others fled into Eastern Europe, including Russia.

The postwar German government tried at least three of the involved Nazis. One, Alfred Schimmel, was convicted and hanged in 1948. Another killed himself in his cell before his sentencing. A third was acquitted.

In 1947, the British brought eighteen involved Germans to trial. Fourteen were convicted and sentenced to death, although only nine were actually hanged. Two were sentenced to imprisonment for life, two of them to ten years imprisonment. Two committed suicide, and one died of natural causes before trial. It is unclear what happened to the remaining two.

[84] Judgment, *Trial of the Major War Criminals Before the International Military Tribunal*, vol. I (Nuremberg: IMT, 1947), 171, 229.
[85] Id., 229.

The chief of a *Gestapo* office involved in the murders, Fritz Schmidt, was arrested in 1967. He was tried, pleading obedience to orders as his defense. He was convicted and sentenced to two years confinement. His was the last conviction involving the Great Escape.

In an earlier World War II incident, in 1942, captured British soldiers involved in the raid against the German heavy water plant at Telemark, Norway, were also murdered by the Nazis acting under Hitler's infamous *Kommandobfehl* (commando order) of October 1942. Prior to the raid (actually against the Norsk Hydro Hydrogen Electrolysis Plant at Vemork), a Halifax glider tug and two gliders with thirty Royal Engineers aboard, crashed. The twenty-one survivors, some badly wounded in the crashes, were all executed.[86]

Reminiscent of the Great Escape, if a single enemy accused is involved in a series of incidents in which his prisoners are killed "attempting to escape," he will be the focus of prosecutorial attention. In March 1945, Major Karl Rauer, commandant of a Nazi airfield at Dreierwalde, Germany, was involved in three such incidents that resulted in the deaths of twelve Allied POWs. Shortly after the war, Rauer and six others were tried by a British military court. "[I]t was less reasonable," the court held, "for these [accused] officers to believe after the second incident that the prisoners involved were shot while trying to escape than it was after the first, and that measures should have been taken after the first shootings to prevent a repetition." The seven were convicted. Rauer was sentenced to life imprisonment, and the others were hanged.[87]

8.5.2. *Firing on Mosques*

In 2008, a combat correspondent wrote of his experience accompanying U.S. Marines in combat in Fallujah, Iraq: "From the start, the guerrillas had used the minarets: to shoot, to spot, to signal one another. When American soldiers first came into Fallujah, 6,000 of them on foot in the middle of a November night in 2004, they weren't allowed to shoot at mosques without permission. After 12 hours, they threw the rule away."[88]

Threw away the rule? Article 53 of Additional Protocol I reads, "[I]t is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples . . . " 1907 Hague Regulation IV and 1954 Hague Convention for the Protection of Cultural Property also prohibit "acts of hostility" directed toward places of worship. The prohibition is known to members of all armed forces. Can the prohibition against firing on places of worship be disregarded, thrown away, because the enemy does not respect the sanctity of their own churches or mosques?

Yes, in some cases the rule may be disregarded. Article 53 of Additional Protocol I also reads, "[I]t is prohibited: (b) to use such objects in support of the military effort;" Hague Regulation IV, Article 27, is clearer: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion . . . *provided*

[86] Christopher Mann, "Combined Operations, the Commandos, and Norway, 1941–1944," 73–2 *J. of Military History* (April 2009), 471, 483–7.

[87] *Trial of Major Karl Rauer and Six Others*, British Military Court, *LRTWC*, vol. IV (London: UN War Crimes Comm., 1949), 113, 117.

[88] Dexter Filkins, "My Long War," *NY Times Magazine*, Aug. 24, 2008, 36–43, at 38.

they are not being used at the time for military purposes . . ."[89] (Emphasis supplied.) This does not suggest that one may use a church steeple as a machine-gun position, as in the closing scenes of the 1999 movie, *Saving Private Ryan*, or that minarets of Iraqi mosques may be targeted because they are believed to be locations of enemy snipers or artillery spotters, à la the abbey of Monte Cassino. If insurgents actually use mosques as weapons collection locations, sniper firing points, or command posts, however, as they commonly did in Iraq, it is no LOAC violation, when such use is confirmed, if the mosques are fired upon in response.

Hospitals and marked wounded collection points are also protected locations.[90] Like places of worship, they lose their protection if used for improper purposes. Additional Protocol I, Article 12, refers to military facilities: "Medical units shall be respected and protected at all times and shall not be the object of attack." In addition, "Under no circumstances shall medical units be used in an attempt to shield military objectives from attack . . . " The protection of civilian medical facilities, such as civilian hospitals in areas of combat operations, is also addressed. Article 13.1 states: "The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given . . . " During Operation Urgent Fury, the 1983 United States invasion of Grenada, a mental hospital located near Richmond Hill was taken under fire by U.S. forces. The hospital was incorrectly thought to be the site of an anti-aircraft gun.[91] In the ensuing air strike, called in because weapons were thought to be on the hospital grounds, portions of the hospital were destroyed and twelve patients were reportedly killed.[92]

Did the attack on the Richmond Hill hospital constitute a war crime? If the soldier calling in the air strike reasonably believed that the hospital hid an anti-aircraft gun, did he have the defense of mistake of fact? If so, were the twelve patients who were killed collateral damage?

The protection accorded churches and hospitals is in keeping with the purposes of LOAC/IHL. Just as a surrendering soldier who suddenly draws a weapon loses his protection under LOAC/IHL, protected churches and hospitals lose their protection should they become sites of offensive activities.

8.5.3. *Hostages*

The taking of hostages is prohibited by LOAC/IHL, and violations of the prohibition constitute a grave breach.[93] It was not always so. In ancient times, hostages were

[89] Geoffery S., Corn, "'Snipers in the Minaret – What Is the Rule?' The Law of War and the Protection of Cultural Property: A Complex Equation," *The Army Lawyer* (July 2005), 128, 36. Professor Corn, closely reading the Hague prohibition, notes, "While this provision reflects a general goal of protecting religious and cultural objects, it does not expressly prohibit the use of such objects for military purposes. Furthermore, the 'as far as possible' caveat suggests a 'military necessity' exception to this general prohibition.

[90] 1977 Additional Protocol I, Art. 12.

[91] Major Ronald M. Riggs, "The Grenada Intervention: A Legal Analysis," 109 *Military L. Rev.* (1985), 1.

[92] B. Drummond Ayres Jr., "U.S. Concedes Bombing Hospital in Grenada, Killing at Least 12," NY *Times* Nov. 1, 1983, A16.

[93] 1949 Geneva Convention common Art. 3(I) (a), and Convention IV, Art. 34. Convention IV, Art. 147 specifies that the taking of hostages is a grave breach. Hostage taking is prohibited by 1977 Additional Protocol I, Art. 75.2. (c) and Protocol II, Art. 4.2. (c), as well as by the Rome Statute of the ICC in both

commonly held to ensure the execution of treaties, offered up by one side to the other as a form of insurance. As late as 1948, the judgment of the U.S. tribunal in *The Hostages Case* held, "hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot."[94]

The same tribunal judgment held, however, "customary international law is not static. It must be elastic enough to meet the new conditions that natural progress brings to the world."[95] World War II, and the excesses suffered by hostages taken by the Nazi regime, particularly, were among the "certain conditions" that brought an international consensus that hostage taking could no longer be condoned by civilized nations. "[State] practice since then shows that the prohibition of hostage-taking is now firmly entrenched in customary international law . . . "[96] Although there is not a universally applicable definition,

> [g]enerally speaking, hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces. . . . The modern form . . . is the taking of hostages as a means of intimidating the population in order to weaken its spirit of resistance and to prevent breaches of the law and sabotage . . . "[97]

Hostage taking should not be confused with reprisals, which are acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to solely to compel the enemy to cease his own LOAC/IHL violations. In both international and non-international armed conflicts, the prohibition on hostage taking is absolute.

Despite the prohibition of more than half a century's standing, hostage taking was encountered in the U.S.–Iraq conflict. In July 2003, a brigade commander of the U.S. Army's 4th Infantry Division said that tough intelligence-gathering methods were being used by his soldiers, who had arrested the wife and daughter of a former Iraqi lieutenant general. The soldiers left a note which read, "If you want your family released, turn yourself in."[98] The colonel said that the tactics were justified because "it's an intelligence operation with detainees, and these people have info."[99] Five months later, during the search for Saddam Hussein, another brigade of the 4th ID missed Saddam but seized family members[100] and the family members of a close Saddam aide.[101] In 2006, an Iraqi female whose male relative was suspected of being a terrorist was released after being

international (Art. 8(2) (a) (viii)) and non-international (Art. 8 (2) (c) (iii)) armed conflicts. It is further prohibited by the U.N. International Convention Against the Taking of Hostages (June 1979), which is ratified by the United States.

94 *U.S. v. List et al.* ("The Hostage Case"), XI *T.W.C. Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (Washington: GPO, 1950), judgment, 1249.

95 Id., at 1241.

96 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I: *Rules*, supra, note 8, Rule 96, at 334.

97 Jean S. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), 229.

98 Thomas E. Ricks, "U.S. Adopts Aggressive Tactics on Iraqi Fighters," *Washington Post*, July 28, 2003, A1.

99 Id.

100 Eric Schmitt, "Finding Hussein Took Skill And Plenty of Legwork," *NY Times*, Dec. 16, 2003, A18.

101 "Arrests in Iraq," *NY Times*, Dec. 16, 2003, A8.

held for four months. She was one of five women who were held for the same reason. A memo reportedly written by a Defense Intelligence Agency officer said that the husband had been the target of the raid on the woman's home but she was arrested "in order to leverage the primary target's surrender."[102] As late as 2008, female family members of wanted Iraqis were seized by U.S. Army troops of the 1st ID:

> As the U.S. military searches for tactics to break an escalating guerrilla war . . . few occurrences have unleashed more anger and etched deeper the cultural divide than several arrests of wanted men's relatives – particularly women . . . Some villagers insist the relatives have been taken as hostages . . . a charge the military has denied. . . . "I told them they were creating enemies for themselves," the sheik said. "If they don't exist already, you'll make them exist now."[103]

It is disturbing that LOAC/IHL violations have been directed by senior military officers. Sometimes argued as being akin to law enforcement techniques in investigating serious crime ("In certain cases it becomes necessary to detain anyone 'who has knowledge of the acts of particularly nefarious people.'"[104]), no competent American police force arrests relatives of suspects for their possible knowledge of their relative's acts. Hostage taking under any guise is a grave breach, and these cases, brief as their descriptions are, meet the definition of hostage taking.[105] "At no time can Soldiers and Marines detain family members or close associates to compel suspected insurgents to surrender or provide information. This kind of hostage taking is both unethical and illegal."[106]

8.5.4. *Human Shields*

Is it a war crime or grave breach to employ human shields – closely related to hostages?

Article 51.7 of Additional Protocol I makes clear that, "[t]he presence . . . of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks . . . The Parties shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations." In agreement, Article 28 of Geneva Convention IV mandates that "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations." Article 23 of Convention III provides the same protection for POWs,[107] as does Article 19 of Convention I for medical units. The Statute of the ICC, Article 8(2) (b) (xxiii), recognizes the use of human shields as a war crime.

[102] Nancy A. Youssef, "U.S. Has Detained Women In Iraq As Leverage," *Miami Herald*, Jan. 28, 2006, 1.

[103] Anthony Shadid, "U.S. Detains Relatives of Suspects in Iraq Attacks," *Washington Post*, Nov. 6, 2008, A21.

[104] Id.

[105] The ICRC writes: "'[H]ostage-taking' has occurred when both of the following conditions are fulfilled: • A person has been captured and detained illegally. •A third party is being pressured, explicitly or implicitly, to do or refrain from doing something as a condition for releasing the hostage or for not taking his life or otherwise harming him physically." "ICRC Position on Hostage-Taking," 846 *Int'l Rev. of the Red Cross* (June 2002), 467.

[106] *The U.S. Army-Marine Corps Counterinsurgency Field Manual* (Chicago: University of Chicago Press, 2007), paras. 7–41, at 250.

[107] It has long been customary law that POWs may not be used as shields for enemy activity. See: *Trial of Kurt Student*, British Military Court, Luneberg, Germany (May 1946), LRTWC, vol. IV (London: UN War Crimes Commission, 1948), 118.

"Irrefutably, this norm mirrors customary international law."[108] There is no treaty-based prohibition on the use of human shields in non-international armed conflicts.

In 1967, during the U.S.–Vietnamese conflict, the Hanoi thermal power plant was successfully attacked by American aircraft. "Subsequently the North Vietnamese housed several U.S. prisoners of war . . . in the facility as hostages to preclude its reattack. It remained off-limits from attack until confirmation was received that the POWs had been removed."[109] Then the power plant was again attacked, and it was out of service for the rest of the conflict. North Vietnam's use of human shields was an LOAC/IHL breach but, until discontinued, was successful in achieving the enemy's aim.

If civilians are forced to act as human shields, as is most often the case, they are hostages, the use of whom constitutes a grave breach.[110]

Article 51.7 also prohibits deliberately placing a military objective in the midst of, or close to, a civilian area, "for example by positioning a piece of artillery in a school yard or a residential area."[111] If civilian casualties result from an illegal attempt to shield a legitimate military objective with a human shield, those casualties are the responsibility of the side using the human shield, not the attacking side.[112]

What if the individuals making up the human shield are willing participants? In July 2006, Lebanese Hezbollah militants crossed into neighboring Israel and attacked an Israeli patrol, killing three soldiers and capturing two. The thirty-three-day conflict that followed illustrates a difficult human shield problem. "[T]he [Lebanese] civilian population were seriously regarded by Israel as being involved in the conflict insofar as they provided Hezbollah with logistical support and permitted it to operate behind a shield of civilians. This is a frequent occurrence in modern conflict . . . [T]he question is whether there is any justification for violating humanitarian law in response to the corresponding [human shield] violations by the other party."[113] Can the placement of civilians in a military objective area, a form of human shield, bar an attack by enemy forces? Virtually no military target will be completely free of a civilian presence. The principle of proportionality, then, becomes central to the human shield issue. "However . . . the actual test of excessive injury to civilians must be relaxed. That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that – if an attempt is made to shield military objectives with civilians – civilian casualties will be higher than usual."[114]

Israel was ruthless in attacking suspected Hezbollah bases and missile sites in Lebanon, to include Lebanese residential areas from which Hezbollah fired rockets into Israel. More than 12,000 air strikes, cluster bombs, and over 100,000 artillery rounds were fired into Lebanon.[115] Israel estimated that 1,084 Lebanese civilians were

[108] Dinstein, *Conduct of Hostilities Under the Law of International Armed Conflict*, supra, note 6, at 130.
[109] W. Hays Parks, "Righting the Rules of Engagement," U.S. Naval Institute *Proceedings* (May 1989), 83, 92.
[110] 1949 Geneva Convention IV, Relative to the Protection of Civilian Persons in Time of War, Art. 147.
[111] Jean-François Quéguiner, "Precautions Under the Law Governing the Conduct of Hostilities," 864 *Int'l Rev. of the Red Cross* (Dec. 2006), 793, 812. Also, Stéphanie Bouchié de Belle, "Chained to Cannons or Wearing Targets on Their T-Shirts: Human, Shields in IHL," 872 *Intl Rev. of the Red Cross* (Dec. 2008), 883.
[112] Hays Parks, "Air War and the Law of War," 32–1 *AFLR* (1990), 1, 174.
[113] Enzo Cannnizzaro, "Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War," 864 *Int'l Rev. of Red Cross* (Dec. 2006), 779, 789–90.
[114] Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, supra, note 6, at 131.
[115] Uzi Rubin, "Hizballah's Rocket Campaign Against Northern Israel: A Preliminary Report," Jerusalem Center for Public Affairs, Aug. 31, 2006, available at: http://www.jcpa.org/brief/brief006-10.htm.

killed.[116] International condemnation over the lack of proportionality was widespread.[117] Was it an abuse of proportionality amounting to a war crime, or should the Lebanese have suffered criticism for use of human shields?

The proportionality/human shield conundrum of military objectives surrounded by civilians, often by accident, sometimes with forethought, is not unique to Israel. American forces regularly encounter the same issue in Iraq and Afghanistan.[118]

What if the enemy employs human shields, but persons constituting the human shields are not merely willing, but are volunteers? What if they knowingly place themselves, or allow themselves to be placed, at locations that are legitimate military objectives? Some experts contend that acting as a voluntary human shield constitutes taking a direct part in hostilities. In March 2003, as the U.S. invasion of Iraq began, there were roughly 250 Americans and Europeans voluntarily in Iraq to act as human shields for the Iraq government to place at military objectives. On April 1, two buses carrying the volunteers were fired upon, reportedly wounding several.[119] Was a war crime committed?

Yes, it was a LOAC/IHL violation. The party to the conflict who uses human shields, volunteers or not, is in violation of Article 51.7. The volunteer human shields, if killed or wounded, have no cause of action against the party who fired on them, however. Military objectives protected by human shields remain lawful targets despite the presence of such shields.

8.5.5. *Explosive Vests and Burning Bodies*

In Iraq, in July 2008, a U.S. Army Special Operations unit encountered and engaged insurgent fighters. After the firefight, an inspection of the scene of the battle revealed a number of dead enemy insurgents. Three of them were wearing explosive vests they had not detonated in the course of the firefight. The Special Operations unit did not have explosive ordnance disposal (EOD) specialists attached to the unit who could deactivate the vests, nor could EOD personnel reach the location of the firefight before the soldiers had to depart. There was a village very near the site of the engagement. How should the on-scene commander handle dead insurgents still wearing vests containing armed explosives? Any attempt to move the bodies could result in a detonation of a vest and death or injury to friendly troops. To leave the bodies where they lay would invite unfriendly Iraqis to retrieve the vests and make new deadly use of them. The effect of detonating the vests while they remained on the bodies is clear. Having a village nearby raised the possibility of noncombatant injury, and to have villagers observe the effect of detonating the vests while they remained on the bodies only complicated the

[116] Reuven Erlich, "Hezbollah's Use of Lebanese Civilians as Human Shields," part 2 (2006), at 6, available at: http://www.ajcongress.org/site/PageServer?pagename=secret2.

[117] E.g., Steven Erlanger, "With Israeli Use of Force, Debate Over Proportion," *NY Times*, July 19, 2006, A1; Warren Hoge, "Attacks Qualify as War Crimes, Officials Say," *NY Times*, July 20, 2006, A11; and John Kifner, "Human Rights Group Accuses Israel of War Crimes in Lebanon, *NY Times*, Aug. 24, 2006, A6.

[118] E.g., Paul von Zielbauer, "U.S. Investigates Civilian Toll in Airstrike, but Holds Insurgents Responsible," *NY Times*, Oct. 13, 2007, A5; Carlotta Gall, "British Criticize U.S. Air Attacks in Afghan Region," *NY Times*, Aug. 9, 2007, A1.

[119] Scott Peterson, "'Human Shields' in Tug-of-War," *Christian Science Monitor*, March 17, 2003, available at: http://www.csmonitor.com/2003/0317/p01s04-woiq.html; and Rym Brahimi, "Were Human Shields Attacked?" CNN.com./World, available at: http://www.cnn.com/2003/WORLD/ meast/04/01/ otsc. irq.brahimi/index.html.

commander's decision. Grotius wrote in 1625, "all agree that even public enemies are entitled to burial. Appian calls this 'a common right of wars' . . . Says Tacitus: 'Not even enemies begrudge burial.'"[120] Grotius had not dealt with explosive vests, however. What should the commander do to both solve his problem and avoid committing a war crime?

In a common Article 2 conflict, Article 130, Geneva Convention IV, addresses the treatment of the bodies of internees who die in custody. "The detaining authorities shall ensure that internees who die while interned are honorably buried, if possible according to the rites of the religion to which they belonged . . ." Directions for grave sites and registering the sites follow. In a common Article 3 conflict, absent internees, the intent of the same Article should be considered. Considering only common Article 3, mistreatment of enemy dead might be considered a violation of paragraph (1) (c): "outrages upon personal dignity, in particular, humiliating and degrading treatment."

In a common Article 2 conflict, Additional Protocol I, Article 34.1, directs that "The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities . . . shall be respected, and the gravesites of all such persons shall be respected . . ." These general requirements are followed by directions concerning grave sites and their registration and tending. Geneva Convention III, Article 120, relating to deceased POWs, calls for similar respect and honorable treatment of the remains of deceased prisoners.

The dead insurgents were neither prisoners nor internees, nor in occupied territory, but the legal and moral requirements of LOAC/IHL are clear. Enemy bodies may not be ill-treated. If not turned over to relatives, bodies should be buried, the location of the grave recorded and reported. Respectful treatment is the clear common theme.

The explosive vests were not in violation of LOAC/IHL. The degree of injury that detonation of the vests might inflict would not be clearly disproportionate to the intended objective, the killing of the U.S. enemy. There was not an issue of military necessity because resolution of the vest issue, no matter how decided, was not indispensable for securing the submission of the enemy as soon as possible. The sole issue was the action to be taken by the U.S. commander and its lawfulness.

When the event occurred, the commander consulted his unit's legal advisor. After considering the tactical situation, including the lack of EOD support, the proximity of potential noncombatant victims, and the need to withdraw from the area, the judge advocate made his recommendation to the commander, who agreed. The vests were detonated in place while they remained on the dead insurgents' bodies. Given the circumstances, that appears a prudent decision, and not a violation of LOAC.

Not all issues of enemy dead are so well considered. In Kandahar province in southern Afghanistan, in October 2005, a U.S. Army unit engaged a band of Taliban fighters. Afterward, a psychological warfare team piled the bodies of Taliban fighters killed in the engagement at the base of a hill where an Afghan village was located. Then, while being filmed by an Australian television crew, they set fire to the bodies they had soaked with gasoline. Over loudspeakers, the team taunted any Taliban in the village to avenge the burning of their comrades' corpses. ("Come and fight like men."[121]) The televised event raised immediate complaints that such conduct violated Geneva Convention

[120] Hugo Grotius, *The Law of War and Peace* (Buffalo, NY: Hein reprint of Kelsey translation, 1995), Book II, chapter XIX, III.

[121] Chuck Neubauer, "Soldiers Rebuked In Corpse Burning," *LA Times*, Nov. 27, 2005, A1.

prohibitions on the treatment of enemy dead, and U.S. and Afghan investigations followed. The *Los Angeles Times* reported:

> U.S. investigators found that the burning of the bodies and the broadcasting of the taunts were separate incidents. Two soldiers involved in cremating the bodies and two others who took part in the psychological warfare operation received reprimands . . . "The weather was hot, the remains were heavily damaged by gunfire, laying exposed for over 24 hours and beginning to rapidly decompose," the report said. "The unit planned to remain on that hill for 48 to 72 more hours and thus made the decision to dispose of the remains in this manner for hygiene reasons only."[122]

Unlikely assertions of hygiene notwithstanding, the burning of bodies in that manner constituted LOAC/IHL violations.

8.5.6. *Photos of POWs*

Is it a war crime to photograph an enemy prisoner? The question arises with increasing frequency when U.S. combatants routinely carry video cameras and cell phones with photographic capabilities. Cameras and phones are linked to ubiquitous laptop computers, making images from remote Afghanistan and Iraq available to relatives and news agencies, virtually in real time. Are such photos a LOAC/IHL violation?

The lawyer-like answer is: It depends. Italian domestic law forbids the publication of the photo of any police prisoner showing him/her to be wearing handcuffs. Geneva Convention III, Article 13, does not go that far: "Prisoners of war must at all times be humanely treated. . . . Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. . . . " The *Commentary* adds, "The protection [due prisoners of war] extends to moral values, such as the moral independence of the prisoner (protection against acts of intimidation) and his honour (protection against insults and public curiosity)."[123]

What is the nature of the photograph? Is it a depiction of unlawful treatment, as the infamous Abu Ghraib photos? Obviously, those photos were demeaning, pandering to the base emotions of the soldiers involved. They were degrading images, their taking contrary to Article 13.[124] Digitally obscuring the faces of the prisoners made them publishable for purposes of documenting the misconduct involved in their taking; the photos were only the final act in the LOAC/IHL violations they depicted. But what if, unlike the Abu Ghraib photos, photos of prisoners are taken for use in a lawsuit against the party holding them, or as evidence to be provided to the ICRC to document prisoner abuse? Such use would be for the protection of the depicted prisoners rather than for purposes of public curiosity and, as long as they were not made public, would be no violation.

Immediately after the initiation of the 2003 U.S.–Iraq conflict, Iraqi television showed footage of American soldiers being captured and of other wounded U.S. captive soldiers. Could the Iraqi footage be described as intimidating, insulting, or playing to public curiosity? There were strenuous U.S. objections to the "humiliating" treatment

[122] Id.
[123] *Commentary*, Geneva Convention III, at 141.
[124] Julia Preston, "Officials See Risk in the Release of Photos and Videos of Iraqi Prisoners," *NY Times*, Aug. 12, 2005, A12.

of captured Americans.[125] As one European writer contends, however, "[n]ot all images or films of prisoners of war, even if broadcast globally, violate the protection guaranteed by Article 13. Only instances where prisoners are individually identifiable on film constitute such a violation of rights . . . If prisoners are identifiable, the potential of satellite communications makes it possible for them to become objects of global curiosity and repeated and manifold sensationalism."[126] On the other hand, when a clearly identifiable prisoner is seen on television, the world knows that he is alive and apparently well. After the picture is seen, his captors are unable to credibly deny his captivity and health, and they have reason to ensure his continued well-being.

Whether a photo constitutes a war crime may turn on the purpose for which it was taken and the use to which it is put. During the common Article 2 phase of the U.S.–Iraq conflict, a photo of Saddam Hussein wearing only underpants was widely published in newspapers around the world. The photo was seemingly taken, and was published, to demean and humiliate Saddam; an insult in pixels. In contrast, if the picture was shown only to a seminar of judge advocates for purposes of illustrating what constitutes a violation of Convention III, Article 13, the taking of the photo remains a violation, but its publication in the judge advocates' seminar is not.

In antiterrorist actions, photographs may actually be required for purposes of possible prosecution. "Units should use photographs to connect the individual being detained to the basis for detention. These photographs can be and frequently are presented to judges at the Central Criminal Court of Iraq . . . Therefore, the more photographs that the unit takes on the objective, the better the potential case has for prosecution."[127] Photos of relevant evidence, such as weapons, money, or detonators, is encouraged. Of course, such photos are not for general publication.

The wrongfulness or innocence of a photo may depend on the audience for whom a picture is intended. Do lingering scenes of a bearded and recently captured Saddam Hussein having his widely opened mouth examined pander to public curiosity, or do they merely provide irrefutable evidence to a doubting Iraqi public that he was alive and in U.S. hands? The U.S. commander in Iraq, in charge of Saddam the prisoner, said:

> [W]hen we released a short video clip of the exam, the press immediately began speculating that the physician's assistant was checking Saddam's beard for lice and looking inside his mouth as if he were checking out a slave or an animal. That was not the case, however. He was simply checking for the cuts and bruises that Saddam had mentioned [receiving during capture] . . . Our sole intention was to convince the Iraqi people that we had, indeed, captured Saddam Hussein.[128]

The Iraqi audience for whom the general says the video clip was taken, would see Saddam only as being humiliated and held up to public ridicule by the invader. Surely another

[125] Jack M. Beard, "The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations," 101–1 *AJIL* (Jan. 2007), 56–73, 68.

[126] Horst Fischer, "Television Footage of Prisoners of War: From Violations to War Crimes," *Bofaxe*, No. 244E (24 March 2003).

[127] Maj. Marie Anderson and Emily Zukauskas, eds., *Operational Law Handbook, 2008* (Charlottesville: Judge Advocate General's Legal Center and School, 2008), 189.

[128] Lt.Gen. Ricardo S. Sanchez, *Wiser in Battle* (New York: Harpers, 2008), 299. Should the dead bodies of Saddam's sons, Uday and Qusay, killed resisting capture by U.S. forces, have been shown on television, as they were? "Because the Geneva Conventions did not allow [this], we had to take the issue all the way to Washington . . . [T]he administration made the decision to override the Conventions." Id., at 241.

portion of the Saddam clip could have been released, one not showing him being probed and prodded; one not tending toward insult or pandering to the desire to show a defeated and debased Saddam.

Should state parties be concerned with protecting the sensitivities of the Saddam Husseins of the world, à la Article 13, or should the limitations of Article 13 be strictly adhered to? If the U.S. broadcasts such images, do we, in effect, waive the "right" to complain when individual U.S. prisoners are shown? When does the legitimate recording of identity shade into Article 13's pandering to public curiosity?

Will particular photos, even if lawful, inflame the enemy and ultimately create unnecessary friendly casualties? Such questions are outside the ambit of LOAC/IHL, but any commander must carefully consider that issue before allowing the release of even innocuous seeming photos that picture the enemy.

The Saddam movie notwithstanding, it may be argued that there is an overblown sensitivity to showing any photos whatsoever of captives. As long as the camera does not linger on a particular captive, show him or her in humiliating poses or situations, or use the picture for propaganda purposes, the necessary *mens rea* or culpable negligence for a criminal prosecution is absent. Even the brief image of a prisoner's face in the context of a legitimate informational account should not lead to concern for a prisoner's protection under the Geneva Convention.

8.5.7. *Burying the Enemy Alive*

On February 24, 1991, U.S. and Allied forces started the "hundred-hour war" against Iraq, a common Article 2 armed conflict. On a ten-mile portion of the front – the "Saddam Line" – the U.S. 1st Infantry Division (Mechanized) faced the entrenched 110th Brigade, 26th Iraqi Infantry Division. Eight U.S. M-1A1 heavy tanks with large saw-toothed plow blades affixed to their bows were supported by Bradley Fighting Vehicles. On signal, the Abrams plows punched through the sand berms, and turned to their flanks to face the enemy infantrymen in the trenches they had just crossed. Supported by 25mm fire from the supporting Bradleys, the tanks plowed forward, burying the enemy combatants where they hunkered. Many Iraqi soldiers were buried alive. Was a war crime or grave breach committed?

When, as in this case, there is no specific provision in a LOAC convention, protocol, or treaty relating to questioned conduct, how does one determine if a war crime might have been committed, short of a trial? A reasonable indication of the lawfulness of a questioned *jus in bello* act may be determined by examining it in terms of the four core LOAC principles. In this case, there is no issue of proportionality because civilians were not involved. There is no issue of distinction because the uniformed identity of the opposing combatants was clear to both sides.

Was there a valid military necessity to employ the Abrams-mounted plows? Is the tactic employed by the Americans prohibited by LOAC/IHL? No, it is not. Was it indispensable for securing the complete submission of the enemy as soon as possible? There were a variety of tactics available to the commander of the 1st Infantry Division to overcome the enemy, such as bombing by heavy bombers, artillery bombardment, or assault by infantry. *Some* method of attack was essential, and the technique used is not prohibited, and appeared likely to quickly overcome the enemy force. There was no violation of military necessity.

Did the tactic constitute unnecessary suffering? The answer may be determined by asking whether the suffering caused was substantially outweighed by the military advantage to be gained. The answer to this key question is no; given the great military importance of quickly breaching the Saddam Line and launching the initial attack against the Iraqi enemy, the suffering caused the enemy combatants was not clearly disproportionate to the military advantage gained. The commander of the tank forces points out, "Burying people alive doesn't sound very nice, as if being burned alive in a tank does, or being bayoneted or grenaded does . . . Most people don't realize, I think, how violent ground combat is."[129] Another 1st ID officer asked, "Would it have been better if we had dismounted [from armored vehicles] and gone into the trenches with our rifles and bayonets and taken probably hundreds of American casualties?"[130] The Iraqi combatants had the opportunity to surrender upon the approach of the American tanks, and many did. Those who did not faced a battle in which they were outgunned and eventually overwhelmed. No military commander wants an equal or "fair" battle; planning to maximize the possibility of an unequal fight is a mark of good generalship and no war crime. "Military doctrine – and common sense – clearly dictated [using the tanks]. To do otherwise would have been criminally irresponsible. Was it 'fair'? The question itself is silly."[131]

In cases not covered by the laws of war, the Martens Clause requires adherence to the principles of humanity. In modern armed conflict, "humanity" can be a broadly interpreted term.

8.5.8. *Pillage*

In March 2003, U.S. Army Task Force 3/15, from the 2nd Brigade of the 3rd Infantry Division, fought its way into Baghdad. Two soldiers carefully picked their way through one of the numerous palaces deserted by Saddam and his family. The two soldiers discovered four locked safes, which they forced open. In the fourth safe they discovered $856,000 in large-denomination U.S. bills, along with substantial amounts of British pounds and Jordanian dinars. Bingo! Unobserved, the soldiers put the currency into Meals, Ready-to-Eat (MRE) boxes, which they then taped closed. One of the soldiers, however, unable to maintain his secret, sent thousands of dollars home in ordinary envelopes and stuffed inside teddy bear souvenirs. He was also unable to resist the lure of satellite cell phones, expensive watches, and other costly items available from Iraqi street vendors even in the midst of the combat zone. The soldier's profligate spending soon led his superiors to suspect him. The soldier later said, "All of a sudden, you come across $850 million [sic]? Do you think you're not gonna try to get some of that home to your family? How is anything wrong with that? I need somebody to explain that to me."[132] When a fellow soldier allegedly stole $54,000 from the original thief, investigation and courts-martial followed.

[129] Barton Gellman, "Reaction to Tactic They Invented Baffles 1st Division Members," *Washington Post*, Sept. 13, 1991, A21.
[130] Id.
[131] Harry Summers, "Bambifying War," *Washington Times*, Sept. 19, 1991, G1.
[132] Billy Cox, "The Spoils of War," *Marine Corps Times*, July 7, 2008, 14, 15.

Pillage, often referred to as "plunder," has long been recognized as prohibited by customary LOAC. The ICTY has defined it as "the fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto."[133] It has also been more simply defined as "unlawful appropriation of property in armed conflict."[134] The latter definition seems preferable as there is no customary law basis for limiting the crime to "funds."[135]

The two Baghdad thieves were charged with violation of Article 103 of the Uniform Code of Military Justice. "... Any person subject to this chapter who.... engages in looting or pillaging; shall be punished as a court-martial may direct." The *Manual for Court-Martial* defines the offense as "unlawfully seizing or appropriating property which is located in enemy or occupied territory."[136] Pillaging is also addressed in Geneva Convention IV, Article 16. ("..... As far as military considerations allow, each Party to the conflict shall... assist [endangered persons and] protect them against pillage and ill-treatment.") It is covered in Geneva Convention I, Article 15; Convention II, Article 18; Convention IV, Article 33; Additional Protocol I, Article 4.2; ICC Article 8(2) (b) (xvi); and 1907 Hague Convention IV, Articles 28 and 47. Both soldiers were convicted at their April 2004 courts-martial and sentenced to one year's confinement.[137]

Did they violate LOAC and did they commit a war crime? Clearly their acts were violations of specific laws and customs of war. Just as clearly, however, their acts were not grave breaches recognized by the community of nations as of universal concern. This was a crime committed in the combat zone, arguably associated with the conflict itself. It was a violation of the laws and customs of war and therefore a war crime, *stricto sensu*, but a violation meriting no more than a disciplinary response.

8.5.9. *"Double-tapping"*

There is no official or agreed upon definition of a practice often encountered among U.S. soldiers and Marines in Afghanistan and Iraq.[138] The tactic is known as a "double-tap" or, in some Marine Corps circles, a "dead check." It is the shooting of wounded or apparently dead insurgents to insure that they are dead.

[133] *Prosecutor v. Jelišić*, IT-95-10-T (14 Dec. 1999), para. 48.
[134] *Prosecutor v. Delalić*, supra, note 70, at para. 591.
[135] Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, supra, note 43, at 96.
[136] *Manual for Courts-Martial, United States* (Washington: GPO, 2008), iv–40.
[137] *U.S. v. PFC. Earl B. Coffey*, unreported; pet. for rev. den. 29 June 2005; and *U.S. v. John R. Getz*, unreported; pet. for rev. den. 8 March 2005. Although pillage has long been recognized as contrary to customary law of war, it has been practiced for just as long. "... [N]early all the men in ETO [World War II's European Theater of Operations] participated in the looting. It was a phenomenon of war. Thousands of men who had never before in their lives taken something of value that did not belong to them began taking it for granted that whatever they wanted was theirs. The looting was... in accord with the practice of conquering armies since Alexander the Great's time. Stephen E. Ambrose, *Band of Brothers* (New York: Simon & Schuster, 1992), 268."
[138] Israeli forces have encountered the grave breach of double-tapping, as well: Haim Watzman, "When You Have to Shoot First," *Int'l Herald Tribune*, July 29, 2005, 6. "... [T]wo of the assailants were shot dead. The third was also on the ground, badly wounded but conscious. 'I went up to him and raised my rifle and switched it to automatic,' Eldad told me. 'He put up his hands as if to fend me off, or maybe beg for mercy. But I just pulled the trigger...' But you killed a wounded and disabled man, I objected... 'He could still use his hands, and he might have had a grenade... He was going to die anyway. And he deserved it.'"

Killing enemy wounded, or prisoners, is hardly new to warfare. On both sides in World War II it happened in the Pacific[139] and in Europe,[140] and in World War I,[141] and before.[142] Seldom has the practice been as openly acknowledged as it is today, however.

A reasonable definition of double-tapping is: during the initial transit of a military objective, to *indiscriminately* twice shoot a wounded or an apparently dead enemy to ensure he is not feigning death. A double-tap should not be confused with a "controlled double," which is the firing of two aimed shots at a lawful enemy target.

Soldiers, sailors, and Marines often assault an objective such as a terrain feature, a house, or other structure. Upon taking the objective, wounded or apparently dead insurgents are sometimes encountered. Two quickly fired shots, "a double-tap," into the head or body of those wounded or dead insurgents assures the soldier or Marine that he is, in fact, dead – a "dead check." The soldier, sailor, or Marine knows that when he passes a double-tapped insurgent, he will not rise to shoot him or his fellow fighters in the back.

The reasons asserted for employing a double-tap always come down to, "so the enemy won't feign death, and later shoot my soldiers in the back." Feigning death with the intent to kill or wound the unsuspecting enemy is the war crime of perfidy.

An account of an enemy encounter near Ramadi, Iraq, is typical: "Stark saw a wounded insurgent on the ground with a hand behind his back. 'Turn on your stomach!' Gilbertson, the gunner, yelled, intending to detain the man. But the insurgent hurled a grenade . . . The pin failed, and Gilbertson shot him with his machine gun . . . After that, the soldiers said, they decided to kill any wounded insurgents able to move."[143] Is that a reasonable response to such an experience? Is it a lawful response? Is it self-defense? Is it merely . . . war?

General Jean-René Bachelet, former General Inspector of the Armed Forces of the French Republic, said of a similar situation in Sarajevo, in 1995, when he was a commanding officer of troops:

> [T]here is an exceptionally narrow dividing line between soldierly behavior, as dictated by our cultural heritage and international law, and barbaric behavior . . . [I]n situations like that, the natural instinct is barbaric. That is where the commander plays an essential, determinative role: provided that he has the support of his men, that he . . . holds sway by his strength of character, his authority and his skills, but also his inner qualities, he is the only person capable of controlling combat hysteria, which otherwise leads to barbaric behavior. That is the weight of his responsibility . . . [A]scendancy must be gained over the enemy, the upper hand must be gained over the forces of violence, the soldiers need to be the strongest. In the name of our civilization's values, however, that is not done anyhow or at any price; the principle of humanity is no less essential. Force could thus not be unbridled violence . . . [144]

[139] E.g., E.B. Sledge, *With the Old Breed* (Novato, CA: Presidio, 1981), 34, 118, 148.
[140] E.g., Ambrose, *Band of Brothers*, supra, note 137, 152, 210.
[141] E.g. Lt. Col. Dave Grossman, *On Killing* (New York: Little, Brown, 1995), 175–6. Also, Cases and Materials, following Chapter 3, *Trial of Major Benno Crusius*, convicted of murdering French wounded.
[142] John Keegan, *The Face of Battle* (London: Barrie & Jenkins, 1988), 93, 175, relating the murder of prisoners at Agincourt and Waterloo.
[143] Ann Scott Tyson, "A Deadly Clash at Donkey Island," *Washington Post*, Aug. 19, 2007, A1.
[144] Jean-René Bachelet, "Address by General Jean-René Bachelet," 870 *Int'l Rev. of the Red Cross* (June 2008), 215, 217.

A U.S. Marine recon officer in Iraq simply said, "[a]n officer's job isn't only to inspire his men to action but also to rein them in when fear and adrenaline threaten to carry them away."[145]

At some level, every combatant knows that double-tapping – shooting the wounded – is contrary to LOAC/IHL. In contrast, if a wounded but still living enemy exhibits any offensive intent, he is a lawful target, no matter how grievously wounded he may be. "Any offensive intent" is sometimes open to subjective assessment, but it may not be presumed as a matter of course. If there is an *honest and reasonable belief* in the soldier's mind that the wounded enemy presents a danger to the soldier or his fellow soldiers, the fallen enemy is a lawful target. Otherwise, he is not. It is always a possibility that the enemy may feign death, then fire on the opposing force from behind. That is why any area with apparently dead enemy fighters should be secured and the "bodies" examined, or at least watched, while friendly troops remain in the area. If it is not possible to examine enemy bodies or post a security watch, and it often is not in a combat situation, the risk of a perfidious enemy does exist. That is, and always has been, a combatant's risk.

That is easy to say in the calm of a seminar room, but that makes it no less true in the chaos of combat. The possibility of perfidy is not an excuse to violate LOAC as a matter of course. "[M]embers of the Armed Forces are expected to behave responsibly under adverse conditions, even when no peer supervision is present. Members of the military are expected to resist temptation – which may be considerable in battle – to deviate from what they know to be ethically proper."[146]

Indiscriminate – and "indiscriminate" is stressed – double-tapping is a grave breach of LOAC, in violation of Article 12 of Geneva Convention I: "Members of the armed forces . . . who are wounded . . . shall be respected and protected in all circumstances . . . Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated . . . " Double-tapping is the grave breach of murder. To double-tap a wounded enemy who appears to be reaching for a weapon is no crime, however. If a Marine honestly and reasonably believed that a wounded insurgent he killed had a weapon, but the Marine was mistaken, it still is no crime. The issue turns on the honesty and reasonableness of the Marine's belief, and, in combat, Marines and soldiers should be given every benefit of the doubt. That benefit should not be stretched to constitute license, however.

The prohibition against indiscriminate double-tapping is customary law and is at least 140 years old. The Lieber Code mandates in Article LXI that, "[t]roops . . . have no right to kill enemies already disabled on the ground, or prisoners captured by other troops." The U.S. law of war manual prohibits indiscriminate double-tapping: "It is especially forbidden . . . to declare that no quarter will be given." and, " . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion."[147] Double-tapping is contrary to Additional Protocol I, Articles 40 and 41, as well. Article 40: "It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis." Article 41: "1. A person who is recognized or who, in the circumstances should be recognized to be *hors de*

[145] Nathaniel Fick, *One Bullet Away* (New York: Houghton Mifflin, 2006), 253.
[146] Th.A. van Baarda and D.E.M. Verweij, *Military Ethics: The Dutch Approach* (Leiden: Martinus Nijhoff, 2006), 12.
[147] FM 27–10, *The Law of Land Warfare*, supra, note 5, paras. 28 and 29, at 17.

combat shall not be made the object of attack. 2. A person is *hors de combat* if: "(c) he has been rendered unconscious or is otherwise incapacitated by wounds . . . and therefore is incapable of defending himself."

Double-tapping is an easy course, however, and it continues. During the common Article 2 phase of the U.S. invasion of Iraq, in April 2003, a U.S. Army column from the 3rd Infantry Division (Mechanized) was fighting its way toward Baghdad. As the Abrams tanks and Bradley fighting vehicles drove northward, they encountered a new enemy tactic.

> They [Iraqis] would lie next to the ditches, pretending to be dead. After the tanks had passed, they would leap up, aim an RPG tube, and fire grenades at the rear of the tanks. . . . From the commander's hatch of his Bradley, [the commander] . . . spotted two Iraqi fighters in the median. One was waving a white flag . . . They were making wild "don't shoot" gestures. [The commander] let them go. But just after he passed them, the two men picked up weapons and opened fire. . . . Over the net, other commanders were complaining about the phony dead men rising up and firing weapons. They wanted permission to make sure people who appeared to be dead really were dead. Lieutenant Colonel [in charge] had heard enough. He got on the net and ordered his men to "double tap." Anything you see, he instructed, don't assume it's dead. Double tap it. Shoot it again . . . [148]

It is facile to criticize the conduct of those on the battlefield who sometimes must make instantaneous decisions that may mean the success or failure of an assigned mission or the death or wounding of one's own troops. Ordering or allowing the shooting of a wounded enemy should never be a commander's decision, however. "Effective leadership demands judgments which are sound from the operational *and* the ethical point of view."[149] Like police officers, soldiers and Marines cannot lawfully fire on someone who *could* pose risk; they cannot carry enough ammunition to kill everyone who *could* be a threat. They cannot double-tap a wounded insurgent because yesterday they heard of an insurgent who hid a grenade he used to kill himself and an approaching soldier. For both police officers and soldiers, it is potentially a harsh law, but the profession of arms is harsh. Nor is "I did it to save American lives" license to violate LOAC. That is *kriegsraison*, the individual's belief that he has the right to do whatever is required to prevail; to do whatever he believes is required to win. It is murder on the battlefield.

8.6. U.S. Military Policy

"Long before U.S. troops were engaged in combat in Vietnam, the Army had included in its training programs material designed to inculcate in the troops a knowledge of the rights and obligations under the Geneva conventions of 1949."[150] During that conflict, on April 20, 1965, little more than a month after the initial major American units landed at Da Nang, South Vietnam, the first Military Advisory Command, Vietnam (MACV) directive dealing with war crimes was published. MACV Directive 20–4 ordered that it was "the responsibility of all military personnel having knowledge or receiving a report of an incident or of an act thought to be a war crime to make such incident known to his

[148] David Zucchino, *Thunder Run* (New York: Grove Press, 2004), 32.
[149] van Baarda and Verweij, *Military Ethics*, supra, note 146, at 2. Emphasis in original.
[150] MGen. George S. Prugh, *Law at War: Vietnam 1964–1973* (Washington: Dept of the Army, 1975), 74.

commanding officer as soon as practicable."[151] The directive applied to members of all branches of U.S. Armed Forces in South Vietnam.

From that date forward, there have been multiple orders in effect in every U.S. armed service requiring that war crimes and suspected war crimes be promptly reported. Rules of engagement pocket cards carried by U.S. combatants usually repeat that admonition. The semiannual classes on LOAC that every U.S. armed service member is required by service order to attend, starting in basic training, repeats that war crimes are to be immediately reported. This training is in keeping with the requirements of Geneva Convention common Article 47/48/127/144 and Additional Protocol I, Article 87.1.

But, just as no domestic law is going to end domestic crime, no military order, regardless of how often repeated, can prevent all criminal conduct by armed men and women engaged in combat. The unit that perpetrated horrific grave breaches at My Lai was subject to a multiplicity of Department of Defense, Department of the Army, MACV, and division orders regarding the prevention and reporting of war crimes. Yet they had not received adequate law of war training. Lieutenant General William Peers, who conducted the most comprehensive of the My Lai investigations, wrote, "Undoubtedly part of the problem was rooted in the lackadaisical manner in which the training was handled."[152]

Still, as with most states, it is long-standing U.S. policy that all service members be trained in LOAC, receive regular refresher training, and be made aware of their obligation to report war crimes and suspected war crimes. That policy is vigorously pursued, and most war crimes that come to light are revealed as a result of reports by service members. At the same time, the perception of some younger warfighters that telling superiors of a possible crime committed by another soldier or Marine is "ratting out" a buddy inhibits reporting.[153] In such cases the silent witnesses, if found out, may be (and some have been) disciplined for not reporting a war crime of which they knew.[154] We will never know how often known war crimes are not reported.

8.7. Summary

Crimes, war crimes, and grave breaches. For combatants, the first are defined in the state's military justice code – for the Untied States, the Uniform Code of Military Justice (UCMJ). While of little direct significance for LOAC and IHL, the UCMJ is important because it is the vehicle by which war crimes are usually charged, when committed by U.S. combatants.

[151] Id., 72, 137.

[152] Lt.Gen. W.R. Peers, *The My Lai Inquiry* (New York: Norton, 1979), 230. Gen. Peers adds, "Even accepting these training deficiencies . . . there were some things a soldier did not have to be told were wrong – such as rounding up women and children and then mowing them down, shooting babies out of mothers' arms, and raping." Id.

[153] An example of such thinking is found in literature and media reports. The front page of the June 9, 2008, *Marine Corps Times*, in inch-high letters, read, "Stand by Your Squad." The sub-head read, "The story of one Marine who refused to snitch," referring to U.S. federal grand jury proceedings regarding alleged 2004 grave breaches in Fallujah, Iraq.

[154] Chris Amos, "6 Sailors Charged With Detainee Abuse In Iraq 5 Others Get NJP For Failing To Report It," *Navy Times* Web site (Aug. 14, 2008), available at: http://www.navytimes.com/news/2008/08/navy_bucca_081408/.

Grave breaches are specified in Geneva Convention common Article 49/50/129/146. They are the most serious LOAC/IHL crimes, usually committed against military or civilian prisoners. States ratifying the 1949 Geneva Conventions are pledged to prosecute grave breaches. Originally considered limited to international armed conflicts, today grave breaches are often prosecuted when committed in non-international conflicts, as well.

Some war crimes are sufficiently minor to be considered disciplinary in nature. There is no internationally agreed definition of war crimes, and no definition could encompass all possible war crimes any more than a municipal criminal code can enumerate all possible criminal acts. However, an authoritative listing of war crimes is found in the Statute of the ICC.

A mandatory requirement of grave breaches, besides that requiring criminal provisions for their violation, is that ratifying states seek out and try those who have committed them, a form of universal jurisdiction. In practice, some states exercise permissive universal jurisdiction – that is, they prosecute grave breaches no matter where committed, but only if the accused is present in their state.

When it is determined that a war crime has been committed, it may be prosecuted if that offense is reflected in the state's military code or has been incorporated in the state's domestic criminal code, and if the act has a nexus, a connection, to an armed conflict. War crimes are most often committed by combatants, but may be committed by civilians, as well.

By now, like grave breaches, most lesser war crimes have been codified in treaties such as the Geneva Conventions and Additional Protocols. Those that are not may be, and continue to be, tried as violations of the laws and customs of war.

CASES AND MATERIALS

PROSECUTOR V. DUSKO TADIĆ

(IT-94-1-T) Opinion and Judgment (7 May 1997). Footnotes omitted.

Introduction. *The ICTY's* Tadić *case is one of the most significant in LOAC for several reasons. One reason is that it explains essential concepts that had not been decided since their incorporation in the 1949 Geneva Conventions. A concept it examines is the requirement of a nexus between the alleged wrongful acts of an accused and an armed conflict.*

572. The existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the former Yugoslavia. For a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.

573. In relation to the applicability of international humanitarian law to the acts alleged in the Indictment, the Appeals Chamber has held that:

> Even if substantial clashes were not occurring . . . at the time and place the crimes were allegedly committed . . . international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.

For an offence to be a violation of international humanitarian law, therefore, this Trial Chamber needs to be satisfied that each of the alleged acts was in fact closely related to the hostilities. It would be sufficient to prove that the crime was committed in the course of or as part of the hostilities in, or the occupation of, an area controlled by one of the parties. It is not, however, necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred, . . . nor is it necessary that the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict; the obligations of individuals under international humanitarian law are independent and apply without prejudice to any questions of the responsibility of States under international law. The only question to be determined in the circumstances of each individual case, is whether the offenses were closely related to the armed conflict as a whole.

574. In any event, acts of the accused related to the armed conflict in two distinct ways. First, there is the case of the acts of the accused in the take-over of Kozarac . . . Given the nature of the armed conflict as an ethnic war and the strategic aims of the *Republika Srpska* to create a purely Serbian State, the acts of the accused during the armed take-over and ethnic cleansing of Muslim and Croat areas . . . were directly connected with the armed conflict.

575. Secondly, there are the acts of the accused in the camps run by the authorities of the *Republika Srpska*. Those acts clearly occurred with the connivance or permission of the authorities running these camps and indicate that such acts were part of an accepted policy towards prisoners in the camps . . . Indeed, such treatment effected the objective of the Republika Srpska to ethnically cleanse, by means of terror, killings or otherwise, the areas of the Republic of Bosnia and Herzegovina controlled by Bosnian Serb forces. Accordingly, those acts too were directly connected with the armed conflict.

Conclusion. *Having found the required nexus between Tadić's wrongful acts and the armed conflict, the Trial Chamber was satisfied that he had committed war crimes, rather than violations of the domestic law. The Chamber eventually found Tadić not guilty of several charges but convicted him of multiple counts of persecution, cruel treatment, crimes against humanity, inhumane acts, and assaults. He was sentenced to confinement for a period of ten years.*

PROSECUTOR V. KUNARAC, ET AL.

IT-96-23 & 23/1-A (12 June 2002). Footnotes omitted.

Introduction. *Five years after the* Tadić *opinion, the nexus requirement was further clarified in the* Kunarac *opinion.*

55. There are two general conditions for the applicability of Article 3 of the [ICTY] Statute: first, there must be an armed conflict; second, the acts of the accused must be closely related to the armed conflict.
56. An "armed conflict" is said to exist "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".

57. There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place . . . [T]he requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporarily and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.

58. What ultimately distinguishes a war crime from a purely domestic offense is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established . . . that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. . . .

59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.

60. The Appellant's proposition that the laws of war only prohibit those acts which are specific to actual wartime situations is not right. The laws of war may frequently encompass acts which, though they are not committed in the theater of conflict, are substantially related to it. The laws of war can apply to both types of acts. The Appeals Chamber understands the Appellant's argument to be that if an act can be prosecuted in peacetime, it cannot be prosecuted in wartime. This betrays a misconception about the relationship between the laws of war and the laws regulating a peacetime situation. The laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation. . . .

64. Furthermore, the Appeals Chamber considers that the Prosecutor did not have to prove that there was an armed conflict in each and every square inch of the general area. The state

of armed conflict is not limited to the areas of actual military combat but exists across the entire territory under the control of the warring parties . . .

65. . . . The Appeals Chamber does not accept the Appellant's contention that the laws of war are limited to those acts which could only be committed in actual combat. Instead, it is sufficient for an act to be shown to have been closely related to the armed conflict . . .

Conclusion. *With this opinion, it becomes clear that, in ICTY practice, at least, short of a crime committed between and among one side's combatants, a nexus between an alleged wrongful act and an ongoing armed conflict is not difficult to establish.*

"THE ZYKLON B CASE"

Trial of Bruno Tesch and Two Others
British Military Court, Hamburg, Germany (1–8 March, 1946)[155]

Introduction. The Zyklon B Case, *conducted shortly after the conclusion of World War II, was a military tribunal that examined*, inter alia, *the liability of civilians for the commission of war crimes, although this was not a major issue in the case. (The Prosecutor was Major, later Colonel, G.I.A.D. Draper, later a prominent British law of war publicist and professor.) From the War Crimes Commission report of the commission*:

Bruno Tesch was owner of a firm which arranged for the supply of poison gas intended for the extermination of vermin, and among the customers of the firm were the [Nazi] S.S. Karl Weinbacher was Tesch's Procurist or second-in-command. Joachim Drosihn was the firm's first gassing technician. These three were accused of having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so used. The Defence claimed that the accused did not know of the use to which the gas was to be put; for Drosihn it was also pleaded that the supply of gas was beyond his control. Tesch and Weinbacher were condemned to death. Drosihn was acquitted.

From the record of the British Military Court that prosecuted the three civilians:

B. NOTES ON THE CASE

2. QUESTIONS OF SUBSTANTIVE LAW

(ii) *Civilians as War Criminals*

The decision of the Military Court in the present case is a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of the state and other public authorities, but to anybody who is in a position to assist in their violation.

The activities with which the accused in the present case were charged were commercial transactions conducted by civilians. The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal.

[155] U.N. War Crimes Commission, *LRTWC*, vol. I (London: UN War Crimes Comm., 1947), 93–103.

Conclusion. *Clearly, not only soldiers can be held criminally liable for grave breaches and war crimes. In other post–World War II trials, government officials, industrialists, judges and prosecutors, and concentration camp inmates and guards were found guilty of war crimes.*

PROSECUTOR V. FURUNDŽIJA

IT-95-17/1-T (10 December 1998). Footnotes Omitted.

Introduction. *An ICTY Trial Chamber discusses universal jurisdiction in the context of the grave breach of torture. Years before the U.S. Military Commissions Act of 2006, this opinion deliberates the legal ineffectiveness of a state's legislative attempt to immunize those who torture, which critics charge the Military Commissions Act with doing.*[156]

155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimize any legislative, administrative or judicial act authorizing torture . . . If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would . . . not be accorded international legal recognition . . . What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorization by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have international duties which transcend the national obligations of obedience imposed by the individual State".

156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, "it is the universal character of the crimes in question [i.e. international crimes] which vests in every State the authority to try and punish those who participated in their commission."

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.

[156] E.g., Jordan J. Paust, *Beyond the Law* (New York: Cambridge University Press, 2007), 32.

Conclusion. *Does this opinion, buttressed by reference to a U.S. Federal District Court opinion,*[157] *suggest anything about possible travel plans for leaders of states who sponsor legal efforts to immunize those who torture?*

IN RE AMBERGER[158]

Wuppertal, Germany, British Military Court, March 14, 1946

Introduction. *The duty of captured combatants to escape, if reasonably possible, and the duty of their captors to foil attempts to escape, are highlighted here. Amberger's was a case sadly similar to many other post–World War II military commissions. It is notable only for the judge advocate's frank, even stark, assessment of the duties and rights of the opposing parties.*

The Facts: The accused Amberger, who was a warrant officer in the German Army, was charged with the killing at Dreierwalde, on March 22, 1945, of four enemy prisoners of war. The circumstances were as follows: during a severe air raid on March 21, 1945, five Australian and British airmen were forced to bail out from their aeroplane. On landing they were made prisoners of war and taken to the near-by aerodrome of Dreierwalde. On the following evening the five prisoners were placed in charge of the accused Amberger and two German non-commissioned officers, and marched off in the direction of a railway station, ostensibly en route for a prisoner of war camp. After proceeding for a distance of about a mile and a half, the party turned along a track which led into a wood. The five prisoners of war were walking abreast and in an orderly fashion in front of the guards when, without warning, the accused Amberger and the two other guards opened fire on them. All the prisoners with the exception of one, Flight-Lieutenant Berick, were killed. The latter, although wounded, managed to escape.

In his defense the accused said that he had seen the prisoners of war talking to one another in a suspicious manner and taking their bearings from canal bridges and from the stars. Their conduct had led him to believe that they were about to make an attempt to escape. The accused asserted that in the failing light four of the prisoners had then tried to escape in various directions, while the fifth prisoner had attacked him.

In his summing up, the Judge Advocate said with regard to rules applicable to escape of prisoners of war: "... [I]t is the duty of an officer or a man if he is captured to try and escape. The corollary to that is that the Power which holds him is entitled to prevent him from escaping, and in doing so no great niceties are called for by the Power that has him in his control; by that I mean it is quite right, if it is reasonable in the circumstances, for a guard to open fire on an escaping prisoner, though he should pay great heed merely to wound him; but if he should be killed, though that is very unfortunate, it does not make a war crime.... If the accused, Karl Amberger, did see that his prisoners were trying to escape or had reasonable grounds for thinking that they were attempting to escape, then that would not be a breach of the rules and customs of war, and therefore you would not be able to say a war crime had been committed."

Held: That the accused Amberger was guilty. The accused was sentenced to death.

[157] *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985), cert. den., 475 U.S. 1016, 106 S.Ct. 1198 (1986), which discusses universal jurisdiction in relation to war crimes.

[158] H. Lauterpacht, ed., *Annual Digest and Reports of Public International Law Cases: Year 1946* (London: Butterworth (1951), 291.

"DOUBLE-TAPPING"

Introduction. *This e-mail was reportedly written by R. V., an enlisted soldier in the 2d Battalion, 327th Parachute Infantry, 101st Airborne Division, while serving in Iraq. It reflects the feelings of many soldiers and Marines regarding "double-tapping" and dead checks.*

You media pansies may squeal and may squirm/ But a fighting man knows that the way to confirm/ That some jihadist bastard is finally dead/ Is a brain-tappin' round fired into his head.

To hell with some weenie with his journalist degree/ Safe from the combat, tryin' to tell me/ I should check him for breathing, examine his eyes./ Nope, I'm punchin' his ticket to Muj' paradise.

To hell with you wimps from your Ivy League schools,/ Sittin' far from the war tellin' me about rules,/ And preaching to me your wrong-headed contention/ That I should observe the Geneva Convention.

Which doesn't apply to a terrorist scum,/ So evil and cruel their own people run/ From cold-blooded killers who love to behead./ Shove that mother' Geneva, I'm leavin' him dead.

You slick talking heads may preach, preen and prattle,/ But you're damn well not here, in the thick of the battle./ It's chaotic, confusing, and comes at you fast,/ So it's Muj' checkin' out, because I'm gonna last.

Yeah, I'll last through this fight and send his ass away/ To his fat ugly virgins while I'm still in play./ If you journalist weenies think that's cold, cruel and crass,/ Then pucker up sweeties; kiss a fighting man's ass.

Conclusion. *Is it possible to convince a soldier, young, articulate, and intelligent as this soldier apparently is, that he is mistaken and that he subscribes to a LOAC/IHL grave breach? It is possible only through training and supervision by noncommissioned and commissioned officers. Soldiers and their units usually take on the characteristics of their leaders, particularly at the company and battalion levels. Leadership and training remain essential to the combat performance of a command and to that of young soldiers.*