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Legal Considerations in Relation to Maritime Operations against Iraq

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It is twenty years since I first visited the headquarters of US Naval Forces Central Command (USNAVCENT) in Bahrain. I have been there on many occasions since, whether on board visiting ships or on headquarters staffs. On my last visit, in May 2009, to call on the UK's Maritime Component Commander—who is also the Deputy Commander of the Combined Maritime Forces (CMF) under the operational command of the Commander, Naval Forces United States Central Command—I was struck not only by the enormous physical development of the US and CMF headquarters footprint in Bahrain, but by the pace and character of the maritime security operations that stretch from the northern Arabian Gulf to the Horn of Africa, the developed legal underpinning of those missions, and by the unprecedented levels of genuine international cooperation, particularly between the US-led CMF and the task groups of NATO, the European Union and the many other nations conducting counter-piracy operations. In examining the conduct of maritime operations by coalition forces in Iraq since 2003, and the reasons for them, it is first necessary to consider what is a highly complex background.

* Commodore, Royal Navy. The views expressed in this article are those of the author and do not represent those of the Royal Navy, the United Kingdom Ministry of Defence or Her Majesty's Government.

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

Background

A simple list of the major maritime operations conducted in the USNAVCENT area of responsibility during the last twenty years—from the protection of merchant shipping during the Iran-Iraq war, the first Gulf War following the Iraqi invasion of Kuwait, the use of maritime interdiction operations to enforce UN sanctions against Iraq, the use of maritime aviation in policing the southern Iraqi no-fly zones, and maritime security operations in relation to international terrorism and weapons of mass destruction (WMD) proliferation after the 9/11 attacks on the United States to the mission in Iraq since 2003—demonstrates how this area has been at the cutting edge of maritime operations, many of which generated novel and complex legal issues. It is striking, therefore, to observe at the outset that notwithstanding their scale and complexity, they have not generated the development in the case of the law of armed conflict at sea that has been seen in other areas of the law of armed conflict (LOAC) over the same period.[1]

There are a number of reasons for this. The simplest, of course, is that with only two exceptions, namely the Gulf wars in 1991 and 2003, maritime operations were not a part of an international armed conflict at sea. Whether conducted under the explicit authority of the UN Security Council (e.g., Security Council Resolution 665,[2] authorizing maritime interdiction to enforce the sanctions against Iraq established under Resolution 661[3]), or amid the confusion that prevailed after 9/11 concerning international terrorism or in the face of the increasing dangers of the proliferation of WMD, the laws that regulated the conduct of maritime operations were generally not found in the LOAC but in other areas of existing international law and the use of force was generally consistent with domestic law enforcement.

It is also appears that much legal debate during the Cold War and in its immediate aftermath was complicated by a reticence on the parts of some States to claim for themselves—or even to recognize in others—certain belligerent rights or use even the language of the law of armed conflict at sea.[4] When asked in 1990 whether coalition naval forces had established a blockade, US Secretary of State James Baker replied accurately, but in a manner that set the tone for a considerable period subsequently: "Let's not call it a blockade. Let's say we now have the legal basis for interdicting those kinds of shipments."[5]

Against this background, the focus of debate in 1990 was thus centered on whether boarding operations were conducted under Article 41 or 42 of the UN Charter, the relationship between those UN Security Council authorizations and the right of national self-defense under Article 51 of the Charter, and, of course, the great question that became prevalent again in 2003, that of Iranian neutrality.

Iranian Neutrality

While the mechanism in the 1990–91 Security Council resolutions restricting the legal authorization to conduct operations against Iraq to "those states cooperating with the Government of Kuwait" provided an effective and helpful legal limitation on membership of the 1991 coalition, the general duty on other States to cooperate was not so restricted and so the notion of Iranian or any other neutrality (as opposed to support) was the cause of some legal debate. If coalition forces were acting under Article 51, the thinking went, Iranian territorial seas would be neutral waters to be respected by all belligerents. If, however, operations were carried out under the direct authority of Resolution 678[6] and those participating were able to use all necessary means, how could Iran, requested like all States to provide appropriate support, claim to be neutral?

Why was this significant in 2003? Three issues stand out; each influenced consideration of maritime operations in 2003. First, one reading of the US position on the *jus ad bellum* in 2003 suggested the 1991 Security Council authority had been resuscitated[7] and the 1991 debate on the impact of UN authority on neutrality therefore revived, although many commentators have suggested that this would only have been a real issue had there been a so-called "second resolution" in 2003 authorizing the immediate use of force to disarm Iraq. Second, certain resolutions, not least Resolution 665, which authorized maritime interdiction operations against all vessels entering and leaving Iraq in order to enforce the UN sanctions, were still in place in 2003. And finally, while the coalition operations in 1991 to remove Iraqi forces from Kuwait were most likely welcomed by Iran and were conducted without encroaching near Iranian territory or disputed maritime zones, the same could not be said for operations after the invasion in 2003.

Although considerations of the law of neutrality and the question of Iran neutrality are important, their practical significance was initially limited. The international armed conflicts involving coalition forces in 1991 and 2003 presented, in relation to Iraq, Iran and Kuwait, particular operational and tactical complexities that considerably affected both the conduct of maritime operations and the application of the law that underpinned them. The foremost was geography: set at the head of the northern Arabian Gulf, Iraq has a coastline of only thirty-five miles and a very small territorial sea. Iraqi territorial seas are significantly bounded by those of Kuwait and Iran, and the history of all three States during the rule of Saddam Hussein was not only one of strikingly different positions in relation to the West, but of sustained animosity toward each other due in no small part to historical disputes over their territories and over the maritime borders that subdivided a small

and heavily congested sea area through which were accessed the great waterways of the Khor Al-Abdullah and, in particular, the Shatt Al-Arab.[8]

In 1991, Iran had made its intention to "refrain from engagement in the present armed conflict" clear in statements to the United Nations,[9] and subsequently warned belligerents that their aircraft and vessels should not enter Iranian airspace and territorial seas, and threatened to impound aircraft from either side. In the politico-legal circumstances that preceded the 2003 invasion of Iraq, Iran did not make formal statements at the United Nations but there is evidence that in 2003 it was determined to be cast again as a neutral and was widely reported in the press as expecting this to be respected. Indeed, it appears that in the early stages of offensive operations, the Iranian government set up field hospitals near the Kurdish border to treat victims of the war in Iraq, but then refused admission to injured fighters of Ansar al-Islam.[10] It could, of course, be speculated that this was an Iranian attempt to be seen to be neutral in relation to Operation Enduring Freedom, as well as Operation Iraqi Freedom.

While coalition forces involved in the invasion of Iraq in 2003 took steps to avoid encroaching upon Iranian territory, the nature of the invasion and occupation inevitably brought them close to Iran in a way that had not occurred in 1991. While during offensive operations in 2003 there was no Iranian interference with coalition forces—quite possibly due in part to the decision of coalition commanders not to conduct a full-scale amphibious assault—the disputes in relation to the maritime border and the status of the Treaty of Algiers created ambiguity that, along with Iran's questionable "neutrality" from 2004, became problematic during the occupation and thereafter while coalition forces remained in Iraq under the authority of Security Council Resolution 1483[11] and subsequent resolutions. With the regime changes in Baghdad and Tehran in the intervening period, the contradictory statements emanating from each capital and the small matter of the 1980–88 war, the status of the Treaty of Algiers[12] is a matter of much debate. As a minimum, the treaty agreed that the riverine border would follow the thalweg (which it identified), and established a detailed process for the parties acting together to track the natural movement of the thalweg and verify the border on a regular basis. Relations between the countries ensured that after the signing of the treaty none of these events ever occurred and this, and the shifting river delta, was later to create a toxic situation, notably for UK forces in command of Multi-National Division South East based in Basrah, which saw Royal Navy and Royal Marines personnel in small boats on the Shatt Al-Arab waterway captured and in due course held for short periods by the Iranian authorities in two separate incidents in 2004 and 2007.[13] On each occasion, UK personnel were demonstrably on the Iraqi "side" of the waterway. In both cases, which occurred after the

conclusion of the international armed conflict with Iraq, Iran was not entitled to seize the UK personnel and under international law would only have had the authority to request (and if necessary require) them to leave Iranian territorial seas immediately. An interesting legal issue, although not tested at the time, may have been whether, either during the belligerent occupation or subsequently when present in Iraq under explicit UN Security Council authority (and charged with preserving the sovereignty and territorial integrity of Iraq), the coalition forces may have been able to represent themselves as agents of the new Iraqi government and rely on Article 7 of the Treaty of Algiers, which provides warships and State vessels of Iran and Iraq access to the whole of the Shatt Al-Arab waterway and the navigable channels to the territorial sea, irrespective of the line delimiting the territorial seas of each of the two countries.

Other Aspects of Maritime Operations from 2003

Given the profile of the tortuous process of international diplomacy, including that at the Security Council, and the added dimension of UN weapons inspections in Iraq, much press speculation has surrounded the political and legal controversy of the decision to commence coalition operations against Iraq in 2003. It was clear to those involved in military contingency planning during that period that any operation to disarm Iraq would require the removal of the regime of Saddam Hussein and would precipitate an international armed conflict between sovereign States that comprised conventional hostilities and belligerent occupation as regulated by the LOAC.[14]

Press speculation as to possible land operations launched from Turkey (from where the northern no-fly zone had been policed by US and UK aircraft) is well documented. The subsequent refusal of Turkey to approve the northern option meant that Operation Iraqi Freedom would require a massive sealift to the northern Arabian Gulf, the presence there of maritime aviation and amphibious capability and of maritime-launched missiles, and, of course, the presence of maritime forces to counter the limited naval-mine and land-launched-missile threat and to protect the oil terminals crucial to Iraq's future economic viability.

Sealift

Notwithstanding prepositioning, the requirement to move naval units and massive volumes of military equipment from the United States and the United Kingdom in particular to the northern Arabian Gulf saw extensive use of the Strait of Gibraltar, the Suez Canal, the Strait of Bab al-Mandeb and the Strait of Hormuz. Although predominantly conducted prior to the invasion, this movement through

international straits and the Suez Canal continued during the operation and, notwithstanding the lack of international support, no real threat was made to the transits nor were there protests against the nonsuspendable right of straits passage applicable in peace and war.[15] While it may be stretching the point to say that every littoral State was consciously discharging its obligations as a neutral under international law, it is probably safe to assert that each acted consistently with the obligations in international law set out in the *San Remo Manual*.[16] Indeed, the only documented attempts to interfere with coalition shipping occurred at Marchwood Military Port in the United Kingdom where anti-war protesters attempted to prevent Royal Fleet Auxiliary and other supply ships from sailing. The protestors were subsequently tried and convicted of trespass and criminal damage offenses, the defense that their action was permitted under UK domestic law as necessary to avert the crime of aggression having failed.[17]

Maritime Aviation

While significant air assets were based on land in the Gulf region, the presence of US and UK aircraft carriers, operating both fixed-wing aircraft and helicopters, was critical to the coalition in providing fighter and strike capability, airborne early warning and helicopter lift for the invasion force. Although easily taken for granted, the freedom of maneuver afforded by the 1982 UN Convention on the Law of the Sea[18] to move maritime forces to the territorial sea limits of any State and to operate there with direct access to Iraq from the high seas and international airspace provided a unique operating capability for maritime forces free from the risk of outright refusal to operate from or over territories, or from restrictions and conditions in relation to aircraft numbers and missions, by any host State. Airstrikes by carrier-borne aircraft were integrated into the combined and joint coalition targeting process and the air tasking order (ATO) cycle, which enabled a coherent approach to deliberate targeting to be conducted under the direct command of the coalition targeting coordination board that sat daily (and at which the senior US and UK legal advisers were Navy lawyers). In contrast to the first Gulf War, where the air campaign generated much debate about the application of Additional Protocol I, it is probably fair to say that, although it still did not apply as a matter of law (because Iraq had not signed and the United States had not ratified), the principles codified in Article 57 in particular were followed in practice. This was made possible by increased technology, better coalition interoperability and the fact that, in reality, high-intensity offensive operations were conducted only for a short period and were successful.

Naval Fires

While much air targeting was deliberate and subject to the ATO process, even expedited processes could not keep pace with the pace of the land maneuvers, and in the same manner close air support and artillery were provided, warships were also used to provide crucial indirect fires. In these circumstances the role of legal advisers in theater was to ensure that those authorizing the fires (ground commanders, forward controllers or ship's commanding officers based on the tactical situation) fully understood their legal obligations in relation to precautions in attack.

Maritime Offensive Operations

With the Iraqi navy largely destroyed in 1991, conventional naval operations against belligerent naval units were largely restricted to dealing with what was a very limited naval mining capability. Coalition forces having quickly established sea control, the remaining threat was essentially an asymmetric one and the potential threat carried in vessels entering and, in particular, leaving Iraq.

Maritime Interdiction Operations

Although permitted under the law of armed conflict, for geographical and operational reasons there was no realistic prospect of establishing an effective blockade of Iraq in accordance with the rules set out in the *San Remo Manual*.[19] During the international armed conflict in 2003, while it was determined by coalition partners that their naval forces could as a matter of law have exercised belligerent rights of visit and search against enemy and (in certain circumstances) neutral vessels, this never occurred. Indeed, on this issue there was greater legal divergence in coalition positions than in any other area, even if in practice the units themselves performed identical missions. While the law of armed conflict at sea permits belligerent warships to board enemy merchant vessels and those neutral vessels suspected of carrying contraband to enemy territory, these powers were narrower than those available under Resolution 665. Faced with this reality, and mindful of the requirement to prevent key personnel, weaponry and WMD or related materials from leaving Iraq (given that the UK legal basis was Iraqi disarmament), the United Kingdom decided to rely solely upon the UN Security Council resolutions that permitted the use of all necessary means to stop and search all inward and outward shipping, and to seize any goods breaking the comprehensive sanctions against Iraq. US naval forces, on the other hand, sought in addition to establish the necessary mechanisms to be able to exercise the belligerent rights of visit and search. A contraband list was produced, US courts to conduct prize court hearings and special commissioners were identified, and a concept of operations developed. Neither the United Kingdom nor Australia established similar processes, both noting the

unique circumstances of the Resolution 665 authority. Neither country issued a disavowal of the right of visit and search.

Prisoners of War

The Third Geneva Convention states that prisoners of war (PWs) may be interned only in premises located on land.[20] While adequate provision was made for both UK and US prisoner of war camps in Iraq with sufficient capacity for the expected numbers, it was clear that the invasion, and in particular the helicopter assault of the Al Faw Peninsula by 3 Commando Brigade Royal Marines, would generate PWs and casualties in the earliest stages of the operation and before the first PW camps were in place. In these circumstances, arrangements were made by senior UK commanders for PWs and casualties to be transported to and temporarily held in Royal Navy warships until PW facilities were available ashore. While not an ideal scenario for naval commanders, and not a measure to be taken lightly in view of the existing law, this was deemed a prudent contingency to provide a realistic and reasonably safe temporary option in view of the relatively low risk to the warships in the northern Arabian Gulf.

Casualties

Whereas the Royal Navy during the Falklands war had participated in the establishment of a "Red Cross Box" along with Argentina and the International Committee of the Red Cross,[21] no such provisions had been adopted in 1991 when, among other factors, there were extensive facilities available ashore. Commentators have speculated as to why similar shore-based facilities were not available in 2003, notably in neighboring States. In their absence a similar problem to that encountered with prisoners of war presented itself to the coalition. The Royal Navy, for its part, while mindful that it was not protected against attack under the law, used the Royal Fleet Auxiliary *RFA Argus*, an aviation training ship with troop accommodation that had been extensively equipped as a primary casualty reception ship, for the treatment of both coalition and Iraqi casualties alike, strictly according to their medical need.[22] Iraqi casualties were transferred to medical facilities or the United Kingdom's PW camp at Umm Qasr at the earliest opportunity. While *Argus* is capable of being used as an "other medical ship" within the definition of Article 23 of Additional Protocol I, any protection afforded to it would have ceased in 2003 (in accordance with Art 23.3) given that its wider operational tasking brought it within Article 34 of the Second Geneva Convention.

Protection of Iraq's Oil Terminals

While Iraqi oil was not a coalition war aim, it was well understood that Iraq's future economic viability and its ability to recover after years of neglect under the regime of Saddam Hussein would require Iraq to gain early access to oil revenue. While Iraqi oil facilities and pipelines ashore came under sporadic attack, the key facilities were the Al Basrah and Khawr Al Amaya oil terminals in Iraqi territorial seas where almost all Iraqi oil was loaded into oil tankers. Protection of those facilities was therefore accommodated within wider operational planning (they were seized by US and Polish forces during the opening hours of the invasion) and on completion of the high-intensity operations became perhaps the most significant maritime task. When on April 24, 2004 a suicide attack by a vessel-borne improvised explosive device killed two US Navy sailors and one Coast Guardsman, the two-nautical-mile security zone around each terminal was replaced with a three-thousand-meter warning zone and a two-thousand-meter exclusion zone. The greatest legal significance of this step was what the zones did not do. Neither zone, even the exclusion zone, created a trigger or "line of death." Instead, the zones complemented a system of layered defense that permitted combat indicators of threats to be detected and warnings given, and so inform commanders as to whether and what force was necessary to protect the terminals and the people on them (both military and oil workers). This took into account the density of merchant shipping in what is a confined area, the proximity of international waters and both Iranian and Kuwaiti territorial seas. It left judgment with commanders who were clear as to their mission, who could choose not to use lethal force against fishing vessels inadvertently drifting close to the terminal, but who at the same time could be confident that if they detected an imminent threat at a distance even beyond the outermost warning zone, they could act decisively. In the aftermath of the April 24 attack, these proposals, made by the USNAVCENT Staff Judge Advocate, were staffed by UK legal advisers and commanders, and received UK approval in a day.

Conclusion

The establishment in 2009 of Combined Task Force Iraqi Maritime, under alternate US and UK command, with a mission to train the Iraq navy to take responsibility for the policing of Iraqi territorial seas and protection of the oil terminals brought within sight the end of a mission commenced in 2003, and perhaps engagement in the northern Arabian Gulf—an engagement that can be traced to the naval patrols that began to protect shipping during the Iran-Iraq war.

While maritime forces conducting operations in the armed conflicts of 1991 and 2003 did operate within the parameters of the law of armed conflict, it is clear

that, due to a unique combination of geographical, geopolitical, historical and operational factors at play, elements of the law of armed conflict at sea were not utilized in full or at all. That does not mean that those parts are necessarily less relevant or that they are somehow discredited; maritime powers must be slow to see them removed from national manuals, doctrine and training. As recent activity in the USNAVCENT area of responsibility, and not least off the Horn of Africa, continues to demonstrate, maritime operations have a key role to play in global security, particularly where the maritime powers are called upon to deal with threats to security caused or exacerbated by failed or failing States. Dealing with these within the existing international law framework, and understanding the implications for maritime operations of the growing impact of human rights legislation on operations generally, is an essential element in preserving freedom of maneuver for maritime commanders. Careful consideration of high-intensity maritime operations and those parts of the law of armed conflict that will regulate them is a critical element in future-proofing that process. In operations in the northern Arabian Gulf since 2003 some important modern lessons have been learned.

Notes

1. Reflected in such studies as CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2 volumes: Vol. I, Rules; Vol. II, Practice (2 Parts)) (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) and in the categorization of combatants. *See* NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-872-p991/$File/irrc-872-reports-documents.pdf.

2. S.C. Res. 665, U.N. Doc. S/RES/665 (Aug. 25, 1990).

3. S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990).

4. The example often cited involves the UK statements following the torpedoing by *HMS Conqueror* of the Argentine cruiser *ARA General Belgrano* during the 1982 Falklands conflict, but a more pertinent example here might be the differing positions taken by the United States and the United Kingdom on ship boardings by Iranian forces during the Iran-Iraq war of 1980–88. Whereas the United States characterized the boarding operations as an exercise of belligerent rights, the United Kingdom, in relation to the boarding of a UK-flagged vessel, referred to the Iranian right to rely on the UN Charter Article 51 right of self-defense, which would appear to limit the belligerent right to exercise visit and search of neutral shipping. 90 Hansard, House of Commons, col 426, Jan. 28, 1986.

5. Simon Tisdall, *Crisis in the Gulf: West seeks total naval blockade*, GUARDIAN (London), Aug. 13, 1990.

6. S.C. Res. 678, ¶ 3, U.N. Doc. S/RES/678 (Nov. 29, 1990) ("Requests all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2," which authorized all necessary means).

7. Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 21, 2003).

8. Although there is no formal agreement between Iraq and Kuwait over their shared border, the UK commander of Combined Task Force 158 in 2006 brokered an agreement between the Iraqi and Kuwaiti navies and coast guards to coordinate access to maritime zones.

9. Letter Dated 23 January 1991 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, U.N. Doc. S/22141 (Jan. 23, 1991).

10. Ansar al-Islam (Supporters of Islam) is a militant Islamic Kurdish separatist movement with ties to Iraq that seeks to transform Iraq into an Islamic state. *See* Background Q&A: Ansar al-Islam (Iraq, Islamists/Kurdish Separatists), http://www.cfr.org/publication/9237/ (last updated Nov. 5, 2008).

11. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

12. Treaty Concerning the State Frontier and Neighbourly Relations between Iran and Iraq, Iraq-Iran, June 13, 1975, 1017 U.N.T.S. 136.

13. On June 21, 2004 eight Royal Navy/Royal Marines personnel were captured while conducting a riverine patrol in the Shatt Al-Arab and held for three days before being released. On March 23, 2007 fifteen Royal Navy/Royal Marines personnel were captured in the approaches to the Shatt Al-Arab in the vicinity of a vessel they were about to conduct a routine boarding of; they were held for twelve days before being released.

14. Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; all *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 244, 301 and 422, respectively.

15. United Nations Convention on the Law of the Sea art. 38, Dec. 10, 1982, 1833 U.N.T.S. 3, *reprinted in* 21 INTERNATIONAL LEGAL MATERIALS 1261.

16. INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 105, para. 29 (1995) [hereinafter San Remo Manual].

17. R v. Jones and others [2006 UKHL 16]. The House of Lords ruled that customary international law was, without the need for any domestic statute or judicial decision, part of the domestic law of England and Wales, but that the appellants had no defense in arguing that they were trying to prevent what they referred to as a war of aggression.

18. *Supra* note 15.

19. San Remo Manual, *supra* note 16, 176–80.

20. GPW, *supra* note 14, art. 22.

21. *See* SYLVIE-STOYANKA JUNOD, PROTECTION OF THE VICTIMS OF ARMED CONFLICT FALKLAND-MALVINAS ISLANDS, 1982: INTERNATIONAL HUMANITARIAN LAW AND HUMANITARIAN ACTION ch. 3 (1984).

22. GPW, *supra* note 14, art. 30 ("Prisoners of war . . . whose condition necessitates special treatment . . . or . . . care . . . must be admitted to any military or civilian medical unit where such treatment can be given . . .").