

COMBAT RESTRAINTS

Howard S. Levie

Combat restraints fall into two separate and distinct categories: (1) Restraints on the use of particular weapons, such as the prohibitions on the use of dum dum bullets and poison gas; and (2) restraints on the actions that may be taken during the course of combat, such as the prohibitions on the denial of quarter and on the shooting of civilian noncombatants. The discussion which follows will be concerned solely with this latter type of restraints on permissible combat actions.

Most of these restraints, of both categories, have their origin in custom which has evolved over long periods of time. Many of these customs have been codified, primarily at The Hague in 1899¹ and 1907² and at Geneva in 1929³ and 1949.⁴ However, they have not all been codified and, accordingly, there are still some rules for which we

must have recourse to custom. At the first successful codification in 1899, in order to leave no doubt in this respect, it was agreed that the preamble of the convention being drafted should include a provision (which has become known as the deMartens Clause, after its author) to the effect that apart from the rules codified in the Regulations then being adopted, "populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."⁵

There are, of course, a very large number of restraints on the actions that may be taken during the course of combat. The four specific areas of combat restraints which will be discussed

are: (1) Military necessity; (2) reprisals; (3) protection of civilian noncombatants; and (4) protection of prisoners of war.

Military Necessity. Inasmuch as this doctrine is really an excuse for non-compliance with combat restraints, its importance as an introduction to any discussion of such restraints is obvious. Over 100 years ago, in 1863, Francis Lieber defined this term as follows: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."⁶ (Emphasis added.) Note that the last clause requires that all actions taken because of military necessity must be lawful actions. Contrary to the foregoing, *The German War Book*, published early in this century, adopted the doctrine of "Kriegsraison," which is, in effect, the doctrine that the end justifies the means: "Humanitarian claims such as the protection of men and their goods can only be taken into consideration insofar as the nature of the war permits."⁷ That this was the Nazi policy during World War II is indicated by the following statement found in the opinion of the International Military Tribunal:

There can be no doubt that the majority of [the war crimes committed during World War II by the Germans] arose from the Nazi conception of "total war," with which the aggressive wars were waged. For in this conception of "total war," the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war.⁸

U.S. military doctrine has not changed during the period of more than

a century since Lieber formulated it in 1863. The present *U.S. Army Manual* states that military necessity "justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."⁹ (Emphasis added.) It goes on to call attention to the fact that "military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity." The *British Army Manual* is substantially to the same effect.¹⁰

The subject of military necessity as a defense for illegal combat actions was considered in a number of war crimes cases after World War II. Attention has already been invited to the statement of the International Military Tribunal. In the case of *United States v. Krupp*, the U.S. Military Tribunal said:

In short, these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical means nothing more or less than to abrogate the laws and customs of war entirely.¹¹

Similarly, in *United States v. List*, another U.S. Military Tribunal held:

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. . . . The rules of international law must be followed even if it results in the loss of a battle or even a war."¹² (Emphasis added.)

As a practical matter, there are still many who would agree with the implications of Bismarck's query: "What head of government would allow his state and its citizenry to be conquered by another state just because of international law?"¹³ While this may appear to put the problem at the civilian political level and to remove responsibility from the military commander, that is not always true. In any event, it must be borne in mind that when a chief of state decides that military necessity requires the violation of affirmative rules of the law of armed conflict he will not thereafter be held accountable alone: Those who pass down or execute his illegal orders in this respect may likewise be adjudged war criminals.¹⁴ It might also be noted that, prior to the advent of the nuclear age (and, perhaps, even since that event), it was rare, indeed, that the illegal application of the rule of military necessity would make the difference between victory and defeat.

Now let us attempt to apply the restrictions on the doctrine of military necessity to specific factual situations.

The law of armed conflict specifically protects prisoners of war from maltreatment. For example, an armored unit has just captured a large number of prisoners of war. It receives urgent orders to move forward to participate in an attack which is taking place some miles away. What does it do with its prisoners of war? It cannot take them along. It has no personnel available to guard them and no facilities for sending them to the rear. Does military necessity permit the shooting of these POWs? No. The rule protecting them from maltreatment, including death, was drafted and adopted with full knowledge of the existence of the doctrine of military necessity and overrides it insofar as the treatment of prisoners of war is concerned. To shoot them would violate an affirmative rule of the law of armed conflict and the participants in such an episode would be guilty of

having committed a war crime. (A number of the individuals responsible for an incident of this nature at Malmédy,¹⁵ including SS Colonel Joachim Peiper, were convicted of war crimes and sentenced to death.¹⁶ While they were not executed, they spent 13 years in jail—and in July 1976, Peiper while living in the South of France was assassinated by revenge seekers.¹⁷ The massacre of Poles in the Katyn Woods¹⁸ may have been of the same nature. So also was Napoleon's massacre of more than 3,500 Arabs in Jaffa in 1799.¹⁹)

The law of armed conflict now specifically prohibits the taking of civilians as hostages. In another example, resistance groups in the rear are destroying railroad tracks, blowing up trains, and ambushing truck routes, thus critically interfering with essential supply of troops in combat. The local commander orders the random taking of civilian hostages, some to be carried in the trains and trucks being attacked, and others to be executed at the ratio of 10 civilian hostages for each soldier of his command who is killed by the irregulars. Is this order legal? No. The rule prohibiting the taking of civilian hostages was drafted and adopted with full knowledge of the existence of the doctrine of military necessity and overrides it insofar as the use of hostages is concerned. To take hostages in the manner and for the purposes indicated would violate an affirmative rule of the law of armed conflict and the participants in such an episode would be guilty of having committed a war crime.²⁰

Reprisals. Reprisals are acts of retaliation, in the form of conduct which would otherwise be illegal, committed by one side in an armed conflict in order to put pressure on the other side to compel it to abandon a course of illegal action which it has been following and to return to compliance with the law of armed conflict.

It has sometimes been argued that

reprisals lead, not to redress of the wrong previously committed, but to new breaches. Nations have, in theory, admitted this to be a fact by agreeing to prohibit reprisals against various categories of protected persons and even against certain categories of property. Nevertheless, reprisals do still remain a possibility, however limited, under the law of armed conflict. Sometimes they are the only measure available to a belligerent in its attempt to secure compliance with the law of armed conflict by its adversary.

There are at least seven matters to be considered with respect to reprisals:

1. The enemy must have committed an act which violates the law of armed conflict. (It could be argued that the act must also either be a continuing one or that the enemy has indicated that it will take the same action in the future when the occasion arises.)

2. Reprisals must not be used until appropriate efforts to secure compliance with the particular law of armed conflict being violated by the enemy have been attempted and have been unsuccessful.

3. Reprisals should be used only upon the orders of a high military commander. Since the use of reprisals will rarely remain localized, the supreme commander or even the civilian government, should normally be made aware of and approve the use of reprisals before they are actually undertaken.

4. Reprisals may only be directed against enemy personnel who, and property which, are not within any provision excluding them as the targets of reprisals. For example, enemy hospitals may not legally be the targets of reprisals as they are specifically protected against attack.²¹ Similarly, civilian noncombatants²² and prisoners of war²³ may not legally be the targets of reprisals as they are protected from reprisals by specific prohibitions contained in the relevant 1949 Geneva Conventions. In effect, this really means

that reprisals may only be directed against enemy combatants and against enemy property not protected by a specific rule of the law of armed conflict.

5. Reprisals must be roughly proportional to the enemy's original illegal act. Of course, it will frequently not be possible to give an exact quantitative value to the enemy's illegal act—but it will usually be possible to approximate that value within reasonable bounds. For example, when, during World War II, the Nazis adopted a reprisal policy of 10 to 1, and even 100 to 1, there could be no question but that they were violating the rule of proportionality.²⁴ Similarly, the action taken at Lidice was a reprisal which outrageously violated the rule of proportionality.²⁵ But when the enemy intentionally bombs a hospital there can only be a commonsense gauge of proportionality.

6. Reprisals need not necessarily be of the same nature as the original illegal act. For example, the reprisal response to maltreatment of prisoners of war by the enemy need not, in fact it may not, be maltreatment of prisoners of war by the other side.

7. While relatively little has been written on the subject, it appears that the very nature and purpose of reprisals require that they be directed against the state whose personnel committed the alleged violation of the law of armed conflict and not against an ally of that state.²⁶

Here are some specific cases of reprisals which have occurred in the past.

During the American Civil War there was no rule of the law of war protecting prisoners of war against being the targets of reprisals. A Union commander (Custer) executed six members of a Confederate irregular cavalry unit on the basis that they were bandits, not soldiers. The Confederate commander (Mosby) executed five Union prisoners of war as a reprisal. That ended the episode, the irregulars captured there-

after were treated as prisoners of war.²⁷ Reprisals worked in this instance.

During World War II, in 1942 at Dieppe and at Sark, Canadian and British commandos tied the hands of their German prisoners of war together in order to prevent them from destroying documents having intelligence value. The Germans captured a copy of the order containing instructions in this regard and promptly responded by handcuffing 1,000 British and Canadian inmates of prisoner-of-war camps for 12 hours a day. The British, apparently contending that their action had not been a violation of the law of armed conflict but that the German action was, responded by handcuffing a large number of German prisoners of war. Although the British abandoned the use of shackles after a few months, the Germans continued the practice for another year.²⁸ Both alleged reprisals were, of course, violations of the prohibition on reprisals against prisoners of war.

During 1965 a member of the Vietcong was tried and convicted of acts of terrorism by a court of the Republic of Vietnam and he was executed. Three days later the Vietcong announced the reprisal execution of an American prisoner of war. Shortly thereafter three members of the Vietcong were tried and convicted for acts of terrorism by another court of the Republic of Vietnam and were executed. A few days later the Vietcong announced the reprisal execution of two American prisoners of war.²⁹ Apart from the fact that these alleged reprisals by the Vietcong violated the specific prohibition against making prisoners of war the targets of reprisals (the Vietcong claimed not to be bound by the humanitarian conventions), it should be noted that it was the Republic of Vietnam, not the United States, which had committed the acts against which the reprisals were directed. The Vietcong were, in effect, executing American prisoners of war in

order to apply pressure on the Republic of Vietnam. In this case the indirect pressure apparently accomplished its purpose as Vietcong terrorists subsequently convicted and sentenced to death were not executed.

Protection of Civilian Noncombatants. During the early years of recorded history, such as that contained in the Bible, no distinction was made between combatants and noncombatants, and all were usually put to the sword or enslaved. But by the late Middle Ages, before the days of professional armies and rampant nationalism, apart from the sieges of cities, war could more or less pass the civilian noncombatant by, leaving him physically untouched. Changes in this respect began to appear in the 17th century and a rather radical transformation had occurred by the beginning of the 19th century, particularly during the Napoleonic wars. While the 1899 and 1907 Hague Regulations³⁰ included some combat restraints on actions directed against civilian noncombatants, such as a prohibition against the bombardment of undefended cities, a prohibition against the use of coercion to obtain military information, and the granting of a protected status to members of the *levée en masse*, there were really few rules protecting civilian noncombatants from being intentionally made the targets of combat actions. Even the 1949 Geneva Civilians Convention,³¹ revolutionary in concept as it was, contains surprisingly few provisions that can be considered as protecting the civilian noncombatant from combat actions. It is true that this Convention prohibits belligerents from using civilians to render an area immune from attack; prohibits the use of civilians as the objects of reprisals; and prohibits the use of civilians as hostages. But when one has completed that short list one has just about covered all of the protection of civilians against combat actions contained in the 159 articles

of the 1949 Geneva Civilians Convention.

Efforts are currently being made to remedy this situation. The *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, which has already convened on three separate occasions and which is expected to complete its work during 1977, has tentatively adopted a number of articles for the protection of civilians from combat activities, most of which can be expected to be a part of the Protocol finally approved. One such article (Article 46, adopted in committee by consensus)³² provides that "civilians shall enjoy general protection against dangers arising from military operations." It then goes on to enumerate a number of specific protections:

- Prohibition against making civilians the objects of an attack.

- Prohibition against acts or threats of violence intended to spread terror among the civilian population.

- Prohibition against indiscriminate attacks. These attacks are defined as those which have no specific military objective; or those which employ a method or means of attack which cannot be directed at a specific military objective, or the effect of which cannot be limited to that objective. Examples of indiscriminate attacks are area bombardments where the area so bombarded contains a concentration of civilians; and attacks which would cause loss of civilian lives in a number which would be excessive in the light of the "concrete and direct military advantage anticipated."

- Prohibition against attacks against civilians by way of reprisals.

- Prohibition against the use of civilians to render a location immune from military operations, including the movement of civilians to shield military objectives or military operations.

A number of other articles of the Protocol which have been tentatively

approved would also afford protection to civilians against combat activities. Thus, Article 48 (adopted in committee by consensus)³³ forbids military attacks on "objects indispensable to the survival of the civilian population," such as foodstuffs, food-producing areas, crops, livestock, drinking water, etc. This prohibition is applicable whether the motive for the attack is "to starve out civilians, to cause them to move away, or any other motive." Again, Article 50 (adopted in committee by a vote of 66-0-3)³⁴ and Article 51 (adopted in committee by consensus)³⁵ require the commander of an attacking force to take certain precautions intended to protect the local civilian population before the attack is actually launched.

These articles of the Protocol to the 1949 Geneva Conventions which is in process of preparation are but a few examples of what the Diplomatic Conference hopes to accomplish towards the goal of better protecting civilian noncombatants from the effects of combat actions. Unfortunately, when one has had the opportunity to read and analyze them, one cannot avoid the feeling that a number of them are so impractical that it will be extremely difficult, if not impossible, for even the most law-abiding commander to comply with them fully. This is regrettable as it means that there will be a limited number of ratifications and many valuable and acceptable provisions will be lost; or there will be ratifications but no compliance.

Prisoners of War. The 1949 Geneva Prisoner of War Convention³⁶ is probably the most complete single code contained in the law of armed conflict. Since its drafting and acceptance by the vast majority of the nations which constitute the present-day world community, there has been available for the guidance of nations at war a substantial and pervasive body of law on this subject.

We are here concerned, of course, only with those aspects of this Convention which relate to the protection of prisoners of war by restraints on combat. Understandably, there are only a few provisions of the Prisoner of War Convention which may be deemed to fall within this category. Thus, prisoners of war are to be evacuated from the combat zone as soon as possible after capture and are not to be unnecessarily exposed to danger while awaiting such evacuation (Article 19); the evacuation is to be accomplished in as humane a manner as possible (Article 20); the capturing troops are prohibited from taking anything from the prisoners of war except arms, military equipment, and military documents (Article 18); prisoners of war may not be sent to, or detained in, areas where they will be exposed to the dangers of the combat zone, nor may they be used to render an area immune from attack (Article 23); and prisoner-of-war camps are to be marked so that they can be identified by an attacking force (Article 23). Of course, as has already been noted in the discussion of military necessity, the protection against maltreatment con-

tained in the Convention includes a positive ban on shooting them even though the combat force which captures them does not have the facilities for their evacuation.³⁷ In fact, the willful killing of prisoners of war is a grave breach of the Convention and calls for penal sanctions against the offenders.³⁸ They cannot avoid this responsibility by refusing quarter and thus contending that the individuals killed were never prisoners of war, since Article 23(d) of the 1907 Hague Regulations³⁹ specifically bans any declaration that no quarter will be given.

The foregoing is a rather summary treatment of four very important areas of the law of armed conflict dealing with combat restraints. However, it should demonstrate beyond dispute that, paradoxical as it may seem, civilization has evolved many humanitarian rules calling for such conflict to be conducted in a manner calculated to reduce unnecessary suffering and to provide a maximum of protection for the victims thereof, combatant and non-combatant. The problem in this area, as in many other areas, is not lack of law, it is lack of compliance with the law.

NOTES

1. Hague Convention No. II Concerning the Laws and Customs of War on Land of July 29, 1899 (with annexed Regulations), 32 Stat. 1803; Naval War College, *International Law Documents 1950-1951*, at 13 (1952); 1 *Am. J. Int'l L. Supp.* 129 (1907).

2. Hague Convention No. IV Concerning the Laws and Customs of War on Land of October 18, 1907 (with annexed Regulations), 36 Stat. 2277; Naval War College, *International Law Documents 1950-1951*, at 31; 2 *Am. J. Int'l L. Supp.* 90 (1908).

3. Geneva Convention for the Amelioration of the Condition of Wounded and Sick of Armies in the Field of July 27, 1929, 47 Stat. 2074; 118 L.N.T.S. 303; Naval War College, *International Law Documents 1950-1951*, at 40, 49; 27 *Am. J. Int'l L. Supp.* 43, 59 (1933); and Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929, 47 Stat. 2021; 118 L.N.T.S. 343.

4. Geneva Conventions for the Protection of War Victims of August 12, 1949, [1955] 3 U.S.T. 3114; 75 U.N.T.S. 31; Naval War College, *International Law Documents 1950-1951*, at 81.

5. Preamble, 1899 Hague Convention No. II, *supra* note 1. This statement, or a paraphrase thereof, will also be found in each of the Conventions cited in notes 2 to 4 *supra*.

6. Section 14, General Orders No. 100, 24 April 1863, *Instructions for the Government of the Armies of the United States in the Field*, 2 F. Lieber, *Miscellaneous Writings* 245 (1881); Naval War College, *International Law Discussions* 1903, at 115 (1904); *The Laws of Armed Conflicts* 3 (D. Schindler & J. Toman eds., 1973).

7. J. Morgan, *The German War Book* 69 (1915).

8. 22 Int'l Mil. Tribunal, *Trial of the Major War Criminals* 469-70 (1948); *Nazi Conspiracy and Aggression: Opinion and Judgment* 56 (1947); 41 *Am. J. Int'l L.* 172, 224 (1947).
9. U.S. Dep't of Army, Field Manual No. 27-10, *The Law of Land Warfare*, para. 3a (1956). See also, U.S. Dep't of Navy, NWIP 10-2, *Law of Naval Warfare*, sec. 220a (1958).
10. Great Britain, War Office, *The Law of War on Land: being Part III of the Manual of Military Law*, para. 633 (1958).
11. *United States v. Krupp*, 9 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, at 1347 (1950).
12. *United States v. List, et al. (The Hostage Case)*, 11 *id.* 1253, 1272 (1950).
13. Quoted in 2 U.S. Dep't of Army, Pamphlet No. 27-161-2, *International Law*, at 10 (1962).
14. The defense that the accused had acted in accordance with the orders of a superior was the one most frequently advanced in the war crimes trials conducted after World War II. It was universally rejected as a defense, although it was considered in mitigation of punishment. 15 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, at 157-60 (1949).
15. Concerning this incident, see Charles Whiting, *Massacre at Malmédy* (New York: Stein and Day, 1971), pp. 52-53.
16. *Id.*, at 195.
17. *Saint Louis Post-Dispatch*, 15 July 1976, at 2A.
18. Concerning this incident, see Winston Churchill, *The Hinge of Fate* (Boston: Houghton Mifflin, 1950), pp. 758-60.
19. *The Law of War on Land*, *supra* note 10, at 53, n.1.
20. *United States v. List*, *supra* note 12, at 1269-70.
21. Article 46, Geneva Convention for the Amelioration of the Wounded and Sick of Armed Forces in the Field of August 12, 1949, [1955] 3 U.S.T. 3114; 75 U.N.T.S. 31; Naval War College, *International Law Documents 1950-1951*, at 81.
22. Article 33(3), Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, [1955] 3 U.S.T. 3516; 75 U.N.T.S. 287; Naval War College, *International Law Documents 1950-1951*, at 170.
23. Article 13(3), Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, [1955] 3 U.S.T. 3316; 75 U.N.T.S. 135; Naval War College, *International Law Documents 1950-1951*, at 116.
24. *United States v. List*, *supra* note 12, at 1269-70.
25. Concerning this incident, see William Stevenson, *A Man Called Intrepid* (New York: Harcourt Brace Jovanovich, 1976), p. 357.
26. Moritz, "The Common Application of the Laws of War Within the NATO-Forces," 13 *Mil. L. Rev.* 1, 14 (1961); Levie, "Maltreatment of Prisoners of War in Vietnam," 48 *B.U.L. Rev.* 323, 357-58 (1968). To the same general effect, see *United States v. List*, *supra* note 12, at 1270.
27. Shelby Foote, *The Civil War: Red River to Appomattox* (New York: Random House, 1974), v. III, pp. 805-06.
28. 1 *Report of the International Committee of the Red Cross on its Activities during the Second World War*, at 368-70 (1948); *The Law of War on Land*, *supra* note 10, at 53 n.2.
29. Levie, *supra* note 26, at 353-54.
30. Notes 1 and 2 *supra*.
31. Note 22 *supra*.
32. *Synoptic Table of the Draft Additional Protocols to the Geneva Conventions of August 12, 1949, and the Texts Adopted by the Main Committees at the First and Second Sessions of the Diplomatic Conference [on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts]*, CDDH/226, 15 December 1975, at 88-89.
33. *Id.* at 94-95.
34. *Id.* at 102-04.
35. *Id.* at 105.
36. Note 23 *supra*.
37. See text accompanying notes 15 to 19 above.
38. Article 130, *op. cit. supra*, note 23.
39. Note 2 *supra*.