

“To Be or Not to Be, That is the Question”

Contemporary Military Operations and the Status of Captured Personnel

Major Geoffrey S. Corn
Professor, International and Operational Law Department
The Judge Advocate General School, U.S. Army

Major Michael L. Smidt
Professor, International and Operational Law Department
The Judge Advocate General School, U.S. Army

Introduction

On Wednesday, 31 March 1999, somewhere along the border between Yugoslavia and Macedonia, three soldiers from the 1st Infantry Division were captured by Yugoslav forces, and transported to Belgrade.¹ In the first official statements related to the incident the following morning, neither President Clinton nor Secretary of Defense Cohen referred to the three soldiers as prisoners of war.² Instead, both leaders referred to the three soldiers as having been “illegally abducted.”³ Later that same day, Department of Defense Spokesman Kevin Bacon stated in response to a question why the three had not been declared prisoners of war: “We consider them to be [prisoners of war]. We consider that—we believe that they are—we assert that they are covered by the Geneva Convention, which, of course, gives them a series of internationally recognized protections. At a minimum they are entitled to [prisoner of war] status.”⁴ On that same day, Department of State Spokesman James Rubin asserted both points in the same brief—the three U.S. soldiers were entitled to prisoner of war status, but they also had been illegally detained, and therefore must be immediately released.⁵ Contrary to U.S. demands, the three soldiers were not immediately released.

Approximately two weeks later, on 16 April 1999, the Kosovo Liberation Army captured a Yugoslav Army lieutenant.⁶ According to the *New York Times*: “The Pentagon immediately declared the officer a prisoner of war. Quick to draw a distinction with Yugoslavia’s treatment of the three American soldiers

captured along Macedonia’s border on 31 March, officials here emphasized that the officer would be treated in accordance with the Geneva Convention.”⁷ Pentagon Spokesman Kevin Bacon indicated that unlike the immediate release that the United States deemed appropriate for the U.S. soldiers in Yugoslav custody, this soldier would “remain in our custody until the hostilities end.”⁸

The events surrounding the status and treatment of personnel captured during Operation Allied Force demonstrate the importance of understanding both the conditions that trigger prisoner of war protections, and the procedures that the Department of Defense established for implementing these protections. The purpose of this article is to summarize the relevant international law and domestic policy related to prisoner of war issues. The first section addresses the conditions which, as a matter of international law, bring the protections afforded to prisoners of war into force. The second section of this article examines the key provisions of this law, which must be complied with during military operations.

Enhancing this understanding is critical for a very simple reason: to reduce the potential risk for members of the Armed Forces of the United States who are captured and might be denied the benefits of this law.⁹ Confused or conflicting assertions made by national level authorities regarding the legal status of captured U.S. personnel increases the risk that these personnel will be denied the benefits of the law related to prisoners of war. This risk will probably also increase if the detain-

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1. Office of the Assistant Secretary of Defense (Public Affairs), Department of Defense News Briefing, 1 Apr. 1999 [hereinafter DOD Press Briefing].
 2. Laurie Asseo, *The Kosovo Conflict: 3 POWs Could Be In Serbia For A While*, STAR-LEDGER (Newark, N.J.) Apr. 2, 1999, at 16.
 3. *Id.*
 4. DOD Press Briefing, *supra* note 1.
 5. United States Department of State, Daily Press Briefing (DPB #42), Apr. 1, 1999 [hereinafter DOS Press Briefing].
 6. Stephen Lee Myers, *Serb Officer, Captured By Rebels, Held by U.S.*, N.Y. TIMES, Apr. 17, 1999, at A6.
 7. *Id.*
 8. Office of the Assistant Secretary of Defense (Public Affairs), Department of Defense News Briefing, 17 Apr. 1999.
 9. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. 3364 [hereinafter GPW].

ing power perceives that the U.S. military is failing to comply with legal obligations owed to their personnel held in U.S. custody. In short, whenever U.S. military personnel are placed at risk of capture by a belligerent force, leaders at all levels must be fully informed of what the law of war requires, and the consequences of sending conflicting signals about the status of U.S. personnel.

Do Labels Matter?

Placing the interests of captured personnel above political or diplomatic concerns is not a novel concept. Indeed, the Official Commentary to the Prisoner of War Convention¹⁰ embraces this approach when it states that “it must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve [s]tate interests.”¹¹ As the debates surrounding the status of personnel captured during Operation Allied Force demonstrate, this is a principle that is more likely to be challenged today than ever before.

Controversies over the legal basis for military operations seem to be continually bleeding over into the issue of what law applies to the combatants involved in such operations. A recent statement made by an International Committee of the Red Cross (ICRC) representative emphasized that such considerations should not determine when the law of war applies. The ICRC representative made this statement in response to the debate over whether the capture of the three U.S. personnel was “illegal,” which is an issue that turns on the nature of the conflict between the North Atlantic Treaty Organization (NATO) member states and Yugoslavia. According to the ICRC representative:

On the basis of the Geneva Conventions, we are not seeking release—we are seeking protection . . . Our view is that when two different countries are at war with each other, then the members of their armed forces are considered enemy forces. And if they are captured, they are under this protection. What is legal, what is illegal? We are not the institution who decides that. We are the ones who say ‘You captured them, you have to treat them in a humane way.’¹²

This trend is apparently the result of the changing terminology related to the conduct of military hostilities. Before the end of the Cold War, U.S. forces fought in “wars”: the World Wars, the Korean War, and the Vietnam War. As a result, there was little difficulty understanding what law applied to such situa-

tions: the law of war. Americans now, however, refer to hostilities as “operations”: Operation Urgent Fury, Operation Just Cause, Operation Restore Hope, Operation Deny Flight, and Operation Deliberate Force. Even “operations” that take on all the characteristics of state-on-state conflict, and therefore seem to meet the pragmatic definition of war, are not labeled “wars.” Instead, we remember Operations Desert Storm, and now Operation Allied Force.

While such terminology nuances should not be relevant to determining what law applies to protect captured personnel, Operation Allied Force demonstrates the confusion caused by asserting that the “law of war” applies to “operations” not acknowledged as war. The following exchange from a recent Department of State Press Briefing exemplifies this point:

QUESTION: Have you been working with the Swedes, the protecting power in Belgrade? Have you heard back from them?

MR. RUBIN: I don’t have any new information to report. Clearly, under the Geneva Convention which would apply—whether or not we’re at a state of war it applies—the Serb authorities are responsible to, under the convention, to pursue through the protecting power, allowing access to them, and also access through the ICRC. That is required.

QUESTION: You sort of got into it just there, the crux of the whole question here. You don’t think these men are prisoners of war? The Serbs aren’t calling [them] prisoners of war. Can you explain what’s behind all of that?

MR. RUBIN: Well, obviously there’s armed conflict between NATO forces and the Serbs in Serbia and in Kosovo. But as far as the legal definition of a state of war and all that would apply, it’s just not relevant to this circumstance. All I’m saying is that there is very clear international law that applies here

. . . .

QUESTION: Jamie, I may have missed this at the beginning but did you say that they are to be treated as prisoners of war under the Geneva Convention?

MR. RUBIN: What I said was they are prisoners, clearly. The Geneva Convention provides for certain treatment. We’re not at a state of war but, nevertheless, the international lawyers advised me that the require-

10. COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean S. Pictet et al. eds., 1958) [hereinafter OFFICIAL COMMENTARY].

11. *Id.*

12. Stephen Lee Myers, *Serb Officer, Captured By Rebels, Held by U.S.*, N.Y. TIMES, Apr. 17, 1999, at A6 (quoting Doris Pfister, spokeswoman for the ICRC).

ments – that they be treated humanely, that they get necessary medical attention, that they’re protected from any form of coercion, that they get adequate food and clothing, that they get access by our protecting power and the International Committee of the Red Cross—still pertain.¹³

Mr. Rubin had it right—the entitlement to prisoner of war status under the law of war is in no way contingent on acknowledging a state of war between belligerents. Perhaps more importantly, asserting that prisoner of war status applies for captured U.S. personnel should not be considered acknowledging a state of war between the U.S. and the detaining power. The following exchange between Pentagon Spokesman Kevin Bacon and a Pentagon correspondent on the day the capture of the three U.S. soldiers was announced highlights this commonly held misconception:

Q: Ken, is the United States at war with Yugoslavia?

A: We are—without getting into the technicalities, we have made very clear what our goals are, and we will continue to attack the Federal Republic of Yugoslavia until our military goals are met.

Q: If I could just follow up. By asserting prisoner of war status for these three captured soldiers, isn’t that a tacit admission that the United States is at war with Yugoslavia?

A: Absolutely not. By international law the Geneva Convention applies to all periods of hostilities.

Q: Can I follow up on that? The Secretary in Norfolk, before you just said what you did from the podium, called them “illegal detainees.” Why the sudden change?

A: He said that their status was subject to review, and it’s been reviewed, and the gov-

ernment has decided that the Geneva Convention applies.¹⁴

In short, labels do not matter. Instead, the *de facto* state of hostilities between two states is all that is required to trigger the Prisoner of War Convention. This is not only the clear intent of the law, but also a point that the U.S. District Court for the Southern District of Florida emphasized in *United States v. Noriega*,¹⁵ discussed below.

What Triggers Prisoner of War Protections?

Controversy over when the protections of the law of war would apply to captured combatants is not a new trend.¹⁶ According to the first comprehensive multi-lateral law of war treaty, The Hague Convention of 1899,¹⁷ the “Laws and Customs of War on Land were applicable ‘in case of war.’”¹⁸ Although neither the Hague Convention of 1907¹⁹ nor the 1929 Prisoner of War Convention²⁰ contained a similar explicit reference to war, “the very title and purpose of the Conventions made it clear that they were intended for use in war-time, and the meaning of war seemed to require no definition.”²¹ What constituted “war,” however, was defined by general international law, and did not always apply to conflict between the armed forces of two states, particularly when one or both of the states denied that a state of war existed between them.²²

After World War II, the confusion over when the law of war related to prisoners of war came into force was rectified. According to the Official Commentary to the Third Geneva Convention:

It was necessary to find a remedy to this state of affairs and the change which had taken place in the whole conception of such Conventions pointed the same way

The Preliminary Conference of National Red Cross Societies, which the International

13. DOS Press Briefing, *supra* note 5.

14. DOD Press Briefing, *supra* note 1.

15. 806 F. Supp. 791 (S.D. Fla. 1992).

16. OFFICIAL COMMENTARY, *supra* note 10, at 19-23.

17. Hague Convention No. II Respecting the Laws and Customs of War on Land, (1899) [hereinafter Hague II], *reprinted in SHINDLER & TOMAN, THE LAWS OF ARMED CONFLICT* 63 (1988) (this first Hague Convention “succeeded in adopting a Convention on land warfare to which the *Regulations* are annexed”).

18. OFFICIAL COMMENTARY, *supra* note 10, at 19 (quoting Hague II, *supra* note 17, art. 2).

19. Hague Convention No. IV Respecting the Laws and Customs of War on Land, (1907) [hereinafter Hague IV] *reprinted in DEP’T OF THE ARMY, PAM 27-1, TREATIES GOVERNING LAND WARFARE* (Dec. 1956).

20. Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, *reprinted in SHINDLER & TOMAN, THE LAWS OF ARMED CONFLICT* 339 (1988).

21. OFFICIAL COMMENTARY, *supra* note 10, at 19.

Committee of the Red Cross convened in 1946, fell in with the views of the Committee and recommended that a new Article, worded as follows, should be introduced at the beginning of the Convention: "The present convention is applicable between the High Contracting Parties from the moment hostilities have actually broken out, even if no declaration of war has been made and whatever the form that such armed intervention may take."

The Conference of Government Experts recommended in its turn that the Convention should be applicable to "any armed conflict, whether the latter is or is not recognized as a state of war by the parties concerned," and also to "cases of occupation of territories in the absence of any state of war."²³

As the Official Commentary indicates, "There was no discussion at the 1949 Diplomatic Conference, on the Committee's proposal . . . the experience of the Second World War had convinced all concerned that it was necessary."²⁴

Common Article 2 of the Four Geneva Conventions of 1949 implemented this recommendation.²⁵ This article states:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.²⁶

Addressing the pragmatic significance of this new "armed conflict" standard dictating the scope of application, the Official Commentary states:

By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient.²⁷

The Official Commentary also explains that the term "armed conflict" was used specifically for the purpose of ensuring law of war application was based on pragmatic, and not political or diplomatic considerations:

It remains to ascertain what is meant by "armed conflict." The substitution of this much more general expression for the word "war" was deliberate. It is possible to argue almost endlessly about the legal definition of "war." A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression "armed conflict" makes such arguments less easy. *Any difference arising between two States*

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Since 1907 experience has shown that many armed conflicts displaying all the characteristics of a war, may arise without being preceded by any of the formalities laid down in the Hague Convention. Furthermore, there have been many cases where Parties to a conflict have contested the legitimacy of the enemy Government and therefore refused to recognize the existence of a state of war. In the same way, the temporary disappearance of sovereign States as a result of annexation or capitulation has been put forward as a pretext for not observing one or other of the humanitarian Conventions.

OFFICIAL COMMENTARY, *supra* note 10, at 19-20.

23. *Id.* at 20 (quoting REPORT OF THE WORK OF THE PRELIMINARY CONFERENCE OF NATIONAL RED CROSS SOCIETIES FOR THE STUDY OF THE CONVENTIONS AND OF VARIOUS PROBLEMS RELATIVE TO THE RED CROSS (Geneva, July 26-August 3, 1946); REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS FOR THE STUDY OF THE CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS (Geneva, April 14-26, 1947)).

24. *Id.* at 20-21.

25. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2-3, T.I.A.S. 3362 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, art. 2-3, T.I.A.S. 3363 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 2-3, T.I.A.S. 3364; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, art. 2-3, T.I.A.S. 3365 [hereinafter GC].

26. *See supra* note 25.

27. OFFICIAL COMMENTARY, *supra* note 10, at 22-23.

*and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2.*²⁸

Finally, the Official Commentary specifically addresses the all too frequent occurrence of not just one, but both states involved in an armed conflict denying that a state of war exists between them:

The Convention provides only for the case of one of the Parties denying the existence of a state of war. What would the position be, it may be wondered, if both Parties to an armed conflict were to deny the existence of a state of war? Even in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying. *It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.*²⁹

This evidence, when coupled with the plain language of Article 2 of the Prisoner of War Convention, clearly indicates that applying prisoner of war protections is intended to be based on a purely *de facto* standard, with no “political” influence whatsoever.³⁰ Interestingly, this has long been the position of a distinguished Department of Defense (DOD) law of war expert, Mr. Hayes Parks.³¹ Mr. Parks has advised The Judge Advocate General of the Army on every major prisoner of war issue to arise since Operation Urgent Fury in 1983.

In a recent interview with the authors, Mr. Parks asserted his support for applying prisoner of war protections based on a purely *de facto* standard. This standard rejects the relevance of whether the United States, or an adversary, considers hostilities to amount to a state of war. Less relevant is whether the operation in question is considered a war for domestic legal pur-

poses, such as the War Powers Resolution.³² According to Mr. Parks, he has provided advice consistent with this *de facto* standard on numerous occasions.³³ These included the treatment of captured Cuban personnel during Operation Urgent Fury; the status of downed U.S. Navy Lieutenant Robert Goodman upon capture by Syrian forces; the treatment of captured personnel during Operation Just Cause in 1989; the treatment of captured personnel, and the status of U.S. personnel captured by Iraqi forces during Operation Desert Storm in 1991; and the status of personnel captured during Operation Allied Force in 1999.³⁴

For the U.S. government, the opportunity to test the validity of the proposition that a pure *de facto* standard dictates when the law of war applies arose as a result of the capture of General Manuel Noriega during Operation Just Cause in 1989. In that case, the Federal District Court for the Southern District of Florida confronted the issue of whether General Noriega, then in U.S. custody pending sentencing for violations of U.S. law, was entitled to prisoner of war status.³⁵ In this rare opportunity for the judicial branch to address when the law of war applies to a particular conflict, the court framed the issues as follows:

Before the Court are several questions, but the ultimate one appears to be whether or not the Geneva Convention prohibits incarceration in a federal penitentiary for a prisoner of war convicted of common crimes against the United States. To resolve this issue the Court must consider three interrelated questions: (1) what authority, if any, does the Court have in this matter; (2) *is Geneva III applicable to this case*; (3) if so, which of its provisions apply to General Noriega’s confinement and what do they require?³⁶

In addressing whether Geneva III applied, the court noted that, throughout the case, the government had “obviated the need for a formal determination of General Noriega’s status”³⁷ by indi-

28. *Id.* at 23 (emphasis added).

29. *Id.*

30. See GPW, *supra* note 9, arts. 2-3.

31. Mr. W. Hayes Parks (Colonel Retired, United States Marine Corps), has occupied the position of Special Assistant to the Judge Advocate General of the Army for Law of War Matters during all conflict operations since the war in Vietnam. Mr. Parks also serves as an Adjunct Professor of Law, George Washington University School of Law, and American University School of Law. Mr. Parks has written and lectured extensively on law of war related issues.

32. Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)).

33. Interview conducted with W. Hayes Parks, Special Assistant to The Judge Advocate General of the Army for Law of War Matters, Office of the Judge Advocate General, U.S. Army, Rosslyn, Va. (Apr. 23, 1999).

34. *Id.*

35. See *United States v. Noriega*, 806 F. Supp. 791 (S.D. Fla. 1992).

36. *Id.* at 793 (emphasis added).

37. *Id.* at 794.

cating that “Noriega was being and would continue to be afforded all of the benefits of the Geneva Convention.”³⁸ The court also noted, however, that the government had never “agreed that [Noriega] was, in fact, a prisoner of war.”³⁹ Instead, the government asserted that it had never made a formal decision on the issue of whether personnel captured during Operation Just Cause were legally entitled to prisoner of war status.⁴⁰ The court then identified the limited value of this type of policy-based application of the law of war⁴¹ without a formal acknowledgment of its binding nature:

The government’s position provides no assurances that the government will not at some point in the future decide that Noriega is *not* a [prisoner of war], and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against.⁴²

Based on the conclusion that this policy-based application of the law of war did not definitively resolve the issue of General Noriega’s status, the court went on to determine whether Geneva III applied. In holding that the Convention applied to the General, the court indicated the significance of the language of Article 2 and the Official Commentary related thereto and the irrelevance of the “label” used by the government to characterize the conflict:

The Convention applies to an incredibly broad spectrum of events. The government has characterized the deployment of U.S. Armed Forces to Panama on [20 December] 1989 as the “hostilities” in Panama (citation omitted). However the government wishes to

label it, what occurred in late 1989-early 1990 was clearly an “armed conflict” within the meaning of Article 2. Armed troops intervened in a conflict between two parties to the treaty.⁴³

In reaching the conclusion that Operation Just Cause triggered the protections of the Geneva Conventions, the court relied heavily on the Official Commentary. Perhaps more importantly, the court also relied on the fact that “the government has professed a policy of liberally interpreting Article 2.”⁴⁴ The court then cited the following Department of State position regarding applying the Geneva Conventions:

The United States is a firm supporter of the four Geneva Conventions of 1949 As a nation, we have a strong desire to promote respect for the laws of armed conflict and to secure maximum legal protection for captured members of the U.S. Armed Forces. Consequently, the United States has a policy of applying the Geneva Conventions of 1949 whenever armed hostilities occur with regular foreign armed forces, even if arguments could be made that the threshold standards for the applicability of the Conventions contained in common Article 2 are not met. In this respect, we share the views of the International Committee of the Red Cross that Article 2 of the Conventions should be construed liberally.⁴⁵

The court went on to hold that General Noriega was indeed legally entitled to prisoner of war status under Geneva III.

38. *Id.*

39. *Id.*

40. The court cited the following language from government filings in support of this conclusion: “the United States has made no formal decision with regard to whether or not General Noriega and former members of the PDF charged with pre-capture offenses are prisoners of war” *Id.* at n.4 (quoting Government Resp. to Def. Post-Hearing Memo. of Law, Sept. 29, 1992 at 8).

41. This seems to be exactly what is required by the DOD Law of War Program, as implemented by Chairman of the Joint Chiefs of Staff Instruction 5810.01, which requires:

The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized, and unless otherwise directed by higher competent authorities, will apply law of war principles during all operations that are categorized as Military Operations Other Than War.

CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, (12 Aug. 1996) [hereinafter JCS INSTR. 5810.01].

42. *Id.* In a supporting footnote, the court stated: “There appears to be some cause for concern about the government changing its position. After consistently stating that the General has been, and will continue to be, treated as a prisoner of war, the court detected a slight shift in the government’s argument at the post-sentencing hearing.” *Id.* n.5.

43. *Id.* at 795.

44. *Id.*

45. *Id.* (quoting Letter from the State Dept. to the Attorney General of the United States, Jan. 31, 1990, at 1-2).

This case seems to establish a clear precedent on the issue of when the United States is obligated to acknowledge that the law of war applies to captured personnel. The court rejected any “political” considerations as to the nature of the conflict between U.S. forces and the Panamanian Defense Forces. Instead, the court followed the Official Commentary guidance to apply a *de facto* test for determining applicability. The court succinctly rejected the significance of the label provided by the executive branch for the conflict. This unusual judicial interpretation of the law of war should serve as a guide for all future national level decisions related to when the law of war applies to specific military operations. Based on the “principles and spirit” of the law of war, this approach will enhance the likelihood that captured U.S. personnel will be treated as prisoners of war in accordance with international law.

Prisoner of War Issues at the Operational and Tactical Level

As discussed above, there may be a host of political and legal reasons to classify a crisis or military operation as something other than “international armed conflict.” These pressures at the national level may leave soldiers in the field with a less than precise legal description of the conflict that they are about to enter.

Therefore, commanders and their legal advisors at the operational and tactical level may be confused as to what law applies in a given military operation. Commanders at these levels cannot afford to play guessing games as to what type of conflict they are entering. Their legal advisors should not be expected to decipher the applicable law. Therefore, national level leaders drafted policy gap-fillers, which nullify the need

to define the nature of a conflict at commands below the strategic level. The purpose of this section is to highlight this national policy, and discuss the key provisions of the law related to prisoner of war treatment that U.S. forces must comply with at all times.

When the national level authorities conclude that a conflict is an international armed conflict, determining what law applies is relatively easy. The entire body of the law of war applies. It is less clear when the national command authority refuses to classify the operation as such. Regardless of how a conflict is defined at the strategic or national level, there is no shortage of guidance on how tactical and operational commands must handle captured personnel.⁴⁶

Until otherwise directed by competent higher authority, commanders and their legal advisors should assume that the full body of the law of war regarding the treatment of captured personnel applies in all military operations. This baseline rule is not contingent on how the operation might later be characterized.⁴⁷

Initial Disposition

The Secretary of the Army is the executive agent for administering the DOD Prisoner of War Program.⁴⁸ Personnel captured or detained by U.S. Armed Forces are to be handed over to the U.S. Army Military Police as soon as practical.⁴⁹ Once in the “care, custody, or control”⁵⁰ of U.S. forces, captured or detained personnel may not be transferred to any other entity outside the DOD without the approval of the Assistant Secretary of Defense for International Security Affairs (ASD (ISA)). The Judge Advocate General of the Army, in coordination with the Army General Counsel and the General Counsel of the

46. Part of the impetus for this article was the numerous questions that the International and Operational Law Department at The Judge Advocate General’s School received “from the field” regarding the law of war relative to the treatment of prisoners of war as a result of the American and Serbian soldiers captured in and around Kosovo. Questions came from every level within the DOD. While the International and Operational Law Department is a resource, it does not have the authority to provide official opinions on behalf of the DOD, the U.S. Army or The Judge Advocate General.

47. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (Dec. 9, 1998) [hereinafter DOD DIR. 5100.77]. “The Heads of the DOD Components shall: Ensure that the members of their Components comply with the law of war during all conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.” *Id.* para. 5.1, 5.3. The directive requires, therefore, as a matter of policy, that the law of war apply to all conflicts. Although “conflict” is not defined, a plain meaning interpretation suggests that DOD personnel are to comply with the full body of the law of war whenever they are involved in hostilities or where hostilities are likely. In military operations where there is less of a chance of actual combat, the “principles and spirit of the law of war” must be followed. The Directive does not explain what constitutes the principles of the law of war. Therefore, at the operational and tactical level, the law of war should be applied in non-conflicts unless and until directed otherwise. In implementing this directive, the Chairman of the Joint Chiefs of Staff established:

The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized, and unless otherwise directed by competent authorities, will apply the law of war principles during all operations that are categorized as Military Operations Other Than War.

JCS INSTR., *supra* note 41, para. 4a.

48. DEP’T OF DEFENSE, DIR. 2310.1, DOD PROGRAM FOR ENEMY PRISONERS OF WAR (EPOW) AND OTHER DETAINEES, para. D2 (Aug. 18, 1994) [hereinafter DOD DIR. 2310.1]. The principal assistant to The Judge Advocate General in this area is the Chief, International and Operational Law, Office of the Judge Advocate General.

49. *Id.* para C4.

50. *Id.* para. C3.

DOD, is specifically designated as the legal advisor for the Enemy Prisoner of War Program.⁵¹ Commanders of the Unified Combatant Commands have the overall responsibility for prisoner of war operations in their theaters and are directed to issue appropriate plans, policies, and directives, consistent with this DOD program.⁵²

As the DOD executive agent, the Secretary of the Army has promulgated a multi-service regulation covering how enemy prisoners of war, retained personnel, civilian internees and other detainees are handled. This regulation applies to the Army, Navy, Air Force, and Marine Corps and their reserve components when on active duty in a Title 10 status.⁵³ This regulation seeks to implement international law, “both customary and codified,”⁵⁴ related to captured and detained personnel during military operations, including military operations other than war. In cases where there are discrepancies or conflicts between the regulation and codified international law, however, the codified law (usually in the form of treaties) takes precedence.⁵⁵

As Executive Agent, the Secretary of the Army’s policy is that all persons “captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.”⁵⁶ Moreover, all persons taken into custody are to be afforded the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW)⁵⁷ until their legal status is determined by competent authority.⁵⁸

This regulation, therefore, establishes a clear mandate: U.S. forces must comply with the full body of the law of war with respect to captured enemy personnel, regardless of the type of

conflict. Thus, commanders at the operational and tactical level need not engage in “conflict characterization” for the purposes of handling captured or detained personnel.⁵⁹ These command levels must be prepared to comply with all of the law in this area during military operations.

Primary Protections Required by the Law of War

The policies cited above are silent as to what requirements in the law of war rise to the level of “principle.” The significance of this silence is that it results in an absence of definition of what law of war rules are cognizable under this national level mandate. This lack of specific policies is beneficial in that it provides flexibility to the commander on the ground. From the perspective of the legal advisor, however, the benefit can also be a curse, due to the lack of specificity regarding what the commander *must* do. Therefore, this article offers the following as “primary protections” that must be afforded to all captured personnel in all military operations.

The GPW establishes the protections owed to captured enemy personnel by a detaining power.⁶⁰ This comprehensive treaty contains 143 articles and numerous annexes. While all of these provisions are technically binding during international armed conflict, some are logically more significant than others. These core provisions are the “primary protections” or “principles of the convention.”

In operations short of armed conflict, some of the less significant protections⁶¹ arguably fall short of being “principles” of the law of war.⁶² Instead, they may be more accurately described as the “details” or “specifics” of the law of war.

51. *Id.* para. D2g.

52. *Id.* para. D4.

53. U.S. DEP’T OF ARMY, REG. 190-8, U.S. DEP’T OF NAVY INSTR. 3461.6, U.S. DEP’T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 31-304, U.S. MARINE CORPS ORDER 3461.1, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (Oct. 1, 1997) [hereinafter AR 190-8].

54. *Id.* para. 1-1b.

55. *Id.* para. 1-1b(4).

56. *Id.* para. 1-5a(1).

57. GPW, *supra* note 9.

58. AR 190-8, *supra* note 53, para. 1-5a(2).

59. GPW, *supra* note 9. Article 2, referred to as Common Article 2 because it is common to all four of the 1949 Geneva Conventions, explains that the Geneva Conventions apply in declared wars and in any other conflict between two or more contracting parties “even if the state of war is not recognized by one of them.” *Id.* This does not mean, however, that the characterization issue is irrelevant. Requirements based on policy, rather than law, arguably give the commander more flexibility. Therefore, judge advocates should be prepared to characterize the conflict—to inform a commander when he is required to act as a matter of law, rather than policy, or vice versa.

60. AR 190-8, *supra* note 53, para. 1-1a(3). Although the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) includes provisions on prisoners of war, the United States is not a party to Protocol I. Furthermore, the articles related to prisoners of war in Protocol I focus more on prisoner of war “status” rather than the protections owed to prisoners of war. Hague IV, Annex to the Convention, also contains rules regarding the treatment of prisoners of war. This Convention, however, was expanded and modified by the GPW.

It may not always be possible, or even proper, to comply with every requirement of the GPW in all military operations short of war. In such cases, the commander should try to adhere to the “spirit”⁶³ of the GPW, and should, at a minimum, provide the primary protections, or principles, delineated therein. What follows, then, is a suggested list of the core protections provided by the law of war, that is, those that may be viewed as the principles of the law of war relative to the treatment of prisoners of war.

Non-Combatant Status—Perhaps the most important of all the benefits afforded to a prisoner of war is that of non-combatant status⁶⁴—the prohibition against killing or wounding an enemy who has laid down his arms.⁶⁵ This prohibition applies for the duration of detention. Thus, not only is the detainee no longer a legitimate target, the detaining party may not kill captive prisoners.⁶⁶

Humane Treatment—Prisoners must be treated humanely at all times.⁶⁷ Captured personnel should be protected from murder, mutilation, violence, torture, corporal punishment, sensory deprivation, collective punishment, and humiliation.⁶⁸ Prisoners must, upon request, provide their name, rank, service number, and date of birth.⁶⁹ No force or coercion may be used to

compel a prisoner to provide this information, however. Instead, such a prisoner should be treated as if he holds the lowest enlisted rank.⁷⁰ Prisoners may also be interrogated and asked any question concerning anything believed by a commander or intelligence operative to be within the prisoner’s knowledge. The use of physical or mental coercion to acquire information is prohibited, no matter how valuable that information may be.⁷¹

This seemingly vague and ambiguous standard of humane treatment is actually the crux of the Geneva Conventions.⁷² In creating guidelines for the handling of captured enemy personnel, U.S. personnel should adopt a “do unto others” approach. Humane treatment will usually be provided if U.S. personnel “test” their actions against a simple standard: would they consider their treatment of captured enemy personnel objectionable if similar treatment was afforded their fellow soldiers or subordinates in the hands of the enemy? Importantly, captured enemy personnel are generally referred to as prisoners of war; they are not to be thought of as “criminals.”

No Medical or Scientific Experiments—Largely as a result of wholly meritless medical experiments conducted on prisoners of war during World War II,⁷³ the GPW prohibits conducting

61. See, e.g., GPW, *supra* note 9, art. 28 (“Canteens be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use.”); *id.* art. 38 (“The Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.”); *id.* art. 120 (stating that prisoners are to have wills drawn up so as to satisfy the conditions of validity imposed by their own country); *id.* art. 77 (stating that the will should be drafted after consulting with an attorney).

62. DOD DIR. 5100.77, *supra* note 47.

63. *Id.*

64. “Prisoner of war status” is a legal term of art. To receive the full benefits of the law of war relative to the treatment of prisoners of war, a captured enemy must meet the conditions laid out in Articles 2 and 4 of the GPW. Article 2 describes the type of conflict that must be involved to trigger the convention. Assuming the Article 2 requisite conflict requirement is met, the captive must then meet the individual criteria laid out in Article 4. Where status is questionable, the captive must be treated as a prisoner of war with all the protections that status provides, unless and until he or she is determined to not be entitled to status by a competent tribunal. GPW, *supra* note 9, art. 5. The proper procedures for conducting an “Article 5 Tribunal” are established in AR 190-8, *supra* note 53, para. 1-6. This article presupposes that the requirements of status are met or, that as a result of policy reflected in the DOD Law of War Program, DOD DIR. 5100.77, *supra* note 47, that treatment as a prisoner of war is extended even though the captive may not be entitled to status as a matter of law.

65. *Id.* art. 13; Hague IV, *supra* note 19, art. 23(c).

66. GPW, *supra* note 9, art. 13; *but see* GPW, *supra* note 9, ch. III. Prisoners of war may be charged and punished by the detaining power for post capture violations of the detaining power’s law, providing that its own personnel are subject to the same laws and procedures. This may include the imposition of the death penalty for particularly egregious offenses, such as the murder of fellow prisoners of war. *Id.* art. 42. Deadly force may be used to prevent escape after warnings appropriate to the circumstances are given. According to the official commentary, warnings may be given verbally, may be given by means of whistles, bells, etc., or given by warning shots. The official commentary points out that since the GPW requires “warnings,” at least two should be given. OFFICIAL COMMENTARY, *supra* note 10, at 246.

67. *Id.* art. 13.

68. *Id.*; *see also* AR 190-8, *supra* note 53, para. 1-5(b), (c).

69. GPW, *supra* note 9, art. 17.

70. OFFICIAL COMMENTARY, *supra* note 10, at 158-61. While this may appear an insignificant consequence for obstinate prisoners, there are many benefits accorded to prisoners of war based on rank. For example, privates may be forced to perform manual labor, while noncommissioned officers and officers may not. *See infra* note 93.

71. GPW, *supra* note 9, art. 17; *see also* OFFICIAL COMMENTARY, *supra* note 10, at 163-64.

72. OFFICIAL COMMENTARY, *supra* note 10, at 140.

medical and scientific experiments on prisoners or war.⁷⁴ Prisoners are not to be used as “guinea-pigs.”⁷⁵ The GPW does not, however, prevent the use of experimental medicines or techniques where the sole object of the proposed treatment is the prisoners’ health or dental care.⁷⁶ For example, a new drug developed to combat the harmful effects of nerve agents, administered to U.S. forces before approval by the Federal Drug Administration, might also be issued to enemy prisoners of war.

Protection from Insults and Public Curiosity—Captive enemy personnel are to be treated with honor and respect.⁷⁷ “The prisoner of war must be viewed by his guard as an unhappy enemy and must be treated accordingly: administrative officials and guards alike must be considerate of the sensibilities of soldiers who have tasted defeat, and any persecution based on their misfortune is prohibited.”⁷⁸ To protect their honor, captured enemy personnel must be protected from insults and “public curiosity.”⁷⁹

Although the GPW indicates that this prohibition includes parading prisoners of war through towns or caging them in areas accessible to the general public, the question of whether to allow the media to film enemy captives in U.S. control is not specifically addressed. The GPW does not specifically forbid filming or photographing prisoners of war. Commanders may desire to use such a technique to prove that prisoners are being treated properly. Commanders may also believe enemy soldiers are more likely to surrender if they are convinced that they

will be treated humanely, and may therefore see the media as the medium to convey this message to enemy troops.

Captured prisoners of war are not always considered heroes by their own leaders, however.⁸⁰ Prisoners returning home are often subject to severe punishment.⁸¹ Furthermore, an enemy soldier’s family may be placed at risk if the soldier is known to be a prisoner of war.⁸² Therefore, there are significant policy concerns related to using the media to display captured enemy personnel.⁸³ A significant “reciprocity” concern also exists: an enemy might respond by compelling U.S. prisoners to publicly “confess to war crimes” or make similar statements.⁸⁴

Army regulations now prohibit the filming, photographing, and video taping of individual captured enemy personnel for other than facility administration or intelligence purposes.⁸⁵ Group, area wide, or aerial photographs of the facilities may be taken only if the senior military police officer in the facility commander’s chain of command approves it.⁸⁶

Equality of Treatment—As a general rule, all prisoners must be treated alike, without distinction based on race, nationality, religious belief, political opinions, or “any other distinction founded on similar criteria.”⁸⁷ There are some specific exceptions to this rule of non-discrimination, however. Absolute equality, without considering the relevant circumstances of the individual, is itself a form of discrimination.⁸⁸ For example, dissimilar treatment may be based on rank,⁸⁹ sex,⁹⁰ religious accommodation,⁹¹ aptitude for work,⁹² age,⁹³ or state of health.⁹⁴ Further, the Official Commentary explains that additional crite-

73. A. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIME TRIALS* (1987); GEORGE J. ANNAS & MICHAEL A. GRODIN, *THE NAZI DOCTORS AND THE NUREMBERG CODE, HUMAN RIGHTS IN HUMAN EXPERIMENTATION* (1992); *United States v. Karl Brandt*, in 1 *TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 13* (1950); Jon M. Harkness, *Nuremberg and the Issue of War-Time Experiments on U.S. Prisoners*, 276 *JAMA* 1672 (1996); OFFICIAL COMMENTARY, *supra* note 10, at 141.

74. GPW, *supra* note 9, art. 13.

75. OFFICIAL COMMENTARY, *supra* note 10, at 141.

76. *Id.*; GPW *supra* note 9, art. 13.

77. GPW, *supra* note 9, art. 14.

78. OFFICIAL COMMENTARY, *supra* note 10, at 145.

79. *Id.* at 141; *see also* GPW, *supra* note 9, art. 13; Trial of Lieutenant General Kurt Maelzer, Case No. 63, *reprinted in* UNITED NATIONS WAR CRIMES COMMISSION, XI *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 53 (1949) (noting that Maelzer was convicted for parading U.S. prisoners of war through Rome).

80. Rev. Robert F. Grady, *The Evolution of Ethical and Legal Concern for the Prisoner of War*, Studies in Sacred Theology, n.218, The Catholic University of America; OFFICIAL COMMENTARY, *supra* note 10, at 512; R.C. HINGORANI, *PRISONERS OF WAR* 180-186 (1982).

81. *Iraqi Deserters Weary of Bombing*, FT. WORTH STAR-TELEGRAM 1, Feb. 12, 1991 (noting that surrendering Iraqi soldiers were threatened with execution upon return).

82. U.S. DEP’T OF DEFENSE, *CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS O-18* (1992) [hereinafter *FINAL REPORT*]; *Prisoners of War*, GANNETT NEWS SERV., Feb. 27, 1991, *available in* WESTLAW, ALLNEWS database (noting that Saddam Hussein threatened to kill the families of Iraqi soldiers that surrendered).

83. *FINAL REPORT*, *supra* note 82; *see also* W. Hayes Parks, *The Gulf War: A Practitioners View*, 10 *DICK. J. INT’L L.* 393, 418 (1992); Memorandum, Assistant Secretary of Defense for Public Affairs, subject: Photography of Enemy Prisoners of War (Feb. 2, 1991); Gordon Risius & Michael A. Meyer, *The Protection of Prisoners of War Against Insults and Public Curiosity*, 295 *INT’L REV. RED CROSS* 298 (July-Aug. 1993).

ria could be established.⁹⁵ In short, discrimination is not permitted when it is of an adverse nature, but it is acceptable if the purpose is a good faith attempt to further the notions of respect and protection.

Free Maintenance and Medical Care—Prisoners have a right to quarters,⁹⁶ food and water,⁹⁷ clothing,⁹⁸ hygiene facilities,⁹⁹ and medical care.¹⁰⁰ These obligations require enemy prisoner of war projections and planning by each level of command.

84. FINAL REPORT, *supra* note 82; see also *The Fragile Rules of War*, ECONOMIST, Jan. 26, 1991, at 22. This article discusses the GPW and the display of battered and bruised American pilots on television advocating that the U.S. end the war with Iraq. The article speculates that torture may have been used to obtain statements, noting the obvious injuries and trauma, and that one pilot had mocked his captors' accent. In Operation Allied Force in Kosovo, captured American soldiers were shown on Serbian television within hours of sending a radio message that they were under fire and being listed as missing. See John H. Cushman, Jr., *3 G.I.'s Missing in Macedonia After They Reported Attack*, N.Y. TIMES, Apr. 1, 1999, at A1; see also Bradley Graham & Daniel Williams, *U.S. Soldiers in U.N. Force Apparently Captured*, WASH. POST, Apr. 1, 1999, at A22. President Clinton, British Foreign Secretary Robin Cook, and others, protested the showing of the soldiers on television. Some argued that doing so was a violation of Article 13, GPW. The soldiers had obvious injuries that appeared consistent with some sort of physical struggle. See *President Clinton on Kosovo*, Excerpts from Remarks Made in Washington DC, Apr. 2, 1999, <<http://www.state.gov/www/regions/eur>>; see also *NATO Will Hold Milosevic Responsible for Safety of Captured US Soldiers*, AGENCE FRANCE-PRESSE, Apr. 1, 1999, available on WESTLAW, ALLNEWS.

The assertion that showing the prisoners on television is illegal, absent being coerced into making statements or being shown in a humiliating fashion, is questionable. In this case, the benefits to the prisoners of being shown on television arguably outweighed any "insult" or "humiliation" they may have experienced. They were accounted for, the fact they were in Serb control was irrefutable, a record of their condition upon capture was to a degree preserved, and they had the satisfaction of knowing that the world, the United States and their families knew all this as well. The protections of the GPW against public insult and humiliation belong to the prisoner of war, not to the sending state and its policies. In cases such as this, where the prisoners do not appear to have been coerced into making anti-American statements, protests against showing American captives on television may ultimately prove to be counterproductive.

85. AR 190-8, *supra* note 53, para. 1-5d.

86. *Id.*

87. GPW, *supra* note 9, art. 16; see also AR 190-8, *supra* note 53, para. 1-5b. Unlike the GPW, AR 190-8 also lists sex as a criterion for which different treatment is not appropriate. See *infra* note 93. However, the drafters of the treaty clearly saw times when discrimination based on gender was appropriate or even required. It is possible that in the future, U.S. forces may capture prisoners of war from many different cultures. Certain cultures may demand some gender based discrimination. For example, some may desire segregated housing or hygiene facilities, both of which are required by the GPW. The GPW protects the prisoners honor, not necessarily U.S. social and cultural norms and policies. It is appropriate, therefore to read the Army regulation prohibiting discrimination based on sex in the spirit of the GPW, which allows discrimination based on gender where it is not of an "adverse nature." OFFICIAL COMMENTARY, *supra* note 10, at 154.

Moreover, the GPW does, in the area of housing, also allow for segregation based on nationality, language, and customs so long as they are not separated from their sending state armed forces. GPW, *supra* note 9, art. 22. In World War II, many Jewish Americans were separated from other American prisoners and were sent to work in labe labor camps. See MITCHELL G. BARD, *FORGOTTEN VICTIMS: THE ABANDONMENT OF AMREICANS IN HITLER'S CAMPS* (1994). The official commentary to the GPW explains however, that a facility commander may separate soldiers of the same army where it is necessary to prevent hostile activities. OFFICIAL COMMENTARY, *supra* note 10, at 185. Not all soldiers in a given army come from the same culture or political background. Some may be conscripts and personally opposed to their nation's policies. During the Korean conflict, in one UN prisoner of war camp, North Korean activist prisoners murdered a number of their fellow prisoners who were sympathetic to South Korea and captured the camp commander. See WALTER G. HERMES, *TRUCE TENT AND FIGHTING FRONT* 232-63 (1966).

88. OFFICIAL COMMENTARY, *supra* note 10, at 154.

89. GPW, *supra* note 9, arts. 39, 40, 43, 45, 49, 60, 89, 97, 98.

90. *Id.* arts. 14, 25, 29, 49, 88, 97, 108.

91. *Id.* arts. 22, 26, 34.

92. *Id.* arts. 49, 53, 62.

93. *Id.* arts. 49, 45.

94. *Id.* arts. 30, 49, 55, 92, 98, 108, 109, 110, 114.

95. OFFICIAL COMMENTARY, *supra* note 10, at 154.

96. GPW, *supra* note 9, art. 25. The quarters must be as a favorable as those of the soldiers running the facility. The prisoners may be compelled to construct their own quarters with materials provided by the detaining party if all the requirements with regard to labor are met. *Id.* arts. 49-54; OFFICIAL COMMENTARY, *supra* note 10, at 193.

97. GPW, *supra* note 9, art. 26. Prisoners should be allowed to participate in preparing their food. Collective punishment involving the withholding of food is prohibited. Camp commanders must take into account the prisoners' unique dietary needs. *Id.*

98. *Id.* art. 27. Commanders must take into account the weather and work being performed by the prisoner. Prisoners must also be allowed to wear their badges of rank, nationality, and decorations. *Id.* art. 40.

Early in a conflict, when only expedient prisoner of war camps have been established, commanders may want to house captured enemy personnel in civilian or military confinement or correctional facilities. It may be in the prisoners' best interests to be temporarily held in a confinement facility. Such a facility would be capable of providing for them shelter, food, and medical care. However, as with the other GPW protections, it is the prisoners' best interests, not the detaining power's convenience that must be considered. Therefore, such facilities may be used only if in the prisoners' best interests.¹⁰¹

No Reprisals on Prisoners of War—Prisoners of war may not be the objects of reprisal.¹⁰²

Reprisals are acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.¹⁰³

The law of war has not always forbidden reprisals against prisoners of war. Because of their availability to the enemy and their helpless and vulnerable situation, prisoners of war fre-

quently were subjected to acts of reprisal. The prisoners in custody, however, are likely completely innocent of alleged ongoing violations of the law of war committed by the sending state. Now, the GPW clearly states that prisoners of war cannot be made the objects of reprisal.¹⁰⁴

The Protecting Power and the ICRC—Traditionally, a protecting power is a neutral third state, agreed upon by the state parties to a conflict, which seeks to protect the rights and welfare of the prisoners of war.¹⁰⁵ The GPW codified the concept of the protecting power as it relates to prisoners of war.¹⁰⁶ In this century, however, there have been few occasions where protecting powers have been appointed.¹⁰⁷

The drafters of the GPW recognized that prisoners of war might not be afforded oversight when parties to the conflict either would not or could not agree on a protecting power. As a result, subject to the consent of the parties to the conflict, the GPW allows the ICRC, or any other acceptable private organization, to perform the protecting power function.¹⁰⁸

Representatives of the protecting power are to be allowed to visit all places and premises where prisoners of war are being held. The protecting power representatives are to have full power to choose where to visit. They are to be allowed to interview prisoners without witnesses present. Their visits may not

99. *Id.* art. 29. This includes baths or showers, sanitation facilities, sufficient water and soap for their person and their laundry. The facilities must be maintained in a clean condition. The facilities must be open during the day and at night. *Id.*

100. *Id.* art. 30. Every camp must have an adequate infirmary with separate wards for contagious or mental disease. The detaining power must attempt to procure whatever medical or hospital care a prisoner may need, at no cost to the prisoner. *Id.*

101. *Id.* art. 22. There may be other benefits to using such facilities. For example, virtually all prisoners are instructed to attempt escape on capture. Arguably, holding them in a secure facility would provide a greater level of physical protection, because the guards are trained and the physical obstacles established to prevent inmates from escaping are such that the guards are less likely to have to use deadly force to thwart such attempts to do so. However, not only might a prisoner fall victim to the criminal inmates or overzealous guards unable to distinguish the difference between prisoners of war and criminals, the GPW is clearly concerned with the psychological well being of the prisoner of war. See OFFICIAL COMMENTARY, *supra* note 10, at 182-183. At a minimum, however, a prisoner of war in a confinement facility must be segregated from the criminal population, must be allowed to wear his or her uniform and decorations, and should be given as much freedom within the facility as is feasible, based on security and safety considerations. Finally, such a situation should only be temporary in nature.

102. *Id.* art. 13.

103. U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, REPRISALS 177 (1956).

104. OFFICIAL COMMENTARY, *supra* note 10, at 141-142. The commentary also points out that reprisals rarely solve the abuse on the other side and merely generate a vicious circle of reprisal and counter-reprisal.

105. HOWARD S. LEVIE, 59 INTERNATIONAL LAW STUDIES, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 255-293 (1977); HINGORANI, *supra* note 80, at 158-161.

106. GPW, *supra* note 9, art. 8.

107. LEVIE, *supra* note 105; HINGORANI, *supra* note 80.

108. GPW, *supra* note 9, arts. 9, 10.

It must be remembered that the International Committee of the Red Cross is today, as when it was founded, simply a private association with its headquarters at Geneva, composed solely of Swiss citizens recruited by co-optation. It is therefore neutral by definition and is independent of any Government and political party. Being the founder body of the Red Cross and the promoter of all the Geneva Conventions, it is by tradition and organization better qualified than any other body to help effectively in safeguarding the principles expressed in the Conventions.

OFFICIAL COMMENTARY, *supra* note 10, at 107.

be prohibited except for reasons of “imperative military necessity, and then only as an exceptional and temporary measure.”¹⁰⁹ The ICRC is to enjoy these same rights and access to prisoners of war.¹¹⁰ Commanders must understand that facilitating such unlimited access is the legally sanctioned method of “showing the world” that the prisoners are being well treated and cared for.

No Renunciation of Rights—Under “no circumstances” may a prisoner renounce, in whole or in part, any right or protection provided by the GPW.¹¹¹ Prisoners are in very coercive environments in which their ability knowingly and voluntarily to renounce certain of their rights is questionable.¹¹² In such an environment, it is possible to imagine a prisoner being willing to participate in medical experiments¹¹³ or to labor in direct support of the detaining power’s military effort.¹¹⁴

The under “no circumstances” rule may be overly simplistic, however.¹¹⁵ Read in conjunction with GPW, Article 6, it appears that a prisoner may not renounce his rights but may agree to an advancement of rights.¹¹⁶ For example, prisoners of war have the right to repatriation immediately upon the end of hostilities.¹¹⁷ Must a commander forcibly repatriate a prisoner of war when the prisoner does not want to return home out of fear for his safety? There are examples of prisoners being allowed to seek asylum rather than be repatriated.¹¹⁸

The right of repatriation however, is based on the premise that it will be the prisoner’s natural desire.¹¹⁹ In demanding that a prisoner be repatriated at the end of hostilities, the drafters also considered the possible need to protect prisoners from themselves. Accepting offers from the detaining power to remain after hostilities have ceased may at the time seem advantageous; but may, in the long run, be less than desirable.¹²⁰ Finally, a prisoner of war continues to be a member of his country’s armed forces and therefore owes a duty of allegiance to those armed forces.¹²¹

A prisoner’s request not to be repatriated should be granted only if the captive, upon return, may be subject to, “unjust measures affecting his life, liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being.”¹²² No propaganda may be used to convince the prisoner to object to repatriation; supervisory bodies must be able to satisfy themselves that the requests have been made freely and in all sincerity.¹²³

Combatant Immunity—Indelibly linked to non-combatant status is combatant immunity. Ordinarily, nation states are free to define and to prosecute criminal activity engaged in within their borders or committed by or against their citizens. Obvi-

109. GPW, *supra* note 9, art. 126.

110. *Id.*

111. *Id.* art. 7.

112. OFFICIAL COMMENTARY, *supra* note 10, at 89.

113. HINGORANI, *supra* note 80, at 111.

114. United States and Others v. Herman W. Goering and Others, International Military Tribunal, Nuremberg, 22 TRIAL OF MAJOR WAR CRIMINALS 411 (1946); United States v. Erhard Milch, U.S. Military Tribunal, Nuremberg, 2 TRIAL OF MAJOR WAR CRIMINALS 773 (1947).

115. LEVIE, *supra* note 105, at 92.

116. *Id.* at 91-93; OFFICIAL COMMENTARY, *supra* note 10, at 90-91; HINGORANI, *supra* note 80, at 183-84.

117. GPW, *supra* note 9, art. 118.

118. See David J. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT’L L. 801, 880-888 (1996); Jan P. Charnatz & Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L.J. 391-515 (1953); Howard W. Levie, *International Aspects of Repatriation of Prisoners of War During Hostilities: A Reply*, 67 AM. J. INT’L L. 232-43 (1973). However, as Pictet points out, at the time of the Korean Conflict, none of the parties had ratified the Geneva Conventions and therefore were not binding on the parties. While the parties did state their intention to apply the “principles” of the Conventions, the Official Commentary makes it clear that the Korean War must not in anyway be considered precedent to the application of Article 118. OFFICIAL COMMENTARY, *supra* note 10, at 543-546.

119. *Id.* at 547.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 548. Individuals forced to enlist in the enemy state’s military, such as during occupation, and deserters that have gone over to the enemy side, are not covered by Article 118.

ously, before capture, many prisoners of war participate in activities that are, during times of peace, generally considered criminal. For example, it is foreseeable that soldiers will be directed to kill, maim, assault, kidnap, sabotage, and steal in furtherance of their nation state's objectives. In international armed conflicts, the law of war provides prisoners of war with a blanket of immunity for their pre-capture warlike acts.¹²⁴

The receipt of combatant immunity upon capture comes with a heavy pre-capture price. The protections of the GPW and combatant immunity are available only to those involved in an armed conflict of an international nature where they clearly distinguished themselves as combatants before capture.¹²⁵ In other words, there is a *quid pro quo* element to combatant immunity. That is, persons entitled to immunity for pre-capture war-like acts must have made themselves legitimate targets while performing those acts.

Before capture, the captive must have been a member of the regular armed forces of a party to a conflict or be a member of a militia or organized resistance movement belonging to a party to the conflict.¹²⁶ Members of militias and resistance organizations must meet four additional criteria for prisoner of war status.¹²⁷ These criteria are:

- (1) Commanded by a person responsible;
- (2) Have a fixed distinctive sign recognizable at a distance;
- (3) Carry arms openly; and
- (4) Conduct operations in accordance with the laws and customs of war.¹²⁸

As a general rule, this immunity is not available to combatants involved in internal armed conflicts such as civil wars.¹²⁹ Insurgents threaten the very essence of the state; therefore, if the state has the authority to prosecute anyone, it should be

124. See HINGORANI, *supra* note 80, at 9; Christopher C. Burris, *Re-Examining the Prisoner of War Status of PLO Feaydeen*, 22 N.C. J. INT'L L. & COM. REG. 943, 967-979 (1997); Robert K. Goldman, *International Humanitarian Law: Americas Watches Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49, 56-58; Laura Lopez, *Uncivil Wars: The Challenge of Allying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 933-936 (1994); Waldemar A. Solf, *Non-International Armed Conflicts*, 31 AM. U. L. REV. 927, 928-933 (1982); Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic and Transnational Practice*, 33 AM. U. L. REV. 53, 57-61 (1983); Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 68-72 (1997).

The GPW does not specifically mention combatant immunity. As discussed in the above listed articles, it is considered to be customary international law. Moreover, it can be inferred from the cumulative affect of protections within the GPW. For example, Article 13 requires that prisoners not be killed, and Article 118 requires their immediate repatriation after the cessation of hostilities. Although Article 85 does indicate that there are times when prisoner of war may be prosecuted for pre-capture violations of the laws of the detaining power, the Official Commentary accompanying Article 85 limits this jurisdiction to only two types of crimes. A prisoner may be prosecuted only for: (1) war crimes, and (2) crimes that have no connection to the state of war. For example, the prisoner of war may have been involved in selling illegal drugs in the detaining power's territory prior to hostilities. See *United States v. Noriega*, 806 F. Supp. 791 (S.D. Fla. 1992).

125. GPW, *supra* note 9, arts. 2, 4.

126. *Id.* art. 4.

127. *Id.* The GPW does not specifically state that members of the regular forces must wear a fixed insignia recognizable from a distance. However, as with the requirement to be commanded by a person responsible, this requirement is arguably part and parcel of the definition of a regular armed force. It is unreasonable to believe that a member of a regular armed force could conduct military operations in civilian clothing, while a member of the militia or resistance groups cannot. Should a member of the regular armed forces do so, it is likely that he would lose his claim to immunity and be charged as a spy or as an illegal combatant. LEVIE, *supra* note 105, at 36-38.

128. *Id.* The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) significantly reduces these requirements for militias and resistance groups. Article 44 of Protocol I requires only that members of these groups involved in international armed conflict distinguish themselves from civilians by carrying their arms openly during and immediately preceding an attack. Most significantly, this means that there is no requirement for members of guerrilla groups to wear uniforms or distinctive emblems. This allows members of guerrilla forces to clandestinely move in and out of the civilian population except during actual combat operations. This blurring of the line between civilians and combatants would have the tendency of placing civilians at greater risk.

Inevitably, regular forces would treat civilians more harshly and with less restraint if they believed that their opponents were free to pose as civilians while retaining their right to act as combatants and their prisoner of war status if captured. Innocent civilians would therefore be made more vulnerable by application of the Protocol.

Abraham D. Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont.)*, 82 AM. J. INT'L L. 784, 786 (1988). The United States has officially objected to the relaxation of the rules concerning distinction in Protocol I. *Id.*; Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Advisor, United States Department of State (January 22, 1987)*, in 2 AM. U. J. INT'L L. & POL'Y 460, 463 (1987); Howard S. Levie, *The 1977 Protocol I and the United States*, 38 ST. LOUIS U. L.J. 469, 473-477 ((1993). For a contrary opinion by a high ranking U.S. Department of State official, see George H. Aldrich, *Civilian Immunity and the Principles of Distinction: Guerrilla Combatants and Prisoner of War Status*, 31 AM U. L. REV. 871 (1982); George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1 (1991).

129. See HINGORANI, *supra* note 80, at 9; Burris, *supra* note 124; Goldman, *supra* note 124; Lopez, *supra* note 124; Solf, *Non-International Armed Conflicts*, *supra* note 124; Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic and Transnational Practice*, *supra* note 124; Tittmore, *supra* note 124.

those who are seeking to destroy it. The insurgent is arguably the arch criminal of the state in the international state system. The law of war reflects this reality. Although Common Article 3, GPW and Protocol II apply to such conflicts, neither extends, either explicitly or implicitly, prisoner of war status to insurgents.¹³⁰

This dichotomy, based on conflict characterization, may cause difficulty for commanders. Although combatant immunity is available under the law of war only to participants in international, rather than internal armed conflicts, the DOD Law of War Program directs that the law of war apply to all armed conflicts, however characterized.¹³¹ It also mandates that the principles and spirit of the law of war extend to operations other than war.¹³²

Imagine a U.S. operation in support of a host nation's counter-insurgency. Assume that following a fire-fight between U.S. forces and insurgent forces, a member of the insurgent force is captured by U.S. personnel. How is the mandate of the DOD Law of War Program applied to this situation? Certainly, U.S. forces are engaged in armed conflict. Thus, regardless of the characterization of the conflict as internal, the U.S. commander is directed to apply not just the "principles and spirit" of the law of war, but simply the "law of war." Under the law of war, an individual meeting the criteria of a privileged combatant who falls into the hands of the enemy is entitled to prisoner of war status. Does this mean that the U.S. commander must treat the captured insurgent as a prisoner of war, provide immunity for the insurgent, and refuse to hand him over to the host nation authorities for prosecution? Or should the U.S. commander conclude that the captured insurgent is not entitled to combatant immunity by the law of war because the requirement of international armed conflict is not satisfied?

The answer to this question depends on how the DOD Law of War Program is interpreted. One possible conclusion is that the mandate of this Program essentially "trumps" international law, vitiating the significance of the nature of the conflict for purposes of the U.S. commander's decision-making process. Such a conclusion seems justified based on the plain language of the Law of War Program Directive, which mandates applying the law of war to any conflict, and makes the characteriza-

tion of the conflict irrelevant. Any other interpretation arguably renders the Directive meaningless.

Based on this interpretation, applying the law of war to any conflict (and arguably even the "principles" of the law of war to non-conflict operations), should result in a grant of combatant immunity. This is a benefit afforded to enemy personnel captured after a "fair fight" under the law of war. The difficulty with adopting this interpretation is that it requires the commander to place U.S. domestic policy in a position that trumps the clear dictates of international law (specifically the law of war requirement that combatant immunity is a benefit afforded *only* during international armed conflict). It also requires domestic policy to trump the dictates of host nation law (which regards insurgent activity as criminal activity directed against the state).

The alternate interpretation of the Law of War Program Directive is that with regard to "enemy" personnel captured during the course of an (internal armed conflict) operation, U.S. commanders must treat such personnel as if they were prisoners of war *while they are in U.S. custody*, but not extend combatant immunity to them. Thus, such captured personnel must be turned over to host nation authorities upon demand, and may, without any U.S. objection, be lawfully subjected to host nation criminal penalties for their warlike activities.

This interpretation strikes a balance between two competing interests. On the one hand, it accommodates the interest of the United States, which is to ensure that U.S. personnel apply a consistent standard of treatment to captured personnel within their custody. At the same time, it accommodates the interest of international law, which protects the fundamental interests of states fighting against an insurgency by preserving for the state the right to treat insurgents as criminals.

Thus, in the hypothetical provided above, the U.S. commander must apply more than just the law of war applicable to internal armed conflict (Common Article 3 and Geneva Protocol II), while the insurgent is in U.S. custody. The commander, however, may not assert the DOD Law of War Program as a basis for refusing to comply with a host nation demand to turn over the insurgent for criminal prosecution.¹³³

130. GPW, *supra* note 9, art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). The United States, however, is not a party to Protocol II.

131. DOD DIR. 5100.77, *supra* note 47.

132. *Id.*

133. In fact, there may be bilateral agreements, such as a Status of Forces Agreement, that requires U.S. forces to transfer host nation enemies of the state to state authorities. Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1967, art. XXII, 17 U.S.T. 1677. Using the Korean status of forces agreement as an example, U.S. forces have no jurisdiction over Korean nationals or residents of the Republic of Korea involved in sabotage, espionage, treason, against the Republic of Korea, or that have allegedly violated any law relating to the official secrets of Korea, or secrets relating to its national defense. Persons involved in such activities against the republic of Korea may not be held by U.S. forces.

The second interpretation offered above, which reconciles the Law of War Program and international law, results in a certain degree of risk for a U.S. commander. If the commander turns over a captured insurgent, and the insurgent is subsequently executed or sent to prison for an extended period (which is legal under the law of war), it is possible that the insurgents might subject captured U.S. forces to the same treatment.¹³⁴ Because of this risk, a U.S. commander may want to refuse to hand over insurgents to the host nation government. As noted above, however, it is unlikely that the DOD Law of War Program provides a basis to do so. Instead, this concern for reciprocal treatment suggests a need for the United States to consider negotiating an agreement with the host nation extending combatant immunity to captured insurgents as a matter of domestic, vice international, law. Thus, while there may exist

a significant policy reason why a ground commander should be cautious in turning over captured insurgents to host nation authorities, legal advisors should consider such turn over required unless and until the host nation agrees to some alternate disposition.

While such a resolution may be ideal, it is also unlikely. General guidance exists, however, for commanders at the operational and tactical level concerning how to respond to a demand to turn captured insurgents over to the host nation. Insurgents in the care, custody, or control of U.S. forces should not be turned over to host nation authorities absent authority from the Secretary of Defense.¹³⁵

134. See Neil Sheehan, *Reds' Execution of 2 Americans Assailed by U.S.*, N.Y. TIMES, A1 (Sept. 28, 1965). United States Army Captain Humbert R. Versace and Sergeant Kenneth Roarback were executed in retaliation for the United States handing over Viet Cong to the South Vietnamese authorities for prosecution and probable execution. In response, the United States changed its policy and began granting prisoner of war status and immunity for Viet Cong captured on the "field of battle." See also U.S. MILITARY ASSISTANCE COMMAND, VIETNAM, DIR. 381-11, EXPLOITATION OF HUMAN SOURCES AND CAPTURED DOCUMENTS (Aug. 5, 1968); THE HISTORY OF MANAGEMENT OF POW'S, A SYNOPSIS OF THE 1968 U.S. ARMY PROVOST MARSHAL GENERAL'S STUDY ENTITLED "A REVIEW OF UNITED STATES POLICY ON TREATMENT OF PRISONERS OF WAR 49-55 (1975).

135. DOD DIR. 2310.1, *supra* note 48, para. C4; AR 190-8, *supra* note 53, para. 3-11. Captives in the custody or control of U.S. forces may only be transferred to another government or agency only with secretary of defense approval.

Operation Allied Force and the Question of Prisoner of War Status

During Operation Allied Force, the United States initially asserted that the three U.S. soldiers captured by Serbia were not involved in combatant activities, and were therefore, illegally abducted and demanded their immediate release.¹³⁶ At the time of their capture, however, the operation in Macedonia was part of the NATO mission and, therefore, the assertion that they were non-combatants is questionable.¹³⁷

When the mission in Macedonia changed from a United Nations (UN) to a NATO operation in February of 1999, the units in Macedonia traded in their traditional UN blue peacekeeping helmets for green kevlar, donned flack jackets, and began to affix crew-served weapons to their vehicles.¹³⁸ On the day NATO began bombing in Serbia, cavalry units in Macedonia began scouting the border between Macedonia and Kosovo (Serbia) as a measure of force protection for the NATO forces in Macedonia.¹³⁹ There had been border clashes between Serbian troops and members of the Kosovo Liberation Army.¹⁴⁰ During one such incident, a soldier from Macedonia was killed by fire from the Serbian side of the border.¹⁴¹

At the time of their capture, the American soldiers were conducting a reconnaissance patrol along the Kosovo-Macedonia border.¹⁴² They were carrying small arms and had a .50 caliber machine gun mounted on their vehicle.¹⁴³ It is foreseeable that their rules of engagement would have allowed, or even directed, that they return fire, if fired on and that they could have used deadly force in the face of demonstrated enemy hostile intent.¹⁴⁴ According to media reports, 12,000 NATO troops had massed in Macedonia for potential ground operations in Kosovo.¹⁴⁵ The captured American soldiers looked like combatants, were armed like combatants, were performing a mission that supported ongoing combat operations in Serbia, and were located in close proximity to those combat operations. To the Serbs, they may have looked like the lead element of an invading force of an offensive ground operation.

Even if the captured American soldiers were involved in non-combatant operations at the time of their capture, they were arguably legitimate military targets. They were captured during a time when the United States was conducting combat operations against the Former Republic of Yugoslavia. Although NATO was limiting its attacks to air operations in Serbia, there is nothing in the law of war that requires a party to

136. James P. Rubin, U.S. Dep't Of State, Office Of The Spokesman, Press Statement, *U.S. Servicemen Abducted In Macedonia*, Apr. 1, 1999; Hugh Dellios & Charles M. Madigan, *By Capturing 3 GIs, Serbs Score Propaganda Victory*, CHI. TRIB., Apr. 2, 1999, at 1; Tony Mauro & Andrea Stone, *Definition of Soldier's Situation Could Determine Their Treatment*, USA TODAY, Apr. 2, 1999, at 3A; *Trial of US Troops Illegal: State Department*, AGENCE FRANCE-PRESSE, Apr. 1, 1999, available WESTLAW ALLNEWS.

It is unclear as to why the U.S. government believed that the soldiers were unlawfully abducted. The assertion that there were involved in non-combat activities in Macedonia may have stemmed from the fact that just previously to the capture, the U.S. forces in Macedonia were involved in a UN peacekeeping mission. U.N.S.C. Res. 1186, 3911th Meeting (July 21, 1998). However, the UN Security Council later refused to extend the mission beyond February 28, 1999, and it, therefore, ended the month before the capture. U.N.S.C. Press Release 6648, 3982nd Meeting (Feb. 25, 1999).

Had this been a UN peacekeeping mission, immediate repatriation may have been appropriate. Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15 (Feb. 13, 1946); Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, 49 GAOR, Supp. (No. 49) at 299, UN Doc. A/49/49 (1994). However, in UN missions involving combat, the requirement for repatriation is questionable. The Convention on the Safety of United Nations and Associated Personnel does not apply in Chapter VII actions. *Id.* art. 2. In an international armed conflict, the detaining party must protect the prisoner but has the legal right to detain the prisoner until the cessation of hostilities. GPW, *supra* note 9, art. 118. The detaining power may not kill the prisoner, but may prevent him from rejoining his unit to fight another day. *See generally* Tittmore, *supra* note 124.

137. Patrick J. Sloyan, *Crisis in Yugoslavia, Higher Stakes, Serbs to Try 3 Captured GI's Drawing Clinton Rebuke*, NEWSDAY, Apr. 2, 1999, at A3; Jennifer Bjorhus, *Oregonians Suddenly at Edge of War, What Started as a U.N. Peacekeeping Mission for Two Young Soldiers Takes a Dangerous Turn*, PORTLAND OREGONIAN, Apr. 27, 1999, at A1.

138. *Id.*

139. Charles M. Sennott, *Platoon Frets for 3 Held Captive, Not Enough Being Done to Free Them Other Soldiers Fear*, BOSTON GLOBE, Apr. 15, 1999, at A29.

140. *Bid to Free Soldiers Fails, Clashes Intensify; Russian Missile Threat Reported*, SEATTLE TIMES, Apr. 9, 1999, at A1.

141. *Id.*

142. Dellios & Madigan, *supra* note 136.

143. *Latest Developments in Kosovo*, A.P. ONLINE, May 7, 1999, available WESTLAW ALLNEWS; *Balkans Notebook Day 45*, SEATTLE TIMES, May 7, 1999, A19; *Latest Developments Relating to Kosovo Crisis*, TIMES UNION, May 8, 1999, at A6.

144. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.01, JCS STANDING RULES OF ENGAGEMENT, encl. A (Oct. 1, 1994) reprinted in INT'L AND OPS L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK, ch. 8 (2000). Enclosure A is an unclassified portion of an otherwise secret document.

145. Sennott, *supra* note 139.

a conflict to restrict its counter-offensive to the same type of military operation in the same general location.¹⁴⁶

There is potential danger for troops on the ground when the national command authority insists that soldiers captured during military operations are not, as a matter of law, prisoners of war. If the triggering mechanisms of the GPW are not met, then the protections are not applicable, including the concept of combatant immunity. Leaders of countries launching aggressive wars may improperly capitalize on the U.S. government's

assertion that captured U.S. service members are not prisoners of war and should thus be immediately released. A regime already determined to ignore the law of war may use such a statement as grounds to withhold the protections of the GPW, to include combatant immunity. Such a regime may agree that the captured soldiers are not prisoners of war and then try them for domestic crimes rather than release them, even in cases where combatant immunity is clearly warranted.

146. See generally Hague IV, *supra* note 19; GWS, *supra* note 23; GWS Sea, *supra* note 23; GPW, *supra* note 9; GC, *supra* note 23. Soldiers of a party to a conflict, no matter where they are located, represent legitimate targets because they could easily become reinforcements or replacements to those in the theater of operations.