

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Family Law Notes

Parents Delinquent in Child Support Across State Lines May Face Felony Charges

On 24 June 1998, President Clinton signed the Deadbeat Parents Punishment Act of 1998 (DPPA).¹ This act toughens the previous statute known as the Child Support Recovery Act.² Under the DPPA, any person who travels across state lines with the intent to evade a child support obligation that is over \$5000 or that has remained unpaid for longer than one year can be charged with a federal felony.³ The DPPA also makes it a felony for any person to willfully fail to pay support for a child living in a different state if that obligation is greater than \$10,000 or if it remains unpaid for more than two years.⁴ The DPPA also requires courts, when adjudging a sentence, to include restitution of unpaid child support that is due under the order that led to the indictment or information.⁵ Major Fenton.

Payment of College Expenses for Children of Divorce

When a couple with children divorces, one of the most important decisions that a court makes is the award of child support. All states have guidelines that set the amount of money that is due monthly for child support.⁶ An increasingly litigated issue is whether a parent must provide post-minority support for a child to attend college. Two recent decisions high-

light the disparate approaches that courts have taken on this issue.

Texas enforces post-minority awards of college expenses if there is a contractual basis for payment of those expenses between the parties. In *Burtch v. Burtch*,⁷ the Texas Court of Appeals held that Mr. Burtch breached a contractual obligation to pay the college expenses of his children. In their divorce decree, the Burtchs agreed to split the costs of college, including a provision that obligated Mr. Burtch to pay fifty percent of the tuition, books, and room and board costs associated with college.⁸ The decree also imposed some conditions on this obligation. For example, the children had to attend full-time and maintain a "C" grade-point average.⁹ Mrs. Burtch brought a breach of contract suit when Mr. Burtch failed to pay his share of the college expenses.

Mr. Burtch argued that the provision was unenforceable because it was in the portion of the decree that dealt with child custody, visitation, and child support. In addition, he claimed that under existing state law the obligation to pay support ends when the child reaches age eighteen.¹⁰ He further argued that the court could not enforce the language of the provision because it was vague and ambiguous.¹¹ The Texas Court of Appeals rejected all of Mr. Burtch's arguments. The court stated that there is no independent right to child support for college, or for any child, beyond the age of eighteen.¹² The parties, however, may, contractually agree to extend child support

1. Pub. L. No. 105-187 (codified at 18 U.S.C.A. § 228 (West 1998)).

2. 18 U.S.C.A. § 228 (West 1998). The DPPA amends the Child Support Recovery Act. The underlying rules and application remain the same. For a more detailed explanation of this statute see Family Law Note, *The Child Support Recovery Act: Criminalization of Interstate Nonsupport*, ARMY LAW., Dec. 1997, at 26.

3. 18 U.S.C.A. § 228(a)(2).

4. *Id.* § 228(a)(3).

5. *Id.* § 228(d).

6. The Family Support Act of 1998, Pub. L. No. 100-485, 102 Stat. 2343 (codified at 42 U.S.C.A. §§ 654, 666-67 (West 1998)). The Family Support Act of 1988 mandated that all states enact child support guidelines by 1994. All states complied with this mandate. For a detailed review of all states child support guidelines and statutes, including worksheets for the guidelines, see LAURA MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION (1998).

7. 972 S.W.2d 882 (Tex. App. 1998).

8. *Id.* at 885.

9. *Id.* at 887.

10. *Id.* at 886.

11. *Id.*

12. *Id.* at 885.

beyond the age of eighteen.¹³ The court found that the language of the Burtch's decree, while not a model of clarity, was not so ambiguous and unclear as to make it unenforceable.¹⁴ Consequently, the court awarded Mrs. Burtch a judgment for \$12,016.79 for college expenses.¹⁵

North Dakota recently took a different and more dramatic approach to this issue. In *Donarski v. Donarski*,¹⁶ the North Dakota Supreme Court held that a divorce court could impose an award of post-minority support, including college expenses, under appropriate circumstances.¹⁷ North Dakota's child support statute terminates support at age nineteen.¹⁸ The court cautioned trial court judges that the authority to impose post-minority support is not absolute. The court set out twelve factors to consider before making such an award:

(1) [W]hether the parent, if still living with the child, would have contributed toward the costs of the requested higher education; (2) the effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education; (3) the amount of the contribution sought by the child for the cost of higher education; (4) the ability of the parent to pay that cost; (5) the relationship of the requested contribution to the kind of school or course of study sought by the child; (6) the financial resources of both parents; (7) the commitment to and aptitude of the child for the requested education; (8) the financial resources of the child, including assets owned individually or held in custodianship or trust; (9) the ability of the child to earn

income during the school year or on vacation; (10) the availability of financial aid in the form of college grants and loans; (11) the child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and (12) the relationship of the education requested to any prior training and to the overall long-range goals of the child.¹⁹

The most significant of these factors is the parent's ability to pay.²⁰ The law on college expenses is, like most family law issues, one that varies from state to state.²¹ The safest way to ensure support for future college expenses is to negotiate it in the divorce decree. While some states may allow for post-minority support by statute, few impose this obligation absent some contractual provision. Legal assistance attorneys need to raise the issue with clients and help them think through the various options. In drafting a college expense provision, attorneys should be careful to define terms and conditions and make sure that the document clearly indicates the contractual intent of the parties. Major Fenton.

Survivor Benefits Notes

Dependency and Indemnity Compensation Restoration

One of the major benefits that is available to the survivors of service members whose death is service-connected²² is Dependency and Indemnity Compensation (DIC).²³ This is a monthly payment from the Department of Veterans Affairs (VA) that is

13. *Id.* at 886.

14. *Id.* at 888.

15. *Id.* at 891.

16. 581 N.W.2d 130 (N.D. 1998).

17. *Id.* at 136.

18. N.D. CENT. CODE § 14-09-08.2(1) (1997) (terminating child support at the end of the month during which the child graduated from high school or attains age nineteen if still in high school).

19. *Donarski*, 581 N.W.2d 130, 136 (N.D. 1998) (quoting *Newburgh v. Arrigo*, 443 A.2d 1031, 1038-39 (N.J. 1982)).

20. *Id.*

21. See MORGAN, *supra* note 6, at 4-33 (summarizing state treatment of post-minority college expenses).

22. The term "service-connected" means, with respect to disability or death, that the disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in the line of duty while on active duty. 38 U.S.C.A. § 101(16) (West 1998). If death occurs while a service member is on active duty, a presumption arises that death was service connected if it was not due to the service member's willful misconduct. An injury or disease will be deemed to have been incurred in the line of duty and not the result of the service member's own misconduct when at the time of the injury or disease contracted, the person was on active duty (even if on authorized leave). *Id.* § 105(a). "Willful misconduct" means an act involving conscious wrongdoing or known prohibited action. Pensions, Bonuses, and Veterans Relief, 38 C.F.R. §§ 3.1(n), 3.301 (1998).

23. 38 U.S.C.A. §§ 1301-1322.

made to eligible persons.²⁴ A base amount is paid together with other allowances that may be added under certain circumstances. For example, the VA adds allowances for additional dependents,²⁵ as well as for children over the age of eighteen and permanently incapable of self-support,²⁶ and surviving spouses who are so severely disabled as to be house bound or in need of regular aid and attendance.²⁷ Currently, the base amount for surviving spouses is \$850 per month for life, unless they remarry. Previously, surviving spouses would lose their entitlements to DIC if they remarried, regardless of their age. The VA would not reinstate the payment, even if the marriage was terminated through divorce or death.²⁸

As of 1 October 1998, new legislation restored the eligibility of certain remarried surviving spouses for DIC upon termination of the remarriage.²⁹ The remarriage of a surviving spouse of a veteran will not bar DIC payments to the surviving spouse if the remarriage is terminated by death, divorce, or annulment unless it is determined that the marriage was secured through fraud or collusion.³⁰ Historically, another bar to the payment of DIC applied to surviving spouses who lived with another person and held themselves out openly to the public as that person's spouse.³¹ Under the new legislation, if a surviving spouse of a veteran stops living with the other person and does not hold himself out openly to the public as that person's spouse, the statutory bar to the granting of DIC as the surviving spouse does not apply.³² The legislation is retroactive and restores prior eligibility, but no payment will be made for any month prior to October 1998.³³

The VA is attempting to contact eligible spouses by direct mail and publicity to inform them of this restored benefit. Legal assistance offices should publicize this recent legislative change and instruct former surviving spouses to contact their local VA regional office.³⁴ Major Rousseau.

SGLI Dividend Hoax

Recently, on some military installations, flyers have appeared that indicate that Congress passed legislation that allows veterans to claim a dividend on Servicemembers' Group Life Insurance (SGLI).³⁵ Similar memoranda have come across military fax machines and appeared on the Internet. The message indicates that veterans must send personal information (such as a Department of Defense Form 214) regarding their military service to a "veteran's center" in order to claim the dividend. These offers are hoaxes that are aimed at acquiring personal information about the service member. Some versions of the hoax offer to assist the veteran in obtaining the dividend for a fee.

These hoaxes have their origins in a special dividend that the Department of Veterans Affairs (VA) paid to World War II veterans who had National Service Life Insurance policies.³⁶ This particular group of veterans had to apply for the payment. In 1950, many veterans were paid under the "1948 special dividend," and by the 1960's the VA had already paid out the special dividend to virtually all eligible policyholders.³⁷ In 1965, inaccurate newspaper reports surfaced that the VA was paying

24. 38 U.S.C.A. § 1304; *id.* § 1311 (discussing children); *id.* § 1313 (discussing parents); *id.* § 1315 (discussing benefits for survivors of certain veterans rated totally disabled at the time of death); *id.* § 1318 .

25. *Id.* § 1313.

26. *Id.* § 1314.

27. *Id.* § 1311.

28. For purposes of DIC, the term "surviving spouse" is defined in pertinent part as "a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death . . . and who has not remarried." *Id.* § 101(3). Should the surviving spouse remarry, DIC shall be discontinued effective on the last day of the month before such remarriage. *Id.* § 5112(b)(1); *see also*, 38 C.F.R. § 3.500(n) (1998).

29. On 9 June 1998, the President signed the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 8207, 112 Stat. 107 (1998) (codified as amended at 38 U.S.C.A. § 1311(e) (West 1998)).

30. 38 U.S.C.A. § 1311(e)(1).

31. 38 C.F.R. § 3.50(b) (1998).

32. 38 U.S.C.A. § 1311(e)(2).

33. Transportation Equity Act for the 21st Century § 8207(b).

34. Department of Veterans Affairs, News Release, *VA Announces Restoration of Benefits for Spouses* (visited Aug. 31, 1998) <http://www.va.gov/pressrel/98dic.htm>.

35. 38 U.S.C.A. §§ 1965-1976.

36. Department of Veterans Affairs, *VA Insurance Hoax Resurfaces on the Internet* (visited Aug. 28, 1998) <http://www.va.gov/benefits/hoax.htm>.

37. *Id.*

a special dividend to all veterans (not just those who served in World War II).³⁸ Many of the recent hoaxes are aimed at active duty personnel, reservists, and personnel who retired or separated from the military in the last few years.

Any dividends that are derived from the SGLI are deposited to the credit of a revolving fund to meet costs of the program.³⁹ There has not been any recent legislation that authorizes special dividends for SGLI. Dividends are not payable to current service members who are insured under SGLI or Veterans' Group Life Insurance.⁴⁰ The VA does pay routine dividends on several policies, but only to veterans who have kept their policies in force. These dividends are paid automatically on the anniversary date of the individual policy and the veteran does not have to apply for them.⁴¹

The VA Office of the Inspector General (VAOIG) is attempting to put an end to these insurance hoaxes. If you are aware of such solicitations report them immediately to the VAOIG at 1-800-827-1000.⁴² Major Rousseau.

Reserve Component Note

New TJAGSA Legal Assistance Publications

Recently, The Judge Advocate General's School, Army (TJAGSA) published two new legal assistance publications. They are *JA 260: The Soldiers' and Sailor's Civil Relief Act (SSCRA) Guide*⁴³ and *JA 270: The Uniformed Services Employment and Reemployment Rights Act (USERRA) Guide*.⁴⁴ The SSCRA guide was thoroughly updated and revised to reflect all the changes in case law since 1996.

The USERRA guide, a new publication, outlines the law, regulations, and practice concerns raised by the USERRA for both private and public employers and employees. This publication replaces the 1991 TJAGSA pamphlet entitled *Materials on the Veterans Reemployment Rights Law*, which was written before the enactment of the USERRA.⁴⁵

As reservists continue to be activated for military duty on a regular basis, protections for such service members and their families are crucial to making today's Army an effective fighting force. As Secretary of Defense William Cohen recently observed, the days of "the weekend warrior" are over. "Strike that term from your lexicon. Today, we simply cannot maintain our military commitments without the Guard and Reserve. We can't do it in Bosnia, we can't do it in the [Persian Gulf], we can't do it anywhere."⁴⁶

The protections that are provided in the SSCRA and the USERRA are crucial to reserve component recruitment, retention, and good unit morale.

These guides are relevant to judge advocates of all components. Whether you conduct mobilization and demobilization briefings for reserve component soldiers at a power projection platform installation such as Fort Benning, Fort Dix, or Fort Bragg, or provide legal assistance in Bosnia, issues that are impacted by the USERRA and SSCRA will arise. Judge advocates who are working in other areas of the law cannot ignore these statutes either. For example, labor counsel who advise civilian personnel managers on military leave policies for Department of the Army civilians must understand the ramifications of the USERRA on military leave policy and benefits such as pensions, the Federal Thrift Savings Plan, and reduction in force actions. Legal assistance attorneys who provide pre-

38. *Id.*

39. 38 U.S.C.A. § 1969(d)(1).

40. *Id.* §§ 1977-1979.

41. See, e.g., *VA Announces 1998 Insurance Dividends*, PR News wire, Jan. 26, 1998, available in WESTLAW, MILNEWS Database.

42. Department of Veterans Affairs, *News About the Servicemembers' Group Life Insurance Hoax*, (visited Aug. 28, 1998) <<http://www.va.gov/oig/hotline/news1.htm>>.

43. ADMINISTRATIVE & CIVIL L. DEP'T., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U. S. ARMY, JA-260, LEGAL ASSISTANCE GUIDE: THE SOLDIERS' AND SAILORS CIVIL RELIEF ACT (Apr. 1998).

44. ADMINISTRATIVE & CIVIL L. DEP'T., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U. S. ARMY, JA-270, LEGAL ASSISTANCE GUIDE: THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (June 1998) [hereinafter JA 270].

45. ADMINISTRATIVE & CIVIL L. DEP'T., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, MATERIALS ON THE VETERAN'S REEMPLOYMENT RIGHTS LAW (Mar. 1991). The USERRA was signed into law on 13 October 1994. In a recent after action report, the Center for Law and Military Operations stated that active component judge advocates in Bosnia erroneously briefed activated reservists on the former Veterans' Reemployment Rights Act (VRRRA), formerly codified at 38 U.S.C.A. §§ 2021-2026. Beware of teaching materials prepared on the prior VRRRA, e.g., *Department of the Army Pamphlet 135-2-R, Briefing on Reemployment Rights of Members of the Army National Guard and U.S. Army Reserve* (May 1982); Major Bernard P. Ingold and Captain Lynn Dunlap, *When Johnny (Joanny) Comes Marching Home: Job Security for the Returning Service Member Under the Veterans' Reemployment Rights Act*, 132 MIL. L. REV. 175 (1991). Good current teaching materials are included in JA 270 and may be obtained from world wide websites for the Department of Defense National Committee for Employer Support of the Guard and Reserve NCESGR at <http://www.ncesgr.osd.mil> and the Department of Labor at <<http://www.dol.gov/dol/vets/>>.

46. Major Donna Miles, *U.S. Chamber of Commerce Signs Pledge*, THE OFFICER [ROA], Aug. 1998, at 18.

retirement briefings and counseling should understand the USERRA's protections that extend to veterans who seek employment.⁴⁷ Both guides, which are disseminated through multiple channels, provide a valuable resource to assist both new and experienced judge advocates in meeting their obligations to their clients.⁴⁸ Lieutenant Colonel Conrad.

International and Operational Law Note

Principle 3: Endeavor to Prevent or Minimize Harm to Civilians

The following note is the fourth in a series of practice notes⁴⁹ that discuss concepts of the law of war that might fall under the category of "principle" for purposes of the Department of Defense Law of War Program.⁵⁰

The law of war principle discussed in this note encompasses rules intended to prevent or minimize harm to civilians. This is proposed as a cord "principle" of the law of war falling within the scope of *Chairman, Joint Chiefs of Staff Instruction 5810.01*. By compelling commanders to consider implementing measures to avoid or minimize such harm, this principle complements the principles of "distinction" and "military objective." *Field Manual (FM) 27-10* expresses this basic principle as follows:

Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.⁵¹

The law of war includes a comprehensive body of rules designed to implement this basic principle. These rules are found in law of war treaties that are intended to protect civilians from the effects of hostilities. The most notable rule is the 1977

Protocol I Additional to the Geneva Conventions of 1949.⁵² Many of these detailed provisions may appear "aspirational" in nature because they are often qualified with caveats such as "when possible," or "as feasible." These caveats, however, must be understood within the context of the basic rule – endeavor to minimize civilian suffering. Against this backdrop, the practitioner should recognize that these detailed provisions are neither irrelevant because of the application caveats nor absolutely mandatory because of what they seek to achieve. Instead, the provisions should be understood as mechanisms for achieving compliance with the basic principle; therefore, they must be considered in the planning and execution of military operations.

The legal advisor is responsible for ensuring that these mechanisms are considered. This responsibility is heightened by the context in which these rules become relevant: restraining commanders tasked with accomplishing a combat mission. While our commanders should be expected to approach their duties with a good faith recognition of the need to minimize harm to civilians, it is unlikely that they will make this principle a paramount priority during mission planning and execution. Whether in the context of a high intensity conflict, or a non-conflict operation other than war, what will be paramount in the commander's mind is mission accomplishment. Because of this, this principle and the rules designed for its implementation reflect a fundamental tension within the law of war. The law of war is founded in part on the recognition that minimizing non-combatant suffering will ultimately aid in mission accomplishment. Destruction of the enemy, however, is the likely key aspect of mission accomplishment in the mind of the commander. Because of this reality, the judge advocate command advisor must understand the imperative of balancing these potentially competing interests. During the planning and execution process, this imperative should translate into input to the commander that is based on the law of war provisions discussed in this note.

Feasibility is the key component in determining when many of these detailed rules must be implemented. Feasibility provides a limited mechanism to bypass applying certain rules

47. The USERRA includes a provision that prohibits employer discrimination in hiring, retention, promotions, or any benefits of employment because of the employee's prior military status. See 38 U.S.C.A. § 4311 (1998). See *Petersen v. Dep't of Interior*, 71 M.S.P.R. 227 (1996).

48. These publications may be obtained through a Defense Technical Information Center account, downloaded in electronic file format via the Legal Automation Army-Wide System electronic bulletin board service as TJAGSA publication library files, or downloaded as electronic files via Lotus Notes on the Internet through the Army Judge Advocate General's Corps World Wide Web site at <http://www.jagcnet.army.mil>. Further information on obtaining these publications may be found in the back of the September 1998 edition of *The Army Lawyer*.

49. See International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., JUNE 1998, at 17; International and Operational Law Note, *Principle 1: Military Necessity*, ARMY LAW., JULY 1998, at 72; International and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., AUG. 1998, at 35.

50. See U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). See also CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996) [hereinafter JCS INSTR. 5810.01].

51. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 5 (July 1956) [hereinafter FM 27-10].

52. 16 I.L.M. 1391 [hereinafter GP I].

related to minimizing civilian harm when application would be harmful to the force. Ironically, concern over the perceived negative ramifications from causing harm to civilians during an operation may lead to “extra” compliance with these law of war rules, leading commanders to be overly cautious. In both scenarios, the commander is ultimately responsible to decide when, where, and how to apply destructive force. But it is the responsibility of the judge advocate to ensure that such decisions are based on an understanding of not only the “must do’s” of the law of war, but also the “should do’s.” To this end, the law of war embraces the notion that by endeavoring to implement the detailed rules discussed in this note, civilian suffering that could and should be avoided, will be avoided.

The Allied bombardment of the city of Caen in July 1944 provides a good template to illustrate the complex nature of these rules as they relate to minimizing civilian harm. Although other contemporary examples exist, the stark facts of Caen make it especially relevant. Field Marshall Montgomery’s decision to launch the operation highlights the intense “non-legal” pressures that confront commanders during combat operations. Far behind schedule, suffering unacceptable losses, and facing damage to his prestige, Field Marshall Montgomery had to achieve the long overdue “breakout.” The Caen operation illustrates the impact of considering this law of war principle, and the rules intended to implement it, into targeting decisions.

In July 1944, British and Canadian forces in Normandy faced a dilemma. For over one month they had been battling the German defenders of the area surrounding the French city of Caen. Allied plans called for the capture of Caen within days of the 6 June D-Day landings. Unfortunately, as of 18 July, the Germans still held this urban center in the path of the planned Allied “encirclement” route. The war of movement that the Allies anticipated had become a war of attrition, a war that the British could ill afford. This was emphasized to Montgomery in mid-July when the British Adjutant-General visited him to “warn him about the shortage of replacements.”⁵³

Against this backdrop, Montgomery planned a major operation to finally capture Caen. Nothing indicates that Montgomery considered bypassing the city.⁵⁴ Instead, his plans called for employing 450 heavy aircraft from the Bomber Command to attack the city in order to reduce enemy defenses and to facilitate the corps-strength ground assault. The ensuing bombard-

ment virtually destroyed the city. Hundreds of civilians were killed or wounded. Most civilians had elected to remain in the city rather than heed the German suggestion that they evacuate the area. In spite of the massive scale of the bombardment, Allied ground forces still faced determined resistance.

The tactical result of the bombardment was negligible. Most German forces were not even in the city, but in surrounding areas. The small portion of German defenders in the city conducted defensive operations after the bombing. Consequently, although the bombing boosted the morale of the Allied forces entering the ground offensive, it provided virtually no other benefit. The Allies suffered substantial losses, and did not capture the city until 20 July, nearly two weeks after the bombardment.⁵⁵ Even at that point, the Germans continued to hold defensive positions behind the city, preventing the Allied breakout that the fall of Caen was expected to unleash.⁵⁶

Montgomery was under intense pressure to achieve the long overdue breakout from Normandy. Accomplishing this mission was likely his primary concern when he decided to bomb Caen. Nothing indicates that protecting the French population of the city was a significant competing interest. Might the outcome of his decision making process have been different if he had the benefit of contemporary law of war advice? Although we can only speculate, it is this might that is significant for the law of war practitioner to consider, because it illustrates the value of injecting such consideration into the planning and execution of any future military operation.

The battle for Caen demonstrates the troubling dilemma posed by the intersection of the law of war intended to minimize harm to civilians and the realities of military operations. It highlights the difficulty of balancing the need to minimize harm to civilians and the needs of the mission. The improvement in the technology and lethality of warfare makes this dilemma arguably more profound today than in 1944. Unlike in 1944, however, the law of war explicitly requires commanders and their planners to consider measures that are intended to shield civilians from the harmful effects of combat during the planning and execution process. The source of this obligation is the 1977 Protocol I Additional to the Geneva Conventions of 1949.⁵⁷ This is not an obligation that is exclusive to the attack-

53. MAX HASTINGS, *OVERLORD: D-DAY AND THE BATTLE FOR NORMANDY* 221 (1984).

54. *Id.*

55. *Id.* at 236-37.

56. *Id.* at 223-39.

57. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 615 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY] (indicating that the rule that related to the protection of civilians from the harmful effects of hostilities “explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities”).

ing force.⁵⁸ It extends to all combatants during international armed conflict, and arguably to combatants during internal armed conflict as a matter of customary international law. The focus of this note, however, is the impact on a force that is planning an attack, and not in the defense.

Article 51 of Protocol I establishes the rule that civilians “shall enjoy general protection against dangers arising from military operations”⁵⁹ Article 51 also includes specific provisions of law that are intended to give effect to this general rule.⁶⁰ Although the United States never ratified Protocol I, the provisions discussed in this note, which implement this “general rule” of minimizing harm to civilians, were considered by the United States as codifying customary international law obligations.⁶¹

Any intentional targeting of persons who qualify for status as civilians would clearly violate the customary international law obligation to distinguish between lawful and unlawful targets which lies at the heart of the law of war.⁶² While Article 51 prohibits making civilians “the object of attack,”⁶³ it also prohibits the unintended harm to civilians when the extent of that harm is so significant that it is tantamount to intentional harm. Thus, the principle of minimizing harm to civilians is based on the premise that civilians may never be the lawful object of intentional attack. The law of war, however, also accepts as reality that “armed conflicts entail dangers for the civilian population,”⁶⁴ and aims to limit the *unintentionally* inflicted harm to civilians during hostilities.⁶⁵

The need for such a principle is amply demonstrated by the facts surrounding the bombardment of Caen. No evidence indi-

cates that Field Marshall Montgomery ever *intended* to inflict suffering on the civilian population of the city. This, however, did not prevent extensive harm to civilians and their property as a result of the bombardment. While such suffering is almost certainly the unavoidable product of armed conflict, the key issue related to protecting civilians is whether everything “feasible”⁶⁶ was done to prevent or minimize this suffering. The law of war principle of protecting civilians from the harmful effects of warfare can therefore best be understood by recognizing the underlying purpose of the principle: to prohibit those acts that, although in no way intended to cause civilian suffering, are so wanton or reckless that they should be prohibited as if such an intent did exist.⁶⁷

A series of detailed articles contained in Protocol I codified this principle. While there is no substitute for turning to these provisions when analyzing a targeting decision, a judge advocate can facilitate his understanding of the provisions by thinking in terms of three primary sub-components:

1. The absolute prohibition against any “indiscriminate” attack;
2. The obligation to take certain precautions to protect non-combatants; and
3. The obligation to refrain from any attack that “may be expected to cause incidental injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and

58. GP I, *supra* note 52.

59. *Id.* art. 51.

60. *Id.*

61. See *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, in *The Sixth Annual American Red Cross – Washington College of Law Conference on International Humanitarian Law*, 2 AM. U. J. INT’L L. & POL’Y 419 (1987).

62. See International and Operational Law Note, ARMY LAW., Aug. 1998, at 35 (discussing of the principle of distinction).

63. See GP I, *supra* note 52, art. 51(2).

64. COMMENTARY, *supra* note 57, at 617.

65. *Id.*

66. The law of war practitioner must understand the complexity of the meaning of this term. What is “feasible” in any given situation is a fact intensive issue. Factors such as force protection, security, logistics, intelligence, and personnel resources all must be considered. *It should not* be read to assume that the technological ability to use precision targeting, *standing alone*, automatically makes use of such technology “feasible.” See, e.g., Danielle L. Infeld, Note, *Precision-Guided Munitions Demonstrated their Pinpoint Accuracy in Desert Storm; But is a Country Obligated to use Precision Guided Technology to Minimize Collateral Injury and Damage?*, 26 GEO. WASH. J. INT’L L. & ECON. 109 (1992) (concluding that use of available precision-guided munitions is not mandated by the law of war).

67. This analogy is not offered by the Commentary. It may, however, be useful for facilitating an understanding of the objective of the rules intended to implement the imperative to minimize civilian suffering.

direct military advantage anticipated,”⁶⁸ commonly referred to as the “proportionality” test.

Each of these sub-components shares the same objective but achieves it differently. Of the three, the absolute prohibition against indiscriminate attacks is most obviously related to the principle of distinction. No member of the military profession should object to the absolute prohibition of *intentionally* launching an indiscriminate attack. It is the extension of this prohibition to the *unintentional* violation of the distinction between lawful and unlawful targets that poses the greatest dilemma in application.

In order to achieve this extension, Protocol I defines prohibited indiscriminate attacks as:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; and,
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; *and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.*⁶⁹

As the emphasis indicates, this provision does not mean that the mere presence of civilians or civilian objects makes any planned attack “indiscriminate.” Instead, it reinforces the principle of distinction by capturing the definition of indiscriminate targeting decisions, which by their nature cannot distinguish between military objectives and the civilian population. The Official Commentary reinforces this conclusion:

[T]he provision begins with a general prohibition on indiscriminate attacks, i.e., attacks in which no distinction is made. Some may think that this general rule should have sufficed, but the conference considered that it should define the three types of attack covered by the general expression “indiscriminate attacks.”⁷⁰

Applying this rule to the Caen targeting decision illustrates its impact. The bombardment of Caen would have arguably violated Article 51, had it been in force at the time. Whether the attack was directed against a “specific military objective” is debatable. Although there was intelligence indicating the presence of German defensive positions in the city, the bombardment was general, and does not appear to have been directed at any specific defensive position. How, if at all, should the sophistication of weapons technology that was available to the Allies impact this analysis? The method employed would appear justified if then existing weapon systems did not allow for more precise targeting of the enemy position within the city. This consideration, however, illustrates why the definition of “indiscriminate” in Article 51 includes attacks with weaponry that cannot be directed against, or destructiveness limited to, specific military objectives.⁷¹

As with virtually all law of war provisions that relate to targeting decisions, application of this rule is fact intensive. The law of war is intentionally designed to provide general guidance to combatants. Commanders retain a great deal of flexibility when analyzing the legality of targeting decisions. Article 51 should not be read to categorically prohibit any employment of non precision-guided munitions.

The facts of the Caen bombardment, however, suggest that the target was the city itself, with little or no effort made to identify and target specific emplacements within the city. Article 51 is clearly intended to prohibit such weapon employment. Had the Allies identified enemy defensive positions co-mingled with the civilian population in the city, Article 51(5)(a) might have impacted the target selection. This provision of Protocol I adds to the category of “indiscriminate attacks”:

[A]n attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects⁷²

The Official Commentary indicates that this provision was a direct response to the devastation caused by the type of area or

68. This “proportionality” test is used in Protocol I to define the meaning of an indiscriminate attack. See GP I, *supra* note 50, art. 51(5)(b). It is also stated as a component of the Article 57 precautions in the attack obligations, *see id.* art. 57(2)(a), (b). In FM 27-10 it is a “stand-alone” provision which indicates that “loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage to be gained.” FM 27-10, *supra* note 49, at 5.

69. GP I, *supra* note 52, art. 51(4) (emphasis added).

70. COMMENTARY, *supra* note 57, at 620.

71. *Id.*

72. GP I, *supra* note 52, art. 51(5).

“carpet” bombing exemplified by the Caen operation.⁷³ Although the devastation caused by such bombing may in no way be intended, it is considered an indiscriminate employment of a method of warfare, and therefore prohibited.

The next sub-component of the principle of protecting the civilian population from the harmful effects of hostilities is the obligation to take certain precautions during combat operations. Article 57 of Protocol I is devoted to implementing this requirement. Entitled “precautions in attack,”⁷⁴ it establishes the general rule, applicable to *both* the attacking and defending force. Article 57 provides that, “[I]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians, and civilian objects.”⁷⁵ The following summary illustrates the nature of the specific provisions of Article 57 that are intended to implement this general rule:

- The parties to the conflict must do everything feasible to verify that targets of attack are valid military objectives;
- The parties to the conflict must do everything feasible to choose means and methods of combat which will avoid or minimize harm to civilians or their property;
- *when circumstances permit*, the parties to the conflict must provide advance warnings for attacks which may affect the civilian population;
- when choosing among several military objectives for obtaining a similar military advantage, the parties to the conflict must select the objective with the least likelihood of causing civilian casualties; and,
- The parties to the conflict must suspend, cancel, or refrain from launching any attack which may be expected to cause incidental harm to civilians or their property that would be excessive in relation to the concrete and direct military advantage anticipated.⁷⁶

Had either Protocol I or the current version of *FM 27-10* been in effect at the time of the bombardment of Caen, the Allies should have done “everything feasible to verify that the

objectives to be attacked [were] neither civilians or civilian objects . . . but [were] military objectives . . .”⁷⁷ Although German defensive positions did exist within the city, *FM 27-10* and Protocol I would have prohibited treating distinct military objectives within a civilian population area as one overall military objective. Thus, the presence of defensive positions within the city arguably would not have justified treating the entire city as a single objective. If the Allies had targeted the individual defensive positions within the city separately, the method or means of combat that was employed should have been such that the effects could be relatively limited to these objectives.⁷⁸ Carpet bombing of a city does not appear to comport with this restriction.

An advance warning requirement is a component of Article 57. It appears that the Germans actually took measures to this end. They advised the local population to flee the city. Nothing, however, indicates that the Allies attempted a similar warning. No such warning would be required if Allied planners believed that it would compromise the mission. Under such circumstances, the commander may reasonably conclude that the warning would not be feasible or permitted by the circumstances. This is a key caveat to the duties imposed by Article 57.⁷⁹ This conclusion must be made in good faith, based on all the information available to the commander at the time. In the example of Caen, enemy expectation of a continued attack is not the exclusive factor in assessing the feasibility of a warning. Multiple factors impact this decision. The record is insufficient to make a clear retrospective assessment. What is clear, however, is that in such circumstances, a warning should at least be considered. In contemporary practice, implementing this provision requires close coordination with psychological operations assets within the command.

Another issue that is related to Article 57 is whether other similar objectives could have been selected to achieve a similar advantage while reducing harm to civilians. This raises the difficult issue of what constitutes a “similar military advantage.”⁸⁰ Discussion of this provision in the Official Commentary focuses on civilian objects that are used to support the enemy war effort, such as transportation facilities and economic tar

73. “It is characteristic of such bombing that it destroys all life in a specific area and razes to the ground all buildings situated there. There were many examples of such bombing during the Second World War, and also during some more recent conflicts . . .” COMMENTARY, *supra* note 55, at 624.

74. GP I, *supra* note 52, art. 57.

75. *Id.*

76. *See id.*

77. *See FM 27-10, supra* note 51, at 5; *see also GP I, supra* note 52, art. 57(2)(a).

78. *See FM 27-10, supra* note 51, at 5; *see also GP I, supra* note 52, art. 57(2)(a).

79. *See e.g., GP I, supra* note 52, art. 57(2).

80. GP I, *supra* note 52, art. 57(3).

gets.⁸¹ The Official Commentary indicates that such targets can often be disabled without totally devastating the civilian infrastructure. The Commentary then indicates that Article 57 requires this course of action. The more difficult aspect of this provision, however, is determining how increased risk or cost to the attacker factors into this equation. Does the increased risk or cost related to attacking an alternate target justify the conclusion that the ultimate military advantage is no longer the same or similar? Although not addressed in the Official Commentary, it seems logical that considering the increased “cost” of attacking an alternate target is legitimate. Denying the commander the right to factor friendly “cost” into the equation of what constitutes a similar military advantage would always require him to sacrifice his force to protect civilians. This result is contrary to the basic concepts of the law of war, which balances the needs of the force with the dictates of humanity.

In the Caen example, the Allies arguably may have reduced the city’s defenses by bypassing the city. This may also have been achieved by attacking other enemy concentrations outside the city, rendering the Caen’s defenders unsupported. What is impossible to analyze is the anticipated cost to the Allies of such alternate courses of action. If the anticipated cost would have been greater than that of the course of action selected, the military advantage should not have been considered the same or similar. Although the resulting harm to civilians might have been reduced, the alternate target selection requirement of Article 57 would have been inapplicable.

The final aspect of the precautionary obligations as codified in Article 57 is the requirement to suspend, cancel, or refrain from launching, or suspend any attack that may cause incidental harm to civilians or their property which would be excessive in relation to the concrete and direct military advantage anticipated.

This rule is a sub-component of the rule that prohibits “indiscriminate” attacks in Article 51, and the “precautionary measures” rule of Article 57. It is commonly treated as a stand-alone “test” for analyzing the legality of targeting decisions. While *FM 27-10* incorporates language similar to that in Article 51, it also utilizes the term “disproportionate” in defining “unnecessary killing and devastation.”⁸² Specifically, *FM 27-10* provides that:

[L]oss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure . . . that these objectives may be attacked without probable losses in lives and damage to property *disproportionate to the military advantage anticipated*.⁸³

This prohibition of attacks that would cause civilian harm that is excessive in relation to the “concrete and direct military advantage to be gained”⁸⁴ is perhaps the most challenging aspect of the law related to employment of methods and means of warfare. According to the Official Commentary, there was a great deal of debate related to these provisions and much criticism aimed at the imprecise nature of the language used in the “test.”⁸⁵ This test, however, is based on a presumption that the basic rule of minimizing civilian harm should always be a guide for military planners,⁸⁶ that the rule will be applied in good faith by military commanders who are cognizant of this imperative,⁸⁷ and that it is the last step in an analytical process intended to ensure the destructive effects of combat are minimized.

The Official Commentary indicates that this “proportionality” test is only one aspect of a larger analytical process intended to protect civilians. In response to the argument that the “proportionality” rule of Protocol I legalizes *any* attack, so long as the loss of civilian life or damage to civilian property is not excessive in relation to the concrete and direct military advantage anticipated, the Commentary states:

This theory is manifestly incorrect. In order to comply with the conditions, the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; *moreover*, even after those conditions are fulfilled, the incidental civilian losses and damages must not be excessive.⁸⁸

81. COMMENTARY, *supra* note 57, at 687.

82. FM 27-10, *supra* note 51, at 5.

83. *Id.* (emphasis added).

84. GP I, *supra* note 52, art. 51(5)(b).

85. COMMENTARY, *supra* note 57, at 625.

86. *See id.*

87. *See* Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91 (1982).

88. COMMENTARY, *supra* note 57, at 625-26.

Thus, although imprecise, the “proportionality” test embodied in both Article 51 and Article 57 of Protocol I can be viewed as the critical “last line of defense” against inflicting unintended civilian harm on such a scale that is tantamount to being “indiscriminate.”

This “proportionality test” is perhaps the most difficult obstacle to overcome when attempting to justify the legality of the Caen bombardment within the context of Protocol I. Was there a military objective? Certainly the presence of German defenses within the city satisfied this test. What was the concrete and direct military advantage to be gained? Assuming that the Allies believed that the bombardment would substantially aid the ground offensive, there is some evidence that the city was not bombed because of the decisive effect that was anticipated, but because it was well behind the main battle area, thereby limiting the risk of friendly casualties. Max Hastings highlights the overall negligible military advantage of the bombardment:

The use of the heavy bombers reflected the belief of Montgomery and the Allied high command that they must now resort to desperate measures to pave the way for a ground assault. With hindsight, this action came to be regarded as one of the most futile air attacks of the war. Through no fault of their own, the airmen bombed well back from the forward line to avoid the risk of hitting British troops, and inflicted negligible damage upon the German defences. Only the old city of Caen paid the full price.⁸⁹

Even Hastings, however, acknowledges that the futility of the attack is a matter of hindsight. In analyzing compliance with the “proportionality” standard of Protocol I, it is not hindsight that is determinative, but the facts that are available to the commander at the time of the targeting decision.⁹⁰ Whether Montgomery and the Allied planners believed that there would be a positive effect on the operation is doubtful. This, however, does not end the analysis. Even if it can be argued that, from

Montgomery’s perspective, there was some military advantage to be gained by the bombardment, that advantage would not justify the attack *if* the anticipated harm to civilians or their property would be excessive in relation to that advantage. Factors that weigh against the legality of the Caen bombardment include: bombing the center of a city, without any advance warning, deliberately well behind the main area of enemy resistance in order to avoid friendly casualties, and knowledge that only a small portion of the overall enemy defenses were located within the city.

Whether the bombardment of Caen would have violated the contemporary law of war principle of minimizing harm to civilians is less relevant than the value that the operation provides in illustrating the need for such a principle. Many other examples exist in the history of modern warfare. Recent history also illustrates that situations implicating this principle are in no way limited to international armed conflict. Operations other than war, which are replete with complex force protection and distinction issues, also involve the imperative to minimize the harm caused to civilians. One need only reflect upon the battles in the “mean streets of Mogadishu” to understand how complex the implementation of this principle becomes in such confused environments. Yet to the great distinction of the armed forces of the United States, this principle has been, and continues to be, a key component to mission success.

Conduct-based rules of engagement clearly manifest how this principle is transmitted to the lowest levels of mission execution. These rules call upon the skills of the American soldier in limiting the use of deadly force to those situations that are warranted by all of the available facts. This principle must also permeate the planning and targeting process at all levels of command. To this end, judge advocates must be thoroughly familiar with the details of the law of war that implement this principle, and totally integrated in the planning process, particularly the targeting process. Understanding the underlying purposes of these rules will enhance the ability to effectively apply them during this process. Major Corn.

89. *Id.* at 222.

90. COMMENTARY, *supra* note 57, at 681. *See also* Fenrick, *supra* note 87, at 108 (indicating that the United States delegation to the Protocol I drafting conference stated: “Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time,” citing 3 PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE GENEVA CONVENTIONS 334, 336 (H. Levie ed., 1980)).