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BELLIGERENT OCCUPATION -

The Conceptual Sufficiency of Occupation, as
Codified in Contemporary Multilateral Treaties,
to Armed Conflict in the Nuclear Age.

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

An inquiry into the contemporary adequacy of current concepts of belligerent occupation, with regard to the protection of persons, as derived from existing multilateral treaties which have codified normative standards of the Law of War on Land into positive International Law: a study of the influence of the Roman Law theory of occupatio in this conceptual evolution; and, primarily, with a view towards evaluation of present requisites for the treatment of civilian persons within occupied territory, an examination of the relevancy and current sufficiency of orthodox notions of "occupation", thereby derived, to the changing modes of warfare in the nuclear age and to the resultant, tactical operations envisioned for the battlefield in future armed conflict.

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I HISTORICAL DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION

From the dawn of recorded history, the customs of war have slowly evolved to form the normative standards which are known to the modern era as the Law of War. A subdivision of the Law of War, the Law of Belligerent Occupation has been developed through a parallel, evolutionary process, and provides the basis for current concepts of Occupation in International Law.

To illustrate the import of historical factors which have influenced present concepts of Belligerent Occupation in modern International Law, together with the attendant legal consequences which currently derive from a status of military occupation, a brief resume of significant aspects in the treatment of enemy personnel and of his domains during the early formation of the customs of war and in the later development of the Law of War, is deemed appropriate.

A) Ancient Concepts:

Under the customs and usages of antiquity, Biblical history of the Jewish Tribes indicates that it was not uncommon for a victorious invading army to slaughter all members of the vanquished group, including men, women and infants.¹ Occasionally, through indulgence

1. Deut. II, 33, 34; Deut. III, 2, 6; 1 Samuel XV, 3.

or for reasons of convenience to the conqueror, mercy would be extended to the women and children of a non-victorious foe.²

Likewise, under the customs of ancient Greece, following military defeat, all personnel of the fallen enemy were dealt with at the pleasure of the conqueror, to be put to the sword or utilized as slaves, at his mercy.³ Due to ethnological, religious and cultural ties, however, the early Greek city-states not infrequently extended more humane consideration, among themselves, to the aged and infirm, the women and children of their vanquished foes, thus affording limited historical precedent for civilized refinement of the Law of War many centuries later.⁴

2. Deut. XX, 10-18.

3. Baxter, "So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs", XXVIII Brit. Yb. Int'l L. 324 (1951), hereafter cited as Baxter, "Unp. Bellig."

4. I Oppenheim, International Law (Peace) 74-75 (8th ed. Lauterpacht 1955).

Subsequently, in the historical panorama, progressive successes of her conquering legions caused Rome to pursue a different course by reason of "political considerations".⁵

Writing in recent years of the significance of these historical factors with respect to development of modern international law, one contemporary authority has concluded:

"... Since the founders of modern international law were not prone to overlook the verdict of the past, they were forced to admit that every enemy could in strict law be subjected to violence and could only urge that non-combatants be spared from attack as an act of mercy.¹ ... 'In general, killing is a right of War [Grotius] De Jure Belli ac Pacis (1646 ed. transl. by Kelsey, 1925), Book iii, ch. iv, v, 1), '... according to the law of nations, anyone who is an enemy may be attacked anywhere' (ibid., viii. I), and 'How far this right to inflict injury extends may be perceived from the fact that the slaughter even of infants and of women is made with impunity' (ibid., ix. I). It was the 'bidding of mercy which called for the protection of certain categories of persons, such as children, women, old men, priests, writers, farmers, merchants, prisoners of war, supplicants, and those who gave themselves up to the victor (ibid., ch. xi, viii - xiv incl.) ..."⁶

This ancient concept, affording a conqueror the power of life or death over his fallen foe was correlative of the view that war between principalities made every inhabitant an enemy (in a legal sense) to each person of the opposing power. This view persisted until relatively recent times; "The courts of the United States

5. Baxter, "Unp. Bellig.", op. cit. supra note 3 at 324.

6. Id. at 324-25.

have been particularly prone to start from the premise that all inhabitants of the enemy state and all persons adhering to it are enemies ...".⁷

Exercise of these belligerent prerogatives of antiquity was, fortunately, modified by charitable considerations, even early in the modern era to the extent that von Bynkershoek was able to comment, in 1737: "But although the right of executing the vanquished has almost grown obsolete, this fact is attributed solely to the voluntary clemency of the victor ...".⁸

The incidents of "enemy" status have, of course, been the subject of substantial historical mitigation as to both combatants and non-combatants under modern precepts of the Law of Nations, and in recent codifications of these concepts, which will be described below. Hence, with ample justification, the Supreme Court of the United States could recently conclude, with respect to current ideology, that "Modern American Law has come a long way since the time when outbreak of war made every enemy national an outlaw, subject to both public and private slaughter, cruelty and plunder ...".⁹

7. *Id.* at 325.

8. Van Bynkershoek, *Ouaestionum Juris Publici Libri Duo* (The Classics of International Law) Book 1, Ch.iii, p. 18 (1737 ed.) (Scott ed., Tenny, transl. 1930).

9. *Johnson v. Eisentrager*, 339 U. S. 763, 768-69 (1950).

B) "Occupatio" - Emergence of Legal Rules in the Era of the Roman Empire:

During the era of the Roman Empire, the legal concept emerged and prevailed for many centuries, with regard to conquered territory, that the conquering belligerent, upon attaining and maintaining exclusive physical possession of the domain of a fallen foe by military force, succeeded to and acquired an actual or "substituted" sovereignty over the area which he had thus acquired through conquest. The Roman theory of "occupatio", thus accorded a full right of ownership in the vanquished territory, together with its inhabitants, to the conqueror, "so long as he could hold on to it."¹⁰ This development in the custom of War was analagous to the parallel concept of "occupatio", also conceived in Roman civil law, later expanded by Grotius to afford a theory of orderly regulation to discovery and settlement of the New World, whereby property which was unowned (or abandoned by its owner), "res nullius", could lawfully be acquired by anyone who desired to keep it and reduce it to possession.¹¹

Oppenheim succinctly describes the significance and degree of development of the Law of War (if it be

10. Taylor, International Public Law 584 (1901).

11. Id. at 128-29; Brierly, Law of Nations 162 (6th ed. Waldock 1963).

possible to thus denominate the emerging customs of that era) during the transcendence of Rome with the following thoughts:

"... For warfare itself no legal rules existed, but discretion only, and there are examples enough of great cruelty on the part of the Romans. Legal rules existed, however, for the ending of war. War could be ended, first, through a treaty of peace, which was then always a treaty of friendship. War could, secondly, be ended by surrender (deditio). Such surrender spared the enemies their lives and property. War could, thirdly, and lastly, be ended through conquest of the enemy's country (occupatio). It was in this case that the Romans could act according to discretion with the lines and the property of the enemy. (Emphasis supplied).

It thus appears that the Romans gave to the future the example of a State with legal¹ rules for its foreign relations. As the legal people par excellence, the Romans could not leave their international relations without legal treatment. And though this legal treatment can in no way be compared to modern International Law, yet it constitutes a contribution to the Law of Nations of the future, insofar as its example furnished many arguments to those to whose efforts we owe the very existence of our modern Law of Nations."

"¹But essentially municipal rather than international."¹²

12. I Oppenheim, op. cit. supra note 4 at 77.

II MODERN REFINEMENTS AND EARLY CODIFICATION

1) Influence of Vattel and the Classical Scholars:

Subsequent to the middle ages there arose an era of classical analysis, noted for intellectual and humanitarian evolution in the Law of Nations, which emerged late in the sixteenth, and continued, particularly, throughout the seventeenth and eighteenth, centuries. The authoritative treatises produced in this epoch by recognized scholars of keen perspective, such as Alberico Gentile, Hugo Grotius, Richard Zouche, Cornelius van Bynkershoek and Emerich de Vattel, among others, effected a profound conceptual influence in the enlightened progression of International Law at the dawn of the modern era.¹³ The substantial contributions of these eminent scholars resulted in a concomitant, gradual amelioration, dictated by considerations of humanitarianism and good conscience, in the developing law of warfare among civilized nations.

Following collapse of the Empire, legalistic refinement in the Law of War, achieved largely by Rome, had suffered a substantial decline, which continued throughout the feudal period. Correspondingly, there ensued an era of retrogression to savage confusion in the practices of belligerents toward enemy personnel,

13. Id. § 42-58, at pp. 83-105; Brierly, op. cit. supra note II at 25-40.

particularly non-combatants, which continued during most of the mediaeval period. This decline in the customs of war was not mitigated until the gradual reforms of the modern era.¹⁴

In his Droit des Gens, (1758), Vattel ventured some progressive and portentous comment on the rights acquired by a conquering sovereign over territory gained from conquest:

"Real property - lands, towns, provinces - become the property of the enemy who takes possession of them; but it is only by the treaty of peace, or by the entire subjection and extinction of the State to which those towns and provinces belong, that the acquisition is completed and the ownership rendered permanent and absolute.

A third party cannot, therefore, obtain secure possession of a conquered town or province until the sovereign from whom it has been taken has either renounced it by the treaty of peace or lost his sovereignty

14. "It was the received opinion in ancient Rome, in the times of Cato and Cicero, that one who was not regularly enrolled as a soldier could not lawfully kill an enemy. But afterwards in Italy, and more particularly during the lawless confusion of the feudal ages, hostilities were carried on by all classes of persons, and everyone capable of being a soldier was regarded as such, and all the rights of war attached to his person. But as wars are now carried on by regular troops, or, at least, by forces regularly organized, the peasants, merchants, manufacturers, agriculturists, and, generally, all public and private persons who are engaged in the ordinary pursuits of life, and take no part in military operations, have nothing to fear from the sword of the enemy. So long as they refrain from all hostilities, pay the military contributions which may be imposed on them and quietly submit to the authority of the belligerent who may happen to be in military possession of their country, they are allowed to continue in the

ever it by final and absolute submission to the conqueror. For so long as the war is in progress and the sovereign has hope of recovering his possessions by force of arms, is a neutral prince to be allowed to deprive him of that chance, by purchasing the town or province from the conqueror? The former sovereign cannot lose his rights by the act of a third party, and if the purchaser wishes to retain his acquisition he will find himself involved in the war. It was thus that the King of Prussia was numbered with the enemies of Sweden by receiving Stettin from the King of Poland and the Czar, under the title of confiscated property. (a) But as soon as a sovereign, by a definite treaty of peace, has ceded certain territory to a conqueror, he thereby abandons his title to it, and it would be absurd for him to claim the territory from a second conqueror who should take it from the first, or to claim it from any other prince who should acquire it by purchase, by exchange, or by any other title."

"(a) By the Treaty of Schwedt, October 6, 1713."¹⁵

Vattel then continued this enlightened discourse to conclusion, with skillful use of historical reference and solicitous reasoning, based primarily on considerations of equity, morals and "humane sentiment".¹⁶

Following Vattel's commentaries, the ancient dogma that sovereignty transferred to the conqueror during

enjoyment of their property, and in the pursuit of their ordinary avocations. This system has greatly mitigated the evils of war, and if the general, in military occupation of hostile territory, keeps his soldiery in proper discipline, and protects the country people in their labors, allowing them to come freely to his camp to sell their provisions, he usually has no difficulty in procuring subsistence for his army, and avoids many of the dangers incident to a position in a hostile territory." II Halleck, International Law, 19-22 (4th ed. Baker 1908).

15. I Vattel, Law of Nations, Ch. XII, § 197-98 (1758) (Penwick transl. 1916).

16. Id. at § 199-203.

belligerent occupation gradually became discredited, and was finally interred with emergence of the new and humane concepts, more fully developed in the age of codification.

"After the close of the Seven Years' War the distinction between the right of control over hostile territory incident to mere military occupation and the right of sovereignty incident to completed conquest became so clearly defined that the continuing sovereignty of the original owner became generally recognized for certain purposes, while the intruder was supposed to supersede him temporarily for certain other purposes".¹⁷

Even early in the emanating modern era, however, under traditional theories, when a conqueror had occupied enemy territory, it was considered that he could "devastate the country with fire and sword", thereby to deal with enemy property and personnel at his pleasure, to include the execution of inhabitants, or if desired, removing them to captivity, or swearing them to an oath of allegiance; moreover, he could even dispose of the occupied territory by cession to a third power.¹⁸ Such a sale had occurred during the Northern War between Denmark and Sweden (1700-1718) when Denmark sold the conquered Swedish territories of Verden and Drenner to the German State of Hanover in 1715; as recently as 1808, an oath of allegiance was required by Alexander I, of Russia, from the inhabitants of occupied Finland; and "during the Seven Years' War, Frederick II, of Prussia,

17. Taylor, op. cit. supra note 10 at 585-86.

18. II Oppenheim, International Law (Disputes, War and Neutrality), 432 (7th ed. Lauterpacht 1952).

repeatedly made forcible levies of thousands of recruits in Saxony, which he had occupied."¹⁹

Though it had been a subject of earlier attention by Vattel, the ramifications of the distinction between temporary belligerent occupation and actual acquisition of territory through military conquest were not completely manifested, in practice, until a substantial time following the Napoleonic Wars. Professor Lauterpacht attributes the consequences of this distinction to August W. Heffter, in his treatise, Das europaeische Voelkerrecht der Gegenwart, published in 1844.²⁰ The same authority indicates that "it took the whole of the nineteenth century to develop the rules regarding occupation which are now universally recognized."²¹

B) The Era of Codification:

As is evident from these glimpses into history,* arrival of the day for fulfilment of the long-awaited "Grotian plea for mitigation of unnecessary suffering" from the ravages of war, was quite dilatory:

"The major achievement of the Grotian call to 'humanise' war was not indeed consolidated until the late nineteenth century. And at that stage it is already difficult to apportion credit for it as between on the one hand, the fading calls

19. Id. at 432.

20. Id. at 432-33.

21. Id. at 433.

* It is beyond the scope of this discourse to trace the intricacies of the Law of War throughout the eons of

of chivalry, and the Grotian call and, on the other, the powerful humanitarian movement."²²

Significant achievements were, however, effected from the middle of the last century, and, prospectively, in effort to codify the emerging, humanitarian concepts of the era into a settled body of rules for the conduct of civilized warfare.

The American War between the States (1861-1865) afforded both practical experience and conceptual development. An humanitarian and exemplary code of land warfare was promulgated by the United States Army, of which one authority has commented:

"The actual foundations of a considerable part of present-day rules on military occupation were laid in 1863 in the manual, Instructions for the Government of the Armies of the United States in the Field, drafted at the request of President Lincoln by a German-American professor, Dr. Francis Lieber. The original text was partially revised by a board of army officers and then approved by the President. The Instructions, a body of rules comprising 157 articles divided into 10 major sections, were issued to the Army on April 24, 1863, as General Orders No. 100. They remained in force until 1914 when a new manual (Rules of Land Warfare) was compiled by the War Department.

civilization. Rather, our purpose is to discuss certain concepts of Belligerent Occupation. However, incidental references to historical indicia and parallel trends in the Law of Land Warfare (which is contextually inter-related to the Law of Belligerent Occupation) are offered in this and subsequent Chapters when deemed relevant and appropriate.

22. Stone, *Legal Controls of International Conflict* 336 (1957).

Lieber's Instructions became the forerunner of a whole series of military manuals, such as those in Italy in 1896 and 1900, in Russia on the occasion of the Russo-Japanese War (Instructions to the Russian Army Respecting the Usages and Customs of Continental War), and in France in 1901 and 1912."²³

In addition to the various advanced manuals of land warfare which had resulted from its contribution, the "Lieber Code"²⁴ of the United States was significantly influential in the rapid progression of continental concepts on war and military occupation, culminating finally in the Hague Peace conferences of 1899 and 1907.²⁵

Among other developments of that era worthy of note is the 1874, International Conference of Brussels, which was called at the initiative of Russia, for the purpose of codifying the Law of War. Attended by eminent continental jurists, this Conference produced the advanced "Projet de Declaration", which, although remaining unratified, "exercised a very considerable influence on the legal thinking of the time"²⁶

23. Von Glahn, Occupation of Enemy Territory 8 (1957).

24. U. S. War Dept., Instructions for the Government of Armies of the United States in the Field, Gen. Orders No. 100 (April 24, 1863), contained in U. S. War Dept., JAGS Text No. 7, Law of Land Warfare (1943), pp. 155-186; II Halleck, op. cit. supra note 14, 54-70.

25. Bishop, International Law 55 (2nd ed. 1962).

26. Von Glahn, op. cit. supra note 23, at 8.

Also, in 1880 the Institute of International Law drafted the "Oxford Manual (Manuel de Lois de la Guerre sur Terre)", a humanitarian code on the Law of War, never officially adopted, but which nonetheless was "mentioned frequently with approbation in the writings of contemporary Continental jurists".²⁷ Further codification of the Law of Land Warfare was drafted in 1894 by the German author, Geffkin, whose code combined many facets of the Brussels and Oxford efforts, "interspersed with several highly original ideas of its author", and was anticipatory of several features of the later Hague Conventions of 1899 and 1907.²⁸

The fruition of these nineteenth century, humanitarian developments was the resultant, Hague Conventions of 1899 and 1907, respectively, which were, and are, of substantial importance in the codification of the Law of Land Warfare and to current concepts of Belligerent Occupation. With respect to the latter, the following comment of Professor Von Glahn concerning the Hague Conventions is deemed of interest:

"Best known and most important of the attempts to define the rules of warfare were the results of two peace conferences held at the Hague in 1899 and 1907. The 1899 Convention with Respect to the Laws and Customs of War on Land laid the basis for most of the principles

27. Id. at 9.

28. Ibid.

currently guiding armies in the lawful occupation of enemy territory. The later (1907) Fourth Convention Respecting the Laws and Customs of War on Land and its annexed Regulations, particularly Articles 23g, 23h and 42 to 56, embodied the rules which have been adopted officially by most nations of the world into their military manuals. The 1907 treaty has also supplied the reference material for the greater part of all scholarly investigations of the laws of military occupation. It is interesting to note that many sections of both conventions are identical with the text of the 1874 Brussels Declaration. ... insofar as this study (Occupation of Enemy Territory) is concerned, the 1907 convention represents but a minor revision and improved version of the 1899 convention on war on land."²⁹

Among provisions of the Hague Conventions which are germane to this discussion are Articles 42-56 (concerning belligerent occupation) of the Annexed Regulations to the Fourth Convention of 1907 (Hague IV)³⁰ (hereafter referred to as the Hague Regulations).

29. Ibid.

30. Convention Respecting the Laws and Customs of War on Land, and Annex, October 18, 1907, 36 Stat. 2277, 2295, T. S. No. 539. Sec. III of the Annexed Regulations containing Articles 42-56 thereof, is also reproduced in U. S. Dept. of Army Pamphlet No. 27-1, Treaties Governing Land Warfare (1956), at pp. 15-17, hereafter referred to as D A Pam. 27-1.

III CURRENT CONCEPTS OF BELLIGERENT OCCUPATION

Despite private adoption in 1928 by the International Law Association at Warsaw of the "Bellot Rules of War in Occupied Territory", an expanded and most liberal code, as concerns occupied territory, and other proposed reforms, "the 1907 Hague Convention and its annexed regulations represented the latest binding code of the laws of belligerent occupation preceding the coming of the Second World War."³¹

A) Post-War Development - The War Crimes Trials:

The incredible ravages of total warfare wrought by aggressor powers in World War II literally stunned the sensibilities of world opinion. The victorious Allied Powers, fully aroused by cumulative revelation of mass atrocities and wholesale violations of elementary concepts in the Law of War among civilized nations which had been perpetrated by the Axis powers, responded by post-war

31. Von Glahn, op. cit. supra note 23, at 15; general dissatisfaction, however, with the protection afforded to personnel under the Law of War, engendered by experience derived from World War I, led to further effort towards codification and resulted in adoption of the "Geneva Convention Relative to the Treatment of Prisoners of War," of July 27, 1929, 47 Stat. 2021, T. S. No. 846, which embraced the provisions of Articles 1, 2 and 3 of the Hague Regulations, affording prisoner of war status to irregulars and members of a levee-en-masse, if such persons met the requirements specified; aside from other conventions designed to humanize naval warfare at sea and to eliminate the use of poisonous gas and bacteriological warfare, efforts were made through the League of Nations and by treaties, which were

prosecution of those responsible in the noted War Crimes Trials for these numerous transgressions against International Law.³²

A few of the trials of War criminals, involving alleged culpability, excesses, and other ramifications of the Law of War concerning persons in occupied territory will be briefly mentioned at this point as merely descriptive, rather than expository, of the many issues raised at that time.

designed, through the use of collective security, to eliminate war, itself - this effort culminated in the portentous, "General Treaty for the Renunciation of War", of August 27, 1928 (popularly known as the "Kellog-Briand Pact", and "Pact of Paris"), 46 Stat. 2343, 94 L.N.T.S. 57. The "Pact of Paris" became highly significant in the development of principles of International Law following World War II, when the Judgment of the International Military Tribunal on September 30, 1946, ruled that the waging of aggressive war by the defendants had violated, inter alia, the "Kellog-Briand Pact", 1 Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg 218-24 (substantial portions of this Judgment are also reproduced in Bishop, op. cit. supra note 25, at 846-58).

32. A detailed resume of the trials of major war criminals is beyond the scope of this discussion. The reader will recall, however, the most notable of these trials, in which several high echelon officials of the Third Reich were brought to the bar of international justice. The trial of "war criminals" for violations of the Law of Nations was not novel in history; probably, never before, however, had key officers of an unsuccessful belligerent been prosecuted to this extent, or by such an imposing forum as the International Military Tribunal. See, 1 Judgment of the International Military Tribunal at Nuremberg, supra note 31.

The German commander in occupied Netherlands, General Rauter, was prosecuted for reprisals and other measures (including executions, forcible relocation of civilians and other collective penalties) which he had taken to repress the resistance activity which had interfered with his occupation regime. His defense contention, that such repression was justified under the Law of Nations by resistance activity of the populace, was rejected by the court, which ruled that civilian inhabitants were not bound by a duty of obedience to the belligerent occupant, that such inhabitants could lawfully resist the occupant, and that, while certain repressive punishments might be taken by the occupation authority, excessive measures in reprisal would subject the occupation commander to subsequent punishment for violation of International Law. This tribunal appeared, nevertheless, to have been substantially influenced by the initial unjustness of the aggressor-occupant's presence in Holland.³³

33. See, In re Rauter, XIV L. R. T. W. C. 89, at pp. 129, 134-35; Greenspan offers the following comment on the Rauter theory: "Some war-crimes courts have recognized the right of the general population in occupied territory to defend themselves against wrongs perpetrated by the occupant. Such counteractions of violence by the population for the purpose of self-defense have also been justified as being in the nature of reprisals against illegal acts, for the purpose of compelling adherence to the laws of war. Against justifiable reprisals of this kind, the courts have held, the occupant may not institute counter-reprisals," Greenspan, Modern Law of Land Warfare, 266-67 (1959).

Another noted trial, for mass atrocities committed against inhabitants and prisoners of war in occupied Russia, was "The Einsatzgruppen Case", which has been described as the "greatest murder trial in History". In this case, several Nazi "SS" group commanders were prosecuted for the extermination of about one million persons in occupied Soviet territory. Speaking of "justifiable reprisals" on the part of inhabitants of occupied territory, the tribunal stated, "under international law, as in domestic law, there can be no reprisal against reprisal. The assassin who is being repulsed by his intended victim may not slay him and then, in turn, plead self-defence."³⁴ In "The Hostages Case", in which execution of innocent persons in reprisal, as a deterrent for acts of "partisan" or unlawful belligerency, was reviewed, inter alia, by an American War Crimes tribunal, the court, in a decision which was unpopularity received in many European circles, held that under existing International Law the execution of innocent persons as hostages, "a very serious step", could only be taken after certain fundamental requirements are accomplished and following "meticulous compliance" with strict procedural safeguards, including trial, to determine if "such fundamental requirements have been met".³⁵ In another case, on an issue of

34. United States v. Ohlendorf, et al, (U. S. Mil. Trib., Nuremberg), IV T.W.C. 493 (1948).

35. United States v. List, et al, (U. S. Mil. Trib.,

the propriety of punishment of enemy covert personnel, other than spies in the orthodox sense, who were apprehended without the wearing of the customary military uniform, the court refrained from determining that the right to a trial, already existing under international law with regard to spies, was likewise accorded.³⁶

B) The Geneva Conventions of 1949:

Following the revelations of gross brutality by Axis participants in World War II and the many evidentiary volumes of horrendous atrocities adduced at the War Crimes Trials, as well as deficiencies or ambiguities which had thereby been revealed as to certain concepts of existing International Law (e.g., the occupant's right to execute hostages, the right of accused unconventional belligerents or partisans to a judicial hearing to determine guilt, etc.), further effort to ameliorate the plight of persons affected by hostilities in modern conflict resulted in the four Geneva Conventions of 1949, which constitute the most recent codification

Nuremberg), XI T.W.C. 1250-51, (1950); one respectable authority has gone so far as to cite this case for the proposition that, "Innocent persons cannot be executed as a reprisal." Greenspan, op. cit. supra 412.

36. Judgment of the Tribunal, in United States v. Von Lieb, et al, (U. S. Mil. Trib., Nuremberg), XI T.W.C. 462, at 523 (1950).

of the rules of civilized warfare.³⁷ Of primary interest to current concepts of belligerent occupation is the fourth of these Conventions, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, (hereafter referred to as, "GC"). Portions of this Convention (as well as of the companion Conventions) pertinent to this discussion are reproduced in the implementing, Army Field Manual 27-10,³⁸ which is a remote successor to the Lieber Code.

1. General Doctrinal Standards:

Let us briefly recapitulate the significant current concepts of the Law of Belligerent Occupation which have culminated from this protracted evolutionary process.

37. The four Geneva Conventions of 1949 are: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, T.I.A.S. 3362, hereafter referred to as "GWS"; (2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, T.I.A.S. 3363, hereafter referred to as "GWS Sea"; (3) Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S., 3364, hereafter referred to as "GPW"; and (4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, T.I.A.S. 3365, hereafter referred to as "GC". Complete texts of these Conventions, the 1907 Hague Conventions III, IV and V, and certain other protocols are reproduced in D A Pam. 27-1, supra note 30, for dissemination to American Forces throughout the World.

38. U. S. Dept. of Army Field Manual No. 27-10, The Law of Land Warfare, Ch. 5 at pp. 134-64, (1956), hereafter referred to as FM 27-10. This manual is a remote successor to the old Lieber Code, supra note 24, and, correspondingly, is not merely another military

Under the modern view, a status of belligerent occupation does not transfer sovereignty to the occupant, Rather, he merely "exercises" certain attributes of sovereignty pending the occupation, and possesses corresponding obligations; the ancient incident of occupatio, that sovereignty passes to the victor through conquest or subjugation, no longer obtains.³⁹ Professor Lauterpacht aptly describes the concept in the following passage:

"... The principle underlying these modern rules is that, although the occupant in no wise acquires sovereignty over such territory through the mere fact of having occupied it, he actually exercises for the time being military authority over it. As he thereby prevents the legitimate sovereign from exercising his authority, and claims obedience for himself from the inhabitants, he must administer the country, not only in the interest of his own military advantage, but also, at any rate so far as possible, for the public benefit of the inhabitants. Thus International Law not only gives rights to an occupant, but also imposes duties

training publication, but constitutes the official governmental view on current concepts of the Law of Land Warfare. Art. 1, Hague Conventions of 1907, supra note 30, had earlier required the "Contracting Powers" to issue instructions to their "land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention". Interesting comment on an analagous requirement (Art. 144, GC) of the 1949 Geneva Conventions, preparation of the current edition of FM 27-10, and final ratification of the Geneva Conventions is contained in Von Glahn, op. cit. supra, note 23, at 18-19.

39. GC, supra note 37, at Article 47; FM 27-10, supra, paras. 358 and 365; Greenspan, op. cit. supra note 33, at 215-16.

upon him."⁴⁰

Generally, effective governmental powers pass to the belligerent occupant, who exercises a temporary right of military administration over the occupied territory. Executive, legislative and judicial powers, as necessary, commensurate with the licit purposes of his army, may be exercised by the occupant, utilizing authority of martial law, when requisite, to accomplish his purpose. While, in general, the laws of the country should be followed in the occupant's administration, they need not impede his legitimate aim and purposes, but may be abrogated for political needs of the occupier, or as the exigencies of war and the occupation may require. It is generally accepted that in governing occupied territory, the occupation commander must provide for public order, safety and general security of persons and property. He should exercise his powers to insure the integrity of religious practices and respect individual lives, private property and family honor. Subject to

40. II Oppenheim, op. cit. supra note 18, at 433-34. Judicially, this position has long been recognized by the United States; see, *United States v. Rice*, 17 U. S. (4 Wheat.) 246 (1819). Diplomatically, the United States has also long since endorsed this view; see I Hackworth, *Digest of International Law*, 146, 157 (1940).

the proscriptions of the Hague Regulations (1907) and the 1949 Geneva Conventions, the legitimate exercise of general governmental authority during belligerent occupancy, as described in the preceding sentences, is appropriate under International Law, and must be recognized by the lawful government, in postliminium, after the termination of occupation.⁴¹

Moreover, the administration of the occupant will include the broad spectrum of governmental activity (many facets of which are subject to provisions of the Hague and Geneva Conventions), encompassing such functions as fiscal and economic control and administration, among others, to measures affecting public health, penal confinement, relief and welfare of children, as well as those concerned with postal, communications, utilities and transport systems of the occupied territory.⁴² Municipal functionaries may be deposed at the pleasure of the occupier; he should not compel them forcibly to perform their duties, except for reasons of "military necessity", and should, when local officials refuse to serve or are dismissed by him, appoint temporary

41. II Oppenheim, op. cit. supra note 18, at 436-38.

42. Greenspan, op. cit. supra note 33, at 227-35; U. S. Dept. of Army Field Manual No. 41-10, Civil Affairs Operations (1962), sets forth governmental policy regarding these varied activities. The power of a

functionaries in order to carry out his obligation to secure public order and safety under Article 43, Hague Regulations.⁴³

Existing courts and judicial officers of the occupied territory may either be maintained by the belligerent occupant, or, particularly in the light of post World War II occupation experience, he may alter, abrogate or suspend such dictatorial, totalitarian and discriminatory laws of the former sovereign, together with its system of judicial administration and procedure, as may be necessary to the legitimate purposes of the occupation and consistent with civilized concepts of justice. To this end - at least, in situations

military occupant over private property and the economic structure within occupied territory is primarily governed by the Hague Regulations; hence, nineteenth century, laissez-faire ideology forms the basis of existing legal concepts in this sphere. Due to the subsequent, modern trend towards socialization in most countries, thus limiting the scope of private property protected by the law of current codes, the opinion has been advanced that there is insufficient protection, under existing law, against economic exploitation of occupied areas by an unscrupulous occupying power. Stone, op. cit. supra note 22, at 727-32. Further analysis of economic problems is beyond the scope of this discourse.

43. II Oppenheim, op. cit. supra note 18, at 445, cf., Art. 54, GC; this concept, if carried to the extreme, is believed unrealistic by the writer, who served for several years with the United States Occupation Forces, Berlin. Rather, it is contended, "exigencies" of the situation might require higher standards of performance from otherwise recalcitrant, ministerial officials, in the interest of maintaining orderly governmental functions.

analogous to the recent Allied Occupation of the former Axis States - he may suspend or replace judges, as well as other officials, and create military or occupation tribunals to perform necessary judicial functions without doing violence to Article 43, Hague Regulations.⁴⁴ Parenthetically, the elementary principle

44. II Oppenheim, op. cit. supra note 18, at 445-57; Greenspan, op. cit. supra note 33, at 223-26. Latitude is afforded an occupant in modifying penal laws for considerations of "security" or if they present a threat "to the application of the present Convention". The population of occupied territory may be subjected to "essential" provisions to enable the occupant to fulfill the "obligations" of the "Convention", maintain "orderly government" and the "security of the Occupying Power"; GC, Article 64. Provisions for local judicial administration and the creation of occupation courts are also contained in FM 27-10, supra note 38, at para. 373.

It is noted that the victorious Allies did not follow the literal requirements of Sec. III, Hague Regulations (i.e., by "respecting, unless absolutely prevented, the laws in force in the country" - Art. 43) with regard to unconscionable Nazi legislation and portions of the internal political structure of defeated Germany during the Post-World War II "Occupation". There is substantial support for the view that upon the demise of the Third Reich, when Germany was totally occupied by, and unconditionally surrendered to the Allied Powers through complete defeat, resulting in debellatio, the existing codal Law of Belligerent Occupation ceased to apply, affording to the victors the earlier right of subjugation and annexation (the latter prerogative being, however, repeatedly disavowed by the Allies). The subsequent legal status and rule by the Allies, in condominium, was considered sui juris in International Law. Those supporting this view indicate, generally, that, as the Hague Regulations thereby ceased to apply upon the cessation of hostilities (i.e., termination of the state of "belligerency"), a period of "military occupation" succeeded the prior era of "belligerent occupancy", in which no restrictions were applicable to the Allies in administration of

is noted that "indigenous courts have no right whatsoever (during belligerent occupation) to try enemy persons (that is, individuals of the occupant's nationality or of that of any of his allies in the war) for any and all acts ... even if such acts are in the nature of

conquered Germany other than relevant agreements among the victorious Allies themselves, the International Law of Peace, including the Charter of the United Nations, and other minimum standards of the Law of Nations, protecting from crimes against humanity and preserving certain other interests, including various property rights. An analytical discussion of these principles, including a post-war Memorandum for the Judge Advocate General, several quotations from Hyde and Kelsen, with comment by Jessup and Wright, among others, is contained in an article by Professor Feilchenfeld (and other members of the Institute of World Polity) in *I World Polity* (Georgetown University), at 177 (1957). A slightly differing view is presented in Von Glahn, op. cit. supra note 23, Ch. 21, "The Legal Status of Defeated Germany", at 273; see also, Greenspan, op. cit. supra note 33, at 225-26.

Compare the different legal status of the successful belligerent occupant following the termination of hostilities in future war, under Art. 6, GC, providing, in part:

"In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143."

"Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention."

war crimes."⁴⁵

It will be recalled that the 1907 Hague Regulations had codified earlier concepts in order to preclude more traditional abuses in belligerent occupancy, thus rendering it a violation of Internal Law for an occupant to pursue such practices as to force inhabitants to give information concerning their army (Article 44), to compel an oath of allegiance to him from the inhabitants (Article 45) and to commit pillage (Article 47). The Hague Regulations had also: provided basic reforms through the requirement of respect for honour, rights and lives of private persons, their private property and their religion (Article 46); attempted to deter collective penalties and punishment against innocent parties by an occupant (Article 50), and the use of inhabitants in military operations against their own country (Article 52); and generally provided for conscientious, orderly administration, and equitable, humanitarian imposition of taxes, levies and requisitions by the occupier in occupied territory (Article 43, Articles 48, 49, Articles 51-56).

45. Von Glahn, op. cit. supra note 23, at 112; FM 27-10, supra note 38, at para. 374. For example, this elementary concept is codified for the current Allied Occupation of Berlin in Law No. 7, Allied Kommandatura, 2 Official Gazette, Allied Kommandatura Berlin, at p. 11 (March 31, 1950), which provides, inter alia, that German courts shall not exercise jurisdiction over members of the Allied Forces nor in matters involving the Occupation

2. Specific Requisites of the Geneva Codifications:

As the unfortunate experience of World War II and certain of the decisions in the War Crimes Trials proved the Hague Regulations, as well as customary Law of Nations, to be ineffective for the full protection of non-combatants and innocent victims in a modern, total war of aggression, the 1949 Geneva Conventions were designed primarily to ensure inviolability of the rights of various classes of affected persons during hostilities.

Substantial portions of the Geneva Convention for the Protection of Civilian Persons⁴⁶ are devoted to the protection of persons in occupied territory. Articles 27-33 of the Convention prescribe general principles for the treatment of persons in both occupied territory and in the territory of the belligerent. These "protected persons"⁴⁷ are to be accorded respect of

Authorities, or of the validity of their acts, in criminal or civil cases unless "expressly authorized, either generally or in specific cases, by the Allied Kommandatura or the appropriate Sector Commandant."

46. GC, supra note 37.

47. "Persons protected by the convention are those who, at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals." GC, supra note 37, Art. 4 (1); Art. 4 (2) further limits persons thus defined: "Nationals of a State which is not bound by

their persons, their honor, their religious beliefs and family rights; special protection is assured by reasons of age, sex (prevention of rape or enforced prostitution) or health, and no adverse consideration should be accorded due to their race or political opinions. "Such persons are accorded freedom from coercion, particularly to obtain information from them or third parties; brutality or measures which might produce suffering or extermination

the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."; and Art. 4 (4) excludes persons protected by the three companion Geneva Conventions from the definition contained in the Article. Thus, while the current convention proscribes inhumane acts of brutality, such as resulted in many of the War Crimes Trials following World War II, the range of civilian persons protected by this Convention is smaller, due to the limitations contained in this Article.

Colonel Draper has criticized the omission of protection for possible minority groups with the following significant comment:

"Nevertheless, large loopholes remain. The systematic extermination of Hungarians and Jews and Gypsies by Germany during the Second World War affords an example. Hungary and Germany were at that time co-belligerents with diplomatic representation between the two states. Under the pretext of founding work camps, Germany induced Hungary to part with large sections of her Jewish and "Gipsy" communities. These were subsequently exterminated in the camp of Auschwitz Birkenau in German occupied Poland. Article 4 of the Geneva Civilians Convention would not include such persons within the class of protected persons as long as normal diplomatic representation existed between the two States concerned." Draper, The Red Cross Conventions, at 28-29 (1958).

of these persons is proscribed. This prohibition is applicable "not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents" (Article 32).

Collective penalties, pillage, and reprisals are forbidden (Article 33), and the taking of hostages is prohibited (Article 34). In view of various exculpatory defenses offered in the many War Crimes Trials, Article 29 is most expedient, as it reaffirms both state and individual responsibility for treatment accorded to "protected persons." Additionally, these persons are entitled to access to the International Committee of the Red Cross, as well as of the Red Cross Society and similar organizations of the state in which they are residing. Moreover, "within the bounds set by military or security considerations", such persons are guaranteed the right of visitation, for purposes of assistance, by these organizations, apart from the visitation by representatives of the International Red Cross and of the Protecting powers, separately assured under Article 143 (Article 30).

Articles 47 through 78 of the Civilian Convention pertain exclusively to Occupied territory. "They are

to a large extent declaratory of existing International Law - though in some ways they go beyond the provisions of the Hague Regulations and supersede them as between the Contracting Parties."⁴⁸ Some of these provisions, largely those involving substantial variations from previous concepts or insuring individual rights in excess of those hitherto provided under International Law will be briefly mentioned below.

The benefits of the Convention are secured against political or governmental changes introduced by the Occupier (Article 47). Article 49 proscribes forcible deportations of inhabitants of occupied territory; the inhabitants may not be compelled to serve in the occupant's armed or auxiliary forces, and detailed provisions and proscriptions are set forth for labor of persons in such areas by Article 51. Specific measures are prescribed for the protection of children by Article 50. The right to communication with representatives of the Protecting Power is assured by Article 52. Article 53 prohibits unnecessary destruction of public or privately owned real or personal property, except when "absolutely necessary"; and Article 54 purports to deter a change in status of public officials and judges in

48. II Oppenheim, op. cit. supra note 18, at 451-52; Art. 154, GC, supra note 37, however describes the effect of the Civilians Convention as "supplementary" to the Hague Regulations.

occupied territory and to prevent coercion or discrimination against these officials if they abstain from their functions due to conscience, while retaining the occupant's right to remove such officials from their posts.⁴⁹

Articles 55 through 63 prescribe detailed requirements and obligations for the occupant with regard to food, medical services and supplies (a novel concept), as well as for public health and spiritual assistance. These articles also limit the requisition by an occupant of hospitals, food and medical supplies in a manner as to assure attendance to the needs of the populace. Relief consignments, both public and individual, are guaranteed, and the activities of the Red Cross and similar societies are protected from wanton violations by the occupying power.

Articles 65 through 77 of the Civilian Convention provide for a humane administration of the criminal law, including the penal provisions promulgated by the occupier under Article 64, through a prescribed system

49. The rights and obligations of the occupant as to property in the occupied territory is beyond the scope of this discussion. An analytical study is contained in Mundt, "Modern Warfare and Property on the Battlefield", thesis prepared for JAG School, United States Army, April, 1964. The inconsistency between Art. 54, concerning the status of public officials and judges, and Art. 51, as to compelling inhabitants to perform work, has been noted in II Oppenheim, op.cit. supra note 18, at 453.

of procedural requirements and judicial safeguards for an accused, which includes: the requirement of a "regular trial", upon adequate notice to the accused of the pending charges; opportunity to present evidence and to call witnesses in defense; the right to assistance of counsel and an interpreter, if necessary, as well as of appeal in certain cases; notification to the Protecting Power of the pending proceedings; and the right to detention within the occupied territory.

Penal provisions promulgated by the occupier should not be effective without adequate publication in the language of the populace, nor may they have retroactive effect (Article 65). Where an accused is charged with violation of a penal provision enacted by the occupant, trial must be before a non-political, military court, sitting in the occupied territory, though courts of appeal may sit elsewhere (Article 66). Courts shall consider "the fact that the accused is not a national of the Occupying Power" (Article 67). Penalties under Article 68, for offenses against the occupant are to be determined by the severity of the acts against him (analogous to major or minor offenses).

The penal provisions enacted by an occupant under Articles 64 and 65 may only impose the death penalty on a protected person "when the person is guilty of espionage, or serious acts of sabotage against the

military installations of the Occupying Power, or of intentional offenses which have caused the death of one or more persons, provided that such offenses were punishable by death under the law of the occupied territory in force before the occupation began"; moreover, a death penalty may not be imposed against a person who was under eighteen years of age at the time of the offense, or without calling the court's attention to the mitigating factor that, as the accused is not a national of the Occupying Power, he is not bound to it by a duty of allegiance (Article 68).

It is noted that paragraph 2 of Article 68 (the substance of which is quoted above) was opposed by the United States, among others, on the grounds that the occupant should possess the power to take drastic action against illicit actions directed against his security, and to prevent an unsuccessful belligerent from abolishing the death penalty in areas facing impending occupation, and thereby to threaten the occupant's security; consequently, the United States, the United Kingdom, Canada and the Netherlands reserved the right to impose the death penalty with regard to Article 68 (2) offenses, irrespective of the fact that such offenses may not have carried the death penalty under the law of the occupied area prior to the

commencement of occupation.⁵⁰

The right of petition for pardon or reprieve is assured those condemned to death, and further qualifications surround the death penalty by a requirement that execution be delayed for six months except for "individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power", wherein appropriate notice must be given the Protecting Power (Article 75).

"Protected persons" may only be subjected to "assigned residence or to internment" for "imperative reasons of security", subject to a right of appeal and adequate provision for their support (Article 78).

Certain other provisions also affect the rights of persons in occupied territory. Under Article 5, (GC), where a "protected person" in occupied territory is detained as a spy or saboteur, or under definite suspicion of activity hostile to the occupant's security, and where absolute military security requires, he may be regarded as having forfeited his rights of communication provided by the convention; however, such a person does not forfeit rights to humane treatment and to the "fair and regular trial prescribed by

50. Von Glahn, op. cit. supra note 23, at 119-20; II Oppenheim, op. cit. supra note 18, at 454; FM 27-10, supra note 27, at par. 438.

the Convention".⁵¹

Article 3 prescribes minimum and non-discriminatory standards in cases of "armed conflict not of an international character occurring in the territory of

51. Art. 5, GC, has been criticized on various grounds. Colonel Draper indicates that it could afford an occupier a regrettable latitude for unconscionable pressure on inhabitants of occupied territory in the name of "security": "... Such a power in the hands of the Detaining State opens up endless possibilities for bargains as to release. For example, the suspected civilian may be held up because it is thought he has knowledge of or contacts with escape route organizations for prisoners of war. His release may be conditioned by disclosures of such information. It would be difficult to deny that failure to disclose information on these terms justified his continued detention", (citing the World War II practice in Belgium, whereby the German occupants uncovered escape organizations - "the release of a member of a family from 'security custody' with the infamous 'Sicherheitsdienst' would be promised in return for information about escaping aircrew. This could be extremely successful in cases where the German security services, disguised as escaping aircrew, had been accepted as such by the family concerned."). Draper, *op. cit.* supra note 47, at pp. 30-31.

Professor Lauterpacht points out a gap in the requirement for a trial of persons falling within the operation of this Article, although it had been generally assumed that the right of trial was largely assured by decisions of the War Crimes Tribunals, for persons in these circumstances: "... The English text of the third paragraph of that Article proceeds to lay down that 'in case of trial' such persons shall not be deprived of the rights of fair and regular trial prescribed by the Convention. The expression 'in case of trial' seems to suggest a departure from the fundamental rule of the Convention that a trial is un-variably required. The French text of this paragraph uses the expression en cas de poursuite. The writer understands that the discrepancy is due to the fact that it proved impossible to reconcile the conflicting views on the subject." Lauterpacht, "The Revision of the Law of War", XXIX Brit. Y. Int'l. L., 360, 381 (1952; cf., Art. 3, GC.

one of the ... Parties" (i.e., civil war), for treatment of non-combatant persons and members of armed forces rendered hors de combat. These minimal standards include prohibitions against violence, murder, brutality, taking of these persons as hostages, degradation, and the imposition of sentences or execution "without previous judgment pronounced by a regularly constituted court" affording "judicial guaranties ... recognized as indispensable by civilized peoples". The Article also requires attendance to needs of the wounded and sick, urges the parties to utilize services of an humanitarian body such as the Red Cross, and to "further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention". Article 3 significantly indicates that application of the preceding requirements "shall not affect the legal status of the Parties to the conflict". The provisions of this Article were, indeed, considered of sufficient importance that identical Articles are contained in each of the four 1949 Geneva Conventions, as Article 3 thereof.

Most of the remaining articles of the Geneva Civilians Convention pertain to the treatment of internees, which is beyond the scope of this discussion. Other articles of this Convention and of the companion Conventions which are applicable to belligerent occupation will be discussed below, in context, when

pertinent.

Although the earlier Declaration of Brussels (1874) and the Hague Regulations (1907; Article 2) had afforded protective status to a levee en masse (persons who "spontaneously take up arms to resist the invading troops without having had time to organize themselves" into distinctive militia or volunteer corps) occurring in unoccupied territory, true historical precedents for such situations are apparently few in number.⁵² A wide segment of opinion was generated, largely during World War II, to the effect that resistance, or "underground" activity against an aggressor-occupant was justified and should, therefore, have more recognition under International Law.⁵³ In addition to the traditional protection accorded members of the levee en masse in unoccupied territory, Article 4 of the third Geneva Convention (Relative to Treatment of Prisoners of War), , affords limited protection for such "unconventional" combatants in occupied territory. Article 4, GPW, thus includes members of "organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied", within those groups defined

52. Von Glahn, op. cit. supra note 23, at 49-54.

53. Ibid.; see also, In Re Rauter, supra note 33.

therein as entitled to the protected status of Prisoners of War upon capture, provided the four traditional conditions or indicia of their belligerent status (as previously expressed in Article 1 of the earlier, Hague Regulations) are fulfilled:

- "(a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war." (Article 4A(2), GPW).⁵⁴

Article 5 of the same Convention further protects these persons (as well as others defined as Prisoners of War by Article 4) by a requirement, should they fall into enemy hands following commission of a belligerent act, that "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."⁵⁵

In concluding this Chapter, it is noted that, by

54. Supra, note 37.

55. A generous interpretation is accorded this provision by the United States in questionable cases. The "competent tribunal" must consist of a board of not less than three officers acting in compliance with prescribed procedure; nor may persons, found by such a board not entitled to prisoner of war status, be executed or otherwise penalized "without further judicial proceedings to determine what acts they have committed and what penalty should be imposed therefore". FM 27-10, supra note 38, par. 71 b, c and d, at 30-31.

the terms of Article 154, the Geneva Civilians Convention is considered as "supplementary to" Sections II (hostilities) and III (military authority in occupied territory) of the 1907 Hague Regulations. It is beyond the purview of this treatise to present a detailed analysis of all aspects of belligerent occupation.⁵⁶ In view of changing modes of modern warfare and envisioned battlefield exigencies, certain problem areas in present concepts of occupation will be outlined in a subsequent Chapter, with brief comments offered for further consideration.

56. An informative volume of this description is Von Glahn, op. cit. supra note 23. Probative summaries of the Law of Belligerent Occupation are also contained in several recognized authorities. Among several excellent works are: II Oppenheim, op. cit. supra note 18, Ch. XII, § § 165-72 b, at 430-56; Greenspan, op. cit. supra note 33, Ch. VII, at 210-77; Stone, op. cit. supra note 22, Ch. XXVI, at 693-732; U. S. Dept. of Army Pamphlet No. 27-161-2, II International Law, Ch. 6, at 159-88 (1962).

IV FUTURE WARFARE AND THE CHANGING BATTLEFIELD CONCEPT

A detailed prognosis of the strategy and variant tactics of future wars, either general or limited, nuclear or otherwise is, of course, beyond the capability of the writer. As no major nuclear conflict has ever been experienced by mankind, it is believed that any discussion of the varied ramifications which would ensue in that eventuality must remain, at best, highly speculative.

Nevertheless, relevant aspects of recent history, analyses of current events and comments of recognized experts do afford significant indicia that the strategy and tactics of future warfare of substance will evince a marked departure from that of past wars.

By reason of the extant, dualistic concentration of world political and military power, it is believed beneficial, for purposes of this discussion, to outline briefly the changing battlefield concepts from the American as well as from the Soviet points of view.

A) The American View:

1. Post World War II Concepts:

The reader will recall that for several years following use of the atomic bomb in the War against Japan, during the summer of 1945, the consensus prevailed throughout the western world that possession

of this weapon by the United States, with huge bombers capable of utilizing "the bomb" on strategic global targets would deter aggression and hence, the probability of war between the great powers, indefinitely. It did not appear inexpedient, therefore, that immediately following the Japanese surrender of World War II, the Western Allies rapidly and "thoroughly" demobilized their armies,⁵⁷ and complacently prepared for peacetime normalcy.

In 1949, the Soviet Union, surprisingly, exploded what is believed to be its first atomic device, some five years ahead of western estimates.⁵⁸ In 1950, with the outbreak of the Korean War, an astonished American Public was abruptly faced with prospects of limited war in which utilization of the mesmerizing power of our atomic arsenal was not deemed appropriate. It is a matter of general knowledge that American ground forces had been sadly diminished through rapid, post-World War II demobilization. Concentrated remobilization suddenly became imperative as the United States and her United Nations Allies were forced "to accept combat on the terms laid down by a rather primitive Asiatic army".⁵⁹

57. Gavin, *War and Peace in the Space Age*, 105-06 (1958); see also, Taylor, *The Uncertain Trumpet*, 12 (1959).

58. Taylor, supra, at 25; Gavin, supra, at 101-02.

59. Gavin, supra, at 123; see also, id., at 121-25.

Nonetheless, dominant United States strategic thought during that era was that the deterrent potential of our monopoly on the atomic bomb, which could be speedily delivered by manned bombers against aggressors, was an "absolute" weapon substantially reducing the need for conventional forces.⁶⁰ This theory, developed in 1945 and known as the doctrine of "Massive Retaliation", "later reached full acceptance as military orthodoxy in the so-called New Look program adopted by our government in 1953."⁶¹ Nevertheless, embarrassing lessons of the Korean War, the experiences of the French at Dien Bien Phu, and other events at the time, provided a source of grave concern, to many senior officers of the ground forces, with the inflexibility of the strategy of Massive Retaliation.⁶² However, this strategic creed remained as prevailing American policy during the nineteen-fifties.

During 1952 nuclear testing at Eniwetok, the United States developed a megaton weapon. In August of 1953, the World was amazed over news that the Soviets had successfully achieved a hydrogen explosion. The 1949 and 1953 nuclear accomplishments of the Russians stimulated substantial reflection in both official

60. Gavin, supra, at 102; Taylor, op. cit. supra note 57, at 4-5.

61. Taylor, supra, at 4-5.

62. See: Taylor, supra, at Chs. I & II; Gavin, op. cit. supra note 57, at Ch. 5.

and private American circles concerning eventual loss of our nuclear monopoly. The view was thus advanced by respectable authorities which conceded the emergence of an era of mutual nuclear deterrance, thereby presaging definite "limitations of dependence on a nuclear strategy"; hence, a theory was ventured that "limited" warfare is the only type of conflict which would "conceivably" occur in the future.⁶³

During the ensuing years various missiles and rockets were developed by both the Soviet Union and the United States. Wide public debate followed in the forum of American public opinion over the continued wisdom of exclusive reliance on the inflexible concept of Massive Retaliation as the primary defense of the nation.

In 1958, the noted analyst, Hansen W. Baldwin, published an evaluation of American strategic reliance upon the exclusive nuclear deterrent, in which a grave critique of prevalent policy was posed:

63. Taylor, supra, at 25-26. General Maxwell D. Taylor (currently, United States Ambassador to the Republic of South Viet Nam; formerly, Chairman, United States Joint Chiefs of Staff and Chief of Staff, United States Army) credits George F. Kennan, B. H. Liddell Hart, W. W. Coffman, Vanevar Bush, and Bernard Brodie, as publicly indicating as early as 1954 (following the successful Soviet hydrogen explosion of 1953), that the era of total war had passed, and in the future "limited military operations are the only ones which could conceivably serve any coherent purpose." Id., at 26.

"... There has been a slow change in the world balance of military power ever since the Soviet detonated its first atomic bomb in 1949. In strategic terms, our past nuclear dominance has almost shifted to a balance of terror ...".⁶⁴

Among those advocating a conceptual change in defense policy to a posture which could embrace the more elastic response of "limited war", either nuclear or conventional - dependent upon the powers and international variables which might be presented - as the only rational military policy for the future, was Dr. Henry A. Kissinger. In a study prepared on behalf of the Council on Foreign Relations in 1957, this authority criticized the current wisdom of the American principle of "unconditional surrender" as a prevailing military response to aggression, and contended:

"... A strategy of limited war represents a realization that it is no longer possible to combine a deterrent based on the threat of maximum destructiveness with a strategy of minimum risk."

"... The purpose of a policy of limited nuclear war is not to provide a substitute for all-out war, but to create a range of options within which the response can be brought into balance with the provocation and where military capability and the will to use it will be in greater harmony than in the stark case when all-out war remains our only response to a challenge."⁶⁵

Details of the American "arms debate" form no useful part of this discussion. Although no substantial

64. Baldwin, The Great Arms Race, 12-13 (1958).

65. Kissinger, Nuclear Weapons and Foreign Policy, 173, 200-01 (1957).

departure from the policy of Massive Retaliation was then initiated, continued Soviet progress in nuclear capabilities, and in missile development, as well as the concomitant strength in her ground forces, stimulated further appraisal in domestic circles concerning the American strategic position, and in the advisability of pursuing a more flexible course in our capability for armed reaction to potential hostilities.

Adverting, as early as 1957, to the significance of these changing notions, the late Secretary of State, John Foster Dulles, wrote:

"During the ensuing years the military strategy of the free world allies has been largely based upon our great capacity to retaliate should the Soviet Union launch a war of aggression. It is widely accepted that this strategy of deterrence has, during this period, contributed decisively to the security of the free world.

However, the United States has not been content to rely upon a peace which could be preserved only by a capacity to destroy vast segments of the human race. Such a concept is acceptable only as a last alternative Recent tests point to the possibility of possessing nuclear weapons, the destructiveness and radiation effects of which can be confined substantially to predetermined targets.

In the future it may thus be feasible to place less reliance upon deterrence of vast retaliatory power. It may be possible to defend countries by nuclear weapons so mobile, or so placed, as to make military invasion with conventional forces a hazardous attempt. Thus the tables may be turned, in the sense that instead of those who are non-aggressive having to rely upon all-out nuclear retaliatory power for their protection, would-be aggressors will be

unable to count on a successful conventional aggression, but must themselves weigh the consequences of invoking nuclear war." (Emphasis supplied.)⁶⁶

Through this "debate", sufficient divergence from the existing position had been advocated both within the government and in responsible private commentaries to portend an eventual shift in American strategic and

66. Dulles, "Challenge and Response in United States Policy", 36 Foreign Affairs 25, 31 (1957). Ambassador Maxwell D. Taylor (then Army Chief of Staff) portrays these thoughts of Secretary Dulles as evincing a serious desire for "military solution" which would "permit lessened dependence upon Massive Retaliation. Taylor, op. cit. supra note 57, at 57. General Taylor further indicates that Mr. Dulles believed this hope might be achieved through development of "low-yield atomic weapons", a view which the Secretary pursued during meetings with military chiefs and the Secretary of Defense in the spring of 1958. Ibid. Moreover, in the course of policy review within the Joint Chiefs of Staff later in the spring of the same year, spokesmen for the Navy and Marine Corps also voiced the position for flexibility in approach then being advanced (though not for the first time) by the Army, that: "the United States must recognize the implications of mutual deterrence, must be prepared to fight limited war with or without nuclear weapons, ... should provide itself with a wide range of nuclear yields ..."; the "... United States must be prepared to establish limited objectives to military operations whenever such action serves its interest"; and that "Massive Retaliation could not be the answer to everything - perhaps not the answer to anything." Though the Air Force did not join in the concept of "nuclear parity and of mutual deterrence", nor was this view then adopted as official United States policy, it was decided that these varying concepts should remain under "continuous review". Id., at 58-65.

tactical concepts, particularly when considered in context with progressive Russian missile achievements combined with the vastly increased mechanization of Soviet ground forces.⁶⁷

Following the Red Army Day parade in November, 1957, the amazing technological development in the Soviet Army, which had then been revealed, was noted and recognized in official American circles. It was, thus, later conceded by the United States Deputy Secretary of Defense that Russian ground forces equipment was of "general superiority".⁶⁸ In April, 1958, the President proposed certain internal reorganization measures within the Department of Defense. Of future legal and strategic significance, the modifications adopted pursuant to these proposals were not, however, utilized to effect changes of substance in basic strategic policy of that era.⁶⁹

67. Baldwin, op. cit. supra note 64, at 44; see also, Gavin, op. cit. supra note 57, at Ch. 1.

68. Baldwin, supra, at 35 (quoting Hon. Donald A. Quarles).

69. Department of Defense Reorganization Act of 1958, 72 Stat. 514; Sec. 5 (b) of this act, nevertheless, did amend Sec. 202 of the National Security Act of 1947 (61 Stat. 495), to provide for the establishment of unified and specified combatant commands "responsible to the President and the Secretary of Defense for such military missions as may be assigned to them by the Secretary of Defense, with the approval of the President." In 1961, the Army's Strategic Army Corps ("STRAC") was combined with the Air Forces Tactical Air Command ("TAC") to comprise a unified command designated as Strike Command ("STRICOM"), which is generally considered capable of

2. Current Doctrine:*

Immediately following his retirement in 1959 as Army Chief of Staff, General Taylor published a critique of American strategy entitled, "The Uncertain Trumpet",⁷⁰ in which it was urged:

"The strategic doctrine which I would propose to replace Massive Retaliation is called herein the Strategy of Flexible Response. This name suggests the need for a capability to react across the entire spectrum of possible challenge, for coping with anything from general atomic war to infiltrations and aggressions such as threaten Laos and Berlin in 1959."⁷¹

This evolution in military thought merited an official reception following the 1960 elections when, in 1961, President Kennedy recalled General Taylor to duty as his personal military advisor.⁷² It is worthy of mention that another officer of prominence, Lieutenant General James M. Gavin, (formerly Army Chief of Research and Development), who had retired and written a critical

performing highly mobile operational missions over wide areas of the globe, if necessary. Due to its classified nature, however, little public information is available concerning "STRICOM". United States Department of Army Pamphlet No. 27-187, Military Affairs (1963).⁷³ See also, Taylor, op. cit. supra note 57, at 175, and Baldwin, op. cit. supra note 64 at 94-96.

^{70.} Taylor, op. cit. supra; Gen. Taylor's work has been frequently cited in this section, as his views have obviously had considerable influence on recent United States military doctrine.

^{71.} Taylor, supra, at 6.

^{72.} Later, Gen. Taylor was appointed Chairman of the Joint Chiefs of Staff; he is presently the United States Ambassador to the Republic of Viet Nam. Time Magazine, January 8, 1965, p. 15.

analysis of United States military policy in 1958, War and Peace in the Space Age, was appointed by President Kennedy as United States Ambassador to France, following the Elections of 1960.⁷³ In support of his thesis, and in the Von Clausewitz tradition, General Gavin had classically observed:

"... a thermonuclear-equipped B-52 can contribute little more to the solution of a limited local war than a 155-mm gun can contribute to the apprehension of a traffic violator."⁷⁴

In view of the many lessons of post World War II history, United States military strategy has since shifted to concepts which are founded upon mobility and pliancy of reaction; "exclusive" reliance on an "absolute" nuclear deterrent is no longer deemed sufficient for the security of the nation. Rather, current military doctrine envisions an American capacity to respond with celerity to any strategic crisis or fluid battlefield situation that may arise. With regard to United States ground forces, this variable response

73. Gavin, op. cit. supra note 57. In view of the events of this decade, the writings of both Generals, Taylor and Gavin, are considered to possess significant value with regard to current military doctrine. See also, "New Career for Gavin", United States News and World Report, April 3, 1961, p. 22.

74. Gavin, supra at 128.

may now be made, tactically, in both nuclear and non-nuclear situations.⁷⁵ Hence, in 1963, the Secretary of Defense could aptly comment:

"... What most needs changing is a picture of ourselves and of the Western Alliance as ... outmanned and outgunned except for nuclear arms no longer exclusively ours. We should not think of ourselves as forced ... to rely upon strategies of ... vast mutual destruction, compelled to deal only with the most massive and intermediate challenges, letting lesser ones go by default ...

Within the last two years we have increased the number of our combat-ready Army divisions by about 45% ... a 30% increase in the number of tactical air squadrons; a 75% increase in airlift capabilities, and a 100% increase in ship construction and conversion ...

The key to effective utilization of these forces is combat readiness and mobility. The most recent demonstration of our ability to reinforce our troops presently stationed in Europe occurred in Operation Big Lift, ... For the first time in military history, an entire division was airlifted from one continent to another ...

We need the right combination of forward deployment and highly mobile combat-ready ground, sea and air units, capable of prompt and effective commitment to actual combat, in short, the sort of capability we are increasingly building up in our forces ..." (Emphasis supplied).⁷⁶

Recent modifications have also been effected in United States land forces, to promote a maximum variability

75. United States Dept. of Army Field Manual No. 101-31-1, Nuclear Weapons Employment, par. 105, p. 4, and generally, (1963), hereafter referred to as FM 101-31-1; Gladstone's, Effects of Nuclear Weapons, originally published by the United States Atomic Energy Commission (1957), has been reproduced by the Army and used as an official training aid, U. S. Dept. of Army Pamphlet No. 39-3, The Effects of Nuclear Weapons, (1962).

76. McNamara, "Our Military Strategy and Force Structure", United States Army Information Digest, February, 1964,

in deployment, with a significant emphasis towards attaining mobility commensurate with the firepower capability of modern tactical arms. Describing these developments in 1964, the Chief of Staff, United States Army thus noted:

"... The Army is now clearly concerned with bringing Army mobility to the level of existing improvements in firepower and communication... With mobility improved commensurately with our advances in communications and firepower, we shall have a better balanced fighting force - a modern Army that is tactically and strategically mobile, maneuverable and reinforceable."⁷⁷

Consistent with these views, prodigious military evaluation is presently continued in order to avoid the static vulnerability which might otherwise result from stagnation in dogma or concept through complacent adherence to tactical theories of previous wars. In a recent reorganization of American ground forces to insure increased tactical flexibility, therefore, the object lessons of World War I and advanced German concepts which led to quick field successes over Belgium and France in World War II, have not been ignored.⁷⁸

pp. 38-43, (from an address originally made to the Economic Club of New York on November 18, 1963).

77. Wheeler, (now Chairman, United States Joint Chiefs of Staff), quoted in "Army Moves Towards Mobility", United States Army Information Digest, February, 1964, pp. 32-37.

78. "Our present ROAD division and the make-up of our modern Army structure of sixteen divisions follows the same principle of combinations of the combat arms in which firepower and mobility are balanced. I emphasize this principle of balance, which today means, in effect,

Recent history indicates that the response of our nation, as that of other modern powers, to any military exigency of the future will be swift and mobile, and as varied as the requirements of the tactical situation. Changing battlefield concepts portend instantaneous movement of troop concentrations over hundreds or thousands of miles. United States sea and air landings in Lebanon of 1958,⁷⁹ as well as recent air lifts to the

keeping the means of mobility abreast of the advances in firepower.

We intend to avoid a repetition of the situation which developed in World War I when the machine gun and artillery brought maneuver largely to a halt and resulted in the carnage in battles such as those on the Somme and in Flanders. Late in that war, the land began to redress this balance and to restore mobility to the battlefield.

The organization, materiel, and doctrine of the major armies that began World War II represented their respective conclusions on the lessons of World War I concerning firepower and mobility. The conclusions reached by the German Army proved to be decisively the better, and its ground forces - that were only partly mechanized - overwhelmed Belgium in 18 days and France in 19 days. These facts present a startling example of the impact of doctrine in a situation in which the materiel on the opposing sides were roughly equal.

The German Army in 1940 had neither quantitative nor qualitative superiority in armor. But the German doctrine of grouping tank and motorized divisions into powerful mobile, combined arms teams supported by tactical airpower proved overwhelmingly superior to the doctrine of armor dispersal practiced by the allies." Wheeler, quoted in, "Army Moves Toward Mobility", United States Army Information Digest, June, 1964, pp. 2-3.

79. Taylor, op. cit. supra note 57, at 92-93, 151, 153.

Congo incident to the rescue of "white hostages",⁸⁰ exhibit the speed with which a verticle or sea lift action may now be executed.

Future tactical operations may thus include the swift deployment of "sky cavalry"; as envisioned by General Gavin for use by ground forces, "sky cavalry teamed with drone surveillance forces offers our military establishment the greatest innovation in tactical combat since the beginning of history".⁸¹

While airborne operations were utilized for mobility and surprise during World War II,⁸² modern innovations indicate significant advances for the future in these concepts. As noted below, the Soviet Union has achieved a substantial capacity for paratroop and air-lift actions. United States tacticians, likewise, are continuously improving these potentialities, so that in future warfare the constant air-lifting of units, varying in size from the company to an entire air assault division will, doubtlessly, be routine.⁸³

⁸⁰. United States News and World Report, December 7, 1964, at 41-43; Time, December 18, 1964, at 30.

⁸¹. Gavin, op. cit. supra note 57, at 228; see also, pp. 226-7, pp. 266 and 273.

⁸². Id., Chs. 3 and 4.

⁸³. An air assault division, and other tactical units of this type are currently under experimentation by the Army. See a descriptive comment on the 11th Air Assault Division (Test), and other units, in "Test For Air Assault Units", U. S. Dept. of Army, Command and General Staff College, Military Review, (April, 1963), p. 100;

A considered and significant prediction of military tactics for limited nuclear war is deemed of interest as a concluding thought, both as to future battlefield conditions and as regards traditional notions of belligerent occupation:

"The tactics for limited nuclear war should be based on small, highly mobile, self-contained units, relying largely on air transport within the combat zone. ... The units must be mobile, because when anything that can be detected can be destroyed, the ability to hide by constantly shifting position is an essential means of defense. The units should be self-contained, because the cumbersome supply system of World War II is far too vulnerable to interdiction. The proper analogy to limited nuclear war is not traditional land warfare, but naval strategy, in which self-contained units with great firepower gradually gain the upper hand by destroying their enemy counterparts without physically occupying territory or establishing a front line.

While it is impossible to hold any given line with such tactics, they offer an excellent tool for depriving aggression of one of its objectives: to control territory. Small, mobile units with nuclear weapons are extremely useful for defeating their enemy counterparts or for the swift destruction of important objectives. They are not an efficient means for establishing political control ... Nuclear units of high mobility should, therefore, be used to make the countryside untenable for the invader. They should be supplemented by stationary defensive positions in deep shelters, immune to any but direct hits by the largest weapons to discourage sudden coups against cities.

A defensive structure of this type would pose a very difficult problem for an aggressor. To defeat the opposing mobile units he would require highly mobile detachments of his own. To control hostile territory and reduce nuclear

For a revealing description of the novel possibilities for ultra-mobility presented by "air cavalry" units in a specific tactical situation, see Howze, "Tactical Employment of the Air Assault Division" Army, p. 35 (Sept., 1963); as a result of substantial evaluation, air assault units have been recently recommended, "Air Assault Force Proposed by Army", New York Times, Feb. 4, 1965, p. 20 (City Ed.).

hedgehogs, he would have to use massive forces. Against determined opposition, it will prove very difficult to combine these two kinds of warfare. Stationary, well-protected hedgehogs should force the aggressor to concentrate his forces and to present a target for nuclear attack. Mobile nuclear units should be able to keep the enemy constantly off balance by never permitting him to consolidate any territorial gains and by destroying any concentration of his forces

These tactics will require a radical break with our traditional notions of warfare and military organization"⁸⁴

B) Soviet Military Doctrine in the Nuclear Era:

1. Strategic Concepts:

That future conflict amounting to major or significant, limited war will exhibit mobility of forces and a degree of tactical pliancy hitherto unknown, has not escaped the observation of Soviet military strategists. The military forces of modern Russia have thus been highly redeveloped and modernized since World War II, to assure a capability for deployment under any situation, nuclear or non-nuclear, envisioned by current military science. No modern strategical or tactical factor has been neglected by the Soviet Ministry of Defense in its thorough preparation of the current military posture of the Soviet Union.

By virtue of its geographical location on the land mass of the Euro-Asian Continents, the Soviet Union has, historically, placed great emphasis on the utilization

84. Kissinger, op. cit. supra note 65, 180-81.

of huge field armies to close with the enemy and, eventually, to occupy his territory. Thus, Russian strategists have never shared the belief that exclusive military reliance could repose upon an "ultimate weapon", or upon a single, dominant arm of the military forces.⁸⁵ Soviet doctrine, rather, has contemplated a considerable latitude in the deployment of modern, balanced forces. As recently as May, 1960, the creation of a new service, the strategic rocket forces, was announced by Krushchev to provide an additional arm for the Soviet military establishment, and to complement the existing ground forces, air forces, navy and air-defense forces.⁸⁶

An extensive analysis of current Soviet military strategy is contained in a well documented study by Raymond L. Garthoff, revised in 1962 and entitled, Soviet Strategy in the Nuclear Age. Some of Garthoff's critical observations are relevant to this discussion and merit further comment.

Speaking of rapid strides in Soviet development of ballistic missiles, and of strategic planning for the possible use of such weapons, Garthoff indicates:

"... As predicted, the Soviets did in fact establish a separate long-range missile command

85. Garthoff, Soviet Strategy in the Nuclear Age, Ch. 4, generally, at 61-96, and particularly at 76-81 (Revised ed., 1962).

86. Id. at 256.

under a marshal of artillery. Krushchev revealed this organizational innovation in May, 1960 ... Though there is little reliable information publicly available on current strengths, it is clear that the Soviets believe that their long-range missile force will eventually supersede long-range bomber aviation.

Marshal Moskalenko ... in late 1961 described the ... significance of Soviet missiles ...

... The emergence of a new type of national armed forces, the rocket troops, has a substantial influence on the further development of Soviet military science ... Until the appearance of rocket-nuclear weapons there were no means ... possible to attain decisive objectives of a war within brief periods of time and in any theater of military operations ... At the present time, our armed forces dispose of powerful rockets with nuclear warheads, which make it possible to attain strategic objectives of a war in a short period of time. The rocket troops are capable of conducting operations of varying scope in any area of the globe, and they can exert a substantial influence not only on the course but also on the outcome of a war as a whole."⁸⁷

As thus indicated, the Soviet Union has not forgone an availability of the latest of weapons in the nuclear arsenal. Despite these significant missile and rocket achievements, affording strategic variability, Russia retains the position that "future nuclear war would probably be long and drawn out", and that land "Campaigns would be necessary to destroy all the enemy's military forces and potential and to occupy his territories" (Emphasis supplied).⁸⁸ Soviet theoreticians do not, therefore, conclude that "Blitzkrieg" tactics

87. Id. at 263-65.

88. Id. at 258-59.

alone will achieve decisive victory in a major war.⁸⁹

It is their general view that only a long war, with the use of large ground forces, as well as other military arms unified in appropriate balance, will successfully reduce a major enemy to control and achieve ultimate victory.

"... For example, on the occasion of Krushchev's 1960 military policy announcement ..., Minister of Defense Malinovsky declared:

The rocket troops are indisputably the main arm of our armed forces. However, we understand that it is not possible to solve all the tasks of war with any one arm of troops. Therefore, proceeding from the thesis that the successful conduct of military operations in modern war is possible only on the basis of a unified use of all means of armed conflict, and combining the efforts of all arms of the armed forces, we are retaining all arms of our armed forces at a definite strength and in relevant, sound proportions.

The reaffirmation of the continuing need for a balanced and varied force structure has been often reiterated in Soviet military doctrine in the period since ... Other Soviet discussions stress the importance of other arms, particularly the ground forces, in exploiting the gains of nuclear-strikes. Marshal Yerezenko, for example, has remarked:

Until recently, the ground forces played the main role in strategic planning. Now the situation has changed. These troops, however, continue to have great significance, since only with them can successes attained by the use of new weapons systems be consolidated and extended. General of the Army Kurochkin has also recently advanced the thesis that war in secondary theaters may closely resemble World War II, because the main use of nuclear weapons will be concentrated in the main theaters.

89. Id. at 257-58, and 84.

The closely associated principle of combined action of the various arms continues to be Soviet doctrine. As the authoritative 1961 volume Marxism - Leninism on War and the Army states:

For victory it is necessary to use effectively the forces and resources on hand, and that is achieved above all by a rational and well-planned combined operation of the various arms of the armed forces." (Emphasis supplied).⁹⁰

The foregoing theses, demonstrating Soviet rejection in concept of an "ultimate" or "absolute" weapon for decisive victory in future warfare, are of particular interest when contrasted with American and western military doctrine of the post World War II years, as discussed above.

It is also of significance that, during the same era, in addition to its disavowal of the doctrine of the "ultimate" weapon, the Soviet Union had steadfastly maintained the view that "defeat of the enemy will be achieved above all by means of the annihilation of his armed forces", and that "the objective of combat operations must be the destruction of the [enemy] armed forces, and not strategic bombing of targets in the rear."⁹¹

Moreover, Russian military strategists persevered in the concept of balanced arms following development of their atomic bomb in 1949, their thermo-nuclear weapon in 1953, their intercontinental jet bomber in 1954, and their intercontinental ballistic missile in 1957.⁹²

90. Id. at 256-57.

91. Id. at 72-73.

92. Id. at 76.

2. Tactical Concepts:

As indicated, throughout recent years, the Soviet Union has asserted the vital necessity of large standing armies. Marshal Zhukov has been cited as emphasizing the importance of this position shortly prior to his fall from "grace" in 1957.⁹³ His tactical predictions at the time are also indicative of the official staff position with respect to chemical and bacteriological warfare:

"A future war, should it be unleashed, will be characterized by the massive use of air forces, various rocket weapons and various means of mass destruction such as atomic thermonuclear, chemical and bacteriological weapons. However, we proceed from the principle that the very latest weapons, including the means of mass destruction, do not lessen the decisive importance of land armies, the fleet and the air force"⁹⁴

Despite development of the Soviet intercontinental ballistic missile in 1957, current Russian dogma stresses the need for vast ground forces to consolidate strategic successes in future warfare with "decisive operations", and a concomitant necessity even to increase the land forces in the event of nuclear conflict, as quoted by Garthoff, Lieutenant General Krasilnikov of the Soviet General Staff, thus stated in 1956:

"... The atomic or hydrogen weapons and in general any single weapon, cannot decide the fate of a war. All forms of armament are necessary, and together with them massed armed

93. Id. at 149, 152.

94. O'Brien, Legitimate Military Necessity, II World Polity (Georgetown University), at 79 (1960).

forces capable of waging a strenuous struggle on land, sea and in the air ... Weapons of mass destruction not only require mass armed forces, but require their inevitable increase. (Emphasis supplied).⁹⁵

With regard to tactical deployment of these land forces in a nuclear war, it has long been recognized by Soviet tacticians that fixed positions and large concentrations of troops present a vulnerable target, and that substantial dispersion of ground forces is, therefore, essential.⁹⁶

In order to achieve rapid dispersion of troops, as well as their concentration, where needed to meet the exigencies of the nuclear battlefield, Russian doctrine recognizes mobility as a capability of paramount importance.

"Mobility of the troops is considered the key to victory in all forms of combat operations under conditions of the employment of means of mass destruction. ... In addition to mobility, dispersal, and improved reconnaissance, another measure of achieving defensive security emphasized by the Soviets is the 'hugging' technique. As Colonel Yakovkin has put it: 'The best defense against an atomic strike is precipitate closing with the enemy,' so that he cannot use atomic weapons without endangering his own front lines. Thus the Soviets are led to implement the old principle that the best defense is offense."⁹⁷

From these tactical aspects of atomic ground warfare, the Soviet General Staff has concluded that nuclear

95. Garthoff, op. cit. supra note 85 at 154.

96. Id. at 158.

97. Id. at 159.

weapons will substantially "increase the offensive potentialities of the ground troops"; it is also believed by Soviet theoreticians that land forces can thus be deployed in the offensive to attain "a swift breakthrough of [enemy] defensive lines and destruction of the [enemy] tactical and close operational reserves."⁹⁸

What are the weapons and equipment considered necessary by the Soviets to achieve the tactical concepts discussed above? Significant emphasis has been placed by the Soviets, in recent years, to substantial augmentation of the following instrumentalities of ground warfare: extensive capability for combat with tanks; the wide use of tracked, armored vehicles for transporting infantry; a notable variety of self-propelled guns, organic to all Soviet Divisions; and tactical utilization of both long and short range rockets.⁹⁹

Moreover, the deployment of airborne troops for swift penetrations and strikes has been stressed by current Soviet planners; the expanded use of helicopters, as well as verticle lift vehicles, has also been of significant importance in Soviet nuclear war concepts; projected air transport for all infantry troops to achieve the ultimate goal in mobility, has thus

⁹⁸. Id. at 159.

⁹⁹. Id. at 160-61.

received emphasis.¹⁰⁰ In these respects, Russian staff experts, characteristically in constant evaluation of Western military development, have concluded that air-mobility of troops is considered as "the key to success" in predominant American concept, citing particularly, the views of General Gavin.¹⁰¹

Soviet tactical doctrine also envisions the use of individual airborne units of battalion, or smaller size, which could be dropped or landed far behind enemy lines to seize or destroy objectives of key importance, or to conduct missions of raid or ambush. In the event of nuclear conflict, such units could be utilized with protective equipment to accomplish these purposes, or to carry nuclear weapons capable of neutralizing the enemy in sensitive areas. Such tactics, requiring a sophisticated potentiality in mobility, are considered feasible and appropriate in view of recent advances in military air transport facilities, which currently possess the requisite speed, range and cargo capacity to accomplish these missions.¹⁰²

Without dwelling on the future possibilities of projected strategic weaponry, such as suboceanic launched missiles and rockets, atomic powered bacteriological and

100. Id. at 161-62.

101. Id. at 131.

102. Donstov (Col) and Livotov (Lt. Col.), Deystviya Desantnykh Podrazdeleniy (Soviet Airborne Tactics), Voyennyy Vvestnik (Nov., 1963), as translated and digested in U. S. Dept. of Army, Command and General Staff College, Military Review, at 29-33, (Oct., 1964).

chemical weapons capable of destroying life on large segments of the globe - including a "death-ray" obtainable from harnessing the power of the sun - or inter-planetary ballistic missiles (believed by some theorists as feasible within the next decade or two),¹⁰³ a concluding prediction, in Soviet Concept, for ground forces tactics ten years hence is considered germane in this context:

"The Theater Forces"

"The Theater forces will be essentially the Army of the future, one at least as different from that of today as the present one is from that of World War II. Conventional infantry will have been replaced by fully mechanized and largely 'airbornized' soldiers. Conventional artillery will remain, but the major weapons of artillery will be rockets, ranging from less than one to more than a thousand miles in range of fire, and from high-explosive to high-yield thermonuclear shells. Mobility will transform both the infantry and artillery into armored forces, and the tank forces will thus tend to merge or absorb them. New tanks may even fire nuclear shells, and tanks may be developed which can fly. The greater operational mobility required for future nuclear war of maneuver will be gained by the widespread use of varied vertical-takeoff aircraft, aerodynes, and helicopters. Not only will the new Army take to the air, it will take to the ground. New vehicles for subterranean movement, or at least rapid burrowing for temporary protection, will have appeared. New means of communications, including television, and night vision aids, will permit rapid reconnaissance and movement. Such tactical aviation as remains will be even more closely integrated into the Army. In addition to the use of nuclear shells, rockets, and bombs, there may be 'battlefield' use of paralyzing gases and rays, and of radiological weapons.

103. Garthoff, op. cit. supra note 85, at 245-46.

The purpose of the theater forces would be the rapid subjection of all the Eastern hemisphere. 'Nuclear neutralization' by massive destruction might be employed against key enemy areas of great resistance (such as Great Britain), but on the whole the Soviets would expect to conquer, rather than pulverize, Eurasia and Africa. For this purpose of conquest, the large theater forces would have to be maintained."¹⁰⁴

104. Id. at 246-47.

V ARE THE CURRENT CONCEPTS OF BELLIGERENT OCCUPATION SUFFICIENT FOR THE EXIGENCIES OF MODERN AND FUTURE WARFARE? SOME PROBLEMATIC AREAS DISCUSSED

A) When is Belligerent Occupation Effected?

The traditional principle envisions a state of belligerent occupation as effected, in legal contemplation, when an invading belligerent takes physical possession of enemy territory for the purpose of holding this area for, at least, a temporary period. Article 42 of the Hague Regulations defines the rule which is essentially based on the military factual situation, in this manner:

"Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where authority has been established and can be exercised."

Thus, the many governmental prerogatives of the belligerent occupant depend upon physical retention of the territory he has seized, as defined in the Hague Regulations above, while the protection afforded to most civilians during invasion or conflict attaches much earlier, by virtue of the 1949 Geneva Conventions:

"Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict ..." (Article 4, G.C.).

As will be indicated presently, the classical legal concept of "occupation", a refined, historical derivative

from the early Roman Law of occupatio (ante, Chapter I, B) and quite adequate to the customs of conventional warfare, is hardly sufficient to the tactical exigencies envisioned in nuclear or other future conflict.

1. Occupation Distinguished From Invasion:

While occupation will normally follow hostile invasion of enemy country, the traditional status of occupation should be distinguished from mere invasion or temporary forays by a party to the conflict, either by surface or air, over unfriendly terrain or the domain of a non-belligerent.¹⁰⁵ Under this orthodox view, inherent in current concepts which obviously relate to the Roman Law doctrine of occupatio, it is questionable whether the technical status of "occupation" will ever be achieved, short of ultimate defeat by one of the belligerents, under conditions of tactical elasticity contemplated for major future warfare.

2. Occupation Distinguished from the Civil Affairs Function:

Belligerent occupancy should also be distinguished from governmental powers exercised and administered by an external power (usually military or quasi-military)

¹⁰⁵. "... Occupation is invasion plus taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent from the fact that an occupant sets up some kind of administration, whereas the mere invader does not. A small belligerent force can raid enemy territory without establishing any administration,

over territories which are either "friendly", or possessed by a former enemy or co-belligerent, under a "civil affairs" agreement. Such agreements were utilized towards the close of World War II to enable the Allies to exercise temporary administration over "liberated" territories of France, the Low Countries, Norway and Italy, under varying circumstances; military administration under a "civil affairs" agreement normally affords the commander a somewhat lesser degree of ultimate authority, due to the retained or residual power of the permanent sovereign, than that accorded to a full military government under the Law of Nations, although there is, nevertheless, a measure of legal and historical similitude between these two forms of military authority.¹⁰⁶

Of potential significance in International Law, the "civil affairs" agreement may be used consentaneously between friendly states which are parties thereto (bilateral, or multilateral, as may be the case), to furnish

quickly rush on to some place in the interior for the purpose of reconnoitring, destroying a bridge or depot of munitions and provisions, and the like, and quickly withdraw after having realised its purpose." II Oppenheim, op. cit. supra note 18, at 434-35. These factors are also reflected in FM 27-10, supra note 38, at paras. 351, 352 and 355. As to the effect of operations by a belligerent over territory of a "neutral" or non-belligerent, thereby bringing such terrain within the "region of war", see, II Oppenheim, supra, at 240-41.

106. Greenspan, op. cit. supra note 33, at 212-13, 235-36. This distinction has been officially recognized in the United States rules of Land Warfare, FM 27-10, supra, at 354.

an adequate legal basis for orderly civil administration and military operations necessitated by the variable circumstances which may arise in either a "limited" or nuclear, conflict, requiring substantial fluidity in tactical deployment of troops and in logistical support. Undoubtedly, the term, "civil affairs", will be utilized with frequency in the future.

By reason of the resemblance between "military government" (an orthodox term bearing connotations analogous to those of belligerent occupancy to the international jurist) and certain functions of "civil affairs", a generic designation currently in vogue among American officials to denote a foreign military presence, function, control or status in a given area, but which may vary substantially from belligerent occupation,¹⁰⁷ a few added thoughts on the latter concept merit brief comment. "Civil Affairs" agreements may present many of the characteristics of "occupation", on the one hand, where it has been agreed that one power may exercise all the incidents of sovereignty in territory of another state, subject (theoretically) to

107. Greenspan, supra, at 212; Cunningham, Civil Affairs - A Suggested Legal Approach, Mil. L. Rev., Oct., 1960 (DA Pam. 27-100-10, Oct., 1960), at 115-16, 129. See also, U. S. Dept. of Army Field Manual No. 41-10, Civil Affairs Operations, (1960); supra note 42, at paras. 2 and 3; but see FM 27-10, supra note 38, at para. 354, distinguishing a status of occupation from that of civil affairs administration.

an ultimate right of revocation, while, on the other hand, the agreement may simply provide for the amicable presence or deployment of forces by one state in the domain of another, with a stipulated relationship delineated between the visiting forces and the host state, as in "status of forces agreements".¹⁰⁸ A brief example of the latter type of agreement was that concerning the status of American forces landed in Lebanon during July, 1958, which was later expanded, to provide for more specific governing procedures.¹⁰⁹ An agreement of the former type, affording a status closely resembling that of "occupation" is that exemplified by Article III of the 1951 treaty of peace with Japan, providing a consensual legal basis for the present United States position in Okinawa.¹¹⁰

108. Greenspan, op. cit. supra note 33, at 237-40; Cunningham, supra, at 129.

109. T.I.A.S. No. 4387, 10 U.S.T.&O.I.A. 2166 (1958); see also U. S. Dept. of Army Pamphlet No. 27-161-1, I International Law, at 134-35, (1964).

110. The peace treaty gives the United States an option to proceed towards eventual United Nations trusteeship; however, pending such development, Article III provides that "The United States will have the right to exercise all and any powers of administration, legislation, and jurisdiction over the territory and inhabitants of these islands, including their territorial waters". Treaty of Peace With Japan, 3U.S.T. 3172-73, T.I.A.S. No. 2490 (1952). John Foster Dulles, (later Secretary of State) characterized Japan's retained interest in Okinawa, following this treaty, as "residual sovereignty", 25 U. S. Dept. of State Bull., at 452, 455 (1951). Meanwhile, this territory is provisionally governed by the executive departments through a High Commissioner and governmental structure provided by Executive Orders of the President.

B) The Relevancy of Current Codifications in Atomic or Major, Non-nuclear Warfare - An Anachronism in the Nuclear Age?

From the preceding analysis of battlefield characteristics of major warfare of the future, it may readily be anticipated that the tactical concepts of substantial future "limited" or nuclear conflict (as distinguished from the isolated, localized type of non-nuclear hostilities described in Section "D", below) will generate numerous sudden raids and rapid thrusts, somewhat analogous to the Dieppe Raids and Blitzkrieg movements of World War II, though in an accelerated degree of intensity and mobility. Unfortunately, the humanitarian codification contained in the Geneva Conventions of 1949, is founded upon tactical concepts of the last great wars, while the civil affairs tenets of "occupation", set forth in the Hague Regulations, were based upon nineteenth century ideology.¹¹¹

Current Law of Nations does not prohibit the use of nuclear or "atomic" weapons, which emerged in the

Exec. Order No. 11010, 27 Fed. Reg. 2621 (1962); Exec. Order No. 10713, 22 Fed. Reg. 4009 (1957). An informative discussion of some of the legal ramifications presented by the administration of Okinawa is contained in the article by George, The United States in the Ryukus: The Insular Cases Revived, 39 N.Y.U.L. Rev. 785 (1964).

111. O'Brien, Some Problems of the Law of War in Limited Nuclear Warfare, Mil. L. Rev., Oct., 1961 (DA Pam. 27-100-14, 1 Oct. 61), at 15-17.

twilight of World War II. Such munitions are not considered, per se, as "violative of international law in the absence of any customary rule of international law or international convention restricting their employment".¹¹² Despite the known portent of Blitzkrieg mobility and of atomic weapons derived from World War II experience, however, the framers of the recent Geneva Conventions adroitly avoided the effect of nuclear and tactically mobile conflict on the Law of War. The resultant, enlightened rules of Geneva were thus drafted on the basis of stabilized military situations characteristic of earlier wars.¹¹³ Notwithstanding modern tactical doctrine, which may extend historically narrow battle-front lines to a depth exceeding two hundred miles, thereby obviating classical "front" and "rear" concepts, the Red Cross Commentary on the Geneva Conventions yet describes the duty of a besieging power in the traditional vein, as to "permit the passage between the lines of enemy personnel of the same nationality as the wounded requiring attention."¹¹⁴

112. FM 27-10, supra note 38, at para. 35; but see, O'Brien, II World Polity, supra note 94, at Sec. III, for an interesting discussion of limitations imposed by positive international law and natural law concepts of "proportionality" upon unrestrained nuclear warfare.

113. O'Brien, Mil. L. Rev., supra note 111, at 16-17.

114. Id., at 16; International Committee of the Red Cross, Commentary, I Geneva Convention 157 (Pictet ed., 1952).

Either nuclear or major, non-nuclear warfare of the future involving the great powers will, doubtlessly, be the occasion of considerable field maneuver over wide territory, with each belligerent deftly dispersing his strength as he seeks to avoid both the presentation of concentrations which would provide potential nuclear targets, and areas of terrain which are contaminated by radiation or deadly chemical agents (i.e., "gas"). It is thus logical to ask, what practicable opportunity will the future field commander have, when faced with these tactical exigencies, to: care for enemy wounded and sick, so that they shall not "be left without medical assistance and care" or under "conditions exposing them to contagion or infection";¹¹⁵ to arrange an armistice "to permit the removal, exchange, and transport of the wounded left on the battlefield"; or to search for and "ensure that the dead are honourably interred?"¹¹⁶ Conversely, it appears that the future battlefield, a scene of rapid deployment, swift maneuver and evacuation, with a noted absence of permanent fronts, will produce vast problems with regard to aid for the wounded and helpless; unfortunately these problematic facets were either neglected or unheeded by the draftsmen at Geneva in 1949.

115. Required by Art. 12, GWS, supra note 37. 361 37.

116. Required by Arts. 15 and 17, GWS, supra note 37.

In the event of mass radiation casualties anticipated in nuclear conflict, demand on existing medical facilities would reach such proportions that little relief would remain available for battlefield patients who have sustained lethal or near lethal doses.¹¹⁷ Under such circumstances, if these "hopelessly" contaminated battlefield casualties of friendly forces are, necessarily, thus segregated and untreated,¹¹⁸ can it be expected that similarly afflicted enemy victims will fare better, due (for illustrative purposes) to the requirements on an occupant, as expressed in the following clause of Article 18, Geneva Conventions for the Wounded and Sick:*

"The provisions of the present Article do not relieve the Occupying Power of its obligation to give both physical and moral care to the wounded and sick."

What effective capability would a belligerent commander possess to furnish treatment for thousands of mass atomic casualties, with a mere handful of physicians and medical attendants at his disposal, even though a substantial number of the victims had sustained non-lethal doses of radiation and could thus be saved through medical aid?

The tactical key to atomic warfare will be the exercise, by field commanders of constant mobility

117. O'Brien, Mil. L. Rev., supra note 111, at 18.

118. Id., at 20.

*This Article, in general, assures permission for indigenous personnel and relief societies in invaded or occupied areas to care for the wounded and sick.

through penetration and evacuation, to seize or destroy significant objectives, and to avoid concentration of strength and permanency of position which would afford vulnerable nuclear targets. Through this continuous maneuver and elastic deployment of units, traditional field stability which, throughout the history of warfare, has led to progressive occupation of enemy territory, will disappear. The historical process of belligerent occupancy, consequently, will not occur with successive invasion other than on a sporadic, or possibly, a heterogeneous basis.

In tactically "limited" nuclear conflict of the future, unless the opposing powers annihilate each other through massive "overkill" in a frantic, initial exchange of total nuclear strikes, it is deemed quite probable that vast segments of territory, or even of continents, will become battlefield areas in the manner thus described. Due to the present sophistication of tactical nuclear weapons, which have been developed with yield capabilities commensurate to use by field armies or other tactical forces on targets which have customarily been considered as military objectives,¹¹⁹ there is little doubt that both major power blocs of the World possess a current capacity for waging either

119. Baldwin, "A New Look at the Law of War", Mil. L. Rev., April, 1959, (DA Pam. 27-100-4, 11 Mar. 59) at pp. 1, 35-36; see also, FM 101-31-1, supra, note 75, and other manuals of the same, numbered series.

major or geographically restricted war with "limited" nuclear weapons of this type. It is logical to assume, therefore, that the great powers of east and west, each possessing mutually-deterrant capabilities for nuclear annihilation, may tacitly restrict potential warfare between their blocs to "limited" nuclear conflict with battle-area tactics similar to those envisioned in the preceding paragraphs.¹²⁰ Moreover, by reason of the advanced state of the art in current, non-nuclear, mechanized arms and equipment, as well as the presumed fear of presenting likely nuclear targets in conflict which may have theretofore remained non-nuclear, it is anticipated that similar mobility and tactical elasticity will be typical of any non-atomic warfare between the great World powers.

Speaking of the effect of these "limited nuclear war" tactics on current concepts of "occupation", Professor O'Brien has aptly indicated:

"... The realities of modern warfare bring an urgency to this concept that is particularly acute. Presentation of a nuclear target in such a war is fatal. Hence, the one thing which the pentomic army will not do is to "occupy territory." It will move and maneuver and seek to defeat the enemy forces without reference to occupying territory. Effective occupation requires two things: (1) The power to control the area; (2) The intention to control it. But in pentomic warfare the element of intent will seemingly not be present in most cases. Where does this leave the existing laws designed to protect civilians

120. See also, Baldwin, supra, at pp. 2-5, 37.

in occupied areas?"¹²¹

Following a brief description of the minimal governmental functions, health and relief measures required by FM 27-10, in implimenting various provisions of the Hague and Geneva Conventions applicable to belligerent occupation, he continues:

"... One cannot carry out these functions without the kind of comparative stability which has been traditionally derived from the fact of effective control.

It is quite clear, unfortunately, that effective control will be a rarity in the considerable areas over which pentomic armies will move. Large areas may be without any really permanent effective occupation for protracted periods ..."¹²²

C) "Civil Necessity" as a Predicate for the Exercise of Military Governmental Services on a Functional Basis Future Conflict:

Orthodox notions of Belligerent Occupation, imbued with the ancient theory of occupatio and its connotations of stability, contemplate physical possession coupled with an intentional retention by the invader of the territory taken and occupied, to the exclusion of the regular sovereign ("total occupation"). As suggested above, current legal concepts of occupation are not sufficient for the sudden thrusts, penetrations and pliant tactical deployment which will be applied in future, general or "limited nuclear war" or in limited, non-nuclear warfare between the great powers, "to neutralize the enemy's

121. O'Brien, Mil. L. Rev., supra note 111, at p. 25.

122. Ibid.

retaliatory power". The swift movements and military strikes thus contemplated, by way of analogy to the brief Dieppe raids of World War II (though differing in degree), would afford no opportunity for the military commander to provide routine governmental and civil affairs functions - "in this fluid tactical environment, the basis of military government will hardly rest on 'occupation' in the classical sense".¹²³ Rather, the view is advanced that nuclear war will be typified by "self-sustaining islands of armed forces", separated by "atomic wastelands" and other areas of little interest to the invader. Nevertheless, certain essential governmental functions must be performed in these seized enclaves, albeit the offensive commander will lack the complete territorial occupancy necessary to be considered a belligerent occupant under orthodox legal concepts. Thus, it is concluded that, lacking the status of an "occupant" in the traditional sense, the attacking commander must, nonetheless, exercise such requisite civil affairs activities which are adequately justified by the extant circumstances on a specific "functional" basis, even though "directed against the civil institutions of a hostile belligerent" (e.g., during invasion of unfriendly territory), on the legal foundation of

123. Cunningham, op. cit. supra note 107, at p. 126; see also, id., at pp. 124-25.

"consent and necessity."¹²⁴

Where the civil affairs operations thus undertaken are based upon consent, either express or implied, of the "host sovereign", as in the case of liberation of friendly or allied territory from control of an aggressor-occupant, the restrictions of orthodox concepts of occupation as contained in current codification and in governmental manuals would not be applicable (e.g., the following proscription from Article 51, GC, would, thus, not be operative: "The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labor.") Rather, the terms of the consensual agreement, as may be reasonably ascertainable, would govern the exercise of the specific functions performed, subject, nevertheless to "humanitarian principles embodied in conventional and customary international law," and to "self-imposed restraint (of the military force discharging the civil affairs function) if no consensual restrictions can be prescribed."¹²⁵

124. *Id.*, at pp. 126-27. The author suggests that "nineteenth century conceptualism ... anchored to the notion of total control of territory, the term, 'occupation' is inadequate as a predicate for civil affairs operations in an atomic era. It must be rendered more fluid and elastic if it is to be of guidance in situations where the military exercise of governmental responsibilities is necessary, but where, in the traditional sense, the responsible military commander is not an 'occupant'". Continuing, he advances "a conception of occupation related to specific civil affairs functions. An area of governmental service may be 'occupied' to the extent that the normal agencies of government are unacceptable or ineffective, or both, with reference to the governmental function in question." *Id.*, at p. 136.

125. *Id.*, at pp. 127-28.

Under the diverse situations which may face the military commander in future contingencies, if a needed civil affairs operation of this type cannot be founded upon consent, due, for example, to the wide span of his operations, an obvious emergency, resulting in a vacuum of local civil government lacking both "acceptability" (i.e., due to its hostility) and "effectiveness", will justify the function undertaken upon the basis of necessity; "... if, be the people friendly or hostile, there is no local government in esse capable of exercising the particular function, necessity would serve as a predicate for the military exercise of the function."¹²⁶ In domestic territory where a civil affairs function is thus performed by reason of emergency, the resultant status is known as martial law, and its necessity is determined by municipal law. Where the function performed is in the territory of a foreign sovereign, however, three legal systems may be involved: the municipal law of (1) the state wherein the operation is conducted, and (2) of the power whose forces are exercising the function, and (3) International Law, which may afford "paramount legal norms," if the circumstances so require.¹²⁷

Absent a consentaneous basis, however, these military governmental or civil affairs functions may be applied in

126. Id., at p. 130.

127. Id., at pp. 131-33.

enemy, friendly or neutral territory, if necessity dictates, subject to the limitations of International Law, which furnishes the normative standards applicable to this function.¹²⁸ A concept of "civil necessity", as the legal foundation of such operations, under adequate precedents in the Law of Nations, has been suggested by Colonel Cunningham* for this purpose, as a rational extension and a "higher criterion of necessity which circumscribes (the traditional doctrine of) military necessity."¹²⁹

Military necessity, under present concepts, may accord the belligerent the right to effect certain "measures not forbidden by international law which are indispensable for securing the complete submission of the enemy ..." although, "the prohibitory effect of the law of war is not minimized by 'military necessity'".¹³⁰ The connotations of military necessity, however, imbued

128. Greenspan, op. cit. supra note 33, at 211 and note 9 thereon; Id., 212 and note 10 thereon; Cunningham, op. cit. supra note 107, at pp. 132-33.

129. Cunningham, supra at pp. 134-35; "... The term suggested for the necessity which prompts governmental action by the military in the interest of civil order is civil necessity. It is a functional delineation of the fund of law that circumscribes military necessity. It is nothing more than an affirmation of respect for the rule of law called into being whenever, absent any acceptable and effective civil agency of government, there is a present military agency capable of, and therefore bound to, assume responsibility for the maintenance of governmental services essential to the fabric of civil society." Id., at p. 137.

130. ~~Id.~~ supra note 38, at para. 3a.

* Lieutenant Colonel Cunningham, United States Army, is a

with prohibitive inhibitions emphasized by the poignant War Crimes trials, are not adequate for the purposes herein described.¹³¹ Consequently, the suggested thesis of civil necessity is considered justified and appropriate under existing International Law, with due regard to the tactical elasticity anticipated of future warfare, to vest legal authority in the invading belligerent for the exercise of requisite civil functions in insular, militarized areas, during provisional periods, without the "total occupation" of the territory involved.

Among the provisional civil functions which, doubtlessly, would be exercised with frequency under these circumstances are measures pertaining to police and security. By providing minimal services in such instances, it is believed and suggested, the visiting belligerent would, in addition to preserving a fair

specialist in International Law, assigned to the Judge Advocate General's Corps.

131. Time and space limitations do not permit an examination of "military necessity", in depth, in these comments. The historical concepts of necessity and the German theory of Kriegsraison, a "doctrine of potentially unlimited military necessity", analyzed both in the light of World War II experience and from the aspect of thermo-nuclear conflict, is contained in the following articles by Professor William V. O'Brien, a respected authority: "The Meaning of 'Military Necessity' in International Law", I World Polity, Georgetown University, at 109 (1957); "Legitimate Military Necessity", II World Polity, op. cit. supra note 94, at 35; and "Some Problems of the Law of War in Limited Nuclear Warfare", Mil. L. Rev., Oct., 1961 (DA Pam. 27-100-14, 1 Oct. 61.) at pp. 1, 6-10 (supra note 111).

measure of order in the militarized area, insure adequate security for his own military needs without doing violence to customary International Law, provided that the proscriptions of the 1949 Geneva Civilians Convention, with respect to treatment of the civil populace of the enemy belligerent are respected where applicable.

Nevertheless, under tactical conditions envisioned in preceding paragraphs, wide areas of terrain would, doubtlessly, remain in which, absent the presence of occupation troops in the orthodox tradition, civil affairs or governmental functions could not be supplied by the invading belligerent through this sporadic genus of "occupation" on a "functional" basis.

In suggesting an answer for the problem posed by the vacuous areas thus resulting in the conflict described above, Professor O'Brien rejects a narrow view that legal responsibility for protected persons and necessary services in these "areas of anarchy" should rest upon the "effective control" of traditional occupation; rather, he offers the humanitarian approach of filling this breach by expanded utilization of relief agencies such as the Red Cross, to take over functions of welfare and aid normally assumed by the belligerent occupant. Moreover, by analogy to the laws regulating

care of the sick and wounded, he suggests that trained civil affairs personnel may be left by the commander, in passing such areas of need, "to fill the gap between the departure of our forces and the arrival of the enemy." This authority further urges that a "moral duty" requires resolution of this problem, noting the favorable results which would flow from an humanitarian solution in the realm of psychological warfare, as an added incentive (and as a conscionable antidote to a barren approach); he thus concludes:

"It appears, then, that pentomic warfare as a concept in the growing tradition of modern limited war offers encouragement to those who seek a revival of the law of war. But at the same time it raises some very serious questions as to the practicality and relevance of the existing concepts and rules of the very part of the law which is supposedly the most secure, the humanitarian laws of war."¹³²

The writer is of the opinion that these comments, emanating from an authority of stature, merit serious consideration for the future, as regards a situation of genuine concern.

D) Local and Civil Conflict:

Characteristic of the atomic age is the "local" or civil conflict, which has hitherto avoided the devastating direct confrontation which would follow from uninhibited or even, limited, nuclear conflagration between the great power blocs. The Korean

¹³². Id., at pp. 27-29.

War of 1950, various conflicts on the African Continent of the past decade, and the current hostilities in South Viet Nam are typical examples. Frequently, these hostilities assume the appearance of civil wars, although forces from one or several external powers may become directly or indirectly involved through overt assistance or subterfuge. Such conflicts may involve a party or parties to the 1949 Geneva Conventions, states which have not acceded thereto, or entities which are not even, as yet, in esse. Article 3, GC, common to each of the 1949 Conventions and previously mentioned, which has been aptly described as a "Convention in miniature,"¹³³ represents an innovation in the law of war and a substantial "extension of the international obligation of States" to afford humanitarian rules for such conflict.¹³⁴

Colonel Draper* has significantly commented as to this novel provision:

133. Pictet, Commentary IV (Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949) (1958), 34, hereafter referred to as "IV Pictet", for a vivid description of the protracted discussion and divergent views expressed in the Conference sessions prior to adoption of Art. 3, see Id., at pp. 22-44. The Red Cross portrays the novel achievement of this Article with jubilant gratification under a subheading, The Rights of Rebels; Joyce, Red Cross International and the Strategy of Peace, at p. 61 (1959).

134. Draper, op. cit. supra note 47, at 14.

*Lieutenant Colonel G.I.D. Draper, is Director of (British) Army Legal Services, and an authoritative English commentator on the Law of War.

"It has the advantage of not being based upon the principle of reciprocity and it has an automatic application once such a conflict has broken out"... "There is some merit in the view that Article 3 should be given a wide interpretation. In the form in which the Article is cast there is no limitation of the undoubted right of a State to quell a rebellion ... It is not easy to imagine that a State will claim the legal right before the forum of world opinion to murder, torture and mutilate ... because the victims are, or were, only bandits."

"Little attention seems to have been paid at the Dipolmatic Conference to the legal difficulty involved in binding an entity that is not only not a party to the Convention but does not exist. Nevertheless, such is the legal position under Article 3, and it connotes a remarkable state in the evolution of international law. States and individuals are bound by the Conventions. When individuals group themselves in a particular way so that they become a party to an internal conflict, then they are given collectively a sufficient legal personality to enable them to be subject to obligations and to hold rights conferred or imposed on them by these conventions ..."135

The Article further induces its observation by reciting, in the last sentence, that its application "shall not affect the legal status of the Parties to the conflict". The effect of this proviso, is that the de jure government (in "armed conflict not of an international character occuring in the territory of one of the High Contracting Parties") has not, by compliance with the Article, recognized the rebel force for legal purposes or otherwise waived the right to punish its members in accordance with law.¹³⁶

135. Id., at pp. 14-17.

136. Id., at pp. 15, 16-17.

It is noted that, by the terms of Article 3, the requirements of this Article only, and not of the other portions of the Convention, are obligatory. Parties to the conflict are encouraged, nonetheless, by "special agreements", to bring all other parts of the Convention into operation during hostilities. This Article has not yet faced the enduring test of history; therefore, its efficacy is difficult to evaluate. It is of interest, however, that the authorities commanding United Nations Forces during the Korean War announced that they would abide by the humanitarian rules of the Geneva Conventions,¹³⁷ though the United States had not, as yet ratified these Conventions.¹³⁸ A recent example of the effect of Article 3 is the civil conflict in Yemen, in which the International Red Cross was instrumental in obtaining assurances from opposing belligerent forces to abide by the requirements of the Article in their hostilities.¹³⁹

Precisely where the line will be drawn between maraud or brigandage on the one hand, which are, generally, of no concern to the Law of Nations, and an insurgency "not of an international character", but falling within

137. II Oppenheim, op. cit. supra note 18, at 225; Baxter, "Problems of International Military Command", XXIX Brit. Yb. Int'l. L., (at p.) 325, 355 (1952), hereinafter referred to as Baxter, "Int. Command".

138. Baxter, "Int. Command", supra note 137, at p. 355.

139. International Review of The Red Cross (Annual Summary, 1963) at 602.

the purview, and presumptively, the minimal protection, of International Law by virtue of Article 3, is elusive of definition. The following comment has been offered on this point by Dr. Pictet, Director for General Affairs of the International Red Cross:

"Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities - conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front."¹⁴⁰

Even though no state of "belligerency", in the classical sense, has been recognized to invoke the general laws of war in the traditional vein, extensive conflict between forces of substance within the territory of a signatory Power would, without doubt, be within the protective mantle of Article 3. The problematic area arises from sporadic strikes of insurgent partisans or guerrillas, who customarily inflict tortious harrassment but usually seize or occupy no territory through their hostilities. Due to the prevalence of "unconventional" combatancy in the current era, existing codal concepts afford no definitive solution to the problem. In many

¹⁴⁰ Pictet, op. cit. supra note 133, at 36; Id., at 25-45, contains an informative discussion and analysis of this Article, indicating that much divergency of opinion existed on this issue and that twenty-five meetings were required before the present wording was adopted.

instances, the hostilities of these "unconventional" combatants may be construed as being beyond the pale of this Article. Of course, a more appealing case may be advanced for these combatants if their activities are sufficiently organized so that they meet the four conditions required by Article 4A (2), GPW, for recognition of their status, upon capture, as prisoners of war. Recent proposals for amelioration of the traditional rules governing the status of these combatants will be discussed in Section "F" below.

It is recalled that, while World War II was followed by many War Crimes Trials prosecuted by the victorious Allied powers, the number of such prosecutions following World War I was relatively insignificant;¹⁴¹ the writer knows of no similar prosecutions having been initiated following the Korean Armistice. It would thus appear axiomatic that the degree of military or political victory with which a war is determined has a direct bearing on the post-war judicial inquiry which may ensue concerning violations of the Law of War which may have occurred during hostilities. It is believed, therefore, that in future, localized conflict or "civil war" involving international interests, any appreciable violation of Article 3 by an entity, not a party to the Convention, may well result in prosecutions for war

141. II Oppenheim, op. cit. supra note 18, at 587.

crimes, or other sanctions under International Law, at least, if conclusive, military victory has been achieved.

Ample and sufficient legal bases exist for comparable enforcement of Article 3, which "ensures the application of the rules of humanity which are recognized as essential by civilized nations"¹⁴² and as such is declaratory of the minimal existing fundamentals of International Law, and for the prosecution of its violators in the future. Although specific reference thereto was discreetly avoided in the Geneva Conventions, World War II War Crimes prosecutions for violations of the fundamental precepts of International Law, as currently augmented by concepts of the "grave breaches" and the minimal standards of Article 3, afford recent historical precedent. Corresponding prosecution for "grave breaches" of the Civilians Convention (as defined by Article 147) is provided by Article 146, which contemplates a universality of jurisdiction over such violations, in obligating Parties to the Convention to prosecute offenders before its own courts or to turn

142. IV Pictet, op. cit. supra note 133, at 34; it is also suggested by the writer that Article 3, GC is declaratory of the minimal requirements of the existing Law of Nations concerning treatment of civilian persons during the type of conflict therein described.

them over to another signatory power for this purpose. Examination of Article 147 will reveal that "grave breaches" are substantially the same (although not identical) as those acts forbidden by Article 3, indicating that the fundamental principles of International Law involved are essentially similar.

Articles 158, GC, reaffirms these principles and adherence thereto with the proviso that even upon renunciation by a Party of the Conventions (which would not take effect for one year, or after peace is concluded, if attempted during conflict), such action "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."¹⁴³

Article 2, GC, makes the Convention applicable in armed conflict between parties to the Convention in total or partial occupation, even if the occupation is accomplished without armed resistance (as was the German occupation of Denmark in World War II). By virtue of this Article, moreover, "although one of the Powers in conflict may not be a party to the present Convention,"

143. Art. 158, GC; see also, discussion of obligation of the parties contained in IV Pictet, op. cit. supra note 133, at 37.

the Powers who are parties to the Convention remain bound in relation to the non-signatory Power "if the latter accepts and applies the provisions thereof." Colonel Draper indicates that such application of the Convention by a non-signatory power may be either express or implied from its action and conduct; he has, moreover, theorized that there are definite limitations to relief from the requirements of the Convention:

"Reciprocity is, by way of exception, the principle governing this part of Article 2 and that principle should, it is submitted, operate pro tanto. The failure by the non-contracting party to observe a particular article of the Conventions legally exempts the adversary who is a Contracting Party from a like observance and no more."¹⁴⁴

Hence, it is apparent that where parties to a conflict, one or more of which are signatory to the Convention, act in reasonably good faith, the obligations of the Convention, or most of them, remain legally applicable to the conflict.

The foregoing legal bases and precedent are believed to constitute a sufficient predicate, in law, to afford and require substantial adherence to current codal concepts of belligerent occupation in future armed conflict, which may be either purely local in nature, (as in a true civil war) or "limited" only in terms of area or scope, as in a "civil war" involving participation

¹⁴⁴. Draper, op. cit. supra note 47, at 12.

by external powers or political entities. The basic standards of International Law are now sufficiently broad to include within their purview all parties or entities involved in the conflict (with a few exceptions, mentioned below), whether or not they may be signatory to the 1949 Geneva Conventions, and even though they may not, as yet, be in esse. Adequate legal enforcement procedures, primarily through the deterrance of penal sanctions (i.e., war crimes prosecutions) for "grave breaches" thereof, are currently available to insure compliance with, at least, the minimal standards of the Law of Nations.

One may only hope that the passions of overwhelming expediency in such warfare, or the primitive savagry of uncivilized atrocities in "underdeveloped" regions may not engender progressive, retrogression from, or abandonment of, current humanitarian concepts of the Law of Belligerent Occupation where a status of such occupancy may have been attained. Unfortunately, the prognosis of history would portend a tendency for irresponsible belligerents to recede from close adherence to these normative standards where desperation entices, or by way of excessive reprisal, on the occurrence of tempting incidents. It is, therefore, to be desired that historic implications of the War Crimes prosecutions,

when viewed in context with the fundamental principles required by Article 3 and the declaratory standards of International Law implicit in the "grave breaches", will be effectively conducive of minimal compliance by the belligerent occupant in future limited or civil conflict, even though he may not be a party to the Geneva Conventions.

E) The Unified, International Command:

Although not historically unknown, another product of the atomic era is the grouping of states, for reasons of common ideology or political convenience into multi-lateral blocs, to insure their mutual defense or to achieve other joint or reciprocal goals. Characteristic of the current age, therefore, is the unified international command, which affords interesting, though not insurmountable, legal ramifications under existing concepts of belligerent occupation.

Some problems of the unified international military command may have been envisioned from the preceding section. Other complications may arise during the operations of an international command in time of war. The 1949 Geneva Conventions are protocols between "High Contracting Parties", open to accession by states ("any Power in whose name the present Convention has not been signed ...").¹⁴⁵ Major (now, Professor) Baxter

145. Articles 1 and 155, GC, supra, note 37, representing similar articles in the companion Conventions.

has stated, in an analytical study of legal problems incident to the "International Military Command":

"One of the oldest problems of combined operations by the forces of several countries has been that of determining who is entitled to war booty, to property seized in occupied areas, and to naval vessels."¹⁴⁶

Judicial punishment of prisoners of war by a Detaining Power presents another interesting facet. Under the Geneva concepts judicial proceedings against these prisoners may only be taken for acts which are "forbidden by the law of the Detaining Power or by international law"; moreover, such persons may only be "validly sentenced ... by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power ...".¹⁴⁷ Similar standards exist for other purposes in the Law of War. Legal implications may thus result from detention and control of prisoners of war by an international command having no penal code, vis-a-vis detention by the orthodox Detaining Power which would possess adequate municipal law for these purposes.¹⁴⁸

Moreover, due to the operation of various clauses

¹⁴⁶. Baxter, "Int. Command", supra note 137, at pp. 325, 352-53; further discussion regarding such war and occupation problems as involve enemy property, however, are beyond the scope of this discussion.

¹⁴⁷. Articles 99 and 101, GPW, supra, note 37.

¹⁴⁸. Baxter, "Int. Command", supra note 137, at p. 354.

of the 1949 Prisoner of War Convention, the "internationalization of war crimes proceedings has been impeded rather than advanced by the Geneva Conventions of 1949".¹⁴⁹

In addition, mature opinion has been advanced adverting to the improbability that the law of the Detaining Power would authorize utilization of foreign officers on its own military tribunals, thereby rendering impossible the creation of international military tribunals of "mixed composition".¹⁵⁰

The Occupation of territory by an international command poses similar problems. Further legal difficulty may result if all participating powers or entities of the unified command are not parties to the same multilateral treaties concerning the Law of War (i.e., 1907 Hague Conventions; 1949 Geneva Conventions, etc.).¹⁵¹

149. Ibid.

150. Id., at pp. 354-55.

151. Problems of inequality in judicial punishment of inhabitants could arise due to the different laws of the occupying powers, in the event members of a unified occupation command asserted such punitive measures in their individual capacity as an occupying power; judicial consistency in the occupied territory could be further jeopardized through the reservations taken by certain states as to punishment under Art. 68, GC, supra note 37.

It is fully realized that these situations can pose other onerous questions. In case of foreign hostilities, generally, the situation could become acute in the event one international force, whose members are parties to the Geneva Conventions (or if not, have signified adherence thereto), faces an enemy international force which consists of members which are either not signatory to or who consider themselves as unbound by the Conventions, and, either from malice or due to its primitive state of civilization, the latter force adamantly refuses to operate under current rules of war, offering no reciprocity of humane observance.

As the Geneva Conventions contemplate that states, as national and legal entities, would be the parties responsible in adherence to the standards and procedures required thereby, additional questions would ensue concerning responsibility (of the occupant) for dealing with the Protecting Power under the Civilians Convention.

It will be recalled that, through agreement, the victorious Allies established a joint, yet severable, occupation regime for Germany following World War II. This administration was characterized by both an united Allied Control Council to provide unanimity of action and uniformity of general policy throughout the occupied territory, and respective zones of occupation for administration by the major Allied powers, individually.¹⁵² That this system proved beneficent for the governing of the western zones, yet tortuous for inhabitants of the remaining zone, thereby pungently demonstrating the latent deficiency of a unified occupation administration, is elementary recent history. The present, physical division of Germany is an unfortunate result of this experiment.

Recent activities in the Congo are somewhat discriptive; see supra note 80. In this eventuality, nonetheless, it is suggested that the requirements of Art. 3, GC, supra, and the avoidance of "grave breaches" should be the minimum standard followed by the former international force.

152. Baxter, "Int. Command", supra note 137, at pp. 328-30.

An analogous plan is currently retained, with similar defects, for administration of the City of Berlin, which, in the opinion of this writer, represents both a tribute to enlightened concepts of occupation in the three Western Sectors and a tragic monument to tyranny and legal repression in the Soviet Sector.¹⁵³ Germane to this discussion, therefore, is the unavoidable conclusion that the occupation of territory by an international force can present problematical ramifications far beyond the scope of existing concepts of the Law of Belligerent Occupation. Although the international command representing United Nations Forces in Korea has been reasonably successful, its operation has not been without complications; difficulty involving parties not signatory to the 1949 Geneva Conventions, however, was resolved through voluntary assumption by the United Nations Command of the obligations

153. The Occupation of Germany, and the current status and administration in Berlin are broad subjects beyond the scope of this discourse, of which much has been written. Informative and intriguing factual accounts of the Occupation of Germany and the early administration of Berlin are contained in Clay, *Decision in Germany* (1950), and Howley, *Berlin Command* (1950), respectively. Legal ramifications of problems concerning the occupation and current status of Berlin (where the writer was privileged to serve in a legal capacity for nearly five years) are skillfully analyzed and summarized in the following studies: Legien, *The Four Power Agreements on Berlin*, (2nd Ed., 1961), transl. by Davies, and Hagopian, *The Legal Bases for the United States Rights in Berlin*, Thesis Presented to TJAG School, United States Army, (April, 1964, unpublished).

of those Conventions.¹⁵⁴

A minor problem for the unified occupation command and raised by the Fourth Geneva Convention, is analogous to that mentioned above concerning composition of courts for the trial of prisoners of war by an international force as the "Detaining Power." In the event of occupation by a unified command, a similar problem would arise concerning the nationality and membership of occupation courts, under the requirement of Article 66, GC, that "protected persons" in occupied territory, be tried before a "non-political military court" of the "Occupying Power".¹⁵⁵

An effective solution to many facets of administration and varying problematical legal ramifications which may arise under current International Law from occupation by an international command are treaties or agreements between the participating states providing for adequate resolution of these troublesome contingencies (for full effectiveness, such protocols should be negotiated well in advance of their possible utilization). The European

154. Baxter, *Int. Command*, supra note 137, at p. 355.

155. In view of the recent practice of the United States Occupation Forces in Germany of utilizing occupation courts staffed with qualified civilian legal personnel, and of the probable impediment towards utilizing foreign officers on military courts and commissions (see supra, note 150), provision for these contingencies in future codification would appear useful. See also, Hodges, The Judicial Character of Nonstatutory Military Tribunals, Thesis Presented to TJAG School, United States Army, (April, 1963), at p. 44; Chapters III and IV of this work

Defense Community has been cited by one authority as a model plan; a successfully functioning example is the North Atlantic Treaty of April 4, 1949, under which the well-known North Atlantic Treaty Organization, with its currently established international commands, was created.¹⁵⁶ Although during World War II, Variant significant actions were effected, and instruments of surrender were even received, by a single international commander, acting on behalf of several powers in an agency capacity,¹⁵⁷ it is highly desirable from the legal aspect that the scope and extent of these powers be previously delineated through protocols covering the varied responsibilities to be delegated. It is believed that "civil affairs agreements" (discussed previously) would be suitable for certain situations.

"Whatever solution is adopted, there must necessarily be a complex of agreements between the parties, assigning to particular states or apportioning between states responsibilities and rights created by the law of war regarding custody

contain an excellent analysis of courts and tribunals of the belligerent occupant in occupied territory, which is beyond the scope of this discussion.

156. Baxter, Int. Command, supra, note 137, at pp. 355-56; 63 Stat. 2241, TIAS 1964. An commendable study in depth of the Law of War as it affects the unified commands under NATO, is contained in Moritz, The Common Application of the Laws of War Within the NATO Forces, Mil. L. Rev., July, 1961 (DA Pam. 27-100-13, 1 July 1961) at pp. 1-34.

157. Baxter, Int. Command, supra, at p. 356.

of prisoners of war, the occupation of enemy territory, the appropriation of enemy property, the trial of war criminals, and the like."¹⁵⁸

The opinion was advanced several years ago in some circles, which has remained as a subject of subsequent conjecture, that a force constituting a United Nations international command, by virtue of its status, is not bound by the current Law of War, in toto, but may utilize such principles thereof, in military "Enforcement Action", which is deemed useful.¹⁵⁹ This view, however, was not shared by the United Nations Command in the Korean Action.¹⁶⁰ This position also appears to derogate from the humanitarian principles inherent in the United Nations, itself, irrespective of the technical applicability of the Geneva Conventions, per se, to a specific "Enforcement Action" which may be undertaken (as in Korea). An undesirable product of this view might be its extension to other collective military actions, which may be effected by several states or entities, wherein the Geneva Conventions may be considered as technically inapplicable. Aside from a retrogression from current humanitarian concepts of the Law of War itself (as codified in the Geneva Conventions), which may not be alone sufficient to induce compliance therewith, it is believed that there

158. Ibid.

159. Id., at pp. 357-58.

160. See, supra note 154.

are additional considerations militating against adoption of this view, particularly for actions involving a United Nations Command. Motivations of reciprocity, insuring "certainty and mutuality" of treatment should, indeed, afford a strong inducement for the protection of most belligerents. Moreover, belligerent forces should not be unmindful of the general tendency in recent years towards construing the civilized precepts of the Law of War (as codified in the least, by the minimal requirements of the Geneva Conventions, discussed above) as having broad applicability to "armed conflicts of an international character", without regard to the historic definition of "war" in its more limited connotations.¹⁶¹

For these reasons, and by reason of the contentions set forth in preceding sections of this discussion (particularly with reference to Articles 2 and 3, GC), the writer is in agreement with those who contend that the case against adherence to current Law of War under the indicated circumstances is without substantial merit. Indeed, in the interest of dispelling any ambiguity, sufficient motivation would appear to exist for an early announcement of adherence to the principles of the Geneva Conventions on the part of future belligerent

¹⁶¹. Baxter, Int. Command, supra note 137, at pp. 358-59.

forces in the envisioned circumstances.¹⁶²

F) The "Unprivileged Belligerent" - Saboteurs, Guerrillas and Other Unconventional Participants:

Growing concern has been voiced in recent years over the position of spies, guerrillas, saboteurs and other irregular "belligerents" under the current Law of War. As to territory which is under belligerent occupation, the problem may assume major proportions for the occupant due to activities of organized or sporadic resistance groups, guerrillas or others who are trying to assist the "legitimate" sovereign or its allies in ousting and harassment of the occupier. The occupation abuses of the Axis Powers in World War

162. Indeed, it is not accidental that the 1949 Geneva Conventions contain no "general participation clause", characteristic of earlier codifications. It will be recalled that, aside from traditional, "declared war", the Conventions extend to "any other armed conflict" between signatories, and others, under circumstances contemplated by Art. 2, GC, supra note 37, and to "occupation" under the same article, as well as to "armed conflict not of an international character occurring in the territory" of one of the parties, under Art. 3, GC, supra. The modern trend of International Law is against the interpretation of technical inapplicability of Conventions codifying the Law of War as a justifiable excuse for avoidance of their requirements, at least as to the minimal standards set by the War Crimes trials, as augmented and codified in Art. 3, GC, supra, and in the proscription, by Articles 146 and 147, GC, supra, of "grave breaches". In this respect, it should be recalled that technical lack of applicability of certain prior Geneva Conventions and of the Hague Regulations, due to the fact that some belligerents in World War II were not parties thereto, was rejected by the International Military Tribunal as a valid defense for the Nazi defendants in the War Crimes Trial before that body, the Tribunal stating, "... by 1939 these Rules laid down in the Hague Convention

II generated sufficient sympathy¹⁶³ for such resistance fighters as to focus substantial attention during the 1949 Geneva Conference on the legal position of these persons under traditional concepts.

The Geneva Conventions retained the limited historical protection accorded to certain irregular fighters in non-occupied territory - the right for members of a levee en masse (inhabitants who "spontaneously" and openly take up arms to resist an invader) to the status of prisoner of war upon their capture.¹⁶⁴ As a result of World War II experiences, however, organized resistance movements (as distinguished from the levee en masse) were recognized by the Geneva Conventions to the extent that members thereof may legitimately operate (and thereby attain privileged - i.e., prisoner of war - status if captured) inside or outside of occupied territory, providing they fulfill the previously mentioned four conditions (evidencing their overt, quasi-belligerent status) specified in Article 4A (2), GPW. Accordingly, the current, orthodox view can be summarized in the following passage:

"An open rising in occupied territory, if not carried out by members of organized resistance movements fulfilling the above conditions, exposes

were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war," as quoted in Draper, op. cit. supra note 47, at 12.

163. This was evidenced earlier by the judgment in the War Crimes Trial, In re Rauter, supra note 33.

164. Art. 4A (6), GPW, supra note 37.

all who participate to trial by the Occupant's courts for violation of the penal law imposed to safeguard the Occupant's civil and military authority in the area."¹⁶⁵

It is not doubted that in the course of future belligerent occupation, instances wherein members of resistance movements openly identify their combatant status in their "freedom fighting" operations by compliance with the four conditions, cited above, will be, indeed, rare. Characteristically, to achieve success blows of stealth and acts of sabotage against an occupant must be accomplished clandestinely, and by persons not identifiable by overt military indicia. Guerrilla and partisan type belligerency, typical of modern, local and civil warfare, as discussed above, and often utilized by Communist factions in recent years, provide related and further exemplary facets of the problem. With regard to belligerent occupancy, however, traditional concepts of the "duty of obedience" owed by inhabitants to an occupying power (which became a contentious issue at the Geneva Conference, and remains ideologically unresolved at the present time) were apparently of sufficient importance to the conferees, to forestall an accordance of "legitimate" status (i.e., that of prisoner of war upon capture) to added

¹⁶⁵. Draper, op. cit. supra note 47, at 40.

"unconventional" categories of irregular resistance fighters¹⁶⁶ - other than those qualifying under Article 4A (2), GPW, as indicated above.

166. Speaking of the conditions required by Art. 4A (2), GPW, supra note 37, for protection of those comprising members of organized resistance movements, Colonel Draper has also alluded to the crux of the disagreement over the orthodox "Duty of Obedience" owed to an occupying power, in concluding: "It is not an unreasonable assumption that this part of the Article is a further triumph for those States which have been Occupants, but have never been occupied," Draper, supra, at 39-40.

The traditional view, advanced by some authorities, is more prone to speak of a "duty" owed the occupant by the inhabitants of occupied territory; Professor Lanterpacht attributes this to the "Marital Law of the Occupant to which they are subjected"; II Oppenheim, op. cit. supra note 18, at 438-39; FM 27-10, supra note 38, at para. 432, describes it as follows: "It is the duty of the inhabitants to carry on their ordinary peaceful pursuits, to behave in an absolutely peaceful manner, to take no part whatever in the hostilities carried on, to refrain from all injurious acts toward the troops or in respect to their operations, and to render strict obedience to the orders of the occupant." Professor Stone states that some authorities infer this "duty to obey from a supposed morally sanctioned contract between the inhabitants and the Occupant, exchange-obedience against protection", Stone, op. cit. supra note 22, at 725. The contrary view, that no duty or obligation exists on the part of inhabitants of occupied territory to obey the belligerent occupant is also discussed and described in Stone's analysis of this problem, supra, at 723-26, and further outlined in Von Glahn, op. cit. supra note 23, at 45-48.

It is noted that the Geneva Conventions do not compel this obedience and that such resistance actions against an occupant as have been loosely called "war treason", or as committed by so-called "war rebels", are not war crimes or violative of international law, as such, but merely afford an occupant or belligerent (under certain circumstances) the self-protective right, under International Law, of punishment of the perpetrators, Stone, supra at 726. See also, Baxter, Unp. Bellig., supra note 3, at pp. 323, 337.

The ideological disagreement over the "duty" of obedience was culminated at the 1949 Geneva Conference

Certain respected authorities, among others, Professors Baxter and Stone, have contended that various forms of "unprivileged belligerency", with respect to guerrillas, saboteurs and other "underground" resistance fighters, have thus resulted and remain as an incongruity in the current Law of War,¹⁶⁷ despite the more advanced protection which is afforded to military and qualifying quasi-military personnel in conflict, as well as to civilians in occupied territory

in debate over the limitation on imposition of the death penalty by the occupant, to espionage, serious acts of sabotage and certain intentional crimes, provided the death penalty obtained for such offenses "before the occupation began", supra, Ch. III, B) 2; Professor Draper's comment on the reservations of the United Kingdom and the United States to the second paragraph of Art. 68, GC, supra note 37, are likewise, expositive: "This provision appears to have been too drastic and dangerous for those countries which have never been occupied, but who have been Occupants of enemy territory. Perhaps it is no strange coincidence that some of the countries which have had bitter experience of occupation have abolished the death penalty. It is significant that Western Germany which has been both an Occupant and occupied has abolished the death penalty." Draper, supra at 43-44.

167. Baxter, Unp. Bellig., op. cit. supra note 3, at 323; Stone, op. cit. supra note 22, at 562-70. The problem has also been analyzed in a treatise prepared for the United States Dept. of Army by Thienel, (Philip M.) et al, The Legal Status of Participants in Unconventional Warfare, Special Operations Research Office, American University (Dec., 1961), hereafter referred to as "Thienel (SORO)", with preface by Major General Claude B. Micklewait, Ret'd. (formerly the Assistant Judge Advocate General, United States Army), who comments, concerning certain participants in unconventional warfare, inter alia: "... the Geneva Civilian Convention of 1949 is a great humanitarian commandment. However, as indicated above, it does not cover all the situations in which civilians may need its protection. All this points to the need for revision and extension, by agreement among

under present codal concepts.¹⁶⁸

Professor Baxter suggests the theory that most forms

nations, of the current law of war relating to unconventional forces. The precepts of humanity lead to the same conclusion ...", Id., at pp. v, vi.

168. The status of most of these "privileged" and "unprivileged belligerents", as well as United States official policy concerning such persons is briefly summarized below. It will be recalled that normal military forces and quasi-military groups, engaging in hostilities and meeting the four conditions of Art. 4A (2), GPW, supra note 37, (organized resistance groups in or outside occupied territory) are, by the terms of that Article, entitled to "privileged" (i.e., prisoner of war) status; this protection is further implemented for United States Forces by FM 27-10, supra note 38, at paras. 61 and 64. Similar protection for members of the levee en masse (Art. 4A (6), GPW, supra, arising in unoccupied territory, is implemented for United States forces by FM 27-10, supra at para. 65. In case of doubt whether any belligerent persons fall within the category of prisoner of war, they shall enjoy protection as such "until such time as their status has been determined by a competent tribunal" (Art. 5, GPW, supra); this protection is implemented by FM 27-10, supra, at para. 71, which construes a "competent tribunal" to be a board of "not less than three officers". United States regulations forbid punishment for those found by a "competent tribunal" not to be within the purview of Art. 4, GPW, supra, (i.e., entitled to prisoner of war status), "without further judicial proceedings", FM 27-10, supra, at para. 71.

Most persons (other than those qualifying as prisoners of war under Art. 4, GPW, supra) in occupied areas who commit belligerent acts are civilian "protected persons" under Art. 4, GC, supra note 37, and as such, are accorded the added protection (hence "privileged" belligerents) of the various requirements for penal and judicial standards of Articles 64-77, GC, supra; this protection is implemented for United States forces by FM 27-10, supra, at paras. 72, 434-48, (subject to the United States reservation regarding limitations on the death penalty of Art. 68, GC, supra, as contained in FM 27-10, supra, at para. 438b).

FM 27-10, supra, at para. 73, further indicates that a person not qualifying under Art. 4, GPW, supra, as a prisoner of war, nor found to be so qualified by "a competent tribunal acting in conformity with Article 5,

of such "unprivileged belligerency" are founded upon one legal concept, whether the persons affected are military persons who lack certain legal qualifications, or civilians participating in various hostile actions

GPW", supra, is, "however, a 'protected person' within the meaning of Article 4, GC, supra, (which is recited in FM 27-10, supra, at para. 247). It will be recalled that, inter alia, Art. 5, GC, supra, affords to a "Party to the conflict", in domestic territory, the power to deprive a 'protected person' of certain privileges where it is "definitely suspected" that he has "engaged in activities hostile to the security of the State; similarly, in occupied territory, when a "protected person is detained as a spy or a saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power," if "absolute military security" requires, may "be regarded as having forfeited rights of communication" under the convention. This Article has been quoted verbatim in FM 27-10, supra, at para. 248, which further construes the law of war, as follows:

"b. Other Areas. Where, in territories other than those mentioned in a above, a Party to the conflict is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person is similarly not entitled to claim such rights and privileges under GC as would, if exercised in favor of such individual person, be prejudicial to the security of such State.

"c. Acts Punishable. The foregoing provisions impliedly recognize the power of a Party to the conflict to impose the death penalty and lesser punishments on spies, saboteurs, and other persons not entitled to be treated as prisoners of war, except to the extent that power has been limited or taken away by Article 68, GC (par. 438)." (Emphasis supplied.) The foregoing subsection is emphasized, as it is considered as declaratory of existing International Law, and provides the focal point of the problem for which Professor Baxter and others urge remedial codification.

or in espionage. From this legal premise, the hostile activities perpetrated by such personnel, either with the use of arms or unarmed and wherever occurring, thus serve to divest this class of belligerents of the protection otherwise accorded to combatants and civilians under International Law, thereby leaving them within the virtual power of the enemy.¹⁶⁹ The resultant "unprivileged belligerency" has, consequently, been criticized as being out of context with the humanitarian considerations currently accorded other belligerents and to civilian persons under the modern Law of War.

This view is, to a substantial extent, motivated by the recent blurring of the historical distinction between military combatants and civilian, non-combatants through both the totality of national effort and operation characteristic of modern warfare, and under concepts of extreme tactical flexibility which may include mobile airborne missions and even officially sponsored guerrilla hostilities. For example, it is asserted that the wide range of persons whose status may depend on the current rules of espionage might be greatly expanded due to swift airborne activities and operations deep within enemy territory, thereby rendering reconsideration

¹⁶⁹. Baxter, Unp. Bellig., supra note 3 at pp. 342-45.

of current legal concepts a matter of urgency.¹⁷⁰

It is also pointed out, with justification, that the extent to which guerrilla warfare is utilized in current concepts of warfare, even by regular armies, is substantial.¹⁷¹ Several vexing practical problems of interpretation, which may readily confront the field commander from operation of the four conditions of Article 4A (2), GPW, for acceptance of "unconventional" combatants to prisoner of war status in future conflict, have been logically envisioned by another authority in support of this theory.¹⁷²

The thesis for amelioration is thus advanced, with a view towards eliminating the so-called status of "unprivileged belligerency". This position is predicated upon a belief that, under modern concepts and practices of war, wherein the total economic and human resources of the state are mobilized for victory or with regard to occupied territory, when the fortunes of battle are still in doubt - thereby inducing resistance activity motivated by political allegiance and patriotism to the

170. Id., at p. 341.

171. "Guerrilla warfare, in other words, is assured of military regularism. But that still leaves unsettled the question of its regularisation under international law", Stone, op. cit. supra note 22, at 564.

172. Many potentially troublesome physical and factual problems for the field commander have been summarized in an analytical discussion of the "four conditions" contained in Thienel (SORO), op. cit. supra note 167, at pp. 44-46.

legitimate sovereign, rather than by desire for pillage and banditry¹⁷³ - it is unrealistic and inappropriate, the the distinction between privileged and "unprivileged belligerent" is often determined by the type of clothes worn by an individual participant, (as through the application of the "four conditions" specified in Article 4A (2), GPW). Consequently, the proposal has been offered that changes be effected in current legal concepts to accord a protected status for all belligerents in future conflict "however garbed" or equipped.¹⁷⁴

An apparent alternative measure for limited amelioration of the status of the "unprivileged belligerent" has been offered by Professor Baxter in his commentary on the problem. It is believed by the writer that this, alternative step would be, realistically, more adaptable to the tactical concepts of mobility envisioned for future hostilities, and would also prove more acceptable, in principle, than his main thesis to those powers which favor the traditional view regarding a "duty of obedience"¹⁷⁵ of the populace in occupied territory. The ominous

173. Baxter, Unp. Bellig., supra note 3, at pp. 337-38.

174. Id., at pp. 343-44.

175. Supra, note 166; see also, supra, note 50, concerning reservations by certain western powers to limitations on imposition of the death penalty for violation of occupation legislation.

threat to internal civil stability raised by the position of the Soviet Union and international Communism with regard to unconventional belligerency and "just war" is also believed by the writer to provide grave questions of policy for Western nations which would deter full adoption of the thesis advanced for complete elimination of "unprivileged belligerency" at the present time.¹⁷⁶

176. The view of the Soviets and other Communist nations, strongly favors legitimation of partisan, unconventional and guerrilla warfare. This position stems, not only from their bitter World War II partisan warfare with the armies of the Third Reich, but to a substantial degree from their thesis of revolution, which engenders tactics of extreme unconventional warfare for achievement of its end. For this reason, Communist ideology has seized upon and distorted the enlightened Grotian theory of a "just war", to suit the Communist revolutionary goal of World conquest through the process of historical and dialectical materialism. Due to its significance in this area of discussion, a succinct summary of the Communist position is quoted below:

"The Soviets also point out that their World War II partisan movement was organized on an equal basis with the conventional forces, that it constituted an organized militia or volunteer corps which was an integral part of the Red Army, and consequently that it was legal ... Emphasizing the equality of the partisans with conventional units of the Red Army, one Soviet jurist notes that the 'orders of The Supreme Commander ... directed to the Red Army men, were also directed to the men and women who fought as guerrilla troops.'

Underlying these claims for the legitimacy of partisan warfare ... is a combination of the Russian historical experience and the traditional Marxist adulation of the classic 'people's war'. Partisan warfare is deeply embedded in the Marxist-Leninist approach to military doctrine and holds a critical position in the concept of the peoples' war, liberation war, and proletarian uprising ... one Soviet writer points out that restrictions on guerrilla warfare are directed against the very 'substance' of a peoples' war ... and adds ... when it is correctly developed ... guerilla warfare will embrace the 'broad masses of the people'.

Professor Baxter's alternative, urged by way of analogy to other principles of the Law of War, is therefore, quoted in detail:

"'... unprivileged belligerency' pertakes strongly of the nature of a ruse by reason of its clandestine character. The same 'statute of limitations' which forbids

"Soviet recognition of the validity of unrestricted guerrilla warfare is, however, qualified ... In... that legitimacy pertains only to those forces who fight on the side of the 'broad masses' in a 'just war'. The Soviets claim that ... Article 51 of the U. N. Charter, which guarantees the inherent right of ... self-defense, encompasses 'popular guerrilla warfare' and guarantees its legality. On the other hand, the 'inspirer and defender' of aggression who tries to initiate guerrilla warfare in an 'unjust war' cannot ... come ... under ... international law.

In recent years Soviet jurists have tended ... to disregard international legal codes in determining the status of guerrillas and to emphasize the idea of a 'just' war instead. It is currently stated that anything the guerrilla does to harm the enemy in a 'just' war is legal, yet any repression against guerrillas is criminal if it exceeds treatment accorded to regular conventional personnel.

The distinction between a 'just' war and an 'unjust' war, based on Marxist-Leninist ideology, has important ramifications for any future employment of guerrillas and their accepted status vis-a-vis the Soviet Union and the Communist Bloc. A clear implication of the Soviet position is that the legal status of guerrillas depends on their political affiliation; those who fight against Western imperialism are bona-fide belligerents and are on the side of the masses, whereas anti-Communist guerrillas fighting against Communist hegemony, or a Communist-dominated regime, are counter-revolutionaries and because of their repugnant political alignment are precluded from claiming the protection of the laws of war. By this argument, the Soviets go to the very roots of Western tradition and question the concept of the equal treatment of all parties under the law." Thienel(SORO), op. cit. supra note 167, at pp. 49-51.

These views are shared by the current regime in "Red" China; Id., at 50.

the punishment by the enemy of a spy who has returned to his own lines accordingly could be applied to other forms of unprivileged belligerency, and there would appear to be strong reasons of policy for doing so.¹ ... the principle to be applied would appear to be that if an individual has either returned to his own lines or become part of the regular armed forces or has otherwise indicated the termination of his belligerent status, as by long abstention therefrom, he may not be prosecuted by the opposing state for his previous acts of unprivileged belligerency."

"¹ It was at one time suggested that the war traitor who had returned to his own lines should benefit from the immunity extended to the spy (Article 104, Gen. Orders No. 100, 24 April, 1863) but the contrary view now appears to prevail ..."¹⁷⁷

To this proposal, however, an additional question can be posed. If the suggested limitation were imposed against further liability for punishment, under Internal Law, of the saboteur or the guerrilla who has successfully returned to his own 'lines' or to the area controlled by his own "forces" - analogous to the cessation of liability of the spy who rejoins his own army (Article 31, H. R.)¹⁷⁸ - would there remain a sufficient, general deterrance under the Law of War against hostile, clandestine actions to enable a belligerent effectively to protect his security?¹⁷⁹

177. Baxter, Unp. Bellig., op. cit. supra note 3, at 344-45.

178. This immunity from punishment for the spy who rejoins his army has been construed as applicable to military spies only, and not to civilians in a like situation, II Oppenheim, op. cit. supra note 18, at 424-25.

179. Stone, op. cit. supra note 22, at 570, particularly note 38 thereon.

More recently, a related but less radical plea for partial amelioration in the status of certain classes of "unprivileged belligerents" has generated growing support, due, particularly to the prevalent use of guerrilla warfare and unconventional forces in hostilities of the current era. Thus, it has been urged that the Law of War should be modified to accord a protected or prisoner of war status to captured guerrillas and members of partisan bands who meet, at least, the first of the four traditional requirements of Article 4A (2), GPW ("(a) that of being commanded by a person responsible for his subordinates;").

It is contended that this humane gesture, when extended, at least, to these groups which operate as quasi-militia - as distinguished from the isolated saboteur, bomb terrorist or spy - will encourage reciprocity of treatment and, if accorded on a basis of sufficient latitude coupled with assurances of amnesty in appropriate circumstances, may well succeed in inducing an early termination of insurgent movements and even cessation of guerrilla warfare in some instances. Aside from serving as an aid in psychological warfare, it is also ventured that, in event of a successful revolution, this policy may well have served as an effective palliative to heal the wounds of bitterness

between opposing belligerent groups - French policy towards organized rebel forces in the recent War of Algerian Independence has been cited in support of this theory.

Proponents of this view further indicate that the extension of this recognition during insurgency (and, by implication, during belligerent occupancy) can result in no harm to the de jure government or to the occupying power which, in any event, retains ultimate power to later punish such persons judicially for war crimes or other criminal violations which may have been previously committed.¹⁸⁰

Those who advocate this position indicate that such ameliorative action is incumbent upon enlightened nations, as an exemplary attribute of advanced civilization, even in hostilities against a primitive or savage foe.¹⁸¹ It is also noted that a similar policy was adopted by the German occupation commander of Jugoslavia in 1944,

180. This thesis was advanced by M. Jean - Robert Leguey-Feilleux, Director of Research, Institute of World Polity, (Georgetown University), Lecturer, Dept. of Government and School of Foreign Service, Georgetown University (also, former Lecturer on International Affairs, University of Marseille-Aix, France), in a lecture and seminar presented on the subject, Guerrilla Warfare, at TJAG School, United States Army, in March, 1965.

181. Ibid; M. Leguey-Feilleux further supported his view with personal recollection of his life in France during the German occupation of World War II. He attributes the relatively quick change in concept on the part of responsible German citizens since World War II as being

when partisan bands were considered to be operating on a scale of sufficient magnitude and organization to warrant their recognition "as an enemy on a plane with the regular forces of other combatant nations."¹⁸²

Professor Von Glahn has been cited by one authority as favoring the accordence of legal status and conventional rights as prisoners of war to members of "guerrilla forces who operate in accordance with the rules of war except for insignia and open display of arms".¹⁸³

Advocates of this thesis, moreover, suggest that adoption of these procedures was a substantial factor in the successful termination of the post-war Hukbalahap ("Huk") insurgency in the Philippines, and that application of similar measures by the British was instrumental in favorable resolution of the recent guerrilla warfare in Malaya.¹⁸⁴

in no small measure, a responsive product of the enlightened Allied Occupation of Germany following victory in that conflict.

182. Thienel (SORO), op. cit. supra note 167, at p. 21.

183. Id., at 51.

184. From a lecture and seminar presented by Prof. William T. Mallison, Jr., School of Law, Georgetown University, at TJAG School, United States Army, in Feb., 1965. See also, Molnar et al, Undergrounds in Insurgent, Revolutionary, and Resistance Warfare, Special Operations Research Office, ("SORO"), American University, at 329 (1963).

The writer is of the opinion that there is substantial merit to this view, and that corresponding modification in the Law of Land Warfare, as well as implementing national codes, should be initiated. For the more conservative, it is suggested that this position would be appropriately incorporated into existing battle concepts of land warfare, although the Law of Belligerent Occupation might remain in its current status, and unamended.

VI CONCLUSIONS AND RECOMMENDATIONS:

There is little doubt that current concepts of belligerent occupation, as of the Law of War, generally, were formulated on the basis of known battlefield conditions of historic wars. As such, present codifications of these notions are not readily adaptable, in toto, to the envisioned characteristics or tactical exigencies of the future battlefield under conditions of total war, limited, nuclear or non-nuclear, conflict. No similar problem of substance, however, is observed with respect to purely local conflict in a restricted geographical area.

It is the opinion of the writer, nonetheless, that, in fundamental concept, adequate foundation is afforded, by the existing structure of the Law of War to provide, at the least, basic legal standards for the guidance of States and their field commanders in future warfare.

Were many of our current codal concepts non-existent, save for those prescribed by Article 3, GC (The "Miniature Code") and the proscription against "grave breaches" (as defined in Article 148, GC), those principles alone, together with a reasonable comprehension of implications inherent from the judgments of major War Crimes Tribunals following World War II, would provide minimal normative criteria for the rational.

Without doubt, there is room for improvement and need for modification of current conceptual minutiae - as distinguished from fundamental tenets - particularly in view of the variant physical factors, the mobility and elasticity, which will typify the war of the future. In addition to problematical areas, which have been indicated by respected academicians - a few of which have been discussed in the preceding Chapters - other responsible sources have raised doubt over the adequacy of the 1949 Geneva Conventions to modern warfare of substance. Such critical comment has ranged from that voiced by analyst Hanson Baldwin, who has questioned the propriety of certain restrictions imposed upon prisoner of war labor - thereby evoking a rejoinder from Professor Baxter¹⁸⁵ - to concern expressed by a former Secretary of the Army over the "stabilized" concepts of traditional warfare

¹⁸⁵. Baldwin, Mil. L. Rev., supra note 119, at p. 7.

which were apparently contemplated by the Conventions. Similar reflection has been expressed by the Legal Advisor for the Department of State, in the following vein: "It may be suggested that the 1949 Convention is too elaborate, and that many of its detailed requirements will prove impossible of execution in modern war".¹⁸⁶

It should be borne in mind, however, with regard to previous deficiencies in the Law of War, as revealed and developed through the agonizing experience of World War II, that the Geneva Civilians Convention of 1949:¹⁸⁷

"goes a long way towards filling these gaps ... the changes introduced by these Conventions go beyond a mere extension of the categories of protected persons ... the Convention imposes certain minimum obligations of humane treatment even in armed conflicts which are not of an international character and even if the parties to the conflict, which may not be states, are not parties to the Convention - an interesting example of obligations ... imposed on entities ... not normally subjects of international law."¹⁸⁸

¹⁸⁶. O'Brien, Mil. L. Rev., supra note 111, at 17.

¹⁸⁷. See note 37, supra.

¹⁸⁸. Lauterpacht, Brit. Y. Int'l. L., supra note 51, at pp. 360-61. Lauterpacht continues: "... While the Hague Regulations did not contain a single article relating to judicial criminal proceedings against inhabitants of occupied territory, the ... Convention devotes fifteen elaborate articles both to procedural safeguards and to the latter, the Convention ... imposes obligations upon courts as distinguished from the Contracting Parties, to apply certain principles ... this, in its limited sphere, is a veritable universal declaration of human rights; unlike the Declaration adopted by the General Assembly in December, 1948, it is an instrument laying down legal rights and obligations as distinguished from a mere pronouncement of moral principles ..." Ibid, at p. 362.

That many such "gaps" remain to be clarified by future exposition and possible codification should be understood.¹⁸⁹

Aside from representing an empirical development from World War II, the current codifications, moreover, have resulted from intricate and protracted negotiation. They are the product of varying facets of agreement and contention, some of which have been discussed above, and hence represent, as to most areas, the probable maximum extent to which the "High Contracting Parties" could concur, in principle, at the time. Professor Lanterpacht

¹⁸⁹: Some of the "gaps" mentioned by Lauterpacht, inter alia, include: "... the changed character of the duties of the Occupant who is now bound, in addition to ministering to his own interests and those of his armed forces, to assume an active responsibility for the welfare of the population under his control ... the emergence of motorized warfare with its resulting effects upon the factual requirements of occupation and the concomitant duties of the inhabitants ... problems raised by the use of aircraft to carry spies and so-called commando troops; the limits, if any, of the subjection of airborne and other commando forces to the rules of warfare ... reconciliation of the ... contradictory principles relating to espionage said to constitute a war crime on the part of spies and a legal right on the part of the belligerent to employ them ... humanization of the law relating to the punishment of spies and of so-called war treason; ... clarification of the law relating to ... war crimes, in particular with regard to the plea of superior orders ... responsibility of commanders for the war crimes of their subordinates; the regulation, in this connexion, of the question of international criminal jurisdiction; .., the ... law ... relating to ruses and stratagems, especially with regard to the wearing of the uniform of the enemy, ... effect of the ... limitation of the right of war on the application of the rules of war, in particular in hostilities waged collectively for the enforcement of international obligations ... In all these matters the lawyer must do his duty, regardless of dialectical doubts ..., Id. at p. 381.

concludes, as to the remaining "spheres" of ideological difference:

"in view of the absence of agreement in these spheres on the importance attaching to the distinction between combatants and non-combatants and of the radical change in the character of war in scope and method, the creation of new law is substantially a matter of political decision not necessarily related to any existing generally recognized legal principles."¹⁹⁰

Heedful of the factors to which Professor Lanterpacht discreetly alludes, this writer is not in agreement with those who would recommend major revisions of substance in the Law of War, as concerns Belligerent Occupation, at the present time. Material augmentation of the presently multifarious obligations and requirements now imposed on the belligerent occupant, either by way of additional international protocols or through unilateral directives to United States Land Forces should, likewise, be discouraged until the international climate exhibits a propensity for resolution of these grave measures by all major powers in a mutual spirit of legal maturity. As implied from the sources of responsible public opinion and practical governmental policy, cited above, any other course, for the present or near future, would far exceed the pale of wisdom and reality, when tested on the fields of battle in atomic or limited conflict between powers of substance.

190. Id., at p. 379.

Legal standards which are illusory due to a genuine, physical incapacity for performance, serve only to discredit and dissuade general compliance with the requirements of law in areas where no lack of ability exists - a reaction, well known in municipal law, which should be especially discouraged in International Law. The writer believes that over-codification of the Law of War could readily stimulate a stultifying, retrogressive effect in practical application of fundamental concepts.

Although the writer would relax the present four requirements for combatant status as regards unconventional and guerrilla groups which approximate militia, where feasible, it is believed that caution should be exhibited towards any drastic revision of current concepts which might extend the full mantle of "privilege" to the belligerency of saboteurs, terrorists, arsonists or spies, at least in territory subject to belligerent occupation. Current codal concepts, a product of the natural revulsion from the atrocities of aggressive conquest in World War II, go far towards stripping the belligerent occupant of authority for protection of his vital security. It is feared that radical or plenary enhancement in the legal role of the so-called "unprivileged belligerent" would unduly encourage an elevation of the Marxist-Leninist doctrine of subversive aggression -

which has enslaved millions of innocents in our own time - to an eventual, color of legitimacy under International Law. In view of the Communist ideology as to unconventional warfare and "just war", the resultant peril to the security of a belligerent occupant or to that of modest, independent states is too grave for a complete conceptual revision in this area at present. There is no moral parallel in fact between the World War II resistance fighter of Holland or Yugoslavia and the saboteur in Stanleyville or Saigon of 1964; nor, it is submitted, should concepts of international law, however well motivated, be revised to furnish such a parallel in law.¹⁹¹

Certain positive measures can be recommended, however, to resolve conceptual ambiguities and inconsistencies, which remain in several areas - some of which have been indicated - wherein no substantial disagreement would

¹⁹¹. This is not to say that the writer views the suggestions of those authorities advocating this and other material remedial revision of current concepts with disparagement. To the contrary; past history has shown that most progress in the Law of War has been initially suggested by respected scholars and eminent international jurists, at least one or two generations in advance of its general acceptance by nations. The Lieber Code and the Brussels Declaration are apt illustrations. A revival of intellectual interest in the rules of war, as that witnessed in the past decade and a half, is a beneficial omen. Similar analyses-in-depth and private model codes for the future should be highly encouraged. These indicia of the future may hasten the day when the relationship among major powers will attain sufficient mutuality of maturity and genuine comity, for the adoption of more enlightened concepts.

ensue. Such legal modification could be effected without violence to the delicate balance of current World polity. International jurists and political scholars can effectively evaluate both the current codifications and the various national "rules" which construe and impliment the basic law, with a view towards clarification of these inadequacies. Although United States Regulations are not deficient in this respect, hortatory provisions urging relaxation of arbitrary powers and use of humanitarian measures invitational of reciprocity, wherever militarily practicable, should be further encouraged for incorporation into respective national "rules". Continuous study of these problems by acknowledged private, as well as governmental authorities, should be undertaken and stimulated, with this purpose in mind. It is noted that the Air Force and the Marine Corps of the United States have, apparently, neglected to issue regulations comparable to the American "rules" on the Law of Land and Sea Warfare issued by the Army and the Navy. This legal gap in United States implimentation of current codal concepts of Land Warfare, required by both the 1907 Hague and the 1949 Geneva Conventions, should be quickly remedied through administrative action by the Department of Defense.

By virtue of the envisioned, fluid tactical situation in invaded and militarily penetrated territory, certain

remedial administrative action, suggested by respected scholars, as noted in preceding sections, merits concluding emphasis.

With due consideration for the probable physical characteristics of the expanded battlefield of the future, with its absence of orthodox, progressive "occupation", effective provisional plans should be developed, both unilaterally and multilaterally, where feasible, for a very substantial increase in utilization of the civil affairs units and civic action teams in any future conflict. It is assumed that the mobile, belligerent invader in potential warfare will have no immediate practicable alternative, but to utilize the "functional" approach to occupation, as discussed above, for a substantial period, prior to eventual placement of his more permanent occupation troops and military governmental units, which would, doubtlessly, occur only at the completion of protracted military engagement. In the meantime, of course, he would utilize all available local administrative facilities to afford as many of the essential civic and public services as possible to fill the resultant void in governmental functions. Through previous preparation, a vastly increased use of civil affairs and civic action groups organized by the invader "occupant"¹⁹² could thus

192. Civil Affairs and Civic Action Units are

augment and supervise the various municipal administrative organs as remain effective during the interim period. Such a program would require thoroughly adequate planning and detailed preparation, at relatively high military and governmental echelons, well in advance of any possible need. Contingency plans for these activities on a grossly accelerated scale should currently be effected; even at the present time, a wide organization of selected cadres should be scheduled for this purpose.

Supplementing these activities in affording potentially necessary services for the relief and administration of invaded and sporadically occupied territory,¹⁹³ would be the humanitarian service organizations, such as the Red Cross, the Salvation Army, and others, to furnish mass ancilliary relief, medical and disaster aid, on a scale possibly hitherto unknown. Coordination should be presently initiated and constantly maintained on a contingency basis, by and between governments, international unified commands and such organizations on a broad basis thus to organize and constitute a standing, Reserve Humanitarian Force or a

descriptively portrayed in an informative article by Garrison, Have Skills, Will Travel, United States Army *Information Digest*, Feb., 1965, at pp. 26-30. Vastly expanded units, similar to the prototype described in this article, organized to serve the unique needs of the future battlefield, are envisioned.

¹⁹³. As indicated in preceding chapters, certain localities within the battlefield areas of the future

ready, World Reserve Relief Corps, which could prepare for such eventualities as may arise in this sphere. It should be feasible to plan for and attain the added coordination of major humanitarian service organizations on an international basis (at least, with responsible nations participating) so that their services could be utilized immediately, if the occasion required. With the foregoing measures, all individual effort of the mature states, and responsible international facilities could be rapidly mobilized during periods of invasion or preliminary "occupation" in possible future warfare of substantial proportions, to achieve the maximum efficacy of service, and to reduce human misery to the minimum extent possible. In this manner the powers concerned, and their field commanders, can effectively strive to achieve the true spirit of the humanitarian end set forth in the American rules, which, in typical character, prescribe a guide in excess of the standards required by enlightened, Geneva Concepts:

"b. Application of Law of Occupation. The rules set forth in this chapter (implementing the Geneva Civilians Convention on Occupation) apply of their own force only to belligerently occupied areas, but they should, as a matter of policy, be observed as far as possible in areas

would, undoubtedly, be militarily occupied, at least on a "functional" basis, while, without the auxiliary services described herein, many other areas and localities would likely remain devoid of adequate relief and administration.

through which troops are passing and even
on the battlefield."¹⁸⁹ (Emphasis Supplied.)

194. FM 27-10, supra note 38, at para. 352 b.

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