

Law of War

(International Humanitarian Law)

Lieber Code, 1863 (General Orders #100)

Article 14: Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

Article 16: Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

Combatant Rights

Protected Persons

Geneva III (1949)

Article 4, Sec. A

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those 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, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (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.

Combatant Rights (cont.)

Article 5: Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Geneva Protocol I

Article 44 (Combatants and prisoners of war)

- *Para. 2:* While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except...
- *Para 3:* In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly.

Combatant Rights (cont.)

Rights

Geneva III

Article 13: Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.... Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Article 17: Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.... No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Article 118: Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

Combatant Rights (cont.)

Article 3 (Common to Geneva III and IV)

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Combatant Rights (cont.)

Geneva Protocol I

Article 75 (Fundamental guarantees)

- *Para. 1:* [P]ersons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article...

- *Para. 2:* The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
 - (a) Violence to the life, health, or physical or mental well-being of persons, in particular: (i) Murder; (ii) Torture of all kinds, whether physical or mental; (iii) Corporal punishment; and (iv) Mutilation;
 - (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
 - (c) The taking of hostages;
 - (d) Collective punishments; and
 - (e) Threats to commit any of the foregoing acts.

Noncombatant Rights (cont.)

Article 54 (Protection of objects indispensable to the survival of the civilian population)

- *Para. 2:* It is prohibited to attack, destroy, remove or render useless *objects indispensable to the survival of the civilian population*, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, *for the specific purpose of denying them for their sustenance value* to the civilian population or to the adverse Party.
- *Para. 3:* The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party: (a) as sustenance solely for the members of its armed forces; or (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

Noncombatant Rights

Hague II (1899)

Martens Clause (from the Preamble)

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that *in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law*, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience...

Noncombatant Rights (cont.)

Geneva Protocol I (1977)

Article 48 (Basic rule): In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times *distinguish between the civilian population and combatants* and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 50 (Definition of civilians and civilian population)

- *Para. 1:* A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
- *Para. 3:* The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Noncombatant Rights (cont.)

Article 51 (Protection of the civilian population)

- *Para. 2:* The civilian population as such, as well as individual civilians, *shall not be the object of attack*. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
- *Para. 4:* Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) Those which are not directed at a specific military objective; (b) Those which employ a method or means of *combat which cannot be directed at a specific military objective...*
- *Para. 5:* [Prohibited attacks:] An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, *which would be excessive in relation to the concrete and direct military advantage anticipated*.
- *Para. 7:* The presence or movements of the civilian population or individual *civilians shall not be used to render certain points or areas immune from military operations*, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

Noncombatant Rights (cont.)

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War on Terrorism

(President Bush, Memo, 7 Feb 2002)

Protected Persons?

Taliban detainees

- I determine that the provisions of Geneva will apply to our present conflict with the Taliban.
- I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.

Al Qaeda detainees

- None of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva....
- Because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as [POWs]....

Detainee Rights?

I determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to armed conflict not of an international character.

Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

Nuremberg Principles

London Charter

Article 6

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

Article 6 (cont.)

- **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
- Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or **CONSPIRACY** to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Judgment

Regarding defense claims of ex post facto laws:

It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a pre-existing law. “*Nullum crimen sine lege; nulla poena sine lege.*” It was submitted that *ex post facto* punishment is abhorrent to the law of all civilised nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

Judgment (cont.)

Regarding defense claims of sovereign immunity:

It was submitted that international law is concerned with the action of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised.

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.... The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

Judgment (cont.)

Regarding defense claims of superior orders:

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders.... That a soldier was ordered to kill or torture in violation of the international law of war this never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

Superior Orders

My Lai Massacre: United States v. Calley (1973)

Judge's instructions to jury

A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it.... Military effectiveness depends on obedience to orders.... The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful....

In determining whether or not Lieutenant Calley had knowledge of the unlawfulness of any order found by you to have been given, you may consider all relevant facts and circumstances, including Lieutenant Calley's rank; educational background; OCS schooling; other training while in the Army, including basic training, and his training in Hawaii and Vietnam; his experience on prior operations involving contact with hostile and friendly Vietnamese; his age; and any other evidence tending to prove or disprove that on 16 March 1968, Lieutenant Calley knew the order was unlawful.

Military Court of Appeals

In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement. But there is not disagreement as to the illegality of the order to kill in this case. For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder.... Whether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved here.

Command Responsibility

Yamashita v. Styer (U.S. Supreme Court, 1946)

Justice Stone (for the majority)

The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the laws of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result....

[The] purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

Justice Murphy (dissent)

Read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: “We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.”

My Lai Massacre: United States v. Medina (1973)

Judge's instructions to jury

As a general principle of military law and custom, a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties as assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation.

Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander *require actual knowledge plus a wrongful failure to act*. Thus mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.

Geneva Protocol I (1977)

Article 86 (Failure to Act)

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87 (Duty of Commanders)

The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

Abu Ghraib Prisoner Abuse

Independent Panel to Review DoD Detention Operations

The Panel finds that the weak and ineffectual leadership of the Commanding General of the 800th MP Brigade [Janis Karpinski] and the Commanding Officer of the 205th MI Brigade [Thomas Pappas] allowed the abuses at Abu Ghraib. There were serious lapses of leadership in both units from junior non-commissioned officers to battalion and brigade levels. The commanders of both brigades either knew, or should have known, abuses were taking place and taken measures to prevent them.

[From Executive Summary] No approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities. Still, the abuses were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels.

Rome Statute: Nuremberg Principles

Article 27

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Article 28

A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 33

The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- The person was under a legal obligation to obey orders of the Government or the superior in question;
- The person did not know that the order was unlawful; and
- The order was not manifestly unlawful.

Orders to commit genocide or crimes against humanity are manifestly unlawful.