

S E C R E T

8 Feb 45

TO: Lt. Col. Mize.

This is a copy of a set of notes I have made in the process of educating myself on some of the vagaries of the laws on land warfare and belligerent occupation. The idea I had in mind was to point up the more pertinent principles of laws covering the type of violations we are most likely to find in occupied Germany. The rules on prisoners of war and on the sick, wounded and dead are not included because these are rather specific. I made the notes simply as a guide for myself but thought you might like to have them.

Incidentally, the more I read on the subject the more it appears to me that we are not going to find precedent in the law or in the authorities as a basis for many of the types of violations we are going to see. An authority on international law, W. Vargus, in an article called "International Law vs. Stubborn Facts," published in the magazine Tricolor for September 1944 concludes that the new totalitarian concepts arising since the last war have completely upset the lagging concepts of civilized laws of nations.

You might be interested in some of the pertinent quotes from this article as follows:

"If, in addition to 'exactions' by the occupant power due to the sole interest of its armies, there is an action visibly exercised to ruin and dismantle the occupied territory, to undermine it physiologically, to wreck it mentally, to kill it morally, then international law and the Hague rules are even more inadequate to cope with the subject matter."

"When such a situation arises in the realm of law, then no amount of procedural refinement can compensate for the inadequacies of the underlying principles. Then it is conservative to revise fundamentals, and trying to abide by the past is equivalent, indirectly, to being subversively revolutionary."

"When civilizations undergo drastic changes, it is natural that law in general should partake of such powerful modifications. New ideologies create new legal concepts and by changing men and events also change the sets of facts to which those legal concepts will apply."

It appears to me in the recent news releases concerning the War Crimes Commission that it had in mind the same idea and apparently is going to treat as war crimes any acts which are obnoxious to the fundamental principles of humanity and chivalry and which are not justified by military necessity.

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S E C R E T

TREATMENT OF ENEMY CIVILIANS

Civilian aliens found in belligerents' own territory may be interned. Must be treated at least as favorably as PWs. Not required to work, other than care of camp; other voluntary work permitted, for same pay as PWs. (JAGS text 7, pp 36-7, 47-8). Convention silent on this point, and it is customary law (Oppenheim, p. 299).

On invasion, civilian enemies generally are not subject to being interned or captured, (HR 46; JAGS Text, p. 48) even tho they work on fortifications, or as drivers or clerks for the enemy army. But high civil officials, and others particularly useful to enemy army as courriers, guides, etc. may be taken as PWs. Also other influential persons who may incite resistance (FM 27-10, par 76) and those who normally follow the army as press men, sutlers and contractors (JAGS Text 7, p 49-50).

Use of enemy civilians for military works or operations prohibited (HR, Art 23 and 46).

Compelling enemy civilians to give information about their army or its defenses (HR, Art 44; Oppenheim, p. 245).

HR, art 23 L and art 44, taken together, forbids employment of enemy nationals not only as combatants, but also as cooperators in any proceedings which are intended to contribute to the defeat of their own country (Wheaton p. 246).

Persecution of Jews considered a war crime (Inter-allied declaration of 17 Dec 1942 - Wheaton, p. 242)

Deportation and enslavement of peoples by Germany listed as war crime. (Wheaton, p. 243-4).

Taking and execution of hostages by Germany denounced by allied powers, 13 Jan 1942 (Wheaton, p. 263).

"No general penalty, pecuniary or otherwise, may be inflicted on the population on account of the acts of individuals for which it cannot be considered as collectively responsible." (Hr, Art 50, p. 261).

Slave labor in Germany probably violation of several rules (HR, arts 23, 43, 44, 45, 46, 50)

On slave labor - "...there is no right to deport inhabitants to the country of the occupant, for the purpose of compelling them to work there". Even German writers admit illegality of taking Belgians to Germany in last war (Oppenheim, p. 345, JAGS Text 11, pp 102-106).

"Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property may not be confiscated". (HR, art 46) This may be basis for listing as war crimes any acts

against enemy civilians, not elsewhere specifically denounced and which cannot be excused in the name of military necessity. (own conclusion) (Also fundamental principles of humanity in customary law may be a basis - Wheaton, p. 165; also see Allied declarations denouncing acts of Germany towards civilians since 1939 - Wheaton, p. 242).

Hague Regulations are not a complete code. The preamble states:

"Until a more complete code of the laws of war can be issued, the High Contracting Powers think it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."

(JAGS text 11, p. 98)

Reprisals, concerning population: may be inflicted on population for acts of individuals for which community is not responsible, but only for violations of laws of war.

Reprisal is retaliation in kind to compel original offender to refrain from his illegal acts. Collective punishment may be imposed for violations of laws of war and for violation of occupant's regulations. (JAGS text 11, pp 115-120).

CONVENTIONAL LAWS

Geneva Conventions:

Re: Sick and Wounded (Red Cross) - 1864, 1906, 1929.

Re: Prisoners of War - 1929.

Hague Conventions:

Re: Land Warfare - 1899, No. II; 1907, No. IV.

CUSTOMARY LAWS

Apply where conventions not specific. Laws are proved by (1) Historical documents of International practice, such as records and correspondence of foreign officers; (2) Textbooks of authorities; (3) Decisions of International Courts and Courts of Arbitration; and (4) Decisions of National Courts.

BASIC PRINCIPLES

(1) Military Necessity. Permits use of all forms of regulated violence, but does not suspend operation of specific prohibitions, as Germany contends. Laws may be set aside in certain circumstances:

- a. Reprisals for breaches by the enemy.
- b. Express provision that a law may be abrogated, when "imperatively demanded by necessities of war".
- c. Required respect for private property is abrogated when military need is imperative.

(2) Humanity. Destruction of the enemy is modified by the claims of humanity to the extent of surrendering the "use of any engine of war whose military effect is disproportioned to the suffering it entails". Examples: Poison, refusal of quarter, injury and killing after surrender, torturing to get confessions; dum-dum and exploding bullets, gas, etc.

(3) Chivalry. Military honor, denouncing bad faith and treachery. Example: Outawry, proscription, misuse of flags, insignia or uniform.

LAWFUL BELLIGERENTS

(1) Lawful belligerents are members of combatant and non-combatant army forces, civilian levee en masse, or any other group that meets the test: (a) commanded by

person responsible for his subordinates, (b) have fixed distinctive emblem recognizeable at a distance, (c) carry arms openly and (d) conduct operations according to laws and usages of war (HR 1 and 2). When captured, these belligerents are protected by PW treaty.

(2) Unlawful belligerents are liable to punishment as war criminals. Examples: Guerillas, snipers and members of civilian uprisings in occupied territory. Guerillas may be soldiers who continue operations after cessation of hostilities, or civilians who do not meet the 4 point test. They are legitimate if they meet the 4-point test.

SPIES

Not war criminals - HR 24 (par 37), HR 29 (par 202 a) and AW 82.

Entitled to trial - HR Art 30 and AW 82.

Include all persons, civilian or military, both sexes.

Definition FM 27-10, p. 58

Shall suffer death penalty - AW 82.

Punishment death to render their use more difficult. (Thus distinguished from PWs)

FM 27-10, p. 58

Immunity - if escapes, rejoins own army and recaptured, is only a PW - HR Art 31.

(rule does not apply to war traitors - FM 27-10, p. 60)

ACTS NOT JUSTIFIED BY MILITARY NECESSITY

Use of Poison or poisoned weapons. Includes also spreading contagious diseases. But contamination of streams, such as placing dead animals in the, is permitted. (HR Art 23, par (a)) Also permitted to poison water supply if notice is posted (JAGS Text 7, p. 30)

Use of Gases and Chemicals. U. S. not party to any treaty restricting use of toxic or non-toxic gases, smoke or incendiary materials. (FM 27-10, par. 29.) But President Roosevelt has condemned "use of poisonous or noxious gases" and has warned the Axis that its use by them will bring prompt retaliation in kind. (JAGS Text 7, page 29)

Treachery. Generally, the assuming of false character to effect a hostile act. Examples: Crossing enemy lines in disguise to wound and kill; shooting a captor in act of surrendering; feigning death, then using weapon; using enemy wounded for cover; using civilians as a screen in attack; offering a reward for enemy "dead or alive". (FM 27-10 and JAGS Text, both par. 30-31, Oppenheim, p. 272, Wheaton P. 207).

Injury after Surrender - When an enemy combatant ceases to fight and asks for mercy, he is soliciting "quarter"; when his life is spared and he is made prisoner, "quarter" is granted to him. Such a combatant may not be injured or killed. Applies also to sick and wounded. (FM 27-10 and Text 7, par 32-33) and to parachutist of disabled plane over hostile territory. (JAGS Text p. 34). Forbidden to declare that no quarter will be given. (HR Art 23, par (d)).

Exceptions: (1) Enemy continues fire after hoisting white flag, and (2) reprisal in kind. (Oppenheim, p. 271) Also when not practical as when victory during an attack would be hindered, during a pursuit, and in firing artillery on fugitives. (Wheaton pp 209-210)

Employment of Arms Causing Unnecessary Injury. Prohibited by HR Art 23 (FM 27-10, par. 34). Includes dum-dum or any unjacketed or grooved bullet, explosive bullets, gas projectiles, poisoning water supply, using germs, etc. (JAGS text, par. 34; Oppenheim pp 271-275; Wheaton pp 201-206).

Using Enemy Nationals in Operations. Prohibited in HR, Art 23 (FM 27-10 and text par 36). Examples: Digging of trenches, constructing fortifications and gun emplacements even at a distance from the front, repairing of arms, making munitions, and building military roads. (JAGS Text par. 36). HR Art 23 is "clearly of a more comprehensive character than military operations - and includes services in all kinds of work - immediately or subsequently useful to the belligerent in carrying on of his war." (Wheaton, p. 210) This is a debated and unsettled subject, however. (Oppenheim, p. 278) Lawful to use enemy nationals to tend their wounded, bury their dead, repair and build roads and bridges of general utility. (JAGS Text 7, par. 36). Capital punishment and imprisonment lawful to enforce work, if necessary. Extent of violent means for these purposes limited by HR 46: "family honor and rights, individual lives and private property, as well as religious convictions and liberty, must be respected". (Oppenheim, pp 278-9)

Destruction or Seizure of Property. Destruction or seizure of enemy property, public or private, prohibited unless imperatively demanded by necessities of war. (JAGS Text 7, pp 43-4).

Enemy property, public or private, to be respected (HR, Art 23g).

Private property must not be confiscated (HR, art 46).

Buildings dedicated to religion, art, science, charity, historical monuments, and hospitals must be spared, unless used for military purposes. (HR, Art 27). Duty of inhabitants to mark these places with black and white panels - (H IX Art 5, par 2, 1907)

Pillaging, even in assault, is prohibited (HR, Art 28)

Displacement of Civilians. Deportation of civilians to Germany listed as war crime. (Wheaton, p. 244). Not listed as exception in consideration of military necessity (Wheaton, p. 248.)

STRATAGEMS

Ruses of war and measures to obtain information about enemy and country are permissible (HR, Art 24).

Absolute good faith must be observed (FM 27-10, par. 38).

Legitimate Ruses: Spying in civilian disguise; bribery of enemy military and government officers, persuading desertion and insurrection when done openly by combatants in uniform; use of enemy flag and uniform for approach or withdrawal if discarded before opening of fire; ambushes and feigned movements; false signals and messages. (FM 27-10 and Text 37, 38, 40; Wheaton, p. 207-8; Oppenheim, p. 333-6).

Illegitimate Ruses: Line of demarcation indistinct, but generally, any act involving treachery or perfidy is forbidden. Generally, false declaration of truce or armistice; misuse of flags, insignia, uniforms, and Red Cross (HR, Art 23).

Examples: Combatant parachutists in enemy uniform (JAGS Text 7, p. 39)
Feigning surrender to lay a trap (Oppenheim p. 336).
Killing by disguised combatant is assassination. (Oppenheim, p. 336).
Using Red Cross on troop transport, military depots, OPs, places of refuge for troops (Wheaton, p. 209), gun positions, CPs or any place except at sanitary establishments (FM 27-10, par 44).
Using flag of truce to obtain information, for surprise attack, or to gain time. (FM 27-10, par. 42)

CONSIDERATION OF POSSIBLE DEFENSES

Military Necessity. Germany contends that necessity in war overrules the manner of warfare. But Hague Conventions took military necessities into account in framing the regulations. (Oppenheim, p. 184; JAGS text 7, p. 6). German authority has contended that "violation of the laws of war alone offers (is justified as) either a means of escape from extreme danger or the overpowering of the enemy".
Military necessity -- does not justify such violation. (JAGS text 7, p. 7).

Both conventions and usages specifically prohibit certain practices as never justified by military necessity: use of poison germs, and gases, acts of treachery, injury to PWs, use of arms causing unnecessary injury, use of enemy civilians in military work or operations, unnecessary destruction of property and pillaging.

Reprisals. "Not now provided for in conventions, and some precise rules regarding reprisals is an imperative necessity. In last war, atrocities committed in Belgium and France were declared by Germany to be justified as measures of reprisal."
(Oppenheim, p. 449)

Limitations: (1) prohibited in case injury complained of has been repaired, (2) shall never exceed the measure of infraction committed by the enemy, and (3) may be inflicted only for violations of laws of war (JAGS text 7, pp 118-9)

Reprisals against PWs prohibited (GPW, art 2)

Reprisals never adopted for revenge, but only as an unavoidable last resort to induce enemy to desist from illegitimate practices (FM 27-10, par. 358)

Collective Punishment. May be imposed both for violation of laws of war and violation of occupant's regulations (JAGS text 11, p. 116; HR art 50).

Limitations: (1) No general penalty to be imposed for acts of individuals for which they and the community cannot be regarded as jointly and severally responsible (HR, art 50), (2) community responsibility must be present in each case (JAGS text 11, p. 113); (3) destruction committed by legitimate combatants is not a ground (JAGS text 11, p. 113); (4) exorbitant fines do not differ from pillage except in name (JAGS text 11, p. 115).

Superior Orders: Commission of a war crime under orders is not a complete defense, but may be considered (Amend. to FM 27-10, pars 345 and 347 in Info Cir No. 2, 12th AG, 29 Dec 44)