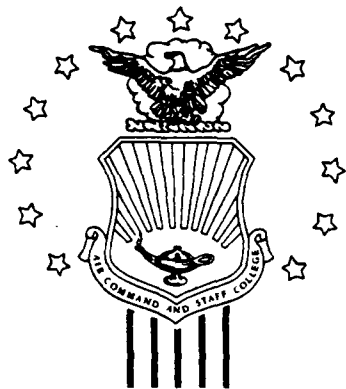


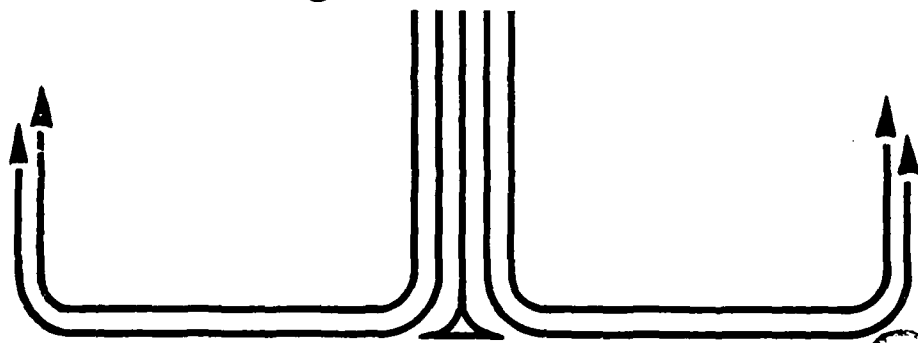
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AIR COMMAND AND STAFF COLLEGE

STUDENT REPORT

OFFENSES UNDER
THE LAW OF ARMED CONFLICT
- A COMPENDIUM
MAJOR KEVIN L. DAUGHERTY 88-0660
"insights into tomorrow"



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requirements for graduation.

AIR COMMAND AND STAFF COLLEGE
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PREFACE

An effective military force must maintain discipline at all times, especially during combat. The body of law which deals with criminal acts during combat is generally referred to as the Law of Armed Conflict or the Law of War. It is made up of statutory provisions, treaties, and regulations. However, the average Air Force member's understanding of the Law of Armed Conflict and what is expected of the member during combat is incomplete. For example, there may be confusion over which provisions of the Code of Conduct governing the behavior of U.S. prisoners are punitive and whether violations of those provisions are punishable by military authorities. Yet the Code of Conduct, as distinguished from the Law of Armed Conflict, was merely guidance to aid prisoners in comporting themselves while in captivity. Yet, in certain cases such as My Lai, servicemen failed to recognize obvious criminal acts.

To try and shed some light on this area of confusion, this paper will list the various statutory provisions which create criminal sanctions for specific acts in combat. It will also describe how a member's conduct in combat may constitute violations of those provisions and list the maximum penalties. Finally, it will address the fundamental need for the existence of the Law of Armed Conflict.

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Major Kevin L. Daugherty was commissioned as a Judge Advocate under a direct appointment on 28 May 1978. His initial duty assignment was as Assistant Staff Judge Advocate, 100th Combat Support Group, Beale Air Force Base, California. There he acted as Claims Officer and Chief of Civil Law. In September, 1979, Major Daugherty was assigned as the Area Defense Counsel for Beale AFB. He was assigned as the Circuit Defense Counsel for the First Judicial Circuit, headquartered at Bolling Air Force Base, D.C., in May, 1981. After two years as Circuit Counsel, he was appointed as an Associate Appellate Government Counsel at Headquarters, United States Air Force in August, 1983. There he represented the Air Force before the Air Force Court of Military Review and the United States Court of Military Appeals. In November, 1984, he was assigned as the Staff Judge Advocate for the 6960th Electronic Security Wing, later the Continental Electronic Security Division, where he served until attending the Air Command and Staff College.

Major Daugherty graduated with honors in 1975 from Carson-Newman College with a Bachelor of Arts degree in Political Science. He received his Doctor of Jurisprudence from the University of Tennessee in 1977. He was licensed to the practice of law in Tennessee in 1978 and admitted to practice before the Tennessee State Supreme Court the same year. He is also a member of the Tennessee Bar Association.

Major Daugherty has completed Squadron Officer School. He has been awarded the Meritorious Service Medal with one Oak Leaf Cluster and the Air Force Commendation Medal with One Oak Leaf Cluster.

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EXECUTIVE SUMMARY



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REPORT NUMBER 88-0660

AUTHOR(S) MAJOR KEVIN L. DAUGHERTY

TITLE OFFENSES UNDER THE LAW OF ARMED CONFLICT - A COMPENDIUM

I. **PURPOSE:** To provide guidelines to Air Force personnel for understanding the sanctions under the Law of Armed Conflict for criminal acts committed during combat.

II. **PROBLEM:** Air Force members have an incomplete understanding of the Law of Armed Conflict. During the Vietnam era, there was confusion among prisoners of war about the liability of their conduct while they were in captivity and by combatants for their conduct on the battlefield. Part of the cause for this confusion was the fact that the Law of Armed Conflict is made up of numerous statutes, treaties, and regulations. There is not a succinct compilation of the specific provisions that govern the actions of military personnel during combat.

III. **DISCUSSION:** The Law of Armed Conflict is made up of selected articles from the Uniform Code of Military Justice, the four Geneva Conventions of 1949, and Department of Defense and service regulations. Most of the rules against criminal conduct that would apply in combat are incorporated in the Uniform Code of Military Justice. This includes those well known

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offenses such as murder, rape, or theft. It also includes such military offenses as cowardice and compelling surrender.

Although the Geneva Conventions and military regulations are not punitive in nature themselves, certain conduct during combat (i.e. mistreatment of prisoners, reprisals on civilian populations, and perfidy) are deplored as prohibited acts by the signatory nations. Much of this feeling toward these acts is based on the customs and traditions of the armed forces of the nations. They would also be viewed as conduct which is prejudicial to good order and discipline or of a nature to bring discredit upon the armed services and therefore punishable under the general articles of the Uniform Code of Military Justice. In whichever case the prohibited conduct arises, the Air Force is tasked with taking appropriate disciplinary action against the perpetrator.

There are practical reasons for maintaining combat discipline. A unit's safety and effectiveness depends upon its cohesion when engaging the enemy forces. Side trips by members to take part in criminal acts detract from the unit's efficiency, depletes the commander's control over his personnel, and may even put the unit at risk of counterattack. The need for strong discipline among the troops does not go down during combat. To the contrary, that is when the need is greatest.

Chapter One

INTRODUCTION

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust, he not only profanes his entire cult, but threatens the very fabric of international society. (5:18)

This quote from General of the Army Douglas MacArthur eloquently states why the American serviceman is held personally liable for his conduct during periods of combat. This paper will attempt to set out the various actions by a military member during armed conflict which would constitute criminal offenses. The various legal provisions which impose this criminal liability are contained in what is called the Law of Armed Conflict, or the Law of War. [The terms "Law of Armed Conflict" and "Law of War" are synonymous when talking about that part of the law which regulates the conduct of armed hostilities. (17:1-1)] The specific criminal restrictions are included in various statutes, treaties, regulations, and also military customs and traditions. The intent of this paper is to draw all of these provisions together, identify the type of criminal conduct, and list potential penalties. In doing so, it will give the Air Force combatant some understanding of what he can, and cannot, do while in combat.

Many criminal acts under the Law of Armed Conflict are also offenses during peacetime under U.S. domestic law (i.e. murder, rape, or theft). However, many of the maximum penalties are increased during war and I will identify these. Still, there are many restrictions on a service member's conduct that apply only during combat and are not readily recognized as crimes (i.e. perfidy, a subordinate compelling surrender, or cowardice). This latter category needs to be understood by combat commanders who are tasked with enforcing discipline within their units.

For purposes of this paper, the Air Force's definition of Armed Conflict will be used. Armed Conflict is defined as "conflict between states in which at least one party has resorted to the use of armed force to achieve its aims. It may also embrace conflict between a state and organized, disciplined and uniformed groups within the state such as organized re-

sistance movements." (16:1-2) The difficulty arises in defining what is an organized, disciplined and uniform group. Will any use of force by the U.S. military against an armed body be considered as "armed conflict" where the Law of Armed Conflict applies? This is probably the case in reality. In fact, it is Department of Defense policy that "U.S. Armed Forces will comply with the Law of Armed Conflict in armed conflict regardless how such conflicts are characterized." (18:1-1) This applies to illegal or aggressive wars. (18:1-1) Therefore, if a serviceman is fighting someone, he/she must consider he/she is subject to the Law of Armed Conflict.

Chapter Two

APPLICABILITY OF THE LAW OF ARMED CONFLICT

Why are we concerned about a standard of conduct during combat? The Law of Armed Conflict is a standard of conduct for United States combatants based on the moral foundations of the Constitution and the Government. We can presume any time America sends troops into combat, American society and government wishes to sustain one of the fundamental principles upon which it was founded. We Americans also like to think of ourselves as a morally decent, law abiding people. To ourselves, we are the "good guys." Allowing amoral conduct to go unpunished would demean our national character. (5:17-18) We would not like to, as Pogo said, meet the enemy and find he is us.

However, the shorter, more simplistic answer to the question of why be concerned with the Law of Armed Conflict is that it is the law. Many of the specific provisions are set out in the punitive articles of the Uniform Code of Military Justice. (8:--) Congress passed the Uniform Code under its power to regulate the Armed Forces and to define felonies against the Law of Nations. (6:--) Provisions of the Law of War are also described in the four Geneva Conventions of 1949. These four treaties, the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Geneva Convention III Relative to the Treatment of Prisoners of War, and the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (3:153-337) plus the Hague Convention of 1907 (12:--;3:43-119) were ratified by Congress and therefore became the law of the land under Article VI of the U.S. Constitution. (7:--) The fact a ratified treaty becomes binding law has long been upheld by the U.S. Supreme Court. (20:314) These treaties also set out what have long been the customs and traditions of the U.S. Armed Services (16:15-4) which may be incorporated into the Uniform Code of Military Justice under the General Articles. (8:Sections 933 and 934) Department of Defense Directives state "alleged violations of the Law of War, whether committed by or against the U.S. or enemy personnel, are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action." (13:para c3) For military members, therefore, there is a body of law to which they are subject, and while the various treaties are not formulated as criminal statutes them-

selves, they bind the signatory nations to enforcing the treaty provisions. (16:15-2) Violations of these provisions are viewed as breaches of military discipline and punished accordingly. (16:para 15-3b; 14:--) It has been the historic premise that the military may charge and try a member under domestic statutes for breaches of the Law of War. (4:796) This is also the current policy of both the Air Force and the Army. (18:1-1, 8-1; 16:15-2; 20:--)

There are also some operational reasons for enforcing the criminal restrictions under the Law of Armed Conflict. First, the violations detract from the reasons the U.S. is engaged in a combat situation, causing loss of public support. This public support of a military action is vital to the success of that action. (5:17-18) Further, if the members of a unit are busy looting, pillaging, or otherwise occupying themselves, they are not attending to their jobs, making their field positions vulnerable and open to attack. (5:21) Finally, the leader whose personnel are occupied in committing criminal acts of their own has lost control over his/her unit, making it extremely hard, if not impossible to fulfill his/her mission. (5:22) Be it a foot soldier who abandons his/her position to loot or an airman who flies off to conduct his/her own reprisal, the commander loses a part of his/her effective fighting force. Failing to maintain the necessary discipline within the unit puts the mission and lives at risk.

Chapter Three

CRIMES OF GENERAL APPLICATION

Certain acts will be criminal if committed by a military member regardless of when or where they are committed. It is generally acknowledged such offenses as rape, murder, theft, or involvement with illegal drugs can land a person in jail. These types of crimes are prosecuted by both military and civilian authorities. Yet these "civil" crimes may take on added significance during combat. The soldiers of the First Platoon of Charlie Company did not appear to view their acts at My Lai as anything outside the bounds of their combat duties. Yet after the disclosure of the incident, we know that multiple homicides were committed. One author suggests My Lai was the result of "intellectual laziness and pathological narcissism." (2:252) Or it may just have been the result of the Fog of War. (5:18) Whatever the reason, it is submitted a sound understanding of offenses under the U.S. Law of War by the soldiers in the field may have had an impact in preventing or reporting the mass murder in a timely manner, if not by the direct participants themselves, then by those support people who were aware of what was going on. (2:219) The mere fact of being in combat will not remove the liability for the offenses which are included in the Uniform Code or other pertinent provisions.

Still, we often view the military as having special laws to govern military situations. This is true. There are some offenses which apply only to military members. For example, only a military member may be prosecuted for an unauthorized absence, missing movement, or mutiny. Some certain offenses, by their nature, can only occur during combat (i.e. compelling surrender and misbehavior before the enemy). (11:--) One need not memorize the entire Uniform Code before going into battle and it wouldn't be practical to have a judge advocate with each unit. However, an understanding of what conduct is prohibited may go a long way toward avoiding problems.

As stated above, certain crimes which are considered "civilian" may also apply in combat. A brief discussion of these offenses may prove useful in helping the service member understand his/her responsibilities. (A list of all offenses and their maximum punishments are set out in Appendix 12 of the Manual For Courts-Martial.)

a.

Homicide involves the killing of another human being without excuse or justification. (8:Sec 918, 191) While killing armed enemy combatants during hostilities would serve as a sufficient justification, killing noncombatant civilians in a battle area or killing enemy soldiers after they have laid down their arms and surrendered would not be justified. The maximum penalty could include death. (11:A12-5) Determining the status of a person as a noncombatant will depend on the facts of the situation. If a civilian is trying to do harm to a soldier, that soldier may use such force as necessary to protect himself.

b.

Rape and carnal knowledge involve the nonconsensual sexual intercourse with a female who is not the wife of the accused, or sexual intercourse with a female under the age of sixteen. (8:Sec 920) There is never justification for these acts, even on the battlefield. The maximum penalty for rape may include death, while the punishment for carnal knowledge may include a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years. (11:A12-5)

c.

Larceny is the wrongful taking of property of another with the intent to keep the property. (8:Sec 921) Robbery is the taking of property by means of force. (8:Sec 922) A soldier does not gain a claim to another's property if it simply happens to be in a war zone. A local farmer still may keep his gold pocket watch, though soldiers may be using his farmyard as a staging area. (Other acts of taking property may also constitute the crimes of pillage or looting and will be discussed later.) Depending on the value of the property, the penalty for larceny may include a dishonorable discharge, 10 years confinement, and forfeiture of all pay and allowances. (11:A12-5) The maximum penalty for robbery may include a dishonorable discharge, total forfeitures, and 15-years confinement. (11:A12-5)

d.

Maiming is the intentional injuring, disfiguring, or disabling of another person which disfigures by mutilation, destroys or disables any member or organ of the body, or diminishes his/her physical vigor by injury to any member or organ of the body. (8:Sec 924) If a military person decides to punch a noncombatant civilian or fellow serviceman in the nose for no good reason, and he/she breaks the other's nose, he/she will be guilty of maiming. (11:IV-89) The same can be said for wrongful uses of weapons. Any hostilities or violent acts must be directed at the opposing forces, not casual people. The maximum penalty could include a dishonorable discharge, total forfeitures, and confinement for 7 years. (11:A12-5)

e.

Any person who engages in unnatural carnal copulation with another person of the same or opposite sex, or with an animal, is guilty of sodomy. (8:Sec 975) Therefore, though the military person is alone and away from home, he/she must leave his/her buddies and the local livestock alone. The maximum penalty may include a dishonorable discharge, total forfeitures, and up to 20-years confinement. (11:A12-5)

f.

Arson is the wilful and malicious burning of an inhabited building or other property. (8:Sec 926) A military member may set fire to a building if it is being used as cover by hostile forces, but he/she cannot set fire to a farmer's barn just to watch it burn. The maximum penalty for arson includes a dishonorable discharge, total forfeitures, and confinement up to 20 years.

g.

If a military member unlawfully enters a dwelling of another at night with the intent to commit a crime therein, he/she is guilty of burglary. (8:Sec 929) This offense does not change with the combat status of the accused. The maximum penalty would include a dishonorable discharge, total forfeitures, and confinement up to 10 years. (11:A12-5) If the offense does not take place at night, the individual is guilty of house-breaking. (8:Sec 930) The maximum penalty is the same, except the period of confinement may not exceed 5 years.

h.

The wrongful use, possession or transfer of a controlled substance (illegal drugs) may be punished by a court-martial. (8:Sec 912a) This is especially critical in times of combat. The success of any military action obviously depends on the readiness of the individuals involved. The maximum punishment for transfer includes a dishonorable discharge, total forfeitures, and up to 15 years confinement. The wrongful possession or use of drugs other than marijuana is the same except confinement is limited to 5 years, marijuana being limited to 2 years. (11:A12-4) The significant aspect of these offenses is that if the individual is receiving combat or hostile duty pay under 37 United State Code, Section 310, or if there is a time of war, all of the maximum penalties for drug offenses are increased by 5 years. (11:A12-4)

Chapter Four

CRIMES OF A PURELY MILITARY NATURE

While many of the offenses described above apply to civilians as well as military personnel, there are some criminal acts which can be committed only by military personnel because of the act's martial nature. A few offenses in this category relate only to crimes which can be committed during combat. Some, such as desertion or disobedience, are readily recognized as offenses. But what of such acts as compelling surrender, misbehavior before the enemy, or cowardice? A quick look at the laws which are pertinent to combat may help shed some light on the nature of these offenses.

a.

When a member goes or remains away from his/her unit, organization, or place of duty, with the intent to remain away permanently, he/she is guilty of desertion. (8:Sec 885) The intent may be formed at any time during the absence. (11:IV-12) The maximum penalty is limited to a dishonorable discharge, total forfeitures, and confinement for 2 years unless otherwise aggravated. (11:A12-1) If the desertion is terminated by apprehension by any authority, then the period of confinement is increased to three years. If the desertion is to avoid or shirk hazardous duty or important service, then the maximum penalty is 5 years. (11:A12-1) "Hazardous duty or important service" includes duty in combat or other dangerous areas, movement to a point of embarkation for the purpose of deploying to a combat area, or entrainment for duty on the border to repel invasion, suppress a riot or strikes, or aid a civil power. (11:IV-13) Drill, maneuvers, or exercises would not be normally considered hazardous duty, but a court-martial would have to decide based on individual facts. (11:IV-13) Still, if a military person leaves his/her unit, or does not show up to go with his/her unit to a combat area, to avoid fighting, then he/she will be guilty of aggravated desertion. However, all of the provisions for setting a maximum penalty are suspended in time of war. During war, the possible penalty for desertion is death. (11:IV-11)

b.

Absence without leave (AWOL) is similar to desertion except there is no intent to remain away permanently. (8:Sec 886) The offense is simple, a member must not be away from his/her unit without permission or authorization. If he/she does so for more

than 30 days, then the maximum punishment can include a dishonorable discharge, total forfeitures, and confinement for up to 1 year. (11:A12-1) If the absence is for more than three days, but less than 30, there is no punitive discharge and forfeitures are limited to two-thirds pay and allowances, and confinement is limited to 6 months. However, if the absence was with the intent to abandon a guard or watch or to avoid maneuvers or exercises, the maximum penalty would include a Bad Conduct Discharge, total forfeitures, and 6-months confinement. (11:A12-1)

c.

If a person misses the movement of his/her unit, aircraft, or ship, through design or neglect, he/she is guilty of missing movement. (8:Sec 887) The military requires its members to move when required. Forgetting to show up, or being too drunk to make the departure point will nonetheless make an individual liable for this offense. "Movement" involves going a substantial distance over a period of time. (11:IV-17) The possible maximum penalty includes a dishonorable discharge, total forfeitures, and confinement up to 2 years.

d.

A member may not strike, lift a weapon, or offer violence toward a superior commissioned officer in the execution of his duty, nor may the member refuse to obey a lawful order of a superior commissioned officer. (8:Sec 890) If a member hits a superior officer in any way, or brandishes a weapon in any manner, he/she would be guilty of this offense. However, just telling the officer the member is going to do something to the officer is not enough to violate this law (This would be a different crime). (11:IV-21) If an officer's order is lawful, the member must obey. In either case, it is a defense to these offenses if the officer acts in a way that placed him/her outside the protection of his/her office. (11:IV-22) For example, if the officer were to assault the member first, or give a clearly unlawful order (such as to commit a murder), the member could fight back, or refuse to obey the order. Striking an officer carries the maximum penalty of a dishonorable discharge, total forfeitures, and 10 years confinement. Disobedience has the same punishment except the period of confinement is limited to 5 years. (11:A12-2) However, both of these punishments are suspended in time of war, when the penalty may include death. (11:IV-23)

e.

Mutiny is the usurpation or overriding of lawful military authority. (8:Sec 894) This offense may be committed in any of three ways. A single person can commit a mutiny by creating violence or a disturbance alone. If he/she acts with others to disobey orders, he/she is also guilty of mutiny. Likewise, if he/she does not take the utmost actions to suppress a mutiny, or does not report the mutiny by all reasonable means, he/she is as guilty as the principle actors. (11:IV-31) A military

person cannot stand by and do nothing to stop a mutiny by others. The maximum penalty for this offense is death. (11:A12-2)

f.

The offense of misbehavior before the enemy encompasses a broad variety of acts by military personnel during combat. For the purpose of this offense, "enemy" includes any hostile body opposing U.S. forces, including rebellious mobs and bands of renegades, and all of the citizens of a belligerent country. (11:IV-40) Misbehavior includes 1) running away (unauthorized) to avoid impending or actual combat; 2) shamefully abandoning, surrendering, or delivering up a command when not in the last extremity; 3) endangering the safety of a unit, command, or military place by neglect or intentional conduct; 4) casting away arms or ammunition; 5) cowardly conduct (misbehavior motivated by fear); 6) quitting the place of duty to plunder or pillage (the unlawful seizure of public or private property); 7) causing false alarms or spreading false or disturbing rumors; 8) wilfully failing to do the utmost to engage, encounter, or capture the enemy; and 9) failing to give all practical aid and relief to other U.S. forces engaged in combat. (11:IV-40-41) The thrust behind this offense is to require the service member to remain in place and do his/her duty to achieve the combat mission. The maximum penalty for this offense is death. (11:IV-42)

g.

Whenever a subordinate compels, or attempts to compel, a commander to give up to an enemy, or hauls down the colors of flag, or offers surrender, the subordinate is guilty of the offense of compelling surrender. (8:Sec 900) The offense is similar to that of mutiny, however, some overt act is necessary to complete the offense rather than just using words. The offense is not complete until the command is actually given up to the enemy. The maximum penalty is death for this offense. (11:A12-3)

h.

A countersign is a word, signal, or procedure given by a higher headquarters as an aid to guards. A parole is a word used as a check on a countersign. (11:IV-45) If anyone discloses the parole or countersign to an unauthorized person or gives a wrong parole or countersign from the one he/she knows he/she is supposed to give, he/she is guilty of an offense. (8:Sec 901) The improper use destroys the value of the countersign or parole and places the unit at risk. The maximum penalty for this offense is death. (11:IV-45)

i.

Anyone who forces a safeguard is guilty of a crime. (8:Sec 902) A safeguard is a detachment, guard, or detail posted by the commander for the protection of a unit or place, or a writ-

ten order left on enemy property to protect that property. (An "Off Limits" restriction is not a safeguard unless the commander clearly designates it as such.) The effect of a safeguard is to pledge the honor of the country to respect the person or property by the country's armed forces. (11:IV-46) Here again, the maximum penalty is death. The military is there to protect property, not destroy or take it. (11:A12:3) A "time of war" need not exist for this offense. (21:--)

j.

When a service member fails to secure captured or abandoned property, or fails to report or turn over that property, or buys or sells that property, or loots or pillages property, he/she is guilty of a criminal act. (8:Sec 903) Captured or abandoned property of the enemy becomes the property of the United States. The individual has no private right to it. (11:IV-47-48) The maximum penalty for failing to secure or report captured or abandoned enemy property is a dishonorable discharge, total forfeitures, and confinement for up to 5 years. In the case of looting or pillaging, the maximum period of confinement could be for life. (11:IV-48)

k.

The offense of aiding the enemy involves both direct and indirect actions by a military member. (8:Sec 904) Aiding the enemy may include providing arms, ammunition, supplies, money, or other things to assist him in any way. It also includes harboring or protecting the enemy, giving intelligence to the enemy, or communicating with the enemy without authority. It does not include an offer of aid to enemy prisoners of war to which they are otherwise entitled. (11:IV-49) The maximum penalty is death. (11:A12-3)

l.

The question of what constitutes the offense of misconduct as a prisoner is an area which may cause confusion. One may believe from reading the language used in the tenets of the Code of Conduct that they are punitive in nature and that violations of these tenets subject the individual to punishment. However, this is not the case. The Code of Conduct is merely a guideline for helping American servicemen conduct themselves with honor while in the hands of the enemy. The offense of misconduct as a prisoner contained in the Law of Armed Conflict is much more limited. It includes acting without authority to the detriment of another for the purpose of securing favorable treatment or mistreating other prisoners while in a position of authority. (8: Sec 905) The intent must be to improve one's own position to the detriment of other prisoners. The conduct must be contrary to law, custom, or regulation. Examples include reporting plans of escape or reporting secret food caches, arms, or equipment. (11:IV-51) Mistreatment must be real, though not necessarily physical. (11:IV-52) The limited provisions under this article do not mean that a prisoner could

not be guilty of a violation of some other provision of the law, such as murder, misbehavior before the enemy, or disobedience of a superior. The maximum penalty for misbehavior as a prisoner is a dishonorable discharge, total forfeitures, and life in prison. (11:A12-3)

m.

Any person who lurks as a spy or acts as a spy in or about a certain place, vessel, aircraft, or place in control of the armed forces, or a shipyard or industrial or manufacturing plant or other institution engaged in work in aid of the U.S. war effort is guilty of spying. (8:Sec 906) Spying means the collection of information (or the attempt to do so) with the intent to convey this information to the enemy. (11:IV-52; 9:33) The actions must be done clandestinely or under false pretenses. (11:IV-53) For purpose of this offense, there must be a declaration of war by Congress, or a factual determination of war by the President. (11:II-2) If found guilty of this offense, the accused must be put to death. (20:A12-3)

n.

Espionage is an offense similar to spying, though it need not have the element of clandestine action. Espionage is the passing or communicating anything to a foreign entity with the intent to injure the United States or to help the foreign entity. (8:Sec 906a) Though imprisonment for life is the authorized maximum period of confinement for most cases involving espionage, certain types of espionage may include the death penalty. These are acts concerning nuclear weaponry, war plans, communications intelligence or cryptographic information, or major weapons systems or defense strategy. (11:IV-54) This offense was added to the Uniform Code of Military Justice in 1985 in response to the Walker Family case where father and son were passing classified information about the Navy to the Russians and it was discovered there was not a sufficient means of dealing with this offense. (15:--;10:577-579) A "thing" referred to in the statute can include a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information related to the national defense. (11:IV-54)

o.

When a member is stationed as a sentinel or lookout and that person falls asleep, becomes drunk, or leaves his/her post before being relieved, he/she is guilty of misbehavior as a sentinel or lookout. (8:Sec 913) His/her "post" is the place he/she is required to perform his guard duties, maintaining a vigilance for an enemy approach, and protecting the persons, property, or place under his/her care. (11:IV-66) This offense, if committed during wartime, carries the death penalty as the maximum punishment. If in other combat situations, the maximum punishment includes a dishonorable discharge, total forfeitures, and confinement for 10 years. (11:A12-4)

p.

One who feigns illness, physical disablement, mental lapse, or who inflicts a self-injury is guilty of malingering. (8:Sec 915) The purpose of this act would be to avoid any work or duty which is normally expected of the military. (11:IV-69) The feigning of an illness or other incapacity during combat carries a maximum penalty of a dishonorable discharge, total forfeitures, and 3-years confinement. Inflicting a self-injury in combat increases the maximum period of confinement to 10 years. (11:A12-4)

q.

There are two additional forms of crimes involving a sentinel or lookout. The first can be committed against a sentinel by acting in a disrespectful manner toward the sentinel. (8:Sec 934; 11:IV-141) This would include any behavior that detracted from the due authority of the sentinel. (11:IV-20) The sentinel may be guilty of a crime himself if he/she loiters on his/her post. (8: Sec 934) "Loitering" means to stand around, to move about slowly, to linger or lay behind, or to sit on post when in violation of known instructions or when there is a failure to give full attention to his duties. (11:IV-141) The maximum penalty for disrespect to a sentinel during combat is forfeiture of two-thirds pay and allowances for 3 months and confinement up to 3 months. While the maximum penalty for loitering as a sentinel or lookout would include a dishonorable discharge, total forfeitures, and confinement for 2 years. (11:A12-8)

Chapter Five

CRIMES UNDER THE GENEVA CONVENTIONS

The offenses listed in the previous chapter are those elements in the Law of Armed Conflict which are specifically incorporated into the Uniform Code of Military Justice. However, there are other types of action that may be considered criminal because they are contained in the four Geneva Conventions, or are contrary to the customs and traditions of the military. Some actions may also be criminal because they are prejudicial to the good order and discipline of the Armed Forces or are of a nature to bring discredit upon the service. The Geneva Conventions of 1949 are not punitive of themselves, and Congress did not make them so when they were ratified. (3:--) But, concepts for conduct during combat set out in the Conventions have been so thoroughly adopted by the U.S. military (indeed, the Air Force discusses them in an Air Force Pamphlet (16:--)) that they must be considered as part of the customs and traditions of the military. (1:70-71) As such, violations of them may be charged under the General Articles of the code. (8:Sec 934; 11:IV-109) Additionally, these acts could also be described as prejudicial to good order and discipline or as service discrediting and so equally chargeable under the same General Articles. (11:IV-109) Either way, those provisions become part of our Law of Armed Conflict.

What are these other acts of misconduct which could be criminally charged? Again, a brief discussion and listing may help identify possible problem areas. This discussion cannot be considered exhaustive of all offenses since most will depend on the facts of each case, facts which cannot be foreseen. But the Law of Armed Conflict does anticipate several potential situations. As for penalties, if there is a closely related offense under the Uniform Code, the maximum punishment for the violation charged under the General Articles will be the same as the closely related offense. If there is no closely related offense, the punishment will be as authorized by the custom of the service. (11:II-147)

a.

A military member may not shoot a parachutist who is descending or has landed as a downed airman. The parachutist must be given a reasonable time to surrender, but he may be attacked if he continues to resist after landing. Airborne troops who are engaged in hostile purposes are not protected.

(16:4-2) A similar offense would be that of murder with a maximum penalty of death.

b.

A civil aircraft is not subject to attack unless it is a valid military objective or an immediate military threat. It will be a factual question as to whether the aircraft is a legitimate target or is posing an immediate threat, however, the most likely case of becoming a valid objective is when a civilian aircraft is used for the transport of troops. (16:4-2 - 4-3) Here again, the closest related offense would be murder with a possible death penalty.

c.

Aerial bombardment poses a particular problem in as much as the Law of Armed Conflict talks in terms of limiting civilian casualties unless they are incidental to an attack on a military target. The focus is on indiscriminate bombing or bombing for the purpose of terrorizing the population. (3:122) While the question of what are valid military objectives may be debated between nations, it would be obvious that a pilot who bombarded a non-military target or civilians for his own purpose would be guilty of an offense. (16:5-8) There would be no difference in using an aircraft to kill an innocent victim than in using a gun. Also, deliberate bombardment of a protected place, (hospital, church, school) is prohibited. (16:15-4) If there is loss of life, the closest related offense would be murder.

d.

Perfidy is the inviting the confidence of an adversary that the actor is entitled to protection under the Law of War with the intent to betray that confidence. (16:8-1) This would include the misuse of recognized signs (flag of truce, "S.O.S.") or the use of the enemy's flag, feigning a ceasefire or surrender, disguising oneself in civilian clothing, or misusing specified signs or signals (church, Red Cross). The closest related offense would be misbehavior before the enemy which carries the maximum of the death penalty.

e.

Improperly using a protected place (i.e. hospital, church, school) for military purposes is prohibited. (16:15-4) Such improper use would void the protection afforded these places, jeopardizing innocent people. The offense is similar to perfidy since the purpose would be to shamefully trick the enemy or hide behind noncombatants. The closely related offense would be misbehavior before the enemy and would carry the maximum penalty of death.

f.

A treacherous request for quarter, the refusal to give quarter, or the firing on a flag of truce would be an offense.

(16:15-4) There must be certainty that attempts to end hostilities by means of recognized signs will not be the means of providing a target. Such misconduct would be closely related to the offense of misbehavior before the enemy. The maximum penalty would be death.

g.

Military members must not deliberately attack a hospital, medical aircraft or ship, medical units or personnel. (16:15-4) The reasons for this are obvious and stem from long-held custom. (3:169-171) This offense would also be closely related to misbehavior before the enemy which carries a maximum penalty of death.

h.

Prisoners of War are accorded special protection. (3:215) They are not persons who are convicted of a crime, but are merely opposing forces detained out of conflict until hostilities are ended. (1:23) Therefore, it would be an offense to mistreat them by: 1) willfully compelling them to perform prohibited labor, 2) killing a person without trial for committing hostile acts, 3) deliberately depriving fair trial rights, 4) mistreating a prisoner (i.e. rape, maiming, beating, torturing, etc.). If loss of life is involved, or the act is rape, the maximum penalty would be death. Denying fair trial rights is closely related to obstruction of justice. The maximum penalty for this is a dishonorable discharge, total forfeitures, and confinement for 5 years. (11:A12-7) Other acts of mistreatment would be closely related to mistreatment of subordinates (8:Sec 893) The maximum penalty for this would be a dishonorable discharge, total forfeitures, and 1-year confinement.

i.

Finally, U.S. military personnel are required to report violations of the Law of Armed Conflict to their superiors. (17:--) The closest related offense under the Uniform Code would be a failure to obey an order or regulation. (8:Sec 892) The maximum penalty would include a dishonorable discharge, total forfeitures, and confinement for 2 years.

Chapter 6

SUMMARY

In order to maintain the effective and disciplined fighting force necessary to fulfill its mission, the Air Force and the other services must know what limitations there are on combatants, and these limitations must be enforced. Much of the reason is because we are a moral people. But also, our military customs and traditions require it. As every child growing up learns, the showing of a white flag means not to shoot. We expect the flag to be honored, and if it is not, our moral conscience and sense of proper conduct is shocked and we expect the actor to be punished.

But, as pointed out earlier, there are also some very practical reasons for obeying the Law of Armed Conflict. When unit members' discipline breaks down, the unit is placed in danger, and it loses its effectiveness. Also we would not want the same acts to be committed against us, and violations by U.S. troops would invite the same in reprisal.

Each military member should be fully aware of the provisions of the Law of Armed Conflict and he/she should be fully prepared to abide by it in combat. The offenses discussed, though not all inclusive, will hopefully provide a foundation of understanding which can be incorporated by the individual during combat.

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