BOMBARDMENT OF LAND TARGETS--MILITARY NECESSITY AND PROPORTIONALITY INTERPELLATED

A Thesis

Presented To

The Judge Advocate General's School

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 or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

A study of the existing law of war as it pertains, during an armed conflict of international character, to bombardment of land targets; together with a discussion of the application of the doctrines of military necessity and proportionality in target selection.

TABLE OF CONTENTS

I. INTRODUCTION

A. THE PROBLEM

Mankind lives in an age of unparalled scientific achievement. This is the era of heart transplants, jet airlines and space probes. Also, it is a nuclear era with national survival at stake.

Total war has been avoided in recent years, notwithstanding such cold war threats as police actions, offshore missile bases and intelligence ship seizure. Yet the possibility of World War III is ever present.

Nuclear disarmament and absolute war prevention are not likely to achieve universal acceptance within the forseeable future. Therefore, the time is nigh for world powers to re-examine the law of war. This task must not assume the form of a perfunctory ritual, but should be designed to balance necessary humanitarian concepts with the realities of war.

With the advent of nuclear weapons, and long range land, sea and air delivery systems, the rules pertaining to bombardment acquired international importance.

While bombardment historically was utilized in direct support of ground troops or in battles between sea vessels, it rapidly developed into numerous systems of mass devastation. Weapon technology rapidly

outdistanced the existing law of war. Accordingly, bombardment practices, to some degree, 'carved' war law by usage--rather than the practice developing under pre-existing legal restrictions.[1] This situation has caused writers to assert diverse positions concerning the effect of bombardment law. Royse maintains that "(r)ules of war...do not limit utility...."[2] O'Brien states that Royse "proved that there was no effective (aerial bombardment) law...."[3] Greenspan asserts that while "(n)o authoritative body of rules exists to regulate air warfare...,"[4] the practice is governed by the "general rules of warfare."[5] Stone indicates that

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1. M. Royse, Aerial Bombardment and the International Regulation of Warfare 147-148 (New York: Harold Vinal 1928). With certain exceptions, Royse accurately prophesied the role of aerial bombardment in World War II. Unfortunately, his theory of "utility" cannot be adopted as it could lead to unlimited bombardment practices. See J. Spaight, Air Power and War Rights 254 (3d ed. 1947) (target area bombardment established by usage).

2. M. Royse, supra note 1, at 4.

3. O'Brien, The Meaning of Military Necessity in International Law, I Institute of World Polity 109 at 135 (1957). He also indicates that the laws of war were revealed as inadequate during World War I. Id. at 131-132.

4. M. Greenspan, The Modern Law of Land Warfare 351 (1959). The author considers the Hague Regulations as providing authoritative rules applying to land warfare.

5. Id. at 352.

a "body of intelligible rules of air warfare" does not exist.[6] However, most writers agree that international re-codification of the law of war is necessary.

Notwithstanding the above opinions, it is maintained that specific bombardment rules do exist either in treaty or customary law form. This body of war law will be examined as it applies during an armed conflict of international character.[7]

The major bombardment rules were codified in treaty form over sixty years ago and subsequently modified by custom. In practice these rules are interrelated.

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6. J. Stone, Legal Controls of International Conflict 609 (2d ed. 1959); see also W. Bishop, International Law 814 (2d ed. 1962); 3 Hyde, International Law 1806 (2d rev. ed. 1945) (Hague Regulations are singularly inept as applied to aerial warfare).

7. The law of war applies during armed hostilities between States or a recognized belligerent--but not during civil conflicts with rebel forces which have not acquired belligerent status. J. Stone, supra note 6, at 305; U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare, at paras. 8, 11 (1956) (hereafter cited as FM 27-10); see also C. Fenwick, International Law 653-654 (4th ed. 1965). However, it has been suggested that the law of war be extended to include such civil war hostilities. See M. Greenspan, supra note 4, at 20, 621. United Nation peacekeeping forces also must abide by the law of war when engaged in armed conflict. J. Stone, supra note 6, at 315-316 and Supp. 1953-1958, at 879; P. Jessup, A Modern Law of Nations 213 (1952); International Law, Academy of Sciences of the U.S.S.R. Institute of State and Law 407 (D. Ogden transl. Foreign Language Publishing House Moscow).

For example, the bombardment of military targets located in a North Vietnamese city would involve a consideration of Articles 23e, 23g, 25 and 26 Hague Regulations, together with an application of military necessity and proportionality principles. However, in the interest of clarity, bombardment rules will be discussed individually, whenever possible.

B. TREATIES AND OTHER PRONOUNCEMENTS

To ascertain the foundations for the modern rules of bombardment, it is necessary to consider various historical treaties and pronouncements.

1. The Declaration of St. Petersburg

The Declaration of St. Petersburg of 1868[8] was signed by nineteen nations. The United States was not a party to this Declaration. The Contracting Parties mutually renounced, in the case of war among themselves, the use by their military or naval troops of any projectile weighing below 400 grammes (approximately 14 ounces) which either was explosive or charged with fulminating or inflammable substance; and, of greater

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8. III Phillimore, International Law, 3d ed. [1865] at 160-162. The text of this Declaration, less signatures, also is contained in U.S. Dep't of Army, Pamphlet No. 27-161-2, 2 International Law 277-278, Appendix B (hereafter cited as DA Pam 27-161-2).

importance, renounced as violating the laws of humanity, "the employment of arms which uselessly aggravate the sufferings of disabled men, or renders their death inevitable". This provision was the forerunner of a milder "unnecessary suffering" prohibition which subsequently will be discussed in detail.[9] It has been asserted that portions of the Declaration, including that section above quoted, announce "prohibitory rules of international law, independent of treaty obligation," and apply equally to air, land and sea operations.[10] Thus, it is argued that the use of certain weapons which "uselessly aggravate the suffering of disabled men, or render their death inevitable" would violate customary war law.[11] It also has been suggested that the Declaration does not apply to aerial warfare.[12] However, a better view is that the Declaration has no

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9. See M. Greenspan, supra note 4, at 353.

10. J. Spaight, supra note 1, at 198. England was a signatory. However, the author's view does not reflect the opinion of all English writers. See note 12.

11. See M. Greenspan, supra note 4, at 353. The author maintains that the "special conventions" referred to in Article 23, Hague Regulations of 1907, consist of five international declarations, including the Declaration of St. Petersburg. Id. at 354.

12. J. Stone, supra note 6, at 615 n. 51.

binding effect whatever,[13] as its customary provisions were incorporated into the Hague Conferences. This position appears entirely consistent with the expressed purpose of the Hague Conferences to revise and define the existing general law and customs of war.

2. The Hague Conferences

In 1899, the First Hague Conference attempted to codify international war law. The land warfare rules of this Convention basically were incorporated in Hague Convention IV, Respecting the Laws and Customs of War on Land, and Annex, of 18 October 1907.[14] (Hereafter, Hague Convention IV will be cited in this text as Hague IV and the Annex as Hague Regulations.) It has been stated that the "Second Conference, in fact, produced only the same results as had the First"[15]--however, the Second Conference clearly placed aircrafts within

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13. See M. Royse, supra note 1, at 126-127; see also Meinast, United States Use of Biological Warfare, 24 Mil. L. Rev 1 at 24 (1964); where the author states: "Because of the demonstrated indefiniteness of the St. Petersburg Declaration of 1868, conclusions that its status 'as an independent norm is extremely questionable' and that it has 'little relevance to modern warfare' should prevail and relegate this Declaration to a limbo in history." Cf. C. Fenwick, supra note 7, at 667-668.

14. 36 Stat. 2277, 2295, T.S. No. 539 (Convention hereafter cited as HIV and Annex as HR).

15. M. Royse, supra note 1, at 130.

bombardment rules prescription. Further, the Hague Convention of 1899 is said to continue in force as between the United States and a signatory who has not ratified or adhered to subsequent superseding conventions.[16] Considering the customary application of bombardment rules, as hereafter discussed, this distinction is of slight importance.

With certain exceptions, modern prescriptive bombardment rules are contained in the Hague Regulations. Although these Regulations have been criticized as inadequate[17] and of "limited importance,"[18] they generally are recognized as reflecting existing customary law, independent of treaty obligation.[19]

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16. Foreward to FM 27-10, supra note 7, at 1; Foreward to U.S. Dep't of Army, Pamphlet No. 27-1, Treaties Governing Land Warfare 1 (1956). A convenient text of the Hague Convention of 1899 may be found in J. Scott, The Hague Conventions and Declarations of 1899 and 1907, at 100-131 (3d ed. Oxford University Press New York 1918).

17. M. Greenspan, supra note 4, at 20.

18. 2 Oppenheim, International Law 229 (7th ed. Lauterpacht 1952); Cf. C. Fenwick, supra note 7, at 95, 652-653, 668-669.

19. J. Spaight, supra note 1, at 198; International Law, Academy of Sciences of the U.S.S.R., supra note 7, at 441; 1 International Military Tribunal Nuremberg, Trial of the Major War Criminals (Goring's Trial et al) at 253-254 (1945-1946) where the court stated: "But it is argued that the

It should be noted that in 1907, the United States, also affirmed a declaration prohibiting the discharge of projectiles from balloons. This declaration (Hague Declaration XIV) is without legal effect today.[20]

An important convention, formulated during the Second Hague Conference, pertained to bombardment by naval forces--Hague Convention Number IX[21] (hereafter referred to as Hague IX). Article 1, Hague IX contains a general prohibition against bombarding undefended ports, towns, villages, dwellings or buildings. Article 2, Hague IX, however, incorporated "a new

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Hague Convention does not apply in this case, because of the 'general participation' clause in Article 2 of the Hague Convention of 1907....(B)ut by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war...." See International Committee of the Red Cross, Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War 54 (2d ed. 1958) (hereafter cited as Red Cross Draft Rules); see also M. Greenspan, supra note 4, at 5-6 (author recognizes that much of the Hague Regulations express already existing customs of war.); 2 Wheaton, International Law 168 (7th ed. Keith 1944).

20. M. Greenspan, supra note 4, at 354; J. Stone, supra note 6, at 332, 623; J. Spaight, supra note 1, at 42; see also N. Royse, supra note 1, at 29-31.

21. 26 Stat. 2351, T.S. 542, II Malloy, Treaties 2314. A convenient partial text of this Convention is located at Appendix F, DA Pam 27-161-2, supra note 8, at 288-290.

test--that of the military objective".[22] Thus, certain specified targets[23] could be bombarded in an undefended locale provided a summons was given followed by a reasonable waiting time. Where "for military reasons immediate action" was necessary, Article 2 authorized bombardment of the listed objectives without prior warning.[24] However, the naval commander was required to exercise due care, when taking immediate action, to insure that the undefended area suffered "as little harm as possible".[25] Hague IX is significant because, the concept of military objectives was extended to aerial bombardment.

3. The Commission of Jurists of 1923

From December 11, 1922 until February 18, 1923, a Commission of Jurists met at the Hague to formulate modern aerial warfare rules.[26] The results of their labors were reduced to The Hague Rules of Air Warfare,

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22. 2 Oppenheim, supra note 18, at 512.

23. E.g., military works, military or naval establishments, depots of arms or war material, workships or plants which could be utilized by the hostile fleet or army and ships of war in harbour.

24. 2 Oppenheim, supra note 18, at 512-513.

25. Id. Naval forces were authorized to bombard defended enemy coast towns. Id. at 511.

26. M. Hoyse, supra note 1, at 174.

1923 (hereafter cited as Hague Air).[27] Article 24 (1) of Hague Air adopted a military objective test similar to Hague IX. Article 24(2) listed permissive military objectives.[28] Article 24(3) prohibited the bombardment of cities, towns, villages and buildings not in the immediate neighborhood of the land forces operation; and prohibited military objective bombardment in those areas if such action would result in indiscriminate bombardment. Article 24(4)authorized bombardment of cities, towns, villages and buildings in the immediate neighborhood of the operation of land forces provided such action was based on military necessity. As early as 1928, the extensive restrictions of Hague Air were recognized as being unrealistic.[29] Article 24(2) was construed to preclude bombardment of such important targets as mines, oil wells, gas works, electric power stations, pig iron

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27. A text of these Rules is contained at Appendix VI, M. Greenspan, supra note 4, at 650; M. Royse, supra note 1, at 213-214 contains a partial text--Articles 22 thru 24.

28. E.g., military forces, works, establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition or distinctively military supplies; and, lines of communication or transportation used for military purposes.

29. See M. Royse, supra note 1, at 226-233.

blast furnaces and similar facilities.[30] Article 24 (3) was denounced for creating an artificial war zone distinction.[31] These early objections were re-affirmed, "in the light of later experience," after World War II.[32] Because the prohibitions contained in Hague Air "would have substantially curbed air power itself",[33] the Rules were never formally adopted by any government. However, Hague Air hovers like an unwanted ghost in the home of aerial warfare law. Even today, one eminent writer maintains that these Rules have "strong persuasive authority".[34] Conversely, it has been claimed that Hague Air has not had a significant influence on belligerent practice "on any critical matter".[35] A third writer indicates that Hague Air may

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30. Id. at 226.

31. Id. at 232-233. The author states that: "To interprete 'indiscriminate bombardment,' as laid down in [Article 24(3)] on the basis of incidental damage to non-combatant populations, would thus, in effect, eliminate aerial bombardment (outside the combat zone)." Id. at 232. (Parens supplied.)

32. J. Spaight, supra note 1, at 229.

33. M. Royse, supra note 1, at 237.

34. M. Greenspan, supra note 4, at 334, 352.

35. J. Stone, supra note 6, at 609; see Phillips, Air Warfare and Law, 21 Geo. Wash. L. Rev. (Part 1) 311, 327 (1952-1953) (Hague Air is not law at all only "pious hope").

have some significance in developing aerial bombardment rules.[36] The best view, however, is that Hague Air did embody some "general principles of a customary or conventional character"[37] and provides a "convenient starting-point" for any future attempt at air law codification.[38] Hague Air principles apparently were considered in the formulation of the Red Cross Draft Rules.[39] Further, the Hague Air principle of military objective has been considered, together with Hague IX, as providing a basis for noncompliance with the strict interpretation of Article 25, Hague Regulations.[40]

C. OTHER CONFERENCES

In 1932, a General Commission of the Disarmament Conference met at Geneva. This Conference subsequently resolved that air attacks against civilians should be prohibited. However, the Resolution never acquired

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36. J. Spaight, supra note 1, at 42.

37. 2 Oppenheim, supra note 18, at 520. (E.g., prohibition of direct attack upon noncombatants.)

38. Id. at 519.

39. Supra note 19.

40. See M. Greenspan, supra note 4, at 333-334; J. Spaight, supra note 1, at 220-221; 2 Oppenheim, supra note 18, at 522-523.

binding force.[41]

In 1938, a resolution of the League of Nations Assembly sought to prohibit any deliberate attack on civilians; require that only identifiable military objectives be bombarded; and, require that aerial attack be carried out in a manner to avoid careless bombardment of the civilian population. This provision failed to acquire general acceptance.[42]

In 1958, the Red Cross published a second edition to their draft rules designed to limit wartime dangers incurred by the civilian populace.[43] These Rules purport to represent international humanitarian standards.[44] However, the Red Cross left "to Governments the responsibility for embodying (their) requirements

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41. J. Stone, supra note 6, at 624-625; J. Spaight, supra note 1, at 245, 248.

42. J. Stone, supra note 6, at 624-625. Compare the League of Nations resolution with the three rules of aerial bombardment announced by Prime Minister Chamberlain on 21 June 1938. Mr. Chamberlain asserted that "reasonable care" must be taken to avoid the careless bombardment of civilians. This criteria was more elastic than the League of Nations resolution. Comment, The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War, 33 Mil. L. Rev. 93, at 97-98 (1966).

43. Red Cross Draft Rules, supra note 19.

44. Id. at 27.

in rules binding on the States."[45] Some Draft Rules' provisions reflect a meaningful codification of existing war law. Other provisions exhibit the same restrictive tone of Hague Air. Thus, it is doubtful whether the Rules will ever be incorporated into binding treaty form.

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45. Id. at 21.

II. BOMBARDMENT OF DEFENDED AND UNDEFENDED PLACES

The first major rules area, warranting consideration, concerns the bombardment of defended and undefended places.

A thorough understanding of these bombardment rules may be obtained by examining and tracing Article 25, Hague Regulations, through various stages of usage modification.

Rules pertaining to assault bombardments, incidental damage, noncombatants, bombardment warnings and protected property will be discussed in this section. However, these rules are not limited merely to place bombardment.

A. SCOPE OF ARTICLE 25, HAGUE REGULATIONS

Article 25, Hague Regulations provides that: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited".[46]

As previously indicated, Hague IX prescribed the rules governing naval bombardment. Article 25, Hague Regulations, obviously was intended to preclude land artillery bombardment of specified undefended places.

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46. HR, supra note 14. (Emphasis in text supplied.)

Further, Article 25 was modified in 1907 to include the words "by whatever means". This intentional modification subjected aerial bombardment to land bombardment prescriptions.[47] Thus, Article 25, as currently modified, applies to both aerial and land bombardment.

B. THE DEVELOPMENT AND MODIFICATION OF ARTICLE 25 BY USAGE

1. The Rule At Work

Article 25, Hague Regulations, was the product of historical development. In the nineteenth century, civilian sections of fortified towns were located beyond the effective range of besieger artillery. This mechanical limitation spawned a general belief that

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47. 2 Oppenheim, supra note 18, at 418, 517; 2 Wheaton, supra note 19, at 215-216; J. Stone, supra note 6, at 621; M. Greenspan, supra note 4, at 332; M. Royse, supra note 1, at 114; International Law, Academy of Sciences of the U.S.S.R., supra note 7, at 441; see also A. Higgins, War and the Private Citizen 44 (London, P.S. King & Son 1912); C. Fenwick, supra note 7, at 675; J. Spaight, supra note 1, at 42, 220 (the words were added to prescribe aerial bombardment by balloons); cf. FM 27-10, supra note 7, para. 42 states: "There is no prohibition of general application against bombardment from the air of combatant troops, defended places, or other legitimate military objectives." (Emphasis supplied.) While FM 27-10 does not state that aerial bombardment is prescribed by Article 25, HR, it is significant that the above paragraph does not attempt to place undefended places within the list of other permitted air targets. But see, Phillips, supra note 35, at 322.

noncombatants should be immune from war disasters.[48]

Early bombardments were directed against either fortresses or towns protected by forts. Thus, an early practice developed that only fortified places could be bombarded; and, that open cities, civilian life and private property should be spared.[49] With the advent of field tactics, unwalled, defended towns acquired greater military significance.[50] This development prompted the First Hague Conference to adopt a new "defended place" test in lieu of the "fortified place" concept.[51] The Second Hague Conference extended the defended place test to circumscribe aerial as well as land bombardment. Considering that in 1907, motor driven aircraft had not been used on bombardment missions,[52] and that long range artillery, surface to surface missiles and rockets were nonexistent, it is apparent that bombardment was viewed primarily as a combat zone problem.[53] The only forseeable exception--

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48. M. Royse, supra note 1, at 150.

49. Id. at 151-156.

50. Id. at 156-157.

51. Id. See J. Spaight, supra note 1, at 221.

52. M. Royse, supra note 1, at 61.

53. See J. Stone, supra note 6, at 623.

naval bombardment of coastal towns--was made the subject of special "military objective" rules established under Hague IX.[54]

Under the "defended place" test, a place (listed in Article 25) was considered defended, and thus subject to bombardment, not only if it was, in fact, fortified[55] but if combat forces were present in occupation or even passing through its boundaries.[56] A city, town or village also was considered defended when a fort (military installation) was located in close proximity, as the fort could protect the community in return for logistical support.[57] These criteria are recognized by the Department of the Army.[58]

Equally important was the fact that Article 25

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54. Id. at 588.

55. What status has a fortified town, in the combat zone, when it chooses not to defend against an attack? It would appear that such a place is undefended within the meaning of Article 25, HR. M. Royse, supra note 1, at 162. However, a strong presumption exists that its defenses will be used; and, to obtain any immunity, the town must clearly convey its intent to surrender to the attacking forces. M. Greenspan, supra note 4, at 337.

56. See M. Greenspan, supra note 4, at 337; 2 Wheaton, supra note 19, at 215.

57. M. Greenspan, supra note 4, at 337.

58. FM 27-10, supra note 7, at para. 40.

related directly to Article 27, Hague Regulations, which governed sieges and bombardments.[59] Thus, an undefended place could not be assaulted, bombarded or attacked.[60] But a defended place in the combat zone could be assaulted and subjected to heavy bombardment. During such an attack, a commander could range his artillery over an entire town, provided he took "all necessary measures" "to spare, as far as possible" protected buildings (e.g., churches, hospitals etc.).[61] The same latitude regarding bombardment of combat zone defended places, currently applies to naval and air bombardments[62] and should be applied to bombardments by

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59. See Comment, 33 Mil. L. Rev., supra note 42, at 95. Note the reference to, investment, bombardment, assault and siege in FM 27-10, supra note 7, at para. 40.

60. See 2 Oppenheim, supra note 18, at 418. However, it has been asserted that without modification Article 25, Hague Regulations, allowed bombardment of military objectives, in open towns, which could not be "reached by other means." M. Royse, supra note 1, at 162-163.

61. HR, supra note 14, at Article 27; 2 Oppenheim, supra note 18, at 421; Red Cross Draft Rules, supra note 19, at 91; see, M. Greenspan, supra note 4, at 336; Nurick, The Distinction Between Combatant and Noncombatant in the Law of War, 39 Am. J. Int'l L. 680 at 684-685 (1945). Protected property will be discussed subsequently.

62. J. Stone, supra note 6, at 621; J. Spaight, supra note 1, at 252-253; see also C. Fenwick, supra note 7, at 676.

long range artillery and missiles.[63] It should be noted, that Field Manual 27-10 expressly retains the defended place concept, while incorporating the military objective test.[64] By continuing partially to apply the undefended-defended place principles, our military forces may claim the right to subject combat zone defended places to general bombardment under Article 27, Hague Regulation criteria.[65] But should this right

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63. J. Stone, supra note 6, at 560; 2 Oppenheim, supra note 18, at 420. Both authors recognize that such bombardment would be legitimate, if it is true that general naval and air bombardment can be conducted within the zone of operations (combat zone) "even though there is no intention to occupy the bombarded area." Naval and air forces were given this latitude, because neither inherently possessed ground seizing capabilities. See also Nurick, supra note 61, at 684-685.

64. FM 27-10, supra note 7, at para. 40.

65. This doctrine is not without limitation. Articles 23e and 23g, HR, impose additional requirements, which should not be abused intentionally even during assault. Also note that Red Cross Draft Rules, supra note 19, at Article 6, Paragraph 2, propose a new rule based on protection of all buildings and means of transport, which are for the exclusive use and occupancy of the civilian populace. Further, since 1949 belligerents acquire a joint obligation to enter good faith, local negotiations for the removal of various classes of civilians from a besieged or encircled area presumably before bombardment or attack is commenced. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 17, [1956] 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (hereafter cited as GC). However,

always exist? Obviously, in the heat of battle a commander may not be able to determine the exact location of aggressive fire; however, enemy fire occasionally may be pinpointed to a specific assault area. In this latter circumstance, there would not be any necessity to bombard buildings or areas actually undefended. Unfortunately, specific assault rules cannot be established beforehand. In most instances, the existing military situation will dictate the degree of assault bombardment required. However, even during attack, a commander should use such reasonable care as the circumstances dictate--weighing bombardment damage against the necessity for mission accomplishment and troop safety.

As above indicated, undefended places were not subject to attack, under Article 25, Hague Regulations. The effect of this prohibition, was reflected in the open town concept. An open town traditionally was

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negotiations may be impossible under certain field conditions--e.g., where a force or aircraft is suddenly subjected to effective hostile fire from an encircled village. Subject to the provisions of Articles 17 and 23, GC, there exists no rule which compels the besieging commander to permit noncombatants to leave the besieged area. FM 27-10, supra note 7, at para. 44a. See also M. Greenspan, supra note 4, at 349-351 (Commanders have a duty to conclude evacuation agreements whenever possible).

defined as being undefended, and one which could be entered by friendly land troops without encountering enemy opposition.[66] Such a town could not be bombarded. With the advent of aerial bombardment and long range artillery, the problem became acute. Could a city outside the combat zone (hinterland city) unilaterally declare itself "open" and thereby obtain bombardment immunity? It has been suggested that the open city concept never was intended to extend beyond the combat zone.[67] However, an equally sound position is that an undefended, hinterland city cannot unilaterally prevent bombardment of any legitimate military objective within its boundaries.[68] Even under recent treaty provisions, the establishment of safety and neutral zone is subject to mutual recognition by the belligerent parties.[69] Further, the Red Cross Draft Rules, while acknowledging the hinterland applicability of the open city concept,

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66. M. Greenspan, supra note 4, at 332; see also 2 Hyde, International Law 303 (1922) (A place to be undefended must be left open to occupancy.); 2 Wheaton, supra note 19, at 215.

67. J. Stone, supra note 6, at 621-623.

68. See M. Greenspan, supra note 4, at 333-334.

69. See GC, supra note 65, at Articles 14-15.

requires that all belligerents formally recognize such status.[70] Thus in my opinion, no right exists under current war law for one belligerent to unilaterally create an open hinterland city.

2. The Rule Partly Modified

During World War I, Germany briefly asserted that air attack outside the combat zone was prohibited. However, the Anglo-French doctrine that all military objectives were subject to bombardment prevailed.[71] Germany subsequently engaged in hinterland bombing designed to demoralize the English people.[72] "England suffered 51 airship raids and 52 airplane attacks....The total casualties for England were 3,408 wounded and 1,413 dead."[73] The Allies also bombed enemy hinterland areas. General World War I practice, to bomb hinterland targets, gave birth to the aerial warfare doctrine of military objective.[74] This doctrine has been loosely

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70. Red Cross Draft Rules, supra note 19, at 118 and Article 16.

71. J. Stone, supra note 6, at 615.

72. M. Royse, supra note 1, at 181.

73. Id.

74. Id. at 193; J. Stone, supra note 6, at 615; see also 2 Oppenheim, supra note 18, at 418; Nurick, supra note 61, at 692.

described as "...the right to bombard objects of a military character wherever such objects (are) found...."[75] This definition, while conveying the concept of the military objective doctrine, is misleading. It fails to warn the reader of other limiting rules, such as wanton property destruction and unnecessary suffering.

The doctrine of military objective originally was introduced in Hague IX and applied only to naval bombardment. It has been recognized that the special reasons for the naval rule "...equally apply in large measure to aerial bombardment"--as neither naval commander nor pilot can take possession of the undefended place and thus, without recourse to bombardment, destroy the military objectives therein located.[76] In 1923, the Commission of Jurists drafted the doctrine of military objective into the Hague Air Rules,[77] and disregarded Article 25, Hague Regulations.[78] Since that time writers have generally accepted the military

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75. M. Royse, supra note 1, at 192. (Parens supplied.)

76. J. Spaight, supra note 8, at 220-221. (The three successive stages in bombardment law development are: (1) fortified city concept (2) defended city concept; and, finally, (3) the military objective.)

77. Hague Air Rules, supra note 27, at Article 24.

78. M. Royse, supra note 1, at 237-238.

objective doctrine; and, several have maintained that Article 25, Hague Regulations, is an obsolete test.[79] While Field Manual 27-10 adopts the military objective test, without distinction as to the type of weaponry concerned, it also retains the defended place concept.[80] This suggests that the United States Army, at least, has not renounced Article 25, Hague Regulations as being completely inoperative. It is, therefore, my opinion that Article 25, Hague Regulations, is not obsolete; but, in fact, operates in a form modified by customary war practice to include the military objective doctrine.

Rather than devising a working definition of "military objective" several sources list, by way of example, certain targets that so qualify. Some targets are listed in Field Manual 27-10 which states:

Factories producing munitions and

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79. Id. 2 Oppenheim, supra note 18, at 522-523; Hall's International Law 663 (8th ed. A. Pearce Higgins 1924); J. Spaight, supra note 1, at 261. See Red Cross Draft Rules, supra note 19, at 65-66, which acknowledges that the doctrine of military objective is now an established rule of warfare. See also GC, supra note 65, at Article 18 and Annex I, Article 4, which by implication recognizes the validity of the military objective doctrine. Cf. 3 Hyde, supra note 6, at 1824.

80. FM 27-10, supra note 7, at para. 40.

> military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places devoted to the support of military operations or the accommodation of troops may also be attacked and bombarded even though they are not defended.[81]

Spaight lists such targets as shipping, oil plants, marshalling yards, aircraft factories, aluminum works, internal communications, armament and accessory factories, submarine facilities, air bases, steel works, benzol plants, ballbearing plants, railways, canals, viaducts and road bridges of military importance.[82] He also lists power houses, gas works and water supply systems located in industrial areas.[83] Red Cross Draft Rules attempt to define the term military objective,[84]

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81. Id. (Emphasis added.) This list does not purport to be exhaustive.

82. J. Spaight, supra note 1, at 277, 279-280. See M. Greenspan, supra note 4, at 281. Author lists such targets as fortifications, entrenchments, supply centers, military stores, dumps, transportation, fighting vehicles, military aircraft, war factories, military headquarters, barracks, and any buildings occupied by troops which are not protected by the Geneva Conventions.

83. J. Spaight, supra note 1, at 229.

84. Red Cross Draft Rules, supra note 19, at Article 7; states: "Only objectives belonging to the categories of objectives which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives."

and to provide a comprehensive, <u>though not exhaustive</u> list of military objective targets.[85] Of great signi-

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85. The Red Cross Draft Rules, state in pertinent part: "I. The objectives belonging to the following categories are those considered to be of generally recognized military importance::
(1) Armed forces, including auxiliary or complementory organizations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting.
(2) Positions, installations or constructions occupied by the forces indicated in sub-paragraph I above, as well as combat objectives (that is to say, those objectives which are directly contested in battle between land or sea forces including airborne forces).
(3) Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (<u>e.g.</u> Ministries of Army, Navy, Air Force, National Defense, Supply) and other organs for the direction and administration of military operations.
(4) Stores of arms or military supplies, such as munition dumps, stores of equipment or fuel, vehicle parks.
(5) Airfields, rocket launching ramps and naval base installation.
(6) Those of the lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.
(7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance.
(8) Industries of fundamental importance for the conduct of the war:
(a) industries for the manufacture of armaments such as weapons, munitions, rockets, ships, including the manufacture of accessories and all other war material;
(b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment for the armed forces;

ficance, is the clear assertion in the Red Cross Draft Rules that any listed target cannot be considered as a military objective, "where their total or partial destruction, in the circumstances...offers no military advantage."[86] Although not specifically mentioned in the Draft, "pointless" destruction would violate Article 23g, Hague Regulations. However under normal wartime conditions, all targets above discussed, including

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(c) factories or plants constituting other production and manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military;
(d) storage and transport installations whose basic function it is to serve the industries referred to in (a)-(c);
(e) installations providing energy mainly for national defense, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.
(9) Installations constituting experimental, research centres for experiments on and the development of weapons and war material.
II. The following, however, are excepted from the foregoing list:
(1) Persons, constructions, installations or transport which are protected under the Geneva Conventions I, II, III, of August 12, 1949;
(2) Non-combatants in the armed forces who obviously take no active or direct part in hostilities." Id. at 72-73. It would appear that the initial determination of whether a specific target has "fundamental importance for the conduct of the war" etc. either will be a military or political determination. However, any war action ultimately may be subject to judicial review.

86. Id. at 9-10.

coal, iron, uranium and similar mines or processing plants, would constitute legitimate military objectives within the meaning of that concept.[87]

C. CIVILIANS AS MILITARY OBJECTIVES

The question frequently arises as to what extent the civilian population may be considered military objectives and bombarded. Historically civilians, and certain military personnel (e.g. doctors and chaplains), were considered as noncombatants, provided they did not engage in hostile action against the enemy. Before the advent of modern warfare civilian noncombatants rarely were subjected to a bombardment attack. However, during World War I, Germany openly engaged in terror bombing of English citizens. Further, in World War II many civilians were killed--approximately 70,000 people died as a result of the atomic bombardment of two cities, Hiroshima and Nagasaki. The changing conditions of modern warfare--such as, more effective weapons and the absolute need for destroying an enemy's war production capability--have produced a definite rise in noncombatant casualties. These developments caused some

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87. However, it has been suggested that the doctrine of military necessity will be "more rigidly applied" outside the combat zone. J. Spaight, supra note 1, at 254.

writers to acknowledge that the traditional distinction between combatant and noncombatant has become obscured.[88] Spaight has suggested that a distinction must be drawn between true noncombatants and civilian war workers who cannot claim immunity from attack.[89] Stone asserts that war workers are part of a quasi-combatant work force subject to direct attack.[90] However, the majority of writers support the view that noncombatants are not subject to direct attack.[91] This latter position appears to reflect the current war law rules concerning noncombatants. Noncombatants are not classified as legitimate military objectives. In my opinion, an intentional, direct attack against noncombatants could

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88. M. Greenspan, supra note 4, at 53; 2 Oppenheim, supra note 18, at 207-208; C. Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations 105-106 (M. Nijhoff The Hague 1966); Nurick, supra note 61, at 680; G. Schwarzenberger, The Legality of Nuclear Weapons 16-22 (1958); see 2 Wheaton, supra note 19, at 170-171 (The distinction should be abolished).

89. J. Spaight, supra note 1, at 44, 47-48, 261, 263.

90. J. Stone, supra note 6, at 628.

91. E.g., 2 Oppenheim, supra note 18, at 207-208; Hall's International Law, supra note 79, at 471; Brungs, The Status of Biological Warfare in International Law, 24 Mil. L. Rev. 47 at 77 (1964); International Law, Academy of Sciences of the U.S.S.R., supra note 7, at 422, 426; Red Cross Draft Rules, supra note 19, at 8, 46, 58 and Articles 4, 6.

constitute a violation of the unnecessary suffering provisions of Article 23e, Hague Regulations--which is not limited, in application, merely to enemy combat forces. However, noncombatants are not absolutely immune from bombardment. For it is well established that noncombatants are subject to personal injuries indirectly resulting from land, naval or air operations directed against military objectives.[92] Thus, noncombatants are subject to injury or death incidentally arising from the conduct of legitimate military operations.[93] Further, the mere presence of noncombatants on a legitimate military objective will not normally render the target immune from attack.[94] In fact, a

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92. Hall's International Law, supra note 79, at 471 (The author's assertion, that noncombatants are subject to indirect injury whether the military operation was reasonably necessary or not, appears to be a statement of fact rather than a legal conclusion that such an operation would be legitimate.); 2 Oppenheim, supra note 18, at 346, 525; Brunge, supra note 91, at 77; see Kelly, Gas Warfare in International Law, 9 Mil. L. Rev. 1, at 50 (1960), Mil. L. Rev. Vols. 1-10, Selected Reprints 469 at 517-518 (1965); M. Greenspan, supra note 4, at 53; see also M. Royse, supra note 1, at 172-173.

93. A military action to be legitimate must meet the two tests of military necessity and proportionality. These principles subsequently will be discussed in detail.

94. 2 Oppenheim, supra note 18, at 525; see also M. Royse, supra note 1, at 241.

provision had been incorporated into the Red Cross Draft Rules, stating, in part, that:

> (S)hould members of the civilian population...be within or in close proximity to a military objective they must accept the risk resulting from an attack directed against that objective.[95]

Further, Article 11, of the Red Cross Draft Rules, indicates that the authorities "shall, so far as possible" take the necessary steps to avoid endangering their civilian population to attack--including removing them from military objective areas. Such a rule, if practiced, could greatly reduce civilian casualties.

D. BOMBARDMENT WARNING REQUIREMENTS

Bombardment warning rules are designed to protect civilian noncombatants and their property. These rules are not limited in scope merely to places listed in Article 25, Hague Regulations. However, warning situations most frequently arise in conjunction with city, town or other residential area bombardment. Accordingly, it is appropriate to discuss warning rules at this time.

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95. Red Cross Draft Rules, supra note 19, at Article 6, para. 3. This provision does not permit direct attack against noncombatants, e.g. machine gunning civilian workers running from a bombarded plant. Id. at 64. Quaere: Would you fire if the noncombatants, running on the ground, were the enemy's best nuclear scientists?

1. Artillery Bombardment Warnings

The warning requirements for artillery bombardment are contained in Article 26, Hague Regulations, which provides:

> The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.[96]

The provisions of Article 26 are elastic in nature. The purpose of notification is to enable private individuals, within the area to be bombarded, "to seek shelter" and to protect their "valuable personal property."[97] Thus, the warning requirement exists only when a portion of the civilian population remains in the area to be bombarded.[98] Even then, there is no obligation to notify the authorities before commencing joint bombardment/assault operations.[99]

In addition, a commander is required only to "do all he can" to warn the authorities.[100] A reasonable

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96. HR, supra note 14.

97. 2 Oppenheim, supra note 18, at 420; M. Greenspan, supra note 4, at 338; 2 Wheaton, supra note 19, at 216.

98. FM 27-10, supra note 7, at para. 43b; M. Greenspan, supra note 4, at 338-339.

99. See M. Greenspan, supra note 4, at 339.

100. 2 Oppenheim, supra note 18, at 420.

attempt to communicate notice should meet this test.

Further, no warning is required when necessities of war demand immediate bombardment or the military situation otherwise precludes timely notification. These exceptions prevail even when an assault is not contemplated, and portions of the civilian population remain in the target area.[101] Thus, under Article 26, Hague Regulations, the attacking commander is vested with considerable discretion in determining notice requirements.[102]

2. Naval Bombardment Warnings

The warning requirements of Article 26, Hague Regulations, do not apply to naval bombardment. Naval bombardment, notification requirements are contained in Articles 2, 3 and 6, Hague IX.[103] Article 6, Hague IX, closely corresponds to the artillery notification provisions above discussed.[104] However, when military objectives, located in an undefended place, are subject to naval bombardment, the following rule applies:

> Only if, for military reasons,

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101. Id. M. Greenspan, supra note 4, at 339.

102. M. Greenspan, supra note 4, at 339.

103. Hague IX, supra note 21.

104. M. Greenspan, supra note 4, at 339.

> immediate action is necessary, and no delay can be allowed to the enemy, may bombardment be resorted to without previous warning, the commander being compelled to take all due measures in order that the undefended place itself may suffer as little harm as possible.[105]

Considering that the Hague Conferences authorized naval forces to attack military objectives, it is not inconsistent to assume that greater notification duties were imposed. In practice, though, no real difference exists.

3. Aerial Bombardment Warnings

It has been suggested that Article 26, Hague Regulations, does not pertain to aerial bombardment;[106] however, there exists equally persuasive, contra authority.[107] As the Hague Regulations, as reflected by Article 25, generally were intended to apply to aerial bombardment, the latter view appears correct. However, warning ordinarily need not precede aerial bombard-

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105. 2 Oppenheim, supra note 18, at 512-513 (Emphasis supplied.); see Hague IX, supra note 21, at Article 2.

106. See discussion Red Cross Draft Rules, supra note 19, at 83.

107. See M. Greenspan, supra note 4, at 340; Red Cross Draft Rules, supra note 19, at 54 and Article 8 (c); see also 2 Oppenheim, supra note 18, at 420 n. 1, 524 n. 2, 3 (It is interesting that the author's index lists "Aerial bombardment....warning of, 524."); 6 Hackworth, Digest of International Law 264-265 (1943), citing, Coenca freres c. Etat allemand and C. Kiriadolou c. Etat allemand.

ment--even if Article 26, Hague Regulations, applies. It generally is accepted that necessity for surprise, and the military exigencies inherent in most aerial warfare missions, do not allow such notification to be given.[108] The necessity for these exceptions is strengthened by the existence, in modern warfare, of sophisticated radar devices, jet interceptors and surface to air missiles. Obviously, if the enemy possesses effective air defense capabilities, which could jeopardize the bombing mission, notice should not be required.

Although, it has been suggested that the warning requirement has "fallen into disuse," enough instances of notification exist to repudiate this allegation.[109] In my opinion, failure to warn generally is connected with one of the above exceptions, rather than to a customary practice of complete rule abandonment.

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108. M. Greenspan, supra note 4, at 339-340; J. Stone, supra note 6, at 622; J. Spaight, supra note 1, at 241; see Nurick, supra note 61, at 686; cf. 2 Oppenheim, supra note 18, at 420.

109. See DA Pam 27-161-2, supra note 8, at 50 and n. 50; see also M. Greenspan, supra note 4, at 340, n. 108. But cf. J. Spaight, supra note 1, at 241-242. During the aerial and land bombardment of Hue, Republic of Vietnam, loudspeaker warnings were broadcast.

4. Warning Policy

It is the express policy of the Department of the Army that:

> Even when belligerents are not subject to the above treaty (Hague Regulations), the commanders of United States ground forces will, when the situation permits, inform the enemy of their intention to bombard a place, so that the noncombatants, especially the women and children, may be removed before the bombardment commences.[110]

This notification policy was established to insure the highest degree of noncombatant protection, consistent with existing military mission requirements.[111]

Further, by reducing the possibility of incidental property damage and human suffering, through timely notice, a commander will acquire a greater bombardment latitude under the proportionality doctrine.

E. PROTECTED ENEMY PROPERTY

Certain classes of enemy property enjoy limited protection from combat action. This protection arises from customary war law and treaty provisions. Protected property frequently is located within those "places"

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110. FM 27-10, supra note 7, at para. 43c. (Emphasis supplied.)

111. Quaere: Was this policy statement also intended to suggest that the Department of Army does not consider Article 26, Hague Regulations, as expressing customary war law binding on a non-signatory? In my opinion it was not.

listed in Article 25, Hague Regulations. Thus, it is appropriate to examine the applicable protection rules at this time.[112]

1. Historical Buildings And Monuments

Article 27, Hague Regulations, requires that during sieges and bombardments, "all necessary steps must be taken to spare, as far as possible" buildings used for religious, artistic, scientific or charitable purposes, and historic monuments.[113] This protection is not absolute. The above property is subject to intentional bombardment when used for military pur-

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112. For general discussions of protected property rules see M. Greenspan, supra note 4; FM 27-10, supra note 7 and DA Pam 27-161-2, supra note 8. Note: Improper use of privileged buildings for military purposes is considered a war crime. FM 27-10, supra note 7, at para. 504 h; see also 2 Oppenheim, supra note 18, at 567 n. 2 (bombardment of protected buildings).

113. Supra note 14. Such places should bear distinctive and visible identification signs. Protection is extended to prevent willful damage during occupation. See Id. at Article 56. Protection also is provided from naval bombardment. H. IX, supra note 21, at Article 5. Further, the United States has entered a regional agreement regarding protection of these property classes. International Treaty for the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact) of 15 April 1935, 49 Stat. 3267, T.S. 899. International recognition of the need for protecting valuable buildings and monuments also is reflected in the Hague Convention of May 1954 concerning the Protection of Cultural Property in the Event of Armed Conflict.

poses.[114] It has been stated that, in all other circumstances, deliberate bombardment would be prohibited.[115] However, when military necessity exists, and the doctrine of proportionality would not be violated, these buildings and monuments can be destroyed--e.g., where the enemy elects to defend, or erects a munitions factory, in close proximity to the property.[116] Of course, "every effort must be made to preserve" protected property "from damage incidental" to legitimate military objective bombardment.[117]

2. Medical Facilities

In addition to the general protection acquired under the Hague Conventions,[118] military fixed and mobile medical facilities, hospital ships and aircraft, and civilian medical facilities, enjoy special bom-

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114. FM 27-10, supra note 7, at para. 46c; M. Greenspan, supra note 4, at 340-341; J. Spaight, supra note 1, at 285.

115. M. Greenspan, supra note 4, at 341.

116. See generally 2 Oppenheim, supra note 18, at 415, 420-421; cf. 2 Hyde, supra note 66, at 304-305; 3 Hyde, supra note 6, at 1805.

117. M. Greenspan, supra note 4, at 341.

118. HR, supra note 14, at Article 27; Hague IX, supra note 21, at Article 5.

bardment protection under the Geneva Conventions.[119]

While some differences exist in required notification (identification) procedures, between various type of medical facilities, units, ships and aircraft, all are protected against deliberate bombardment or attack whether from land, sea or air.[120] These facilities, and conveyances, may lose their protection but only if "used to commit, outside their humanitarian duties, acts harmful to the enemy."[121] Even in these circumstances, the protection privilege is not auto-

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119. GC, supra note 65, at Articles 18-22; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, arts. 19-26, 35-37, [1955] 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (hereafter cited as GWS); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, arts. 22-26, 34, 36-39, [1955] 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (hereafter cited as GWS Sea).

120. M. Greenspan, supra note 4, at 341; see 2 Oppenheim, supra note 18, at 356-360, 365.

121. GWS, supra note 119, at Article 21; GWS Sea, supra note 119, at Article 34; GC, supra note 65, at Article 19. (These Treaties also list specific acts which will not be considered as having deprived the facilities or conveyances of protection.); FM 27-10, supra note 7, at para. 258b states: "Acts harmful to the enemy are not only acts of warfare proper but any activity characterizing combatant action, such as setting up observation posts or the use of the hospital as a liaison center for fighting troops."

matically terminated. Due warning must be given. Further, in "all appropriate cases" a reasonable time must be granted the violator in which to desist from his harmful activity. Only "after such warning has remained unheeded" may deliberate attack or bombardment be commenced.[122]

The Geneva Conventions do not provide absolute protection, to medical facilities or conveyances, against incidental bombardment or attack. To reduce the risk of incidental damage, provision was made that military "medical establishments and units" shall, "as far as possible", be located so that "attacks against military objectives cannot imperil their safety".[123] It also was recommended that civilian hospitals be located "as far as possible from such

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122. Id. M. Greenspan, supra note 4, at 341. A definite hospital identification problem is created by guerrilla warfare tactics--e.g. as employed by the Viet Cong. Sometimes crude medical facilities will be discovered in recently abandoned caves etc. In such instances, the caves must be closed to prevent subsequent habitation for military purposes. However, captured medical supplies, no matter how rudiment in nature, must not be destroyed, but should be reserved for the use of wounded and sick personnel. Cf. GWS supra note 119, at Article 33. If the medical material is without healing value, it perhaps could be released to the National Red Cross for ultimate disposition.

123. GWS, supra note 119, at Article 19.

objectives."[124] However under normal conditions, especially in hinterland bombardment, requests should be processed to remove known medical facilities from potential target areas. In my opinion, though, if the enemy intentionally uses any medical establishment as a protective screen for an important military objective, it should assume the risk of immediate, incidental damage to that establishment.[125]

3. Protected Zones

An important innovation of the Geneva Conventions is the permissive provisions for mutual establishment of recognize hospital, safety and neutralized zones.[126] Such zones would not be subject to attack or bombardment, unless misused for military purposes.

Considering the extreme difficulty of concluding safety agreements during hostilities, it would be desirable if the major West and East powers could negotiate zone establishment during peacetime. Perhaps

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124. GC, supra note 65, at Article 18.

125. Cf. J. Spaight, supra note 1, at 58; 2 Wheaton, supra note 19, at 217.

126. GWS, supra note 119, at Article 23 and Annex 1; GC, supra note 65, at Articles 14-15 and Annex 1; see FM 27-10, supra note 7, at 101 which authorizes "subordinate military commanders" to conclude agreements for the establishment of neutralized zones.

zones could be established in areas of non-military significance, where periodic inspections might be conducted.

Actual zone establishment could provide real meaning to the Geneva Convention provisions.

III. BOMBARDMENT OF ENEMY PROPERTY

Having discussed war rules applicable to place bombardment, it is time to examine the major rules area which pertains to bombardment of enemy property wherever located. Such a study includes examination of Article 23g, Hague Regulations and the doctrine of military necessity as modified by customary war practice.

In addition, the rules pertaining to property devastation, terror bombing, indiscriminate bombardment and target area bombing will be included in this section, although such questions also may be connected with unnecessary suffering or place bombardment rules.

A. ARTICLE 23g, HAGUE REGULATIONS

The basic rules concerning enemy property destruction are located in Article 23g, Hague Regulations.

Article 23 provides, in pertinent part, that:

> In addition to the prohibitions provided by special Conventions, it is especially forbidden...
> g. To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.[127]

This prohibition has been recognized as expressing a customary rule of international war law.[128] In my

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127. HR, supra note 14, at Article 23g.

128. 2 Oppenheim, supra note 18, at 413; C. Fenwick,

opinion, it is binding on all combatants apart from existing treaty obligations.[129] Thus, land, sea and air bombardment cannot legitimately be accomplished when it would violate Article 23g, Hague Regulations.

Basically, Article 23g, Hague Regulations, requires that "military necessity" exists before enemy property

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supra note 7, at 679; see 2 Wheaton, supra note 19, at 213; see also M. Royse, supra note 1, at 132-133; M. Greenspan, supra note 4, at 313-316; cf. International Law, Academy of Sciences of the U.S.S.R., supra note 7, at 441. But cf. Red Cross Draft Rules, supra note 19, at 53-54. While asserting that HR expressed principles which in the absence of more suitable rules are and remain valid at all times, the Draft does not specifically list Article 23g as a customary principle, as it does Articles 23e, 25, 26 and 27. However, the Preamble, H IV states that the Treaty provisions were "intended to serve as a general rule of conduct for the belligerents." H IV, supra note 14. Further, Article 23g is a major elastic Treaty provisions, which includes military necessity as an element. This provision was intended to pronounce a rule of conduct applying the generally accepted Lieber theory of military necessity.

It should be noted that the principles expressed in Article 23g, HR were, in effect, reaffirmed by the inclusion of Article 53 in the GC of 1949. GC, supra note 65.

129. Additionally, all provisions of HR must be strictly observed (in the absence of specific orders to the contra) by United States Army military commanders, whether or not such provisions are "legally binding" upon the United States. FM 27-10, supra note 7, at para. 7a. As Article 23g expresses a customary war rule, only legitimate reprisal or self-preservation should justify the issuance of an order requiring rule departure.

can be seized or destroyed. When an infantryman marches into battle, he may kill enemy soldiers in combat. His acts, in the above circumstance, are termed "permissive violence", because they are necessary acts of war. Conversely, the infantryman cannot enter the enemy's country and steal the possessions of noncombatants, as such acts are not necessary to the war effort. Thus, one observes that military necessity is the 'key stone' doctrine behind all legitimate acts of war--it defines the scope of permissive violence.[130] Therefore, to understand the general applicability of Article 23g, Hague Regulations, the meaning of military necessity must be determined.[131]

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130. See M. Royse, supra note 1, at 136. The author states: "The normal restrictions on violence in warfare are thus released by military necessity, just as long as real necessity exists...." See FM 27-10, supra note 7, at para. 3a, which states: "The law of war places limits on the exercise of a belligerent's power...and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes...." See also 2 Wheaton, supra note 19, at 213; cf. 2 Hyde, supra note 66, at 300.

131. 2 Oppenheim, supra note 18, at 233. Author supports the accepted position that Article 23g, HR, incorporates by "express reference" the doctrine of military necessity. See 2 Wheaton, supra note 19, at 212; C. Fenwick, supra note 7, at 679; cf. 2 Hyde, supra note 66, at 306.

B. MILITARY NECESSITY

1. The Concept In Operation

The doctrine of military necessity is a subject worthy of independent study.[132] It serves as an underlying principle in both Article 23g and Article 23e, Hague Regulations.

Historically the term military necessity conveyed the following three distinct, legal concepts:

> (a) ...an overriding right of law, inherently superior to any conflicting legal rights or rules. (Kriegsraison theory.)
> (b) ...an exceptional justifying cause, ...releasing the perpetrator of a criminal act from criminal responsibility. (Sometimes called the exceptional theory.)
> (c) ...a positive principle underlying the law, rather than subverting or overriding it.[133] (Lieber theory.)

The Kriegsraison theory, was regarded as an unlimited warfare rule, because it tended to assert the right of military convenience (loosely called military necessity) to prevail over mere customs or manner of war

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132. See generally O'Brien, supra note 3; Platt, Military Necessity and the Development of the Laws of War, April 1965 (unpublished thesis presented to the Judge Advocate General's School, U.S. Army).

133. O'Brien, supra note 3, at 116. The author further states that military necessity could operate on either the State level (raison d'état) or at the level of the military commander (raison de guerre). Id. at 114-115. See Platt, supra note 132, at 10.

(Kriegsmanier).[134] The exceptional theory, sometimes termed state of necessity, differed in degree from Kriegsraison. Under the Kriegsraison theory, customs and usages of war were binding only when they did not impair military convenience; however, under the exceptional theory, war law was binding until some exceptional military necessity compelled its violation.[135]

The Lieber theory held that "military necessity was limited by the rules of warfare" and could not be invoked as a right to violate these rules.[136] Under this theory, if a rule of war was not elastic--did not

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134. O'Brien, supra note 3, at 120; J. Stone, supra note 6, at 352; see also 2 Oppenheim, supra note 18, at 233; C. Fenwick, supra note 7, at 655.

135. Platt, supra note 132, at 15-16; see O'Brien, supra note 3, at 112. In literal translation, the Kriegsraison theory was not as liberal as above stated; however, in practice the doctrine could cause mere military utility to prevail over war law. Id. at 120. In effect, the military commander was free to determine when he was bound by the law of war. M. Greenspan, supra note 4, at 314. The exceptional theory initially placed a duty upon the commander to comply with the law of war. However, in final analysis, it was the commander who determined when exceptional military necessity existed. Thus, loose interpretation could lead to war law abuse under either theory.

136. O'Brien, supra note 3, at 118; Platt, supra note 132, at 10; see also G. Schwarzenberger, supra note 88, at 41-42.

contain provisions for exception--it must be strictly obeyed. Legitimate military necessity, therefore, was defined in and limited by war law.[137] For example, Article 23d, Hague Regulations is not elastic; therefore, military necessity cannot justify refusal to give quarter. Conversely, Article 23e, Hague Regulations is elastic. A commander can inflict substantial suffering, upon the enemy, provided it is necessary.

It is generally accepted that Hague IV and the Hague Regulations discarded both the Kriegsraison and exceptional theories of military necessity, and adopted only the Lieber concept.[138] In fact, Kriegsraison has been severely condemned.[139] While the exceptional theory can no longer be regarded as a means of escaping

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137. O'Brien, supra note 3, at 129-130; see also 2 Oppenheim, supra note 18, at 322 and n. 3; 2 Wheaton, supra note 19, at 203.

138. O'Brien, supra note 3, at 130-131 (A study of the Preamble, H IV, Article 22, HR and the Conference's proceedings clearly evidence the Lieber theory adoption.); see J. Stone, supra note 6, at 351-353, 547-548; 2 Oppenheim, supra note 18, at 233; Platt, supra note 132, at 20; see also O. Asamoah, supra note 88, at 115; J. Spaight, supra note 1, at 203; cf. M. Greenspan, supra note 4, at 279-280, 314, 409 (Neither does the defense of superior orders justify violation of the law of war); 2 Hyde, supra note 66, at 301; 3 Hyde, supra note 6, at 1802.

139. J. Stone, supra note 6, at 351.

the rules of warfare, it's shadow lingers to confuse the war law student. This confusion, in part, is caused by an analogous doctrine called "state of necessity", "plea of necessity" or "necessity" which apparently still operates in other areas of international law--concerning such matters as the law of territorial or maritime jurisdiction.[140]

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140. O'Brien, supra note 3, at 160. This doctrine appears to be grounded on raison d'état rather than raison de guerre. See Id. at 114-115. In such an instance, the sovereign state finds itself in a situation where a fundamental right can be preserved only by breaking international law. Id. at 112; Platt, supra note 131, at 8. One possible situation exists in which the exceptional theory of military necessity (raison de guerre) still may operate. Perhaps even here, the situation is not one of "exceptional military necessity", but more correctly "(sovereign) self-defense" or "state of necessity" (raison d'état). In any event, the war rules concerning permissive violence are not relaxed. The situation occurs as follows: X sovereign invades (or bombards) the territory of neutral (or ally) Y because Y is allowing (or cannot prevent) enemy belligerent Z to operate an active military base of operations within its boundaries. Several writers agree, and appropriately so, that X can so act under the circumstances. See O'Brien, supra note 3, at 160; Hall's International Law, supra note 79, at 325; 2 Oppenheim, supra note 18, at 698; M. Greenspan, supra note 4, at 538-540, 554; J. Spaight, supra note 1, at 434-435; Lawrence, Military Legal Considerations in the Extension of Territorial Seas, 29 Mil. L. Rev. 47 at 90 (1965); see also FM 27-10, supra note 7, para. 520. One form of "state of necessity" (raison d'état), occurs when State X sends an armed force temporarily into State Y to protect State X citizens--because

Additional confusion occurs when one fails to distinguish this analogous doctrine from the doctrine of (sovereign) self-defense.[141]

As military necessity does not authorize departure from the law of war, it is generally recognized that an individual soldier cannot successfully invoke a plea of (personal) defense of necessity /(personal) self-

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State Y, which is having a civil war, cannot guarantee such protection.

141. "Legitimate self-defense in international law is the right of a political entity, usually a State, to take all measures necessary for its protection when its vital interests are endangered by an aggressive illegal act of another State. The act of aggression gives the injured party the right to take all necessary counter measures....This right is specifically reiterated in Article 51 of the Charter of the United Nations." O'Brien, supra note 3, at 112. This right of (sovereign) self-defense may or may not result in war. P. Jessup, supra note 7, at 163. And it can be utilized only when the situation cannot be corrected by lesser means. P. Jessup, supra note 7, at 164. Quaere: Can a threatened nation resort to war under its right of (sovereign) self-defense, when it has not been subjected to "armed attack" but observes another state preparing to launch an atomic attack against it? In my opinion, yes. But see P. Jessup, supra note 7, at 166-167. See C. Asamoah, supra note 88, at 113, for a discussion of the right to use nuclear weapons in self-defense. In my opinion, while the right of (sovereign) self-defense may entitled a nation to go to war, once so engaged it is bound to adhere to the law of war--the only valid exceptions being legitimate reprisal and possibly self-preservation.

defense/ when charged with a war law violation.[142] Thus, sovereigns and individual combatants all are bound by applicable, customary and codified war law.

2. The Definition Of Military Necessity

Having observed that Lieber's concept of military necessity applies to war law, and that Articles 23e and 23g, Hague Regulations, each contain therein an express military necessity exception, it is now time to define the term.

Working definitions of military necessity have been proposed from time to time. Royse states that "no specific meaning can be given to the question of violence."[143] But, he proceeds to establish the following test:

> If an act is essential, if the destruction is effective and not wanton, and the results to be gained are not grossly disproportionate to the extent of destruction, then the act can hardly

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142. M. Greenspan, supra note 4, at 499-500; FM 27-10, supra note 7, at para. 3a (General provisions of FM 27-10 "are of evidentiary value" concerning war law "custom and practice." Id. at para. 1.); see U.S. v. Ohlendorf (The Einsatzgruppen Case), Vol. IV, Trial of War Criminals before the Nuernberg Military Tribunals 462-463 (15 Vols; Washington: United States Government Printing Office 1946-1949). But see a discussion of the Flick and Farben war crimes trials. M. Greenspan, supra note 4, at 496-500.

143. M. Royse, supra note 1, at 136-137.

> be condemned regardless of the amount of suffering and violence.[144]

He further noted that "wantonness was associated with unnecessary destruction"; and, thus did not interfere with regular artillery operations.[145] However, Royse failed to recognize that bombardment, while not causing disproportionate damage, could cause disproportionate suffering, thereby violating Article 23e, Hague Regulations. Therefore, his definition cannot be accepted in toto.

In discussing Article 23g, Hague Regulations, Oppenheim merely recites its language--perhaps not as a definition of military necessity. He states:

> (I)n every case the destruction must be "imperatively demanded by the necessities of war" and must not merely be the outcome of a spirit of plunder or revenge.[146] (Emphasis supplied.)

The emphasized portions of this quote add little to a military necessity definition. Such action would not be based on any necessity whatever, and therefore would be illegal per se. Oppenheim further states:

> All destruction of...enemy property

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144. Id. at 137.

145. Id. at 158.

146. 2 Oppenheim, supra note 18, at 414.

> for the purpose of offence or defence is necessary destruction...and therefore lawful....[147]

A literal interpretation of this statement is subject to objection.[148] While enemy property destruction for offence or defence purposes, generally may be necessary, this does not automatically legalize all such destruction. The destruction may be disproportionate and therefore illegal; or, the act of destruction could be intended to cause unnecessary suffering, in violation of Article 23e, Hague Regulations.

O'Brien provides a detailed, but complicated, definition of military necessity. He states:

> Military necessity consists in all measures immediately indispeneable and proportionate to a legitimate military end, provided they are not prohibited by the laws of war or by the natural law, when taken on the decision of a responsible commander, subject to judicial review.[149]

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147. Id. at 413.

148. It is extremely doubtful that Oppenheim intended to create an absolute test applicable in all instances of property destruction.

149. O'Brien, supra note 3, at 138; see, Platt, supra note 132, at 53. Platt adopts the O'Brien definition except for the words "or by the natural law." He properly contends these words are unnecessary, because military necessity is limited by the law of war which includes the principle of humanity. Platt, supra note 132, at 57-58.

O'Brien proceeds to define a legitimate military end as one "designed to bring about the defeat of the enemy and to force him to accept a just and lasting peace."[150] This sub-definition appears entirely appropriate. The author then states that the term "all measures immediately indispensable" exhibits a requirement for genuine necessity.[151] This genuine necessity is equivalent to immediate, imperative necessity. O'Brien correctly defines imperative necessity as meaning:

> (T)here is no equally effective lawful means, involving less damage or suffering, which is sufficient to the legitimate end.[152]

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150. O'Brien, supra note 3, at 138.

151. Id. The author observes that many writers erroneously contend that "military necessity must always be 'immediate in point of time'"--and that this interpretation is due to confusing military necessity as an exceptional justifying cause (exceptional theory) rather than as a principle of war law (Lieber theory). O'Brien states that it would be more appropriate to consider the requirement for "immediate necessity" as demanding "a definite and forseeable connection between the act committed and the alleged military necessity." Id. at 141. This is a restatement of the obvious principle, that to be permissible, violence must causally relate to the military operation. See FM 27-10, supra note 7, at para. 56. (A reading of O'Brien's discussion is recommended.)

152. O'Brien, supra note 3, at 141 (Text emphasis supplied). The author clarifies this definition by stating: "The distinction is usually made

While portions of O'Brien's military necessity definition are both accurate and acceptable, the definition in its entirety should not be adopted. The words "subject to judicial review" are superfluous. I am not implying that judicial review of military decisions is unwarranted.[153] The war crime trials, following World War II, established that military decisions could be subject to international judicial

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between 'necessity' and 'convenience'....As in the requirement of 'immediacy,' the point is that not every act which has some military utility is justified by the principle of military necessity. Rather only those acts which are imperatively necessary, without which the legitimate military object cannot be attained, are allowed." Id. at 141-142. See Platt, supra note 132, at 54. Compare O'Brien's imperative necessity definition with Red Cross Draft Rules, supra note 19, at Article 9, para. I. The Draft Rules place the attacking side under an obligation to reduce civilian property and life loss to a minimum. Red Cross Draft Rules, supra note 19, at 85-86. However, property can be destroyed under Article 23g which, unless destroyed, would present an obstacle to a military operation or jeopardize troop safety. 2 Hyde, supra note 66, at 306; 3 Hyde, supra note 6, at 1807.

153. Under customary international law belligerents have an obligation "to take measures for the punishment of (grave breaches) war crimes committed by all persons, including members of a belligerent's own armed forces." FM 27-10, supra note 7, at para. 506b. In my opinion, the obligation should also extend to most types of conventional war crimes. See M. Greenspan, supra note 4, at 420, 463-467. However, a belligerent must not be obligated to punish its own spy etc.

review.[154] Further, war crimes are punishable under domestic law--including the Uniform Code of Military Justice.[155] Thus, no need exists to include judicial review in the military necessity definition.[156] The words "when taken on the decision of a responsible commander" also are unnecessary.[157] Any military person, within the scope of his authority, can make battlefield decision to commit acts of permissive violence. If O'Brien is attempting to restrict all permissive violence decisions to military commanders, he is erroneously evaluating war practice.[158] Thus, the restric-

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154. See M. Greenspan, supra note 4, at 430 and n. 68. It has been suggested that the Geneva Conventions of 1949 preclude future international trials of war criminals. See e.g., GC, supra note 65, at Article 146. In my opinion international trials might be conducted where crimes against humanity are charged. However, such a possibility appears remote. See M. Greenspan, supra note 4, at 444-445, 463; c.f. 2 Oppenheim, supra note 18, at 582-586 (recommending the creation of an international, war crimes judicial organ).

155. See FM 27-10, supra note 7, at paras. 13, 498-511; M. Greenspan, supra note 4, at 13-15, 429. See also ACM 7321, Kinder, 14 CMR 742 (1954) and U.S. v. Schreiber, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955). (Each accused was charged with violations of the Uniform Code of Military Justice).

156. The same objection applies to Platt's definition. Supra note 149.

157. Id.

158. In modern warfare each soldier must be trained to

tion should be discarded. The words "or by the natural law" contained in the O'Brien definition are, as shown by Platt,[159] unnecessary in view of the humanitarian principles which operate throughout all Hague Regulations. We now arrive at a very objectionable feature of the O'Brien military necessity definition--the inclusion of the words "and proportionate."[160] The doctrine of proportionality extends far beyond the bounds of military necessity. It directly operates in most war law areas--especially in Articles 23e, 23g and 25 Hague Regulations, reprisals, (sovereign) self-defense and self-preservation. By including proportionality within any war rule definition, its importance as an independent norm is tacitly reduced. When properly defined and applied, the doctrine of proportionality represents a final humanitarian safeguard, independently operating in the law of war. It can prevent the bombardment of an otherwise legitimate military target. In my opinion, this doctrine is too

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independently exercise good judgment and initiative, as he may become separated from command communication and control for extended time periods.

159. Supra note 149.

160. The same objection applies to Platt's definition. Supra note 149.

valuable, as a humanitarian safeguard, to be classified within other war rules. Therefore, it should not be included within definitions of military necessity.[161]

After removing the unnecessary language from O'Brien's military necessity definition, the following remains:

> Military necessity consists in all measures immediately indispensable to a legitimate military end, provided they are not prohibited by the laws of war.

The remaining portions of O'Brien's military necessity definition may now be compared with the definition appearing in Field Manual 27-10. This latter definition states:

> "(M)ilitary necessity" (is) that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.[162]

Considering that O'Brien defined a "legitimate military

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161. The definition and scope of the doctrine of proportionality will be discussed in Chapter V.

162. FM 27-10, supra note 7, at para. 3a; see 2 Hyde, supra note 66, at 299-300; 3 Hyde, supra note 6, at 1801. The word "indispensable" apparently imposes the same legal requirement as "imperative," specifically that there exists no equally effective, lawful means, involving less damage or suffering, which is sufficient for legitimate mission accomplishment.

end" as being one "designed to bring about the defeat of the enemy and to force him to accept a just and lasting peace," it will be noted that the two definitions almost are identical. O'Brien's modified definition contains two features not found in the Army definition. Specifically, the word "immediately" and the sub-definition "to force him to accept a just and lasting peace." As the term "immediately" merely requires a causal connection between the act and the military operation, and does not require immediacy in point of time,[163] it states only the obvious.[164] Thus, the word "immediate" need not be included directly within the Army's military necessity definition.

The United States Army expressly recognizes that one basic purpose of war law is to facilitate "the restoration of peace."[165] However, this principle is so fundamentally important that it could be incorporated directly within the working definition of military

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163. Supra note 151.

164. FM 27-10, supra note 7, at para. 56, recognizes the obvious. Thus, it is stated: "There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army."

165. FM 27-10, supra note 7, at para. 2c; see also C. Fenwick, supra note 7, at 655.

necessity. Failure to incorporate this principle will not render the Field Manual 27-10 definition invalid, provided violence is not undertaken with the intent to impair the restoration of peace. Therefore in my opinion, Field Manual 27-10 correctly defines the Lieber principle of military necessity.

C. MILITARY NECESSITY MODIFIED

Leading war law writers have almost uniformly agreed that the concept of military objective either replaced or supplemented Article 25, Hague Regulations. However, the effect of the military objective doctrine upon the Lieber concept of military necessity, has been relatively unexplored.

It is submitted that during the heat of battle, a commander customarily does not utilize the entire working definition of military necessity, when bombarding enemy property--as originally required by Article 23g, Hague Regulations. Instead he determines whether the property, against which bombardment is directed, constitutes a legitimate military objective. This practice tacitly has been condoned by international law writers, when they repeatedly assert that certain classes of targets obviously are subject to bombardment. The practice, in fact, is entirely appropriate. Why should

a commander evaluate an ammunition dump, under the entire military necessity definition--when it obviously meets that criterion. Therefore I submit that, under customary war practice, the elements of military necessity, with one exception, are presumed to exist regarding those military objectives generally recognized as being subject to bombardment under the modified provisions of Article 25, Hague Regulations.

The exception is that the commander retains a destruction selection obligation. He may employ a specific means or weapon only when no equally effective means or weapon, involving less damage or suffering, exists which will destroy the military objective.

This independent determination satisfies the previously discussed "indispensable" or "imperative" element of military necessity. The above presumption, however, is rebuttable. For example, if unusual circumstances are known, which completely reduce the military value of an enemy target, military necessity cannot be presumed to exist merely because that class of property generally is recognized as a legitimate military objective.

Further, the doctrine of military necessity (as above modified), and the independent doctrine of

proportionality both apply to Articles 23e and 23g, Hague Regulations. Military necessity (or military necessity modified) does not alone grant a license to destroy property or to kill people. The act also must be proportionate.

Military necessity (whether or not modified) indicates what persons or things may be attacked, and requires that a means or weapon be used only when no equally effective, lesser force exists for legitimate mission accomplishment. Proportionality establishes a separate and distinct humanitarian limit on this use of necessary force. Thus the destructive effect, of the minimum force necessary for mission accomplishment, could be so great as to preclude an attack on an otherwise legitimate military objective.[166]

D. DEVASTATION UNDER ARTICLE 23g

In the past, instances have arisen where commanders deliberately destroyed all buildings, crops, cattle and other enemy property located in their path. This action

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166. This represents a proper application of the proportionality doctrine--as an independent norm and not merely as an element of military necessity. Some readers may believe that the same result could be obtained in either case; however, proportionality ultimately will acquire greater recognition and observance, once it is firmly established as a separate war law principle.

is referred to as general devastation. As a general rule such action is forbidden because it normally will not meet the tests of military necessity and proportionality, which control the degree of destruction permitted under Article 23g, Hague Regulations. However, compelling circumstances might exist where general devastation is both necessary and proportionate,[167] e.g., when it is the only means which will prevent an army in retrograde from being annihilated. Under such compelling circumstances, proportionate general devastation should be recognized as a legitimate means of warfare.[168]

E. TERROR BOMBING AND INDISCRIMINATE BOMBARDMENT

In past World Wars, instances unfortunately arose where aerial bombardments were directed against the dwellings of noncombatants to destroy morale and

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167. The burning of individual hamlets in Vietnam does not constitute general devastation. The legality of such action depends entirely upon whether the attendant circumstances meet the tests of military necessity and proportionality. If these tests are not satisfied, the damage would constitute wanton destruction. Wanton property destruction is prohibited. See M. Royse, supra note 1, at 137; FM 27-10, supra note 7, at para. 56; see also NWIP 10-2, Law of Naval Warfare, para. 621a (1955).

168. See 2 Oppenheim, supra note 18, at 415; M. Greenspan, supra note 4, at 285-286; see also FM 27-10, supra note 7, at para. 56; of. C. Fenwick, supra note 7, at 680.

indirectly reduce war production efforts. This form of bombardment has been termed "terror bombing." The proponents of terror bombing attempted to justify their actions on two grounds: that enemy morale was a proper military objective; and, that the attacks were directed against enemy property and not against noncombatants. The first argument clearly was refuted by adoption of the rule that noncombatants are not subject to direct attack. The second argument also is erroneous. Now it is generally accepted that terror bombing violates the law of war.[169] Terror bombing should be condemned, as it thoroughly fails to meet military necessity requirements. Certainly, "destruction...is always illegitimate when no real military advantage is served...."[170]

Some authorities condemn "indiscriminate" bombardment.[171] Basically, this occurs when a legitimate

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169. 2 Oppenheim, supra note 18, at 524-525; J. Spaight, supra note 1, at 17; M. Greenspan, supra note 4, at 337; see, Red Cross Draft Rules, supra note 19, at Article 6; Hague Air, supra note 27, at Article 22; 3 Hyde, supra note 6, at 1806, 1834; see NWIP 10-2, Law of Naval Warfare, supra note 167 at para. 621c; FM 27-10, supra note 7, at paras. 25, 42, 504d, 504j. But cf. C. Fenwick, supra note 7, at 681.

170. See Hall's International Law, supra note 79, at 645; see also Red Cross Draft Rules, supra note 19, at 71 and Article 7; cf. 2 Hyde, supra note 66, at 307-308; 3 Hyde, supra note 6, at 1809.

171. See J. Spaight, supra note 1, at 229-237, 277;

military target is attacked in such an intentional or negligent manner that wanton destruction, rather than permissible, incidental damage, results. It also is claimed to arise, when a military objective is so closely situated to protected buildings or noncombatant property that the latter obviously will suffer widespread damage during the projectile or bomb dispersal pattern.[172] Few individuals would condone intentional bombing which is designed to result in off-target, wanton destruction.[173] However, the prohibition against negligent, indiscriminate bombardment is not absolute. Incidental damage resulting from military objective bombardment is lawful.[174] A thin line often exists between incidental damage and negligent, indiscriminate bombardment. This conflict can only be resolved by

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Hague Air, supra note 27, at Article 24(3). See also Red Cross Draft Rules, supra note 19, at Article 9 (In places with large civilian population, bombings "must not cause losses or destruction beyond the immediate surroundings of the objective attacked.")

172. See Hague Air, supra note 27, at Article 24(3). But see M. Royse, supra note 1, at 241; M. McDougal & F. Feliciano, Law and Minimum World Public Order 646-650 (1961); cf. 3 Hyde, supra note 6, at 1825.

173. See J. Spaight, supra note 1, at 277.

174. M. Greenspan, supra note 4, at 283, 337; 3 Hyde, supra note 6, at 1825-1827; see J. Spaight, supra note 1, at 17; see notes 92, 94, supra.

applying the principles of military necessity and proportionality.[175] If military necessity and proportionality requirements are met, the damage or loss of life becomes incidental and lawful.[176]

F. TARGET AREA BOMBING

During World War II, all belligerents adopted a means of hinterland, aerial bombardment known as "target area bombing." Basically in target area bombing, planes fly over an objective area and drop their bombs in a manner which saturates the entire locale. This form of bombing primarily is used against a built-up area, throughout which are dispersed numerous industrial or other military objectives; or, against an area containing a few targets of critical importance which must

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175. M. McDougal & F. Feliciano, supra note 172, at 652. Cf. M. Greenspan, supra note 4, at 280.

176. Quaere: Assume a bomber, en route to a military objective is attacked over an enemy city residential area. Could the pilot jettison his bombs to avoid being shot down by hostile aircraft? The legal answer depends on the evaluation of numerous factors, such as: (a) type of bomb load; (b) number of civilians likely to be killed or injured; (c) degree of anticipated property damage; (d) military advantage gained by saving the aircraft; and, (e) assumption of risk by the enemy in attacking the plane over a residential area. As a practical matter, it would be difficult to convince a pilot that he should not save his airplane and the lives of his crew.

be destroyed, presumably at all costs--e.g., missile factory. In either case, enemy air defense is considered capable of preventing pin-point bombing. During World War II this practice unfortunately degenerated, at times, into terror attacks.[177]

Much controversy resulted from these bombardment practices. Opponents contend that target area bombing violates the law of war.[178]

Spaight, however, advances both quasi-emotional[179] and legal[180] justification for the practice--concluding

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177. Comment, 33 Mil. L. Rev., supra note 42, at 112; see also O'Brien, supra note 3, at 136; 2 Wheaton, supra note 19, at 352.

178. Red Cross Draft Rules, supra note 19, at 90-92 and Article 10; see 2 Oppenheim, supra note 18, at 530. But cf. U.S. v. Ohlendorf, supra note 142, at 466-467. (The usual objections are based on claims of wanton destruction, unnecessary suffering or indiscriminate bombardment.)

179. J. Spaight, supra note 1, at 47. "(Target area bombing) was an evil, but it was a less evil for humanity than the triumph of the cause whose fruits were to be seen at Buchenwald, Nordhausen, Belsen and Dachau."

180. Id. at 254. The author asserts that target area bombing is now an "established usage." However, Spaight apparently recognizes the applicability of the doctrine of proportionality; because, he concludes that it would not be reasonable to target area bomb an innocent, hinterland town, containing "perhaps one or two military objectives of no great consequence...."

that when no other means of destroying enemy war industry exists, target area bombing does not violate the law of war.[181]

Greenspan states that any legal justification of target area bombing must be grounded upon two factors:

> ...first...that the area is so preponderantly used for war industry as to impress that character on the whole of the neighborhood, making it essentially an indivisible whole. The second factor must be that the area is so heavily defended from air attack that the selection of specific targets within the area is impracticable.[182]

He concludes that military necessity alone could not justify target area bombing.[183]

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181. Id. at 271. See M. McDougal & F. Feliciano, supra note 172, at 652 ("Bombardment resulting in many thousands of civilian casualties...might not be regarded as excessive and unreasonable where indispensable to insure destruction of nuclear delivery systems...." Authors use the principle of proportionality as a key test.)

182. M. Greenspan, supra note 4, at 336. The author states: "In such circumstances, the whole area might be regarded as a defended place from the standpoint of attack from the air, and its status, for that purpose, assimilated to that of a defended place attacked by land troops. In the latter case, the attacking force may attack the whole of the defended area in order to overcome the defense...."

183. Id. at 337. Greenspan distinguishes the effect of nuclear weapons from target area bombing. Id. at 371-372. However, it has been asserted that both means could be subject to the proportionality standard. M. McDougal & F. Feliciano, supra note 172, at 666.

Greenspan apparently would restrict target area bombing to situations where an anology can be drawn with combat zone sieges and assaults. This means of warfare should not be so restricted. In the combat zone, conventional target area bombing should receive the same license as land and naval bombardments against defended places. However, in hinterland target area bombing or bombardment, the following rules should apply: First, legitimate military objectives (or an objective) must exist; Second, the requirements of military necessity (or military necessity modified) must be observed. This includes, selection of a bombardment weapon and delivery means which is indispensable--i.e., no other equally effective means of mission accomplishment exists, which would inflict less injury and damage to the enemy; and, Third, the resulting damage and personal injury must be proportionate to the military advantage to be gained--otherwise unnecessary destruction and/or unnecessary suffering would result, in violation of Articles 23e and 23g, Hague Regulations, respectively.[184]

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184. In my opinion, World War II atomic bombing of Hiroshima and Nagasaki, met this test. First, both cities contained many legitimate military objectives, e.g., war industries; Second, the

The number of military objectives located in the target area merely constitute one consideration factor. In modern warfare, one target, e.g., nuclear weapons facility, may have far greater military value than a hundred other targets, e.g. bayonet factories.

Thus, the legality of hinterland, target area bombing depends upon a proper application of warfare rules to the military situation at hand. This means of warfare is legitimate and very essential under proper conditions.

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weapon selected, the atomic bomb, was the only weapon which could have accomplished the mission as effectively. The mission, in this instance, was the unequivocal and total destruction of all military objectives in the cities; thereby, dramatically impressing upon the Japanese government, the urgent necessity for immediate surrender. (History proves that this bombing caused Japan's immediate surrender; however, history can only estimate the number of lives saved by the bombings.) Third, the resulting damage, injury and death was proportionate to the military advantage to be gained--provided that the estimated number of American, allied and enemy lives saved by Japan's timely surrender, in fact, was reasonably calculated. As it was estimated that well over a million lives were saved, this figure would not be disproportionate to the number of dead and injured bombing victims. But see Red Cross Draft Rules, supra note 19, at 85 [7"(A) military advantage, however considerable, could not justify extensive losses among the civilian population."] In any event, it is sincerely hoped that the world situation will never again require employment of the atomic bomb.

IV. THE PROHIBITION AGAINST UNNECESSARY SUFFERING

The third major war rules area prohibits the use of weapons or means likely to produce unnecessary suffering.

This customary rule will be examined in its Article 23e, Hague Regulations, context.

The position of the United States Army, concerning illegal weapons and the use of legitimate weapons in an illegal manner, will be discussed.

Various war weapons and means will be examined briefly to determine their current status under the law of war.

Finally, the unnecessary suffering provision will be discussed in its relationship to general combat operations.

A. ARTICLE 23e, REFLECTS CUSTOMARY WAR LAW

Article 23, Hague Regulations provides, in pertinent part:

> ...(I)t is especially forbidden...e. To employ arms, projectiles, or material calculated to cause unnecessary suffering.[185]

This provision expresses a general rule of customary war law, which prohibits the infliction of unne-

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185. HR, supra note 14. (Emphasis in text supplied.)

cessary suffering upon the enemy.[186]

Department of Army, Field Manual 27-10, interpretes this provision, in pertinent part, as follows:

> ...What weapons cause "unnecessary injury" can only be determined in light of the practice of States in refraining from the use of a given weapon because it is believed to have that effect. The prohibition certainly does not extend to the use of explosives contained in artillery projectiles, mines, rockets, or hand grenades.[187]

This interpretation is misleading unless studied with other Field Manual provisions.

First, one might conclude that no matter how a legitimate weapon is employed, e.g., an explosive rocket, such employment would not violate Article 23e, Hague Regulations. However, the provision has another meaning--that under Article 23e, Hague Regulations, the United States may employ any weapon, not expressly prohibited by customary war law or by binding international agreements to which this Nation is a party.

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186. M. Royse, supra note 1, at 132; 2 Oppenheim supra note 18, at 227, 340; J. Spaight, supra note 1, at 198; Kelly, supra note 92, at 9 Mil. L. Rev. 24, Mil. L. Rev., Vols. 1-10 Selected Reprint 492; Red Cross Draft Rules, supra note 19, at 54; see M. Greenspan, supra note 4, at 315, 353; 2 Wheaton, supra note 19, at 165, 203.

187. FM 27-10, supra note 7, at para. 34b. (Text emphasis supplied.)

provided such employment does not result in unnecessary suffering to individuals. This meaning is supported by examining paragraphs 2 and 36 of Field Manual 27-10.[188] Paragraph 2 states, in pertinent part:

> (The law of war) is inspired by the desire to diminish the evils of war by:
> a. Protecting both combatants and noncombatants from unnecessary suffering....[189]

Paragraph 36, in discussing the use of weapons employing fire, provides:

> (Fire weapons) should not, however, be employed in such a way as to cause unnecessary suffering to individuals.[190]

Thus, Department of Army policy recognizes, that illegal weapons are prohibited; and, that legal weapons cannot be employed in a manner which cause unnecessary suffering--as both practices would violate the law of war.[191]

Further, paragraph 34b, Field Manual 27-10 should not be interpreted to mean that the customary "practice of States" is the "only" test which our Armed Forces use to determine when weapon employment causes unnecessary

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188. Supra note 7; see also Id. at paras. 7, 33b.

189. Id. at 3. (Parens in text supplied.)

190. Id. at 78. (Parens and emphasis in text supplied.)

191. See Bright, Nuclear Weapons as a Lawful Means of Warfare, 30 Mil. L. Rev. 1 at 39 (1965).

suffering. The paragraph merely recites a test used to determine weapon illegality.[192]

In determining whether a legitimate weapon's employment would cause unnecessary suffering, the two tests of military necessity and proportionality must be utilized.[193] Both tests are recognized in Field

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192. Except for the balloon declaration, which is a nullity, the United States is not a Party to any binding agreement declaring any modern war weapon illegal. Thus, we rely on customary international law to provide such information.

193. "(B)elligerents (must) refrain from employing any kind or degree of violence which is not actually necessary for military purposes...." FM 27-10, supra note 7, at 3 (Emphasis and parens supplied.) O. Asamoah, supra note 88, at 104, states that the means (weapon) must be balanced against the ends (war objectives); see J. Stone, supra note 6, at 558; W. Hall, International Law 568-569 (7th ed. A. Pearce Higgins 1917); Phillips, supra note 35, at 322-323 (The principle includes military necessity); see also 3 Hyde, supra note 6, at 1814 (This evaluation is primarily a military task). Quaere: If that portion of the Declaration of St. Petersburg, which rules illegal all weapons that render men's death inevitable, is binding on the United States, could the same tests be applied concerning nuclear weapons? In my opinion, yes. Atomic weapons do not necessarily render death inevitable. A substantial number of people survived such bombings in Hiroshima and Nagasaki. See M. McDougal & F. Feliciano, supra note 172, at 660-661; U.S. Dep't of Army, Field Manual No. 101-31-1, Nuclear Weapons Employment 13, 15-17 (1963) (concerning nuclear casualty effects); cf. DA Pam 27-161-2, supra note 8, at 42-43; J. Stone, supra note 6, at 558. But see J. Spaight, supra note 1, at 275-276 (The author adopts the test of rendering "death inevitable." He indicates that

Manual 27-10[194] and will be discussed in subsection C.

B. WEAPONS CONSIDERED ILLEGAL UNDER THE LAW OF WAR

The purpose of this section is merely to acquaint the reader with the weapons which have been declared illegal per se, and to list certain weapons which either are considered legal or are deemed controversial. Controversial weapons may be employed by belligerents, especially those who do not concede as a matter of State policy that such weapons are illegal per se.[195] Further, illegal weapons may be employed in reprisal actions.[196]

The following weapons are conceded to be illegal: barbed head lances, irregular-shaped bullets, projectiles filled with glass, bullets treated with any substance tending unnecessarily to inflame a wound

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if the atomic bomb did produce the death of all exposed persons, it would violate the laws of humanity. But Spaight's implied conclusion, based in part on newspaper accounts emphasizing surety of death, fails when compared to actual survival statistics.

194. FM 27-10, supra note 7, at paras. 3a, 41.

195. This statement of fact is not meant to imply whether such use would be legal. Cf. Nurick, supra note 61, at 697.

196. FM 27-10, supra note 7, at 177. The reprisal action cannot violate the doctrine of proportionality.

inflicted by them and bullets whose surfaces have been scored or whose hard case ends have been filed off.[197]

The weapons considered legal per se are to numerous to recite in detail--e.g., rifles, pistols, bayonets, submarine torpedoes, machine guns, conventional howitzer shells and cannon projectiles, rocket launchers (antitank), carbines, machine pistols, conventional bombs etc.

Field Manual 27-10 states that the prohibition of Article 23e does not apply to explosives contained in "...artillery projectiles, mines, rockets, or hand grenades."[198]

Weapons employing fire are legal when used against targets. However, like all legal weapons, they should not be used in a manner which violates the law of war.[199] Fire weapons include tracer ammunition, flame-

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197. Id. at 18; see DA Pam 27-161-2, supra note 8, at 40-41 (Also prohibited are poisoned spears, arrows or bullets). Shotguns are not specifically prohibited. In my opinion, they could be used with large, hard shot.

198. FM 27-10, supra note 7, at 18.

199. Id. DA Pam 27-161-2 supra note 8, at 41-42; J. Spaight, supra note 1, at 196-198 (Incendiary shells, incendiary bombs and flamethrowers are not prohibited; but, explosive and expanding small arms ammunition is banned.); M. McDougal & F. Feliciano, supra note 172, at 622 (nature and

throwers, napalm and other incendiary agents.[200]

Field Manual 27-10 also provides:

> The United States is not party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or non-toxic gases, of smoke or incendiary materials, or of bacteriological warfare.[201]

Note that the Manual does not state an opinion regarding the legality of chemical (gas) or bacteriological agents. Writers are split in opinion concerning these controversial weapons.[202]

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situation of target controls); M. Greenspan, supra note 4, at 360-362 (Napalm, flamethrowers and other similar fire weapons are legal when used against military objectives and not against military personnel.) See 2 Wheaton, supra note 19, at 206. It is submitted, that if a weapon is not per se violative of the law of war, it can be used against personnel as well as "targets," provided military necessity exists and the results are proportionate. Certainly, a lone soldier carrying a flamethrower can use it against advancing enemy troops when his life is in jeopardy--but, if a lesser equally effective means, of stopping the enemy, exists--e.g., a machine gun, the flamethrower should not be employed. It clearly is the policy of the United States Army to use fire weapons against targets, e.g., bunkers, tanks etc. But this policy, in my opinion, is not intended to prohibit the use of fire weapons against personnel, provided such action is necessary and proportionate. However, a commander must insure that these weapons are not used in an indiscriminate manner.

200. FM 27-10, supra note 7, at 18.

201. Id.

202. Gas Warfare: Limited chemical (gas) warfare does

Guided missiles with conventional warheads would not violate the law of war, provided such employment did not result in indiscriminate bombardment.[203]

Concerning, nuclear weapons, Field Manual 27-10 states:

> The use of explosive "atomic weapons," whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment.[204]

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not violate customary international law. Kelly, supra note 92 (This article is worthy of study. It includes detailed discussion of both legal and policy considerations.); see Bernstein, The Law of Chemical Warfare, 10 Geo. Wash. L. Rev. 889; see also DA Pam 27-161-2 supra note 8, at 44-45. Chemical (gas) warfare violates the law of war. Red Cross Draft Rules, supra note 19, at 108, Article 14; M. Greenspan, supra note 4, at 354-359 (smoke to conceal movement is legal); P. Jessup, supra note 7, at 215; 2 Oppenheim, supra note 18, at 342-344. Bacteriological Warfare; Is not prohibited by the customary rules of international law. Neinast, supra note 13, at 44; see also J. Stone, supra note 6, at 557. Violates the law of war: Brungs, supra note 91, at 90; P. Jessup, supra note 7, at 215; M. Greenspan, supra note 4, at 354-359; Red Cross Draft Rules, supra note 19, at 108, Article 14; see also J. Spaight, supra note 1, at 192.

203. See M. Greenspan, supra note 4, at 365-367; J. Spaight, supra note 1, at 215. Both authors indicate that current missiles fail to meet this degree of accuracy.

204. FM 27-10, supra note 7, at para. 35. (Emphasis supplied.)

Authorities have taken differing positions concerning the legality of nuclear warfare.[205] However, those writers advocating the current legality of explosive nuclear weapons tend to support their opinions by sounder legal argument.

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205. That nuclear warfare is not prohibited: Id.; M. McDougal & F. Feliciano, supra note 172, at 659-668; Bright, supra note 191, at 39; see J. Stone, supra note 6, at 344 (Customary international law is inadequate to control use of atomic weapons); 2 Oppenheim, supra note 18, at 349-351 (Limited use of nuclear weapons would not violate international law). That nuclear warfare is prohibited: M. Greenspan, supra note 4, at 371-373 (Radiological warfare also is illegal.); Red Cross Draft Rules, supra note 19, at 108 (Article 14, as drafted, prohibits bacteriological warfare, asphyxiating gases and radioactive warfare but refrains from imposing an "absolute ban on nuclear weapons." But Article 14 "would in practice rule out the use of nuclear weapons in the manner which all can remember."); see J. Spaight, supra note 1 at 273-277 (Nuclear weapons should be banned by international agreement.); O. Asamoah, supra note 88, at 101-120 (Discussing the declaration of the United Nations General Assembly prohibiting the use of nuclear and thermo-nuclear weapons. The United States and 19 other nations voted against the declaration's adoption. Fifty-five nations voted for the declaration and twenty-six nations abstained. But note author's comments at 107.); Falk, The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki, 59 Am. J. Int'l L. 759 (1965) (Discussing the legal implications of the ruling of the Japanese Court concerning the illegality of the World War II atomic bombings.); G. Schwarzenberger, supra note 88, at 48-49 (Atomic bombs should be used only in legitimate reprisal actions); C. Fenwick, supra note 7, at 672 (Illegal unless used in self-defense against a nation that used it first.)

In any event, it appears that Royse's summation, of 1928, is still applicable today. That:

> No effective weapon or means of warfare (has) been restricted or eliminated by international regulation.[206]

C. THE UNNECESSARY SUFFERING DOCTRINE IN GENERAL OPERATION

Having considered the 'role' of Article 23e, Hague Regulations, in determining weapon legality, it is appropriate to consider the doctrine's operation as a humanitarian war principle.

In practice, the unnecessary suffering doctrine operates similarly to Article 23g, Hague Regulations. This doctrine allows permissive violence against persons and prohibits only that suffering which is not necessary.[207] War law condones necessary suffering. Thus, incidental loss of life is permitted during legitimate bombardment--as such suffering is an essential war by-product.

The two basic tests of military necessity (or military necessity modified) and proportionality are employed to determine if suffering is unnecessary. As

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206. Royse, supra note 1, at 141. (Parens supplied.)

207. See J. Stone, supra note 6, at 558; see also 2 Oppenheim, supra note 18, at 227.

previously stated, the law of war requires that belligerents refrain from using any kind or degree of violence which is not necessary for military purposes.[208] Further, all violence must meet the test of proportionality.[209] Thus, in each instance where bombardment or other combat action is contemplated, the commander must employ his force within the circumscription of these two rules. If military necessity (military necessity modified) or proportionality requirements cannot be satisfied, the commander either must refrain from attack or select a weapon or means which will meet the tests. When an attack is carried out using a weapon, or force means, which does not meet both tests, Article 23e, Hague Regulations is violated.

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208. E.g., FM 27-10, supra note 7, at para. 3a; M. Greenspan, supra note 4, at 315.

209. E.g., FM 27-10, supra note 7, at para. 41; M. McDougal & F. Feliciano, supra note 172, at 522, 524; Hall's International Law, supra note 79, at 568-569.

V. THE DOCTRINE OF PROPORTIONALITY

The doctrine of proportionality is the singularly most important war law principle. It is the final humanitarian safeguard contained within the law of war. It is not designed to impair normal war operations. However, when applied in good faith, it will prevent a commander from ordering acts of excessive destruction and slaughter. Thus, it serves a dual function by (a) protecting persons and property from excessive violence; and, (b) conserving military manpower and material from wanton expenditure.

However, the most important aspect of the doctrine is its moral element. In a moral context, proportionality continuously reminds the commander that, even in war, humanitarian limits exist which must not be exceeded.

The doctrine of proportionality has been recognized and applied in the writings of eminent, war law jurists.[210]

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210. E.g., M. Greenspan, supra note 4, at 335, 368, 371-372, 375; M. Royse, supra note 1, at 135, 137; O'Brien, supra note 3, at 138, 148-149; P. Jessup, supra note 7, at 216; W. Hall, supra note 193, at 568-569; Hall's International Law, supra note 79, at 636-637; M. McDougal & F. Feliciano, supra note 172, at 524, 528, 650, 652, 666; O. Asamoah, supra

Although two writers have attempted to incorporate the doctrine into their definition of military necessity,[211] proportionality is a separate, general principle applicable "to any kind of warfare."[212] If proportionality is to retain its legal significance, it must maintain this separate character.

The proportionality doctrine has been defined as follows:

> "The ends to be gained must be proportional to the means employed to secure

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note 88, at 104, 113; FM 27-10, supra note 7, at para. 41; DA Pam 27-161-2, supra note 8, at 43-44; Red Cross Draft Rules, supra note 19, at 80-82, 85 and Article 8; Meinast, supra note 13, at 43, 92; Platt, supra note 132, at 53; Kelly, supra note 92, 9 Mil. L. Rev. at 51, 62-63, Mil. L. Rev., Vols. 1-10 Selected Reprints at 519, 530-531; Bright, supra note 191, at 32-33; Comment, 33 Mil. L. Rev. supra note 42, at 113; see also J. Stone, supra note 6, at 558; J. Spaight, supra note 1, at 29, 254; cf. 3 Hyde, supra note 6, at 1814, 1834.

211. O'Brien, Platt, supra note 149 and accompanying text. Some authorities, while recognizing that proportionality may be a "distinguishable" requirement, tend to apply it as an element within the military necessity doctrine. M. McDougal & F. Feliciano, supra note 172, at 524.

212. Kelly, supra note 92, 9 Mil. L. Rev. at 51, 62, Mil. L. Rev., Vols. 1-10 Selected Reprints at 519, 530; see also M. Greenspan, supra note 4, at 335; M. Royse, supra note 1, at 136, 137 (The manner in which these writers refer to the doctrine indicates that it is a separate test.); FM 27-10, supra note 7, at 4, 19 (Manual treats both doctrines as separate warfare rules).

them."[213]

This definition provides little guidance as the terms "ends" and "means" also require explanation.[214]

Field Manual 27-10 defines the doctrine in more positive terms. It states:

> "(L)oss of life and damage to property must not be out of proportion to the military advantage to be gained."[215]

This definition should be interpreted as requiring that all loss of life (suffering) and property damage (direct and incidental) be proportionate to the military advantage reasonably expected to be gained.[216]

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213. Kelly, supra note 92, 9 Mil. L. Rev. at 51, Mil. L. Rev., Vols. 1-10 Selected Reprints at 519; see O. Asamoah, supra note 88, at 104; O'Brien, supra note 3, at 148.

214. For other definitions: See Red Cross Draft Rules, supra note 19, at 80: "(W)eighing the military advantage against the harm which the attack would be liable to cause the civilian population." Harm includes loss and destruction. Id. at Article 8 (b); M. Greenspan, supra note 4, at 335. The author's definition apparently is that: The necessity for destroying a target should be proportional to, and justify, any incidental damage to lives and property which do not constitute legitimate targets. Both of these definitions primarily stress civilian suffering and property damage.

215. FM 27-10, supra note 7, at para. 41. Although the concept is cross referenced to bombardment of defended places, its application is not limited to Article 25, HR.

216. M. Greenspan, supra note 4, at 335; Red Cross

Military advantage is not always limited to the direct benefit received when a target is destroyed. In some instances, the gained military advantage can be far reaching in scope--e.g., by destroying a submarine base, not only are the lives of many sailors and ship cargoes saved, but the vital supplies which now reach the front, in turn, save other lives. As target destruction benefits increase so, proportionately, does the degree of violence permitted.[217] However, this increase is not without practical limit--as the commander, in fulfilling military necessity requirements, selects a target destruction means only after determining that no equally effective, mission accomplishment method exists, which would cause less suffering or damage.

Draft Rules, supra note 19, at 81 ("The person responsible for the attack may reasonably be required to take account, in his estimate of loss and destruction, of the indirect effects which may normally be anticipated inasmuch as they are liable to occur and are characteristics of the given circumstances."). Obviously, a commander cannot determine, to the exact dollar, the amount of property damage that will result from a bombardment or the exact number of lives that will be lost. However, a commander must possess a reasonable degree of knowledge concerning the effectiveness of the weapons he controls.

217. M. McDougal & F. Feliciano, supra note 172, at 652; see J. Stone, supra note 6, at 558. But see Red Cross Draft Rules, supra note 19, at 85.

In measuring proportionality, writers have suggested employment of the following standards:

> (1) While great latitude has been and should be permitted in interpreting "proportionality" in military necessity, this requirement precludes acts which cause great military suffering without a corresponding military utility.[218]

> (2) If an act is essential, if the destruction is not wanton, and the results to be gained...are not grossly disproportionate....[219]

> (3) (F)orces should refrain from measures which cause additional suffering to military and civilian personnel without compensating military advantage to an overwhelming degree.[220]

However, the word "proportion" expresses a concept which defies precise definition. Resort to dictionaries merely confirms that some reasonable relationship between two things, portions, standards etc., is contemplated. Further, the dictionary definitions, of the word "proportion" and its derivatives, infer that absolute equality is not required.[221] In my opinion,

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218. O'Brien, supra note 3, at 149. (Text emphasis supplied.)

219. M. Royse, supra note 1, at 137. (Text emphasis supplied.)

220. P. Jessup, supra note 7, at 216. (Text emphasis supplied.)

221. E.g., Webster's New Collegiate Dictionary 677 (G.&C. Merriam Co. 1956).

the reasonably anticipated military advantage can be of less value than the resulting damage and suffering, and still be proportionate; provided, this disparity is not so great as to shock the conscience of a reasonable, prudent person in like circumstance. Of course, the commander, whenever possible, should attempt to gain a military advantage of greater proportionate value.

The following standard has been suggested for loss/gain analysis before commencement of a combat operation;

> (M)ilitary advantage should not be arbitrarily overvalued...it must be weighed in the light of experience, which has often proved that the results obtained may be very much less than was anticipated. (The civilian loss should always be rated) as highly as possible, in accordance with the principle..."in dubio pro humanitate".[222]

In my opinion, however, a commander must make a good faith estimate of all military advantages, property destruction and human suffering, that is reasonably anticipated from the action.[223] Neither more nor less deliberation should be required.[224] An attempt to create

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222. Red Cross Draft Rules, supra note 19, at 82. (Text parens and emphasis supplied.)

223. The commander normally will have this information available from his oral or written estimate of the situation.

224. If the military operation, in fact, causes

a stricter standard, due to an overabundance of caution, may result in rule abandonment and Kriegsraison. While lowering of the above standard could result in needless slaughter.

By honestly applying these proportionality rules and standards, a military commander can engage in aggressive combat operations without violating minimum humanitarian requirements.

Some individuals may argue that if an atomic world war occurs, an opportunity to apply the doctrine of proportionality will not exist. The possibility of atomic war only strengthens the requirement for preservation of, and strict adherence to, the doctrine. How else could total devastation be avoided.

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disproportionate results it would violate the law of war. However, the commander ordering the operation should not be prosecuted as a war criminal, unless his failure to correctly estimate the resulting damage and death was based on bad faith or clear criminal negligence. A commander apparently can assert the affirmative defense of mistake of fact in a war crimes trial. See DA Pam 27-161-2, supra note 8, at 246, citing U.S. v. List, XI Trial of War Criminals 759 at 1296.

VI. EXCEPTIONS TO THE LAW OF WAR

It is essential, to any war law study, to discuss the generally recognized war law exceptions. These exceptions, when operative, authorize a participant to engage in acts of violence, which otherwise would constitute a violation of the law of war.

There are two important exceptions to the law of war--reprisal and self-preservation.[225]

A. REPRISALS

The first exception, to be discussed, is the universally recognized principle of war reprisal. This exception is used as a "tool" to enforce enemy compliance with the law of war.

Reprisals are defined in Field Manual 27-10 as:

> ...acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance

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225. Military necessity, as noted previously, is not accepted by the majority of international law jurists as constituting a legitimate war law exception. The highest form of necessity--"state of necessity" or "raison d'état"--may authorize sovereign conduct which otherwise would constitute an act of belligerency; however, it should not be recognized as a war law exception once armed hostilities commence.

with the recognized rules of civilized warfare.[226]

War reprisal action possesses seven important characteristics or criteria.[227] These criteria will be discussed in detail.

1. The Unlawful Act

Before any reprisal action can be initiated, the enemy belligerent first must violate the law of war.[228]

The responding reprisal force also must be unlawful--i.e., it must be an act, which if not legitimately undertaken as a reprisal measure, would violate the law of war.[229] Thus the act, if not justified under the reprisal doctrine, could form the basis for war crime charges.

It generally is accepted that reprisal action does not have to be in kind[230]--i.e., different illegal acts

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226. FM 27-10, supra note 7, at para. 497a; see U.S. v. Ohlendorf, supra note 142, at 493; M. Greenspan, supra note 4, at 407-408.

227. See DA Pam 27-161-2, supra note 8, at 65-67.

228. E.g., FM 27-10, supra note 7, at 177; 2 Oppenheim, supra note 18, at 561; see M. Greenspan, supra note 4, at 410.

229. DA Pam 27-161-2, supra note 8, at 65; FM 27-10, supra note 7, at 177; M. Greenspan, supra note 4, at 407; 2 Oppenheim, supra note 18, at 561.

230. FM 27-10, supra note 7, at para. 497e; DA Pam

or illegal weapons may be employed, proportionately, to force enemy compliance with the law of war.[231] However,

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27-161-2, supra note 8, at 65; J. Stone, supra note 6, at 354; O. Asamoah, supra note 88, at 115; G. Schwarzenberger, supra note 88, at 40; M. Greenspan, supra note 4, at 412 (The author, however, states that acts of torture, cruelty and treachery cannot be regarded as reprisal. Perhaps, such wanton acts could be considered disproportionate per se or inconsistent with the basic purpose of reprisal.). The taking of hostages and "reprisal prisoners" is forbidden. FM 27-10, supra note 7, at 178.

231. E.g., FM 27-10, supra note 7, at 177, states: "For example, the employment by a belligerent of a weapon the use of which is normally precluded by the law of war would constitute a lawful reprisal for intentional mistreatment of prisoners of war held by the enemy." However, some writers have indicated that certain weapons can be used only for reprisal in kind. E.g., Gas reprisal only for prior gas attack: 2 Oppenheim, supra note 18, at 344. Giving no quarter only as a reprisal in kind: 2 Oppenheim, supra note 18, at 339; But see Hall's International Law, supra note 79, at 473. Atomic reprisal only for prior atomic attack: See generally O. Asamoah, supra note 88, at 115-119 (Author discusses Singh's argument that atomic weapons should be limited to reprisals in kind, but appears to conclude that this is not an existing rule of war.); see also 2 Oppenheim, supra note 18, at 351 (Author concludes that atomic weapons may be used for reprisals in kind or "as a deterrent instrument of punishment" where an enemy "violates rules of the law of war on a scale so vast as to put himself altogether outside...consideration of humanity and compassion"--e.g., punishment of Germany during World War II for its executed genocide policy.)

It is difficult to accept any legal argument based on disproportionality per se. Whether gas or atomic weapons are disproportionate depends on their type, size and manner of use, and not on the character of the weapon itself.

reprisal in kind is often used to emphasize the exact nature of the enemy's transgression.

2. The Purpose Of Reprisals

The legitimate purpose of reprisal action is to compel a belligerent to abide by the recognized rules of civilized warfare, in all future instances.[232] Therefore, no reprisals can be taken against a justifiable reprisal;[233] and, legitimate reprisal action must cease as soon as the enemy's conduct conforms to war law requirements.[234]

It has been suggested that reprisal actions primarily are outlets for revenge; however, paragraph 497d, Field Manual 27-10, provides that "(r)eprisals are never adopted merely for revenge...." Thus, United States Army commanders may not initiate reprisals solely for revenge purposes.

An unfortunate aspect of reprisal law is that belligerents may disagree as to what rules constitute

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232. FM 27-10, supra note 7, at 497a; M. McDougal & F. Feliciano, supra note 172, at 682; DA Pam 27-161-2, supra note 8, at 65 ("It is here that it fulfills its function as a sanction for the law."); M. Greenspan, supra note 4, at 407-408; 2 Oppenheim, supra note 18, at 561.

233. M. Greenspan, supra note 4, at 413.

234. Id. DA Pam 27-161-2, supra note 8, at 66.

binding war law. If country A asserts that antipersonnel bombs are illegal per se and country B claims they are legitimate war weapons, grave problems can occur. Upon B's use of the bombs, A might launch a dum-dum bullet attack on B's troops as a reprisal action. B probably would claim that A's attack was not a legitimate reprisal, and therefore a violation of the law of war. B then might commit an act of reprisal against A etc.[235] These series of acts--"spiral effect" --based on reprisals and counter-reprisals virtually reduce war to a 'Roman Holiday'.[236] Thus, both sides must execute reprisal actions, not only within the meaning of the rule, but precisely within the spirit of the law as well.

3. Use Of Lesser Means

Reprisals normally should be used only after all other means, of securing the enemy's compliance with the law of war, have been exhausted.[237] However, when

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235. M. McDougal & F. Feliciano, supra note 172, at 681 (spiral effect).

236. See M. Greenspan, supra note 4, at 408-409; see also C. Fenwick, supra note 7, at 691.

237. FM 27-10, supra note 7, at paras. 497b-497d; DA Pam 27-161-2, supra note 8, at 66; Hall's International Law, supra note 79, at 497; M. Greenspan, supra note 4, at 411; see 2 Oppenheim, supra note 18, at 142-143.

troop safety "requires immediate drastic action and the persons who actually committed" the war law violations cannot be found, immediate reprisal action may be ordered.[238] Reprisals are considered a last resort measure, because such action may increase rather than abate war law violations.[239]

Absent circumstances requiring immediate drastic action, the following means, unless clearly inappropriate, should be attempted before reprisals are ordered: publication of the enemy's violation, in order to influence public opinion against the offender; protest and demand for compensation and/or punishment of responsible individuals; solicitation of the good offices, mediation, or intervention of neutral States; and, search for and punish captured, actual offenders as war criminals.[240] In certain circumstances, use of some of these remedies would appear inappropriate--e.g. publication of an offender's violation, when numerous prior publications have failed to produce corrective action.

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238. FM 27-10, supra note 7, at para. 497b; M. Greenspan, supra note 4, at 411; M. McDougal & F. Feliciano, supra note 172, at 688.

239. Hall's International Law, supra note 79, at 497.

240. FM 27-10, supra note 7, at para. 495; M. Greenspan, supra note 4, at 405-407, 411.

4. Appropriate Command Orders Necessary

Because reprisal would be illegal if unjustified, it may never be employed by individual soldiers, except in obedience to a commander's lawful orders.[241] A subordinate commander may order reprisal actions, on his own initiative. However, he should consult with the "highest accessible military authority" before issuing these orders--"unless immediate action is demanded."[242]

Field Manual 27-10, stresses the importance of a proper command decision, in the following terms:

> Ill-considered action may subsequently be found to have been wholly unjustified and will subject the responsible officer himself to punishment for a violation of the law of war. On the other hand, commanding officers must assume responsibility for retaliative measures when an unscrupulous enemy leaves no other recourse against the repetition of unlawful acts.[243]

The commander, in rendering a proper decision, should recall that:

> Even when appeal to the enemy for redress has failed, it may be a matter of policy to consider, before resorting to reprisals, whether the opposing forces are

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241. FM 27-10, supra note 7, at 497d; M. McDougal & F. Feliciano, supra note 172, at 687.

242. Id. M. Greenspan, supra note 4, at 412.

243. FM 27-10, supra note 7, at para. 497d.

not more likely to be influenced by a steady adherence to the law of war on the part of their adversary.[244]

These factors reflect the necessity for conducting a careful preliminary inquiry to determine the validity and scope of the alleged enemy violation.[245] This inquiry will always be conducted, unless troop safety requires immediate drastic action and the actual offenders cannot be ascertained.[246]

5. Enemy Personnel Or Property

Reprisal actions must be directed against enemy personnel or their property.[247] The purpose of this rule is to emphasize that reprisals, for illegal enemy acts, cannot be directly instituted against neutrals.[248] However, reprisal action directed against the enemy may

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244. Id. at para. 497b; M. Greenspan, supra note 4, at 412.

245. FM 27-10, supra note 7, at paras. 497b, 497d; see C. Fenwick, supra note 7, at 692.

246. FM 27-10, supra note 7, at para. 497f. But see M. McDougal & F. Feliciano, supra note 172, at 687-688. The authors state that, even in an emergency situation, a commander must determine that an enemy caused violation occurred before a reprisal can be ordered. In my opinion, this minimum requirement is implied in para. 497f, FM 27-10.

247. FM 27-10, supra note 7, at para. 497a; DA Pam 27-161-2, supra note 8, at 66; see M. Greenspan, supra note 4, at 410.

248. DA Pam 27-161-2, supra note 8, at 66; M. Greenspan, supra note 4, at 583. But cf. 2 Oppenheim, supra note 18, at 678-684.

indirectly or "incidentally affect neutrals."[249] The law of neutrality should be carefully studied, whenever the contemplated reprisal action could be construed as a direct attack upon a neutral sovereign.

6. Proportionality Of Reprisal Action

It generally is recognized that the doctrine of proportionality applies to war reprisals.[250] Under general reprisal law, a reprisal action "must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation."[251] Similarly, the purpose of war reprisal is to compel the enemy to refrain from future war law violations. Accordingly, war reprisal actions should include the right to use, when necessary, force reasonably in excess of the enemy's

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249. M. Greenspan, supra note 4, at 410, 583. (E.g., bombarding an enemy town containing neutral residents.)

250. FM 27-10, supra note 7, at para. 497e; DA Pam 27-161-2, supra note 8, at 66-67; U.S. v. Ohlendorf, supra note 142, at 494; M. Greenspan, supra note 4, at 412; G. Schwarzenberger, supra note 88, at 40-41; 2 Oppenheim, supra note 18, at 141, 563, 565. But see J. Stone, supra note 6, at 354-355 (While recognizing that many reprisals are proportionate, the author indicates that this requirement cannot be mandatory as long as the law permits reprisals other than reprisals in kind).

251. 2 Oppenheim, supra note 18, at 141. (Emphasis supplied.) This rule applies to war reprisals. Id. at 565 and n. 4.

initial, illegal act--provided the force has a reasonable relationship "to the postulated deterrent effect."[252] However, Field Manual 27-10 provides, in part, that:

> The acts resorted to by way of reprisal...should not be excessive or exceed the degree of violence committed by the enemy.[253]

This provision should be interpreted to mean that all reasonably related consequences, of the enemy's initial violation, can be weighed to determine the degree of reprisal force authorized.[254]

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252. M. McDougal & F. Feliciano, supra note 172, at 682. "(T)he legitimate purpose of reprisal is...the deterrence of future lawlessness."

253. FM 27-10, supra note 7, at para. 497c (Emphasis supplied.); see M. Greenspan, supra note 4, at 412.

254. C.f., The Gulf of Tonkin action, although initiated to enforce compliance with the law of peace rather than the law of war, reflects a practical application of our equal violence policy. The Washington Post, February 25, 1968, ED (Columnists Editorials), at D6, cols. 7-8, contains the following Tonkin Transcript statements:

> "Scope and Retaliation
>
> "The Chairman. Why did the United States consider it necessary to retaliate against North Vietnam in a manner so completely disproportionate to the offense?
>
> "Secretary McNamara. Mr. Chairman, I do not believe it was disproportionate to the offense....The attack itself was very limited in character; it was directed against the bases of the attacking boats and their petroleum support facility....
>
> "Secretary McNamara. It is a limited response because we attacked such low-value

In my opinion, if reprisal force does not exceed the reasonably related consequences of the enemy's violation to such an extent as to shock the conscience of a reasonable, prudent person in like circumstance, it would be proportionate.[255]

However, field commanders should cautiously evaluate all existing facts, before using reprisal force which appears excessive when compared to the immediate degree of enemy violence concerned.

7. Prohibited Reprisals

Reprisals may be visited upon enemy combatants and their property, provided they have "not yet fallen into

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targets as the bases of the PT boats instead of the much more important military targets that lay within the range of those 64 flight paths." (Emphasis supplied.)
It has been asserted that the Tonkin action was disproportionate to the actual damage inflicted upon our vessels. This assertion appears to be true. However, the gravamen of the enemy's violence was not merely the degree of damage inflicted upon our vessels, but also their attempt, via an act of belligerency, to prohibit our use of the high sea. Viewed in this context, the United States' action was not disproportionate to the violence and consequences of the enemy's offense.

255. See 2 Wheaton, supra note 19, at 164 (Reprisals "ought not to be widely disproportionate...."); M. McDougal & F. Feliciano, supra note 172, at 682 (Reprisals cannot be "so gross as to have no reasonable relationship to the postulated deterrent effect...."). But c.f. DA Pam 27-161-2, supra note 8, at 67 (Reprisals "will usually be somewhat greater than the initial violation....").

the hands" of the reprising forces.[256] However, reprisals are forbidden against the person or property of prisoners of war, chaplains, medical personnel, sick, wounded and shipwrecked members of the enemy armed forces, and protected medical buildings and equipment.[257]

Further, it is forbidden to initiate reprisal action against the person or property of an individual protected under Geneva Convention IV of 1949.[258] For example, reprisals cannot be directed against enemy civilians, or their property, located in the occupied or domestic territory of the reprising forces.[259] However, the initiating of reprisal action against enemy civilians, or their property, located in enemy

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256. FM 27-10, supra note 7, at paras. 497a, 497c; M. McDougal & F. Feliciano, supra note 172, at 684-685.

257. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, arts. 13, 87 [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (hereafter cited as GPW); GWS, supra note 119, at Articles 24, 46; GWS Sea, supra note 119, at Article 47; see FM 27-10, supra note 7, at para. 497c; M. Greenspan, supra note 4, at 409-410. But see J. Stone, supra note 6, at 656 n. 21 (It is an open question whether POW's could be subject to reprisals for enemy violations of GPW requirements.)

258. GC, supra note 65, at Articles 4, 33-34; FM 27-10, supra note 7, at paras. 497e, 497g.

259. DA Pam 27-161-2, supra note 8, at 67; M. McDougal & F. Feliciano, supra note 172, at 684-685.

controlled territory, is not prohibited.[260]

In addition, there is rapidly developing an international assumption that cultural type property (monuments, churches etc.) is not subject to reprisal.[261] In my opinion, reprisal action against cultural type property should be prohibited. The destruction of historical, cultural and religious centers, located in enemy territory, may result in a hardening of attitude against the reprising belligerent.[262] This reaction could motivate additional war law violations, thereby thwarting the basic purpose of the reprisal action.

Some writers have stated, that if any enemy fails to abide by the law of war, the United States may conduct unrestricted warfare. It is submitted, that basic, humanitarian principles can be served only by the continuous observance of the law of war; and through

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260. M. Greenspan, supra note 4, at 410. In each instance, Article 4, GC, must be studied to determine the exact scope of protection granted. Although, circumstances may arise where the United States would not be bound under the Geneva Conventions of 1949, care must be taken not to initiate reprisal action which would violate the contemporary, but nonetheless customary, law of war.

261. See M. McDougal & F. Feliciano, supra note 172, at 686; M. Greenspan, supra note 4, at 345, 410 n.33.

262. See M. McDougal & F. Feliciano, supra note 172, at 686.

the use of reprisals, when necessary, to force reciprocal compliance.[263] Thus, reprisals, when strictly controlled, are valuable war law sanctions.

B. SELF-PRESERVATION

The second potential war law exception is the doctrine of self-preservation.

Authorities are split concerning the doctrine's validity and origin. Self-preservation has been described, variously, as arising from the right of self-defense, a state of necessity or Kriegsraison.

Kriegsraison advocates openly asserted that a government could never sacrifice the States existence.[264] Self-preservation, however derived, includes this justifying principle within its framework.

Self-preservation has been described as a general

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263. Some authorities have maintained that aggressor troops, by mere participation in an illegal war, are guilty of war crimes. However, the weight of authority refutes this assertion, and holds that the law of war applies equally to both aggressor and defender troops. See, e.g., M. McDougal & F. Feliciano, supra note 172, at 530-534; M. Greenspan, supra note 4, at 9, 407 n.22, 453; P. Jessup, supra note 7, at 217; O'Brien, supra note 3, at 143-146.

264. See O'Brien, supra note 3, at 124 citing Alphonse Rivier, I Principles du droit des gens, 277 (2 Vols; Paris: Arthur Rousseau, Editeur 1896); DA Pam 27-161-2, supra note 8, at 10.

principle of international law[265] and as a fundamental right of the State.[266]

Hall defines self-preservation as follows:

> In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation....(Self-preservation) works by suspending the obligation to act in obedience to other principles. If such suspension is necessary for existence, the general right is enough; if it is not strictly necessary, the occasion is hardly one of self-preservation.[267]

Under this definition, if a State's continued existence is placed in actual jeopardy, it is released from war law obligations. The State can pursue unrestricted warfare.

O'Brien observes that this doctrine of self-preservation does not enjoy "clear-cut acceptance among international law authorities."[268] He maintains that neither an aggressor nor defender nation has a right of self-preservation, when only the State's political entity is threatened. However, if the disappearance of the sovereign will result in a "loss of freedom of

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265. Kelly, supra note 92, 9 Mil. L. Rev. at 51, Mil. L. Rev., Vols. 1-10 Selected Reprints at 519.

266. Royse, supra note 1, at 3; see C. Fenwick, supra note 7, at 271.

267. Hall's International Law, supra note 79, at 322.

268. O'Brien, supra note 3, at 163.

conscience or of the lives of its citizens", then the situation is transformed into one of legitimate self-defense.[269] Accordingly, O'Brien suggests that the defender nation might resort to any self-defense or reprisal measure necessary to counter the aggressor nation's immoral, extermination threat.[270]

Stone maintains that the right of self-preservation, in time of peace, is generally recognized. He concludes that neither practice nor literature can produce a satisfactory explanation for denying the doctrine's applicability to States at war. But, he notes that Kriegsraison is condemned, and asserts that "...a frank review of the meaning of the self-preservation doctrine remains all the more urgent.[271]

Brierly states that self-preservation is an instinct and not a legal right. He notes that when an instinct conflicts with a legal duty, frequently the instinct prevails--sometimes this is morally right.[272]

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269. Id. at 164-170.

270. Id. at 171.

271. J. Stone, supra note 6, at 352-353.

272. J. Brierly, The Law of Nations, 294-295 (4th ed. 1949); see also C. Fenwick, supra note 7, at 661 (Referring to survival instinct during a nuclear war); G. Schwarzenberger, supra note 88, at 42 (self-preservation is a psychological, not a legal, principle).

Brierly concludes that:

> (N)o self-respecting system can admit that it makes breaches of the law legal; and the credit of international law has more to gain by the candid admission of breaches when they occur, than by attempting to throw a cloak over them.[273]

Asamoah apparently believes that all States will rely on the doctrine of self-preservation, if the need arises. He states:

> The "right" to self-preservation is of doubtful legality. In practical terms, however, it will influence the nature of weapons resorted to. No state will voluntarily court defeat in deference to rules of war. When vital interests are at stake, the claim to the fundamental "right" of self-preservation will be made.[274]

The doctrine of self-preservation, unlike Kriegsraison, has not received absolute condemnation. Whether the doctrine ultimately will be rejected or accepted, by international war practice, awaits in futuro determination.

Assuming arguendo, the doctrine's acceptance, it

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273. J. Brierly, supra note 272, at 295. Quaere: If self-preservation is not a legal right, but merely a war law violation, is it a "credit" to tacitly encourage such breaches by "candid admission"?

274. O. Asamoah, supra note 88, at 115. But cf. 2 Oppenheim, supra note 18, at 233 n.3. Oppenheim probably would reject the doctrine of self-preservation as a means of avoiding the law of war.

should be limited in scope. First, self-preservation should be circumscribed by the doctrine of proportionality.[275] Though proportionality probably will afford little protection in these circumstances. Second, the doctrine of self-preservation must never be construed to authorize a State to commit the crime of genocide against an enemy belligerent. While entire cities containing essential military targets might be obliterated in self-preservation,[276] care must be taken to insure that the opposing civilization is not destroyed.

In addition, it must be considered that the doctrine of self-preservation will never lend itself to unilateral application. Once armed hostilities commence, the rules must be applied equally to all belligerents. During war, 'good guy rules' and 'bad guy rules' cannot exist. Such a system, while theoretically appealing, cannot withstand the rigors of combat. If war rights are granted to one side and denied the other, violations will occur causing reprisals and counter-reprisals. This situation could result

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275. See Kelly, supra note 92, 9 Mil. L. Rev. at 51, 62-63, Mil. L. Rev., Vols. 1-10 Selected Reprints at 519, 530-531.

276. In extreme circumstances, the same result can be legitimately achieved under existing war rules.

in a greater loss of life, and property damage, than would be experienced by the original granting of equal war rights. Thus, any sovereign seeking to acquire rights under the self-preservation doctrine, must be prepared to subject its citizens to a similar claim by the enemy. This sober fact, alone, should greatly reduce the initial appeal for such a dangerous rule.

In my opinion, current war law as modified by custom, coupled with the doctrine of reprisal, allows participants sufficient victory latitude without the addition of a self-preservation license.[277]

Further, during total war a participant whose self-preservation actually is threatened, may not possess the sheer power necessary to prevent defeat. Therefore, practice may reveal the doctrine of self-preservation as highly overrated.[278]

However, humanitarian arguments exhibits the more salient rationale against adoption of the unrestricted self-preservation doctrine. Succintly stated: There

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277. This is especially true, considering that the law of war does not appear to prohibit nuclear warfare properly conducted within the principles of military necessity modified and proportionality.

278. Germany did not resort to mass gas or rocket attacks at the close of World War II. Would such action have changed the war outcome? Obviously not.

comes a point in time when human decency and conscience require that State survival rights yield to human survival rights. The exact restraining point has not been established. However, no nation should be allowed to commit genocide in defense of its existence. Accordingly, the unrestricted doctrine of self-preservation should be rejected; and, this rejection rigidly enforced by weight of international opinion and, if necessary, selective reprisal.

VII. CONCLUSION

Notwithstanding the opinion of various writers, there currently exists established war rules governing land, sea and air bombardment.

Reaction to existing war law will vary. While some authorities will advocate 'victory at all costs', others will demand the imposition of greater humanitarian restrictions. However, the law of war has been carefully tailored to allow military victory, without authorizing unnecessary destruction and death. Military operations, conducted in accordance with existing war law, can result in the loss of noncombatant life. But careful analysis reveals that unattainable war standards will only lead to unrestricted battlefield and hinterland violence.[279] Thus, good faith application of liberal, realistic war rules will provide greater humanitarian safeguards than the creation of narrow, unworkable warfare restrictions.

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279. See J. Stone, supra note 6, at 616. "Admittedly rules in this field cannot proceed merely on simply anology of traditional principles of chivalry and humanity. They call, as well, for cold assessment of military exigencies in face of technological advances. To propose unattainable standards is to leave practice to sink to its own unmitigated level...." (Emphasis supplied.)

In 1907, customary war law was codified in the Hague Conventions. Hague Regulations and Hague Convention IX contained the primary rules of bombardment. While most of these rules reflected customary war law, certain new provisions were added--e.g., the defended place concept of Article 25, Hague Regulations and the naval, military objective test of Hague IX. During the past sixty years, this law of war was modified and extended by the customary practice of participants in two world wars and lesser hostilities. In the rapidly developing area of aerial bombardment, customary war practice played a decisive law making role.

Hague war law does not operate merely as a code of prohibition. This war law codification is intended to "serve as a general rule of conduct for belligerents." Subsequent rule modification did not alter this purpose. Thus, commanders should examine current war rules to ascertain the degree of violence permitted in various combat circumstances.

An analysis of customary war rules as codified in 1907, coupled with subsequent modification and extension, reveals that:

1. Article 25, Hague Regulations, expresses a customary war law rule, which operates independent of treaty obligation. This provision applies to aerial

and artillery bombardment. Article 25 was modified, by customary war practice, to authorize bombardment of military objectives located in hinterland and undefended places. The United States Army recognizes that Article 25, Hague Regulations, as modified, expresses a binding rule of land warfare. Similar naval bombardment rules are contained in Articles 1-2, Hague IX.

2. Noncombatants are not considered legitimate military objectives--they are not subject to direct attack. However, noncombatants are subject to injury and death incidentally arising from the conduct of legitimate military operations.

3. Article 26, Hague Regulations, expresses a customary war law rule, which operates independent of treaty obligation. This provision applies to aerial and artillery bombardment. Articles 2, 3 and 6, Hague IX contain naval warning requirements for land bombardment. In practice, naval and artillery warning requirements are given similar interpretation. However, the broad exceptions contained in Article 26 normally authorize aerial bombardment without prior notification.

4. Article 27, Hague Regulations, expresses a customary war law rule. It tacitly authorizes general bombardment of defended places in the combat zone. However, a requirement is imposed to take all measures

necessary to spare protected property. These provisions apply to both aerial and artillery bombardment. Naval forces are given the same bombardment latitude. Article 5, Hague IX recites similar requirements for sparing protected property. Additional, protected person and property, requirements are contained in the Geneva Conventions of 1949.

5. Article 23g, Hague Regulations, expresses a customary war law rule, which operates independent of treaty obligation. This provision, in effect, prohibits destruction or damage of enemy property, <u>wherever situated</u>, unless such action meets the requirements of military necessity and proportionality.

6. Article 23e, Hague Regulations, expresses a customary war law rule, which operates independent of treaty obligation. This provision prohibits the infliction of any suffering upon the enemy, unless such action meets the requirements of military necessity and proportionality. Specifically, it prohibits the use of a legitimate war weapon in a manner which produces unnecessary suffering.

7. Military necessity is an independent war law principle which operates in conjunction with the doctrine of proportionality, to determine the scope of permissive violence allowed in any combat action. This

principle has been partially modified by customary war practice. The "military necessity modified" test is a 'short-cut' test. A commander can employ this test, to insure compliance with military necessity requirements, in combat actions directed against recognized military objectives. In questionable cases, however, the unmodified military necessity test should be used.

8. The doctrine of proportionality is an independent war law principle. It is the final humanitarian safeguard operating in the law of war. The doctrine of proportionality requires that in any combat operation, the reasonably anticipated military advantage must be proportionate to all resulting suffering, death and destruction. However, a commander is required only to make a good faith, reasonable loss/gain estimate before commencing combat operations. If a commander's estimate reveals that proportionality requirements cannot be satisfied, he either must select a lesser means of violence or forgo commencement of the combat operation--notwithstanding the existence of military necessity.

9. Terror bombing violates the law of war.

10. Intentional indiscriminate bombardment violates the law of war.

11. A thin line often exists between incidental damage and negligent indiscriminate bombardment.

However, if military necessity (or military necessity modified) and proportionality requirements are met, the damage or loss of life becomes incidental and lawful.

12. Target area bombing is lawful provided: the target area contains recognized military objectives or a critical military objective; the requirements of military necessity or military necessity modified are fulfilled; and, the reasonably anticipated military advantage is proportionate to all resulting suffering, death and destruction.

13. General devastation is lawful in those exceptional instances where military necessity and proportionality requirements are met.

14. Reprisal is recognized as a valid exception to the law of war. Because an unjustified reprisal constitutes a war crime, extreme care must be exercised to comply with all reprisal requirements. While reprisal action must be in proportion to the enemy's violation, this requirement is <u>not</u> one of "strict" proportionality. Accordingly the law of war is not violated, when a reprisal action is proportionate to <u>both</u> the degree of initial violence and the reasonably related consequences of the enemy's violation.

The doctrine of self-preservation has received neither general acceptance nor condemnation, as a war

law exception. In my opinion, basic humanitarian requirements compel the doctrine's rejection.

The rules and principles of war are interrelated. The number of rules operative, in any combat situation, depends entirely on the attendant circumstances. For example: Assume an armament factory, located near the residential area of a hinterland city, is considered as a potential bombing target. Because a "place" will be bombarded, the requirements of Article 25, Hague Regulations, as modified by the military objective test, must be fulfilled. As enemy property and lives will be lost, the requirements of Articles 23e and 23g, Hague Regulations, also are applicable. The proposed bombing action must comply with the independent principles of military necessity (or military necessity modified) and proportionality, to satisfy Article 23g and 23e requirements. In addition, Article 26, Hague Regulations, should be considered to determine whether prior warning is necessary. To insure that the bombardment mission would not violate the law of war, a commander may employ a simple thought process while making his estimate of the situation. This <u>thought process</u> can be conducted substantially as follows:

First, the commander determines that the armament factory falls within those classes of

targets generally recognized as legitimate military objectives. In making the determination, he may rely on his own military expertise or refer to target lists similar to those previously cited. Once the determination is made, the commander knows that Article 25, Hague Regulations, will not be violated by the proposed hinterland bombardment. Next, he must insure that military necessity requirements are fulfilled. As the target constitutes a legitimate military objective, the commander may presume that all essential military necessity elements are met--except for the requirement of selecting a target destruction means, for which there exists no equally effective substitute that could produce a lesser amount of life and property destruction.[280] Employing this latter rule, the commander selects a means of delivery and a weapon, which will destroy the target.[281] Considering the city's

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280. If any doubt exist as to the target's qualification as a legitimate military objective, the entire military necessity test must be applied.

281. This legal criterion is entirely consistent with

location, aerial bombardment should be used. Assuming conventional bombs will accomplish the mission, neither napalm nor nuclear weapons should be employed. Once this selection process is completed, the requirements of military necessity modified have been fulfilled. The commander should now determine whether bombardment warning is required under Article 26, Hague Regulations. If the enemy has an effective air defense capability, warning undoubtedly will not be given. However, if no air defense capability exists and the enemy cannot otherwise protect or conceal the target, warning would be appropriate. At this point the commander is ready to apply the final humanitarian test--the doctrine of proportionality. In doing so, he is required to make a good faith loss estimate of all damage, death and suffering that foreseeably will result from the use of the selected mission accomplishment force (conventional bombs). The commander compares this loss estimate against

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the practical military requirement of conserving ammunition and avoiding "overkill".

> the military advantage reasonably expected to be gained by the target strike. If the amount of anticipated loss is proportionate to the anticipated military advantage, the commander may issue the operations order with reasonable assurance that the action will not violate the law of war.

Perhaps at some future time, the major world powers will ratify a new war law treaty. Until then, the Hague Conventions of 1907 and the Geneva Conventions of 1949, as modified by custom, will continue to provide necessary warfare rules. <u>These rules when properly interpreted and applied will meet modern battlefield requirements</u>, and prevent unnecessary death and destruction. Conversely, necessary death and destruction can <u>never</u> be restrained under any warfare rule.

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