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Counterinsurgency and the Geneva Conventions-Some Practical Considerations

Since the end of World War II, the world peace has been disturbed with increasing frequency by outbreaks of armed violence. Geographically, these outbreaks have ranged from the Philippines, and the Dominican Republic to Kenya. In intensity, the range has been from civil disturbances through protracted small unit operations such as took place in Malaysia to major conflicts such as Viet Nam. The nomenclature has been equally varied, including, for example, "uprisings," "police actions," "guerilla warfare," and the term which is gaining increasing current favor, "counter-insurgency operations."

There are several factors common to these outbreaks, some of which will be touched upon subsequently. But one touchstone is paramount: these outbreaks involve actual military operations which severely affect elements of the local civil population. Such operations, simply by their nature, impinge upon the humanitarian areas covered by the several so-called "Geneva Conventions," e.g., humane treatment of prisoners, of the sick and wounded, and of the civil population.

Whether the Geneva conventions are specifically applicable to any given situation depends upon whether the outbreak constitutes "an armed conflict . . . of an international character." This, in turn, requires an analysis in depth of political, legal and diplomatic factors which is beyond the scope of this article. However, specific applicability of the Conventions need not be the key question. Even as to civil war, the Conventions provide that certain humanitarian principles shall apply. Further, the conscience of mankind demands that ends sought to be achieved by the Conventions should be applicable in all situations which involve the application of military force.

Accordingly, the remainder of this article will presuppose the existence of a current "counter-insurgency operation" which involves

United States' forces and to which the several Geneva Conventions are directly applicable.

The purpose of this article is to present for consideration by the entire legal community, practitioners as well as members of the teaching fraternity, government officials as well as private individuals, certain problems which confront the US military in efforts to apply conscientiously the provisions of these Conventions. I do not propose to offer solutions to the problems raised, in some cases because answers require national level decisions, in others simply because no solutions appear readily available.

But I do feel strongly that the American legal community should be aware of these problems, should consider, and if necessary, debate them in forums of the organized Bar, and, where appropriate, aid in formulating answers.

Today, the burden of finding an empirical solution to these problems is falling upon our military forces in Viet Nam. They confront the commanders of assault battalions, division surgeons and provost marshals, judge advocates of all levels of the command structure and ultimately the senior commanders concerned. Tomorrow these problems may well confront the armed forces and legal community of another nation in an area far removed from Southeast Asia.

The Ground Rules Have Been Altered

It may come as a surprise to some Readers to find that real problems exist with respect to the application of the Geneva Conventions to current conflicts. There are some lawyers who take an attitude which can be paraphrased as follows: "We had the Hague Convention in World War I; we had the Geneva Conventions of '29 in World War II, we had the Geneva Conventions of '49 for Korea. How can there be any problems left?" The simple fact is that modern counter-insurgency operations have radically altered the basic ground rules.

In order fully to appreciate this fact it is necessary to consider briefly the background against which the Hague and Geneva Conventions were negotiated. It is a truism to state that treaties which are designed to have future applicability are drafted in terms of problems which have arisen in the past. Thus, the Hague Conventions tend to reflect the problems which arose during the Franco-Prussian conflict of the 1870's; the Geneva Conventions of 1929 address themselves to concepts and techniques of World War I; the Geneva Conventions of 1949 were concerned with matters of controversy arising from World War II.

None of them really foresaw the new problems of the next succeeding conflict. So it is hardly surprising that the current versions failed to provide for the unique situations which confront the military forces engaged in a modern counter-insurgency operation.

A further complicating factor arises from the fact that the Conventions of 1949 very clearly reflect that the balance of power lay, at the time the treaties were negotiated, with the North Atlantic community of nations. Thus, all of the basic concepts very strongly reflect the tactics and organizational concepts of an American/European oriented armed force.

Turning from these generalized observations to more particular facets, a casual reading of the conventions very clearly brings home the point that the rights and obligations contained therein were designed to be exercised in a specific and rather stylized arena of conflict. Specifically, the drafters visualized a series of relatively stable, interlocking corps fronts; the organization of the forces engaged has been presumed to follow the standardized concept, e.g., infantry, artillery, medical corps; the participation of guerilla or partisan bands has been presumed to be a minor adjunct of the major conflict; the civil population as a whole has been assumed to be little more than innocent bystanders; and finally, it has been accepted that orderly lines of communication will lead from the stabilized front to the safety of the rear area.

When one seeks to find similarities between the hoped-for situation described above and that which actually prevails in a counter-insurgency operation, one is immediately struck by the fact that for each supposition the exact opposite tends to prevail.

The Sea Through Which the Fishes Swim

There are rarely fixed fronts of any size, let alone extending to corps-sized operations. Instead, hit and run operations varying from platoon to multi-battalion size extend across substantial sweeps of territory. Instead of organizations modeled upon the patterns developed at command and general staff colleges, the guerilla force must utilize flexible organizational patterns in which no fixed branch of service or mission can readily be ascertained. Guerilla activity instead of being a minor adjunct is the major type of combat. The civilian population instead of being bystanders is either the ultimate prize for which the struggle is being waged or, to borrow a phrase of Chairman Mao's, "the sea through which the fishes swim." Instead of clearly defined rear

areas of safety, major population centers may, in fact, be among the most dangerous areas within the war zone.

For those readers who are interested in a detailed and penetrating analysis of military operations in a counter-insurgency operation, I recommend "Observations of a Brigade Commander" a three-part article which appears in the January—March 1968 issues of *Military Review* by Colonel (now Brigadier General) Sidney B. Berry, Jr. General Berry commanded the 1st Brigade of the 1st Infantry Division in Vietnam from June 1966 to February 1967.

With such a divergence between what the drafters of the Geneva Conventions foresaw in theory and what the man on the ground now actually encounters, it is hardly surprising that problem areas exist. I am deeply indebted to commanders and judge advocates who have served with our forces during the commitment in the Dominican Republic and in Viet Nam for much of the factual background on which the remaining portions of this article are based. Due in large part to the high level of professional competence of these men, practical, on-the-spot, humanitarian solutions to the problems have been found. But it would be a disservice to their efforts to assume either (1) that the problems do not exist or (2) that with the eventual termination of the conflict in Viet Nam, the need for the legal community to address these problems no longer exists.

Some Problems

In the following "case histories" a format has been adopted which first, quotes from pertinent portions of one of the Geneva Conventions; second, sets forth brief factual background, third, gives a hypothetical situation and finally, poses a question.

Situation I

Article 4, Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (hereinafter cited as GPW) provides in pertinent part as follows:

"61. Prisoners of War Defined

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

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

- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
- (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.

* * *

- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.”

Experience indicates that most, if not all, of the following categories of forces opposing the government in being will be encountered: uniformed or quasi-uniformed regular forces, hard-core tactical guerilla groups, operating without standardized uniforms, local guerilla teams (farmers by day and fighters by night) and local inhabitants who are members of the guerilla infra-structure or “shadow government.”

An “eagle flight” of US helicopters carrying a reinforced platoon of infantry spots suspicious activity at a cross road around which are located several farm houses. The flight lands, a seal is established, suspicious individuals are detained and the group returns to the division base camp where a determination as to entitlement to POW status is requested for the following:

- (1) A farmer in whose barn three claymore mines, 100 meters of wire and five detonating devices were found.
- (2) A fourteen year old school girl on whose person was found

a letter directing her to purchase medicine for the guerillas together with a substantial sum of money.

(3) A twenty year old man without identity papers suffering from two gunshot wounds in the lower leg.

(4) A forty year old man who has on his person, in addition to identity documents in proper order, a ledger which clearly is a tax collection book for a political sector of the guerillas.

Are all, or any, of these individuals sufficiently covered by the provisions of the GPW cited above so as to be entitled to prisoner of war (POW) status?

Situation II

Article 33 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (hereinafter referred to as GWS) provides in pertinent part:

The material of mobile medical units of the armed forces which fall into the hands of the enemy, shall be reserved for the care of wounded and sick.

The buildings, material and stores of fixed medical establishments of the armed forces shall remain subject to the laws of war, but may not be diverted from their purpose as long as they are required for the care of wounded and sick. Nevertheless, the commanders of forces in the field may make use of them, in case of urgent military necessity, provided that they make previous arrangements for the welfare of the wounded and sick who are nursed in them.

The material and stores defined in the present Article shall not be intentionally destroyed.

Major base camps of main forces guerilla units are usually located in inaccessible hinterland areas, often in deep jungle. In addition to troop billeting, messing and training facilities, these base camps often contain hospital facilities. In most cases these hospital facilities are located in underground bunkers.

A battalion size search and destroy operation has been launched into a jungle area suspected to be a main operational area of guerilla forces. No roads lead into the area and initial penetration was made by heliborne assault. An unoccupied base camp was located which contains an underground hospital complex. The demolitions capability of the battalion is limited. The only means of destroying the base camp is by means of air strikes and artillery which would result in destruction of the hospital.

Is the battalion commander required to forego destruction of the base camp in order to avoid an apparent violation of the Conventions?

Situation III

Article 19, GPW, provides as follows:

95. Evacuation of Prisoners

Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.

Only those prisoners of war who, owing to wounds or sickness would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone.

Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

Experience indicates that the majority of prisoners are captured during the course of either guerilla assaults against forward installations or during the conduct of search and destroy operations. Permanent prisoner of war internment facilities on the other hand are most often located in the vicinity of logistic complexes which tend to be clustered around coastal population centers.

An infantry brigade has been engaged in a large-scale search and destroy operation which has penetrated jungle base areas. At the same time guerilla forces, in celebration of a national holiday, have launched a campaign of indiscriminate shelling of population centers including the area to which the brigade normally evacuates prisoners. A substantial number of prisoners have completed post-capture processing and are awaiting aerial evacuation to permanent internment facilities.

Would such evacuation be proper under the terms of the Conventions?

Situation IV.

Article 36, GWS provides in pertinent part as follows:

Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed upon between the belligerents concerned.

They shall bear, clearly marked, the distinctive emblem prescribed in Article 38, together with their national colours, on their lower, upper and lateral surfaces. They shall be provided with any other markings or means of identification that may be

agreed upon between the belligerents upon the outbreak or during the course of hostilities.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Quite often heliborne operations are conducted at extensive distances from division, brigade or battalion base camps. When sufficient penetration is involved, a majority of the ground lying between the base camp and the actual area of operations is under the nominal control of guerilla forces.

A two battalion force has penetrated deep into guerilla held territory. As a result of a fire fight, the force has sustained casualties. "Dust-off" helicopters clearly marked with the red-cross emblems are dispatched to evacuate the wounded. During the flight from the base camp to the landing zone the helicopters come under heavy automatic weapons fire.

What fire suppressive measures are authorized?

Situation V

Article 17, GWS, provides in pertinent part as follows:

Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. One half of the double identity disc, or the identity disc itself if it is a single disc, should remain on the body.

Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead.

They shall further ensure that the dead are honorably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased properly maintained and marked so that they may always be found.

None of the guerilla forces wears a double identity disc as provided by the Conventions. Further, the availability of aerial evacuation generally precludes the evacuation of enemy dead from battle field located substantial distances from base camps.

A two battalion size artillery fire support base located some 60 kilometers from the nearest base camp is subjected to three separate

ground attacks during the hours of darkness. The guerillas suffer in excess of 300 killed. The majority of the bodies are located on or within the barbed wire surrounding the perimeter. The battalion surgeon insists on immediate removal or interment of the bodies to safeguard the health of the fire support base personnel. No air transportation is available for the evacuation of the dead. Cremation by napalm or utilization of a bulldozed mass grave are the only feasible courses of action available.

What proper actions may the fire support base commander take?

No Ready Answers

All of the foregoing hypothets represent either problems which have actually confronted US forces or situations which could easily have arisen.

It should be clear that the Geneva Conventions standing alone, no matter how carefully they may be construed, do not supply the answers to current counter-insurgency questions. Unfortunately, the answer to the general question "Where do we go from here?" is no easier to agree upon than the answers to the specific queries I have posed in this article.

To some extent the problems can be, and have been, reduced by specific unilateral guidance to field commanders. But at best this is a stop-gap measure.

In theory, of course, the proper course of action would be to renegotiate the several Geneva Conventions. But this entails, at a minimum, time-consuming procedures and may include substantial diplomatic risks.

Perhaps the best solution, at least for the foreseeable future, is for the organized bar to take a firm public stand on how the Conventions should be applied to counter-insurgency operations.

If this article stimulates initial discussion leading to that end it will have served its purpose.