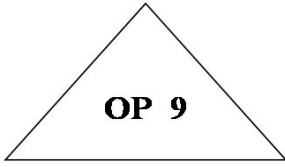


The Law of War: Can 20th-Century Standards Apply to the Global War on Terrorism?

Lieutenant Colonel David P. Cavaleri, US Army (Retired)



Combat Studies Institute Press
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Foreword

The Law of War: Can 20th-Century Standards Apply to the Global War on Terrorism? is the ninth offering in the Combat Studies Institute's (CSI) Global War On Terrorism (GWOT) Occasional Papers series. Mr. David Cavaleri, a retired Armor lieutenant colonel and CSI historian, has produced a study that examines the evolution and continued applicability of the corpus, both conventional and customary, that constitutes the law of war. As background, Mr. Cavaleri provides a theoretical framework and the development of the law within Western and, specifically, US Army doctrine and regulation. He then presents a case study of the British suppression of the Mau Mau insurgency in 1950s Kenya, a conflict with particular resonance today. Some of the more relevant characteristics of the "emergency," as it was called, include the clash between Western and non-Western cultures and an initially asymmetric fight between conventional security forces and loosely organized, poorly equipped insurgents.

The genesis of this study is the public discourse, both explicit and implicit, asserting the possibility that the GWOT may require new rules and new law-of-war prescripts. This important discussion is fraught with complexities and long-term implications; the moral force in warfare is incredibly significant and any changes to the legal framework in place must be very carefully considered.

Do we follow the law of war to the letter, do we remain "consistent with the principles of Geneva," or do we approach the conflict as a new challenge requiring fundamental revisions to the law? These are the options Mr. Cavaleri addresses, and we are pleased to contribute this Occasional Paper to the debate.

Thomas T. Smith
Colonel, Infantry
Director, Combat Studies Institute

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Preface

In 1630 the first governor of Massachusetts, John Winthrop, wrote a sermon titled “A Model of Christian Charity” in which he enjoined his fellow colonists to make Boston a “city set on a hill.” Subsequent political leaders, President Ronald Reagan for one, have periodically employed that image to portray the United States as a beacon of moral fortitude and Western character. This perception of the United States as a “shining city” creates a dilemma caused by the friction between the regulatory principles of the law of war as codified in the Geneva Conventions of 1949 and the military necessity of responding to non-Western tactics, techniques, and procedures (TTP) now encountered during the Global War on Terrorism (GWOT).

This study is intended to generate discussion about the application of the law of war during 21st-century military campaigns conducted in the contemporary operational environment (COE). It combines a review of the documentary evolution of the law of war with a historical case study of the British experience in Kenya between 1952 and 1960 against the Mau Mau insurgents. It makes no claim that every lesson learned by the British during that counterinsurgency operation can be directly applied by the United States to the challenges of the GWOT, but this analysis does offer some insight about applying the law of war to an unfamiliar, non-Western environment.

The debate concerning the law of war’s applicability will grow more vocal as non-state enemies of the United States adapt TTP to exploit perceived centers of gravity like public opinion. In anticipation of that escalating debate, this analysis offers the following as its overarching question: Is the current version of the law of war suited to the COE in general and the GWOT in particular?

I recognize I owe my academic freedom to analyze this topic to the dedicated servicemen and women who face this quandary on a daily basis. Having said that, allow me to exercise that freedom and offer my opinion up front: Law-of-war violations are neither necessary nor excusable for successful prosecution of military operations in any environment, and because the law of war in its current form is more than adequate to face the new GWOT challenges, it does not warrant revision. I acknowledge occasional gaps exist in the case-study analysis presented in this work due to primary-source limitations; still, by contributing a fairly comprehensive historical element to the debate, this study should enable the reader to derive an informed opinion.

No argumentative analysis can succeed without help, and this study is no exception. Dr. William G. Robertson of the Combined Arms Center's Combat Studies Institute (CSI) encouraged me to make this analysis more than just a dry historical recitation by emphasizing there must be a "so what" to every story. Lieutenant Colonel Brian DeToy, Chief of CSI's Research and Publication Division, provided critical mid-course steering corrections and kept this project on track. Fellow GWOT Occasional Paper author Mr. James F. Gebhardt was a constant source of encouragement and "over-the-transom" advice. And finally, I am indebted to the talented—and very patient—Ms. Catherine Shadid Small, whose editorial skills transformed this paper into something more than the ramblings of an energetic historian. Despite all this exceptional help, however, two facts remain. First, all errors and omissions contained herein are my sole responsibility, and second, the analyses and opinions presented in this work do not represent the official views of the US Army.

Chapter 1

Introduction

*[The Global War on Terrorism] is a fight for the very ideas at the foundation of our society, the way of life those ideas enable, and the freedoms we enjoy.*¹

The Honorable R.L. Brownlee (former Acting Secretary of the Army) and General Peter J. Schoomaker (Chief of Staff, US Army) coauthored a paper in 2004 titled *Serving a Nation at War: A Campaign Quality Army with Joint and Expeditionary Capabilities*. In this paper, they articulate a vision for the Army that highlights transformation efforts across the entire DOTMLPF spectrum.² The authors make two points quite clearly: They believe the Global War on Terrorism (GWOT) is a fight for Western values and that the current operational environment (referred to as the contemporary operational environment, or COE) is driving the Army to make evolutionary changes.³

One might argue that Western values themselves deserve to be changed.⁴ Prominent among these values in question is the collection of principles embodied in the law of war, a term recognized by many but truly understood by few. The law of war consists of a combination of customary and conventional international laws and is grounded in Western interpretations of the concepts of justness, necessity, proportionality, and chivalry. Its current version, codified in the Geneva Conventions of 1949, is a uniquely Western construct that has evolved over time in response to changing environments and watershed geo-political events. It should come as no surprise that a public debate has emerged about the law of war's applicability to the asymmetric nature of the GWOT within the COE.

This study will demonstrate that the law of war was established by theologians, jurists, academicians, diplomats, and others for use as a framework, a distinctly Western moral compass if you will, when applying military power. Not surprisingly, because the GWOT represents a cultural clash of global proportions, a difference of interpretation about acceptable conduct in war is emerging in both Western and Middle Eastern camps. The Western perspective proffers an approach to armed conflict that, while violent, generally abides by a collection of "universally" accepted regulatory constraints. The moderate Middle Eastern perspective, however, may be typified by Sheikh Dr. Yousef Al-Qaradhawi. Recognized by some as a leader of the Muslim Brotherhood movement and an influential religious authority in Islamist circles, Al-Qaradhawi issued a *fatwa*, or religious legal opinion,

in August 2004 permitting the abduction and killing of American civilians in Iraq. When proclaiming his *fatwa*, Al-Qaradhwawi explained that a civilian in Iraq is “someone who does not take part in the fighting and does not abet the occupying soldiers. [On the other hand] one who abets the occupiers—his status is identical to theirs. The occupation is fighting against Muslims and anyone who helps the occupation has the same status as the military.”⁵

This troubling disparity in East/West perspective has prompted some to question the continued use by Western powers of current law-of-war principles. For example, on 7 February 2002 President George W. Bush issued a memorandum in which he stated: “The war against terrorism ushers in a new paradigm. . . . Our nation recognizes that this new paradigm—ushered in not by us, but by terrorists—*requires new thinking in the law of war*, but thinking that should nevertheless be consistent with the principles of Geneva”(emphasis added). Former Secretary of Defense James Schlesinger supports this position in the ninth of 14 recommendations contained in the *Final Report of the Independent Panel to Review DoD Detention Operations*:

The United States needs to *redefine its approach to customary and treaty international humanitarian law*, which must be adapted to the realities of the nature of conflict in the 21st Century. In doing so, the United States should emphasize the standard of reciprocity, in spite of the low probability that such will be extended to United States Forces by some adversaries, and the preservation of United States societal values and international image that flows from adherence to recognized humanitarian standards (emphasis added).⁶

It is this very public, yet individually personal, debate that generates this study’s overarching question: Is the current law of war suited to the COE in general and the GWOT in particular? Put another way, has the time come for the West to re-evaluate how it addresses the dilemma caused by the clash of the law of war’s regulatory dicta with the situational demands of military necessity? In this author’s opinion, the time is right for the international community to review the law of war in light of the GWOT, and he is convinced this review will conclude that law-of-war violations are neither necessary nor excusable for successful prosecution of military operations in any environment, and because the law of war in its current form is more than adequate to face the new GWOT challenges, it does not

warrant revision.

The author recognizes some readers will be uncomfortable with the idea that any law should be literally enforced (we do live, after all, in a society that prides itself on creatively applying situational ethics and “shades of grey” interpretations), but in his opinion, the law of war should not be loosely interpreted by any party to a conflict. It exists for two reasons: to rigorously frame justification for war in the hopes of preventing it and, failing that, to regulate combatant conduct in the attempt to interject a sense of humanity into what can quickly degenerate into inhumane activity. The only way any party to a conflict can secure humane treatment for its captured military personnel or detained civilian populace is to unwaveringly adhere to the letter of the law of war. Unfortunately, history provides us with numerous examples when even this approach has failed to secure humane treatment for all parties involved. And therein, sadly, lies the issue at the heart of the law-of-war quandary: Should a party to an armed conflict like the GWOT continue to apply 20th-century standards of conduct in an environment where the enemy refuses to reciprocate? This paper will argue yes, and even though the author acknowledges the cost of such a decision has been, and will always be, extremely high, he firmly believes the alternative is unacceptable.

This study is organized into several sections. It begins with a brief discussion of baseline analytical questions in Chapter 2 that sets up the next chapter’s overview of the documentary evolution of the law of war, which itself is followed by a historical case study of the British experience in Kenya from 1952 to 1960 in Chapter 4, and then an analysis of the conflict’s consequences in Chapter 5. This case study will highlight the law of war in a complex environment defined by opposing characteristics: Western culture vs. non-Western culture and conventional tactics vs. counterinsurgency tactics, just to name two. Analyzing the British experience in Kenya will contrast the law of war (as codified in the Geneva Conventions of 1949 and the subsequent 1977 Protocols) with counterinsurgency challenges faced by the British colonial government and security forces. Armed with this information, the reader will be better prepared to draw conclusions about the law of war’s applicability in the face of contemporary challenges presented by the Taliban in Afghanistan, Ba’ath Party remnants and disaffected civilians in Iraq, the global al-Qaeda network, and the COE at large.

Notes

1. R.L. Brownlee and Peter J. Schoomaker, *Serving a Nation at War: A Campaign Quality Army with Joint and Expeditionary Capabilities* (Washington, DC: Army Strategic Communications, 2004), foreword.

2. DOTMLPF is an Army acronym used to identify the following components: doctrine, organization, training, materiel, leadership and education, personnel, and facilities.

3. “[The COE] is not the strategic context for which we designed today’s United States Army. Hence, our Army today confronts the supreme test of all armies: to adapt rapidly to circumstances that it could not foresee,” Brownlee and Schoomaker, 3.

4. The concept of the United States and its international role as the protector of Western values can be traced back to as early as 1630, when John Winthrop, first governor of Massachusetts, described his vision for Boston with these words: “For we must consider that we shall be as a city upon a hill, the eyes of all people are upon us; so that if we shall deal falsely with our god in this work we have undertaken and so cause him to withdraw his present help from us, we shall be made a story and a byword through the world.” John Winthrop, sermon titled *A Model of Christian Charity*, <<http://www.mtholyoke.edu/acad/intrel/winthrop.htm>, last accessed on 9/22/2004. Occasionally, Western leaders have cited Winthrop’s visual images of this “city upon a hill.” For example, former President Ronald Reagan referenced Winthrop in his farewell speech with these words: “I’ve spoken of the shining city all my political life, but I don’t know if I ever quite communicated what I saw when I said it. But in my mind it was a tall, proud city built on rocks stronger than oceans, windswept, God-blessed. . . . After two hundred years, two centuries, she still stands strong and true on the granite ridge, and her glow has held steady no matter what storm. And she’s still a beacon, still a magnet for all who must have freedom.” President Ronald Reagan’s Farewell Speech, January 11, 1989, <http://www.reaganfoundation.org/reagan/speeches/farewell.asp>, last accessed on 9/22/2004.

5. Special Dispatch No. 794, October 6, 2004, titled “Reactions to Sheikh Al-Qaradhawi’s Fatwa Calling for the Abduction and Killing of American Civilians in Iraq.” <http://www.memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP79404>, last accessed on 10/5/2004. This article by the Middle East Media Research Institute (MEMRI) describes the reaction—for and against—to Al-Qaradhawi’s proclamation. It is interesting to note that this *fatwa* creatively interprets the language of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC) 1949, Article 3, Paragraph 1: “Persons *taking no active part in the hostilities*, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, *shall in all circumstances be treated humanely*, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth,

or any other similar criteria” (emphasis added).

6. *Final Report of the Independent Panel to Review DoD Detention Operations*, August 2004, 80-81 and 91; <http://www.defenselink.mil/news/AUG2004/d20040824finalreport.pdf>, last accessed on 10/5/2004. In this particular instance, Mr. Schlesinger’s call for a review of US law of war is focused on the idea of reciprocity, where one belligerent acts in a certain way based on the assumption the opposition will respond in kind. As further evidence of the emerging debate, *The Orlando Sentinel* published a foreign affairs editorial on February 2, 2005 by Pulitzer Prize-winning journalist John C. Bersia titled “U.S. Should Study Military Strategy.” Bersia states his argument about US efforts to combat terrorism this way: “In dealing with those current and emerging threats [described as petty dictators, troublemakers who aspire to obtain weapons of mass destruction (WMD), and terrorists with global reach] the Bush administration has an obligation to develop clearer guidelines for potential U.S. military action.” Bersia then invites his readers to respond with suggestions for policy development concerning intervention decision making by asking a series of open-ended questions, the last of which directly applies to this study: “Should any rules apply in confronting terrorism?” The answer is emphatically “yes.”

Chapter 2

Establishing Analytical Conditions

*It can only be the earnest desire of all men of good will to ensure that this Convention is made to work in accordance with its tenor.*¹

Gerald Irving A. Dare Draper, in his above quote, is referencing the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, more commonly known as the fourth Geneva Convention of 1949, or (GC). It might seem antithetical to expect combatants to conduct themselves as “men of goodwill” and adhere to humanitarian principles, and yet that was, and remains, the very expectation upheld by a majority of nation-states. There is a predicament, however, between the necessity for military action and the expectation that those actions be tempered with humanitarian constraint, which fully presents itself only when combatants disagree on the validity of the law of war. The ongoing campaign in the Middle East generates the question of whether or not the GWOT is a watershed event that warrants a revisit to, if not a wholesale revision of, the law of war. To develop an informed opinion, one must appreciate the journey taken by the international community in general, and the United States in particular, which has yielded this Western approach to armed conflict.

Research reveals that the legal framework of the law of war is prescriptive, proscriptive, and has a long lineage. A study of this topic requires the reader ask several initial questions to properly frame the debate. For example, the basic question one has to answer is very simply what is war. The answer to that question then leads one to ask why wage war. If empowered to engage in armed conflict, then why regulate war. Assuming intent to regulate war, then what is the law of war. What is the purpose of the law of war, and what are its unifying themes? And the last question revolves around how the law of war is triggered. Volumes have been written on these topics, and this study will not attempt to address any in dissertation-depth. It will, however, offer simple answers that should enable the reader to establish a baseline understanding of the topic and to develop a perspective en route to tackling the dilemma at the heart of this study.

What is War?

In this era of immediate global media coverage, one tends to assume a universal understanding of this complicated subject. The Roman philosopher and politician Cicero, writing in the 1st century B.C., defines war as “a contending by force.”² No discussion of war conducted by Western students is complete without at least one reference to Clausewitz who defines

war as “merely the continuation of policy by other means.”³ American political scientist and international law expert Quincy Wright includes the dual concepts of “armed combatants” and “legality” in his description of war as a “legal condition which equally permits two or more groups to carry on a conflict by armed force.”⁴ *Webster’s Dictionary* defines war as “a state of usually open and declared armed hostile conflict between states or nations,” a clear enough definition, but perhaps too simplistic when applied to the COE. This author prefers the definition of war endorsed by the US Army Judge Advocate General’s (JAG) School: “A contention, i.e., a violent struggle through the application of armed force.”⁵ War can be generally described as an armed struggle between two or more combatants for reasons important to each—an oversimplification to be sure, but a definition that allows us to segue to the second baseline question.

Why Wage War?

One would think a prudent man would undertake war only as a last resort, but that is not necessarily the case. The reasons for justifying war have historically been as varied as the conflicts and combatants themselves. They include pursuit of religious freedom, struggle for economic survival, payback for political insult, visions of ideological hegemony, even maniacal insanity; no matter how logical or seemingly far-fetched the reason, one could probably find a historical example of it being used to justify waging war. The United States views the use of military force as one of four elements of power at its disposal (the other three being diplomacy, information, and economics), yet its reasons for waging war are uniquely its own, as is the case for every nation-state.

This question also raises the issue of just versus unjust war and the lengths to which a nation-state will go to rationalize its decision to wage war. A detailed analysis of this particular subject is beyond the scope of this study, but it will, in a later section, discuss the concept of justifying war as one of the unifying themes of the law of war. For now, suffice it to say man has long struggled to justify waging war and, like beauty, those justifications are more often than not found in the eyes of the beholder.

Why Regulate War?

Why indeed? Given the enormity of a decision to undertake war, is it not prudent to conduct it as violently, as effectively, as horrifically as possible, applying, as it were, an “ends justifies the means” approach? Why not just do whatever is necessary, consequences be damned? Why did the law of war ever evolve at all since going to war is internationally recognized as

an acceptable means of resolving conflicts? Perhaps because man is, at his very core, a rational being, and as weapons technology and tactics became more sophisticated, he acknowledged the need to balance military capabilities with long-term social harmony. Historian Peter Paret notes that 16th- and 17th-century writings on war generally fall into two categories: a collection of what he calls pioneer works in the field of international law and pioneer works detailing advances in military technology.⁶ Before this period, the generally accepted approach to warfare followed the Machiavellian model that advocated unregulated war, later embodied in what Paret characterized as Francis Bacon's "unabashed advocacy of unrestricted war."⁷ But the societal backlash resulting from the Thirty Years War led to the advent of a group of men who opposed the unregulated destructiveness that typified war on the Continent.

These men, the most famous being the Dutchman Hugo Grotius, emerged as proponents of an approach that advocated measures to protect private persons and their rights. They believed the law of nature contained fundamental precepts suited to how nations should be governed, and their works collectively endorsed one central principle described by Paret as being "that nations ought to do to one another in peace, the most good, and in war, the least possible evil."⁸ In a later section, this study will address the contributions of Hugo Grotius, his predecessors and successors, and especially this concept of regulating warfare (referred to in legal and philosophical circles as *jus in bello*).

According to the US Army JAG School, the act of adopting formal measures to regulate conflict accomplishes several things. Efforts to formally regulate war can:

1. motivate the enemy to observe the same rules
2. motivate the enemy to surrender
3. guard against acts that violate basic tenets of civilization (i.e.: protect against unnecessary suffering/safeguards certain fundamental human rights)
4. provide advance notice of the accepted limits of warfare
5. reduce confusion and make identification of violations more efficient
6. help restore peace⁹

These measures presuppose that all combatants acknowledge the need to regulate war in the first place, which is an assumption that begs a follow-up question: What if one or more parties to a conflict differ in their interpretation of acceptable conduct, or worse yet, refuse to acknowledge the need

to regulate warfare at all? This is a difficult question, but let us agree, for now, that over time man has attempted to impart some measure of humanity to an otherwise inhumane activity, and that these regulatory measures are known as the law of war. This leads us to our next question.

What is the Law of War?

In his *Handbook on the Law of War for Armed Forces*, Frederick DeMulinen describes the law of war as a collection of “international prescriptions on the conduct of combat and the protection of victims of combat.”¹⁰ Dr. Michael Walzer of the Institute of Advanced Study at Princeton refers to a “set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements” when describing this construct.¹¹ The Department of Defense (DoD) defines the law of war as “that part of international law that regulates the conduct of armed hostilities. The law of war encompasses all international law. . . including treaties and international agreements. . . and applicable customary law.”¹² This gets closer to something a layman can appreciate, but it still needs clarification. For the purposes of this analysis the following definition will suffice: The law of war consists of a collection of unwritten rules and codified rules, derived from distinctly unique sources and intended for a specific purpose. We will briefly address the source aspect of the law of war first and leave the discussion about purpose for another question.

The law of war is derived from two distinct sources. It is based, in part, on unwritten general rules that have come to be known as “customary international law,” while the specificity of the law of war is attributed to a collection of codified rules known as “conventional international law.” The former are recognized as rules of conduct that bind all members of the community of nations, while the latter represent those codified rules that are binding as a result of express consent. To quote the US Army JAG School, “Many principles of the Law of War fall into this [customary international law] category,” while the term treaty (also convention, protocol, annexed regulation) “best captures this concept [conventional international law].” Three very important points become evident. First, the law of war consists of two distinct components. Second, the law of war owes its current form and force to the evolution of custom and convention as they have developed over time. And third, the customary aspect of the law of war is equally essential to the overall construct as is its conventional aspect, because “once a principle attains the status of customary international law, it is binding on all nations, not just treaty signatories.”¹³ To better understand what the law of war is, and how it evolves, this study will now

discuss these twin sources in detail.

Customary international law is defined by one source as a body of law that results from a “general and consistent practice of States that is followed by them from a sense of legal obligation.”¹⁴ Another source indicates that customary international law is formed by states following a “general and consistent practice, which is motivated by the conviction that international law requires that conduct.” This same source identifies two criteria that must be met for a concept to rise to this level: there must be an act or actual practice, and states must believe they are acting under a legal obligation.¹⁵ The key points to remember about this aspect of the law of war are that the body of customary international law consists primarily of unwritten cultural norms and generally recognized practices, that two components of the test (the “act” and the “belief”) determine customary international law, and that a state cannot renege on its obligation to uphold customary international law.

It is, however, difficult to determine how widespread the general recognition of a practice must be before it can evolve into customary international law. Major Timothy Bulman, writing in the *Military Law Review*, acknowledges the lack of a precise formula for this area, but offers the following guidance:

It [an act or practice] should, however, reflect wide acceptance among the states involved in the relevant activity. Determining when state practice has ripened into binding customary international law has never been easy to objectively quantify. Rather, the developmental process *depends on subjective interpretations of the facts and motives of state officials* (emphasis added).¹⁶

This process is extremely subjective and could potentially take a long time to mature; conversely, under the right circumstances it could proceed rapidly. The key to this process hinges on the distinctions between “custom” and “usage” when referring to a state practice. A custom refers to an identifiable habit or practice that is conducted “under the conviction that they are obligatory under international law,” while usage refers to certain acts without the conviction of legal obligation.¹⁷ For example, the practice of acknowledging the inviolability of a white truce flag began as a practical usage for conducting battlefield negotiations, and only over time became recognized as a custom. Once recognized by the community of states as a practice with associated legal obligations, it evolved into customary

international law and is now recognized as an element of the law of war.¹⁸ This process depends on cultural perspectives, unlike that of the second source of law of war. One final note merits mentioning—in its 1956 law-of-war manual (still in effect, having been revised in 1976), the United States codified its position that customary law of war is binding on all nations and indicated all US forces would strictly observe the said law.¹⁹ This demonstrates the US position that both law-of-war sources were coequal in terms of relevance and legality.

The second source, conventional international law, consists of a voluminous collection of laws, conventions, declarations, and protocols spanning hundreds of years. It is easier than customary international law to comprehend, but perhaps more difficult to derive. For example, the conventional aspect of the law of war consists of codified laws that address specific proscriptions on conduct during armed conflict, yet an international convention of jurists and political leaders must agree on these laws before they can exercise the full force of international law. To further complicate matters, this body of materials generally evolved only in response to a global event that revealed, after the fact, pre-existing inadequacies in law-of-war codes. This study acknowledges the written law-of-war legacy that predates the Romans but will focus only on those elements that emerged beginning in the mid-19th century, which will be prefaced by a brief discussion of the contributions of Cicero, Saint Augustine, Saint Thomas Aquinas, and Hugo Grotius.

The law of war imposes constraints on armed conflict. Of particular note are two areas: behavior of combatants in action and behavior toward and treatment of persons and objects in war, especially victims in war.²⁰ Throughout history, and especially over the past three centuries, the collection of written laws addressing these issues has grown in response to various international events, primarily wars both great and small. The most widely recognized collection of these laws is contained in two groups of treaties—the Hague and Geneva Conventions. The Hague Conventions consist of two primary conventions focused on hostilities in general and the conduct of combatants, while the Geneva Conventions, contained in a collection of four distinct conventions and two protocols, address protective provisions relating to civilians and prisoners of war.²¹ The Hague Conventions in particular acknowledged the inability of conventional international law to address or even anticipate all possible regulatory requirements, and consequently mandated that in the absence of applicable treaty law, civilians and combatants remain under the protection and proscriptions of customary international law.²²

Any discussion of this topic routinely identifies three documents as the foundation for the law of war. They are the Hague Convention of 1907, with its focus on regulating the methods and means of warfare, the four Geneva Conventions of 1949 and their establishment of inviolable protections for specific categories of war victims, and the 1977 Protocols to the Geneva Conventions of 1949, which augment the 1949 convention.²³ In conjunction with this collection one should also consider the body of case law resulting from the post-World War II Nuremberg and Tokyo war-crimes trials.²⁴ We will analyze these primary sources of conventional international law, along with selected secondary sources, in subsequent sections.

What is the Purpose of the Law of War?

At its basic level, the law of war is the legal vehicle by which man regulates his conduct during armed conflict. We have already discussed reasons for regulating war, and the law of war represents the means to that end. In the words of one source, the law of war “aims at limiting and alleviating as much as possible the calamities of war. [It] conciliates military needs and requirements of humanity. . . thus [making] the distinction between what is permitted and what is not permitted.”²⁵ Another source claims the law of war integrates humanity into war (evidenced by the influence of organizations like the International Committees of the Red Cross and the Red Crescent), and that its use can serve as a tactical multiplier.²⁶ US Army Field Manual (FM) 27-10 indicates the law of war, inspired by the “desire to diminish the evils of war,” exists to protect combatants and non-combatants, safeguard human rights, and facilitate the eventual return to peace.²⁷ In short, the law of war’s purpose is to protect all parties to a conflict, empower international judicial bodies, regulate the conduct of war to mitigate suffering and, above all, facilitate the eventual return to peace. The last two questions serving as the analytical framework of this study merit a more detailed analysis than the previous ones.

What are the Unifying Themes of the Law of War?

A law exists for one of two purposes: either to prevent conduct or to control conduct. This principle applies to our study because there are two distinct unifying themes that, when considered holistically, comprise the corpus of the law of war. The first theme is identified by the phrase *jus ad bellum*, a legal and philosophical term that describes those aspects of the law of war intended to prevent armed conflict and, failing prevention, to clarify when war should be waged. The second theme, identified by the phrase *jus in bello*, describes those law-of-war aspects intended to regulate

or control conduct of combatants engaged in armed conflict—it qualifies how to wage war. The two themes, like customary and conventional law-of-war sources, combine to give purpose to the law of war. They are in no way mutually exclusive, but instead compliment each other by offering what University of Tennessee-Martin historian Alex Mosely describes as “a set of moral guidelines for waging war that are neither unrestricted nor too restrictive.”²⁸ These concepts have been under development for centuries, but the terms themselves are relatively modern; in fact, the terms were unknown to early Romanist scholars and did not appear in the writings of medieval canonical and civil lawyers. Their earliest recorded use appears in the 20th-century records of the League of Nations, and it was not until after World War II that they frequently began to appear in philosophical or legal publications.²⁹

Jus ad bellum is the older of the two themes. It defines the circumstances under which the use of military power is legally and morally justified.³⁰ Early societies focused their angst over armed conflict on developing rules for the legitimate use of force and devoted little if any intellectual effort to regulating the application of that force. It was accepted as fact that if armed conflict were determined to be legally justified then constraints need not be applied. This development raises the following question: Exactly what is meant by a just war?

According to recognized expert on international law and former legal adviser to the International Committee of the Red Cross Dr. Robert Kolb, man has for a long time and for a variety of reasons sought a legal framework by which he could reconcile “might” with “right.” Kolb places man’s conduct of war in the context of a response to unprovoked aggression that restores a right that had been violated.³¹ Kolb explains that man has historically justified armed conflict with four material causes; understanding them helps illuminate why any society would go to the expense and sacrifice of waging war. These causes (defense, repossession of property, recovery of debts, and punishment) have evolved over time and certainly do not represent a complete list, but one must remember that the law-of-war construct, and *jus ad bellum* in particular, have also evolved over time.³² For example, Michael Walzer defines a just war as a “limited war” whose conduct is governed by a set of rules “designed to bar, so far as possible, the use of violence and coercion against non-combatant populations.”³³

Because armed conflict was considered valid if it met specific criteria, no need existed to regulate conduct in a just war—the ends were sanctioned or blessed by the highest authority and, hence, the means were already

justified. This “no quarter asked-no quarter granted” approach to war eventually led to the development of the second theme (*jus in bello*), but not until Western civilization had showcased man at his very worst.³⁴ Because the *jus ad bellum* theme originated well before its counterpart (one can trace its roots to early Hittite, Egyptian, Greek, and Roman civilizations), this study turns now to a discussion of Roman and early Christian influences.³⁵

Cicero wrote in the 1st century B.C. that war should never be undertaken by a state “except in defense of its honor or safety.” He further stipulated several conditions that had to be met to justify war: War had to be declared by a proper authority, the antagonist had to be notified of the declaration of war, and the antagonist had to be provided an opportunity to negotiate a peaceful settlement before the onset of hostilities.³⁶ This effort to codify justification criteria probably represented the first formal attempt, at least in the Western world, at developing a universally accepted approach to initiating war—in other words, the first glimmers of *jus ad bellum*.

As the Empire expanded, the grounds for justifying war became more complex and open to interpretation, causing the emerging Christian Church to re-evaluate its pacifist stance in light of the practical demands for survival against invading barbarians. Accordingly, early Christian scholars like Saint Augustine and Saint Thomas Aquinas worked to reconcile church doctrine with political pragmatism by replacing the Roman legal criteria for justifying war with a moral or religious perspective wherein the forces of good waged war against the forces of evil, ultimately invoking God’s blessing for, in the case of the Empire, just wars of survival.³⁷ The resulting just-war doctrine evolved into the first of the two law-of-war themes.

For 12 centuries following the fall of the western Roman Empire, the influence of church theologians permeated all aspects of Western society, to include political theory. Saint Augustine, writing in the 5th century, melded the Roman political perspective on just war with emerging Christian theology and the practical reality of survival, ultimately developing a political theory of just war with a religious twist. He acknowledged Cicero’s definition of a just war as one that avenged an injury to honor or property and also acknowledged the three Roman just-war principles: the need for a legitimate cause, the requirement for declaration by a proper authority, and the requirement that peace be the final objective. But for Augustine, war served one fundamental purpose: It was the means by which

God either punished man or absolved him of his sins. Based on this premise, Augustine postulated that any war ordained by God was, by default, just. If one carries this train of thought through to completion, it logically (from a Western perspective) follows that war is an acceptable instrument of God's will. Accordingly, any state leader was well-grounded in declaring war if it was characterized as supporting God's will, however liberally interpreted. "Beginning with Augustine," said just-war theorist Paul Christopher, "war . . . became more than just a legal remedy for injustice; it became a moral imperative."³⁸ This morality-based approach to *jus ad bellum*, fundamentally different from the objective perspective of the Romans, represented a synthesis of early political philosophy and Christian theology's notion of good and evil that would not be altered until the mid-13th century.

Thomas Aquinas built on the work of Aristotle and Augustine to further define and codify *jus ad bellum* principles. His theories established a theoretical foundation grounded in Christian morality that provided later jurists and state leaders with a framework suited to balancing the esoteric aspects of the "love thy neighbor" mandate with the practical demands of political survival—resulting in what Frederick Russell describes as "perhaps the best compromise between aggression and Christian pacifism that the Church could devise."³⁹ During the 1200s, theological study centered around universities in Paris and other European cities, with a focus on synthesizing traditional thought and new topics then in vogue. Aquinas immersed himself in the spirit of academic innovation and, according to Russell, "Fused Aristotelian political theory to the traditional Augustinian outlook of his predecessors."⁴⁰ His contributions to the development of *jus ad bellum* theory, contained in his work titled *Summa Theologica*, are important. In it, he summarizes Augustine's work on the topic by reducing the earlier theory to abstract but clear principles. For Aquinas, war exists for two basic reasons: to "punish sin and right a wrong that detracted from the common good."⁴¹ One can see Augustine's influence, but Aquinas' position is somewhat more secular. And while he clearly acknowledges the validity of Augustine's three specific requirements for a just war (declared by proper authority, fought for a just cause, and fought with right intentions), his contribution in this area goes beyond merely repeating Augustine's list.⁴²

Aquinas' most significant contribution to *jus ad bellum* theory is in his collection of secular examples and analyses of each justification category. His requirement that a just war be declared by the proper authority harks back to the days of Rome, but Aquinas defines proper authority as one having no

recourse to a higher secular level. In a subsequent study Aquinas expands the definition of “just cause” to include actions taken for the purpose of avenging a wrong, punishing a state for refusing to make amends for said wrongs, and restoring unjustly seized property. His third and final characteristic of a just war, one that is fought with the “right intentions,” includes reasons such as advancing good, securing peace, punishing evil, and avoiding evil. Of special note is his position that any war that adhered to the first two characteristics (declared by proper authority and fought for just cause) could be deemed unjust if not prosecuted with the right intentions.⁴³ Aquinas’ work captured the spirit of Greek and Roman philosophers along with early church theologians, and synthesized those efforts with the secular attitude of political pragmatism that swept Middle Age Europe. His codification of these three *jus ad bellum* principles stood for 300 years and served as a starting point for the next significant law-of-war theorist, Hugo Grotius.

No single man, perhaps with the exception of Dr. Francis Lieber, influenced the evolution of the law of war more than Hugo Grotius. To best appreciate the impact Grotius’ writing had on the law of war in general, and *jus ad bellum* in particular, it is necessary to understand the environment in which he lived, studied, and wrote—the environment that was Europe in the early 17th century, a Europe devastated by the Thirty Years War.

This conflict raged across the European landscape between 1618 and 1648. Initially ignited by the flames of religious intolerance, it also owed its existence to hegemonic aspirations of the great houses of Europe and the tenuous political network that reflected the state of the Holy Roman Empire. This war redrew the political landscape of Europe and placed into sharp relief the fundamental differences between Protestants and Catholics, but for the purposes of this study those results are secondary. Much more significant is this conflict’s catastrophic impact on the population, economies, and social fabric of Europe that eventually gave rise to thinkers and advocates who furthered the concepts of conflict regulation. But just how bad was the Thirty Years War, and why did it stimulate law of war development?

Historical sources vary in their assessment of the scope of this conflict’s humanitarian catastrophe, but even the lowest estimates are horrific. As many as 10 million people might have died during this period due to the sword, famine, disease, and murder. Germany began the conflict with a population of around 16 million; at war’s end its death toll stood at four million. Bohemia lost two million—60 percent—of its prewar population.

And in one startling but telling example the population of the city of Magdeburg, called by some historians the “Hiroshima of the Thirty Years War,” was decimated when invading troops eliminated 83 percent of its population.⁴⁴ “For weeks,” says one historical analysis, “mutilated, charred corpses floated down the Elbe to the North Sea.”⁴⁵ Words fail to describe the horrors Europe’s population endured, but one second-order effect of the fighting is clear: The human landscape of the Continent was irrefutably scarred by this conflict, and Europeans learned many lessons—some technological, some tactical, still others philosophical. Among those in that last category, says historian Larry Addington, was the demonstration that “lack of restraint could be destructive to the interests of all sides,” a lesson that later helped “to inspire some of the first modern efforts at establishing ‘international law’ governing the conduct of military forces and their treatment of civilians.”⁴⁶ Grotius led the vanguard of those efforts.

Hugo Grotius was a 17th-century jurist and humanist who rose to international prominence after winning a prize legal case involving a Portuguese merchant ship captured by Holland. This exposure, and his research efforts informing his prosecution of the case, led him to conduct further study in the area of international law. His interest in this topic had already been piqued as a result of the Thirty Years War. He is perhaps best known for capturing his perspective on international law in the three-volume *De Jure Belli ac Pacis Libri Tres* (*The Law of War and Peace*); in its prologue, he describes the Europe of his day with these words:

Throughout the Christian world I observed a lack of restraint in relations to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.⁴⁷

It was not only the horrific nature of the fighting that influenced Grotius; he also noted the church’s reluctance to intervene and mitigate what he perceived to be overt violations of basic natural law about the conduct of war. Armed with a personal perspective on war, and informed by the work of preceding just-war theorists like Augustine, Aquinas, and the Spaniards Victoria, Ayola, and Suarez, Grotius devoted considerable energy to devising a replacement for the ineffective ecclesiastical-based system of international law that led to the Thirty Years War. Paul Christopher describes Grotius’

focus in this manner: “Grotius’ objective was to supplant the impotent and corrupt ecclesiastical authority with an external, objective, secular authority that the competing political interests would accept—a corpus of international laws.”⁴⁸ The basis for this new perspective on international law was to be found in natural, not church, law. In his own words, Grotius became “fully convinced . . . that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject.”⁴⁹ Throughout his writing one central theme appears: International relations should be governed according to the same natural principles, laws, and morals that govern individual relationships.⁵⁰ This perspective represents another evolution of *jus ad bellum* because Grotius’ work fused the Roman law of Cicero with the canonical law of Augustine, and built on the foundation espoused 400 years earlier by Aquinas.

Grotius added five elements to the list of three just-war principles discussed earlier (just wars must be “declared by legitimate authority,” “fought for a just cause,” and “fought with right intentions”). When the environment in which he lived and the impact the Thirty Years War had on him and Europe as a whole are understood, it becomes clear that he primarily desired to prevent war if at all possible; barring that, he sought to mitigate war’s impact on society. His list of additional principles consisted of the following:

1. “War must contain an aspect of ‘proportionality,’ meaning the ultimate aim of the war is proportional to the impact (damage) the war will have on society.

2. War must be fought with a reasonable chance of success.

3. War must be publicly declared.

4. War must be conducted only as a measure of last resort.

5. War must be fought ‘justly.’”(Note: this particular element, while not specifically cited by Grotius, is referenced by him in Chapter 25, page 18 of the prologue to *The Law of War and Peace*. With this element, Grotius sets the stage for the evolution of the second [*jus in bello*] law-of-war unifying theme concerning the conduct of armed conflict.)⁵¹

Grotius’ influence on the evolution of *jus ad bellum* was significant because his natural-law perspective advocated restrictions on rulers and states. More important, his proposal that natural law bound all people and communities meant that, by its very nature, natural law was superior to even canonical law.⁵² Consequently, when Grotius’ justification principles were publicized in *The Law of War and Peace*, secular rulers throughout

Europe quickly acknowledged them as the guidelines for waging war best suited to international diplomacy on the Continent. By replacing church influence with a code based on natural law, Grotius hoped to eliminate the specter of a war being waged solely for religious reasons. Wars could, and would, still be waged, but the checklist for claiming justification to do so was now much more objective and open to international scrutiny. This list of eight *jus ad bellum* principles, together with the collection of four legitimate causes for waging a just war (defense, repossession of property, recovery of debts, and punishment), has guided the international community for over 375 years, and generally falls into the customary international law source. No analysis of the law of war is complete, however, without discussing the second of its unifying themes, the notion of regulating war-time conduct that is generally captured in conventional international law, known in legal circles as *jus in bello*.

The US Army JAG School defines *jus in bello* as the collection of legal and moral restraints that apply to the conduct of waging war. This body of law, sometimes referred to as Regulation of Hostilities Law, or Hague/Geneva Law, traces its roots back at least 24 centuries; this lineage illustrates the complex challenge man faces when trying to humanize war. The journey man took to regulate his conduct during armed conflict traversed several of history's great civilizations, to include the Babylonians, the Chinese, and the Greeks, but it was Hugo Grotius who (in addition to his significant contributions to the evolution of *jus ad bellum* theory) first proposed a rudimentary collection of regulatory criteria to guide combatants in their prosecution of war.⁵³

Grotius proffered three questions intended to serve as regulatory *jus in bello* guidelines: who could be lawfully attacked? what means could be employed to do so? and how should prisoners be treated?⁵⁴ These guiding principles continued to evolve over the next four centuries. For example, Dr. Francis Lieber in 1863 refers to "justice," "faith," and "honor" in his *Instructions for the Government of Armies of the United States in the Field*; one US Army law-of-war publication in force during World War I references the need to apply the principles of "necessity," "humility," and "chivalry" during combat; and present-day law-of-war doctrine recognizes the three principles of "discrimination," proportionality," and "responsibility" as the foundation upon which combatants must base their actions.⁵⁵

Thus far, we have noted that modern law of war has evolved over time, with a lineage that predates the Roman Empire. We have identified two sources of the law of war (customary international law and conventional

international law) and acknowledged they are coequal in importance and combine to form the body in its entirety. Of the two sources, conventional international law is the easier to codify, while unique customs take time and widespread acceptance before being admitted into the recognized body of customary international law. Lastly, we have identified two unifying themes of the law of war, one addressing the justification for war (*jus ad bellum*) and the other dealing with the regulation of wartime conduct (*jus in bello*).

The dilemma alluded to earlier, represented by the tension between military necessity and the regulation of wartime conduct, is extremely important to our analysis. One of the definitions of “necessity” found in *Webster’s Dictionary* reads “pressure of circumstance,” while another makes reference to “physical or moral compulsion.” The concept of military necessity is unique, however, in that it pertains to a specific environment—armed conflict. The concept embodies a principle that justifies measures deemed indispensable to secure military success yet not explicitly forbidden by the law of war.⁵⁶

Dr. Lieber addressed the dilemma in 1863, and subsequent iterations of US law-of-war regulations continued the theme to try and balance what often appear to be diametrically opposed concepts.⁵⁷ Paul Christopher defines the term as one that “specifically addresses the tension inherent in attempting to minimize suffering through rules while at the same time employing a method (violence) that necessarily causes suffering.”⁵⁸ And Douglas Lackey, professor of philosophy at City University of New York, acknowledges the destruction of life and property as “inherently bad, therefore military forces should cause no more destruction than strictly necessary to achieve their objectives.”⁵⁹

At its heart, the dilemma is one of social conscience made all the more problematic by subjective, often collective, interpretation. The challenges are many: how to agree to acceptable limits, how to codify them, how to enforce them, how to balance the law-of-war principles with the practical demands of military necessity. It is this predicament to which political leaders refer when observing the time may have come to revise conventional international law. The real issue now at hand is the one identified in the opening pages of this study: Either the GWOT is an event worthy of forcing a law-of-war revision or it is not. If it is, then the international community will once again have to collectively balance the concept of military necessity and the *jus in bello* components of conventional international law. If it is not, then the regulatory codes in the existing law of war

corpus are adequate to the task.

How is the Law of War Triggered?

One last question remains to be answered. To appreciate the impact the law of war is intended to have on the actions of a state, it is necessary to understand the concept of sovereignty. *Webster's Dictionary* defines a sovereign as “one that exercises supreme authority within a limited sphere,” and the notion of sovereignty as being the “supreme power, especially over a body politic” acting with “freedom from external control.” The legal community views domestic law as a “barrier of sovereignty” that functions to protect a state from external interference with its internal affairs; in certain situations, however, international law can displace domestic law. International maritime law is an example of such a displacement, and the law of war is likewise capable of piercing the barrier of sovereignty and displacing domestic law under the right circumstances. Once triggered, the law of war displaces a state’s domestic law for the duration of a conflict to an extent contingent upon the nature of said conflict—in other words, the predominant status of a nation’s domestic law is restored once the conflict is resolved and the need for the law of war is terminated.⁶⁰

The law of war is triggered by a conflict, either international or internal in nature, regardless of whether the conflict is recognized by all parties. This triggering standard is clearly outlined in Article 2 of all four 1949 Geneva Conventions:

In addition to the provisions which shall be implemented in peacetime, *the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.* The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

*Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof (emphasis added).*⁶¹

The GWOT presents a variation on the problem previously discussed: How do you enforce *jus in bello* standards when one of the combatants refuses to acknowledge customary and conventional international law? Does one abandon the call to regulate combatant conduct in pursuit of a temporary tactical advantage, or does one enforce standards of combatant conduct unilaterally in keeping with a higher moral purpose? Is there, as some would advocate, a middle ground that involves revising the law of war to better apply to the GWOT environment? An analysis of the documentary evolution of the law of war follows in the next chapter.

Notes

1. Gerald Irving A. Dare Draper, *The Red Cross Conventions* (New York: Praeger Publishers, 1958), 48.

2. Hugo Grotius, *De Jure Belli ac Pacis, Libre Tres*, trans. Francis W. Kelsey (London: Wildy & Sons Ltd, 1964), 33; hereafter referred to as Grotius.

3. Carl von Clausewitz, *On War*, eds. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), Book 1, Chapter 1, 87. Earlier in his classic work, Clausewitz opines that “War is nothing but a duel on a larger scale,” and “War is thus an act of force to compel our enemy to do our will,” (Book 1, Chapter 1, 75). Probably his most widely recognized definition of war is: “We see, therefore, that war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means,” (Book 1, Chapter 1, 87).

4. Quincy Wright, *A Study of War* (Chicago: University of Chicago Press, 1965), 18, quoted in Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (New York: Harper Collins, 1977), 41.

5. *Law of War Workshop Deskbook*, International and Operational Law Department, US Army Judge Advocate General’s School, Charlottesville, VA, (June 2000): 1-2; <http://www.au.af.mil/au/awc/awcgate/law/low-workbook.pdf>, last accessed on 3/22/2005; hereafter referred to as “JAG School Deskbook.” The JAG School applies the following “Four Elements Test” to derive the internationally accepted legal definition of war. War is: (1) a contention (2) between at least two nation-states (3) wherein armed force is employed (4) with an intent to overwhelm.

6. Peter Paret, *Makers of Modern Strategy from Machiavelli to the Nuclear Age* (Princeton, NJ: Princeton University Press, 1986), 72.

7. Ibid.

8. Ibid.

9. JAG School Deskbook, 12.

10. Frederic De Mulinen, *Handbook on the Law of War for Armed Forces* (Geneva: International Committee of the Red Cross, 1987), 1 (Law of War Summary for Commanders).

11. Walzer, 44.

12. Department of Defense Directive 5100.77, *DoD Law of War Program*. (Washington, DC: 9 December 1998), 2, paragraph 3.1, http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf, last accessed on 3/22/2005.

13. JAG School Deskbook, 26.

14. Theodor Meron, "Customary Law," Crimes of War Project, <http://www.crimesofwar.org/thebook/customary-law.html>, last accessed on 10/20/2004.

15. Major Timothy P. Bulman, "A Dangerous Guessing Game Disguised As Enlightened Policy: United States Law of War Obligations during Military Operations Other Than War," *Military Law Review* 159 (March 1999): 155-156, 164-165.

16. *Ibid.*, 156.

17. *Ibid.*

18. One can trace the use of a white flag of truce to at least as far back as the Laws and Customs of War on Land (Hague II); July 29, 1899, Chapter III—On Flags of Truce. <http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm>, last accessed on 12/6/2004. Article 32 is very clear on this subject. It states: "An individual is considered a parlementaire who is authorized by one of the belligerents to enter into communication with the other, and *who carries a white flag*. He has a right to inviolability, as well as the trumpeter, bugler, or drummer, the flag-bearer, and the interpreter who may accompany him" (emphasis added). The Laws and Customs of War on Land (Hague IV), October 18, 1907, Chapter III, Articles 32-34, repeat this information. US Army Field Manual (FM) 27-10, *The Law of Land Warfare*, emphasizes the heritage of Army law-of-war regulations by stating: "The 1949 Geneva Conventions for the Protection of War Victims have been ratified by the United States and came into force for this country on 2 February 1956. *Each of the Hague Conventions of 1899 and 1907 and each of the Geneva Conventions of 1864, 1906, and 1929 will, of course, continue in force as between the United States and such of the other parties to the respective conventions as have not yet ratified or adhered to the later, superseding convention(s) governing the same subject matter. Moreover, even though States may not be parties to, or strictly bound by, the 1907 Hague Conventions and the 1929 Geneva Convention relative to the Treatment of Prisoners of War, the general principles of these conventions have been held declaratory of the customary law of war to which all States are subject*" (emphasis added), (FM 27-10, Foreword). FM 27-10 goes on to identify the purpose of the white flag of truce: "In the past, the normal means of initiating negotiations between belligerents has been the display of a white flag. *The white flag, when used by troops, indicates a desire to communicate with the enemy. The hoisting of a white flag has no other signification in international law* (emphasis added), (Chapter 7, section II). And finally, FM 27-10 identifies abuse of or firing on the flag of truce as a war crime (Chapter 8, Section II).

19. FM 27-10, *The Law of Land Warfare*, (Washington, DC: Department of the Army, 1976), Chapter 1, Section 1, paragraph 7c., <http://www.afsc.army.mil/gc/files/FM27-10.pdf>, last accessed on 3/22/2005. "The unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces, subject only to such exceptions as shall have been directed by competent authority

by way of legitimate reprisals for illegal conduct of the enemy (see par. 497). The customary law of war is part of the law of the United States and, insofar as it is not inconsistent with any treaty to which this country is a party or with a controlling executive or legislative act, is binding upon the United States, citizens of the United States, and other persons serving this country.”

20. De Mulinen, 2.

21. Ibid., 3.

22. Ibid. This language, often referred to as the “Marten’s Clause” after the adviser to the Russian Foreign Ministry, provides for a minimum standard of humanitarian treatment for combatants in the absence of specific conventional law. The preamble to the Laws and Customs of War on Land, (Hague IV) October 18, 1907 clearly states: “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

23. JAG School Deskbook, 26-28.

24. Draper, 94. Draper, a Lecturer in the Faculty of Laws at King’s College in London, writes in 1958 that up until the end of World War II the law of war was “remarkable for the paucity of judicial decisions,” but that the 15 volumes of Law Reports of war crimes trials published by the United Nations War Crimes Commission (UNWCC) represented a wealth of conventional law available for inclusion as appropriate in the larger body of the law of war.

25. De Mulinen, 2.

26. JAG School Deskbook, 3. With regard to the law of war’s functionality as a tactical combat multiplier, the JAG School offers this comment: “Observance of the law of war denies the enemy a rallying cry fight.” In other words, because law-of-war violations could motivate combatants to fight on despite difficult odds, law-of-war compliance eliminates those motivations.

27. FM 27-10, Section 1, paragraph 2. “The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by: *a*. Protecting both combatants and noncombatants from unnecessary suffering; *b*. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and *c*. Facilitating the restoration of peace.”

28. Alex Mosley, “Just War Theory,” University of Tennessee-Martin, 3. <http://www.utm.edu/research/iep/j/justwar.htm>, last accessed on 9/23/2004.

29. Robert Kolb, “Origin of the Twin Terms *Jus Ad Bellum* and *Jus In Bello*,” *International Review of the Red Cross* no. 320, (October 1997): 553, <http://www.icrc.org>

//www.icrc.org/Web/Eng/siteeng0.nsf/iwpList163/D9DAD4EE8533DAEFC1256B66005AFFEF, last accessed on 9/23/2004.

30. JAG School Deskbook, 3.

31. Kolb, 1.

32. Ibid.

33. Walzer, xvii.

34. Kolb explains why medieval societies saw no need to develop a concept of regulating combat in this manner: "The subjective notion of the right to wage war in pursuit of certain causes precluded the emergence of an independent '*jus in bello*'" (Kolb, 2). Walzer's reference to 'non-combatant populations' introduces the notion of regulation via *jus in bello*. He further differentiates between the two themes by assigning specific responsibility for each: "we draw a line between the war itself, for which the soldiers are not responsible [*jus ad bellum*], and the conduct of the war, for which they are responsible [*jus in bello*], at least within their own sphere of activity" (38-39). In simpler terms, for Walzer, soldiers may not be responsible for starting a war, but they are certainly responsible for complying with recognized humanitarian practices.

35. JAG School Deskbook, 4. This source provides interesting detail about the early evolution of this theme. For example, "The Hittites required formal exchange of letters and demands before initiating war, and refused to wage war during the planting season. Both the Egyptian and Sumerian civilizations generated specific rules defining initiation criteria. The Greeks may have actually originated the concept of *jus ad bellum* by developing a list of conditions which, if satisfied, justified the application of force by one city state against another." If one could satisfy the conditions, then the conflict would be blessed by the gods, implying a justification of the conflict. Failure to satisfy the conditions meant the undertaking was unjust and consequently forbidden. Under the Romans this theme evolved further still; they "formalized laws and procedures to make use of force an act of last resort. They used envoys to resolve grievances diplomatically, and required formal declaration of war in order to justify its conduct."

36. Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (Englewood Cliffs, NJ: Prentice Hall, 1994), 13. Christopher cites Cicero's work *De Re Republica* 3, XXIII for this material.

37. Ibid., 23-24.

38. Ibid., 47.

39. Frederick Russell, *The Just War in the Middle Ages* (London: Cambridge University Press, 1975), 303.

40. Ibid., 258.

41. Ibid., 291.

42. Thomas Aquinas, *Summa Theologica II-II, Q. 40, A1*, 106-109, cited in

Christopher, 54 and Russell, 268.

43. Christopher, 54-56. Christopher references the *Summa Theologica* for his list of Aquinas' three just-war *jus ad bellum* principles, and also references Aquinas' *Questiones in Heptateuchum*, 10 for the material that defines "just cause."

44. Larry H. Addington, *The Patterns of War Through the Eighteenth Century* (Bloomington, IN: Indiana University Press, 1990), 87. See also Thomas E. Griess, ed., *The West Point Military History Series*, (Wayne, NJ: Avery Publishing Group Inc., 1984), *The Dawn of Modern Warfare*, by Albert Sidney Britt, III, et. al., 48-54.

45. Britt, 52.

46. Addington, 87.

47. Grotius, Prologemena, Section 28.

48. Christopher, 71.

49. Grotius, Introduction, xii.

50. Christopher, 72.

51. Ibid., 89; see also Mosely, 3-5.

52. Ibid., 109.

53. 7th-century Babylonians distinguished between enemy civilians responsible for starting a war and the soldiers who actually fought, and treated captured soldiers and civilians according to well-established rules, (JAG School Deskbook, 5; Christopher, 9). Ancient Egyptian battle records provide evidence of humanitarian conduct, and the 5th-century B.C. Chinese philosopher Sun Tzu advised that "captive soldiers be kindly treated and kept" [JAG School Deskbook, 5; Christopher, 9; Sun Tzu, "On The Art of War," in *Roots of Strategy*, ed. Brigadier General R. Phillips (Harrisburg, PA: Stackpole Books, 1985), 25]. The 4th-century B.C. Hindu *Book of Manu* provides a detailed list of regulatory guidelines about the treatment of various categories of both combatants and non-combatants (JAG School Deskbook, 5; Christopher, 9). Greek philosophers, Socrates in particular, admonished against indiscriminate destruction of property (Christopher, 10), and Michael Walzer observes that the code of chivalry was "widely shared in the later Middle Ages and sometimes honored," representing a customary, if informal, evolution of *jus in bello* principles (Walzer, 34).

54. Christopher, 100.

55. Mosley, 5.

56. De Mulinen, 82-83; Donald A. Wells, *The Laws of Land Warfare: A Guide to US Army Manuals* (Westport, CT: Greenwood Press, 1992), 25. Wells defines military necessity as "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."

57. Dr. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (Washington, DC: Adjutant General's Office, 1863), Article 14, hereafter referred to as *Lieber Code*, <http://www.au.af.mil/au/awc/awcgate/law/liebercode.htm>, last accessed on 9/23/2004. Lieber both frames the notion of military necessity: "[It] consists in the necessity of those measures which are indispensable for securing the ends of the war," and qualifies it: "[Those measures] which are lawful according to the modern law and usages of war." Subsequent articles contained in the *Lieber Code* attempt to balance military necessity and *jus in bello* with references to the "exigencies of war" [Art. 22], and the "overruling demands of a vigorous war" [Art. 23]. The Hague Convention of 1907 admonishes signatories to adhere to the regulatory principles contained in the Convention "as far as military requirements permit" [Preamble to The Laws and Customs of War on Land (Hague IV), October 18, 1907, hereafter referred to as Hague 1907, <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>, last accessed on 11/12/2004,] and specifically stated that "the right of belligerents to adopt means of injuring the enemy is not unlimited." The US *Rules of Land Warfare* (1914, 1934, and 1940 versions]) and the US *Law of Land Warfare* (1956) all contained language intended to clarify the dilemma, but their success was questionable (Wells, 34-39). Note also the specific language contained in Article 147 of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts. . . [what follows is a list of acts proscribed by conventional and customary international law] *not justified by military necessity and carried out unlawfully and wantonly*" (emphasis added), (Convention IV Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, hereafter referred to as Geneva (IV) 1949, <http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm>, last accessed on 11/12/2004.) The dilemma is fundamentally one of interpretation—and the problem becomes more contentious when a combatant claims military necessity as justification for any action taken during the prosecution of armed conflict. In Paul Christopher's opinion, "This is inadequate. If the Just War Tradition is going to function as a viable set of legally enforceable rules, the principle of military necessity must be more precisely defined and its relationship to other principles clearly articulated in law." Christopher, 167-168.

58. Christopher, 166.

59. Douglas P. Lackey, *The Ethics of War and Peace* (Englewood Cliffs, NJ: Prentice-Hall, 1989), 59.

60. JAG School Deskbook, 28.

61. Common Article 2 to Geneva I, II, III, and IV, 1949. See also JAG School Deskbook, 28-29, for a discussion of the "Barrier of Sovereignty" and "The Triggering Mechanism."

Chapter 3

The Documentary Evolution of the Law of War

In general terms, the law of war has gone through four distinct periods of development. The first, known as the Just-War Period, dates from 335 B.C. to 1800; the second, War-as-Fact Period, extends from 1800 to 1918; the third, *Jus Contra Bellum* Period, roughly spans the interwar timeframe; the final period, the Post-World War II Period, encompasses the past 60 years. This section's framework briefly discusses the key documents developed during each period as they pertain to the law of war's evolution.

Just-War Period: 335 B.C.-1800

The primary law-of-war tenet surfacing at this time was the general acknowledgement that determination of a just cause was necessary to legitimately apply military force. Law of war focused on the *jus ad bellum* aspect vice any notion of *jus in bello* because, the line of thinking went, if a war was justified, then the actual prosecution or regulation of said conflict was unnecessary.¹ The earliest phase of this period emphasized the notion of self-defense; Aristotle's justifiable reasons for waging war included the prevention from being enslaved. Cicero refined this position by stating that the only excuse for war was to maintain a peaceful society where its members could live unharmed.²

There then followed a phase of Christian influence when the notion of "divine justification" superseded the concept of waging war solely for defensive purposes. This study previously noted how early Christian teachings forbidding the use of force, even for self-defense, conflicted with hegemonic aspirations of the Roman Empire. Over time, church scholars like Saint Augustine reconciled these contradictory views by validating recourse to war in certain circumstances, and by positing that a justified war would automatically be fought with God's blessing, further cementing a given conflict's legitimacy.³

In the Middle Ages, Saint Thomas Aquinas refined emerging just-war theory by offering his three conditions needed for a just war to be initiated. His *Summa Theologica* refers to the principles of "sovereign authority," "pure motive," and "just intentions" as the foundation upon which a war should be waged. Aquinas' work is important to law-of-war development because it transitioned from earlier theological solutions to the incongruity between Gospel teachings and the realities of war, to a solution based on

civil, practical fundamentals. One of the catalysts for this transition was rise of new Christian nation-states that emphasized regulating wartime conduct between Christian entities instead of justifying war for religious reasons. This shift, begun under Aquinas, helped formalize the *jus in bello* principles that would later be adopted by members of the international legal community.

Grotius was one of several prominent lawyers who advocated a fundamentally juristic (not religious) approach to waging war. The landscape of Europe had, before he emerged on the scene, already been scorched by the French Wars of Religion in the late 16th century, and we have already noted the Thirty Years Wars' impact on Grotius' theory. His comprehensive work *On the Law of War and Peace* is considered the genesis of modern law-of-war principles. Grotius advocated an environment wherein conduct between nation-states, to include waging war, was best governed by principles of natural law and morality vice canonical-law principles based on religious teachings. By 1800, the philosophical efforts of this period gave rise to lawyers and diplomats (not theologians) who questioned pre-existing concepts of war justification, refined widespread perceptions of customary international law, and started work on conventional international law.⁴

War-as-Fact Period: 1800-1918

This period represents a crucial aspect of the development of law of war, particularly US law of war. In the span of 12 decades, the world saw a European emperor rise and fall, a war to end all wars, and the publication of the first of three primary sources of conventional international law. Despite the fact that its first half was a dark time for the rule of law, this period's second half is described by historian Geoffrey Best as the "epoch of highest repute," due in no small part to the emergence of the international conference as the forum for debate and the evolution of the treaty as the mechanism for codifying agreements between states.⁵ During this developmental era, the purpose of war underwent a paradigm shift: War went from being a means of achieving justice to a tool for securing national objectives.

In the Just-War Period, the law of war had been grounded in the Christian morality espoused by early theologians and the natural-law revisions developed by Grotius and company. Beginning with the turn of the 19th century, however, these principles were gradually replaced by the school of positivism. *Webster's Dictionary* defines this movement as one that described theology and metaphysics as premature, imperfect

modes of knowledge. It further advocated that positive knowledge of one's surroundings and relationships was based on the properties and relations of natural phenomena, as verified by the empirical sciences. Accordingly, law was not based on philosophical speculation but instead on hard rules and international conventions.⁶ And most important, because each state was a sovereign entity no longer beholden to customary international laws based on morality or nature, war was recognized as a legal right of statehood, intrinsically justifiable when required to achieve state policy objectives.

During this period's first 50 years, the law of war remained generally focused on *jus ad bellum* principles reflected in customary international law, but beginning in 1856, the international community started developing the first recognizable *jus in bello* codes of the modern era.⁷ The Declaration of Paris (1856), issued at the conference ending the Crimean War, represented what has been described as the first "statutory measure of this period."⁸ Recognizing that maritime law of the period was unsuited to regulating conflict on the high seas, seven nations adopted a collection of four principles to regulate ocean-going warfare, in particular the practice of turning commercial merchant ships into state-sanctioned privateers.⁹ The following passage provides clear evidence of the school of positivism's influence: "That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their Governments are animated than by seeking to *introduce into International relations fixed principles in this respect* (emphasis added)."¹⁰ Attendees of this conference appreciated that their goals were to set conditions for ending the Crimean War and, more important, to establish precedent in the area of conventional international law, as evidenced by the Declaration's concluding statement:

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentiaries doubt not that the *efforts of their Governments to obtain the general adoption* thereof will be crowned with full success (emphasis added).¹¹

During the decade following the Declaration of 1856, four consequential stimuli accelerated the evolution of *jus in bello* tenets of law of war. The Battle of Solferino in 1859 spurred the creation of the International Committee of the Red Cross (ICRC) and energized the international community to convene in Geneva, while in the United States, the Civil War instigated the publication of the first codified version of US law of war. A few words describing the impact of each are in order.

The Battle of Solferino

In late June 1859, French and Sardinian armies clashed with an Austrian army near the Italian town of Solferino. Roughly 270,000 soldiers fought a pitched battle for 16 hours, and at the end of the day, tens of thousands of casualties were scattered across a 15-mile long front.¹² The suffering was compounded by heat, lack of water, and a battlefield medical system woefully inadequate to the task. It seems that Napoleonic warfare suited the sovereign diplomacy well, but military medical care did not. Swiss businessman Henri Dunant came upon the battlefield while tracking French Emperor Napoleon III in the hopes of receiving government funding to rescue a failing business venture in Africa. The carnage he witnessed moved him to volunteer his services as a civilian caregiver, and the experience inspired him to write a fact-based account of the battle titled *Un Souvenir de Solferino* (A Memory of Solferino) that, when published in 1861, swept Europe and made Dunant an instant celebrity.¹³

The ICRC and the First Geneva Convention

Dunant used *Un Souvenir de Solferino* as a forum for telling a battle story and for proposing two practical measures the international community could take to mitigate battlefield suffering. “Would it not be possible,” he states as his first proposal, “in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers.” These volunteers would provide comfort services to all battlefield wounded, regardless of nationality, and their position “would be recognized by the commanders or armies in the field, and their mission facilitated and supported.”¹⁴ His second proposal advocates an international effort to codify measures governing the treatment of battlefield casualties:

On certain special occasions, as, for example, when princes of the military art belonging to different nationalities meet at Cologne or Chalons, would it not be desirable that they should take advantage of this sort of congress to *formulate some international principle, sanctioned by a Convention inviolate in character*, which, once agreed upon and ratified, might constitute the basis for societies for the relief of wounded in the different European countries (emphasis added).¹⁵

Dunant’s efforts were met with widespread acceptance, and royalty throughout Europe commended him for his vision and endorsed his

proposals.¹⁶ *A Memory of Solferino*, and these two proposals in particular, influenced the creation of the ICRC in 1864 and, in that same year, resulted in a convocation of representatives from 16 nations that drew up the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.¹⁷ This brief document endorsed using the Swiss Red Cross as the symbol for international neutrality (Article 7) and called for international recognition of the neutrality of those sick and wounded on the battlefield, as well as anyone, uniformed or otherwise, who cared for them (Articles 1 and 2).¹⁸ Dunant's accomplishments are generally recognized as the beginning of what historian Larry Addington explains as the "contemporary concern for the rights of wounded and ill combatants, prisoners of war, and non-combatants in war zones."¹⁹ While these activities were occurring on the Continent, on the other side of the world the law of war was being subjected to intense scrutiny during the American Civil War.

The Code

Whenever international law experts mention "The Code," they are referring to the *Lieber Code*, or more accurately *General Orders 100: Instructions for the Government of Armies of the United States in the Field*, prepared in 1863 by Dr. Francis Lieber. One year earlier, Secretary of War Edwin M. Stanton had commissioned a panel of Army officers to develop a manual that provided both Armies (North and South) with guidance on the rules of war. Dr. Lieber was a professor of law at Columbia College of New York, an internationally recognized expert on the law of war, and a personal confidant of Secretary Stanton and Major General Henry W. Halleck, the General-in-Chief of the US Land Forces. Secretary Stanton was a lawyer himself, and General Halleck was generally recognized as the foremost US authority on the theory, history, and rules of war. Based on his personal military service and his academic studies, Halleck concluded the US Civil War did not fit the European mold, and he looked to Lieber to lead the panel's efforts.²⁰

Under Lieber's guidance the panel quickly determined that civil law and treaty law failed to adequately address the conduct of belligerents, and that, according to Lieber himself, "There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and of nations which is called the law and usages of war."²¹ The *Lieber Code* represented the panel's attempt to codify *jus in bello* rules. This manual, born out of the confusion surrounding combat during a civil war, informed officers about what constituted permissible orders and

informed subordinates of the parameters of acceptable conduct. Lieber acknowledged that combatants, despite the violence of their profession, did not cease to be “moral beings, responsible to one another and to God,” and developed a list of prescriptive and proscriptive measures based on the fundamental principles of justice, faith, and honor.²² Five thousand copies of the *Lieber Code* were printed and distributed to officers on both sides of the Mason-Dixon Line, and its principles formed the basis for convention deliberations at the Hague in 1899 and 1907.²³

By the mid-19th century, events had transpired that created an international humanitarian relief agency, the first of several international conventions, and the first formal codification of *jus in bello* regulatory dicta. The positivist view required an empirical codification, either by treaty or some other mechanism, of all rules governing human conduct. A shift in focus from *jus ad bellum* principles to *jus in bello* principles was still needed in the law-of-war evolution, and the *Lieber Code* represented a step in that direction. National leaders like Czar Nicholas II and President Theodore Roosevelt seized upon this shift and, still mindful of the horrors endured by armies on both continents, endorsed further international efforts to refine emerging *jus in bello* principles. These efforts, in combination with other global events, resulted in a series of conventions that contributed to the documentary growth of the law of war.

The remainder of the War-as-Fact Period witnessed the international community's struggle to reconcile regulatory principles with increasingly sophisticated technologies. The Declaration of St. Petersburg in 1868, for example, reflects the efforts of delegates to reduce the use of weapons designed to “uselessly aggravate the sufferings of disabled men, or render their death inevitable.” It specifically prohibits use of an exploding or flammable projectile weighing less than 400 grams and, while it knowingly bound only contracting or acceding parties, the Declaration was nevertheless a step forward.²⁴

In 1899, Czar Nicholas II convened a peace conference at The Hague in response to the Spanish-American War, hoping to bring about arms reduction and develop peaceful conflict-resolution mechanisms. This conference produced a Convention that, among other things, identified baseline provisions for prisoner-of-war treatment and acknowledged the significance of customary international law.²⁵ Perhaps most significant, the provisions of Hague 1899 were carried forward to the Hague Conference of 1907 that embodied an international reaction to the Russo-Japanese War of 1904-05; Hague 1907 is generally recognized as the first of the three

primary sources of modern conventional international law. The *jus in bello* provisions of Hague 1907 built on the earlier work of 1899 and drew significant inspiration from the *Lieber Code* as well, reinforcing the notion that the world recognized its need for regulatory principles.²⁶ The provisions of Hague 1907 about prisoner-of-war treatment governed belligerent conduct during World War I, and they remained in effect until superseded by the Geneva Convention of 1929.²⁷

The United States did not stand idly by while these conventions were occurring on the Continent. American jurists both in and out of uniform worked to incorporate customary and conventional international law into Army regulations and educational training programs. In 1914, the US Army published an update to the *Lieber Code* that acknowledged the influence of “written and unwritten rules” (like customary and conventional international law) and the work done by the Geneva and Hague Conferences.²⁸ The document’s preface clearly states that it was written for the use of officers of the US land forces; it also acknowledges its lineage by stating that “everything vital contained in G.O. [General Orders] 100. . . has been incorporated in this manual.”²⁹ The 1914 *Rules for Land Warfare* contains proscriptions specific to the early 20th century (“train wrecking” was considered a “legitimate means of injuring the enemy”) and timeless guidance, especially concerning the severity with which violations of the law of war were to be dealt.³⁰ Like the *Lieber Code*, the *Rules for Land Warfare* used as a foundation three guiding principles (the earlier principles of justice, faith, and honor found in General Orders 100 now appeared as necessity, humanity, and chivalry), and the regulatory *jus in bello* guidelines contained in *Rules for Land Warfare* carried the US Army through World War I.

The “War to End All Wars” was prosecuted, for the most part, under the auspices of the *jus in bello* dicta codified in Hague 1907 and the 1914 *Rules for Land Warfare*. This collection of conventional international law, derived from 19th-century experiences, was intended to guide belligerent conduct in the 20th century. However, the sheer magnitude of the conflict that began in 1914, combined with the revolutionary technology that enabled it, demonstrated that the law of war in 1918 was inadequate. Consequently, the conclusion of World War I marked the beginning of the third historical period—the *Jus Contra Bellum* Period.

***Jus Contra Bellum* Period: 1918-1945**

World War I challenged the baseline premise of the preceding period

that any war, regardless of cause, was justified if it served the national interest. The global catastrophe resulted in an intellectual shift away from justifying war or regulating conduct to outlawing any aggressive use of force to further state policy. Hague 1899 and 1907 produced multilateral law that recognized war as a legitimate element of national policy; the *Jus Contra Bellum* Period produced conventional international law of a fundamentally different nature.³¹

World War I ended with the Treaty of Versailles that, combined with the early efforts of the League of Nations, represented the first instance where nations acknowledged a legal obligation to avoid war as a means of resolving disputes or securing national goals. Postwar international diplomatic efforts effected a series of agreements between European powers focused on securing borders known as the “Locarno system.”³² One of the results of the Eighth Assembly of the League of Nations that convened in 1925 was a formal ban on aggressive war. An attempt to enforce a ban on war did not occur, though, until 1928 because such an approach ran counter to customary international law, and because conventional international law supported the opposite position.

The first tangible law-of-war revision that arose from this period was the Kellogg-Briand Pact of 1928. These two Nobel Peace Prize winners spearheaded the efforts of 16 delegates to formalize the idea that aggressive war was no longer a justifiable means of resolving conflict. Article 1 of the treaty clearly articulates this radical shift away from the traditional just-war perspective of the preceding period:

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.³³

By the end of 1929, a total of 40 states had ratified the treaty (also known as the Treaty for the Renunciation of War), and it remains in effect to this day. The treaty made no attempt to regulate the use of force for purely defensive purposes, nor did it contain any provision for enforcing the pact. As a result, it became recognized as merely a statement of intent rather than an enforceable element of conventional international law.³⁴ This attempt at rewriting *jus ad bellum* failed when little more than 10 years later all the signatories to the pact were once again embroiled in world war.

As catastrophic as the Great War was in terms of loss of life, it only marginally helped drive law-of-war revisions. Law-of-war historian Donald Wells references University of Zurich Professor of Law Dietrich Schindler by noting that *jus in bello* efforts peaked before World War I and that the Conventions adopted during the interwar period refined existing principles and regulations.³⁵ In 1929, the international community convened another conference in Geneva that generated two new Conventions that both drew inspiration from the Great War.³⁶ Between 1934 and 1940, the US Army published two revisions to its *Rules of Land Warfare*, drawing on the technical and tactical lessons learned during World War I as well as the efforts of the international community during the 1920s. But by and large, the 1934 and 1940 editions included few revisions of the 1914 version that, the reader will recall, drew heavily on the Civil War efforts of Dr. Lieber. In other words, the United States entered World War II armed with *jus in bello* guidelines from an era long gone.³⁷

Post-World War II Period: 1945-Present

By the mid-20th century, world powers recognized the failure of existing conventional international law to regulate conduct during armed conflict. The two Hague Conventions had not prevented World War I, and despite the best efforts of the League of Nations and Ambassadors Kellogg and Briand, the world revisited the horrors of mass war one generation later. World War II resulted in the recognition of two distinct yet interrelated shortfalls, both of which required international community effort to rectify: the creation of a world body with greater power (than the League of Nations) to prevent war, and the development of a body of conventional international law that provided specific protections for victims of war.

Efforts to address these two shortfalls began even before the war had ended. The London Charter of the International Military Tribunal, developed after the surrender of Germany on V-E Day (8 May 1945), established the laws and procedures by which the Nuremberg, Tokyo, and Manila War Crimes trials were conducted. The Charter defined three categories of war crimes (war crimes, crimes against peace, crimes against humanity) and, by specifically stating that neither official position nor obedience to orders were a valid defense against allegations of war crimes, it represented a real attempt at enforcing *jus ad bellum* and *jus in bello* principles.³⁸ This document introduced a new principle of universality, whereby all nations were bound by the law of war because the law of war conventions reflected customary international law and were, therefore, already recognized as being universally in force. This approach led to the adoption in 1945 of the

United Nations charter that continued the previous period's philosophical shift away from justifying war and extended the ban on war to include the concept of "threat" or "use" of force.

At World War II's end the law of war, even though it appeared to be an impressive collection of customary and conventional international codes, remained inadequate. In particular, areas such as how to regulate armed conflict, how to occupy enemy territory, and how to treat prisoners, wounded, and civilians were not authentically addressed.³⁹ As details uncovered during the war-crimes trials in Germany and Japan surfaced, the international community felt an urgent need to address those shortfalls in conventional international law. Caroline Moorehead describes the situation with these words: "The laws of war and Dunant's humanitarian legacy were all that stood between man and the increasing barbarity of war."⁴⁰ Cementing its role as the world's humanitarian conscience, the ICRC led the effort to revise Geneva 1929 to reflect the technology of 20th-century warfare and the complexity of the modern battlefield. The resulting collection of conventional international law, the Geneva Conventions of 1949, remains to this day the benchmark by which the conduct of belligerents is judged.

The ICRC had begun working on revisions to Geneva 1929 in February 1945. ICRC president Dr. Max Huber identified three priorities for review: the protection of civilians, the protection of the victims of civil wars, and the creation of a monitoring mechanism recognized by the international community at large.⁴¹ Over the course of four years it drafted four conventions, and in April 1949 representatives of 63 states gathered in Geneva to consider the proposals. After less than five months of deliberation, the conference adopted the four Geneva Conventions as drafted by the ICRC, and the world now had the second of the three primary sources of modern conventional international law.

The 1949 Conventions were a deliberate endeavor to restrict abuses of humanitarian principles as well as mitigate the likelihood that similar abuses would be directed against those accused of such violations.⁴² In two specific areas, the Conventions attempted to articulate both rules and duties. They established proscriptive rules designed to prohibit the types of inhumane conduct evidenced during World War II, and they also levied on all contracting parties the duty to enact and enforce legislation to punish anyone guilty of violating those rules (Article 146).⁴³ The Conventions were also intended to immediately bring to bear the force of customary international law, previous conventions (Hague 1907 and Geneva 1929),

and the legal decisions resulting from the war-crimes trials.⁴⁴ Essentially, Geneva 1949 did more than revise Geneva 1929—in some cases it fundamentally rewrote the law.

Geneva 1949 consists of 429 articles organized into four separate conventions, three of which were based on previous convention efforts, and the fourth was revolutionary and completely original. The first convention, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS), was a revision of the first of the Geneva 1929 Conventions. The second, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea (GWS-Sea), reflected surface- and sub-surface naval experiences encountered during World War II, especially concerning hospital-ship and coastal-rescue-craft marking and recognition (GWS-Sea Articles 26, 27, 38-40). These two conventions extended protections beyond those envisioned in previous codes and also expanded the category of persons considered as being either wounded or sick (GWS Articles 12-18). The third Convention, the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), endorsed an increase in the quantity and quality of prisoner-of-war rights, and addressed the categorization of persons entitled to prisoner-of-war status (Article 4).⁴⁵ Especially important was the stipulation that, pending final determination of a captured belligerent's legal status, a captured person was entitled to prisoner-of-war status as the baseline standard of treatment (GPW, Article 5). The revolutionary contribution to the law of war, however, lay in the language of the fourth Convention and its means for dealing with the impact of the total-war approach to conflict.

Driving the Geneva Convention of 1949 was the combination of the total-war approach (especially the ramifications of massive air raids against industrial centers and the employment of weapons of mass destruction) and the inadequacy of *jus in bello* guidelines about the treatment of civilians on an expanding battlefield. Known as the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), the fourth Convention confers detailed protections to civilians in occupied territory and, to a lesser extent, to entire belligerent populations in general. It emphasizes the concept of non-combatant immunity and prohibits hostage-taking (Article 34) or hostage-reprisals (Article 33).⁴⁶ It also accords to non-belligerent civilians standards of treatment similar to those afforded persons protected by GWS, GWS-Sea, and GPW.

All four Conventions include a set of common articles. Common

Article 1 obligates states to implement the rules, regardless of their level of involvement in a given conflict, while Common Article 2 states that the rules of the Conventions apply to all wars, declared or otherwise.⁴⁷ Common Article 3, however, is the one most frequently cited in GWOT media coverage. It specifies that signatories to the Conventions abide by international humanitarian law when dealing with internal rebellions, and would apply that same principle “without prejudice” when faced with individuals not actively engaged in hostile action. It also expressly prohibits a variety of actions deemed inhumane: attacks on life or body, hostage-taking, humiliating or degrading treatment, and executions performed without properly constituted civil proceedings.⁴⁸ Common Article 3 represents a clear example of the international community’s acknowledgement that the law of war could legitimately “pierce the shield of sovereignty” as needed.

By the end of 1949, 55 states had ratified the Conventions—today that number stands at 188. The Conventions revised existing *jus in bello* guidelines, developed new ones pertaining to the treatment of prisoners of war, and formally endorsed the ICRC as the organization charged with monitoring and reporting violations of the Conventions. Nothing was put into the language of the Conventions, however, with respect to actually enforcing the law; the ICRC, now able to exercise its mandate to observe and offer services without fear of interference, remained unable to leverage its influence any further. For all their groundbreaking impact, the Conventions were, and still are what Caroline Moorehead describes as “a set of rules, against which could be made appeals for decent treatment during armed conflict.”⁴⁹

That is not to downplay the influence the Conventions have had, and continue to have, on belligerent conduct during war; it does, however, highlight the challenge faced by coalition forces prosecuting the GWOT. The Geneva Conventions of 1949 are a codification of *jus in bello* principles, derived from a Western perspective, adopted by the international community writ large. They serve as the foundation for US DoD and US Army law-of-war regulations. But because they are fundamentally Western in context, and remain unenforceable save for the power of public opinion and the International Court of Justice, the world will continue to witness acts committed by belligerents that clearly violate the spirit and letter of the Conventions.

In 1956 the United States ratified Geneva 1949; that same year the Army published a revision to its *Rules of Land Warfare*. The manual, now titled Field Manual (FM) 27-10: *Law of Land Warfare*, incorporated

several changes based on World War II experiences. New categories of persons on the battlefield required inclusion and analysis, along with the indiscriminate effects of technologically advanced weaponry and the advent of psychological-operations warfare. FM 27-10 reaffirms that armed conflict was regulated by the law of land warfare based on written and unwritten sources (paragraph 2), and specifically notes the law of war is empowered by the force of customary international law (paragraph 6). It also discusses the dilemma between the idea of military necessity and the regulatory principles contained in *jus in bello* codes.⁵⁰ The current version of the manual, dated 1976, represents an updated reprint of the 1956 version. One aspect of this development process should be noted: The law of war programs of all US military service branches are nested in DoD Directive 51000.77, *The DoD Law of War Program*, which clearly references customary and conventional international law and levies a training and enforcement requirement on the service branches.⁵¹

In 1977, the international community produced the third component of modern law-of-war conventional law. The two 1977 Protocols Additional to the Geneva Conventions of 1949 are intended to supplement the four Conventions by addressing shortfalls concerning victims of international and internal armed conflicts. Protocol 1, consisting of 102 articles, addresses victims of the former category. It expands protection for civilian populations as well as military and civilian medical workers (Articles 10-12, 15), and it clarifies the definition of a combatant (Article 43). Protocol I illustrates how the rules governing the conduct of hostilities have evolved, and it extends the listing of acts deemed to qualify as “grave breaches” and war crimes (Articles 11 and 85).⁵²

The 28 Articles of Protocol II elaborate on protections for victims resulting from internal conflicts such as a civil war. In many respects, Protocol II expands on the non-international protections articulated in common Article 3 of the four Geneva Conventions of 1949. Protocol II, defined after a four-year-long arduous debate, provides fundamental guarantees for persons whose liberty is restricted as a result of a civil war (Articles 4-6), affords protection to objects critical to civilian population survival like food production and storage facilities (Article 14), and prohibits forced movement of civilians (Article 17). As of late 1997 148 States had ratified Protocol I, with 140 States adhering to Protocol II.⁵³ The United States has not ratified either of these protocols, but remains bound nonetheless by its commitment to customary international law and the conventional international law codified in Geneva 1949.

In Summation

Before proceeding with Chapter 4, it is worth reviewing several key points. Modern law of war has undergone a long, evolutionary revision process in response to momentous global events, it is grounded in the two diverse but complimentary sources of customary and conventional international law, and it concerns itself with the twin themes of why and how to wage war (*jus ad bellum* and *jus in bello* respectively). US law of war draws heavily on the work of Dr. Francis Lieber and is fully nested in the larger DoD program, which itself acknowledges the primacy of international custom and convention. The law of war owes its current form to three primary collections: Hague 1907, Geneva 1949, and the 1977 Protocols Additional to Geneva 1949. And lastly, we have identified a long-standing dilemma reflected in the tension between military necessity and the regulatory dicta of *jus in bello* conventions. The reader is now armed with enough background to appreciate the British experience in Kenya in the 1950s.

Notes

1. JAG School Deskbook, 5-7. The material used to support this analysis of the Just War Period comes primarily from the JAG School Deskbook, with supplemental use of Kolb and Mosley.

2. Ibid.

3. Ibid.

4. Ibid. The JAG School lists eight elements of just-war theory that emerged by 1800. Five of the eight apply to *jus ad bellum*, the remaining three to *jus in bello*. The following elements comprise the former category: the decision to wage war can be reached only by a legitimate authority; the decision to wage war must be based on the need to right an actual wrong, recover property, or reasons of self-defense; the decision to wage war must be based on an intent to advance good or avoid evil; there must be a reasonable prospect of victory; and combatants must make every effort to resolve differences peacefully before resorting to war. The remaining three constitute the latter category: the innocent are immune from attack, combatants must apply force in proportion to legitimate objectives, and the emerging chivalric code only applied if a war was deemed justified.

5. Geoffrey Best, *Humanity In Warfare* (New York: Columbia University Press, 1980), 129, quoted in Captain Grant R. Doty, "The United States and the Development of the Laws of Land Warfare," *Military Law Review* 156 (June 1998): 224. Also Adam Roberts, "Land Warfare: From Hague to Nuremburg," in Michael Howard et al. eds., *The Laws of War: Constraints on Warfare in the Western World* (New Haven, CT: Yale University Press, 1994), 116, 119, quoted in Doty, 224.

6. JAG School Deskbook, 7.

7. Ibid., 8-9; Doty, 227. Robert Kolb describes the War as Fact Period with these words: "Throughout the 17th and 18th centuries the doctrine of just war lost ground to the idea that States had discretionary powers to wage war and that those powers could be used as a means of pursuing national policy. War was now seen as a 'de facto' and intellectually neutral situation. This resulted in a major shift in the legal emphasis from the subjective lawlessness of resorting to war [*jus ad bellum*] to the rights and duties relating to hostilities as such [*jus in bello*]" (Kolb, 2).

8. Best quoted in Doty, 227; see also Larry Addington, *The Patterns of War Since the Eighteenth Century* (Bloomington, IN: Indiana University Press, 1984), 58. The Crimean War served as a catalyst for the development of *jus in bello* principles due to the casualties incurred by the belligerents: Russia lost 440,000, the French and Turks lost 100,000 each, the British lost another 25,000, and the Piedmontese lost 5,000. The overwhelming majority of these casualties resulted from disease and exposure to the elements.

9. Declaration of Paris, April 16, 1856, <http://www.yale.edu/lawweb/avalon/lawofwar/decparis.htm>, last accessed on 11/15/2004. The four regulatory principles contained in this document are: “1. Privateering is and remains abolished; 2. The neutral flag covers enemy’s goods, with the exception of contraband of war; 3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy’s flag; and 4. Blockades, in order to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.”

10. Ibid.

11. Ibid.

12. Casualty estimates sustained during this battle for Italian independence range from 38,000 (Draper) to 80,000 (Henri Dunant). The fighting has been characterized as some of the most savage seen to that point in Europe.

13. Caroline Moorehead, *Dunant’s Dream: War, Switzerland, and the History of the Red Cross* (New York: Carroll and Graf, 1998), 8. Moorehead describes the public reaction to *Un Souvenir de Solferino* in this manner: “[It] was greeted everywhere with admiration, horror and guilt. Speeches were delivered, lectures given; from their pulpits, priests spoke of Dunant as a man whose name deserved to enter history...Dunant was referred to as a poet, a philosopher, a literary genius, a man de Coeur.”

14. Henri Dunant, *Un Souvenir de Solferino* (A Memory of Solferino), 29, 31, (ICRC publication 1986, reference 0361, http://www.icrc.org/WEB/ENG/siteeng0.nsf/htmlall/p0361?OpenDocument&style=Custo_Final.4&View=defaultBody2, last accessed on 10/22/2004).

15. Ibid., 32.

16. Moorehead, 9: “Dunant’s first royal blessing came from the Queen Mother of the Netherlands, who praised him for a work so ‘eminently philanthropic and Christian.’ After this came messages from Victor Emmanuel II of Italy, Franz Joseph of Austria, the Queen of Prussia, the King of Wurttemberg, and Queen Isabella of Spain.”

17. Originally called the International Standing Committee for Aid to Wounded Soldiers, the ICRC gave itself the mission of establishing national humanitarian-assistance societies and, in the event of war, acting as a neutral intermediary on behalf of war victims. Army Regulation 190-8 governing the conduct of detainee operations recognizes the ICRC’s role as a monitoring and reporting agency: “A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP) to monitor whether protected persons are receiving humane treatment as required by the Geneva Conventions. The text of the Geneva Convention, its annexes, and any special agreements, will be posted in each camp in the language of the EPW, CI and RP,” [Department of the Army Regulation (AR) 190-8, *Enemy Prisoners*

of War, Retained Personnel, Civilian Internees and Other Detainees (Washington, DC: 1997), 2, paragraph 1.5.e, http://www.army.mil/usapa/epubs/pdf/r190_8.pdf, last accessed on 11/17/2004].

18. Doty, 227. See also *Amelioration of the Condition of the Wounded on the Field of Battle* (Red Cross Convention), August 22, 1864, <http://www.yale.edu/lawweb/avalon/lawofwar/geneva04.htm>, last accessed on 11/17/2004.

19. Addington, *The Patterns of War Since the Eighteenth Century*, 67-68.

20. Dr. Francis Lieber was well-qualified to lead Secretary Stanton's panel. Born in Berlin at the turn of the century, he interrupted his medical studies to join the Prussian army and saw action at Ligny, Waterloo, and Namur. He spent several years attending universities in Jena, Rome, Berlin, and London, until 1827 when he left Europe to seek his fortune in America. He found work as a lecturer in history and politics in Boston and Philadelphia and, as a result of his writings, became known to a large audience as an expert on legal aspects of war and its conduct. In 1835, he accepted the professorship of history and political economy at the University of South Carolina, Columbia; 21 years later he secured the same position at Columbia College in New York. In 1860, he became a professor of political science at the Columbia College Law School and, as a result of his teachings and publications, caught the attention of both Secretary Stanton and General Halleck. He warned against secession almost 10 years before the Civil War began and during the war actively campaigned for reestablishing the Union as quickly as possible. Because of Lieber's reputation and strong pro-Union stance, the Secretary of War frequently summoned him to Washington to consult on a variety of subjects, including the wartime conduct of soldiers from both armies. At General Halleck's request Lieber wrote a pamphlet titled "Guerrilla Parties Considered with Reference to the Law and Usages of War," which gained a wide European following, and President Abraham Lincoln ordered Lieber's "Instructions for the Government of the Armies of the United States in the Field" be distributed as a war department general order.

21. *Lieber Code*, Article 40.

22. *Ibid.*, Article 30.

23. Wells, 5. Lieber's work inspired German, British, and French efforts to develop a similar *jus in bello* code, and the 1863 document served as the official US Army *jus in bello* manual until an updated version was published in 1914.

24. Wells, 5-8; see also Declaration of St. Petersburg, November 29, 1868, <http://www.yale.edu/lawweb/avalon/lawofwar/decpeter.htm>, last accessed on 11/17/2004: "That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity; The Contracting Parties

engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.”

25. Laws and Customs of War on Land (Hague II); July 29, 1899, <http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm>, last accessed on 11/17/2004: “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that *in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience*” (emphasis added). The 1899 Conference expressly forbade weapons intended to cause “superfluous injury.” See also Draper, 4.

26. Doty, 241: “A comprehensive and temporal analysis of the various articles from Lieber to the Hague Convention IV of 1907 shows, not surprisingly, that over two-thirds of the fifty-six articles in Hague Convention IV can be effectively traced from the Lieber Code of 1863, through the Russian Proposal for the Brussels Conference and the Brussels Declaration of 1874, via the Hague Convention of 1899, to the Hague Convention IV of 1907.”

27. Wells, 7-8. Like its 1899 predecessor, the Hague Conference of 1907 forbade the employment of weapons intended to cause “unnecessary suffering.” The declaration resulting from this conference proposed significant restrictions on the bombardment of unfortified cities by balloons to protect civilians, prohibited the employment of gas projectiles and “dum-dum” bullets, and also elaborated on prisoner-of-war treatment guidelines. Combat on the western front of World War I demonstrated just how difficult enforcing conventional international law could be.

28. *Rules of Land Warfare* (Washington, DC: Government Printing Office, 1914), 11, paragraphs 1 and 3: “The conduct of war is regulated by certain well-established and recognized rules that are usually designated as the ‘laws of war,’ which comprise the rules, *both written and unwritten*, for the carrying on of war, both on land and at sea” (emphasis added).

29. *Ibid.*, Preface, 7.

30. *Ibid.*, Articles 186 and 181, pages 59 and 58 respectively. Article 181 is especially interesting in light of recent media coverage of alleged wounded prisoner mistreatment: “War is for the purpose of overcoming armed resistance, and no vengeance can be taken because an individual has done his duty to the last.” This Article further emphasizes this principle by citing verbatim Article 71 of General Orders 100: “And ‘whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States or is an enemy captured after having committed the misdeed.’”

31. JAG School Deskbook, 9.

32. James L. Stokesbury, *A Short History of World War II* (New York: William Morrow and Company, 1980), 16-17.

33. Kellogg-Briand Pact of 1928, <http://www.yale.edu/lawweb/avalon/kbpact/kbpact.htm>, last accessed on 11/18/2004.

34. JAG School Deskbook, 10; see also Stokesbury, 17: "All the states that eventually adhered to [the Kellogg-Briand Pact] renounced the use of aggressive warfare as an instrument of policy. There was, however, an opting out clause, and there was no provision for any enforcing of the pact."

35. Wells, 8.

36. Draper, 5.

37. Wells, 10, 32-33. The major differences between the 1914 and 1934 editions were based on the publication of the Geneva Conventions of 1929, while the differences between editions 1934 and 1940 were due to conventional international law passed post-1934 that further interpreted earlier Hague and Geneva dicta. Both the 1934 and 1940 versions repeated the three law-of-war principles (necessity, humanity, and chivalry) contained in the 1914 publication, and clearly defined the interaction between the three: "The principle of military necessity, under which, subject to the principles of humanity and chivalry, a belligerent is justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money." The reader will be hard pressed to find a clearer articulation of the dilemma anywhere. Donald Wells' work *The Laws of Land Warfare: A Guide to US Army Manuals* is an excellent source for tracing the specific evolutionary points of difference between the various regulations.

38. *Nuremberg Trial Proceedings Volume 1: Charter of the International Military Tribunal*, Article 7: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment;" Article 8: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires," <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>, last accessed on 11/18/2004.

39. Draper, 93. Draper further observes that "the war had exposed the inadequacy of the existing conventional and customary rules of the law of war to deal with the phenomena of horror disclosed by that conflict" (Draper, 10).

40. Moorehead, 552. Moorehead's account of the motivation for revising Geneva 1929 includes some depressing statistics about civilian casualties suffered during World War II: 67,000 British citizens killed in air raids; 250,000 German civilians killed over the course of two years of bombing raids; and well over 300,000 Japanese civilians killed. World War II proved it impossible to segregate

civilians from military targets with 100-percent assurance, and existing law-of-war policy failed to guide belligerents adequately in this area.

41. Ibid., 552-553; Draper, 1, 5.

42. Draper, 94.

43. Ibid., 95.

44. JAG School Deskbook, 10-12. The Geneva Conventions of 1949 were recognized as customary international law, which meant that a nation, regardless of whether or not it ratified the treaties, was still bound by the principles contained therein because they were recognized as a reflection of customarily accepted practices.

45. Ibid., 109-110.

46. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, (GC) 12 August 1949, <http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm>, last accessed on 11/18/2004.

47. Ibid.

48. Moorehead, 556-557; also GC 12 August 1949, Article 3, <http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm>, last accessed on 11/18/2004.

49. Moorehead, 557.

50. Wells, 11-13, 24-25; also Field Manual (FM) 27-10, *The Law of Land Warfare* (Washington, DC: Department of the Army, 1956), with 1976 edition changes incorporated. <http://atiam.train.army.mil/portal/atia/adlsc/view/public/296783-1/fm/27-10/toc.htm>, last accessed on 11/19/2004.

51. Department of Defense Directive 5100.77, *DoD Law of War Program* (Washington, DC: 9 December 1998), http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf, last accessed on 11/19/2004. Paragraph 3.1: "Law of War. That part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law;" Paragraph 5.5.1: "Provide directives, publications, instructions, and training so that the principles and rules of the law of war will be known to members of their respective Departments, the extent of such knowledge to be commensurate with each individual's duties and responsibilities;" Paragraph 5.5.4: "Where appropriate, provide for disposition, under the Uniform Code of Military Justice (reference (i)), of cases involving alleged violations of the law of war by members of their respective Military Departments who are subject to court-martial jurisdiction."

52. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <http://www.icrc.org/ihl.nsf/0/f6c8b9fee14a77fdc125641e0052b0>

79?OpenDocument, last accessed on 11/19/2004. Also Rene Kosirnik, "The 1977 Protocols: a landmark in the development of international humanitarian law," *International Review of the Red Cross* no. 320, (October 1997): 483-505, <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList163/81C90C5E769DDA11C1256B66005B0211>, last accessed on 11/8/2004, 1-4.

53. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, <http://www.icrc.org/IHL.nsf/0/d67c3971bcff1c10c125641e0052b545?OpenDocument>, last accessed on 11/19/2004; see also Kosirnik, 4-5.

Chapter 4

Case Study: The Mau Mau Emergency (1952 to 1960)

Nairobi was probably the only capital in the world where you could find civilians drinking tea with one hand and cradling a submachine gun in the other.¹

A historical survey of insurgencies reveals several examples that could serve as case studies (for example, the American experience in the Philippines between 1899 and 1902 or the French experience in Algeria between 1954 and 1960), but none are better suited to our analysis than the British experience in the Protectorate of Kenya between 1952 and 1960. This case study provides clear and, at times, disturbing examples of law-of-war violations by both parties, and the reader will quickly see how valuable these examples are to the debate about whether or not the law of war applies to the GWOT. A British medical officer had this to say about the Kenya insurgency:

It has been possible to transform the human being into a new frame of mind. . . . After having taken three or more oaths the personality of the oath-taker has changed. It is not insanity, even if it appears as such, but the person is not sane in the normal sense of the word. These people do not hesitate or think any more. They murder but not for the sake of furthering a cause, they just kill on being instructed to kill—their own mother, their own baby. Death for them means only deliverance. . . . An intelligent European just cannot grasp, cannot understand, what happens.²

Several parallels exist between that insurgency and the one currently facing coalition forces in the Middle East: both operational environments reflect(ed) a clash of cultures; both groups of insurgents adhere(d) to a well-developed, almost fanatical dedication to their cause and benefit(ed) from widespread passive, if not outright active, popular support; neither group of insurgents represent(ed) a formally constituted uniformed military force; and all parties to both insurgencies violate(d) customary and conventional international law. Our analysis focuses on the eight-year period between 1952-1960 when the Kenya Protectorate experienced a violent insurgency involving close to a million Kikuyu tribe members, a diverse collection of British and indigenous security forces, and roughly 12,000 Kikuyu tribal fighters popularly referred to as Mau Mau.³

The origins of the name Mau Mau are shrouded in folklore. Some say it is a nonsensical term fabricated by Kikuyu tribal children, while others claim it was promulgated by British security officers who, while raiding a suspected insurgent induction ceremony, thought they heard the term used to warn the participants to escape.⁴ Whatever its origins, in the minds of European settlers in Kenya and British citizens at home, Mau Mau was associated with a militant movement involving hideous oath-taking practices and violence directed at innocent Europeans and Kenyans alike.⁵ Oaths were a traditional aspect of Kikuyu life, used to mark important events such as marriages, the exchange or sale of property, and pre-raid ceremonies. As one Kikuyu observed, these oaths were not “sophisticated or elaborate . . . [but were a demonstration of] unity and brotherhood in the struggle for our land and independence, [intended to] give those participants a feeling of mutual respect, unity, and shared love, to strengthen their relationship.”⁶ But beginning in 1952, Mau Mau insurgents manipulated the oath-taking tradition to coerce a small percentage of the population into becoming active fighters and to intimidate hundreds of thousands more into providing support to, and observing silence about Mau Mau operations.

Showcasing the Mau Mau insurgency in this chapter will highlight the dilemma associated with applying the law of war to an asymmetric environment. On the one hand, the Mau Mau insurgents represented a non-state actor whose soldiers wore no uniforms, demonstrated a wanton disregard for basic humane principles, murdered men, women, and children without provocation, and refused to engage British security forces in set-piece battle, choosing instead to conduct harassing raids against military outposts and European farms. These insurgents failed to meet the definition of armed forces contained in the Geneva Conventions of 1949. Yet, despite all their law-of-war violations they were, at a minimum, still entitled to basic civilian protections and trial by military tribunal.⁷ Unfortunately, British security forces did not view Mau Mau that way. A brief discussion of the evolution of British law-of-war doctrine is needed before jumping into the Mau Mau insurgency.

British Law-of-War Doctrine

Because Great Britain did not sign the Geneva Conventions until September 1957 one could argue that, for the first five years of the insurgency, neither Great Britain nor its security-force proxies were legally compelled to comply with conventional law of war as it was codified in Geneva 1949. However, as we learned in the preceding chapter, customary international law carries as much weight as conventional international law, and there

existed a body of British Army doctrine in 1952 suited to guiding security-force conduct in Kenya. The current version of British law of war doctrine is the 9th edition of a series dating back to 1899 with the publication of the *Manual of Military Law*. The 1899 manual includes a chapter titled “The Customs of War” and references the 1868 Declaration of St. Petersburg and the *Lieber Code* in several places. Even though this doctrine was published well before Hague 1907, it nevertheless contains specific guidance with respect to the treatment of captured combatants. Article 14 states: “The right of killing an armed man exists only so long as he resists; as soon as he submits he is entitled to be treated as a prisoner of war.” Article 18 places responsibility for proper treatment of prisoners squarely on the detaining power: “The primary obligation to support prisoners of war necessarily lies with the captor, and he should maintain them in a manner suitable to their condition.”⁸ Subsequent revisions to this manual came about as a result of either global events (World War I and World War II) or conventions that supported the evolution of international law.

The 6th edition of the *Manual of Military Law*, published in 1914, resulted from the latter. Chapter XIV of this edition, titled “The Laws and Usages of War on Land,” was influenced by the Declaration of St. Petersburg, Hague 1899, Geneva 1906, and most significant, Hague 1907. Five articles from Chapter XIV are worth mentioning. Article 3 identifies three principles that guided law-of-war development: the need to achieve complete submission of the enemy at the earliest possible moment with the least expenditure of men and money, the principle of humanity that dictated “all such kinds and degrees of violence as are not necessary. . . are not permitted to the belligerent,” and the principle of chivalry “[that] demands a certain amount of fairness in offence and defence.” These three principles illustrate the unsolved dilemma presented by the clash of military necessity (principle one) and the law of war (principles two and three).

Article 7 is a “get out of jail free” card of sorts that provides an interesting perspective on military actions in support of colonialism: “It must be emphasized that the rules of International Law apply only to warfare between civilized nations. . . *They do not apply in wars with uncivilized States or tribes*” (emphasis added). Article 18 addresses prisoner treatment and detaining-power responsibilities: “Once [the forces of a belligerent] cease resistance they have a right to humane and honourable treatment as prisoners of war. Their lives are spared, and it is the business of the captor to protect and maintain them.” Article 87 addresses detention practices: “Unnecessary limitations of liberty, unjustifiable severity, ill treatment, and indignities are forbidden.” And Article 88 clarifies that the ultimate

responsibility for humane prisoner treatment lies with the detaining power: “The Government into whose hands prisoners of war have fallen is charged with their maintenance.”⁹ This was the doctrine that carried Great Britain through World War I; at this point, the British military clearly understood what “right looked like” when it came to prisoner treatment. However, correctly classifying armed insurgents for the purpose of conferring prisoner-of-war status remained at issue—even today, in some circles, this issue remains alive, despite the clear language of GPW and GC.

The next iteration of the *Manual of Military Law* (7th edition) appeared in 1929 and is significant because it was in force during the first six years of the Mau Mau emergency. It included the material contained in the 1914 version, to include Chapter XIV. Due to heavy demand stemming from the beginning of World War II, the 1929 edition was reprinted in December 1939, but without Chapter XIV; that particular chapter had already been reissued in 1936 under separate cover titled *Amendments No. 12*. The 1936 special printing, plus the 1939 reprint that pointedly included appendices detailing the Declaration of St. Petersburg, Hague 1907, and the Annex to Hague 1907 combined to serve as the principal source of law-of-war guidance for British military and security forces through World War II, the Korean conflict, and the Mau Mau emergency.¹⁰ How best to categorize armed insurgents remained unsolved, though, and would continue to be a point of contention during British counterinsurgency operations until 1958, when the full force of GC was incorporated into British law-of-war doctrine.

In 1951, the War Office published the first installment of a three-part revision to the *Manual of Military Law*. As one might surmise, this 8th edition incorporated experiences from World War II but did not, at least initially, incorporate the regulatory dicta contained in Geneva 1949. Part I addresses routine military discipline and courts-martial; Part II, published in 1955, is titled *Employment of Troops in Aid of the Civil Power* and focuses on the use of military forces to quell riots and civil disturbances. Because Great Britain did not ratify Geneva 1949 until 1957, neither Part I nor Part II mentions prisoner-of-war treatment or civilian-detainee treatment. However, Geneva 1949 became customary international law when it was presented to the international community for ratification, and therefore British security forces during Mau Mau were beholden to abide by the convention, doctrine or ratification status notwithstanding. Fifteen months after Great Britain ratified Geneva 1949, The War Office published Part III of the 1951 manual, titled *The Law of War on Land, Being Part III of the*

Manual of Military Law. This was the version that guided security-force conduct for the final two years of the emergency.¹¹ Several historians of the period found evidence of improved detention-camp conditions based on ICRC and eyewitness reports beginning in 1958.

Essentially, for eight years Great Britain conducted counterinsurgency operations in Kenya against a militant movement that demonstrated no inclination to adhere to the most basic principles of conduct contained in either customary or conventional law of war. Between 1952 and 1958, the conduct of British security forces was framed by the regulatory construct contained in the 1929 edition of the *Manual of Military Law*.¹² And while the 1929 manual (along with the 1936 *Amendments No. 12* and the 1939 reprint) contained language concerning prisoner-of-war treatment requirements, the specific civilian protections defined by Geneva 1949 were not incorporated into British doctrine until Part III of the manual was published in 1958. In retrospect, British security forces complied with published law-of-war doctrine that made reference to humane treatment for prisoners of war, but because it did not mention civilian-detainee protections, the doctrine was itself noncompliant with Geneva 1949 until the emergency was, in effect, over.

Background

By 1952, the East African country of Kenya had been under British influence for over 60 years, dating back to 1887 when Zanzibar granted coastal-area access to the British East Africa Association trading consortium. Formally declared the British East Africa Protectorate in 1895, the region was redesignated the Kenya Colony and Protectorate in 1920 and remained so until Great Britain awarded Kenya the right to self-government in 1960 and full independence in December 1963. The country's current population consists of between 30 and 40 indigenous groups with a corresponding number of languages, and its principle natural resource has always been arable land. In fact, the controversy over land usage and ownership was one cause of the Mau Mau insurgency.

Britain's primary goal in Kenya was to incorporate the area into its global colonial empire and capitalize on the country's fertile land and ability to produce coffee; sources estimate that even though the Kikuyu tribe comprised 30 percent of the total Kenyan population and had historically occupied the fertile highlands, the most fertile land in the Kenyan highlands was owned by fewer than 30,000 Europeans.¹³ With the exception of those Kikuyu who lived and worked on European settlers' farms as laborers,

most lived either in Nairobi or Mombasa, or in another Kenyan region known as the Reserves. It did not take long before resentment (based on social disparity and the inadequacy of the land in the Reserves) surfaced, and by the late 1920s this unrest found a voice in a variety of new political-action groups forming along ethnic lines.

In the years immediately following World War I, interest in local politics, especially among the Kikuyu, began to grow. Several factors helped cause this awakening, such as a perceived inferior social status (referred to as the color bar), wage inequity, wartime experiences in the service of His Majesty's Army, the loss of land to European settlers, increasing taxes and labor demands levied by European society, overcrowding in the Reserves, and missionary efforts.¹⁴ In 1944, the first recognizable source of nationalism emerged with the creation of the Kenya African Union (KAU), whose primary platform centered on African access to lost lands. Not surprisingly, the Kikuyu became the first large ethnic group to actively participate in Kenyan politics. At the core of the land issue was the relationship between European settler and Kikuyu native: Great Britain depended on white-settler agricultural production and taxes to maintain the colony and turn a profit on its investment, and the settlers depended on Kikuyu laborers (popularly referred to as squatters) to work land the Kikuyu viewed as historically theirs.¹⁵ The years between 1945 and 1952 saw a continued increase in African political awareness, along with an increase in Kikuyu dissatisfaction over their social, political, and economic station.¹⁶ Despite the settlers' efforts to retain their position atop the Kenyan social order and their control of the highlands, in 1952 conditions were ripe for a violent insurgency aimed at eliminating European influence in Kenya and returning control of the highlands to the Kikuyu.

Mau Mau evolved into a term used to describe the active element of a widespread Kenya insurgency lasting from 1952 to 1960 that involved roughly 12,000 fighters and around a million passive supporters. Some historians consider the Mau Mau movement a manifestation of poverty and social discontent, while others consider it an excessive reaction on the part of uncivilized peoples against a civilized nation.¹⁷ Historian Marshall MacPhee claims that Mau Mau was none of these; instead, he describes it as a "movement which used every weapon it could to enslave the mass of Kikuyu people to the ideals of African nationalism and to the campaign to free Kenya from alien rule."¹⁸ Whatever the primary reason, several stimuli combined to result in the violence: a perceived color bar to social equality, the land issue, the societal and economic overtones of the squatter problem, increasing unemployment and decreasing housing

availability, and the inadequacy of the land in the Kikuyu Reserves.¹⁹ The insurgency's original objectives were not always clear, but as one eyewitness to the insurgency observed:

[Mau Mau] often professed a desire to drive all the Europeans out of the Colony; to prevent the disposal of any land to non-Africans; to withhold co-operations from the Government; to refuse all information to the Police [by means of administering increasingly sadistic oaths to both active Mau Mau and passive supporters amongst the Kikuyu]; and to give no kind of assistance in the detection of crime or the arrest of offenders where Africans were involved.²⁰

Subsequent analysis will demonstrate how Mau Mau insurgents violated basic humanitarian principles codified in the law of war, but there are two sides to every story, and we turn now to a discussion of the British security forces and their Kenyan proxies to balance the picture.

British Security Forces

British security forces in Kenya during the 1950s and early 1960s consisted of four elements: the British army (specifically, the King's African Rifles), the Kenya Police (KP), the Kenya Police Reserve (KPR), and the Kikuyu Home Guard. All four organizations were involved in the Mau Mau insurgency, and all four were guilty of violating the spirit of customary international law and, after 1957, the letter of conventional international law. As we review these organizations, the reader should keep in mind Article 29 of Convention IV Relative to the Protection of Civilian Persons in Time of War (GC) that clearly states a detaining power remains responsible for the treatment of all persons under its authority, even if it is not physically responsible for that detainee.²¹ Accordingly, Great Britain as the colonial power and defacto detaining authority was responsible for all law-of-war violations perpetrated by its military forces or proxy security forces during the Mau Mau insurgency—even if British military doctrine lagged behind conventional law.

A total of six British infantry battalions operated in East Africa from the late 1800s to the mid-1960s. These battalions, designated the King's African Rifles (KAR) in 1902, consisted of rank-and-file foot soldiers and junior-grade officers raised from indigenous tribes commanded by mid-level and senior professional British army officers. Before World War I, Africans were chiefly employed as direct-support laborers to British units,

but after World War II KAR battalions were recognized as regular combat units and were employed throughout the Commonwealth. Because each battalion was recruited from local populations, each developed a distinct territorial identity that, in the case of Mau Mau, was fundamentally Kikuyu. The Kenyan government used the three KAR battalions at its disposal in support of KP counterinsurgency operations.²²

The second element of British security forces during Mau Mau was the Kenya Police. This active-duty law-enforcement agency numbered 6,500 in 1950, but the events of 1952 resulted in a rapid expansion of the KP to 13,000 men along with a transformation of tactics, techniques, procedures, and equipment. Fifty-one percent of the KP stations were located in the Kikuyu Reserves with the remainder dispersed throughout Kenya.²³ To cover its area of operations (approximately 570,000 square kilometers), the KP was supported by an additional 8,000 men of the KPR and the Tribal Police, and was augmented by European settlers (all of whom had a vested interest in suppressing Mau Mau and maintaining the squatter status quo) recruited into the KP as temporary district officers. Ultimately, the end of the insurgency was partly due to three KP capabilities developed over the course of the eight-year conflict: the development of a paramilitary strike force known as the General Services Unit (GSU), the creation of a high-quality police-intelligence apparatus capable of infiltrating Mau Mau gangs and Kikuyu villages, and the fielding of a sophisticated (for its time) communications system that enabled the KP to respond rapidly to widely dispersed disturbances.²⁴

The KPR was formed in 1948 as a volunteer force to augment the KP when necessary. KPR members only served during periods of scheduled training and during emergencies, which explains why the KPR played a prominent role in the Mau Mau insurgency. It too experienced rapid growth in 1953-1954, ultimately peaking at approximately 8,000 men, who were predominantly Africans commanded by European professional and contract police officers.²⁵ This is an important point that bears repeating: around 88 percent of all KPR police officers were Kikuyu, a factor that contributed to KPR law-of-war violations during Mau Mau.

To adequately oversee this rapidly expanding force, more than 700 European assistant inspectors were recruited in Britain to serve in Kenya on two- or three-year contracts. According to British Police Inspector Major Robert Foran, two in-country training facilities existed (one at Gilgil for British recruits and the other at Kiganjo for Africans) and, despite a severe lack of situational understanding and linguistic capabilities, these

KPR augmentees acquitted themselves well after a brief period of operational experience.²⁶ His opinion is not shared, however, by historian Anthony Clayton. In his 1984 study *Counterinsurgency in Kenya: A Study of Military Operations Against the Mau Mau, 1952-1960*, Clayton observes that the swift expansion of both the KP and KPR caused substantial inexperience at the junior-leader levels, in both the police force in the field and in the prisons: "Most of the 14,000 prison guards [in 1954] were virtually untrained."²⁷ He further observes that prison-warden training only began in 1955 and remained rudimentary until 1960; this certainly calls into question the level of familiarity KP, KPR, and prison/detention-camp wardens had with law-of-war customary and conventional provisions.

Members of the Kikuyu Home Guard, the fourth component of British security forces employed during Mau Mau, consisted of government loyalists among the Kikuyu who had independently formed militia-type units to augment the KAR, KP, or KPR. Initially armed only with traditional tribal weapons, these loyalists found themselves under frequent attack by Mau Mau gangs who quickly recognized the Home Guard as a threat to their local support base. Consequently, Mau Mau gangs waged a deliberate campaign against Home Guard posts, even those colocated with the KP or KPR.

From a macro-perspective, the endorsement of the Home Guard by government agencies represented a two-edged sword; on the one hand, enlisting the support of armed Kikuyu loyalists increased the number of forces available to fight the enemy, but on the other hand, arming Kikuyu loyalists, or those who appeared to be loyalists, represented a real security risk. Placing Home Guard outposts close by KAR, KP, or KPR stations allowed for close oversight of Home Guard activities by KP officers, and a number of Home Guard units were actually commanded by Europeans posted as District officers. As we will see later in this chapter, some of the most flagrant law-of-war violations were perpetrated by the Kikuyu Home Guard against their own tribespeople, often with the direct knowledge of British security-force officials.²⁸

A State of Emergency

Unrest had been brewing for several years by the time the Kenyan colonial government declared a State of Emergency on 20 October 1952. What finally drove the government to its decision was the, to use Frank Furedi's words, "Unrelenting pressure from European settlers and the inflexibility of the government [which combined] to create the basis for a spiral of vio-

lence.”²⁹ The formal declaration was a significant event for both the colonial government and the Kikuyu, and what happened in the months leading up to October 1952 is important to our situational understanding of the operational environment.

Sir Phillip Mitchell, governor of Kenya from 1944 to September 1952, failed to recognize the pattern of growing unrest. Between 1945 and the spring of 1950, Kenya experienced three large civil disturbances: a peasants’ revolt and a general strike in Mombasa, both in 1947, and another general strike in May 1950, this one in Nairobi.³⁰ During the summer of 1950, European settlers and the KP, with government backing, began to exert stringent control over Kikuyu squatters by imposing a harsh climate of law and order to eliminate the Mau Mau threat. This increased oppression was accompanied by widespread evictions from the highlands of squatters alleged to have committed Mau Mau offences. Throughout 1951, government efforts to mitigate the effects of insurgent actions through information operations and community policing failed.³¹ What then began was a downward spiral of European/government oppression of Kikuyu accused of Mau Mau activities, which in turn created an actual increase in the frequency and violence of those activities, further causing the government to enact measures that enlarged its control.³²

Through most of 1952, Mau Mau activists intimidated Kikuyu into joining either the active (fighting) wing (also known as the Land Freedom Army) or the passive (supporting) wing of the insurgency. Furedi describes the situation this way: “State and settler repression forced the Mau Mau movement in new directions. In the spring of 1952 it entered its phase of armed resistance.”³³ In June of that year, the Kenya African Union (KAU) sponsored a tour through the highlands by political activist Jomo Kenyatta who, while exhorting the Kikuyu to work for change in Kenya, stopped short of publicly endorsing Mau Mau activities. His speeches may have contributed to a wave of heightened Mau Mau assaults in the late summer of 1952 targeted against Kikuyu loyalists. The situation continued to destabilize in September with the murder of numerous African loyalists by Mau Mau insurgents. These violent acts, perpetrated by Kenyans against Kenyans, were accompanied by reports of greater instances of oathing and intimidation, maiming of cattle on European farms, and burning of European farm buildings. On 30 September, a new governor arrived in Kenya to set things right, and it did not take Sir Evelyn Baring long to determine the situation called for drastic measures.

Less than 30 days after his arrival, Governor Baring issued the emergency

declaration. This act was a measure of last resort intended to eliminate the Mau Mau threat to European settlers, British agricultural interests in the region, and the socio-political stability of the colony. The declaration precipitated several actions by both parties to the growing conflict. Overnight, Kikuyu suspected of being Mau Mau were declared criminals and subject to arrest; consequently, October 1952 saw thousands of Mau Mau flee the highlands and the Reserves to establish operational bases in the forests. This was not necessarily a new phenomenon (Kikuyu had for generations used the forests as sanctuary), but the armed resistance organized by Kikuyu squatters who fled to the forests in 1952 and subsequent years marked a departure from tradition.³⁴ These original Mau Mau were quickly joined in the forests by large numbers of recruits, while women, old men, and children remained in the villages to work in the passive wing, effectively turning the fledgling insurrection into a Kikuyu mass movement.³⁵ Spurred on by the declaration, Mau Mau oaths changed to reflect increasingly deviant forms of oaths that reinforced the solidarity of gang members.

The European settlers' response to the declaration exacerbated an already unstable environment. Settlers often liberally interpreted the declaration legislation and took the law into their own hands. In response, Mau Mau killed their first European settler on 22 November, after which the number and frequency of squatter evictions dramatically increased. Despite Governor Baring's best intentions to end the insurgency before colonial interests were permanently jeopardized, the Mau Mau revolt "was as much the product of the government's strategy as of the determination of Mau Mau activists to fight for their future."³⁶

Thus far, we have described a situation where Kikuyu squatter unrest predicated on social dissatisfaction (the color bar) and economic inferiority (loss of arable land and a high unemployment rate) served to create a mass uprising. The combination of squatter unrest and magnified violence on the part of Mau Mau gangs led to the declaration of a State of Emergency in October 1952, which triggered Mau Mau gangs to retreat into the forests, the rise in the number of young male and female recruits to the Mau Mau cause, the eviction of large numbers of squatters from European farms, and a general tightening of European control over Kikuyu society. For the next eight years, British security forces employed a variety of techniques to suppress the insurgency and restore social order to Kenya. What follows is a review of key events that sets up a more detailed discussion of law-of-war violations committed by both sides.

Shortly after his arrival in Kenya, Governor Baring made several decisions aimed at improving the operational capabilities of the security forces. He made command and control of security forces more efficient by delegating decision-making authority to officers in the field. He approved the creation of a system of emergency committees in the provinces and districts comprised of administration, police, military, and civilians (European, not Kikuyu). Under his direction the manpower of the KP, the KPR, and the Kikuyu Home Guard expanded. The government undertook construction of fortified police and guard posts in conjunction with a barrier ditch to delineate the border between Kikuyuland and the forests—a fortress Kenya, so to speak. On his watch, the KP built an intelligence network to break through the impenetrable layer of silence brought on by Mau Mau oath-taking.

In a show of support for Baring, Parliament dispatched to Kenya a distinguished army officer, Major General Sir Robert Hinde, to oversee the efforts of the combined security forces. And perhaps most significant to our analysis, the colonial government's legal system underwent a comprehensive review to deal more effectively with the growing number of court cases resulting from security-force detention operations.³⁷ The British security forces wasted no time in beginning aggressive counterinsurgency operations and launched Operation JOCK SCOTT within hours of Governor Baring's emergency declaration.

Counterinsurgency Phase I

Under Major General Hinde's command, KAR and KP forces began a systematic effort to capture and detain suspected Mau Mau insurgents. A large-scale security sweep, Operation JOCK SCOTT, had two consequential outcomes. On the positive side (from the security force's perspective), the operation netted Kenyan political activist Jomo Kenyatta (alleged, but never conclusively proven to be a Mau Mau leader) along with several other KAU political leaders. On the negative side, Kenyatta's arrest and detention motivated hundreds of formerly loyal Kikuyu to join the Mau Mau cause. Additionally, British security forces faced a challenge similar to that encountered in the GWOT: capturing and detaining approximately 12,000 guerillas (the large majority of whom had no formal guerilla training) whose gangs operated independently over a dispersed area with an ineffective regional command-and-control structure. Whatever tactical advantages professionally trained security forces had were mitigated by a collection of factors: the area of operations consisted of dense forest at high altitudes well-known to the insurgents but foreign to the British

military, a widespread insurgent support-base indistinguishable from the active fighters themselves, and a military force consisting of conscript soldiers led by junior officers lacking in key forest-counterinsurgency skills such as ambushes and silent patrolling. Operation JOCK SCOTT successfully rounded up several key activist leaders, but it neither demonstrated security-force tactical superiority nor revealed significant Mau Mau tactical weaknesses.³⁸

Beginning in the fall of 1952, security forces employed a radical technique intended to reduce the effectiveness of the Mau Mau passive wing. The government endorsed a mass relocation program that forcibly removed entire Kikuyu families from homes throughout Kenya to makeshift villages in the Kikuyu Reserves. This passive-wing-focused program, referred to as “villagization,” was separate and distinct from its counterpart, the active-wing-focused “pipeline,” which dealt with the detention of alleged Mau Mau insurgents; the combination of the two created an environment where most law-of-war violations occurred. This study will revisit these two population-control mechanisms in a later section. For now, it is important to acknowledge that beginning in 1952, security forces focused on defeating the Mau Mau by detaining and re-educating significant numbers of Kikuyu suspected of operating in either the insurgency’s active or passive wings.

For the remainder of 1952, Mau Mau attacks on European farmers and their property increased in frequency and severity. But in early 1953, while security forces were still building in numbers and capabilities, the Mau Mau elevated their violence against Europeans and Kikuyu loyalists to a new level. On 26 March Mau Mau insurgents conducted two raids, one against the KPR station at Naivasha and the other against Kikuyu men, women, and children living in the Lari region roughly 30 miles from Nairobi. The town of Naivasha was a social, political, and economic nexus. It was a market town, a railhead, a road junction, the administrative seat of its district, and its KPR station visibly represented the authority of the Kenyan government. In a 20-minute attack, 80 Mau Mau raided the station, killed two constables, stole 18 automatic weapons and 29 rifles with ammunition, and released over 170 detainees.

The raid was a humiliating disaster for the KPR and the KP. As an organization, the KP had begun the emergency severely under-strength and ill-equipped due to inadequate government funding. Governor Baring’s force expansion of the KP and KPR had yet to take full effect, and the raid revealed critical deficiencies in communications and response capabilities.

Government inquiries conducted in the raid's aftermath identified procedural shortfalls that ultimately resulted in, less than two years later, the transformation of both organizations.³⁹ Naivasha was a wake-up call for the British security forces, but it was at Lari where the Mau Mau demonstrated their propensity to ignore the law of war.

On the same night as the Naivasha station raid, somewhere between 400 and 1,000 Mau Mau insurgents swept across a 21-square mile section of the Uplands Plain in retaliation for, among other things, Kenyatta's imprisonment and increased Kikuyu oppression. In the words of one captured insurgent, "We decided to attack Lari because there were many guards who were punishing their fellow Kikuyu and killing them. They were signing away our land."⁴⁰ In an uncharacteristically well-coordinated assault, specific Mau Mau groups deployed to attack targeted families of KPR officers, Kikuyu Home Guards, and Kikuyu loyalists. Defenseless Kikuyu families fled homes and huts set on fire, only to be slaughtered indiscriminately by machete-wielding Mau Mau hiding in the shadows. Hours later, the official casualty list recorded 84 dead (over 60 percent of whom were women and children), 31 wounded or mutilated (some so severely they were permanently maimed), 200 huts destroyed by fire, and 1,000 cattle maimed (usually by having the tendons of the rear legs sliced). Over the course of the following weeks, security forces arrested roughly 2,000 suspects implicated in the attacks, and by December, 342 of these were charged with murder; 135 of them were sentenced to death.⁴¹

News of the Lari massacre, distributed by British and foreign news correspondents in Kenya, shocked the world. Historian Fred Majdalany sums up the impact of both the Naivasha raid and the Lari massacre with these words:

Lari made it indisputably plain . . . that before it was anything else, Mau Mau was Africans terrorizing, killing, and maiming Africans. In a single night Mau Mau had inflicted on the Government forces their two most grievous setbacks of the Emergency, and in so doing Mau Mau had lost the war.⁴²

To this point, those Kikuyu who had not joined either the active or passive Mau Mau wings sat on the fence, so to speak. But after Lari, some began to turn their backs on Mau Mau and its intimidation tactics. The most important combat multiplier available to any counterinsurgency operation—intelligence about the enemy's activities—slowly became available to

security forces. Both the KP and KPR renewed their transformation efforts, and the British government responded to the Lari massacre by dispatching more troops, equipment, and leadership to Kenya to take the counterinsurgency effort to the next level.

Counterinsurgency Phase II

Several significant changes occurred in May 1953 that signaled the beginning of a new counterinsurgency phase. British troop strength grew to 10,000 European and African line troops, with one squadron of heavy bombers and two squadrons of light bombers available for direct-support missions. The combined strength of the KP and KPR reached 21,000 by year's end, and the Kikuyu Home Guard personnel strength grew to 25,000. By December, British security forces held the advantage over the Mau Mau in terms of manpower, better equipment, and better military training, albeit initially not in areas applicable to forest-based counterinsurgency operations. The Mau Mau active-wing base reached its maximum strength of 12,000, but as counterinsurgency efforts progressed, this number decreased while the security forces gained experience and popular support.⁴³

One other event that occurred in May 1953 significantly revised the in-country security force command-and-control structure. General Sir George Erskine, a highly experienced and professionally trained soldier, son of a general officer and personal friend of British Prime Minister Winston Churchill, arrived in Nairobi to assume full command and control of all military units in Kenya and exercise operational control over all KP, KPR, and Home Guard forces as well.⁴⁴ His professional experiences and personal code of conduct made him a perfect choice to lead the combined security forces in the counterinsurgency operation.

Based on research he conducted before he arrived in Kenya and immediately following his assumption of command, Erskine determined that while there was almost "entire unity of purpose in the political aims of the tribe," a relatively low percentage of the Kikuyu believed that achieving their goals required using wanton violence. He also estimated that several thousand "terrorists" in the active wing in 1953 were supported by more than 90 percent of the entire tribe.⁴⁵ His assessment of the situation did not stop with the Mau Mau, however; he also focused on the conduct of his security forces.

Soon after his arrival, Erskine became aware of a disturbing practice

occurring in KAR units wherein scoreboards were kept as a record of indiscriminate shootings and Mau Mau kills; these practices resulted in monetary awards to the shooters, effectively turning unit personnel into bounty hunters. This practice distressed Erskine on several levels, so much so that he disseminated a letter throughout the entire security force and to all newly assigned British security-force officers. The text of Erskine's code-of-conduct letter is reprinted below for two reasons. First, it clearly reveals the moral measure of the man. Second, and in this author's opinion most important, while Erskine makes no specific reference to either British law-of-war doctrine or Geneva 1949, the reader will recognize he clearly infers his intent that all security forces comply with basic humanitarian standards outlined in Hague 1907 instead of unrestrictedly using the principle of military necessity:

It must be most clearly understood that the Security Forces under my command are disciplined forces who know how to behave in circumstances which are most distasteful. I have the greatest confidence in the Army and Police to uphold their honour and integrity while dealing with the present situation. *I will not tolerate breaches of discipline leading to unfair treatment of anybody.* We have a very difficult task and I have no intention of tying the hands of the Security Forces by orders and rules which make it impossible for them to carry out their duty—I am a practical soldier enough to know that mistakes can be made and nobody need fear my lack of support if the mistake is committed in good faith. *But I most strongly disapprove of "beating up" the inhabitants of this country just because they are the inhabitants.* I hope this has not happened in the past and will not happen in the future. *Any indiscipline of this kind would do great damage to the reputation of the Security Forces and make our task of settling Mau Mau much more difficult. I therefore order that every officer in the Police and the Army should stamp at once on any conduct which he would be ashamed to see used against his own people* (emphasis added).⁴⁶

Erskine concludes his instructions with the pledge that all conduct-related allegations brought by non-military sources would be investigated by either the police or the military, and he mandates full cooperation between the police and the army with regard to said investigations. Clear guidance

to be sure, but Erskine quickly learned that the practice of maintaining unit kill boards only scratched the surface of inappropriate security-force conduct. Just as Mau Mau oathing ceremonies and the Lari massacre revealed the depravity of the insurgents, the court-martial of Captain G.S.L. Griffiths exhibited how far some security forces had drifted from compliance with the law of war.

Griffiths was a KAR officer and farm owner who, by some accounts, believed several of his horses had been maimed or killed by men he suspected were Mau Mau insurgents. Shortly after Erskine issued his general order about security-force conduct, Griffiths was charged with the murder of two Africans. Griffiths was brought before a military court-martial during which his company sergeant major testified that Griffiths authorized the shooting of anybody “so long as they were black” and also paid cash for each confirmed kill. Erskine learned of the case when it became public that 20 African soldiers of Griffith’s KAR battalion were to be charged with the murders of the two Kikuyu. Erskine ordered additional investigations that determined Griffiths was guilty, not his subordinates. Initially cleared of the murder charges on a technicality, Griffiths was then indicted for torturing prisoners: one of the prisoner’s ears had been removed, and the other prisoner had a hole bored into an ear. The second court-martial convicted Griffiths, reduced him in rank, and sentenced him to five years in prison.⁴⁷ Erskine’s command had been embarrassed, but his code had withstood its first test.

The Griffiths affair was noteworthy for several reasons. It revealed a pattern of conduct by a commissioned officer that went far beyond a mere character flaw. It revealed a wholesale disregard for the humanitarian principles of prisoner treatment reflected in customary international law or British doctrine since no member of Griffiths’ unit reported his conduct. Also, because the case involved a colonial territory, the court-martial proceedings were widely followed by the British media, the populace, the War Department, and Parliament. And finally, an Army Court of Inquiry appointed by the War Department to investigate the conduct of British military forces in Kenya vindicated the military with its finding that no inappropriate conduct had occurred, with the exception of the previously banned kill-board competitions; yet, one of the two largest London newspapers observed that the public remained concerned about the conduct of the other security forces. In hindsight, the Griffiths incident represented the canary in the mine; it exemplified that security forces were not just capable of committing law-of-war violations; they were, in fact, already

doing so.⁴⁸

In mid-1953, the government issued detention orders as the legal basis for the arrest and internment of thousands of Kikuyu suspected of Mau Mau involvement but for whom prosecution was problematic. These regulations controlled Kikuyu movement and repatriation, institutionalized the villagization program, and authorized both property confiscation and censorship. The government also authorized the death penalty for insurgents convicted of sabotage, illegal possession of weapons or explosives, certain types of oath administration, and particularly egregious passive-wing activity. Not only did the security forces execute a large number of people (896 between October 1952 and December 1954), but the threat of execution was frequently used as an intimidation tool to extract information or extort confessions.⁴⁹

These measures, combined with improved intelligence-gathering techniques and aggressive patrolling, began to turn the tide in favor of the security forces. In 1954, Erskine authorized Operation ANVIL, a military/police sweep through the capital of Nairobi. The cordon-and-search operation lasted one month and produced the removal of more than 16,000 Africans to detention camps or relocation villages. From an operational perspective, ANVIL severely damaged the already limited Mau Mau command-and-control capabilities in Nairobi and had an associated impact on the city-based passive wing's ability to support the remaining active-wing fighters in the forest. In 1955, the combination of an aggressive security-force counterinsurgency campaign, the detention camp and villagization population-control programs, a diminished logistical support base, and reduced popularity spelled the end of the Mau Mau. By year's end, the number of active-wing Mau Mau operating out of forest bases was down from the original 12,000 to mere hundreds, who were constantly running from large-scale security-force patrols.

In May 1956, Erskine's replacement relinquished operational control of the KP, KPR, and Home Guard, and by October 1956 the military component of the counterinsurgency campaign ended. But while the military disengaged, the remaining security forces continued to maintain more than 24,000 detainees spread across 39 detention camps, and an additional 8,400 convicted Mau Mau behind bars in 21 prisons scattered throughout the country; these numbers do not include the hundreds of thousands of Kikuyu relocated to transit camps or makeshift villages in the Reserves. It took the government another four months to officially declare the combat-operations phase over, but the truth about security-force law-of-war violations had yet to be uncovered.⁵⁰

The Population-Control Program

As the emergency progressed, the government implemented a two-faceted population-control program. Each was similar in purpose and general methodology but was also unique in specific form. The program component that dealt with confirmed but redeemable Mau Mau active-wing insurgents was called the pipeline, and its counterpart for civilians and low-threat, passive-wing supporters was known as villagization. Both program elements had as their entry point the initial screening facility, where teams of military personnel and police, augmented by Home Guard personnel and European settlers, conducted interrogations to determine a suspect's oath-taking status and level of insurgency involvement.

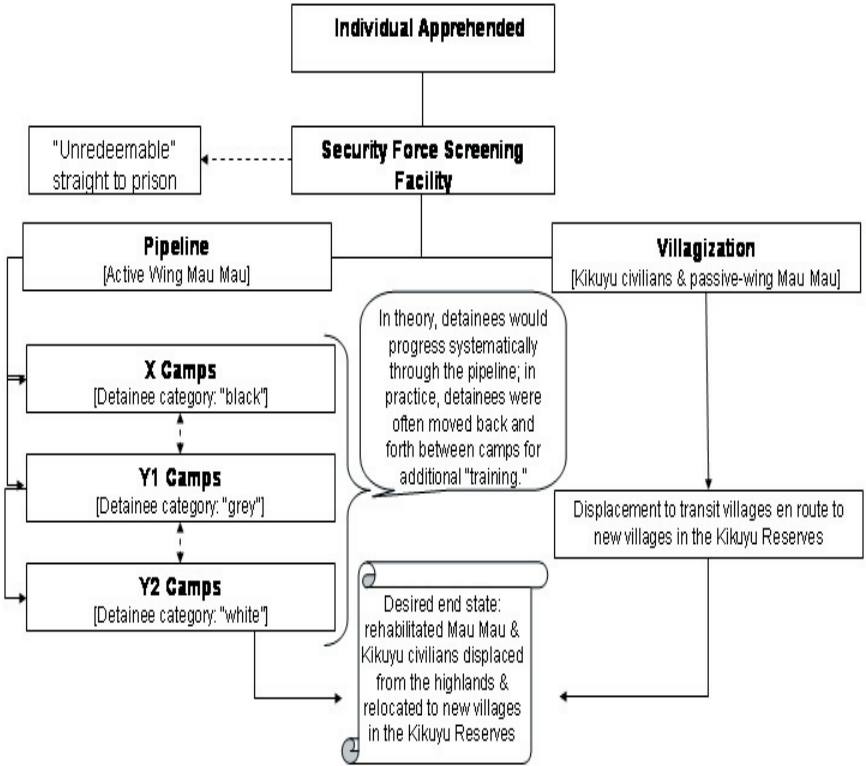


Figure 1. Mau Mau Emergency Population-Control Program

Caroline Elkins, an Assistant Professor of History at Harvard, has extensively researched the emergency population-control program. Her research has uncovered several examples of these screening procedures, one of which is recounted by a Kikuyu squatter:

It was 1953, and there was an atmosphere of war in the

country. The workers on the farm were suspected of illegal oath-taking activities, and one day . . . we were taken to a camp in a farm . . . where we were screened. We would be asked whether we had taken the oath, and those who denied having taken it would be beaten severely until he was forced to say that he had taken the oath. The black askaris [locally recruited African soldiers] were the ones doing the beating, but they were being directed by the [Europeans.] I was charged with taking an illegal oath. We were all sentenced to three years in prison.⁵¹

This one example reveals at least two law-of-war violations, one being the use of beatings to obtain information (GC, Article 3, paragraph 1a; Article 31; Article 32), and the other the imposition of a prison sentence without a legally constituted trial (GC, Article 3, paragraph 1d). These screening operations “confirmed” security-force estimates that the majority of Kikuyu (perhaps as high as 90 percent) had taken at least one Mau Mau oath. Elkins determines that by the end of 1953, security forces had established eight permanent screening facilities throughout the settled areas of Kikuyuland, while even more screenings were conducted at local KP and KPR stations. The results of the screening determined which route through the program a suspect would have to take. If the screeners established a suspect was beyond rehabilitation, he was sentenced directly to prison. If, however, the suspect fell into one of the two other categories previously described, he or she embarked on a different journey through the program.

The Pipeline

The program component reserved for active but redeemable insurgents was the detention-camp pipeline. Initially conceived as an efficient means to segregate insurgents from the general population, the pipeline was a concerted effort by the government to attain two critical objectives: the moral re-education of Mau Mau fighters and the eventual rehabilitation of detainees back to Kenyan society. The defining characteristics of the detention camps were discipline, confession, re-education and, regrettably, intimidation, abuse, and torture. No timetable for moving through the pipeline was set; rather, a detainee’s progression through the camps and ultimate release back to his or her home village depended on two factors: one’s willingness to confess to specific crimes such as oath-taking and one’s ability to demonstrate a satisfactory level of rehabilitation. Also, it was not guaranteed that a detainee would, over time, progress toward freedom; Josiah Kariuki, for example, spent seven years in the pipeline and saw the

inside of 14 different detention camps, sometimes bouncing between different categories before gaining his release. Once marked for detention, the insurgent was transported to one of three categories of detention camps depending on the screeners' assessment of the individual's involvement in the insurgency.⁵²



Figure 2. The Major Detention Camps in Kenya

Unrepentant, hard-core Mau Mau were characterized as “black” and detained in maximum-security camps (referred to as X camps) located outside central Kenya. The focus of these camps was clear: segregating the most dangerous insurgents and obtaining (either freely or through coercion) intelligence information. These camps were only one step removed from prison, but at least here one had the chance to move on. If, and only if, an insurgent satisfied all the conditions, he could be reclassified as “grey” and graduated to one of eight special detention camps (Y1 camps) located

in central Kenya. Here, detainees who were “heavily infected [with Mau Mau philosophy] but not unreclaimable” labored on public-works projects and attended re-education lectures taught by loyalist headmen and former insurgents on topics like politics and economics.⁵³ After another round of public confession, the detainee might find himself reclassified a final time as “white” and moved further down the pipeline to a Y2 work camp. These minimum-security camps were the final stage of the pipeline, and here one underwent more questioning, moral education, and discipline, but also enjoyed the privilege of family visits. Before being released, however, the detainee had to negotiate one final test: his family had to judge his rehabilitation complete. If he passed muster, security forces released him to his home village a reformed Kikuyu; if he failed, he was returned to the pipeline for more training.⁵⁴

By some estimates, between 40,000 and 77,000 Kikuyu moved through the pipeline between 1952 and the end of 1959.⁵⁵ Because of the sheer number of detainees involved, rapid detainee movement through the pipeline became a priority. Sometime after 1956, the colonial government decided to sanction forcefully obtaining the confession needed to graduate a detainee from X camp to Y1 camp to Y2 camp, and then ultimately out of the pipeline altogether. To provide security forces in the field with implementation guidance, the Attorney General’s office issued instructions on the use of “compelling” force vice “overwhelming” force. Using compelling force was legal and included such measures as involuntary movement of detainees, subjecting detainees to hair-cutting, shaving, and medical exams, administering forced feedings, and requiring detainees to dress in uniform. Overwhelming force was illegal. This was defined as applying force to break a detainee’s resistance to a lawful order. Authors Carl Rosberg and John Nottingham differentiate between the two by explaining that it was legal to “physically encourage” a detainee to take an unauthorized set of clothes off and put a uniform on, but it was illegal to beat a detainee to make him comply with such an order.⁵⁶ One can imagine the liberal interpretations that must have circulated throughout the camps; given that the government was splitting hairs, it should come as no surprise the detention camps quickly developed a reputation for physical and psychological abuse and torture.

The historiography of Mau Mau reveals this reputation is well-deserved. Anthony Clayton describes three types of abuse specific to the detention camps: poor medical and sanitation conditions, detainee overwork coupled with inadequate rations, and “patterns of oppression, violence and beatings which repeated themselves from time to time in a number of camps but

which critics found most difficult to establish on evidence from witnesses who could command credibility in Kenya or Britain.”⁵⁷ He elaborates by describing a variety of physical abuses and methods of torture visited on detainees by security forces: the widespread use of leg irons, long periods of solitary confinement combined with inadequate rations, harsh beatings for minor infractions, shock treatments, and disease culminating in over 300 detention-camp deaths brought on by poor sanitation and health care. Clayton also infers governmental complicity in all these law-of-war violations: “Again the pattern repeats itself, the worst offences usually being the work of locally recruited Europeans and junior African officials, some of the wardens being former Kikuyu Guards of the worst type.”⁵⁸ This is not to say that the detention camps operated completely beyond the pale of judicial scrutiny. In a judgment delivered after a 1954 government investigation into the actions of a specific Home Guard post with alleged connections to a district court, one British judge described the situation in these words:

There exists a system of guard posts manned by headman and chiefs, and these are interrogation centres and prisons to which the Queen’s subjects, whether innocent or guilty, are led by armed men without warrant and detained—and as it seems tortured until they confess to alleged crimes and are then led forth to trial on the sole evidence of these confessions . . . naked oppression . . . a hostile bench primed with lies, and the shadow of the cells, flaying whips and threats.⁵⁹

Camp commandants and European settlers occasionally admitted to the abuse visited on the detainees by security forces. One source refers to an account by a senior European settler in the highlands and self-styled leader of the Kikuyu Home Guard, Sir Michael Blundell, who describes a certain camp commandant’s intimidation technique:

[Since] Mau Mau was built on fear we had to create a greater fear of our camp than that of Mau Mau . . . We, ourselves, started rumours regarding the atrocities supposed to be committed in the camp, and these stories lost nothing in horror value as they were passed on. Another trick was to walk into the camp at dead of night with a hurricane lamp, handcuffs, rope and a gun, select a prisoner who had been difficult to screen, handcuff him and march him out, all without a word. Shortly afterwards there would be a series of screams and shouts from the

forest, followed by a shot, then complete silence. In the morning I would walk into the room dangling a pair of handcuffs, rope and gun, throw them on to the office table, say nothing, and then start the day's screening, when a remarkably improved atmosphere was evident among the Mau Mau prisoners.⁶⁰

In this particular case the detainee was not shot—instead, he was quietly transferred to another camp, but the technique was effective nonetheless.⁶¹ As the detainee population grew to near unmanageable proportions, security forces employed more barbaric techniques to exact the confessions needed to move detainees through the pipeline. Caroline Elkins' research in the Kenya National Archives reveals numerous examples where security forces castrated detainees, forced them to engage in acts of sodomy, and, to use her words, "Perpetrated similar horrifying acts [which were] implicitly endorsed by Nairobi as part of its battle plan."⁶² In her opinion, "Coercion replaced reform in the pipeline," and securing confessions ultimately took precedence over all other detention-camp activities.

A review of William Baldwin's first-person account reveals two specific instances of Mau Mau beatings, five examples of Mau Mau intimidation, and no fewer than 22 confirmed instances of Mau Mau executions, all of which occurred at the hands of security forces. The information contained in Figure 3 illustrates the pervasiveness and severity of law-of-war violations from a different perspective. Admittedly, these abuse examples are based on the primary-source accounts of one detainee; however, the geographic dispersion and chronological persistence of these abuses, and the conduct of security-force personnel as recounted by Baldwin, are well-supported by secondary research conducted by Clayton, Elkins, Maloba, Rosberg and Nottingham, among others.⁶³

	Camp Name	Beating	Solitary Confinement	Inadequate Rations	Intimidation - Coercion	Overwork	Personal Indignities	Inadequate Medical Treatment
1953	Kowop							
1954	Langata							
	Manyani							
1955	S. Yatta							
	Manyani							
1956	Saiyusi Island							
	Lodwar							
September 1957		Great Britain becomes a signatory to Geneva Conventions of 1949.						
Oct 1957	*Athi River*							
1958	Othaya							
	Aguthi							
	Nyeri							
9 December 1958	Josiah Karuki temporarily released from the pipeline.	Continued letter-writing campaign results in re-arrest.						
20 Feb 1959	Detained at Othaya							
27 Feb 1959	Kandungu Work Camp							
	Karaba, vic Mwea Camps							
12 Feb 1960	Permanently released							

Figure 3. Patterns of Detainee Abuse Over Time and Space⁶⁴

Evidence of these abuses became more publicized after 1954, due in part to the letter-writing efforts of detainees like Karuiki who, amazingly, given the distance separating author and recipient, found an advocate in British Member of Parliament (MP) and social-reform advocate Barbara Castle.⁶⁵ 1959, however, marked the zenith of security-force law-of-war violations during Mau Mau. In March of that year guards from the Hola detention camp, under the guise of compelling detainees to work, applied overwhelming force, beat 11 men to death and critically injured another 22. The government hastily tried to cover up the incident by attributing the cause of death to excessive consumption of contaminated water.⁶⁶ But the combination of security-force, plain-text radio traffic and the presence of international media correspondents quickly forced the government to recant its initial ill-advised claim and commission an official investigation into the incident. In the words of one historian, “Hola became as much of a household word as Mau Mau and just as damaging to Kenya’s reputation.”⁶⁷ Later in Chapter 5, this study will assess the impact media coverage of the Mau Mau emergency and reports of detainee abuses had on British politics, but first we must address the second component of the population-control program.

Villagization

By 1953, European settlers in the white highlands had convinced the colonial government that Kikuyu squatters working their farms posed a real threat to the continued profitability of Great Britain’s investments in Kenya. Villagization forcibly repatriated hundreds of thousands of Kikuyu families from farms in the highlands and the Rift Valley through heavily guarded transit villages to hastily constructed makeshift villages in the Kikuyu Reserves. “In Kenya’s history,” Kariuki observes, “there can seldom have been another single decision that brought such immediate misery.”⁶⁸

Villagization was a counterpart to the pipeline construct that affected over one million Kikuyu. The logistical and financial problems associated with detaining that many people were a monumental challenge that prompted Caroline Elkins to describe villagization as an alternative program that “solved the practical and financial problems of placing the entire insurgent population into camps and prisons.”⁶⁹ What these transit camps and emergency villages represented was a controlled environment where Kikuyu men, women, and children who had allegedly taken a Mau Mau oath but did not warrant detention via the pipeline, could be controlled, monitored, moved, and forced to work on government projects.⁷⁰ It should

come as no surprise then that, just as was the case in the pipeline, the villagization camps also developed a well-deserved reputation for violence and physical and psychological abuse—in short, the same types of law-of-war violations, perpetrated by the same security forces, as we have already discussed during our pipeline analysis.

Less than two years after the colonial government enacted the villagization program, security forces had relocated 1,050,899 Kikuyu from farms in the highlands to just over 800 villages comprised of some 230,000 huts.⁷¹ The tactics used by security forces to begin this process were disturbingly similar to those used by the Nazis against the Poles in World War II. European officers directed these collection operations, while Home Guard personnel were the action agents responsible for removing the Kikuyu. Little warning was given to inhabitants before security forces torched homes and killed undernourished livestock; simultaneously, security forces liberated healthy livestock for their own use, and all too often children were permanently separated from their families—all of which are violations of GC, 1949 articles 27, 33, and 82.⁷² One Kikuyu mother describes the shock of the initial confrontation with these words:

We had not been given any warning beforehand that our houses were going to be burned. No one in the whole ridge knew that we were to move. The police just came one day, and drove everybody out of their homes, while the home guards burned the houses right behind us. Our household goods were burned down, including the foodstuffs like maize, potatoes and beans, which were in our stores. Everything, even our clothes were burned down. One only saved what one was wearing at the time! During the move I got separated from my children, and I could not trace them. They had been in front, leading our remaining cattle, but I failed to find them. During the whole night I could hear a lot of shooting and screaming. I cried the whole night, knowing that my children were gone. I never saw them again.⁷³

The government accomplished several things with its villagization program. First, it provided an efficient means of controlling and relocating a large population separate and distinct from the pipeline. Second, it severed, to a certain extent, the connection between passive-wing support in the highlands and the remaining active-wing fighters operating out of the forests. (Even though these villages were surrounded by barbed wire and

deep trenches, Elkins and others record instances where ingenious Kikuyu sympathizers managed to circumvent the security measures and provide food, intelligence, some weapons, and limited medical care to Mau Mau fighters.)⁷⁴ And finally, just as with the pipeline, villagization required that internees attest to Mau Mau renunciation, endure political re-education, and participate in forced manual labor as proof of satisfactory progress on the road to rehabilitation. However, unlike the other population-control component where detainee movement through the pipeline followed no set timetable, the government moved internees rapidly through the transit villages to the Reserves. The reason for this was primarily economic in nature: While in the transit villages internee health and welfare was the responsibility of the colonial government, but once the internees arrived in the Reserves they were expected to be self-sufficient even while working on forced communal-labor projects.

The catalog of law-of-war violations committed by security forces during the villagization program mirrored that of the pipeline environment. Admittedly, before September 1957 these violations fell under the category of customary international law, but after that date and for the final two-plus years of the emergency, they unquestionably were violations of conventional international law. Forced removal from homes, destruction of private property, and forced labor projects (internees were required to build houses in relocation villages, dig security trenches, and provide logistical support to the Home Guard) were some of the less reprehensible acts. The more heinous violations included beatings, torture, executions, intimidation, coercion, rape, starvation, and forced confessions.⁷⁵ As was the case with the pipeline, these violations were visited on the camp inhabitants by Home Guard personnel with the knowledge and complicity of British security-force leaders and colonial government representatives. There appeared to be widespread recognition within Kenya's borders of the activities occurring in the pipeline and emergency villages, but what news of law-of-war violations was getting out of the region? And more important, did this news have any impact on the political scene or the military in London?

Notes

1. William W. Baldwin, *Mau Mau Man-Hunt: The Adventures of the Only American Who Has Fought the Terrorists in Kenya* (New York: Dutton, 1957), 38.
2. Fred Majdalany, *State of Emergency: The Full Story of Mau Mau* (Boston: Houghton Mifflin, 1963), 167.
3. Bethwell Ogot, *Historical Dictionary of Kenya* (London: Scarecrow Press, 1981), 63. The Kikuyu tribe (sometimes spelled Gikuyu) represents the largest group of indigenous Kenyan peoples. Current population estimates put the number of Kikuyu tribal members at close to two million.
4. Josiah Mwangi Kariuki, *Mau Mau Detainee: The Account By a Kenya African of His Experiences in Detention Camps, 1953-1960* (London: Oxford University Press, 1963), 23. Kariuki, a member of the Kikuyu tribe, was arrested by British security forces in October 1953 and then spent over five years in a total of 11 different detention camps in Kenya before being released in December 1958. His firsthand accounts of abuses and living conditions in these camps are primary-source materials.
5. Headquarters (HQDA), Department of the Army DA Pamphlet 550-56: *Kenya—A Country Study*. 3rd ed. (Washington, DC: HQDA, 1983), 29-30; Bethwell Ogot, in her *Historical Dictionary of Kenya*, describes the Mau Mau insurgency as a “militant movement of organized violence in pursuit of its political and anti-colonial cause. In terms of political objectives, there was little difference between Mau Mau leaders and leaders of the Moderate Kenya African Union party. The main difference was over political strategy. Mau Mau leaders believed that political goals were attainable only through a violent struggle,” 135.
6. Kariuki, 22, 31. Because of their revolting and graphic nature, a detailed discussion of Mau Mau oaths is inappropriate for this study. But in general terms, oathing ceremonies after 1952 consisted of multiple iterations of secret sessions depending on the level of gang inclusion desired. Early in the insurgency, oaths were based on existing and accepted tribal forms, “Perverved and inverted to play on the superstition, and sense of shame and guilt, of the oath-taker, aware that he was transgressing a tribal taboo” (Majdalany, 164). Primary-source accounts such as Kariuki (who participated in oathing ceremonies) and Foran (who investigated them), describe ceremonial components involving ritualized sadism, bestiality, black magic, and murder, all intended to bind the initiate to the Mau Mau cause and intimidate him or her into observing complete silence about Mau Mau activities if captured and detained by security forces. As the insurgency wore on and the Mau Mau became more desperate, oaths even featured cannibalism (Majdalany, 165).
7. The Geneva Convention (III) Relative to the Treatment of Prisoners of War (GPW), August 12, 1949, defines prisoners of war as members of armed

forces or militias who satisfy specific criteria. In the case of Mau Mau, GPW, Article 4, sub-paragraph 2 indicates that Mau Mau insurgents fell outside the conventional definition of armed forces: "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." Mau Mau satisfaction of condition (a) was questionable at best; Mau Mau compliance with conditions (b)–(d) was non-existent. If Great Britain had classified captured Mau Mau as prisoners of war, its responsibilities to ensure humane treatment would have been crystal clear: "Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them" (Article 12). But because they were not legally classified as prisoners of war, Mau Mau insurgents should have been individually categorized by means of a military tribunal: "The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal" (GPW, Article 5). And barring all other considerations, Mau Mau insurgents once detained by security forces, as well as Kikuyu civilians forcibly displaced by security forces to relocation villages, at a minimum were entitled to baseline humane treatment described as follows: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 'Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'" Convention IV Relative to the Protection of Civilian Persons in Time of War (GC), August 12, 1949, Article 3.

8. The War Office, *Manual of Military Law* 1st ed., (London: His Majesty's Stationery Office, 1899), 288, 289.

9. The War Office, *Manual of Military Law* 6th ed., (London: His Majesty's Stationery Office, 1914), 234, 235, 238, 249.

10. The War Office, *Manual of Military Law* 7th ed., (London: His Majesty's Stationery Office, 1929), 375. The importance of the annexes retained in the 1939 reprint should not be overlooked when evaluating British security-force conduct in Kenya between 1952-1958. Chapter II (Prisoners of War) of the Annex to Hague 1907 specifies that "prisoners of war are in the power of the hostile government, but not of the individuals or Corps who capture them. *They must be humanely treated*" (emphasis added).

11. The War Office, *Manual of Military Law* 8th ed., (London: His Majesty's Stationery Office, 1951).

12. It is important to note British security forces had two sets of doctrine available to them as a guide, one legal in nature (the 1929 *Manual of Military Law* with 1936 *Amendments*), the other tactical. This second manual, titled *The Conduct of Anti-Terrorist Operations, Malaya (ATOM)*, was published in 1952 and applied in Kenya beginning in the spring of 1953. It incorporated tactics like food denial, population resettlement, and prolonged small-unit patrolling. David A. Percox, "British Counter-Insurgency in Kenya, 1952-1956: Extension of Internal Security Policy or Prelude to Decolonisation?" *Small Wars and Insurgencies* 9, no. 3 (Winter 1998): 48.

13. Much of the information in this and the paragraphs immediately following is found in *Kenya—A Country Study*, xiii-xviii, 3-4, and 204-205; see also Marshall A. MacPhee, *Kenya* (New York: Praeger Publishers, 1968), 101. Historian Frank Furedi notes that 30,000 European settlers living on 4,000 farms controlled roughly 7.5 million acres of the best agricultural land in Kenya, while 58 times the number of settlers (approximately 1.75 million Kikuyu) were forced to either relocate to the Kikuyu Reserves (33 million acres of poor-quality land) or remain on Highland farms as squatter tenants. To sum up, European-controlled land represented 50 percent of the arable land and 20 percent of the highly productive agricultural areas, leaving inadequate resources for the Kikuyu. Frank Furedi, *The Mau Mau War in Perspective* (London: Currey, 1989), 9.

14. Kariuki, 21. Kariuki estimates the Kikuyu population density in the Reserves to be roughly 1,000 people per square mile. He describes the Kenyan society color bar in this manner: Significant numbers of Europeans refused to talk to Africans except in poor Swahili; old men were addressed as "boys" or "monkeys" [a pejorative moniker corroborated by Baldwin]; Africans were barred from hotels and clubs; and a "wholesale disregard for human dignity [existed] and little respect for anyone with a black skin."

15. Furedi, 5, 9-11. Furedi observes that, out of all the tribes indigenous to Kenya, it was the Kikuyu who experienced the most disruption from British

colonialism. The loss of highlands land was only one component of Kenyan societal distress; other factors included the emergence of a capitalist market and the redrawing of social lines based on the arrival of European settlers. Ogot defines squatter as “a term used extensively during the colonial period to refer to a labor tenant. He provided part-time labor in return for the right to cultivate a piece of land and grazing rights for his livestock. Most of the squatters were found on the European settlers’ farms, especially in the Rift Valley Province” (Ogot, 197). Kariuki, himself the son of a Kikuyu squatter, describes the system as having “all the social disadvantages found in any feudal relationship (Kariuki, 1). He also observes that his parents, along with many other Kikuyu tribesmen, “Strongly desired the comparative riches that could come from herding their cattle and goats in the White Highlands, where by law no African could hope to own land and where one European’s pastoral farm might be bigger than a location in the Reserves containing sixty thousand people” (Kariuki, 2). The phenomenon of squatter tenancy, a direct result of European-settler agricultural practices, quickly developed into violent opposition to the colonial government and was a key factor in the rise of the Mau Mau insurgency.

16. *Kenya—A Country Study*, xxiii.

17. Bethwell Ogot describes Mau Mau as a “militant movement that advocated the employment of organized violence in pursuit of its political and anti-colonial cause. In terms of political objectives, there was little difference between Mau Mau leaders and leaders of the moderate Kenya African Union party. The main difference was over political strategy. Mau Mau leaders believed that political goals were attainable only through a violent struggle,” (135).

18. MacPhee, 112. MacPhee describes the methods used by Mau Mau as “undoubtedly primitive and evil; but terrorism knows no bounds in Africa or in any other continent.”

19. Wunyabari O. Maloba, *Mau Mau and Kenya: An Analysis of a Peasant Revolt* (Bloomington, IN: Indiana University Press, 1993), 17; Furedi, 5, 9-11; MacPhee, 101. Maloba, in particular, provides a concise listing of Mau Mau insurgency catalysts: “Under the umbrella of Mau Mau there existed ethnic nationalism, the squatter’s problem, unemployment and lack of housing in urban areas, and landlessness in the rural areas of Central Province. The racial problem, essentially the African reaction against white racism and discrimination in Kenya, also became a factor in the general grievances that gave rise to the revolt.”

20. Robert W. Foran, *The Kenya Police, 1887-1960* (London: Robert Hale Limited, 1962), 177. Major Foran, a graduate of the Royal Military Academy at Sandhurst, served in the British army in South Africa and India. In 1904, he was seconded to the British East African Police and returned to Kenya permanently in 1947. During the Mau Mau emergency Major Foran served with the Kenya Police Reserve.

21. GC, Article 29: “The Party to the conflict in whose hands protected persons

may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.”

22. *Kenya—A Country Study*, 246-247. Britain turned over control of the three battalions of KAR (3d, 5th, and 11th) after Kenyan independence in 1963. These units, redesignated the Kenya Rifles, became the core of Kenya’s army.

23. Foran, 192.

24. *Kenya—A Country Study*, 267-268.

25. *Ibid.*, 269; also Foran, 192. Foran lists the following strength figures for the combined KP and KPR force: 202 European officers, 928 European inspectors, 11 European women inspectors, 185 Asians of all ranks, and 9,878 Africans.

26. Foran, 190, 208.

27. Anthony Clayton, *Counterinsurgency in Kenya: A Study of Military Operations Against the Mau Mau, 1952-1960* (Manhattan, KS: Sunflower University Press, 1984), 18.

28. MacPhee, 129, see also Foran, 208-209.

29. Furedi, 112.

30. Percox, 51.

31. Furedi, 112.

32. Clayton, 4: “British Colonial Secretary Oliver Lyttelton, after receiving a delegation of British administrators who described an increasingly unsettled situation, authorized limited legislative measures such as tighter control of African ethnic societies, authority to control/close printing presses, and increased authority to district administrators and police with respect to control and arrest of militants.”

33. Furedi, 112.

34. *Ibid.*, 119.

35. The Mau Mau insurgency area of operations centered primarily on the Central Province and the Rift Valley. Approximately 12,000 Mau Mau fighters operated over roughly 14,000 square miles in the heart of Kenya. While the number of Mau Mau insurgents is widely acknowledged, it is more difficult to ascertain the exact strength of the passive wing. MacPhee estimates approximately two-thirds of the Kikuyu tribe took the “Oath of Unity” in support of Mau Mau, which would have resulted in a potential insurgency logistical-support base of roughly 750,000 Kikuyu (MacPhee, 125). Foran describes the primary passive-wing activities as supplying food and ammunition to the “terrorists.” “Women, and even small children,” he said, “were used for this purpose. Males dressed up as women; and others masqueraded as Masai, wearing long muddled hair in the manner traditional to that tribe” (Foran, 201). Kariuki also notes that Mau Mau

passive-wing supporters provided medical support to injured Mau Mau fighters, who often stole medical supplies from security-force outposts.

36. Clayton, 4-5; Furedi, 112-120.

37. MacPhee, 130.

38. Clayton, 21-23.

39. Majdalany, 142, 145.

40. Furedi, 122.

41. Foran, 188-189; Majdalany, 138-139, 141.

42. Majdalany, 145-147.

43. MacPhee, 133.

44. Clayton, 6-7. Erskine's military experiences included service in North Africa and northwest Europe in World War II, internal security-operations experience in prewar India and Malaya, and command of the Suez Canal Zone when Egyptian nationalists attacked British troops and installations.

45. *Ibid.*, 7.

46. General Erskine's dispatch dated 25 April 1955, cited in Clayton, 38-39.

47. Clayton, 41.

48. *Ibid.*, 42. The security forces' track record did not improve over time. William Baldwin, the American traveling through Kenya in 1954, actually accepted a post as a KPR officer in June of that year and served as patrol leader conducting counterinsurgency raids against the Mau Mau. In his first-person account of time spent fighting the Mau Mau, he recounts multiple instances where he, or his unit, or the British officers of other KPR platoons clearly violated the law of war. For example, after chasing down and summarily executing a suspected Mau Mau, Baldwin observes: "This was grim, horrible work, necessary work. The rules of warfare in the Aberdares were harsh. The terrorists had information vital to us, and the more Mau Mau we could eliminate by using this information, the more we were helping to protect both the loyal Kikuyu and our own forces" (Baldwin, 174). In another example, Baldwin demonstrates the security-force propensity to apply situational ethics and an incorrect interpretation of the rules of warfare: "Unless we happen to pick up somebody extra special, we won't bother with extensive questioning. We'll follow the procedure of our previous patrols: no terrorists alive" (Baldwin, 207). One of Great Britain's foremost authorities on counterinsurgency operations, Lieutenant General Frank Kitson, served more than nine years in a total of four counterinsurgency environments: Kenya, Malaya, Oman, and Cyprus. Detailed in 1953 as a junior intelligence analyst to provide support to the Kenya Police, Kitson offered the following as a possible explanation for security-force behavior such as that described by Baldwin and Kariuki: "Most [of the British soldiers] saw evidence of revolting Mau Mau brutality from time to

time, and probably regarded the finding and disposing of the gang members in the same way as they would regard the killing of a dangerous wild animal.” Lieutenant General Frank Kitson, *Bunch of Five* (London: Faber and Faber Ltd, 1977), xii.

49. Clayton, 14-15. In a clear violation of GPW, Article 13, which proscribes the intimidation of prisoners of war, security forces erected gallows in the Thompson’s Falls prison camp in full view of the entire camp population; likewise, security forces erected a gallows on the Nyeri golf course to “encourage” Kikuyu cooperation with the counterinsurgency. In another example, the Emergency (Detained Persons) Regulations of 1953 not only authorized solitary confinement for a host of infractions, but, in a flagrant violation of GPW, Article 26, also authorized rations restrictions to bare subsistence levels of bread and water.

50. Ibid., 24ff.

51. Caroline Macy Elkins, “Detention, Rehabilitation, and the Destruction of Kikuyu Society,” in *Mau Mau and Nationhood: Arms, Authority, and Narration*, ed. E.S. Atieno Odiambo and John Lonsdale (Athens: Ohio University Press, 2003), 195. Hereafter referred to as Elkins, journal article.

52. Clayton, 16. It is important to note that some camps were totally dedicated to one specific category of detainee, while other camps were further broken down into distinct compounds capable of housing groups of like detainees within the confines of the larger camp construct. Accordingly, even a Y2 camp could house X detainees in a compound completely segregated from the general camp population.

53. Kariuki, 61; Maloba, 141. Maloba notes that detainees were put to work as manual laborers because “the official view was that idleness would hinder rehabilitation.” Detainee work programs included an airport in Nairobi, land terracing and irrigation-canal construction, and deforestation projects (this last one was perhaps a thinly veiled effort to interfere with active-wing hideouts). Maloba notes that detainees were paid 80 cents for a day’s work, and while using detainee labor for public-works projects is not a violation of the law of war, exploiting detainees as cheap labor is (GC, Article 51).

54. Kariuki, 61; Clayton, 17.

55. Carl G. Rosberg and John Nottingham, *The Myth of “Mau Mau”: Nationalism in Kenya* (New York: Praeger, 1966), 342. Rosberg and Nottingham noted that, by February 1959, over 77,000 Kikuyu had been released from detention camps, and by the end of that summer only a little over 1,000 remained in detention. That number represented “those who had not been amenable to ‘rehabilitation’ and had been returned to the pipeline, those ‘whose records were so black, or whose crimes were so brutal, that they would not be accepted back by their own communities’ (as represented by Loyalist committees), and those who were ‘the organizers and managers of the Mau Mau society.’”

56. Ibid., 341-342.

57. Clayton, 47-48.

58. Ibid., 49. Clayton describes many of the Kikuyu Guard as “peasants with neither formal education nor any special training. In combating insurgents they felt, inevitably, the additional bitterness of a fratricidal strife. Many used their power to settle old disputes over land or property” (Clayton, 46).

59. Ibid., 46.

60. Rosberg and Nottingham, 336-337.

61. Effective, yes; a violation of conventional law of war, absolutely. See Common Article 3 of both GC and GPW for language clearly prohibiting intimidation, the use of threats, and coercion.

62. Elkins, journal article, 217. In her citation for this information, Elkins further states that “several informants reported askaris [locally recruited African soldiers], under direction of European officers, castrating detainees as one effort to force them to confess. Others alluded to sodomy but refused to provide details. One informant, however, did specifically discuss forced sodomy during his period of detention.” Additionally, Kariuki makes two references to detainee castrations (Kariuki, 41, 131).

63. Kariuki, 48-105. The list of conventional law-of-war violations represented by the data in Figure 3 includes: GC 3.1.c; GC 20; GC 27; GC 31.a; GC 89; GC 91; GC 97; GC 100; GPW 3.1.c; GPW 13; GPW 17; and GPW 18. Kariuki encountered a form of physical degradation and psychological intimidation while in the Manyani camp that was clearly a violation of both GPW 3.1.c and GC 3.1.c: “Those whom [the compound officer in charge] particularly disliked he would force to remove their trousers and piggy-back another naked person. This was the most shameful thing of all” (Kariuki, 89). Disturbingly, undisciplined coalition security forces engaged in this same practice in Iraq in 2004. In the interest of impartiality, this author feels compelled to observe that Kariuki’s value as a primary source is somewhat diminished by the fact that he was an unabashed Mau Mau sympathizer: “It was not [the Land Freedom Army Mau Mau fighters] job to kill civilians: they fought those fighting against them and they were responsible for many daring raids and hard fought battles, such as the attack on Naivasha Police Station and assaults on Home Guard Posts and Administrative Headquarters. In so far as any war is ever fought cleanly, they fought this one cleanly” (Kariuki, 95). In light of the law-of-war violations committed by the Mau Mau during the Lari Massacre, Kariuki’s definition of a clean fight is suspect.

64. October 1957: During one of the beatings Kariuki received while at Athi River, he sustained a split face, fractured right knee, pierced chest, shaved body, and solitary confinement without food or water for 48 hours. When released back to the general camp population he smuggled letters out to the Colonial Secretary, Member of Parliament (MP) Barbara Castle, the Commissioner of Prisons, and the colonial government’s Attorney General. His letter resulted in a Commission

of Inquiry from Nairobi into the incident.

65. In a 1950s analog version of 21st-century World-Wide-Web information sharing, Kariuki frequently bribed detention-camp wardens to mail letters he wrote detailing camp abuses to colonial office government officials in Nairobi. On more than one occasion, these letters wound up on the desk of MP Barbara Castle who, according to parliamentary debate records, publicly demanded the government investigate the allegations.

66. *Kenya News*, Press Office Handout No. 142: "Death of Ten Detainees at Hola." Cited in Clayton, 345, citation 53.

67. MacPhee, 152.

68. Kariuki, 41.

69. Caroline Macy Elkins, *Detention and Rehabilitation During the Mau Mau Emergency: The Crisis of Late Colonial Kenya* (Ph.D diss., Harvard University, 2001), 234. Hereafter referred to as Elkins, dissertation.

70. Ibid. Elkins summarizes the villagization program with these words: "Similar to the detention camps and prisons, the Emergency villages offered a controlled environment where the government could confine the Kikuyu inhabitants behind barbed wire and deep trenches, control their movements, extract their labor, and punish them for uncooperative behavior. In effect, the government instituted a policy of sending the men to the Pipeline, and the women and children back to the reserves and into the Emergency villages.

71. Elkins, journal article, 207; see also Elkins, dissertation, 231. Kariuki describes the impact of these villages on the Kenyan countryside with these words: "The landscape was only marred by the huge conglomeration of huts on every ridge, the villages into which the people had been moved early in the Emergency" (Kariuki, 137).

72. Elkins, journal article, 207; see also Elkins, dissertation, 232.

73. Elkins, journal article, 207.

74. Elkins, journal article, 208; see also Elkins, dissertation, 233.

75. Elkins, dissertation, 259-276.

Chapter 5

Consequences of the Emergency

*The power of a letter, especially if copied to politicians in England, never ceased to surprise me.*¹

Thus far this study has addressed the who, what, when, where, and, to a certain degree the why of Mau Mau emergency law-of-war violations. This is all essential information leading up to the most important part of our analysis: the so what. To assess the consequences of the emergency we will look at three topics: British press coverage of law-of-war violations, the political fallout resulting from reports of law-of-war violations, and British military reactions to the emergency.

Research reveals that reports of law-of-war violations committed by all parties to the emergency reached the outside world through a variety of channels. Figure 4 depicts how some of those reports were made public:

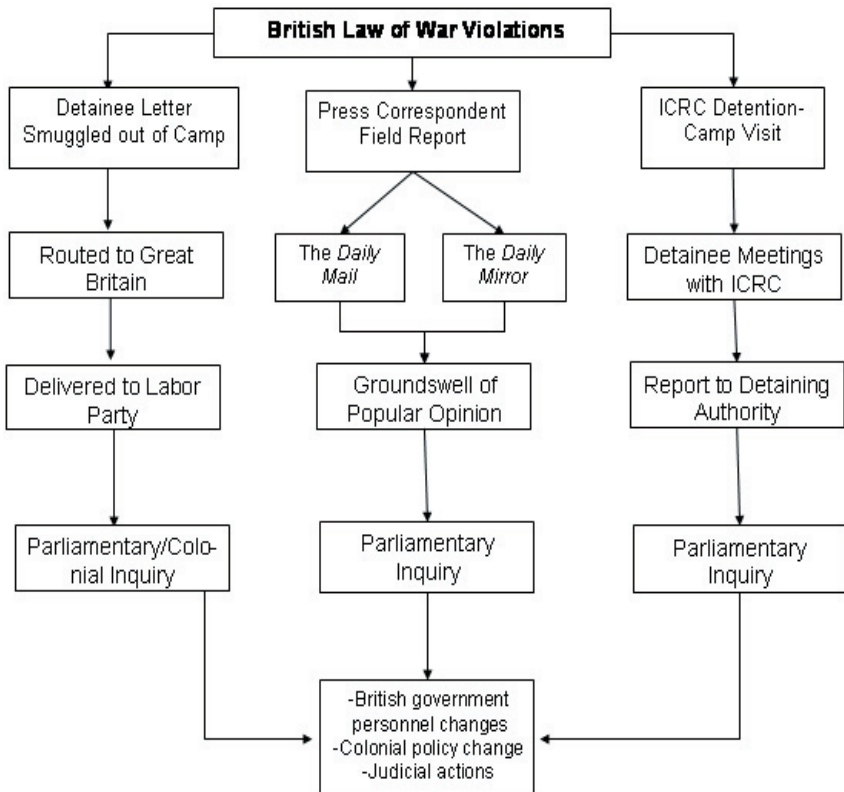


Figure 4. Law-of-War Violations Reporting Flowchart

We have already mentioned how detainee letters influenced senior British politicians like MP Barbara Castle, who demanded formal investigations into detention-camp practices; in fact, it was Kariuki's adamant refusal to cease his secretive letter-writing campaign that got him into trouble while in the pipeline.² Additionally, the ICRC dispatched inspection teams to detention camps where inspectors met with detainees like Kariuki and others and formally recounted law-of-war violations to the colonial government in Nairobi and to the British government in London. But it was the work of British press correspondents, publicized in two of Great Britain's largest newspapers, that exerted the most visible, and vocal, pressure on the British government and its colonial policies.

Popular Press

According to Joanna Lewis, lecturer in African History at the University of London's School of Oriental and African Studies, "The coverage of colonial news was a serious business in the 1950s, especially when a crisis erupted, involving British troops and provoking international criticism."³ These words set the stage for our analysis of the power of British popular press during the Mau Mau emergency. Lewis' research indicates that during this decade broadcast radio and, to a lesser extent television were alternative forms of news dissemination; however, for more than 15 million Britons, their primary news source was one of two daily newspapers: either the *Daily Mail* or the *Daily Mirror*.⁴ Both papers relied on sales rather than advertisements to generate income, and both used photographs and cartoon illustrations to reinforce their stories. Each claimed to be ideologically independent but in reality maintained a loyalty to a political party: the *Daily Mirror* supported the Labor Party agenda while the *Daily Mail* backed the party in power during the emergency, the Conservatives led by Prime Minister Harold MacMillan.⁵

Before the emergency declaration in October 1952, only the *Mail* provided its readers with any real sense of the situation developing in Kenya. Because of its conservative bent, the *Mail* focused on settlers' issues and on reinforcing that the government's best economic, and therefore political, interests lay in supporting the settlers' efforts to control the Kikuyu. It interviewed Sir Godfrey Huggins, Prime Minister of Southern Rhodesia (yet another British colony), for a European perspective on the dangers of a proposed plan to create a federation of African countries, and it ran stories with titles like, "The Women May Decide in New Dominion [Kenya]," "Kenya Unrest to be Probed. New Attacks by Mau Mau. Swordsmen Surround Mission," and "How Recruits

Join Mau Mau—Secret Terrorist Movement Enrols [sic] 200,000 in Kenya.” In contrast the *Mirror*, with its blue-collar focus on sports and sensationalistic gossip about the Royals, devoted little space to the white settlers’ problems in Kenya before mid-October 1952; it was not until 17 October that the *Mirror* ran its first story about Kenya with a single paragraph titled, “Government Backs the New Kenya Laws.” In late October, however, events in Kenya became “a journalist’s dream and a press proprietor’s early retirement package” as Mau Mau resulted in the extension of the *Mail*’s coverage and the beginning of the *Mirror*’s intense coverage.⁶

For the first two months of the emergency, the only news story that rivaled coverage of events unfolding in Kenya was the death of King George VI and the coronation of Queen Elizabeth II (interesting side note: in October 1952 then Princess Elizabeth and her husband were vacationing at the Royal hunting lodge in Kenya within sight of Mau Mau insurgent forest hideouts); other than that, emergency news reports occupied almost every page. Both papers focused on three common aspects: the arrival of British troops, the horrific African violence, and the innovative use of photo-journalism.⁷ The *Mirror* ran sensational stories with titles like, “Emergency Decreed as Kenya Troops Land,” “All Terrorist Leaders Arrested say Kenya Police,” and on 27 October, “All Quiet on the Kenyan Front—or Is It?”

When reports of the Mau Mau attacks at Naivasha and Lari surfaced, the *Mirror* ran stories such as “Suburbia in Darkest Africa Sits Tight on DYNAMITE,” along with “African Burns Down Church,” and it used action shots of soldiers and police to keep the readers’ attention. Not to be outdone, on 16 October the conservative *Mail* ran this front-page headline: “Men of Mau Mau—In Kenya it Means ‘The Greedy Eaters,’” and five days later “Britain Blitzes the Terror: Troops Fly In—and Round-up Starts: ARRESTS BY THE HUNDREDS—Kenya Emergency—Backed by Troops from Suez.” Both papers began the month by showcasing sensational emergency stories and pictures, but while the *Mail* continued to support the Conservative Party and its colonial policies, by the first week of November a sea change had occurred at the *Mirror* as it began to project dissatisfaction (the back page of the 30 October edition levied a “dilly-dally charge” against the government) with Prime Minister MacMillan’s administration. Leading the charge for the *Mirror* was James Cameron, a reporter known as one of the best investigative journalists of his time. His efforts exposed news of security-force law-of-war violations for millions

of British readers.⁸

Political Fallout

Throughout November and December 1952, the tenor of the *Daily Mirror's* coverage turned progressively anti-government. Guided by Cameron's reporting and editorials, the *Mirror* chronicled the emergency as resulting from oppressive colonial policies and excessive state repression. For example, headlines in November included "15 Die as Police Fire on Kenya Mob," and "Army Evicts 7,000 in Kenya Murder Zone." In early December, the *Mirror* turned up the anti-government rhetoric with an editorial acknowledging Mau Mau as evil but cautioning that the excessive use of force by British security elements posed an even greater danger. Joanna Lewis identifies two key themes in this particular editorial: the claim that the government's emergency programs had alienated a million Kikuyu, and, most significant from this study's perspective, the claim that British Colonial Secretary Lyttelton was solely to blame for the emergency problem. The *Mirror* followed this editorial one day later with a report that an inside source had revealed the Labor Party had prepared a plan to counter Lyttelton's emergency program.⁹ These and other commentaries demanding investigation into allegations of security-force abuses or colonial-policy ineffectiveness revealed an important shift in popular reporting: In the eyes of the editors and reporters at the *Daily Mirror*, Mau Mau had become more than just a source of sensational news; it had become a forum for voicing political dissatisfaction and for demanding political action.

December 1952 marked the end of dedicated emergency coverage by the *Daily Mirror* as it reverted back to its traditional focus, and while the *Daily Mail* ran occasional stories on the emergency, neither paper approached the situation in Kenya with anything near the frenzied level characteristic of early 1952. In November 1953, however, the emergency was front-page news again thanks to the Captain Griffiths court-martial. The *Daily Mail* chose to print a front-page photo of Griffiths with his name and rank, followed a few pages later by a straightforward story, and then a follow-up story on General Erskine's security-force code-of-conduct policy, possibly in an attempt to support the government's policies in Kenya.

The *Daily Mirror*, on the other hand, went with its trademark sensationalistic approach right from the start. With headlines like "'Shoot Anyone You Like—If He is Black': a British officer is alleged to have given this order" and a two-page account of the policy and kill-board allegations titled "A Terrible State of Affairs," the *Mirror's* readership was quickly

drawn back into the emergency situation. The *Mirror* took it upon itself to represent its constituency and its demands for a public inquiry (even though this author found little evidence to support the existence of such a “public” demand), and in late November 1953 ran an editorial titled “What is Going on in Our Colonies?” By way of answering its own question, the editor proclaimed it was Parliament’s duty to its “500,000 coloured subjects in the British Commonwealth . . . to find out . . . just what is being done in our name.”¹⁰

Two subsequent editions of the *Mirror* continued this demand for an investigation. The first ran this inflammatory headline: “Kenya Storm Breaks—MPs Told of General’s Warning—Don’t Just Beat Them Up Because They Live There!” and the second used its back-page world-news report section to describe the reaction (Lewis reports that the paper called the reaction “shock”) to the government’s emergency programs.¹¹ The press reaction to the Griffiths court-martial illustrated two things: It reinforced that a tactical action can have strategic implications, and it demonstrated just how quickly the press could ramp-up its emergency coverage when a newsworthy event came to light.

Even though popular exposure to the emergency tapered off after the Griffiths trial, Parliament continued to receive reports of alleged abuses and law-of-war violations by other means. Clayton notes that between 1953 and 1959, parliamentary interest in the emergency remained high, citing parliamentary debates and commons reports revealing the “close attention paid by MPs, nearly all Labour, . . . and also occasionally indicating the sources for their questions.”¹² Kariuki’s letter-writing campaign, along with like-minded detainees, provided an insider’s perspective on detention-camp activities. Additionally, camp visits conducted by parliamentary delegations and the ICRC provided MPs with firsthand information from, at least in the case of the ICRC, impartial observers. As a result of visits such as these and Kariuki’s letters, MP Castle personally investigated at least three separate allegations of security-force practices and commented on her investigations in three *Mirror* articles in December 1955.¹³ The Hola incident in March 1959 and its associated press coverage, however, finally gave the Labor Party its ammunition to force conservative acknowledgement about the need to revise colonial policies. It also marked the beginning of the end of the British Empire in Africa.

The colonial government compounded the tragedy surrounding the deaths of eleven detainees with its amateurish cover-up attempt. Even though Colonial Secretary Alan Lennox-Boyd offered to resign, Prime

Minister MacMillan convinced him to stay on, ostensibly so the Secretary's career would not end in shame, but perhaps also because the Conservative Party faced a general election in October 1959. Instead of resigning, Lennox-Boyd ordered R.D. Fairn, a prison commissioner, to conduct a formal investigation into the Hola affair; his committee's final report of the practices at Hola and other detention camps was damning.¹⁴ Despite press coverage in Great Britain and Kenya and debate in the House of Commons fueled by the Fairn Committee Report, no senior British government official was held accountable.

The tragedy did, though, have considerable second-order effects on MacMillan's administration. Rossberg and Nottingham observe that the House of Commons held not one, but two debates on the incident in a six-week period that summer, with the Labor Party condemning the conduct of all parties to the incident.¹⁵ Maloba characterizes the incident as a "turning point in Kenya's history: the British government found it impossible to remain indifferent to the internal events in Kenya, *for the publicity given to them was causing political problems* for Prime Minister Harold MacMillan" (emphasis added).¹⁶ One of the Conservative Party's own, J. Enoch Powell, assessed the incident as "a great administrative affair."¹⁷ After the October 1959 general elections, Great Britain had a new Colonial Secretary in Ian Macleod, whom MacPhee describes as a "radical Tory with a practical view of the events taking place in Africa."¹⁸ By the end of 1959, the British government was clearly re-evaluating its position on Kenya and Kikuyu political demands as articulated by the Kenya African Union. In MacPhee's words, "The Africans were on the march and it was up to Britain to get out of Africa as quickly and decently as she could;" and the new Colonial Secretary said in early 1960 that, "Hola helped convince me that swift change was needed in Kenya."¹⁹

In July 1959, the *Mirror* ran a story indicating Labor MPs were demanding both Lennox-Boyd's and Governor Baring's resignations; after that point its fascination with the emergency ended. The *Mail*, true to its conservative heritage, covered the Hola investigation with a less than inflammatory story headlined by: "Errors by Exemplary Officer Led to Mau Prison Disaster."²⁰ Lewis' analysis of this period includes an observation that by the end of the 1950s, the *Mail* had concluded "it was time to drop the burden of colonial rule."²¹ Perhaps her most telling observation is that while the *Mirror* was "revolted by the barbarity of Mau Mau, it was equally revolted by strong-arm tactics in the face of a crisis that had political and economic roots. The *Mirror* was concerned that imperial force would both poison race relations and ruin the United Kingdom's reputation

as a liberal, law-abiding, colonial power.”²² For another perspective on Mau Mau and its influence on government policy, we turn once again to Anthony Clayton:

The Hola affair, occurring as it did immediately prior to a General election. . . confirmed the leaders of the Party, in particular MacMillan and Ian Macleod, in their belief that change was inevitable. It can be claimed, therefore, that the fate of the Central African Federation and the early granting of majority rule in Tanganyika [modern-day Tanzania] were in large part the consequence of Mau Mau.²³

British Military Reaction

In response to the emergency, the military revised its law-of-war doctrine and published think-pieces focused on training and organizational initiatives. British security forces began the emergency with the 1936 edition of the *Manual of Military Law* to guide their conduct, but in 1958 the Ministry of Defense (MOD) had published Part III of the *Manual of Military Law* (Parts I and II had previously been published in 1951), directly reacting to Great Britain’s ratification of Geneva 1949. This manual, with its clear reference to the civilian protections defined in GC, framed British military conduct for the final two years of the emergency and caused an immediate decrease in pipeline and villagization law-of-war violations, an improvement corroborated by Kariuki and emergency historians.

In 2004, the MOD published the 9th edition of British law-of-war doctrine titled *The Manual of The Law of Armed Conflict*. It owes its existence to a number of factors. The 1977 Protocols to the Geneva Conventions of 1949 were the primary catalyst for change, but this version also incorporated lessons learned during the Gulf conflict of 1991 and the International Criminal Tribunals for Yugoslavia and Rwanda. Why did it take 46 years for Great Britain to publish a revision to its law of war doctrine? The 1958 version proved sufficient up until the 1977 Protocols were drafted; in fact, the MOD began revising law-of-war doctrine as early as 1979. But Great Britain did not ratify the 1977 Protocols until January 1998, and it took another six years beyond that to incorporate additional changes.²⁴ In addition to these doctrinal responses to changes in conventional international law, one of the most prominent British military thinkers of his time, Lieutenant General Frank Kitson, contributed time and thought to the discussion concerning low-intensity conflict/counterinsurgency unit organization initiatives and training programs.²⁵

In Summation

The Mau Mau emergency was expensive. Security forces killed over 11,000 Mau Mau fighters, detained somewhere between 40,000 and 77,000 in the pipeline, and forcibly relocated roughly a million Kikuyu from the highlands to the Kikuyu Reserves. The security forces themselves lost 167 men with an additional 1,582 wounded; of the 1,877 civilians killed, 96 percent were Africans. Total monetary costs to fund emergency programs approximated \$107,352,000. The Kenyan colonial government exhausted its budget surplus during the first year of the emergency and was forced to request financial aid from Great Britain. During the height of the counterinsurgency program, monthly emergency costs ran close to \$2 million based on pipeline, villagization, and patrol expenses—one estimate put the cost to capture and detain a Mau Mau fighter at over \$19,000 each.²⁶ While the tangible costs of the emergency are relatively easy to compute, the intangible costs of its programs and the law-of-war violations are much harder to assess.

Historian Frank Furedi argues that even though security forces successfully drove the insurgent fighters into the forest sanctuary, thereby preventing the emergence of a more coherent national liberation movement, tactical successes merely delayed long-term strategic changes since Great Britain granted Kenya its independence in 1963.²⁷ The law-of-war violations brought to light by the press, detainee letter-writing campaigns, and camp visits had some impact on the Conservative Party's ability to continue its colonial policy and on the political careers of specific individuals. Perhaps the most challenging consequence of all to assess is the impact law-of-war violations had on Great Britain's collective psyche and international reputation. When everything is said and done we are left with this hard to define but fundamental question: What is the real price a sovereign power pays for allowing its security forces to act outside the domain of the law of war? This was a legitimate question during the Mau Mau emergency, and it remains so today.

Notes

1. Kariuki, 135.

2. One parliamentary delegation to Kenya observed that “brutality and malpractices by the police have occurred on a scale which constitutes a threat to public confidence in the forces of law and order” (Clayton, 45). Following the conclusion of the 1954 criminal case involving the 18-year-old KPR officer Brian Hayward and other KPR officers, MP Castle wrote an article on detainee-abuse practices published in the 10 December 1955 edition of the *Mirror* (Clayton, 45, citations 87, 88). It was still too early in the emergency for efforts like these to have much impact on colonial policy, but subsequent reports of law-of-war violations would eventually reverse that trend. One of Kariuki’s letters made it to Castle in 1959 and prompted her to raise the conditions in detainee camps as a matter of concern for the House of Commons. As a result of her comments, over 200 Members of Parliament demanded a full inquiry into all the camps, but the demand was denied by the Colonial Secretary Oliver Lyttelton (Clayton, 50). One month later, the Hola incident would graphically showcase the law-of-war violations taking place in the camps by security forces.

3. Joanna Lewis, “Daddy Wouldn’t Buy Me a Mau Mau: The British Popular Press and the Demoralization of Empire,” in *Mau Mau and Nationhood: Arms, Authority, and Narration*, eds. E.S. Atieno Odiambo and John Lonsdale), 229. Lewis is also the author of *Empire State-Building: War and Welfare in Colonial Kenya, 1925-1952*.

4. *Ibid.*, 228-229.

5. *Ibid.*, 227-229.

6. *Ibid.*, 230-233. The full quote, found on page 231, reads: “A journalist’s dream and a press proprietor’s early retirement package [as] Kenya’s crisis fed racial prejudice and lined city pockets.”

7. *Ibid.*, 233.

8. *Ibid.*, 232-235. Lewis credits Cameron with providing *Daily Mirror* readers with two perspectives on Mau Mau that differed from the *Mail* coverage. First, Cameron stressed that the causes of Mau Mau ran deeper than mere superstitious railings of an uneducated society, and second, he warned that some settlers were exploiting the emergency to “impose even greater ascendancy over the African” and were guilty of “racial arrogance” (Lewis, 235).

9. *Ibid.*, 236-237.

10. *Ibid.*, 241.

11. *Ibid.*, 241-242.

12. Clayton, 37, citation 73.

13. Ibid., 55.

14. Rossberg and Nottingham, 346. The Fairn Committee reported in its analysis of the Hola incident that committee members had “seen and talked with injured men in the camps and we have had impressive testimony from responsible people on all sides that violence, not just corporal punishment, was often used in the past by the ‘screening teams’ to compel confessions.”

15. Ibid., 347.

16. Maloba, 143.

17. Rossberg and Nottingham, 347.

18. MacPhee, 153.

19. Ibid.; Rossberg and Nottingham, 347.

20. Lewis, 244-245.

21. Ibid., 245.

22. Ibid., 246.

23. Clayton, 61.

24. United Kingdom Ministry of Defence. *The Manual of The Law of Armed Conflict* (Oxford: Oxford University Press, 2004), vii-ix.

25. Frank Kitson, *Low Intensity Operations: Subversion, Insurgency, Peace-keeping* (London: Archon Books, 1975), 165ff. While a student at the Staff College at Camberly in 1956, Lieutenant General Kitson authored a think-piece on the subject of low-intensity conflict training and organization initiatives. Kitson advocated a two-pronged approach: a comprehensive training and education program with special emphasis on information collection and tactical-level intelligence processing, and a series of organizational initiatives to help create and resource low-intensity conflict/counterinsurgency-operations specialty units. It is interesting to note that Kitson does not mention anywhere in his description the need to teach and/or reinforce the regulatory concepts of the law of war. At one point in another of his studies, when discussing how to treat insurgents upon capture, he infers a requirement to comply with the law of war but refrains from overtly referencing the same: “The key to the whole business lies in persuading the prisoner to change sides and all of his treatment, including his interrogation, should be carried out with this in mind. *There must certainly be no brutality*” (emphasis added); Frank Kitson, *Bunch of Five*, (London: Faber and Faber Ltd, 1977), 290. The author acknowledges that his inability to access British military educational curricula for the post-Mau Mau period precludes a more detailed analysis.

26. MacPhee, 135, 143-144. All monetary figures have been converted to 2004 US dollars.

27. Furedi, 124.

Chapter 6

Conclusions

*No country which relies on the law of the land to regulate the lives of its citizens can afford to see that law flouted by its own government, even in an insurgency situation. In other words everything done by a government and its agents in combating insurgency must be legal.*¹

In the final analysis, the extra-legal tactics, techniques, and procedures employed by British security forces in clear violation of customary international law (and to a certain degree their own law-of-war doctrine) did not tip the scales in favor of counterinsurgency operations in Kenya. This author found only one instance where a member of the security forces claimed the practice of internment without trial contributed to the success of the counterinsurgency; this same source avoided making any direct correlation between other, more physical, instances of law-of-war violations and operational success during the emergency.² Given the paucity of evidence to support any legitimate claim that law-of-war violations were unavoidable based on the demands of military necessity, one can assume, with some degree of confidence, that both the pipeline and villagization programs would have been just as successful if security forces had fully complied with the law of war.

Our study of the British experience in Kenya reveals several lessons: cultural awareness should be a component of soldier training, the media will influence policy, and the combination of inadequate soldier training, vague higher level guidance, and lax unit discipline creates a tactical environment conducive to law-of-war violations. So what can we, a half-century removed from Mau Mau, learn from this? Quite simply, some of those lessons learned by British soldiers and security forces are timeless and just as applicable to our soldiers operating in the COE. General Schoomaker's words remind us of exactly how critical the American soldier is to the success of our National Military Strategy, now and in the future:

In a conflict of daunting complexity and diversity, the Soldier is the ultimate platform. 'De-linkable' from everything other than his values, the Soldier remains the irreplaceable base of the dynamic array of combinations that America can generate to defeat our enemies in any expeditionary environment.³

Without question, the disciplined application of the law of war at the

expense of military necessity has proven challenging, but it is a challenge that our military, our political leadership, and all members of the international community must address head on. If ever an element of national policy existed that demands unwavering conviction aimed at avoiding situational ethics at all costs, this is it. The law of war represents a recognized and accepted set of standards intended to regulate battlefield conduct and safeguard civilian and combatant civil liberties; to be effective it must be professionally taught, enthusiastically trained, and rigorously enforced. This author acknowledges life is complicated, but when it comes to the law of war there is no room for equivocation: The decision to comply or violate is black or white, right or wrong, legal or illegal.

In closing, it is appropriate we revisit this study's primary question: Is the current law of war suited to the COE in general and the GWOT in particular? For this author the answer is clear: Only time will tell if the GWOT ranks equal to earlier change agents, but until Congress ratifies a revision to the law of war, Geneva 1949 remains the legal standard of conduct for all US Armed Forces regardless of the operational environment. To quote General Schoomaker: "We're going to have to [change] some of the things that made us the best Army in the world. *Our values are sacrosanct* . . . everything else is on the table"(emphasis added).⁴ Ultimately, the challenge will be determining the right balance between the practical demands of military necessity and humanitarian standards of conduct. Remaining true to both the letter of conventional international law and the spirit of customary international law is without question the road less traveled, but as the Mau Mau case study and events in Afghanistan, Guantanamo Bay, and Iraq illustrate, the alternative carries with it significant political implications, as well as the potential for near-irrevocable damage to our country's international reputation and strategic goals.

Notes

1. Kitson, *Bunch of Five*, 289.

2. Ibid., 58-59. Kitson's argument justifying the practice of internment without trial was weak at best, and clearly skirted the legality issue: "Internment without trial is not an attractive measure to people brought up in a free country, but in Kenya it undoubtedly saved many lives by shortening the conflict and by removing from the scene people who would otherwise have become involved in the fighting." This statement conflicts with his later assertion that all government activities must be legal.

3. Brownlee and Schoomaker, 8.

4. Ibid., 24.

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