UNIT 6 WHAT OTHER LAWS ARE APPLICABLE?

Structure

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6.1 INTRODUCTION

Generally all armed conflict involves action by armed forces or groups. Therefore it becomes necessary to study the rules that purport to govern their conduct, in other words, the content of the relevant military manuals currently available.

Articles 82-84 and 87 of the First Additional Protocol of 1977 specifically obligate contracting states to provide competent legal advisers acquaint military and relevant civilian personnel with International Humanitarian Law and require commanders to take preventive and/or punitive action vis-à-vis non-compliance by their subordinates. In order to fulfill these obligations, states need to acquire expertise and reference material necessary for a clear, uniform and accurate account of the legal rules. Therefore it is necessary to understand whether they emanate from the law of armed conflict or domestic law, or both as the case may be in the military operations.

Realising this need, several military manuals, began taking the approach of group all violations of the law of armed conflict under the term ‘war crimes’. While undoubtedly, excessive in the strictest sense of international law, this conception does not allow an interpretation whereby grave breaches of humanitarian law applicable in non-international armed conflicts can be included within the operative scope of the legal notion of “war crimes”. Examples of this can be found both in earlier manuals such as those in Great Britain in 1958 & in the US in 1956.

A slightly different approach has been adopted by some other recent manuals the 1992 German military manual includes references to Article 3 common to the Geneva Conventions and Protocol II when it gives a non-exhaustive list of grave breaches of international humanitarian law. Likewise, the Annotated Supplement
to the US Commander’s Handbook on the Law of Naval Operations makes several references to Protocol II when providing examples of “war crimes”.

However, while the more recent of these manuals are probably indicative of a new trend in favour of the criminalization of serious violations of humanitarian law applicable in internal conflicts, or leave the door open to such a course by the general nature or imprecision of their definition of war crimes, the legal framework for any resulting prosecution is another matter. While very useful, even essential, for understanding the rules governing the conduct of troops in the theatre of operations, something often difficult to define with precision, military manuals are considerably less pertinent when it comes to more visible elements linked to the repression and punishment of violations of such rules. Therefore, before examining the jurisprudence in this regard, we shall take a look at the relevant legal instruments, that is, laws applying the Geneva Conventions (and the Protocols thereto), general criminal law, and military penal codes.

6.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the scope of Geneva Conventions Act; and
- discuss about Military Code of Conduct.

6.3 GENEVA CONVENTIONS ACT, 1960

India having ratified Geneva Conventions on 16 October 1950, it took rather long for India to transpose them into its domestic law. The Preamble to the Act stated that it was to ‘enable effect to be given to certain international conventions at Geneva on the twelfth day of August 1949, to which India is a party and for purposes connected therewith’. According to the Statement of Object and Reasons, the matters which required to be implemented by the legislation were: punishment of grave breaches’ referred to in Article 50 of the First Convention and equivalent articles of the succeeding conventions such as the conferment of jurisdiction of Indian courts to try offences under these conventions, even when committed by foreigners outside India: extension of the protection given under the existing law to the Red Cross and Geneva Cross, to two new emblems namely, the Red Crescent and the Red Lion and Sun: and procedural matters relating to legal representation, appeal etc. However, the Act contained a provision which stated:

No court shall be take cognizance of any offence under this Act except on complaint by the Government or of such officer of the Government as the Central Government may by notification specify.

Thus, unlike this provision, it is significant to note that the Zimbabwean Geneva Conventions Act of 1981 permits to private prosecution for an offence under the common Law. After analyzing various provision of the Act, one author concluded, ‘it appears as if the legislation was drafted and passed in a hasty manner.

Indian Moral Code, Military Service:

In the Indian moral code, military service is a calling (for the soldiers), different from any other civilian occupation. The most fundamental feature that distinguishes
a soldier from his civilian counterpart is the soldier’s unlimited commitment and liability, which may result in sacrifice of one’s life. Ethics is concerned with life as it ought to be lived, entailing an unceasing struggle for self-improvement. Ethics has a special meaning to the profession of arms because it calls upon its members to make unreserved supreme sacrifice of life at the bidding of a superior in the hierarchy. Therefore, unless the man has firm faith in the ethical correctness of the superior’s motive and conduct, he will lack conviction in his act and will avoid risks to his life and honor.

6.4 MILITARY CODE OF CONDUCT

The code of conduct of the army is oriented to the soldier’s specific tasks both in combat and as a captured prisoner of war. Life loses its meaning in war for soldiers, and there is preparation for it all along. The will to kill the enemy, destroy their property and capture territory as and when ordered is part of the normalcy of the duty of army men. In the event of being captured as prisoners of war they are required to abide by a code of conduct that demands behavioral action oriented compliance. This is ensured through training, professional socialization, informal meetings, daily routine and organizational set up. The major elements of code of conduct of the army are delineated as under:

1) Fighting for safeguarding and a preparedness to give life — I am an Indian fighting man. I serve in the forces, which guard my country and our way of life. I am prepared to give my life in their defense.

2) Non-surrender on both a personal and group — I will never surrender of my own free will. If in command, I will never surrender my men while they still have the means to resists.

3) Escape on capture and denial of favours — if I am captured, I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

4) Prisoner of War refusal of information and action detrimental to comrades and country — If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

5) Refusal to provide any statements oral or written, except basic information about myself — Should I become a prisoner of war, I am bound to give only my name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements, I will not be disloyal to my country and its allies, or harmful to their cause.

6) Reminder of being a fighter and dedicated to patriotic principles — I will never forget that I am an Indian fighting man, responsible for my actions and dedicated to the principles which made my country free.
6.5 MILITARY RULES FOR PRISONERS OF WAR

The Code of Conduct (CoC) is the legal guide for the behavior of military members who are captured by hostile forces.

The Code of Conduct, in six brief Articles, addresses those situations and decision areas that, to some degree, all military personnel could encounter. It includes basic information useful to U.S. POWs in their efforts to survive honorably while resisting their captor's efforts to exploit them to the advantage of the enemy's cause and their own disadvantage. Such survival and resistance requires varying degrees of knowledge of the meaning of the six Articles of the CoC.

**Article 1** of the United States Military Code of Conduct provide that *I am an American, fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.*

From the above Article it can be inferred that it applies to all Service members at all times. A member of the Armed Forces has a duty to support U.S. interests and oppose U.S. enemies regardless of the circumstances, whether located in a combat environment or in captivity.

Medical personnel and chaplains are obligated to abide by the provisions of the CoC; however, their special retained status under the Geneva Conventions grants them some flexibility in its implementation.

The above article paves the way for every Military Personnel to know what is required of them: the past experience of captured Americans reveals that honorable survival in captivity requires that a service member possess a high degree of dedication and motivation. Maintaining these qualities requires knowledge of and a strong belief in the following:

- The advantages of American democratic institutions and concepts.
- Love of and faith in the United States and a conviction that the U.S. cause is just.
- Faith in and loyalty to fellow POWs.

Possessing the dedication and motivation, such beliefs and trust foster enables POWs to survive long and stressful periods of captivity, and return to their country and families honorably with self-esteem intact.
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The Special Provisions for Medical Personnel & Chaplains.

Under the Geneva Conventions, medical personnel who are exclusively engaged in the medical service of their armed forces and chaplains who fall into the hands of the enemy are “retained personnel” and are not POWs. While this allows them the latitude and flexibility necessary to perform their professional duties, it does not relieve them of their obligation to abide by the provisions of the CoC. Like all members of the Armed Forces.

Article II of the United States Military Code of Conduct runs as follows:

*I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.*

From the above article it can be easily understood that Members of the Armed Forces may never surrender voluntarily. Even when isolated and no longer able to inflict casualties on the enemy or otherwise defend themselves, it is their duty to evade capture and rejoin the nearest friendly force.

It also conveys that surrender is the willful act of members of the Armed Forces turning themselves over to enemy forces when not required by utmost necessity or extremity. Surrender is always dishonorable and never allowed. The conduct states that when there is no chance for meaningful resistance, evasion is impossible, and further fighting would lead to their death with no significant loss to the enemy, members of Armed Forces should view themselves as “captured” against their will versus a circumstance that is seen as voluntarily “surrendering.” They must remember that the capture was dictated by the futility of the situation and overwhelming enemy strengths. In this case, capture is not dishonorable.

Therefore the responsibility and authority of a commander never extends to the surrender of command, even if isolated, cut off, or surrounded, while the unit has a reasonable power to resist, break out, or evade to rejoin friendly forces.

Military Personnel should know the following things specifically:

- Understand that when they are cut off, shot down, or otherwise isolated in enemy-controlled territory, they must make every effort to avoid capture. The courses of action available include concealment until recovered by friendly rescue forces, evasive travel to a friendly or neutral territory, and evasive travel to other prebriefed areas.

- Understand that capture does not constitute a dishonorable act if the service member has exhausted all reasonable means of avoiding it and the only alternative is death or serious bodily injury.

- Understand and be confident in their ability to stay alive using survival skills while evading, the procedures and techniques of rescue by search and recovery forces, and the procedures for properly using specified evasion destinations.

Special Provisions for Medical Personnel & Chaplains. No additional flexibility. However, medical personnel and chaplains are subject to lawful capture. They may only resort to arms in self-defense or in defense of the wounded and sick in their charge when attacked in violation of the Geneva Convention. They must refrain from all aggressive action and may not use force to prevent their
The United States Military Code of Conduct Article III says that, if I am captured I will continue to resist by all means available. I will make every effort to escape and to aid others to escape. I will accept neither parole nor special favors from the enemy.

Going by the words of the above article it can be easily said that the misfortune of capture does not lessen the duty of a member of the Armed Forces to continue resisting enemy exploitation by all means available. Contrary to the Geneva Conventions, enemies whom U.S. forces have engaged since 1949 have regarded the POW compound as an extension of the battlefield. The POW must be prepared for this fact.

Enemies have used a variety of tactics to exploit POWs for propaganda purposes or to obtain military information in disregard of the Geneva Conventions. The CoC requires resistance to captor exploitation efforts. In the past, enemies of the United States have used physical and mental harassment, general mistreatment, torture, medical neglect, and political indoctrination against POWs.

The enemy has tried to tempt POWs to accept special favors or privileges not given to other POWs in return for statements or information desired by the enemy or for a pledge by the POW not to attempt escape.

POWs are not permitted to seek special privileges or accept special favors at the expense of fellow POWs.

The Geneva Conventions recognize that the regulations of a POW’s country may impose the duty to escape and that POWs may attempt to escape. Under the guidance and supervision of the senior military person and POW organization, POWs must be prepared to take advantage of escape opportunities whenever they arise. In communal detention, the welfare of the POWs who remain behind must be considered. A POW must “think and escape,” and must try to escape if able to do so, and must assist others to escape.

The Geneva Conventions authorize the release of POWs on parole only to the extent authorized by the POWs’ country and prohibit compelling a POW to accept parole. Parole agreements are promises a POW gives the captor to fulfill stated conditions, such as not to bear arms or not to escape, in consideration of special privileges, such as release from captivity or lessened restraint. The United States does not authorize any Military Service member to sign or enter into any such parole agreement.

Service members should be specifically aware of the following:

- Understand that captivity is a situation involving continuous control by a captor who may attempt to use the POW as a source of military information, for political purposes, and as a potential subject for political indoctrination.

- Be familiar with the rights and obligations of both the POW and the captor under The Geneva Conventions and be aware of the increased significance of resistance should the captor refuse to abide by the provisions of the Geneva Conventions. Be aware that the resistance the CoC requires is directed at captor exploitation efforts, because such efforts violate the Geneva Conventions.
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- Understand that resistance beyond that identified above subjects the POW to possible punishment by the captor for order and discipline violations. Certain actions by the POW can be prosecuted as criminal offenses against the detaining power.

- Be familiar with, and prepared for, the fact that certain countries have reservations to Article 85 of the 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War. Article 85 offers protection to a POW convicted of a crime based on facts occurring before capture. Understand that captors from countries that have expressed a reservation to Article 85 often threaten to use their reservation as a basis for adjudging all members of opposing armed forces as “war criminals.” As a result, POWs may find themselves accused of being “war criminals” simply because they waged war against these countries before capture. The U.S. Government and most other countries do not recognize the validity of this argument.

- Understand that a successful escape by a POW causes the enemy to divert forces that might otherwise be fighting, provides the United States valuable information about the enemy and other POWs in captivity, and serves as a positive example to all members of the Armed Forces.

- Understand the advantages of early escape in that members of the ground forces are usually relatively near friendly forces. For all captured individuals, an early escape attempt takes advantage of the fact that the initial captors are usually not trained guards, that the security system is relatively lax, and that the POW is not yet in a debilitated physical condition.

**Article IV of The United States Military Code of Conduct runs as**

If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

According to the above Article the Officers and noncommissioned officers shall continue to carry out their responsibilities and exercise their authority in captivity.

Informing, or any other action detrimental to a fellow POW, is despicable and is expressly forbidden. POWs especially must avoid helping the enemy to identify fellow POWs who may have knowledge of value to the enemy and who may be made to suffer coercive interrogation.

Strong leadership is essential to discipline. Without discipline, camp organization, resistance, and even survival may be impossible.

Personal hygiene, camp sanitation, and care of the sick and wounded are imperative.

Wherever located, POWs should organize in a military manner under the senior military POW eligible for command. The senior POW (whether officer or enlisted) in the POW camp or among a group of POWs shall assume command according to rank without regard to Military Service. The senior POW cannot evade that responsibility and accountability.

When taking command, the senior POW shall inform the other POWs and shall designate the chain of command. If the senior POW is incapacitated, or is otherwise unable to act for any reason, the next senior POW shall assume command. Every
effort shall be made to inform all POWs in the camp (or group) of the members of the chain of command who shall represent them in dealing with enemy authorities. The responsibility of subordinates to obey the lawful orders of ranking American military personnel remains unchanged in captivity.

U.S. policy on POW camp organization requires that the senior military POW assume command. The Geneva Convention on POWs provides additional guidance to the effect that in POW camps containing only enlisted personnel, a prisoners’ representative shall be elected. POWs should understand that such an elected representative is regarded by U.S. policy as only a spokesperson for the senior POW. The prisoners’ representative does not have command, unless the POWs elect the senior POW to be the prisoners’ representative. The senior POW shall assume and retain actual command, covertly if necessary.

Maintaining communications is one of the most important ways that POWs aid one another. Communication breaks down the barriers of isolation that an enemy may attempt to construct and helps strengthen a POW’s will to resist. Each POW, immediately upon capture, shall try to make contact with fellow POWs by any means available and, thereafter, shall continue to communicate and participate vigorously as part of the POW organization.

As with other provisions of the CoC, common sense and the conditions in the POW camp shall determine the way in which the senior POW and the other POWs structure their organization and carry out their responsibilities.

What Military Personnel Need to Know: Specifically, Service members should:

- Understand that leadership and obedience to those in command are essential to the discipline required to effect successful organization against captor exploitation. In captivity situations involving two or more POWs, the senior ranking POW shall assume command; all others shall obey the orders and abide by the decisions of the senior POW regardless of differences in Military Service affiliations. Failure to do so shall result in the weakening of organization, a lowering of resistance, and, after repatriation, may result in legal proceedings under the Uniform Code of Military Justice (UCMJ).

- Understand that faith, trust, and individual group loyalties have great value in establishing and maintaining an effective POW organization.

- Understand that a POW who voluntarily informs or collaborates with the captor is disloyal to the United States and fellow POWs and, after repatriation, is subject to disciplinary action under the UCMJ for such actions.

Article V of the United States Military Code of Conduct When questioned, should I become a prisoner of war, I am required to give name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

When questioned, a POW is required by the Geneva Conventions and the CoC, and is permitted by the UCMJ, to give name, rank, service number, and date of birth. Under the Geneva Conventions, the enemy has no right to try to force a POW to provide any additional information. However, it is unrealistic to expect a POW to remain confined for years reciting only name, rank, service number, and date of birth. There are many POW camp situations in which certain types of conversation with the enemy are permitted. For example, a POW is allowed,
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but not required by the CoC, the UCMJ, or the Geneva Conventions, to fill out a Geneva Conventions “capture card,” to write letters home, and to communicate with captors on matters of camp administration and health and welfare.

The senior POW is required to represent fellow POWs in matters of camp administration, health, welfare, and grievances. However, POWs must constantly bear in mind that the enemy has often viewed POWs as valuable sources of military information and propaganda that they can use to further their war effort.

Accordingly, each POW must exercise great caution when completing a “capture card,” when engaging in authorized communication with the captor, and when writing letters. A POW must resist, avoid, or evade, even when physically and mentally coerced, all enemy efforts to secure statements or actions that may further the enemy’s cause.

Examples of statements or actions POWs should resist include giving oral or written confessions; making propaganda recordings and broadcast appeals to other POWs to comply with improper captor demands; appealing for U.S. surrender or parole; engaging in self-criticisms; and providing oral or written statements or communications on behalf of the enemy or harmful to the United States, its allies, the Armed Forces, or other POWs. Captors have used POWs’ answers to questions of a personal nature, questionnaires, or personal history to create improper statements such as those listed above.

A POW should recognize the enemy might use any confession or statement as part of a false accusation that the captive is a war criminal rather than a POW. Moreover, certain countries have made reservations to the Geneva Conventions (reference (g)) in which they assert that a war criminal conviction has the effect of depriving the convicted individual of POW status. These countries may assert that the POW is removed from protection under reference (g) and the right to repatriation is thus revoked until the individual serves a prison sentence.

If a POW finds that, under intense coercion, he unwillingly or accidentally discloses unauthorized information, the Service member should attempt to recover and resist with a fresh line of mental defense.

POW experience has shown that although enemy interrogation sessions may be harsh and cruel, it is usually possible to resist, if there is a will to resist.

The best way for a POW to keep faith with the United States, fellow POWs, and oneself is to provide the enemy with as little information as possible.

Article VI of United States Military Code of Conduct read as follows

I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

From the above Article it may be safely said that A member of the Armed Forces remains responsible for personal actions at all times. Article VI is designed to assist members of the Armed Forces to fulfill their responsibilities and survive captivity with honor. The CoC does not conflict with the UCMJ, which continues to apply to each military member during captivity or other hostile detention. Failure to adhere to the CoC may subject Service members to applicable disposition under the UCMJ.
When repatriated, POWs can expect their actions to be subject to review, both as to circumstances of capture and as to conduct during detention. The purpose of such review is to recognize meritorious performance and, if necessary, investigate any allegations of misconduct.

Such reviews shall be conducted with due regard for the rights of the individual and consideration for the conditions of captivity.

A member of the Armed Forces who is captured has a continuing obligation to resist all attempts at indoctrination and remain loyal to the United States.

The life of a POW may be very hard. POWs who stand firm and united against enemy pressures shall aid one another immeasurably in surviving this ordeal.

Self Assessment Question

2) Explain briefly the Military Code of Conduct followed by the U.S. Military relating to Prisoners of War.

6.6 SUMMARY

- Understand the relationship between the Uniform Code Military Justice and the CoC, and realize that failure to follow the guidance of the CoC may result in subsequent disposition under the UCMJ. Every member of the Armed Forces of the United States should understand that Service members may be held legally accountable for personal actions while detained.

- Understand that the Military Services, as prescribed in Federal law, shall take care of both the POW and dependents and that pay and allowances, eligibility and procedures for promotion, and benefits for dependents continue while the POW is detained even if the enemy does not report the Service member as being a POW and his or her status reflects missing in action.

- Understand the importance of military members ensuring that their personal affairs and family matters (pay, powers of attorney, wills, debt payments, and children’s schooling) are kept current through discussion, counseling or filing of documents before being exposed to risk of capture.

6.7 TERMINAL QUESTIONS


2) Discuss the main features of Military code of conduct of India.
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6.8 ANSWERS AND HINTS

Self Assessment Questions
1) Refer to Section 6.4
2) Refer to Section 6.5

Terminal Questions
1) Refer to Section 6.3
2) Refer to Section 6.4

6.9 REFERENCES AND SUGGESTED READINGS
1) U.S. Military Code of Conduct
2) Geneva Convention Act, 1960

6.10 GLOSSARY

Prisoners of War: One who is captured during the war.