ARTICLE

Pray Fire First Gentlemen of France[1]: Has 21st Century Chivalry Been Subsumed by Humanitarian Law?

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This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."

Parker v. Levy, 417 U.S. 733, 743 (1974) (citations omitted).

Introduction

In 1956 the U.S. Army's FM 27-10 required that belligerents conduct hostilities "with regard for the principles of . . . chivalry . . . ." Similarly, the 1958 ¶3 British Manual of Military Law Part III ¶3 stated that chivalry was one of the three principles which determined development of the law of war, saying it "demands a certain amount of fairness and a

[1] In a famous incident at the battle of Fontenoy in 1745, English troops advancing to invest the heights encountered troops of the French Regiment of Guards. Lord Charles Hay, the English commander, doffed his hat and the French officers returned the salute. He called out words, probably most accurately reported as "Gentlemen of the French Guard, Fire." The French replied, "We never fire first; fire yourselves," and the English commenced firing. In his memoires, Maurice de Saxe who commanded the French troops, noted that tactical advantage in single shot musketry called for letting the opposing side fire first because they would find it unnerving that their fusillade had so little effect on the discipline of his troops.

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certain mutual respect between the opposing forces . . . ." Despite those requirements, however, no clear definition of the term existed in a form which provided legal guidance for an officer concerned with international law compliance.

The current (2004)[3] British Manual drops the chivalry requirement,[4] saying only that the Martens Clause[5] "incorporates the earlier rules of chivalry that opposing combatants were entitled to respect and honor."[6] One premise of this Article is that international humanitarian law is not a substitute for the specific elements of chivalry, and that chivalric obligations must continue to guide military conduct, as U.S. law currently requires. It is written primarily at the tactical level, although aspects apply to operational and strategic matters. After an historical survey, it examines modern

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[3] UNITED KINGDOM MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT (2004).

[4] Upon inquiry, two of the British Manual's principal authors (Anthony Rogers and Charles Garraway) provided insight about the reasoning behind the exclusion of the term "chivalry." Professor Rogers noted that "the concept seemed a bit old fashioned and of limited relevance to twenty-first century readers, especially in a multi-cultural and multi-religious environment." E-mail from Anthony Rogers to author (June 1, 2011) (on file with author) (Major General Rogers was the general editor of the 2004 UK Ministry of Defence Manual of the Law of Armed Conflict); Prof. Garraway notes that "My recollection is the same as [Professor Rogers] - though I too rather regret the loss of the term "chivalry" as I think it contains elements that go beyond humanity." E-mail from Charles Garraway to author (June 14, 2011) (on file with author) (Professor Garraway is the current general editor of the UK Ministry of Defence Manual of the Law of Armed Conflict and was on the editorial board of the 2004 edition).

[5] 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.

Convention (II) with Respect to the Laws and Customs of War on Land, Preamble, 29 July 1899, 32 Stat. 1803.

[6] Section 2.4.3 of The Joint Service Manual of the Law of Armed Conflict provides in Chapter 2 "Principles" under "Humanity" that:

> The principle of humanity can be found in the Martens Clause in the Preamble to Hague Convention IV 1907.9. It incorporates the earlier rules of chivalry that opposing combatants were entitled to respect and honour. From this flowed the duty to provide humane treatment to the wounded and those who had become prisoners of war.

chivalry both through positive requirements and negative prohibitions in the national codes of the United States and the international law of war, and analyzes the application of those strictures in regulations, case authorities, and commentary.

The positive requirements of chivalry currently include courage, trustworthiness, mercy, courtesy, and loyalty, and are mandated both by cultural training (e.g., the military academy honor codes) and by legislative or regulatory prohibitions against violations (e.g., conduct unbecoming). The negative prohibitions are represented both by national codes and by war crime bans against specific conduct types (e.g., treachery, perfidy, and breach of parole). There are, of course, localized chivalric mores that vary from nation to nation, but the underlying requirements for what constitutes honorable conduct are uniquely consistent among modern[7] times and cultures.

International humanitarian law is, or should be, applicable both by and to all battlefield participants, civilian and military alike. The positive norms of chivalry, as part of law of war, are uniquely applicable to combatants, both legal and illegal. There is often a clear distinction between the two although lines may blur in situations other than war (e.g., peacekeeping operations). When, however, non-military noncombatant personnel interact with protected persons, IHL does not require conduct unique to chivalry: courage (including moral courage), courtesy, or loyalty. Thus, unless all law of war and the national military codes are subsumed in IHL, and if the positive elements of chivalry are essential to control of combat improprieties, then they continue to be needed and the British Manual is incorrect. The thesis of this Article is that chivalric elements are essential, and that the new British Manual erred in its elimination of chivalry as a positive required principle of the law of war.

II. Defining International Humanitarian Law

The estimable Ted Meron has identified a fusion of law of war and human rights law into international humanitarian law but recognizes that

[7] The word "modern" is meant to include the period since the 16th–17th century development of national states and armed forces. Prior to that time the code of chivalry was much more personalized to relations among individuals. *See* discussion, *infra*, at III.

"it must be noted that neither regime will entirely subsume the other[8]—to some extent different rules will always apply to war and peace."[9] In 1977,[10] Pictet observed in introducing an International Committee of the Red Cross ("ICRC") discussion of the Protocols,[11] that the ICRC had "a long-standing practice of working for the development of international humanitarian law, which regulates the conduct of hostilities in order to mitigate their severity," and which was particularly concerned with "protection of the civilian population against the effects of hostilities." Pictet noted that the ICRC "[tried to obtain] guarantees for the benefit of victims of conflicts . . . as required by humanitarian considerations, but [realistically] taking into account military and political constraints."[12]

In essence, IHL developed exponentially as the threat to civilians from state action,[13] particularly as nuclear weapons proliferated.[14] Taken in

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[8] Which is not to say that some commentators have not assumed just that. *See, e.g.*, Steven Kuan-Tsyh Yu, *The Development and Implementation of International Humanitarian Law,* 11 Chinese (Taiwan) Y.B. INT'L L. & AFF. 1, 1 (1991)(citing J.G. Starke, Introduction to International Law 554 (10th ed. 1989). (The incorporation of human rights law into the "law of war" over the past two decades has replaced the traditional title of "law of war" first with the "law of armed conflict" and now with "international humanitarian law).

[9] Theodor Meron, Fourth Marek Nowicki Memorial Lecture: Human Rights Law Marches into New Territory (Nov. 28, 2008). *See also*, Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 (2000) (Meron says that "[d]erived as it is from [medieval] chivalry [the law of armed conflict] guarantees a modicum of fair play"). He also notes that "chivalry and principles of humanity created a counterbalance to military necessity, serving as a competing inspiration for the law of armed conflict." *Id.* at 243.

[10] Yves Sandoz et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, INT'L COMM. OF THE RED CROSS (1987), http://www.icrc.org/ihl.nsf/COM/470-750001?OpenDocument.

[11] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

[12] Pictet lists as the chief results of the Protocols: 1) "protection of the civilian population against the dangers of hostilities" (which he calls "the primary reason for the Diplomatic Conference"); 2) safeguards for civilian medical and civil defense personnel; 3) coverage of wars of liberation and guerrilla fighters; 4) regulating "the conduct of combatants, a subject which was dealt with in the Hague law. This field was in great need of updating, and most of the customary rules have now been codified." Sandoz et al., *supra* note 10.

[13] The term "humanitarian law" was also used by some in place of "law of war" or "law of armed conflict" because the nature of conflict, post-World War II, often focused on internal atrocities rather than interstate conflicts. Additionally, there was some movement in the international community towards interpreting international treaties as codifying customary

conjunction with the target area bombardments of World War Two,[15] experience demonstrated the need for stronger protection of non-combatants. Culmination of the initial efforts was reflected in the 1977 Protocols,[16] which (where it was not already reflected in the Hague Rules[17] and 1949 Geneva Conventions[18]) codified customary law.[19] While IHL

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law and rights that belong to individuals, rather than recognizing the right of the state to determine the existence of these rights and laws. See, Meron, *Humanization*, *supra* note 9 at 247-248.

[14] "A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The 'laws and customs of war'—as they were traditionally called—were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868, as well as the results of the Brussels Conference of 1874. This 'Hague Law' and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the 'Geneva Law' (the Conventions of 1864, 1906, 1929, and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law."

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8), ¶ 75, (emphasis added).

[15] There are a number of excellent books that describe the horrific effects upon civilians of strategic bombardment during the Second World War. *See, e.g.*, A.C. GRAYLING, AMONG THE DEAD CITIES (2006); R. CARGILL HALL, CASE STUDIES IN STRATEGIC BOMBARDMENT (1998); ROBIN NEILLANDS, THE BOMBER WAR (2001); and FREDERICK TAYLOR, DRESDEN: TUESDAY, FEBRUARY 13, 1945 (2004).

[16] Sandoz et al., *supra* note 10. *See also* Protocol I, *supra* note 11.

[17] Regulations Respecting the Laws and Customs of War on Land, art. 42, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631

[18] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GCI]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3219, 75 U.N.T.S. 85 [hereinafter GCII]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]; and Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV].

[19] Throughout Protocol I, and particularly in Part III, Methods and Means of Warfare Combatants and Prisoners-Of-War, customary (or existing treaty) rules and principles are

certainly includes some elements of chivalry (e.g., the prohibition against treachery), it does not include some of its most important modern aspects.[20] To understand modern chivalry, however, an examination of its history is an absolute necessity.

III. Chivalry: A Brief History

Warfare began with unremitting cruelty. In Sumaria, the defeated were sold into slavery or were slaughtered on the battlefield;[21] in Assyria, soldiers were rewarded for every seventh head so "victory generally witnessed the wholesale decapitation of fallen foes."[22] In Greece, elements of chivalry were recognizable,[23] although combatants regularly sacked cities, murdered the wounded, and slaughtered or enslaved all unransomed prisoners and captured noncombatants.[24] Durant notes that "the right of victors to slaughter their prisoners was generally accepted throughout

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articulated. Those include that choice of "methods or means of warfare is not unlimited," and prohibition of causing "superfluous injury or unnecessary suffering [Article 35], prohibition of perfidy but not ruses [Article 37], misuse of recognized emblems [Article 38] and emblems of nationality such as flags and uniforms [Article 39], the prohibition against denying quarter [Article 40], protection of persons hors de combat [Article 41], the requirement of distinction "between the civilian population and combatants and between civilian objects and military objectives" [Article 48], indiscriminate attacks and reprisals against civilians [Article 51] and protection of civilian objects, cultural and religious objects and objects indispensable to the survival of the civilian population [Articles 52-54]. Other provisions simply exemplify existing requirements, e.g., "take all *feasible* precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects" and "effective advance warning shall be given of attacks which may affect the civilian population, *unless circumstances do not permit*." [Article 57] (emphasis added).

[20] *See infra* Part IV. Part of the confusion of the terms is perhaps reflected by or even based on Meron's statement that "[a]lthough the term 'international humanitarian law' initially referred to the four 1949 Geneva Conventions, it is now increasingly used to signify the entire law of armed conflict." Meron, *Humanization*, *supra* note 9, at 239.

[21] WILL DURANT, THE STORY OF CIVILIZATION: PART I, OUR ORIENTAL HERITAGE 126 (1935).

[22] *Id.* at 271.

[23] For example, the young men of Athens, upon entering military service, took an oath that "I will not disgrace the sacred arms nor will I abandon the man next to me, whoever he may be." WILL DURANT, THE STORY OF CIVILIZATION: PART II, THE LIFE OF GREECE 290 (1939). When two Athenian generals declined to give battle, the Assembly indicted them for cowardice. *Id.* at 470.

[24] *Id.* at 295.

antiquity,[25] and the Romans thought themselves generous in giving captives a chance for their lives in the gladiatorial arena."[26]

Historical chivalry's origins[27] are intertwined with the rise of Christianity and Islam.[28] Durant nicely describes the theory and reality of knightly conduct:

> Theoretically the knight was required to be a hero, a gentleman, and a saint . . . . The knight pledged himself always to speak the truth, defend the Church, protect the poor, make peace in his province, and pursue the infidels. To his liege lord he owed [loyalty] . . . to all knights he was to be a brother in mutual courtesy and aid. In war he might fight other knights; but if he took any of them prisoner he must treat them as his guests . . . all this, however, was chivalric theory. A few knights lived up to it . . . [b]ut human nature . . . sullied the . . . ideal . . . . The same hero who one day fought bravely in tournament or battle might on another be a faithless murderer . . . . The Saracens were astonished by the crudeness and cruelty of the Crusaders . . . . It would of course be absurd to expect soldiers to be saints; good killing requires its own unique virtues.[29]

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[25] Keen notes that "the idea of the warriors as a separate order with a distinct function antedates, by an easy margin, the use of the word chivalry." MAURICE KEEN, CHIVALRY 4 (1984).

[26] Will Durant, *The Story of Civilization: P*ART *II*I, OUR *Caesar and Christ* 385 (1944). See generally, John Warry, Warfare in the Classical World (1995).

[27] Durant says "closed box of old Germanic customs of military initiation, crossed with Saracen influences from Persia, Syria, and Spain, and Christian ideas of devotion and sacrament, flowered the imperfect but generous reality of chivalry." WILL DURANT, THE STORY OF CIVILIZATION: PART IV, THE AGE OF FAITH 572 (1950).

[28] Durant describes knightly warfare as "not too dangerous." At Brémule (1119), of 900 knights who fought, only three were killed; at Tinchebrai (1106), 400 knights were captured but none slain, and at Bouvines, one of the bloodiest medieval battles, 170 of 1500 knights engaged lost their lives. *Id.* at 571.

[29] *Id.* at 574–75. Or, as Keen says, "It represents an ideal vision, more useful to contemporaries who wished to measure and impugn the actual shortcomings of society then to the historian . . . ." Keen, *supra* note 25, at 4.

Core medieval chivalric virtues[30] included loyalty, courage, skill, mercy, trustworthiness, courtesy, justice, and generosity.[31] According to medieval scholars, the ideal knight embodied all of these virtues. There were few ideal knights,[32] though the soldier-poet Philip Sidney (1554–85) comes awfully close, about whom Durant says: "[h]e had all the knightly qualities—pride of bearing, skill and bravery in tournament, courtesy in court, on or in all dealings, and eloquence in love."[33]

While the list of essential chivalric virtues remained essentially unchanged from the end of the twelfth century to the end of the fifteenth century,[34] the Christian Crusades to reconquer the Holy Land placed tremendous moral, cultural, and economic stresses on Europe's military

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[30] BRADFORD BROUGHTON, DICTIONARY OF MEDIEVAL KNIGHTHOOD AND CHIVALRY 108 (1986), summarizes that "at their best, the qualities of the chivalric knight or honor, piety, and love, and at their worst, ferocity superstition and lust. The virtues of chivalry were purged, faith, devotion, and its vices were murder, intolerance, and ferocity."

[31] *See* KEEN, CHIVALRY, *supra* note 26 at 2 ("*prouesse*, *loyauté*, *largess* (generosity), *courtoisie*, and *franchise* (the free and frank bearing that is visible testimony to the combination of good birth with virtue"); THEODOR MERON, BLOODY CONSTRAINT: WAR AND CHIVALRY IN SHAKESPEARE 5 (1998); A.V. B. NORMAN, THE MEDIEVAL SOLDIER 144–46 (1971) (loyalty, courtesy, courage, generosity, mercy, trustworthiness, justice, humility); MALCOLM VALE, WAR & CHIVALRY: WARFARE AND ARISTOCRATIC CULTURE IN ENGLAND, FRANCE, AND BURGUNDY AT THE END OF THE MIDDLE AGES 1 (1981) ("honor, loyalty, courage, generosity").

[32] *See* NORMAN, *supra* note 32, at 146.

[33] WILL DURANT, CIVILIZATION, VOL. VII, THE AGE OF REASON BEGINS 70 (1961). At the battle of Zutphen, his horse having been killed in a charge, Sidney leaped upon another, fought his way into the enemy's ranks, was wounded in the leg, and dying from the wound said, "I would not change my joy for the empire of the world." *Id.* at 73.

[34] KEEN, CHIVALRY, *supra* note 26, at 16. *But see* RICHARD BARBER, THE REIGN OF CHIVALRY 182–83 (1980) which argues that as the medieval shifted to the Renaissance, "[t]he old treatises on knighthood had long since been superseded by books [for the] gentleman and courtier . . . . The gentleman's ideals are often assumed to stem from those of chivalry, but in the main this is untrue. The gentleman's models hark back either to the classical world or to the great men of contemporary life." There was a continuity of certain touchstones such as truthfulness and courage. Thus, in November, 1337, Edward III of England formally declared that after three days England would begin hostilities, WILL DURANT, THE REFORMATION 62 (1957) (*Cf.* Judgment Against Japanese Defendants for Surprise Attack Against the U.S. Naval Base at Pearl Harbor, Findings and Verdict, 1137–1211 (Int'l Military Trib. for the Far E. 1948)), and when Calais was captured and then rebelled in 1348, Edward fought incognito in the assault and was twice struck down by a French knight, Eustice de Ribeaumont. That knight was captured and Edward, at a formal dinner, praised Ribeaumon't valor, crowned him with his own chaplet and gave him liberty, free of ransom. DURANT, THE REFORMATION, *supra*, at 63–64.

class.[35] Clerical influences[36] were specifically intended to limit and channel the violence of late medieval warfare.[37] St. Bernard in a letter to the Master of the Knights Templar, wrote that "[t]he Christian who slays the unbeliever in the Holy War is sure of his reward; more sure if he himself is slain. The Christian glories in the death of the pagan, because Christ is thereby glorified."[38]

In *War & Chivalry*, Malcom Vale discusses the seminal work of Dutch historian Johan Huizinga who embodied the view that 15th century chivalry had degenerated from a "pure and rigorous code":

> The kind of conventions taught in military academies since the 18th century were inculcated, in the later Middle Ages, by a chivalrous education and training. The laws of war—to Huizinga, the precursors of the law of nations—attempted to enforce those conventions, and, as far as possible, to moderate and restrict the excesses to which war gave rise. Chivalry played a vital part in the development of international law, with its rules about the treatment of prisoners, the granting of safe-conducts and immunities, the conduct of battles and sieges, and the limitation of military engagements to time and place. Beside the formal codes and ordinances of war, moreover, lay the dynamic force contained in the notion of honor . . . . Inculcated by a noble

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[35] Durant notes that from Islam Christian Europe received food, drink, drugs and medications, artistic techniques, industrial and commercial articles and methods, laws, games, science, mathematics, philosophy and the poetry and music of the troubadours which directly articulated chivalric values. DURANT, THE STORY OF CIVILIZATION: PART IV, THE AGE OF FAITH, *supra* note 27, at 342. Indeed, Christian youths were sent by their Spanish parents to Muslim courts to receive a knightly education. *Id.*

[36] "Chivalry became associated with knighthood through the Germanic concepts of family and loyalty, and the Church went beyond these ideals by stressing Christian virtues to the mounted warrior caste. Charity to the poor was encouraged, and the strain of idealized love of fair and noble women was derived from the important role of the Virgin Mary in the medieval church . . . . These ideals laid the foundation of the unwritten modern code that states what the professional officer should be." JOHN I. ALGER, THE WEST POINT MILITARY HISTORY SERIES: DEFINITIONS AND DOCTRINES OF THE MILITARY ART 31–32 (1985).

[37] Bonizo of Sutri in Liber de vita Christiana (c. 1090) remarks that "if Kings and . . . knights were not to be summoned to persecute schismatics and heretics and excommunicates . . . the order of warriors would seem superfluous in the Christian legion." Cited in KEEN, CHIVALRY, *supra* note 25, at 5 (emphasis omitted).

[38] Quoted in DURANT, AGE OF FAITH, *supra* note 27, at 593–94.

> education, the sentiment of honor—and fear of dishonor—could act as a check upon the unbridled release of violence and warfare . . . .[39]

Islam provided many of the chivalric ideals[40] that permeated Christian Europe, and a core source of those concepts was the Koran.[41]

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[39] MALCOLM GRAHAM ALLAN VALE, WAR & CHIVALRY: WARFARE AND ARISTOCRATIC CULTURE IN ENGLAND, FRANCE, AND BURGUNDY AT THE END OF THE MIDDLE AGES 8 (1981). *See also* Jeremy duQuesnay Adams, *Modern Views of Medieval Chivalry, 1884–1984*, *in* THE STUDY OF CHIVALRY, 41 (Howell Chickering & Thomas Seiler eds., 1988).

[40] Although Durant posits that Mohammed accepted the laws of war as practiced by Christian nations of his time, [c.630 a.d.] he notes that "the inevitable gap between theory and practice seems narrower in Islam than in other faiths." DURANT, AGE OF FAITH, *supra* note 27, at 183. There is, a considerable time lapse between that period and the development of chivalric practices that migrated to Christian Europe. *See infra* n.36.

[41] "There was a heavy element of imperialism about medieval Islam . . . the Jihad was its sword." PAUL FREGOSI, JEHAD IN THE WEST: MUSLIM CONQUESTS FROM THE 7TH TO THE 21ST CENTURIES 309 (1998). *See also* TIM JUDAH, THE SERBS: HISTORY, MYTH & THE DESTRUCTION OF YUGOSLAVIA 76 (1997). The Ottoman Empire was not originally "colonial" in the western sense; it was an Islamic internationalism where non-Muslims could live as "rayah" (second class citizens) and converts could receive full privileges. *See* ALAN PALMER, THE DECLINE AND FALL OF THE OTTOMAN EMPIRE 4 (1992). The chapters of the Qur'an revealed to Muhammad in Mecca (the years 610–622) taught patience under attack, while the right to repel attack became dominant in the chapters he produced at Medina (after 622). *Id.* at 44; s*ee also* BERNARD LEWIS, THE POLITICAL LANGUAGE OF ISLAM 73 (1988). "In an offensive war, it is an obligation of the Muslim community on the whole (*fard kifaya*); in a defensive war, it becomes the personal obligation of every adult male Muslim (*fard 'ayn*)." Jihad is not an exclusive war against Judaism, and Christianity. JOHN LAFFIN, HOLY WAR: ISLAM FIGHTS 14 (1988). While war against rebels (i.e. non-caliphate Muslim monarchs) was legitimate, it was not, strictly speaking, jihad. *Id.* at 14. The four legitimate enemies were the unbeliever, the bandit, the rebel, and the apostate. Rebels had certain belligerent rights because there was theoretically only one Muslim state; as Muslim nations emerged, the law of rebels (*baghi*), accommodated the existence of multiple Muslim monarchs claiming primacy. Fighting the unbeliever, and the apostate constituted *jihad*. *Id.* at 84. The unconquered unbeliever is an enemy. He is part of *Dar-ul-Harb*, distinguished from the submitting unbeliever. The unsubjugated unbeliever is known as "*harbi*," derived from the word for war. The submitted unbeliever is "*dhimmi*," derived from "*dhimma*." A "'*dhimma*" is a contract between a Muslim state and the leader of a non-Muslim community, by which members of the community are granted status, duties, and privileges under Muslim authority. Regarding apostasy, see *id.* at 84–85. While the unbeliever has never accepted Islam, the apostate ("*murtadd*") has adopted, and then abandoned Islam. *See Id.* at 85. The Muslim who abandons his faith is a traitor, and is punished as such. War was a religious and legal right. Shari'a required a Muslim head of state to annually attack enemy territory to remind Muslims, and non-Muslims alike of Islamic obligation. *Id.* at 44. For an explanation of the obligation, *see* Lewis at 73. The basis of the obligation of jihad is the universality of Muslim revelation. Believers have a duty

Durant notes that "the Moslems seem to have been better gentleman than their Christian peers; they kept their word more frequently, showed more mercy to the defeated, and were seldom guilty of such brutality is marked their Christian capture of Jerusalem in 1099."[42] Without doubt, the beau ideal of medieval chivalry was Saladin.[43] Although a practitioner of medieval brutality, Saladin demonstrated an unparalleled ability of thought and action.[44]

(jahada) to strive to convert, or at least subjugate unbelievers. The obligation continues until the world has either accepted Islam or submitted to its power. *See* M.H. SHAKIR, THE QUR'AN 161 (Tahrike TarsiIe Qur'an Inc., Publishers and Distributors of Holy Qur'an 7'" U.S. ed. 1995). Verse 15, Chapter 8 of the Qur'an says: "O you who believe! When you meet those who disbelieve marching for war, then turn not your backs to them." An enemy was initially offered a chance to opt for peace. *Id.* at 167. "And if they incline to peace, then incline to it and trust in Allah; surely He is the Hearing. the Knowing." Once holy war had been proclaimed, enemies were given an opportunity to embrace Islam. LAFFIN, *supra*, at 47. If the enemy declined conversion, they could accept Muslim rule, second-class citizenship, and taxation. *Id.* at 47. In Chapter 9, Verse 29 has an explicit reference to the duty to fight the unbeliever, and the option of taxation. *See* SHAKIR, *supra*, at 172. "Fight those who do not believe in Allah, nor in the latter day, nor do they prohibit what Allah and His Apostle have prohibited, nor follow the religion of truth, out of those who have been given the Book, until they pay the tax in acknowledgment of superiority and they are in a state of subjection." Verse 67, Chapter 81 of the Qur'an discusses prisoners of war: "It is not fit for a prophet that he should take captives unless he has fought and triumphed in the land; you desire the frail goods of the world, while Allah desires (for you) the hereafter; and Allah is Mighty, Wise." *Id.* at 167. This was often interpreted as permitting execution of war prisoners, FREGOSI, *supra*, at 227, 236, 249, & 277, but Suleiman treated captured Christian opponents with exquisite chivalric kindness, *id.* at 281, and similar dignities were given in Crete in 1648. *Id.* at 226–27. Acknowledgement must be given to the author's former student Andrew A. Smith, whose research in a 2001 paper entitled *The Crescent and the Crucible* provided a basis for this footnote.

[42] DURANT, AGE OF FAITH, *supra* note 27, at 341.

[43] A Kurd, born at Tekrit in what is now Iraq, in 1138, al-Malik al-Nasir Salah-ed-din Yusuf ibn Ayyub (The King, the Defender, the Honor of the Faith, Joseph son of Job), known to the West as Saladin.

[44] In 1186 Reginald of Châtillon of the Latin Kingdom of Jerusalem violated a four-year truce signed with Saladin the year before. Saladin swore to kill Reginald with his own hand. In the crucial engagement of the Crusades fought at Hittin ("the Batlle of Hattin") on July 4, 1187, the Saracens completely defeated the Crusaders. Apparently by Saladin's order no mercy was shown to captured knights of certain Christian orders. He pardoned King Guy of Latin Jerusalem and offered Reginald the choice of death or acknowledging Mohammed as a prophet of God. When Reginald refused Saladin slew him. His offer of terms to the city of Jerusalem was stunningly generous, and when those terms were rejected and the city captured, Saladin directly or indirectly freed thousands of unransomed prisoners from slavery. According to the squire to the leader of the Christian forces, "... he distributed from his own treasure so much that [the prisoners] gave praise to God and published abroad the

European chivalric internationalism provided its own unique problems. Membership in knightly orders meant "it was all too possible for a soldier to be faced with a problem of directly conflicting loyalties, and he had to judge for himself, on the basis of particular circumstances, whether such conflict put him out of the war . . . ."[45] As Renaissance nationalism developed, the troops of the Swiss and German mercenaries and the Spanish and French national infantry were recruited from outside the nobility.[46] Their officers, however, were largely nobles.[47] So, notes Keen, "the ideal of the knight errant began to blend into that of the officer and gentleman; what had been a cavaliers' code developed into the code of an officer class."[48]

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kindness and honor that Saladin had done to them." DURANT, AGE OF FAITH, *supra* note 27, at 598

[45] Thus, since the knightly orders were transnational, they presented the nobility, whose bloodlines and relations often crossed national borders with a mixed loyalty dilemma echoed in modern multi- and transnational corporations. *See* MAURICE KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 86 (1965). The problem of divided "chivalric" loyalties persisted for a considerable time. On April 18, 1861, when Pres. Lincoln sent an emissary to see if Robert E. Lee would take command of Union forces, Lee asked, "how can I draw my sword upon Virginia, my native state?" When Virginia asked the same question of the Winfield Scott, the General in Chief of the Army, Scott responded that "so long as God permits me to live I will defend [the flag of the Union] with my sword, even if my own native state assails it." WILLIAM C. DAVIS, THE CIVIL WAR: FIRST BLOOD 28 (1983).

[46] Durant notes that "[t]he morals of war worsen with time. In the early days of the Renaissance almost all battles were modest engagements of mercenaries who fought without frenzy and knew when to stop; victory was judged won as soon as a few men had fallen . . . . As the *condottieri* became more powerful, and armies larger and more costly, troops were allowed to plunder captured cities in lieu of regular pay . . . .The enslavement of prisoners of war increased as the wars of the Renaissance progressed . . . . There were instances of fine loyalty . . . but by and large the development of cunning put a premium on deceit . . . . As religious belief declined, the notion of right and wrong was replaced, in many minds, by that of practicality . . . ." WILL DURANT, THE RENAISSANCE 591 (1953) .

[47] KEEN, CHIVALRY, *supra* note 25, at 240.

[48] *Id.* at 240. Thus, says Keen, "the conception of an estate of knighthood, with a general commission to uphold justice and protect the weak, was being pared down into the conception of the officer whose business it is to fight the King's enemies." *Id.* Durant says that "however far chivalry in fact fell short of its ideals, it remains one of the major achievements of the human spirit, an art of life more splendid than any art." DURANT, AGE OF FAITH, *supra* note 27, at 578, and adds that "[m]edieval morality was the heir of barbarism and the parent of chivalry. Our idea of the gentleman is a medieval creation; and the chivalric ideal, however removed from knightly practice, has survived is one of the noblest conceptions of the human spirit." *Id.* at 1084.

In *Bloody Constraint*,[49] discussing the legacy of chivalry Meron says that chivalry was "honor in its medieval guise,"[50] and cites *Parker v. Levy*, supra, for the proposition that conduct that disgraces the offender or brings dishonor upon the military profession is properly criminalized, and he notes that "in this code, the duties of the gentlemen go beyond the purely military." Meron, however, says that "chivalry's legacy appears most clearly in the principles of modern humanitarian law."[51] While Meron might be correct if his statement applied only to medieval chivalry, there is, in fact, a substantial difference between current chivalric requirements as they have evolved into the 21st century[52], and modern humanitarian law.

IV. Current Chivalric Requirements

What has evolved from the past into current elements of chivalry are five elements, some of which overlap with international humanitarian law, and all of which squarely reflect their noble forbearers. They are courage, trustworthiness, mercy, courtesy and loyalty. The most militarily unique element of that group is courage, for only a member of the armed forces may be criminalized for inaction through physical cowardice in circumstances which, outside of the military role, would be perfectly reasonable to avoid.

A. Courage

As Vesey Norman says of medieval war "[o]ver and over again we read of battles lost because a rash attack was made against the advice of the most experienced knights, which had been refuted by a taunt against them of treachery or cowardice[53] by some more reckless knight."[54] However, over time, so many lives were lost to the obligation not to retreat that the

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[49] MERON, BLOODY CONSTRAINT, *supra* note 32, at 11–12.
[50] VALE, WAR AND CHIVALRY, *supra* note 39, at 1.
[51] MERON, BLOODY CONSTRAINT, *supra* note 32, at 12.
[52] That societal development in conjunction with military developments is well discussed in GEOFFREY WARNOCK, WARFARE AND SOCIETY IN EUROPE, *1792–1914* (2000).
[53] "Cowardice and treason were [very] serious affairs, as was to be expected in a society whose ethic was essentially martial. Gross cowardice was notionally punishable with death; lesser cowardice could involve loss of status and insignia." *Id.* at 175.
[54] NORMAN, *supra* note 32, at 144.

obligation was abandoned.[55] The requirement of courage as a core virtue of soldiery and chivalry has certainly continued unbroken.[56]

Article 99 of the Uniform Code of Military Justice prohibits misbehavior before the enemy including, inter alia, cowardly conduct; shamefully abandoning, surrendering, or delivering up any command; running away and failure to afford all practicable relief and assistance to armed forces belonging to the United States or their allies when engaged in battle.[57] Cowardly conduct is "refusal or abandonment of a performance of duty before or in the presence of the enemy as a result of fear," where fear is defined as "the natural feeling of apprehension when going into battle."[58] Shamefully abandoning, surrendering, or delivering up of command includes a lack of justification,[59] requiring "the utmost necessity or extremity."[60] Running away is "an unauthorized departure to avoid actual or impending combat. It need not, however, be the result of fear, and there is no requirement that the accused literally run."[61]

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[55] MERON, BLOODY CONSTRAINT, *supra* note 32, at 105.

[56] *See, e.g.*, PAUL FUSSELL, DOING BATTLE: THE MAKING OF A SKEPTIC (1996); VICTOR DAVIS HANSON, CARNAGE AND CULTURE (2001); MAX HASTINGS, WARRIORS: PORTRAITS FROM THE BATTLEFIELD (2006); CHRIS HEDGES, WAR IS A FORCE THAT GIVES US MEANING (2002); RICHARD HOLMES, FIRING LINE (1985).

[57] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 23a (2008) [hereinafter MCM].

[58] *Id.* pt. IV, ¶ 23c(5). Unless the soldier's misbehavior was motivated by fear of facing the enemy, the soldier cannot be found guilty of cowardly conduct. *See* United States v. Yarborough, 5 C.M.R. 106, 115 (C.M.A. 1952) ("[C]owardice while before the enemy is an extremely serious charge, both in terms of the possible punishment and in terms of the degrading nature of the offense which, when found, stays with a person for the remainder of his life.").

[59] MCM, *supra* note 57, pt. IV, ¶ 23c(2).

[60] *Id.* ¶ 23c(2)(d). General James Snedeker has defined the test of justification as "one of necessity, measured by the surrounding circumstances at the time the act of the accused takes place and viewed in the light of the military experience of mankind." Captain Robert M. Lucy, USMC, *Misbehavior before the Enemy*, 1955 JAG J. 3, 4 (1955). This provision concerns primarily commanders: abandonment by a subordinate is ordinarily charged as running away. MCM, *supra* note 57, pt. IV, ¶ 23c(2)(a).

[61] *Id.* ¶ 23c(1)(a). To be found guilty of running away, a soldier must have abandoned his unit with the "intent to avoid combat." United States v. Sperland, 5 C.M.R. 89, 92 (C.M.A. 1952). Unauthorized departure may be justified in cases of the utmost necessity or extremity. Three "running away" cases defined the crime as departing from one's place of duty "without authority or *justification*" (emphasis added).[61] *See, e.g.*,United States v. Parker 3 U.S.C.M.A. 541, 544 (1953); United States v. Boyles, 10 C.M.R. 213, 217 (A.B.R. 1953); United States v. De La Cruz Lanzo-Velez, 11 C.M.R. 529, 533 (A.B.R. 1953).

Perhaps most interesting in the context of this chapter, however, is the failure to rescue provision. Article 99(9) criminalizes "failure to afford all practicable relief and assistance to . . . armed forces belonging to the United States or their allies when engaged in battle." Within the same broad family are provisions of various conventions which require succor to certain enemies who are hors de combat.[62] They do not, however, necessarily implicate criminal sanctions for inaction.[63]

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[62] While the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949) (GC 3), deals chiefly with captured protected persons, Articles 15 and 17 provide for "[arrangements to] permit the removal, exchange and transport of the wounded left on the battlefield . . . and [interment of the dead] . . . ." GC I, *supra* note 18, arts. 15, 17. Interestingly, Article 26 provides that "The staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed [exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease], are placed on the same footing as [medical] personnel . . . provided that the staff of such societies are subject to military laws and regulations." *Id.* art. 26 (emphasis added).

Article 18 of Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea is even more interesting. It requires that:

> After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.
>
> Whenever circumstances permit, the Parties to the conflict shall conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area

GC II, *supra* note 18, art. 18 (emphasis added).

Cf. GCII, *supra* note 18, art. 22 (Hospital ships utilized by National Red Cross Societies). *See also* GC I, *supra* note 18, arts. 12–20 (particularly Article 17.1 ("The civilian population and aid societies, . . . be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas.")). The United States is not a party to Protocol I but has recognized its articulation of customary law. *See* Melissa J. Epstein & Richard Butler, *The Customary Origins and Elements of Select Conduct of Hostilities Charges Before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions*, 179 MIL. L. REV. 68, 83–89 (2004).

These Conventions reflect chivalry, of course, but they also reflect a clear recognition that chivalry and humanitarian law are not the same. Together they mandate that "whenever

99(9)which first appeared in 1951[64] is derived from Article 75 of the Articles of War which did not contain a rescue provision,[65] and from Article

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circumstances permit" conflicting militaries should try to arrange rescues after land or sea battles, but that they must do everything possible to search for the shipwrecked. Further, they clearly reflect that civilian humanitarian aid workers will not be permitted on the battlefield unless they are subject to national military laws. As a result, any civilian humanitarian aid worker accompanying U.S. armed forces would have to be subject to Article 99 or they would be barred from the battlefield by international law. If chivalry and humanitarian law were the same, the requirement would be redundant and have no meaning.

[63] In some instance violation could clearly have legal implications. Failure to provide gas masks to civilians in occupied territory might, under some circumstances (knowing there is a pending attack, for example) constitute a criminal violation. Article 85 of the Geneva Convention Relative to the Treatment of Civilians requires that, "[T]he Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, . . . against the . . . effects of the war. GCIV, *supra* note 18, art. 88. Article 88 says

"[I]n all places of internment exposed to air raids and other hazards of war, shelters adequate in number and structure to ensure the necessary protection shall be installed. In case of alarms, the measures internees shall be free to enter such shelters as quickly as possible, excepting those who remain for the protection of their quarters against the aforesaid hazards. Any protective measures taken in favor of the population shall also apply to them." *Id.* A 1991 U.N. report concerning Israel's Geneva Convention IV obligations to Palestinians in the occupied territories with respect to gas protection informs this point of inquiry: "Since the inception of the crisis, Iraq had repeatedly threatened to attack Israel with conventional and non-conventional weapons in the event of hostilities. As part of its civil defense procedures, Israel provided to its citizens gas masks and related equipment for protection against a chemical attack. The Israeli authorities also issued gas masks to the Palestinian residents of Jerusalem. United Nations officials in the area repeatedly expressed concern about the need of the Palestinian population as a whole to be given such equipment. On 14 January 1991, the Israeli High Court of Justice ruled as follows: "The Military Commander must indeed exercise equality in the area. He may not discriminate between residents. When the Military Commander has reached the conclusion that protective kits must be distributed to Jewish residents in the area, protective kits must also be distributed to the area's Arab residents. . . . The Military Commander must make every possible effort to secure these masks as soon as possible."

UN Secretary-General, Report Submitted to the Security Council by the Secretary-General in Accordance with Resolution 681, P11, delivered to the Security Council, U.N. Doc. S/22472 (Apr. 9, 1991) (emphasis added). *See* Evan Wallach, *A Tiny Problem with Huge Implications—Nanotech Agents as Enablers or Substitutes for Banned Chemical Weapons*, 33 FORDHAM INT'L L.J. 858, 926 n.268 (2010).

[64] 10 U.S.C. c. 47. It was established by the United States Congress in accordance with the authority given by the United States Constitution in Article I, Section 8, which provides

4 (12-20) of Articles for Governance of the Navy, which did.[66] The new provision did not compel rescue to the detriment of a mission,[67] but it

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that "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval forces."

[65] There are no case or law review citations to article 99(9), but the UCMJ provides a sample specification which gives some indication of its intent. "In that (personal jurisdiction data), did, (at/on board – location), on or about _____20 , (before) (in the presence of) the enemy, fail to afford all practicable relief and assistance to (the USS _____,which was engaged in battle and had run aground, in that he/she failed to take her in tow) (certain troops of the ground forces of _____, which were engaged in battle and were pinned down by enemy fire, in that he/she failed to furnish air cover) (_____) as he/she properly should have done." *See* MCM, *supra* note 57, pt. IV, ¶ 23.f.(9).

[66] In 1800 the U.S. Congress modified existing Articles for the Government of the Navy (AGN) and directly adopted the British Naval Code of 1749. U.S. NAVY JUDGE ADVOCATE GENERAL'S CORPS, NAVY JAG HISTORY, http://www.jag.navy.mil/history.htm (last visited Aug. 8, 2012). Article XIII of the British Naval Code provided: "Every person in the fleet, who through cowardice, negligence, or disaffection, shall forbear to pursue the chase of any enemy, pirate or rebel, beaten or flying; or shall not relieve or assist a known friend in view to the utmost of his power; being convicted of any such offense by the sentence of a court martial, shall suffer death. (emphasis added). Under Article XIII Admiral John Byng was executed in 1757 for "failure to do his utmost" to pursue a superior French fleet, demonstrating "that more was expected of naval officers than just courage and loyalty." WARREN TUTE, THE TRUE GLORY, THE STORY OF THE ROYAL NAVY OVER A.THOUSAND YEARS 81–83 (1983). As Voltaire wrote in Candide, "Dans ce pay-ci, il est bon de tuer de temps en temps un amiral pour encourager les autres." ("In this country, it's good to occasionally kill an admiral to encourage the others" (author's translation)). Voltaire, Candide XXIII CPT (1759).

Article XIII was precisely paralleled by Article 4 of the AGN: "The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person in the naval service. . . . Or does not afford all practicable relief and assistance to vessels belonging to the United States or their allies when engaged in battle." http://www.history.navy.mil/faqs/faq59-7.htm. (Emphasis added). The Manual for Courts-Martial (MCM) explains that "[t]he provisions of Article 99 correspond with those in Article of War 75 and Article 4 (12-20) of A.G.N. The generic provision of Article of War 75 against an officer or soldier "who, before the enemy, misbehaves himself" has not been incorporated in Article 99, but it is believed that the new article specifically covers all conduct punishable in this respect. . . . Attention may be invited to the fact that the clause "before or in the presence of the enemy" applies to each of the nine subdivisions of the article. U.S DEP'T. OF DEF., LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL UNITED STATES 267 (1951). It is worth noting that the UK retained that provision until 1971. *See* Naval Discipline Act, 1957, 31 Eliz (Eng.).1957, and upon its removal Read Admiral Morgan Morgan-Giles, MP, arguing the criminal penalty was unnecessary, commented in Parliamentary debate "I think that it is really implicit, certainly in the training of all the Forces. It probably hardly needs saying . . . ." PARL. DEB., H.C. (5th ser.) (1971) 122.

clearly added a criminal mandate to what had been a chivalric requirement on land and the law of the sea. That rescue requirement is a clear distinction between chivalric and humanitarian law; between military personnel and civilians. The non-military IHL community, such as the ICRC or Medcins Sans Frontiers, is unlikely to embrace such strictures, not least because there is a certain difference between going voluntarily into harm's way on a mission of mercy, and being ordered to do so on pain of criminal sanction.

Another civil/military variance is the honesty required of military personnel.[68] While civilians may well be expected by their peers to be truthful, civic sanctions for personal dishonesty short of fraud tend to be less drastic or permanent than those in the military, and for good reason; a combat report, indeed any military report, simply must be reliable. The lives of war-fighters and of nations may depend on it.[69]

B. Trustworthiness

The knightly oath was both economically important,[70] and vital to planning for combat.[71] A knight who captured his peer often set the prisoner free on parole so he could return home and raise a ransom,[72] in return for a chivalric promise to pay.[73] That element of trust as a

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[67] In the Congressional Floor Debate on adoption of the UCMJ, Army Judge Advocate General Thomas H. Green testified that "Section (10) has been amended to make it clear that it is not intended to compel a soldier or commander to abandon a mission of paramount importance in order to render relief to troops, etc., who may be in distress. For example, it is standard instruction to infantrymen that they must continue to advance during an attack without stopping to render aid to the wounded. Such functions are left to medical-aid men." DEP'T OF THE NAVY JUDGE ADVOCATE GENERAL, CONGRESSIONAL FLOOR DEBATE ON THE UNIFORM CODE OF MILITARY JUSTICE 173 (1949).

[68] "Midshipmen are persons of integrity: They stand for that which is right. They tell the truth and ensure that the full truth is known. They do not lie." UNITED STATES NAVAL ACADEMY, HONOR CODE.http://www.usna.edu/OfficerDevelopment/honor/honorconcept.html (last visited August 8, 2012).

[69] *See infra* Part IV B.

[70] THEODOR MERON, BLOODY CONSTRAINT: WAR AND CHIVALRY IN SHAKESPEARE, 5 (1998).

[71] *See supra* n.54.

[72] *Id.* at 175.

[73] Keen says breach of faith was a specific charge raised particularly often in the 14th and 15th centuries in chivalric circles for failure to pay a promised ransom. The captor could sue his prisoner or the prisoner's sureties, could challenge him to a judicial duel, or could

prerequisite for combat transferred and was writ even larger as combat shifted from the individual melee of medieval Europe though mass maneuver of fixed bodies of troops,[74] and through the increasing importance of small unit tactics.[75] It is, of course, at the core of the honor codes of all three military academies.[76] It is also an essential element of international relations in war.

As noted elsewhere, "[d]uring and following active hostilities constraints on warfare facilitate contacts between enemies and peacemaking

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dishonor his arms. "They saw it was a very serious one. It implied a reproach that would be universal in knightly company, and that would set the guardians of chivalrous mores into action." Ibid, fn 26, at 174. See, e.g, William Shakespeare, Richard II, Act 1, Scene iii: "

> Harry of Hereford, Lancaster and Derby
> Stands here for God, his Sovereign and himself,
> On pain to be found false and recreant,
> To prove the Duke of Norfolk, Thomas Mowbray,
> A traitor to his God, his King and him.

Meron discusses judicial duels in detail in THEODORE MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATE MIDDLE AGES 131–42 (1993).

[74] Parole never became entirely obsolete, G.I.A.D. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 46 INT'L REV. RED CROSS 3, 20 (No. 46, Jan. 1965), and although the United States currently prohibits military personnel from accepting parole, it did in the past. Major Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200, 214-15 (1998). During the Civil War, a Union soldier broke parole and was prosecuted. *See United States ex rel. Henderson v. Wright*, 28 F. Cas. 796, 797 (W.D. Pa. 1863). The court held the soldier's promise not to break parole implicated the "national faith" and that in failure to honor parole, "the national character is dishonored." *Id.* at 798. During the Napoleonic Wars, the British stripped parole-violating officers of their commission and sent them to prison or back to France. *Id.* at 798. They believed that the sacredness of officers' oaths was the basis of the military. *Id.*

[75] FM 6-22 on Leadership defines trust as the key component in integrity. "The Army relies on leaders . . . who are honest in word and deed. . . . If a mission cannot be accomplished, the leader's integrity requires him to inform the chain of command . . . it is the leader's duty to report the truth . . . if leaders inadvertently pass on bad information, they should correct it as soon as they discover the error."FM 6-22 (formerly 22-100) Army Leadership,¶s 4-30 to 4-32 at pp. 4-7 to 4-8.

[76] *See* UNITED STATES NAVAL ACADEMY, HONOR CONCEPT, *available at*[76] http://www.usna.edu/OfficerDevelopment/honor/honorconcept.html; THE SIMON CENTER FOR THE PROFESSIONAL MILITARY ETHIC, THE HONOR PROGRAM, 27, 2011); http://www.usma.edu/Cpme/SCPME_About/Honor/honor.htm (last visited Mar. 31, 2012). *The Honor Code*, UNITED STATES AIR FORCE ACADEMY (Apr. 16. 2009),Jan. 27, 2011. http://www.usafa.af.mil/information/factsheets/factsheet.asp?id=9427.

activities. It is simply easier to negotiate with an opponent which is perceived as an adherent to international law."[77] In a similar vein, perception of the enemy as dishonorable, and a counter-view by the foe that you view him as ignoble, render negotiations exceedingly difficult.[78]

Another modern chivalric value is mercy. It is, perhaps, at the core of IHL, and yet it is, again, more enforceable as a military requirement than one governing civilian conduct.

C. Mercy

Medieval knights were obliged to grant quarter to other knights,[79] and to treat prisoners decently.[80] They were also obliged to protect the weak, women, and orphans.[81] These rules were premised on the idea that those who were not strong enough to engage in warfare were innocents who should be protected.[82]

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[77] See Evan Wallach, *Chapter One, Part 1.2, Purposes and Use of the Law of War*, INTERACTIVE CASEBOOK, http://www.lawofwar.org/introduction.htm#Purposes%20And%20Uses (last visited Mar. 31, 2012)..

[78] An example may be found in the difficult path to surrender of the Japanese Empire in 1945. British Prime Minister Winston Churchill had advised U.S. President Harry Truman to leave "the Japanese some show of saving their military honor" On July 26, the Potsdam Declaration was issued by the Allied powers demanding unconditional surrender and not mentioning proposals that a constitutional monarchy be permitted to continue in Japan. Japanese Prime Minister Kantaro Suzuki told reporters in ambiguous language what he meant them to take as his government's intention to study the document without public comment. His statement was, however, interpreted as outright rejection of the Declaration. KeIth Wheeler, THE FALL OF JAPAN, 69–73 (1983). Unquestionably, the limited communications between Japan and the Allies were due, at least in part, to the particular dehumanization with which each side regarded the other. *See* JOHN W. DOWER, WAR WITHOUT MERCY: RACE & POWER IN THE PACIFIC WAR 294 (1986). Equally undeniably, Japanese battlefield treachery (booby-trapping dead and wounded and use of false surrenders) fostered a particularly poisonous atmosphere amplified by the mistreatment and murder of prisoners, eventually by both sides. *See*, *e.g.*, *id.* at 64.

[79] Meron, *Bloody Constraint*, *supra* note 70, at 5, 132. Knights were not required to grant quarter in siege situations. *Id.* Nor were they required to grant quarter to soldiers who were not knights. *Id.* at 119. Medieval scholars argued that the obligation to grant quarter stemmed from a Christian's obligation to be merciful. *See id.* at 132. It is interesting to note that, because captured knights were usually ransomed, knights also had a financial interest in being merciful to their foes. *Id.*

[80] *Id.* at 5.

[81] *Id.* at 5, 136, & 140. As with many chivalric rules, rules forbidding rape did not apply in times of siege, *id.* at 56, 72, and often applied only to Christians. *Id.* at 59.

[82] *See id.* at 56.

Mercy was at the core of modern attempts to regulate the battlefield[83] and evolved into much of what has become modern international humanitarian law[84] in the context of limitations on means and methods of warfare,[85] proportionality and military necessity,[86] and treatment of protected persons.[87]

Examples of military mercy are inherently anecdotal since they often exist at the tactical level.[88] Nonetheless, they persist in the most horrific circumstances and are not all that uncommon in combat.[89] On occasion, mercy raises questions of conflict with duty centered on when the target becomes hors de combat.

Thus, for example, in December 1943, a U.S. B-17 bomber, heavily damaged after a raid on Germany, was spared by an ME-109 piloted by Luftwaffe pilot Franz Stigler, an ace credited with over two dozen kills. The American pilot, Charles Brown, located Stigler long after the war's end.

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[83] *See, e.g.*. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11 1868, 138 Consol T.S. 297 (entered into force Nov. 29, 1868).

[84] Meron, *Bloody Constraint*, *supra* note 70, at 12–13.

[85] *E.g.*, The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 (amended Dec. 21, 2001).

[86] *E.g.*, Protocol I, *supra* note 11, arts. 48–60.

[87] *E.g.* GC I–IV, *supra* note 18.

[88] Indeed, at the strategic level, mercy merges with international law requirements. See, for example, all four Geneva Conventions of 1949, which largely regulate and require mercy to noncombatants and those hors de combat. *Id.*

[89] Thus, decency occurred even in World War Two in the Pacific, a theater noted for its common brutality. *See, e.g.*, DOWER, *supra* note 78, at 77. Shunsaku Kudo, the commander of the Japanese destroyer Ikazuchi saved 422 sailors from the British Cruiser Exeter and the destroyer Encounter sunk in battle on March 1, 1942. Despite danger of a submarine attack, Kudo ordered his crew into the water to rescue British sailors, and washed, fed and clothed the survivors. SAMUEL FALLE, MY LUCKY LIFE: IN WAR, REVOLUTION, PEACE & DIPLOMACY 42–44 (1996). Similarly, Allied fighter pilots sent by the Gestapo to Buchenwald concentration camp were rescued by Luftwaffe officers, although Goering himself was involved in what was as much a jurisdictional dispute as a point of honor. *See,* COLIN BURGESS, DESTINATION BUCHENWALD (1996). All captured aviators classed as *terrorflieger* ("terror aviators") by the Gestapo, were scheduled for execution after October 24; their rescue was effected by Luftwaffe officers who visited Buchenwald and, on their return to Berlin, demanded the airmen's release. Eyewitness accounts of Art Kinnis, president of KLB (Konzentrationslager Buchenwald), and 2nd Lt. Joseph Moser, one of the surviving pilots, available at http://buchenwaldflyboy.wordpress.com.

Stigler explained, "I didn't have the heart to finish off those brave men . . . . I flew beside them for a long time. They were trying desperately to get home and I was going to let them do it. I could not have shot at them. It would have been the same as shooting at a man in a parachute."[90]

The question is unique to each circumstance but it is never a bad thing to remember the Golden Rule.[91]

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[90] Russell James, *A Life in the Balance is Spared Aloft: Airman Finds Counterpart Who Refused to Shoot*, MIAMI HERALD, Dec. 28, 1995, *available at* http://www.highbeam.com/doc/1G1-17954296.html.

[91] As Evan Wallach stated:

> As a JAG in the Nevada National Guard, I used to lecture the soldiers of the 72nd Military Police Company every year about their legal obligations when they guarded prisoners. I'd always conclude by saying, "I know you won't remember everything I told you today, but just remember what your mom told you: Do unto others as you would have others do unto you." That's a pretty good standard for life and for the law, and even though I left the unit in 1995, I like to think that some of my teaching had carried over when the 72nd refused to participate in misconduct at Iraq's Abu Ghraib prison.

Evan Wallach, Waterboarding Used to be a Crime, WASH. POST (Nov. 4, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/11/02/AR2007110201170.html. In a telephone interview, MAJ Troy Armstrong, who commanded the 72nd MP Co. at Abu Grhraib as a Captain, insisted that, the "Golden Rule" lecture had "stuck with them," and acknowledged the value and applicability of mercy as a guiding value. After some of his guards awakened the prisoners one morning by noisily hitting trash cans, MAJ Armstrong learned that Military Intelligence had gone to his subordinates and asked them to "soften up" the Abu Ghraib prisoners. On his inquiry, the troops told MAJ Armstrong that MI had asked them for that, to which he responded, "At no time would we do anything that didn't come through the chain of command." "We were well trained","" MAJ Armstrong said, "to treat them with dignity and respect at all times." The stress was that they lacked food, hygiene, water and were suffering from the heat as were the prisoners. His only further direct action was that he "pulled the troops together, and reminded them we had a duty to care for the detainees." Shortly after that incident, MAJ Armstrong wrote a Memo for Record to the MP Battalion Commander "saying we were violating the Geneva Conventions just due to the conditions under which we were holding the prisoners." By the time Abu Ghraib was turned over to the new MP company, the 72nd had tried to clean up from the prison the garbage, feces and debris that had been present when they took over. There was a "lot of frustration," he said, but "we talked it out and tried to be professional." Telephone Interview with MAJ Troy Armstrong (Apr. 11, 2011) (notes on file with author).

D. Loyalty

Medieval loyalty was considered "one of the greatest virtues that there can be in . . . a knight,"[92] who were expected to remain loyal, both to their sovereign and their code.[93] Treason against either was punished severely.[94] Treason against the United States is, of course, criminalized by the Constitution[95], statute[96] and the UCMJ.[97] Military personnel must do their "utmost" to prevent and suppress mutiny or sedition.[98] Loyalty is not, of course, unique to the military, nor is its violation unpunished in civilians.[99]

E. Courtesy

The courtesy demanded of knights can broadly be defined as conduct of civilized behavior.[100] In the middle ages, courtesy referred to the politeness and consideration with which noblemen were expected to treat each other.[101] This requirement applied both in court and on the battlefield.[102] Knights were required to ensure that they and their enemy

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[92] KEEN, CHIVALRY, *supra* note 25, at 185.
[93] KEEN, THE LAWS OF WAR, *supra* note 47, at 54–55.
[94] *Id.*
[95] U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.").
[96] 18 U.S.C. §2381 (2011) ("Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.").
[97] UCMJ art. 94, 10 U.S.C. § 894 (2011) prohibits mutiny and sedition. *See also* MCM, *supra* note 57, at pt. IV, ¶ 18(a). Violation of Article 94 includes (1) creation of violence or a disturbance with the intent to usurp or override lawful military authority; (2) refusal in concert with another, to obey orders with the intent to usurp or override lawful military authority; or (3) revolt, violence or disturbance against the lawful civil authority in concert with another with the intent to cause the overthrow or destruction of that authority. *Id.* at pt. IV, ¶18(b).
[98] UCMJ, art. 94, 10 U.S.C. § 894(a)(3) (2011).
[99] The Treason laws of the United States do not distinguish between military and civilian traitors. *Id.*
[100] KEEN, CHIVALRY, *supra* note 25, at 33.
[101] *See id.*
[102] *See* Sidney Painter, FRENCH CHIVALRY: CHIVALRIC IDEAS AND PRACTICES IN MEDIEVAL FRANCE 44–45 (1957)*; see also* VALE, *supra* note 39, at 8 (noting that knights regarded each other "as equals or antagonists with equal rights"); Meron, *Bloody Constraint*, *supra* note 70, at 113 (discussing Shakespeare's portrayal of courtesy on the battlefield).

fought on "essentially equal terms,"[103] for instance, by stipulating a time and place for combat.[104] The rules of combat also required that knights not strike when their opponent was without his weapons and that they avoid stealth and trickery (especially the use of poison).[105] The requirement that battles be fair was so important that, in theory, it was supposed to prevail over military strategy.[106] However, in practice, strategic prudence usually won out.[107] Knights who showed courtesy were glorified like those who showed exceptional prowess.[108] Any knight who acted discourteously was scorned and reproached.[109]

The obligation of courtesy is reflected in UCMJ Article 133, which prohibits all conduct "unbecoming an officer and a gentleman."[110] In addition to dishonesty, Article 133 violations include disgracing oneself before or taking advantage of one's subordinates,[111] crimes involving "moral turpitude,"[112] and actions demonstrating "a total lack of moral discernment and responsibility or [is] contemptuous of restraints imposed by standards of public decency and propriety."[113]

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[103] Painter, *supra* note 102, at 34. *See also* VALE, *supra* note 39, at 8; Meron, *Bloody Constraint*, *supra* note 70, at 113.
[104] MERON, HENRY'S WARS AND SHAKESPEARE'S LAW, *supra* note 73, at 141.
[105] Draper, *supra* note 74, at 19. Draper states that all strategems were prohibited. This is a misstatement. As discussed below, medieval scholars distinguished between guile and treachery.
[106] Meron, *Bloody Constraint*, *supra* note 70, at 109.
[107] Meron, HENRY'S WARS AND SHAKESPEARE'S LAW, *supra* note 73, at 141 (quoting JOHAN HUIZINGA, THE WANING OF THE MIDDLE AGES 97 (1924)).
[108] Painter, *supra* note 102, at 54.
[109] *Id.* at 33.
[110] UCMJ art. 133, 10 U.S.C. § 933. The MCM provides that "[t]here are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty." MCM, *supra* note 57, pt. IV, ¶ 59(c)(2). *Cf.* Elizabeth Hillman, *Gentlemen Under Fire: The U.S. Military and "Conduct Unbecoming"*, 26 LAW & INEQ. 1 (2008).
[111] Nelson, *supra* note 15, at 126.
[112] Such crimes include sexual assault or burglary. *Id.* at 135. These crimes are all specifically prohibited by other articles in the UCMJ.
[113] *Id.* at 136. Although amorphously worded, specific acts include adultery, spousal abuse and "association with a notorious prostitute." In *Parker v. Levy*, the Supreme Court held that Article 133 is not void for vagueness. 417 U.S. 733, 752–61 (1974).

It has been argued that, "an attempt to write unambiguous military custom or rules for officers would destroy initiative,"[114] although there is a counter-argument that imprecision has value. Martin Jayne, for example, has argued that Article 133 is not enough.[115] Jayne approves the imprecise nature of Article 133 insofar as "no one could ever draft rules with sufficient foresight and imagination to specifically prohibit [all] innovative misconduct,"[116] but believes that, "in an imperfect world, explicit guidance can illuminate the general principles and help regulate behavior.[117]

In any case, there is a certain level of respect among military combatants, which is wise from any view. In the First World War courtesy among air combatants reached certain levels of formality that entered military folklore.[118] Actual conduct, however, was well grounded in reality,[119] and at some level carried over to World War Two, at least in Western Europe.[120]

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[114] Nelson, *supra* note 111, at 140. To emphasize the difficulty of codifying the customs of the services, Major Nelson quotes the Air Officer's Guide, which states, "The code of the Air Force cannot be captured in its entirety in the narrow lifelessness of the printed word, for this code is a living reality that must be experienced to be fully understood." *Id.* at 141 (quoting THE AIR OFFICER'S GUIDE 277 (19th ed. 1968)) Similarly, Charles Myers has argued that, "it would be counterproductive to reduce, or appear to reduce, the ethical components of officership to a code." Charles R. Myers, *Officership and a Code of Ethics*, 5 USAFA J. LEG. STUD. 9, 10 (1994). Myers bases his argument on the fundamental moral philosophical distinction between morality of duties and morality of character, *id*. at 14, and the fact that "[t]he concept of 'conduct unbecoming an officer and a gentleman' is derived directly from the ethical experience of officers," *id.* at 12. Thus, he concludes Article 133 is the perfect moral rule to guide officers and gentlemen. *Id.* at 16.

[115] H. Martin Jayne, *The Impact of Law and Leadership on the Ethical Behavior of Air Force Officers*, 4 USAFA J. LEG. STUD. 1 (1993).

[116] *Id.* at 7.

[117] *Id.*

[118] Such formalities included the salutes between combating airmen. *See, e.g.*, LEE KENNETT, THE FIRST AIR WAR: 1914-1918 171–74 (1991).

[119] As Lee Kennett quoted:

> In the world of relentless hunters and driven men was there any place for the chivalry so often associated with aerial combat? Strangely enough there was, though there has been considerable dispute about the forms it took and the frequency with which it manifested itself. General Poro wrote that the aviators were rightly called "the knights of the skies," for among them knightly forms and gestures were far more common than in any of the other services; Silvio Scaronji, on the other hand, has written that chivalry rarely made an appearance in the air war...

That version of courtesy is again a unique military virtue, although certain violations such as treachery and perfidy seem equally forbidden to civilians,[121] and certainly apply when civilians fight.[122] Other aspects, however, have no analogue in civilian life.

> What sometimes passed for chivalry was simply the aviators' way of observing the rules of war. Rather than passing names of the enemy airmen killed or taken prisoner to the International Red Cross for transmission to the other side, they simply dropped message, usually over an enemy airfield...In time this custom led to others; when an enemy aviator had been buried, photos of the funeral were sometimes dropped; on other occasions letters from captured airmen were transmitted this way...
>
> The general respect held for airmen of the opposing side was reflected in the messages of condolence or even the funeral wreaths dropped when an enemy aviator of note had been killed.

Id. at 171 (emphasis added.).

[120] *See, e.g.*, the description by an RAF fighter pilot of aerial combat in 1940:

> One of the ME 109s began circling him. 'I was alarmed. He was near enough for me to see his face. I felt . . . he would shoot me . . . But he behaved very well. The noise of his aircraft was terrific. He flew round me . . . then he suddenly . . . waved to me.' And the chivalrous German fighter pilot then dived for home.
>
> John was lucky. He was fair game for the Luftwaffe pilot. Even [Air Marshal Sir Hugh] Dowding thought so. On 'the ethics of shooting at aircraft crews who have baled out,' it was his opinion that 'Germans descending over England were perspective prisoners and should be immune, while British pilots descending over England were still potential combatants. German pilots were perfectly entitled to fire on our descending airmen.'

PETER TOWNSEND, DUEL OF EAGLES: THE STRUGGLE FOR THE SKIES FROM THE FIRST WORLD WAR TO THE BATTLE OF BRITAIN 278 (2003).

[121] A useful example of treacherous civilian conduct punishable by law can be found in the Rwandan genocide where civilians who mislead victims to their detriment were later tried. *See*, *e.g.*, Prosecutor v. Ndahimana, Case No. ICTR-01-68-T, Judgment and Sentence, ¶¶ 147–48 (Dec. 30, 2011) (describing charges against a mayor for leading Tutsi civilians into a church where they were later slaughtered; Ndahimana was ultimately found not guilty of this charge).

A clear example of this distinction may be found in Article 35 of the Hague Regulations which requires that "[c]apitulations[123] agreed upon between the contracting parties must take into account the rules of military honor." What the drafters at the Hague had in mind is perhaps best demonstrated by a definitive account of Lee's surrender of the Army of Northern Virginia at Appomattox. On April 9, 1865, General Lee had advanced with a party between the lines of the two armies to seek a meeting with General Grant, but without asking for a truce. Federal skirmishers were advancing, and a Union courier rode out to warn General Lee's party they were in danger of being overrun. Withdrawing to his lines Lee remembered that his II Corps under General John Gordon was still engaged, Lee sent him orders to arrange a truce. Gordon's courier encountered BG George A. Custer who rode into Gordon's headquarters and demanded immediate surrender:

> Since Lee and Grant already were exchanging messages on the subject of surrender, Custer's demand was a breach of military courtesy. Gordon curtly rejected [it and Custer demanded to see General James Longstreet]…Longstreet blew up like a powder charge. Custer "was reminded…that I was not the commander of the army, that he was within the lines of the enemy without authority, addressing a superior officer, and in disrespect to General Grant as well as myself."… [After the surrender documents were signed] Lee explained to Grant that about a thousand Federals had been captured in recent days; Lee wanted to return them as soon as possible, since he could not feed them. "I have indeed, nothing for my own men," he said. Grant immediately accepted the return of the prisoners and arranged to issue rations to the defeated Confederates….When Lee led the way back to the porch, the Federal soldiers in the McLean yard came to attention and saluted. Lee returned the salute…[Lee mounted his horse]…,Just then Grant, coming

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[122] See, GC III, *supra* note 18, art. 4 (imposing general compliance with the laws of war on any non-military combatant seeking POW status); *see also* Protocol I, *supra* note 11, art. 1.

[123] The United States Army defines a capitulation as "an agreement entered into between commanders of belligerent forces for the surrender of a body of troops, a fortress, or other defended locality, or of a district of the theater of operations. A surrender may be effected without resort to capitulation." DEPARTMENT OF THE ARMY, FM 27-10 DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE ¶ 470 (July 15, 1976).

> down the porch steps, stopped and without a word, removed his hat. The rest of the Federal officers did the same. Lee raised his hat in return and rode slowly off…Throughout the Union Army, artillerymen began to fire salutes. "I at once sent word, however to have it stopped," said Grant. "The Confederates were now our prisoners and we did not want to exult in their downfall."
> [On April 12, the Army of Northern Virginia formally surrendered marching to the ceremony under General Gordon]. As the column neared the double line of Union soldiers, Gordon heard a spoken order, a bugle call and an electrifying sound: the clatter of hundreds of muskets being raised to the shoulder. Gordon's head snapped up. Comprehending in an instant, he wheel his mount toward [BG Joshua] Chamberlain, "…raised his sword aloft and brought the tip down to his nose in sweeping response to the Union tribute. He shouted a command, and the advancing Confederates came from a right shoulder shift to shoulder arms—returning the salute. It was, Chamberlain said, "honor answering honor…"[124]

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[124] JERRY KORN, PURSUIT TO APPOMATTOX: THE LAST BATTLES, 141–55 (1987). Similar examples of military honors exist well into the 20th century. In 1871, during the Franco-Prussian War, the Commandant of the besieged French fortress of Belfort communicated to the French government that "'If, under the existing circumstances the Government finds that further sacrifices would be useless, and that there is reason for giving up the place, the Commandant would desire that the Government itself should discuss the terms of the surrender, taking care to stipulate that, in consideration of the elements of resistance still remaining, the papers and archives . . . should be removed, and that the garrison should be allowed to proceed, with arms and baggage, to the nearest part of the territory occupied by French troops.' In consequence . . . the Government asked of Prussia that the garrison of Belfort should be allowed to quit with the honours of war. These terms were accepted. The troops were authorized to march out with arms and baggage, taking with them their papers and archives." EDMUND OLLIER, 2 CASSELL'S ILLUSTRATED HISTORY OF THE WAR BETWEEN FRANCE AND GERMANY, 1870–1871 274–75 (1895).
On January 2, 1905, following a five month siege in the Russo-Japanese War, the Russian fortress at Port Arthur commanded by MG Anatoly Stoessel surrendered to Japanese forces:

> Marshal Yamagata, Chief of General Staff, under orders from the Emperor, dispatched the following cablegram to Gen. Nogi:
>
> "When I respectfully informed his Majesty of Gen. Stoessel's proposal for capitulation, His Majesty was pleased to state that Gen. Stoessel had

> rendered commendable service to his country in the midst of difficulties, and it is His Majesty's wish that military honors be shown to him."
>
> It is believed here that the Port Arthur garrison has received liberal terms. There is a general disposition to be magnanimous in view of the garrison's marvelous defense. In military circles the opinion is expressed that the discussion between the Commissioners covered only a few questions, including allowing the garrison to march out carrying their arms, permitting the garrison to return to Russia with or without their officers, and requiring their parole not to take any further part in the war.

R. Hart Phillips, *Stoessel, After Long Conference, Surrenders City*, N.Y. TIMES, Jan. 3, 1905, at A1, *available at* http://www.nytimes.com/learning/general/onthisday/big/0102.html.
As late as 1941, the UK granted full military honors to the Italian East African forces of the Duke of Aosta surrendering at Amba Alagi, Ethiopia:

> A Rome communique today admits that Amba Alagi has surrendered and that the Duke of Aosta has been taken prisoner. The British, it was said, had accorded the Italian garrison full military honours.
>
> The communique read: "The garrison at Amba Alagi, after resisting beyond all limits, and now finding itself without water, food, and supplies, and being impossible to care for the wounded, has received orders to cease fighting.
>
> "The enemy, in recognition of the valour of our soldiers, has conceded them full military honours. Officers will be allowed to keep their revolvers, and the British commander has ordered, when the garrison leaves, that it should file past British units, who will render due honours.

The Australian, Melbourne, May 20, 1941.
On 14 June, 1982, Argentine forces in the Falkland Islands surrendered the Stanley Garrison. "As the final battle approached [British commander, MG Sir Jeremy] Moore was of the view that enemy psychology was such that he would 'fight hard' until his 'military honour' is satisfied." SIR LAWRENCE FREEDMAN, 2 THE OFFICIAL HISTORY OF THE FALKLANDS CAMPAIGN, WAR AND DIPLOMACY 649 (2005). Moore "was particularly concerned about the demand for 'unconditional surrender' which he suspected would offend the Argentine sense of honour, and which he concluded was, for all practical purposes, actually irrelevant." *Id.* at 651. Accordingly, he permitted the Argentine commander BG M. Menendez, to strike that portion. The Instrument of Surrender accordingly provided, in part:

> I, the undersigned, Comander [sic] of all the Argentine land, sea and air forces in the Falkland Islands [Menéndez's signature, scribbled over the crossed-out word of "unconditionally"] surrender to Major General J. J. MOORE CB OBE MC* as representative of Her Britannic Majesty's Government.

These are the modern chivalric requirements. How do they apply? What follow are two examples.

V. Two Examples of Distinctions Between International Humanitarian Law and Chivalry

What then is the distinction between Chivalry and International Humanitarian Law? In essence, Chivalry mandates actions and punishes inaction that IHL can only recommend. The difference is excruciatingly demonstrated by the conduct of Dutch U.N. peacekeepers at Srebrenica, Bosnia in 1995.

Srebrenica is a town in Eastern Bosnia and Herzegovina where in 1995, during the Yugoslav civil war, Bosnia Serb Army forces mass-

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> Under the terms of this surrender all Argentine personnel in the Falkland Islands are to muster at assembly points which will be nominated by General Moore and hand over their arms, ammunition, and all other weapons and warlike equipment as directed by General Moore or appropriate British officers acting on his behalf.
>
> Following the surrender all personnel of the Argentinean Forces will be treated with honour in accordance with the conditions set out in the Geneva Convention of 1949. They will obey any directions concerning movement and in connection with accommodation.

Falklands Surrender Document, BRITAIN'S SMALL WARS: THE WEB MUSEUM, http://www.britains-smallwars.com/Museum/Falklands/falkSurrenderDocument.html (last visited Mar. 31, 2012).
Military honors continue to be recognized and rendered:

> The remains of Argentine 1st Lt. Jorge Casco killed in 1982 while flying a Skyhawk fighter plane during the South Atlantic Islands conflict were buried at the Falkland Islands Darwin cemetery on Saturday 7 March 2009.
>
> In line with previous protocol and in accordance with the Geneva Convention, the United Kingdom Military provided military honours during the burial, including a firing party, said a release from the Falklands Government House.

UK Military Honours for Argentine Remain Rurial in Falklands, MERCOPRESS (Mar. 11, 2009), http://en.mercopress.com/2009/03/10/uk-military-honours-for-argentine-remain-burial-in-falklands.

murdered thousands of Muslim men and boys.[125] In March, 1993, U.N. peacekeeping forces had declared the area around Srebrenica as a "safe area," and Bosnian Muslims had congregated.[126] The safe area was ostensibly protected by Dutch Army forces assigned to UN peacekeeping duty.[127]

In early July, 1995, Bosnian Serb forces communicated to the Dutch their intention to capture Srebrenica.[128] Dutch troop strength had been reduced substantially by the refusal of Bosnians to allow the return of Dutch soldiers from leave,[129] and there were initial miscommunications with supporting NATO air forces.[130] Some Dutch soldiers were captured without resistance and later used by the Bosnians as target protection hostages ("human shields").[131] As the main Bosnian Serb attack commenced, the Dutch offered some light resistance,[132] but largely relied on their belief that heavy airstrikes would push back the Serbs.[133] Air support, however, was in fact extremely limited by communications failures and poor command decisions.[134]

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[125] *See* Patricia M. Wald, *General Radislav Kristic: A War Crimes Case Study*, 16 GEO. J. LEGAL ETHICS 445, 448–49 (2003); U.N Secretary General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35*, 77–84, U.N. DOC. A/54/549 (Nov. 15, 1999).
[126] U.N. Secretary General, *supra* note 125, at 13, 19.
[127] *Id.* at 53.
[128] *Id.* at 57–59.
[129] *Id.* at 54.
[130] *Id.* at 57–61.
[131] *Id.* at 61–62. Nor was this the first time the Bosnian Serbs had taken UN personnel as hostages. *Id.* at 46. "On the night of July 11, 1995, as the Dutch peacekeepers were under Serb attack, one unit fled its post in a light tank and plowed through a cluster of armed Muslims who are trying to block their flight." Marlise Simons, *Bosnia Massacre Mars Do-Right Self-Image the Dutch Hold Dear*, N.Y. TIMES, (Sept. 13, 1998), http://www.nytimes.com/1998/09/13/world/bosnia-massacre-mars-do-right-self-image-the-dutch-hold-dear.html.
[132] NETHERLANDS INSTITUTE FOR WAR CRIMES DOCUMENTATION**,** SREBRENICA, A "SAFE" AREA—RECONSTRUCTION, BACKGROUND, CONSEQUENCES AND ANALYSIS OF THE FALL OF A SAFE AREA (Apr. 10, 2002), *available at* http://www.srebrenica.nl/Pages/OOR/23/379.bGFuZz1OTA.html; *see also* Marlise Simons, *Dutch Report Criticizes U.N., Not Soldiers, in Bosnia Massacre,* N.Y. TIMES, (Apr. 11, 2002).
[133] *Id.*
[134] *Id. See also* Barbara Crosesette, *U.N. Details Its Failure to Stop '96 Bosnia Massacre*, N.Y. TIMES, Nov. 16, 1999, at A3 (quoting Sec. Gen. Kofi Annan as saying, "[t]he tragedy of Srebrenica will haunt our history forever;" Chris Hedges, *Conflict in the Balkans: the Overview; Bosnian Serbs Overrun Town Protected by UN*, N.Y.TIMES, Jul,July 12, 1995.

In fairly short order, the Dutch surrendered en masse,[135] and were either voluntarily or forcibly evacuated by the Bosnian Serbs.[136] Later investigation demonstrated a complete failure to carry out their protective duties on the part of the local Dutch command structure.[137] While the government of the Netherlands eventually paid a political price for this failure[138] no criminal charges were laid against the Dutch military forces,[139] and civil actions for damages were rejected by the Dutch courts.[140]

The failure of the Dutch troops to act swiftly, decisively, and courageously was not a violation of international humanitarian law. Nothing in IHL specifically requires that military personnel, even those assigned to protect civilians, are required to risk their lives[141] or units to fulfill that obligation.[142] The Dutch failure was certainly, however, a violation of the principles of chivalry. Under the standards articulated in

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[135] *Id.*

[136] *Id. See also* Stephen Kinzer, *Dutch Conscience Stung by Troops' Bosnia Failure*, N.Y. TIMES, Oct. 8, 1995 "(Before leaving Srebrenica [the Dutch battalion commander] was photographed, glass in hand, with General Mladic.").

[137] *Id.*

[138] Following the issuance of the NIWD Report, *supra* note 132, the Dutch Prime Minister, Wim Kok, assumed responsibility, and he and his entire government resigned on 16 April, 2002. *See* Marlise Simons, *Dutch Cabinet Resigns Over Failure to Halt Bosnian Massacre*, N.Y. TIMES, Apr. 17, 2002.

[139] A number of Bosnian Serb leaders both civil and military were charged with war crimes for these actions. *See* Kara Sundby, *Srebrenica Massacre*, N.Y. TIMES, Aug. 3, 2010 ("in June 2010, judges at The Hague handed down to rare genocide convictions, sentencing two security officers from the Bosnian Serb army to life in prison for their roles in the massacre."). *See also* Prosecutor v. Vujadin Popovi□, Ljubiša Beara, Drago Nikoli□, Ljubomir Borov□anin, Radivoje Mileti□, Milan Gvero and Vinko Pandurevi□, Case No. IT-05-88, Judgment (Int't Crim. Trib. For the Former Yugoslavia June 10, 2010).

[140] The cases were dismissed on September 20, 2008. See *Dutch Court Dismisses Srebrenica Case Against Netherlands*, SREBRENICA GENOCIDE BLOG (Sept. 10, 2008), http://srebrenica-genocide.blogspot.com/2008/09/dutch-court-dismisses-srebrenica-case.html.

[141] Absent, of course, the risks inherent in complying with the doctrines of proportionality and military necessity. *See* Protocol I, *supra* note 11, art. 51. *But c.f.*, Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving As United Nations Peacekeepers*, 51 HARV. INT'L L.J. 113 (2010).

[142] Nothing in current IHL seems to provide an affirmative requirement to rescue. The closest approach seems to be that of Additional Protocol I, Article 58. Precautions against the effects of attacks, which provides, in part, that "Parties to the conflict shall, to the maximum extent feasible: (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations." Protocol I, *supra* note 11, art. 58.

section IV, *supra*, and under articles 99[143] and 133[144] of the UCMJ, the Dutch commander and many of his officers would have been subject to criminal prosecution. The distinction is an important one, and it is why chivalry still matters.

Before turning to that final discussion, however, another example is worth examining[145]. In far more horrendous and threatening conditions, against an enemy far more organized and nefarious, a lone civilian, on a humanitarian mission, stood for everything represented by the principles of chivalry. His name was Raoul Wallenberg.

Wallenberg's story is widely known. He was a Swedish diplomat sent into fascist Hungary in late 1944 to rescue Hungarian Jews faced with deportation to Nazi concentration camps. Working with local Jewish organizations and other diplomats, Wallenberg repeatedly risked his life while participating in activities that preserved the lives of over 100,000 Jewish civilians.[146] The point of Wallenberg's story here is not that he performed heroic acts, but that he was not legally obligated to do so. Wallenberg was not a military officer, he was a civilian diplomat, and under no legal obligation from what evolved into International Humanitarian Law to risk his life.[147] The contrast with the Dutch peacekeepers at Srebrenica is all the more stark because his conduct, while mandated by honor, was entirely un-required by law.

VI. Why Chivalry Still Matters

There is a common assumption among current commentators that the place of chivalry in international law regulating battlefield conduct is

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[143] *See supra* note 57 and accompanying text.
[144] See *supra* note 110 and accompanying text.
[145] In this context, in any publication for Marines, one must also contrast the Dutch behavior with that of CPT Charles B. Johnson, USMC, who, while on peacekeeping duty in Lebanon, drew his pistol and stood in front of three Israeli tanks at his checkpoint in Beiruit, telling the Israelis that they would pass only "over my dead body." *A Marine, Pistol Drawn, Stops 3 Israeli Tanks*, N.Y. TIMES, Feb. 3, 1983, at A1.
[146] LENI YAHIL, THE HOLOCAUST: THE FATE OF EUROPEAN JEWRY 642–48 (1990); *see also* ALEX KERSHAW, THE ENVOY, (2010); Rochelle Berliner, *The Disappearance of Raoul Wallenberg: A Resolution Is Possible*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 391, 392–95 (1990).
[147] *See* Chad Hazlett, *Resistance to Genocidal Governments: Should Private Actors Break Laws to Protect Civilians from Mass Atrocity?*, 15 No. 3 HUM. RTS. BRIEF 24, 25 (2008).

limited to prohibitions against perfidy.[148] If that assumption were true, the British Manual's elimination of the chivalry requirement would be acceptable, since international humanitarian law reflected in Protocol I, prohibits perfidious conduct.[149] As is demonstrated above, however, U.S. law, inter alia, requires considerably more of its military.[150]

It is unquestionable that all American military personnel are prohibited from cowardly failure to fulfill international battlefield

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[148] Fenrick has defined chivalry as "certain recognized formalities and courtesies" on the battlefield. Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 94 (1982). He also argues that, as a unique set of principles, chivalry's remaining vitality is "exemplified by prohibitions against dishonorable or treacherous conduct and against the misuse of enemy uniforms or flags of truce." *Id.* at 94. Similarly, Wingfield insists that chivalry "remains most intact in the distinction between lawful ruses and treacherous perfidy." Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 TOL. L. REV. 111, 113 (2001).

[149] Protocol I, *supra* note 11, art. 37 provides:

Art 37. Prohibition of Perfidy
1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
(a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
(b) the feigning of an incapacitation by wounds or sickness;
(c) the feigning of civilian, non-combatant status; and
(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

Targeted killing of identified enemies is not the same as perfidy. For a comprehensive analysis, see HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel 57(6) IsrSC 1 [2005] (Isr.). The Bosnian Serbs provided an example of specifically perfidious conduct. On May 26, 1995, Bosnian Serb commandos in French uniforms and driving a vehicle with U.N. markings, captured French peacekeepers in Savajevo. Joel Brand, *French Units Attack Serbs in Sarajevo*, WASH. Post, May 28, 1995, at A1.

[150] *See* Part III, *supra*.

obligations,[151] that U.S. officers are governed by a strict (if intentionally amorphous) code of chivalric conduct,[152] that the quality of mercy goes beyond the mandates against denying quarter,[153] that certain promises, even to an enemy, must be kept,[154] and that violation of all these requirements still infers a penal response.

These legal strictures lead us to certain core principles that may guide a military leader on the battlefield and in strategic planning.

A. Tactics and battlefield conduct

Even at the squad level, chivalry has a valuable place for the modern warrior.[155] The discussion above makes it apparent that certain principles

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[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] Excerpt from an e-mail dated January 25, 2011, from former USMC Corporal Andrew R. Wallach to the author:

I wanted to be sure I did nothing which would bother me forever. I also remembered Mom's schooling with on Judaism, mostly her assertion that it is our duty to stand up for those who can't.

I worked at becoming a Viet Cong in terms of knowing everything about them so I could figure out what they were going to do. I tried to learn their psychology, culture, and habits, learned a couple of hundred phrases, and asked a lot of questions about Vietnamese life. I ate whatever I was offered. I always spoke politely using such terms as "yes sir," and asked my villagers their opinion on military actions. This helped me learn and caused them not to totally hate me. When I tripped a mine my villagers did not leave me as they sometimes did to marines who called them racist names. I learned that respect and manners, tended to encourage respect from villagers who went on combat missions with me.

Here are some examples. 1) I always walked point as patrol leader, and led through mine fields. I had tactical reasons but there were some other effects. The villagers looked at me as a leader. 2) One day I stood between a group of marines, and an elderly lady, before a Buddhist shrine. The marines were throwing rocks at her and I started throwing the rocks back at the marines. 3) I had a Vietnamese girl friend. The only time I ever touched her was to hold her hand a couple of times. I used to go visit her and I always put my M14 down and bowed to her father who watched us when I visited. They fed me and treated me the way any family would treat a polite young man visiting their daughter. 4) Outside our wire one day there was a tall Eurasian sitting in the dirt in the middle of the road behaving as if he were mentally ill. He had clean clothes, clean finger nails and clean hair. I assumed he was an NVA intelligence officer but wasn't certain. I got down on my knees, looked directly in his eyes and said in Vietnamese "you are really good". I did nothing else. If I

stand out as guidance for the small unit leader, both as a matter of law and morality. They may be summarized as follows:

- When engaging or about to engage the enemy, never refuse to perform or abandon your duty out of fear
- Never abandon, surrender, or deliver up your command unless doing so is justified by the utmost necessity or extremity, as measured by the surrounding circumstances and viewed in the light of the military experience of mankind
- Never depart from actual or impending combat with the intent to avoid combat, unless doing so is justified by the utmost necessity or extremity, as measured by the surrounding circumstances and viewed in the light of the military experience of mankind
- Never fail to give all reasonably possible relief and assistance to comrades engaged in battle
- Never lie to your comrades
- Never engage in treacherous conduct
- Mercy is required to anyone who is a non-combatant or a combatant who is hors de combat
- Loyalty to your comrades, your unit, your country and your principles should guide you in all things

B. Strategy

Basic strategic considerations of chivalry are the principles above writ large. Treachery as a matter of national practice,[156] torture or mistreatment of prisoners for national intelligence purposes,[157] mass

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abused him it would have made me look bad to the local peasants. It would also have told him he faced an ignorant enemy. Sometimes treating someone politely is a better weapon

I realized that lack of honor, not defending helpless people, and behaving badly caused marines to lose battles. What does this have to do with chivalry? Well honor, good manners, and direct leadership had an effect on the Vietnamese villagers and even affected the other CAP Marines. A Marine with chivalry is a man or woman with courage, manners, respect, and honor. This makes fewer enemies due to racism, temper tantrums, and other personality defects. Courage, both physical and moral, brings respect from both other marines, locals supporting the combat goal, and perhaps the enemy.

[156] For example, Japanese use of red cross-marked hospital ships for troop and ammunition transport in World War II. *See* DOWER, *supra* note 78.

[157] Evan Wallach, *Drop By Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007).

mistreatment or abuse of civilians,[158] and command decisions to abandon a mission for unacceptable political reasons,[159] all reflect a violation of the code of chivalry at some strategic level. When those decisions directly and clearly impugn the military honor code, they may and must be questioned.[160]

There is, however, in the current conflicts in which the United States remains actively engaged, a common thread of Islam, tribalism, and traditional[161] military virtues upon which a chivalric analysis may have considerable strategic value. The question from a strategic view is not so much how the enemy acts, but rather, how he views himself.[162] If the Afghan Taliban leadership views itself, for example, however incorrectly by our standards, as "true, perfect, gentle knight[s],"[163] there may be grounds for communication and some level of mutual respect among adversaries. In that case, the strategic implications for peace-making would be obvious.

Conclusion

While chivalry and International Humanitarian Law may well intersect and overlap, there is an obvious distinction between the chivalric obligations of military personnel in combat and what IHL requires of

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[158] *See* CIVILIANS IN THE PATH OF WAR (Mark Grimsley & Clifford Rogers, eds., 2002).
[159] See *U.N. Details Its Failure to Stop '96 Bosnia Massacre, supra* note 134.
[160] In 1941 Col. Gen. Heinz Guderian returned to Berlin Hitler's order prohibiting the prosecution of German soldiers who killed or mistreated civilians, and informed his superior officer that he would neither publish nor obey it. NICHOLAS BETHELL, RUSSIA BESIEGED 26 (1977); *see also* Peter Hoffmann, THE HISTORY OF THE GERMAN RESISTANCE 1933–1945 268 (1977) ("Verbal agreement was reached that corps commanders be told that execution of the orders for restriction of military law and the shooting of commissars was not desired.").
[161] Albeit, not necessarily, Western, or even classic Islamic. Cultural clashes aside, there seems to be a certain level of perfidy in the approach to combat of the Afghan Taliban, inconsistent with our understanding of the rules of Sharia, of classical Jihad, or of Saladin, *see supra* note 44, for example, the common Taliban practice of emplacing troops among the civilian populace.
[162] In 2009, the Taliban issued rules of conduct ostensibly providing some limitations on use of force. *Taliban Issues Code of Conduct*, AL JAZEERA (July 28, 2009), http://english.aljazeera.net/news/asia/2009/07/20097278348124813.html. While Mullah Omar's Order may have been only a cynical attempt to manipulate local and global opinion, it might also represent something more; it may be a reflection of the Taliban's self-image.
[163] *Cf.* Geoffrey Chaucer, *Canterbury Tales*, *in* THE RIVERSIDE CHAUCER 63, 68, 69, & 72 (Larry Benson, ed., 3d ed. 1987).

civilians. At its core chivalry holds the soldier, sailor, flyer or Marine to a level of bravery and honor that cannot be, and is not reasonably asked, of those who are not war fighters.[164] What may flow from this analysis, however, is that those who are war fighters, even if they are not in standard uniforms, may be subject to the appeal of chivalry. The combatant's self-image is important, not least for the morale and esprit de corps necessary to small unit cohesion. It might be worth the effort to attempt to appeal to the chivalric traditions of our current foes (and friends) in SW Asia. There is a long memory in those cultures. The author sat at dinner in Pakistan one evening in December, 2008 when the Moslem cleric sitting next to him used a reference to an act of mercy by Alexander the Great in 327 B.C. as a general call for respect, mercy, and honor in regional warfare.

From those to whom the national defense is entrusted much is asked, much of it repugnant to civilian sensibilities. While the law may encourage and even reward civilian lifesavers, it makes no pretense of mandate or of punishing failure of courage; the very opposite is true of military conduct.

Indeed, the chivalric code from which that requirement springs makes further demands of those bound by its strictures. It requires a certain minimal level of treatment of honorable enemies, banning perfidy, treachery and mistreatment of those unable to defend themselves as hors de combat or non-fighting civilians. There is a still level of quid pro quo in those requirements which transcends national boundaries, and which binds the honorable warrior whose military code descends from those medieval requirements which bound crusader and mujahedeen.

That common ground for legitimate combatants may well provide a basis for common dialogue, and for the humanity in warfare so earnestly sought by the international humanitarian organizations. There is a certain

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irony[165] that those civilians who call for application of that code are largely unbound by its most stringent requirements. It is that distinction between civilian and war fighter that is the glory of military service and its burden.

[165] There is also considerable irony in the genesis of this article, which is part of the author's continuing examination of command responsibility for combat activities of fully autonomous fighting vehicles. The question necessarily arose, in analysis of the basic principles articulated by FM 27-10 about how to apply chivalry, that uniquely human quality, to principles analysis and control of artificial intelligence. It would seem both inappropriate and difficult to mandate in a criminal venue, that which we cannot analyze. This article has been, at least in part, an attempt to create a basis for applying to fighting machines and their commanders, the rules which make warriors, knights. To recoin a phrase, "Quis custodes ipsos robotus?"