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BEYOND ARM BANDS AND ARMS BANNED: Chaplains,
Armed Conflict, and the Law

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BEYOND ARM BANDS AND ARMS BANNED: CHAPLAINS, ARMED CONFLICT, AND THE LAW

*Lieutenant Jonathan G. Odom, JAGC, USN**

I. Introduction

In Herman Wouk's novel of law and war *The Caine Mutiny*, the protagonist, young Ensign Willie Keith, fretted over his limited role in the battles of World War II. During his deployment aboard the old rusty *USS Caine*, his father wrote him a letter with comforting words to a young man who wanted to see action and fight the good fight. Particularly, he told his son, "It's your way of fighting the war."¹ In this current time of global war, every member of our nation's military has his or her special role in the effort. Clearly, these responsibilities are as diverse as the people who carry out those duties. Just as the jobs of these service members differ within their ranks, so too does their respective status within the relevant battlespace. This article will address the unique status and treatment of one of those special groups within the armed forces of any nation, including the United States—that is, military chaplains.

The familiar phrase "foxhole religion" reminds us that faith is often on the minds of fighting forces.² In fact, U.S. military doctrine for chaplains recognizes that "[m]any ministry opportunities derive from a close proximity to combat action."³ Consequently, such doctrine further "encourages the concentrating of ministry efforts in forward combat areas."⁴ Chaplains and their

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¹ HERMAN WOUK, *THE CAINE MUTINY* 58 (Doubleday & Company 1951).

² Jonathan Finer and Peter Baker, *In Kuwait, Baptism Before the Gunfire: Faced With Threat of War in Iraq, Many Marines Turn to Religion*, WASHINGTON POST (28 February 2003), at A01.

³ DEPARTMENT OF THE NAVY, FLEET MARINE FORCE MANUAL 3-61, MINISTRY IN COMBAT (22 June 1992), ¶ 2002g [hereinafter FMFM 3-61].

⁴ *Id.*

assistants are encouraged to serve “near at hand during battle,” but not “in the midst of battle.”⁵ Seizing upon such opportunities, however, is not without its risk, nor can it always be so neatly compartmentalized. When ministry meets combat, issues of multiple disciplines arise – including issues of law.

All is not truly fair in love and war.⁶ Throughout history, rules have developed which dictate the acceptable limits on how a war may be fought. Likewise, much guidance has been written about these rules of warfare. Certain service publications have provided a chapter by chapter overview of certain aspects of the law of armed conflict,⁷ while others have provided a cohesive analysis of the applicable international conventions.⁸ Still other publications or articles have been written about the special status, treatment and responsibilities of certain categories of unique personnel, such as medical personnel,⁹ civilians,¹⁰ government contractors,¹¹ and others. One such group entitled to special status and treatment under the rules of warfare is military chaplains. However, unlike some of the other groups, such as medical personnel, no such legal publication has recently¹² addressed the specific, unique nature of men and women of the cloth who find themselves in the midst of war. The primary goal of this article is to provide a comprehensive, up-to-date examination of the special legal status, treatment, benefits and responsibilities of chaplains who serve their God and their nation in the midst of armed conflict.

Section II of this article will focus upon the legal status of chaplains in armed conflict: first, the basic law of armed conflict; then, the historical role of chaplains in the U.S. military and how that role has dramatically changed through our nation’s history. Thereafter, the analysis will shift to the actual

⁵ *Id.*

⁶ EDWARD SMEDLEY, FRANK FAIRLEIGH (1850) (“All’s fair in love and war.”); JOHN LYLY, EUPHUES (1578) (“The rules of fair play do not apply in love and war.”)

⁷ *See, e.g.*, DEPARTMENT OF THE NAVY, NAVAL DOCTRINE COMMAND, NWP 1-14M, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (October 1995); DEPARTMENT OF THE ARMY, THE JUDGE ADVOCATE GENERAL’S SCHOOL OF THE ARMY, OPERATIONAL LAW HANDBOOK (2003) [hereinafter OPERATIONAL LAW HANDBOOK].

⁸ *See, e.g.*, DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956) [hereinafter FM 27-10].

⁹ *See, e.g.*, Christopher T. Cline, *Medical Operations and the Law of War*, MILITARY REVIEW (April 1991); Bruce T. Smith, Air Force Medical Personnel and the Law of Armed Conflict, 37 A.F. L. REV. 239 (1994); ALMA BACCINO-ASTRADA, MANUAL ON THE RIGHTS AND DUTIES OF MEDICAL PERSONNEL IN ARMED CONFLICTS (International Committee of the Red Cross 1982).

¹⁰ *See, e.g.*, Lisa L. Turner and Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1 (2001).

¹¹ *See, e.g.*, Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon*, 51 A.F. L. REV. 111 (2001).

¹² L.B. Watson, *Status of Medical and Religious Personnel in International Law*, 20 JAG Journal 41 (1965).

status of all nations' military chaplains under international law, primarily under the Geneva Conventions of 1949. Next, the article will highlight two of the methods of distinction established in the Conventions for setting chaplains apart on the battlefield. Finally, the policy restrictions adopted by the U.S. armed services for the purpose of protecting the status of U.S. chaplains will be examined.

Section III of this article will focus upon the legal treatment of chaplains in armed conflict. First, the discussion will explore the standard of treatment of chaplains in the battlespace. The remainder of this section will examine the standard of treatment of chaplains upon capture, primarily in prisoner of war camps, to include an explanation of the duration of any such retention. Additionally, it will highlight how chaplains are entitled to prisoner-of-war benefits, but are also subject to internal discipline systems of the detention camp. The focus will then shift to the performance of chaplains' spiritual duties in camp, including the special facilities guaranteed in the Conventions to help perform those duties. Finally, examination will shift to the U.S. Code of Conduct and its application to U.S. chaplains retained by the enemy.

Section IV of this article will focus upon the domestic role of U.S. chaplains in armed conflict. Prior to considering the multiple roles, each chaplain must fully understand the status and treatment standards adopted by the U.S. armed forces to implement the obligations under the Geneva Conventions. Thereafter, scrutiny will shift to the three key roles developed for U.S. chaplains in U.S. detention facilities: advisors to camp commanders; ministers to enemy detainees; and conduits between the two interests. Finally, the article will explore a potential conflict of interest arising in the performance of the roles involving the penitent-clergy communication privilege. Throughout the examination of these domestic roles, international law obligations, domestic policy guidance, and the practical application of both by U.S. chaplains recently assigned to Camp X-ray in Guantanamo Bay, Cuba, will be highlighted.

II. Legal Status of Chaplains in Armed Conflict

A. Basic Concepts of the Law of Armed Conflict

The law of armed conflict (often referred to as "LOAC") is a body of international law that addresses the various rules for conducting warfare. As with other areas of international law, this body of law is derived from a variety of sources within two general categories: conventional law and customary international law.¹³ Conventional law refers to international treaties, conventions

¹³ FM 27-10, *supra* note 8, ¶4 at 4.

and agreements that have been entered by multiple nations through established procedures. Customary international law refers to principles which have developed through time and practice of nations, but which may not necessarily be codified in any particular signed agreement.

LOAC addresses the rules of war from several different angles. Namely, LOAC defines who and what may be targeted in periods of armed conflict, how individuals may be treated in periods of armed conflict, what types of weapons may be used in armed conflict, what tactics may be employed in armed conflict, and how all of these rules may be enforced. Most of these legal guidelines under LOAC are intended to promote one of four broad principles: necessity,¹⁴ proportionality,¹⁵ humanity,¹⁶ and distinction.¹⁷ For chaplains, a great deal of the focus in understanding their special status and treatment is derived from the fourth principle of distinction.

The LOAC principle of distinction—sometimes referred to as discrimination—is one of the few positive types of discrimination in the world. In short, armed forces are expected to distinguish between certain categories of individuals and treat these groups differently based upon the respective categories. For the sake of clarity, the key distinction for individuals is between combatants and noncombatants.¹⁸ Combatants are those individuals directly engaged in the fight, while noncombatants are individuals who are not engaged in the fight. While such simple definitions might appear to suggest all military forces are combatants and all civilians are noncombatants, this body of LOAC is not so simplistic. To be sure, uniformed Soldiers and Sailors who are engaged in armed conflict are combatants and the average civilian is a noncombatant. These individuals, however, are not the only individuals who are combatants or noncombatants. For example, a civilian who takes up arms against the enemy

¹⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) [hereinafter GC IV] (Article 147 states: “Grave breaches [of the Convention]...shall be those involving...extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”), in DOCUMENTS ON THE LAWS OF WAR 299, 352 (Adam Roberts and Richard Guelff eds., 3rd ed. 2001) [hereinafter DOCUMENTS ON LOW].

¹⁵ FM 27-10, *supra* note 8, ¶41 at 19 (“[L]oss of life and damage to property must not be out of proportion to the military advantage to be changed.”)

¹⁶ Annexed Regulations to Hague Convention IV Respecting the Laws and Customs of War on Land (18 October 1907) [hereinafter HR IV] (Article 23(e) states: “It is especially forbidden...to employ arms, projectiles, or material calculated to cause unnecessary suffering.”), in DOCUMENTS ON LOW, *supra* note 14, at 77.

¹⁷ Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) [hereinafter GC III] (Article 4 states: “Prisoners of war...are.... [m]embers of the armed forces of a Party...having a fixed distinctive sign recognizable at a distance.”), in DOCUMENTS ON LOW, *supra* note 14, at 246.

¹⁸ HR IV, *supra* note 16, at 73 (Article 3 states: “The armed forces of the belligerent parties may consist of combatants and non-combatants.”).

may potentially become a combatant—in such cases, an “unlawful combatant.”¹⁹ On the other hand, certain uniformed personnel are not combatants, even though they are wearing military uniforms. This noncombatant status may be due to one of several criteria—either because of their responsibilities (e.g., doctors and chaplains) or because of their condition in the fight (e.g., prisoners of war and wounded soldiers).

The legal status of an individual dictates the legal treatment to which he or she is entitled under LOAC. Generally, this treatment falls into three categories: targeting, criminality, and detention. For example, a combatant can be targeted in the fight, cannot be prosecuted for participating in the fight (except for war crimes), and must be afforded prisoner-of-war benefits if detained in the fight (e.g., after surrender or capture). On the other hand, noncombatants cannot be targeted in the fight, can be prosecuted for participating in the fight, and must be afforded some different treatment if detained in the fight.

With this general background of LOAC, let us consider the details of the historical role and legal status of chaplains in the armed conflict environment.

B. Historical Role of Military Chaplains

Men (and, more recently, women) of the cloth have not always been the blessed “peacemakers”²⁰ of the battlefield. The first half of our nation’s military history constituted a true soul-searching of what should be the role of chaplains within our armed forces, ranging from whether chaplains should wear military uniforms to whether they should be armed and join in the fight.²¹ In the decades leading up to the Civil War, chaplains within the ranks were expected to assume various secular duties, to include: teaching the troops; providing medical treatment to the sick and wounded; administrating field hospitals; serving as unit postmasters; organizing shipboard libraries; taking charge of unit recreation programs; and supervising the commander’s mess.²² In conflicts such as the Revolutionary War and the War of 1812, individual chaplains were recognized for their heroic efforts in battle, efforts that included actively participating in the

¹⁹ *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942) (“By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.”).

²⁰ Matthew 5:9 (“Blessed are the peacemakers, for they shall be called sons of God”).

²¹ RICHARD M. BUDD, *SERVING TWO MASTERS: THE DEVELOPMENT OF AMERICAN MILITARY CHAPLAINCY* (Univ. of Nebraska Press, Lincoln, 2002).

²² *Id.* at 18-20, 48-51.

fight.²³ Much of their thrill for the fight might have been attributed to the fact that many of the early chaplains were not ordained ministers, but rather clerks or schoolmasters who accepted the unit chaplain title for its boosted payscale.²⁴

Through the years, however, the image of the “fighting parson” lessened. In 1782, Congress declared that the enemy’s chaplains, surgeons, and hospital officers should not be considered prisoners of war. The U.S. Navy mandated, unofficially in 1823 and officially in the 1841, General Regulations that all chaplains must first be ordained ministers.²⁵ Despite the move towards a professional chaplaincy, individual chaplains continued to hold various combatant roles during the Civil War, ranging from serving as the regimental colonel’s aide-de-camp, to gathering intelligence with their chaplain status as a cover, to assuming their place in the ranks and trading shots with the enemy.²⁶

²³ *Id.* at 21 (“In numerous instances both army and navy chaplains personally took part in fighting. While some pastors, like Lutheran John Peter Gabriel Muhlenberg, forsook their clerical status to become line officers, many saw no conflict in assuming the combat role as a chaplain. John Steele, the 1756 commander of Fort Allison, Pennsylvania, also served as its chaplain and was addressed as ‘Reverend Captain.’ Massachusetts minister William Emerson of Concord carried a musket in the fight against the British in 1775. Chaplain David Jones, armed with a brace of pistols, led a cavalry reconnaissance at Brandywine Creek. John Hurt, captured on an intelligence-gathering mission for Baron von Steuben, was another chaplain who basically operated in a combatant role. Many navy chaplains were also at the forefront of battle. Benjamin Balch, who was a minuteman at Lexington, served as chaplain on the frigate *Alliance* later in the war and fought alongside the crew in a fight with two British men-of-war. Combat participation by navy chaplains continued on several occasions during the War of 1812. Chaplain David Adams on board the frigate *Essex* was given command of three different captured prize vessels because of his knowledge of navigation and because of the shortage of line officers. Thomas Breeze, chaplain with Commodore Oliver Perry Hazard at the battle at Put-in-Bay, helped the purser and Perry fire the last gun on the *Lawrence*.”).

²⁴ *Id.* at 21.

²⁵ *Id.*

²⁶ *Id.* at 54-55 (“The extent of chaplain participation in combat existed on a continuum from quasi-staff work to firing a weapon on the battlefield. A common role for chaplains was to act as the regimental colonel’s aide-de-camp. Future president James A. Garfield’s chaplain acted in this role at the fight at Middle Creek, Kentucky, in 1862, and he was regularly included in the regimental staff meetings. The same was true for Chaplain Dean Wright of the Seventh OVI, who acted in that capacity at Port Republic, Virginia, that same year. Chaplain Denison, who volunteered to be his colonel’s aide, found that during battle he was unable to perform his duties ministering to the wounded because ‘the Colonel always wished me by his side.’ At least three southern chaplains served in this same capacity.

Next, there were chaplains who performed the even more dubious function of carrying or seeking military information, using their chaplain status as a cover. Frederick T. Brown, also of the Seventh OVI and ‘disguised as a mountaineer in homespun clothing, his fine features shaded by a slouch hat,’ carried unwritten dispatches to General Jacob Cox. James H. Fowler, chaplain of the Thirty-third U.S. Colored Troops, was described by his colonel as ‘our most untiring scout’ and as being ‘permitted to stray singly where no other officer would have been allowed to go, so irresistible his appeal, ‘You know I am only a chaplain.’....Apparently at least one Confederate chaplain, William M. Patterson of the Sixth Missouri Infantry Regiment, also crossed the line and engaged in both spying and running contraband goods when he was supposed to be buying Bibles.

Consequently, a significant number of military chaplains for both sides lost their lives in the war—some surely engaged as combatants.²⁷

Eventually, the military leadership of the Union and the Confederacy began to adjust the status of military chaplains. In the summer of 1862, Confederate and Union Generals signed reciprocal orders releasing enemy chaplains captured in the war.²⁸ This trend towards noncombatancy, however, slowed in 1863 when two Confederate chaplains allegedly assisted in the escape of two prisoners of war.²⁹ After both sides temporarily suspended the release of chaplains, they eventually resumed the practice in the fall of 1864. Thereafter, the military chaplain's role in armed conflict was changed forever. American chaplains would never again be involved as armed combatants "except for isolated and unsanctioned incidents."³⁰

At the same time, the domestic legal history of the U.S. Civil War significantly influenced the development of the international law of armed conflict. Particularly, President Lincoln issued General Order No. 100, commonly known as the "Lieber Code" in honor of its chief draftsman, Dr. Francis Lieber.³¹ A veteran of Napoleonic European warfare and thereafter a Professor of Law at Columbia University, Dr. Lieber had urged President Lincoln and the Union military leadership to set boundaries for what their troops should be legally permitted to do on the battlefield.³² In turn, President Lincoln appointed Dr. Lieber to a committee with four general officers to draft "a code of regulations for the government of armies in the field, as authorized by the

The ultimate combatant role for the chaplain, of course, was actually to stand with the troops and fire a weapon. Some went to war prepared for such an eventuality. His fellow ministers gave a Rhode Island chaplain named Jameson a sword as a present on the occasion of his leaving for the battlefields. Wearing his sword and pistol, Chaplain Denison saw no reason for chaplains not to be armed like surgeons and quartermasters. "If [chaplains] exhort men to fight," Denison said, "why not fight themselves, if they have a chance?" Apparently, some chaplains did take their place in the ranks and trade shots with the enemy. It was said of Thomas D. Witherspoon, a southern chaplain, that he had his commission only on the grounds that he could fight in the ranks with the rest of his regiment. Chaplain Henry Hopkins of the 120th New York Infantry Regiment was better known for his martial ardor than for his spiritual qualities; he received the Medal of Honor for his battlefield valor.")

²⁷ *Id.* at 54-55 ("Of thirty-six Union chaplains who died in service, fourteen were killed in battle. Twenty-five Confederate chaplains died in the war, and thirteen were slain in battle. While it is impossible to determine exactly how many of those who were killed in battle were actually engaged as combatants (some were officially listed as taking part in the fighting themselves), the most generous estimate would be that not more than half were themselves bearing arms.")

²⁸ *Id.* at 56.

²⁹ *Id.* at 57.

³⁰ *Id.*

³¹ Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 192 (2000).

³² Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L. L. 213, 214-215 (April 1998).

laws and usages of war.”³³ Upon the code’s completion, President Lincoln approved and promulgated it to Union forces on 24 April 1863.³⁴ The Lieber Code is now commonly recognized as “the first attempt to check the whole conduct of armies by precise written rules,”³⁵ which carried influence beyond the battles and borders of the U.S. Civil War.

As the Lieber Code is the general precursor for the modern body of LOAC, the code also specifically injected terms and concepts into the legal framework concerning chaplains and their status on the battlefield. Specifically, Article 52 of the Lieber Code stated:

The enemy’s chaplains, officers of the medical staff, apothecaries, hospital nurses and servants, if they fall into the hands of the American Army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.³⁶

Notice the Lieber Code’s early use of the term “retain,” as well as the concept of chaplains and medical personnel deserving some special status other than that of prisoners of war. Such terms and concepts regarding chaplains will become more familiar as we examine how this area of LOAC developed to the present.

C. Status Under International Law

At about the same time as the U.S. Civil War, the status of chaplains in armed conflict was being refined under international law. In 1864, an international convention was drafted and signed which first recognized the noncombatant status of chaplains.³⁷ Specifically, Article 2 of the agreement declared that: “Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded,

³³ *Id.* at 215.

³⁴ *Id.*

³⁵ *Id.*

³⁶ GENERAL ORDERS NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (24 April 1863) *in* THE LAW OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS [hereinafter DOCUMENTS ON LOAC]1, 11 (Dietrich Schindler and Jiri Toman eds., 2nd ed. 1981).

³⁷ Geneva Convention for the Amelioration of the Condition of the Wounded on the Field of Battle (22 August 184), *in* DOCUMENTS ON LOAC, *supra* note 26, 213.

as well as chaplains, shall participate in the benefit of neutrality, whilst so employed, and so long as there remain any wounded to bring in or to succor.” The preceding article in that same convention further clarified the benefits of the neutrality of such persons and places, in that they “shall be protected and respected by belligerents” as long as they are not misused. This codified agreement³⁸ was the precursor of the Geneva Conventions of 1929 and, ultimately, the four Geneva Conventions of 1949—which currently serve as the primary legal standard for status and treatment of persons on the battlefield.

Under the Geneva Conventions of 1949, persons on the battlefield are categorized as either combatants or noncombatants. Combatants can be legally targeted, but they are also legally protected in certain ways. If attaining this status is so important, the question is begged: Who exactly is a combatant? As a general rule, the category known as combatants includes a member of the armed forces of a party to the armed conflict who satisfies four pre-requisites: (1) the person’s unit is “commanded by a person responsible for his subordinates”; (2) the person has “a fixed distinctive sign recognizable at a distance”; (3) the person is “carrying arms openly”; and (4) the person’s unit is “conducting their operations in accordance with the laws and customs of war.”³⁹ As a practical matter, almost every member of a nation’s armed forces—ranging from a rifleman to a fighter pilot—will easily satisfy these four pre-requisites in an armed conflict.

At the same time, however, the 1949 Conventions recognize several special groups within a nation’s armed forces who are entitled to different status. More specifically, chaplains and medical personnel are legally entitled to special status. Generally, such personnel shall be “respected and protected,”⁴⁰ regardless of whether they are located on land⁴¹ or at sea.⁴²

³⁸ The United States did not become a signatory of the 1864 Geneva Convention until 1882. BUDD, *supra* note 21, at 57.

³⁹ GC III, *supra* note 17, art. 4.

⁴⁰ For a discussion of what constitutes “respect” and “protect,” see discussion *infra* IIIA.

⁴¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) (hereinafter GC I) (Article 24 states: “Medical personnel exclusively engaged in the search for, or the collection, transport, or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.”) *in* DOCUMENTS ON LOW, *supra* note 14.

⁴² Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (12 August 1949) (hereinafter GC II) (Article 37 states: “The religious, medical and hospital personnel assigned to the medical and spiritual care of [members of a nation’s armed forces who are wounded, sick, and shipwrecked at sea] shall, if they fall into the hands of enemy, be respected and protected....”) *in* DOCUMENTS ON LOW, *supra* note 14.

As a matter of history, the drafters of the 1949 Conventions recognized the historical origins of the special status afforded to medical personnel and chaplains. As with medical personnel, chaplains “are often called upon to give help of a more material nature to the wounded on the battlefield.”⁴³ Consistently, through agreements between commanders of armies in military history, chaplains have been placed on an equal footing with medical personnel for such privileged status.⁴⁴

As a matter of principle, two of the guiding LOAC principles—humanity and necessity—are promoted by giving special status to medical personnel and chaplains. With the principle of humanity, chaplains are able to “[bring] the solace of religion and moral consolation” to the wounded and dying, where they are “present at the last moments of men who have been mortally wounded.”⁴⁵ With the principle of necessity, no reasonable basis exists for allowing enemy forces to target a chaplain who finds himself on the battlefield for the sole purpose of providing spiritual comfort to the wounded and dying.

With these historical origins and LOAC principles in mind, it is important to recognize the delicate nature of this special status afforded to chaplains and the corresponding need to preserve that special status. In the heat of battle and the fog of war, all individuals—including chaplains—wearing enemy uniforms and located in the vicinity of known enemy combatants could easily be construed as legitimate targets. As a result of this inevitable situation and the potential confusion, the drafters of the Geneva Convention recognized that all doubt or risk of mistaken identity should be avoided or reduced.

⁴³ JEAN S. PICTET, COMMENTARY TO GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (International Committee of the Red Cross 1952) (hereinafter COMMENTARY TO GC I) at 219. Immediately after the convened nations approved the text of the four Geneva Conventions of 1949, the International Committee of the Red Cross decided to memorialize a detailed commentary to those texts. *Id.* at 7. A reader of those commentaries should realize that they are not binding. Ultimately, only consultative agreements between the signatory nations serve as the “authentic” controlling interpretation of the conventions. However, the signatories have not routinely entered such interpretative agreements. *Id.* Consequently, the Commentators stated in their foreword:

The International Committee hopes that this Commentary will be of service to all who, in Governments, armed forces, and National Red Cross Societies, are called upon to assume responsibility in applying the Conventions, and to all, military and civilians, for whose benefit this study it will help to make the Conventions widely known – for that is essential to be effective – and to spread the influence of their principles throughout the world.

Id. at 8.

⁴⁴ *Id.*

⁴⁵ *Id.* at 219-220.

Several methods of distinction were incorporated into LOAC to help protect chaplains. The most significant method of distinction is the actual conduct of the individual. Consequently, the drafters declared that “[t]o be entitled to immunity, [chaplains] must be employed exclusively on specific...religious duties.”⁴⁶ Moreover, chaplains “must obviously abstain from all hostile acts.”⁴⁷ Actions with the potential to jeopardize this special status include “any form of participation—even indirect—in hostile acts.”⁴⁸ While these strongly-worded discussions by the commentators were not codified within the actual text of the convention, their interpretative value helps explain the need for the absolutist perspective of our military’s policy regarding arming chaplains, which will be discussed *infra* in Part E.

D. Methods of Distinction

Much of the discussion surrounding chaplains focuses on what they shall not do in armed conflict. The 1949 Conventions, however, balance those restrictions with certain safeguards to minimize the risk to chaplains. These permitted actions serve to enhance the principle of distinction. Such distinction is enhanced primarily by arm bands and special identification cards, both permitted under conventional law.

1. Arm Bands

Chaplains serving in armed conflict are permitted to wear arm bands that distinguish them from the rest of their respective unit. Under the 1949 Conventions, chaplains and medical personnel “shall” wear such an arm band or, to use terminology of the Conventions, an “armlet.”⁴⁹ This arm band must be worn on the chaplain’s left arm. The conventions use the term “affixed,” to signify the importance that these protected persons not take it off and put it on again at will.⁵⁰ While this arm band should be water-resistant to maintain its “good condition,” the lack of that trait does not negate its “protective value.”⁵¹

Additionally, the band must be issued and stamped by the military authority of that chaplain’s armed forces.⁵² The name of the military authority must appear on the stamp.⁵³ Because the stamp is issued by an official military

⁴⁶ COMMENTARY TO GC I, *supra* note 43, at 218.

⁴⁷ *Id.* at 220.

⁴⁸ *Id.* at 221.

⁴⁹ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁵⁰ COMMENTARY TO GC I, *supra* note 43, at 310.

⁵¹ *Id.*

⁵² GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁵³ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

authority, it attaches a senior officer's "responsibility" to the consideration and decision of issuing each such arm band to a deserving individual.⁵⁴ One conceptual thread running throughout the Geneva Conventions is ensuring overall compliance with LOAC by holding individual servicemembers, as well as their commanders, accountable for any violations of the law.⁵⁵ Consequently, the existence of the issuing stamp on the arm band is truly critical—not merely a formality—and its absence will cause the arm band to have “no protective value.”⁵⁶

More importantly, the arm band must bear “the distinctive emblem,”⁵⁷ as the “visible sign of immunity.”⁵⁸ Under international law, the “distinctive emblem” on these arm bands can vary depending upon the religious faith of the chaplain. The most commonly recognized emblem is the red cross on a white background.⁵⁹ While such crosses may at first glance be assumed to reflect the Christian faith, the 1949 Conventions specifically state the origin of this emblem as “a compliment to Switzerland.”⁶⁰ Switzerland, of course, was the homeland of businessman Henry Dunant, who witnessed the horrors of war at the Battle of Solferino in 1859. He subsequently responded by founding the International Committee of the Red Cross in Geneva.⁶¹ He and his organization were chiefly responsible for the inaugural Geneva Convention of 1864,⁶² referenced *infra* Section IIC, and successive international agreements. In order to eliminate “any national association,” the colors of the Swiss flag were reversed.⁶³

While the red cross was intended to be religiously neutral, its unintended impact resulted in other distinctive emblems being recognized. In the negotiations over the series of Geneva Conventions, the International Committee for the Red Cross consistently sought to adopt a single emblem in order to avoid any confusion⁶⁴ among the belligerents in a conflict. They viewed the red cross as an “international sign” that was “devoid of any religious significance.”⁶⁵ Several nations, however, expressed contrary reservations about using the red

⁵⁴ COMMENTARY TO GC I, *supra* note 43, at 311.

⁵⁵ For example, one of the four criteria of a lawful combatant is that the individual serves “under a responsible command.” GC III, *supra* note 17, art. 4.

⁵⁶ COMMENTARY TO GC I, *supra* note 43, at 311.

⁵⁷ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁵⁸ COMMENTARY TO GC I, *supra* note 43, at 11.

⁵⁹ GC I, *supra* note 41, art. 38; GC II, *supra* note 42, art. 41.

⁶⁰ GC I, *supra* note 41, art. 38; GC II, *supra* note 42, art. 41.

⁶¹ Noone, *supra* note 31, at 191.

⁶² COMMENTARY TO GC I, *supra* note 43, at 11.

⁶³ *Id.* at 305.

⁶⁴ *Id.* at 309.

⁶⁵ *Id.*

cross as it was “offensive to Moslem soldiers.”⁶⁶ As such, Turkey indicated its intent to use the red crescent. Siam (Thailand) indicated its intent to use the red flame. Persia (Iran) indicated its intent to using the red sun.⁶⁷ Thereafter, several Muslim nations adopted the red crescent.⁶⁸ Ultimately, the parties agreed to permit the use of several distinctive symbols.

In addition to the red cross, other protective symbols have gradually been permitted either under the conventions or via customary international law. The 1949 Conventions specifically recognize several other emblems, including the red crescent on white background, as well as the red lion and sun on white background.⁶⁹ Additionally, other emblems have been recognized as a matter of custom through the years. For example, Israel employs a red six-pointed star, symbolizing the Star of David.⁷⁰ The U.S. does not formally recognize this symbol as a matter of international law, and the Star has never been adopted in any international convention. Nations involved in Arab-Israeli conflicts, however, have customarily recognized the Star as a protective emblem as a matter of practice.⁷¹

To a certain extent, the U.S. armed forces have incorporated the use of arm bands into their respective uniform regulations. The Army refers to them as “brassards.”⁷² Generally, such brassards may be worn “as identification to designate personnel who are required to perform a special task or to deal with the public.”⁷³ The Army Regulation further describes the specifications and dimensions of such brassards.⁷⁴ Army personnel must wear any authorized brassards “on the left sleeve of the outer garment.”⁷⁵

⁶⁶ *Id.* at 298.

⁶⁷ *Id.* at 299.

⁶⁸ *Id.*

⁶⁹ GC I, *supra* note 41, arts. 38 and 41; Note that Iran has ceased using the red lion and sun, and now employs the red crescent. OCEANS LAW AND POLICY DEPARTMENT, NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (1997) (hereinafter ANNOTATED SUPPLEMENT) ¶ 11.9.1, at 11-16.

⁷⁰ ANNOTATED SUPPLEMENT, *supra* note 69, ¶ 11.9.1, at 11-17.

⁷¹ *Id.*

⁷² DEPARTMENT OF THE ARMY, ARMY REGULATION 670-1, UNIFORMS AND INSIGNIAS: WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (1 July 2002) [hereinafter AR 670-1], ¶ 28-29.

⁷³ *Id.*

⁷⁴ *Id.* (“Brassards are made of cloth; they are 17 to 20 inches long and 4 inches wide and of colors specified. When more than one color is specified for the brassard, the colors are of equal width and run lengthwise on the brassard.”)

⁷⁵ *Id.* (“Brassards are worn on the left sleeve of the outer garment, with the bottom edge of the brassard approximately 2 inches above the elbow.”)

The Army Regulation specifically addresses the wearing of the “Geneva Convention brassard.”⁷⁶ It describes the color scheme of such brassards,⁷⁷ and provides a visual diagram of that color scheme.⁷⁸ The regulation also specifies who is permitted to wear one, as well as when they may wear it.⁷⁹ Of note, such brassards may be worn by “chaplains attached to the armed forces.”⁸⁰

In contrast to the Army Regulation, the Navy Uniform Regulations are less detailed in their discussion of arm bands. Like the Army, the Navy refers to them as “brassards.”⁸¹ The Navy defines them as “cloth bands, marked with symbols, letters or words, indicating a type of temporary duty, to which the wearer is assigned.”⁸² The only other guidance that these uniform regulations provide regarding brassards concerns the appropriate location on the Navy uniform. Specifically, Naval personnel should wear such brassards “on the right arm, midway between the shoulder and elbow, on uniforms or outer garments.”⁸³

Upon review, the Navy Uniform Regulations appears to have several deficiencies. Unlike the Army Regulation, there is no particular discussion of the specifications or dimensions of red cross arm bands, nor is there information delineating who is permitted to wear them. Ironically, with only two sentences of guidance in the Navy Uniform Regulations concerning brassards, one of the two sentences is actually inconsistent with the Geneva Conventions. While the Geneva Conventions mandate that such arm bands be worn on the chaplain’s left arm, the Navy Uniform Regulations generally dictate that armbands shall be worn on the right arm. Consequently, U.S. Navy authorities should consider revising this uniform regulation to make it consistent with international law.

⁷⁶ AR 670-1, *supra* note 72, ¶ 28-29(b)(7).

⁷⁷ *Id.* (“The brassard consists of a red Geneva cross on a white background.”)

⁷⁸ *Id.*, Figure 28-160.

⁷⁹ *Id.*, ¶ 28-29(b)(7) (“Medical personnel wear the brassard, subject to the direction of competent military authority. When the brassard is worn, personnel are exclusively engaged in the search for, collection, transport, or treatment of the wounded or sick; or in the prevention of disease. The brassard is also worn by staff exclusively engaged in the administration of medical units and establishments, and it is worn by chaplains attached the armed forces.”)

⁸⁰ *Id.*

⁸¹ DEPARTMENT OF THE NAVY, BUREAU OF NAVAL PERSONNEL, UNITED STATES NAVY UNIFORM REGULATIONS, NAVPERS 156651, art. 5402(1).

⁸² *Id.*

⁸³ *Id.*, art. 5402(2).

2. Special Identity Cards

In addition to arm bands, the 1949 Conventions permit chaplains to carry special identification cards.⁸⁴ All members of the armed forces are already permitted to carry a general identification card to prove their entitlement to prisoner-of-war status.⁸⁵ The United States has implemented this provision with the “Geneva Conventions Identification Card.”⁸⁶ Chaplains and medical personnel, however, may also carry special identity cards to indicate their protected status. Like the arm bands, the special identity cards must be water-resistant.⁸⁷ Moreover, these pocket-sized cards must contain the following information:

- (a) the personal information of the cardholder (i.e., surname, first names, date of birth, rank, and servicenumber);
- (b) a statement regarding the special protection of the cardholder (e.g., medical personnel or chaplain);
- (c) a photograph of the cardholder;
- (d) either the cardholder’s signature, his fingerprints, or both; and
- (e) the embossed stamp of the military authority that issued the card.⁸⁸

Similar to the arm bands, these cards must also bear the “distinctive emblem” of the red cross, red crescent, *et cetera*.⁸⁹

As with the general identification card, the possession of these special identity cards is extremely important if such persons are actually captured. The arm band is “not in itself sufficient” to prove the protected status of person.⁹⁰ Instead, such captured persons must be able to show definitively that they are

⁸⁴ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁸⁵ “Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner’s surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth.” GC III, *supra* note 17, art. 17.

⁸⁶ DEPARTMENT OF DEFENSE, DD FORM 2 (October 1993).

⁸⁷ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁸⁸ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁸⁹ GC I, *supra* note 41, art. 40; GC II, *supra* note 42, art. 42.

⁹⁰ COMMENTARY TO GC I, *supra* note 43, at 312.

entitled to the truly unique standard of treatment which will be discussed below. Consequently, the possession of such special identity cards is “necessary.”⁹¹

While the 1949 Conventions also provide a standard format for these special identity cards, the U.S. military has subsequently implemented and adopted a standard form which complies with that format. Specifically, Department of Defense Form 1934 is entitled the “Geneva Conventions Identity Card For Medical and Religious Personnel Who Serve In or Accompany the Armed Forces.”⁹² The reverse side of this identity card specifically states:

THE PERSON WHOSE SIGNATURE, PHOTOGRAPH AND FINGERPRINTS APPEAR HEREON IS PROTECTED BY THE GENEVA CONVENTIONS FOR THE AMELIORATION OF THE CONDITION OF WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD, AND AT SEA OF AUGUST 12, 1949. IF THE BEARER SHALL FALL INTO THE HANDS OF AN ENEMY OF THE UNITED STATES, HE SHALL AT ONCE SHOW THIS CARD TO THE DETAINING AUTHORITIES TO ASSIST IN HIS IDENTIFICATION. WHILE RETAINED HE IS ENTITLED AS A MINIMUM TO THE BENEFITS AND PROTECTIONS EXTENDED TO PRISONERS OF WAR OF EQUIVALENT RANK.⁹³

As a practical tip, commands (and their staff judge advocates, legal officers, or legal clerks) deploying to combat regions should ensure that these special identity cards are issued to accompanying chaplains and medical personnel who are potentially “liable to capture or detention.”⁹⁴ For Navy personnel, such special cards may be issued by the respective command’s Administration Department or at their local Personnel Support Detachment.⁹⁵

⁹¹ *Id.*

⁹² DEPARTMENT OF DEFENSE, DD FORM 1934 (1 July 1974).

⁹³ *Id.*

⁹⁴ DEPARTMENT OF THE NAVY, BUREAU OF NAVAL PERSONNEL INSTRUCTION (BUPERSINST) 1750.10A, IDENTIFICATION CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR FAMILY MEMBERS, AND OTHER ELIGIBLE PERSONNEL (1 March 1998) 17. Note this same instruction has been issued by each of the services, respectively, as DEPARTMENT OF THE AIR FORCE, AIR FORCE INSTRUCTION 36-3026(I); DEPARTMENT OF THE ARMY, ARMY REGULATION 600-8-14; DEPARTMENT OF THE NAVY, MARINE CORPS ORDER P5512.1B; AND COAST GUARD, COMMANDANT INSTRUCTION M5512.1.

⁹⁵ *Id.* at 64.

While the command has some responsibility for ensuring that such cards are issued to their personnel, deploying chaplains clearly have a personal vested interest in seeking and obtaining such cards prior to deployment. With the limitations exacted upon chaplains in the battlefield by LOAC, deploying chaplains should take advantage of every possible method and means of protecting themselves afforded under LOAC, to include the arm band and special identity card.

E. Status Restrictions Under U.S. Policy

1. Religious Duties Only

As mentioned earlier, the primary method of distinction codified in the Geneva Conventions was not an arm band or a special identity card, but rather the severe restrictions on the permissible battlefield conduct of chaplains. The text and commentaries to the Geneva Conventions⁹⁶ only protect chaplains who are employed “exclusively” in their religious duties. Additionally, those legal sources prohibit chaplains from “any form of participation” whatsoever in the hostilities. Understandably, our armed forces have uniformly established restrictions on the duties U.S. chaplains may perform in the battlespace and on the possession of arms in the performance of those duties.

For Navy chaplains, the policy is clear concerning the limits of their duties in support of any sea service unit. For chaplains assigned to Navy commands, Article 1063 of the U.S. Navy Regulations provides: “While assigned to a combat area during a period of armed conflict, members of...Chaplain...Corps... shall be detailed or permitted to perform only such duties as are related to...religious service and the administration of...religious units and establishments.”⁹⁷ The single stated purpose of this regulation is “to protect the noncombatant status of these personnel” under the Geneva Convention.⁹⁸ Similarly, for chaplains assigned to any unit within the Department of the Navy (i.e., Navy or Marine Corps units), the Secretary of the Navy has directed that “chaplains shall be detailed or permitted to perform only

⁹⁶ See discussion *supra* Section IIC.

⁹⁷ DEPARTMENT OF THE NAVY, U.S. NAVY REGULATIONS (1990) [hereinafter NAVY REGULATIONS], art. 1063 (“While assigned to a combat area during a period of armed conflict, members of Medical, Dental, Chaplain, Medical Service, Nurse or Hospital Corps and Dental Technicians shall be detailed or permitted to perform only such duties as are related to medical, dental, or religious service and the administration of medical, dental, or religious units and establishments. This restriction is necessary to protect the non-combatant status of these personnel under the Geneva Conventions of August 12, 1949.”).

⁹⁸ *Id.*

such duties as are related to religious ministry support.”⁹⁹ For chaplains assigned to Coast Guard units, the Commandant of the Coast Guard has directed “all Navy chaplains, active duty and Reserve, are noncombatants...and...will not be placed in any duty status which would compromise their status as noncombatants.”¹⁰⁰

This strict policy concerning the limited duties of chaplains is also reflected in directives of the non-sea services. For chaplains assigned to Army units, the applicable Army Regulation states: “Chaplains are noncombatants... Commanders will detail or assign chaplains only to duties related to their profession.”¹⁰¹ Similarly, for chaplains assigned to Air Force units, the applicable regulation directs that “Chaplains do not perform duties that are incompatible with their faith group tenets, professional role, or noncombatant status.”¹⁰²

2. Arms Banned

Just as the services have uniformly implemented a policy of religious duties only, the Navy,¹⁰³ Marine Corps,¹⁰⁴ Army,¹⁰⁵ and Air Force¹⁰⁶ have also specifically prescribed that chaplains will not bear arms. While the exact language of these arms bans vary, the tone of the prohibitions is absolute. None of the service regulations provides for any exceptions or exigent circumstances under which chaplains are permitted to bear arms.

⁹⁹ DEPARTMENT OF THE NAVY, SECRETARY OF THE NAVY INSTRUCTION 1730.7B, RELIGIOUS MINISTRY SUPPORT WITHIN THE DEPARTMENT OF THE NAVY (12 October 2000) [hereinafter SECNAVINST 1730.7B], ¶ 4(a); Similarly, “the Marine Corps manual on chaplains states that chaplains... shall perform no duties relating to combat except those prescribed for chaplains.” FMFM 3-61, *supra* note 3, ¶ 1004f.

¹⁰⁰ COAST GUARD, COMMANDANT INSTRUCTION (COMDTINST) M1730.4B, RELIGIOUS MINISTRIES WITHIN THE COAST GUARD (30 August 1994) [hereinafter COMDTINST M1730.4B], ¶ 1(B)(1)(e).

¹⁰¹ DEPARTMENT OF THE ARMY, ARMY REGULATION 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY (26 May 2000) [hereinafter AR 165-1], ¶ 4-3.

¹⁰² DEPARTMENT OF THE AIR FORCE, AIR FORCE INSTRUCTION 52-101, CHAPLAIN PLANNING AND ORGANIZING (1 May 2001) [hereinafter AFI 52-101], ¶ 2.

¹⁰³ SECNAVINST 1730.7B, RELIGIOUS MINISTRY SUPPORT WITHIN THE DEPARTMENT OF THE NAVY (12 October 2000, ¶4(a) (“...Chaplains shall not bear arms...”); DEPARTMENT OF THE NAVY, CHIEF OF NAVAL OPERATIONS INSTRUCTION 1730.1C, RELIGIOUS MINISTRIES IN THE NAVY (8 November 1995), [hereinafter OPNAVINST 1730.1C], encl. 1, ¶ 2(f) (“It is Department of Navy policy that chaplains shall not bear arms.”); COMDTINST M1730.4B, *supra* note 100 (“[Article 1063, U.S. Navy Regulations] establishes that all Navy chaplains...shall not bear arms at any time.”)

¹⁰⁴ FMFM 3-61, *supra* note 3, ¶ 1004f (“Marine Corps regulations...make it clear that chaplains are not to bear arms under any circumstances...[T]he Marine Corps manual on chaplains states that chaplains `shall bear no arms...’”).

¹⁰⁵ AR 165-1, *supra* note 101, ¶ 4-3(c) (“Chaplains are noncombatants and will not bear arms.”)

¹⁰⁶ AFI 52-101, *supra* note 102, ¶ 2.1.3 (“Noncombatant Status. Chaplains are noncombatants. Chaplains do not bear arms.”)

In theory, this absolute policy makes sense. As a non-target in the midst of a forest of targets, chaplains truly find themselves in a precarious situation. This situation, however, could be remedied in only one of two ways: (a) prohibit chaplains from providing their religious services in harm's way, or (b) make every effort to distinguish chaplains from the target-rich environment in which they work. Recall the four criteria of a combatant (serves under a command, carries arms openly, wears distinctive insignia, and abides by law of war). Taken together, U.S. armed forces' policies seek to distinguish battlefield chaplains in appearance¹⁰⁷ by the absence of one indicia of combatant status (preventing them from carrying arms openly or otherwise) and the presence of one indicia of noncombatant status (the distinctive red cross arm band). Otherwise, as the Fleet Marine Force Manual notes, "[t]he simple act of bearing a weapon could identify the chaplain as a combatant."¹⁰⁸

A reader of the Geneva Conventions may notice that medical personnel—the other class of protected armed forces—have a limited right to bear arms without legally jeopardizing their noncombatant status. Specifically, medical personnel working in fixed establishments, with mobile medical units, or aboard hospital ships are legally protected against attack.¹⁰⁹ This protection against attack, however, is not forfeited *per se* if such personnel are armed for the purpose of defending themselves and their patients.¹¹⁰ The stated rationale for this limited right to bear arms is that such medical personnel “cannot be asked to sacrifice themselves without resistance” when their unit is attacked.¹¹¹ With that being said, the Commentaries to Geneva Convention I stress that this right for such medical personnel is truly limited. Particularly, medical personnel “may only resort to arms for purely defensive purposes” when it is “obviously

¹⁰⁷ FMFM 3-61, *supra* note 3, ¶1004e (“Chaplains must avoid any appearance of being combatants in order to maintain their protected status under the Geneva Conventions.”)

¹⁰⁸ *Id.* at ¶1004f.

¹⁰⁹ GC I, *supra* note 41, art. 19 (“Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict....”); GC II, *supra* note 42, art. 22 (“Military hospital ships, that is to say, ships built or equipment by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked or captured, but shall at all times be respected and protected....”).

¹¹⁰ GC I, *supra* note 41, art. 22 (“The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19 [i.e., the protection against attack]: That the personnel of the unit or establishment are armed, and that they use the arms in their own defence [sic.], or in that of the wounded and sick in their charge.”) GC II, *supra* note 42, art. 35 (“The following conditions shall not be considered as depriving hospital ships or sick-bays of vessels of the protection due to them: (1) The fact that the crews of ships or sick-bays are armed for the maintenance of order, for their own defence [sic.] or that of the sick and wounded.”).

¹¹¹ COMMENTARY TO GC I, *supra* note 43, at 203.

necessary.”¹¹² Moreover, they must “refrain from all aggressive action” and may not “use force to prevent the capture of their unit by the enemy.”¹¹³ Despite this limited provision for arming medical personnel, the Conventions contain no similar exception for religious personnel.

3. Noncombatant State-of-Mind

Lest there be any doubt as to what is expected from chaplains in armed conflict, the Navy chaplain leadership recently addressed the noncombatant status of chaplains and the absolute restrictions it places upon those personnel. A policy letter to all Navy chaplains soon after the September 11th attacks asserted “that we chaplains are, first and foremost, noncombatants.”¹¹⁴ This noncombatant status of chaplains requires that they “do more than simply refrain from carrying or using weapons; it requires a noncombatant state-of-mind.” Consequently, Navy chaplains “must never participate in *any* activity that compromises [their] noncombatant status, or that of other chaplains.” Stated examples in the policy letter of such prohibited conduct by chaplains included: “participating in the planning of military actions,” “carrying or conveying military intelligence,” and “transporting weapons or ammunition from one location to another.” While such policy guidance may arguably raise the bar above the standards established under international law, it definitely serves to protect the noncombatant status of military chaplains by minimizing the risk of misidentification.

4. Potential Consequences of Violations

The absolute nature of the U.S. policy against chaplains bearing arms makes theoretical sense. Such policies serve to protect the status of chaplains on the battlefield. The fact remains, however, that chaplains are still at risk while performing their duties.¹¹⁵ For some, the policy may be viewed as controversial and life-threatening. Therefore, in the battlefield, the reality of war may have to be balanced against the potential consequences of non-compliance.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ DEPARTMENT OF THE NAVY, OFFICE OF CHIEF OF NAVAL OPERATIONS, CHIEF OF CHAPLAINS, CHAPLAIN OF THE MARINE CORPS AND DEPUTY CHIEF OF CHAPLAINS FOR TOTAL FORCE, POLICY LETTER 1730 Ser N097/01301 (8 November 2001) [hereinafter COC POLICY LETTER].

¹¹⁵ “They don’t give a damn whom they shoot, do they, Chaplain?” General Leumuel C. Shepherd, USMC, to Chaplain Connie Griffin, who had just been wounded (quote hanging on lobby wall at Naval Chaplains School, Newport, Rhode Island); FMFM 3-61, *supra* note 3, ¶ 1004(e) (“Chaplains are not lawful objects of attack by an enemy, even though they accept the *normal* risks of the combat environment. They become casualties by accident, not by design.”).

In a criminal sense, real limits may exist as to whether an armed chaplain could be held accountable for bearing arms in certain situations. For a murder charge,¹¹⁶ a strong argument can be made that every individual—chaplain or otherwise—retains an inherent right to individual self-defense at all times, regardless of whether they are serving in the midst of armed conflict¹¹⁷ or simply going about their daily lives.¹¹⁸ Moreover, a battlefield killing or wounding may potentially be insulated by the related defense of justification,¹¹⁹ as “killing an enemy combatant in battle is justified.”¹²⁰ A chaplain, however, may not necessarily have such justification in light of the modern policies restricting their ability to engage in the fight. For an order’s violation charge, an armed chaplain could probably not be prosecuted for violation of a general order,¹²¹ for none of the service policies concerning chaplains bearing arms contain the requisite language necessary to make such a charge viable.¹²² That said, however, one who violates these service directives and the earlier-mentioned policy letter may arguably be guilty of dereliction of duty.¹²³ A court-martial conviction for dereliction of duty carries a maximum punishment of a dismissal, forfeiture of all pay and allowances, and confinement for six months.¹²⁴

¹¹⁶ UNIFORM CODE OF MILITARY JUSTICE, art. 118, 10 USC § 918.

¹¹⁷ CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 January 2000) (unclassified portion) [hereinafter CJCSINST 3121.01A], encl. A, ¶ 5(e) (“Individual Self-Defense. The inherent right to use all necessary means available and to take all appropriate actions to defend oneself and US forces in one’s vicinity from a hostile act or demonstrated hostile intent is a unit of self-defense. Commanders have an obligation to ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense.”).

¹¹⁸ MANUAL FOR COURTS-MARTIAL (2002 ED.) [hereinafter MCM], Part II, Rule for Courts-Martial 916, ¶ e. (“Self-Defense. (1) Homicide or assault cases involving deadly force. It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused: (A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and (B) Believed that the force the accused was necessary for protection against death or grievous bodily harm.”)

¹¹⁹ *Id.*, R.C.M. 916, at ¶ c (“Justification. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.”)

¹²⁰ *Id.*, R.C.M. 916, at Discussion. Note that the Discussion to each of the Rules for Courts-Martial does not constitute the “official view” or rules of the U.S. Government, and they do not create any rights or responsibilities binding on the U.S. Government. *Id.*, at Preamble to the Rules for Courts-Martial, Discussion.

¹²¹ UNIFORM CODE OF MILITARY JUSTICE, art. 92, 10 U.S.C. § 892.

¹²² MCM, *supra* note 118, Part IV (Punitive Articles), ¶ 16.c.(1).(e) (“Enforceability. Not all provisions in general orders or regulations can be enforced under Article 92(1). Regulations which only supply general guidelines or advice for conducting military functions may not be enforceable under Article 92(1).”).

¹²³ UNIFORM CODE OF MILITARY JUSTICE, art. 92, 10 U.S.C. § 892. See MCM, PART IV, ¶ 16.c.(3)(a) (“Duty. A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service....”) and ¶ 16.c.(3)(c) (“Derelict. A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person’s duties or when that person performs them in a culpably inefficient manner.”).

¹²⁴ See MCM, PART IV, *supra* note 122, ¶ 16.e.(3).

In the international realm, the ramifications of chaplains bearing and using arms depend upon how the chaplain holds himself out to others at the time. If the chaplain does not attempt to cloak himself in the permissible methods of distinction (e.g., the arm band), he would merely fall within the category of lawful combatant with the rest of his unit, thereby allowing him to legally participate in combat (under international law only). Consequently, a fighting chaplain would lose his protected status and become a lawful target.¹²⁵

On the other hand, a chaplain who deceptively portrays himself as a noncombatant but acts as a combatant may be guilty of the war crime of perfidy. Perfidy is defined as “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.”¹²⁶ Specifically, international law prohibits the “improper use of the distinctive emblem” of the red cross or any other protective emblem.¹²⁷ A violation of that prohibition constitutes a “grave breach” of the Geneva Conventions and the Protocol.¹²⁸ Ultimately, such grave breaches may be prosecuted as war crimes.¹²⁹

Finally, an armed chaplain on the battlefield risks substantial negative impact for not merely himself, but for all other chaplains for the remainder of that armed conflict and beyond. For example, when Fox News reporter Gerald Rivera was reporting from Afghanistan, he openly revealed that he was routinely

¹²⁵ FMFM 3-61, *supra* note 3 (“Chaplains must never engage in combat. If they do, they lose their special protected status under the Geneva Conventions and become lawful objects of attack by the enemy.”)

¹²⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (8 June 1977) (hereinafter GP I), art. 37, in DOCUMENTS ON LOW, *SUPRA* note 14, at 422. A reader of GP I should understand that the United States has never ratified the GP I and is, consequently, not legally bound by its provisions as a matter of conventional law. At the same time, however, the United States does accept and follow certain basic provisions of the Protocol (including the ones referenced in this article) as a matter of customary international law. OPERATIONAL LAW HANDBOOK, *supra* note 7, at 11.

¹²⁷ *Id.*, art. 38.

¹²⁸ *Id.*, art. 85 (“[T]he following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: ...the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.”)

¹²⁹ *Id.*, art. 87 (“The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.”).

carrying a pistol in the field.¹³⁰ While journalists are not within the same category of protected persons as chaplains and doctors, they are generally noncombatants under LOAC and cannot be lawfully targeted.¹³¹ Consequently, many war correspondents expressed grave concern for the impact that Rivera's actions might have upon them.¹³² As a former NBC correspondent in Vietnam, Arthur Lord complained, "He's endangering every other journalist who's in the area, and that really outrages me."¹³³ Similarly, one chaplain who selfishly elects to use arms, as a practical matter, jeopardizes the protected status of all other chaplains on the battlefield. Consequently, one service's warfighting publication for chaplains specifically points out that "[a]n individual chaplain who violates this policy endangers the noncombatant status of other chaplains."¹³⁴

5. Role of Chaplain Assistant

Does the U.S. military really expect its battlefield chaplains to "turn the other cheek"¹³⁵ to the oncoming fire of an enemy? Not necessarily. The primary method of protection for a combat chaplain is the chaplain's assistant. One of the key responsibilities for the enlisted assistant to a combat chaplain is to provide for the safety and security of that chaplain. In fact, service directives of the Marine Corps,¹³⁶ Army,¹³⁷ and Air Force¹³⁸ specifically recognize the

¹³⁰ Howard Rosenberg, *Television: Oh! What a Lively War*, Los Angeles Times (14 December 2001), at 1.

¹³¹ GP I, *supra* note 126, art. 79 ("1. Journalists engaged in the dangerous profession missions in areas of armed conflict, shall be considered as civilians within the meaning of Article 50, paragraph 1. 2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4A(4) of the Third Convention.")

¹³² Rosenberg, *supra* note 130.

¹³³ *Id.*

¹³⁴ DEPARTMENT OF THE NAVY, HEADQUARTERS MARINE CORPS, MARINE CORPS WARFIGHTING PUBLICATION 6-12, RELIGIOUS MINISTRY SUPPORT IN THE U.S. MARINE CORPS (15 June 2001) [hereinafter MCWP 6-12], at 2-4.

¹³⁵ Matthew 5:39.

¹³⁶ DEPARTMENT OF THE NAVY, HEADQUARTERS MARINE CORPS, COMMAND RELIGIOUS PROGRAMS IN THE MARINE CORPS, MARINE CORPS ORDER 1730.6D (29 September 1997) [hereinafter MCO 1730.6D], ¶ 5b(2)(a) (Religious Program Specialist are assigned to Marine Corps commands "to protect chaplains in combat operations and to support them in planning, administration, and coordination of the [Command Religious Program]."); DEPARTMENT OF THE NAVY, FLEET MARINE FORCE MANUAL 3-6, RELIGIOUS MINISTRIES IN THE FLEET MARINE FORCE (29 August 1989), ¶ 3001e(2) ("RPs, chaplain assistants, and enlisted Marines who support chaplains are not protected persons under the Geneva Convention. If captured, they are entitled to be treated as POWs.") FMFM 3-61, *supra* note 3, ¶ 1006c ("As combatants, the chaplain assistant, under Geneva Convention rules, are treated as prisoners of war (POWs) if captured. They maintain and qualify with weapons in order to provide: (1) Security for himself and the chaplain. (2) Additional defense for friendly units from enemy attack if called upon.").

combatant status of chaplain assistants and delineate their duty to protect the chaplain in combat operations. While the current Navy directives for religious ministries do not specifically address this role, the Navy Regulations implicitly acknowledge by omission the combatant role of a chaplain's assistant. Notice that the customs and traditions codified in Article 1063 of the Navy Regulations omit the category of chaplains' assistants from the group of personnel whose combat duties are restricted in order to preserve their noncombatant status.¹³⁹ That same Navy Regulation, however, specifically includes the full spectrum of medical personnel (medical, dental, medical service, nurse, hospital corps and dental technicians), not just doctors. Thus, in addition to the LOAC differences between chaplains and doctors that have already been noted,¹⁴⁰ another difference is that chaplain assistants are combatants, pure and simple, as long as they hold themselves out as such.

Now, a hypothetical scenario presents itself where a chaplain and chaplain assistant are tested within the parameters of international law and domestic policy. The Religious Ministry Team¹⁴¹ is deployed in a combat zone, and begins to receive sniper fire. The question then arises: What direct or indirect role is the chaplain permitted to take? In essence, what are the limits of the noncombatant status of the chaplain?

Clearly, the chaplain may not take direct action in response to the incoming fire. The earlier-mentioned service directives set forth a *per se* prohibition against chaplains ever bearing arms.¹⁴² Similarly, the commentaries to the Geneva Convention make it clear that chaplains "must obviously abstain

¹³⁷ AR 165-1, *supra* note 101, ¶ 4-7(a) ("Chaplain assistants are combatants and must bear arms and participate in firearms training.") DEPARTMENT OF THE ARMY, ARMY FIELD MANUAL 16-1, CHAPLAINS, ch. 1 ("The chaplain assistant is a soldier trained to assist the chaplain in religious support and is essential to the religious support mission. Under the direction of the chaplain, the chaplain assistant coordinates Ministry Team operations. To accomplish the mission, the chaplain assistant accompanies the chaplain in the area of operations. As a combatant, the chaplain assistant carries a weapon and provides security for the team on the battlefield.")

¹³⁸ AFI 52-101, *supra* note 102, ¶ 2.1.3 ("Combatant Status: Chaplain Assistants are combatants.")

¹³⁹ NAVY REGULATIONS, *supra* note 97, art. 1063 ("While assigned to a combat area during a period of armed conflict, members of Medical, Dental, Chaplain, Medical Service, Nurse or Hospital Corps and Dental Technicians shall be detailed or permitted to perform only such duties as are related to medical, dental, or religious service and the administration of medical, dental, or religious units and establishments. This restriction is necessary to protect the non-combatant status of these personnel under the Geneva Conventions of August 12, 1949.")

¹⁴⁰ See discussion *supra* Section IIE2.

¹⁴¹ MCWP 6-12, *supra* note 134, at 1-4 ("The religious ministry team (RMT) consists of the chaplain(s), RPs, and other designated command members (e.g., CAs, civilian staff, and appointed lay leaders). The RMT is the commander's primary asset for comprehensive RMS [Religious Ministry Support] for the unit(s) assigned. Every unit is supported by an RMT. When a unit does not have a chaplain, RMS is provided by an RMT assigned by higher headquarters.")

¹⁴² See *supra* discussion Section IIE2.

from all hostile acts.”¹⁴³ Therefore, absent the unresolved right of self-defense in such situations, a chaplain may not take up a weapon and return fire.

The chaplain who takes indirect action against the threat, however, is the more difficult question. First, the chaplain may not even possess the authority to order the chaplain assistant to fire at a particular individual or individuals. Chaplains are staff corps officers who lack significant aspects of authority held by their line officer counterparts. For example, by federal statutes, military chaplains are either unable¹⁴⁴ or limited¹⁴⁵ in their ability to hold positions of military command. Moreover, while Article 1021¹⁴⁶ of the Navy Regulations authorizes all officers to issue orders to subordinates, such authority to do so is limited to “all the necessary authority for the performance of their duties.” In this same chapter of the regulations concerning authority, the now-familiar Article 1063 states that chaplains “assigned to a combat area during a period of armed conflict” are “permitted to perform only such duties as are related to...religious service and the administration of...religious units and establishments.”¹⁴⁷ Thus, the duties of warfighting do not fit within the purview of the chaplain’s authority to issue orders as an officer. In fact, chaplain assistants are specifically trained to be in control of such threatening situations, and to issue rather than receive such direction.¹⁴⁸

¹⁴³ COMMENTARY TO GC I, *supra* note 43, at 220.

¹⁴⁴ 10 U.S.C. § 3581 (“A[n Army] chaplain has rank without command.”); 10 U.S.C. § 8581 (“An officer designated as a[n Air Force] chaplain has rank without command.”)

¹⁴⁵ 10 U.S.C. § 5945 (“Staff Corps Officers: Limitation on Power to Command. An officer in a [Navy] staff corps may command only such activities as are appropriate to his corps.”).

¹⁴⁶ NAVY REGULATIONS, *SUPRA* note 97, art. 1021 (“Authority Over Subordinates. All officers of the naval service, of whatever designation or corps, shall have all the necessary authority for the performance of their duties and shall be obeyed by all persons, of whatever designation or corps, who are, in accordance with these regulations and orders from competent authority, subordinate to them.”).

¹⁴⁷ *Id.*, art. 1061.

¹⁴⁸ Prior to deploying with Marine Corps units in combat regions, U.S. Navy chaplains and Religious Program Specialists must complete Chaplain and Religious Program Specialist Expeditionary Skills Training (CREST) that RP receives prior to deployment in combat regions. An article in the Navy-sponsored *All Hands Magazine* revealed the following:

“Unlike other fields in the armed forces, the Chaplains Corps is unique. While in the field, the RP must be in control when it comes to safety. The chaplains are non-combatants and don’t carry a weapon, so it’s essential for them to trust and follow their RP’s direction.

‘If the Chaplain doesn’t listen to what I say while in combat, we’ll both be in a lot of trouble,’ said Religious Program Specialist Seaman Susan Pitterman. To some officers it may be difficult taking orders from an enlisted, especially when those orders are coming from junior Sailors who have been in the Navy for less than a year.

‘If I remember I’m a pastor first, it won’t bother me to take orders,’ said Chaplain (LTJG) Wesly Modder. ‘The emphasis should be that the RP is not a secretary, they’re my bodyguard, my teammate.’” *Prayer and Protection*, ALL HANDS MAGAZINE, March 2001, available at www.mediacen.navy.mil/pubs/allhands/mar01/pg32.htm.

Second, even if the chaplain were to possess the inherent authority to issue such orders, the mere issuing of the order may transform that individual chaplain into a lawful target. The Commentary to the 1949 Conventions state “to enjoy immunity, they must naturally abstain from any form of participation – even indirect—in hostile acts.”¹⁴⁹ As a general rule, to use the language of Geneva Protocol I, individual chaplains “shall not be the object of attack.”¹⁵⁰ Such protection, however, exists only “unless and for such time as they take a direct part in the hostilities.”¹⁵¹ At that point, an order by the chaplain to “take that sniper” would be no different than an order issued by any line officer or non-commissioned officer to “take that hill.” Consequently, such a “direct part” would arguably render the chaplain to be a lawful target.¹⁵²

Therefore, the best piece of legal advice for combat chaplains is to make sure their assigned RP or chaplain assistant is a good shot.¹⁵³

III. Legal Treatment of Chaplains in Armed Conflict

The special status of chaplains dictates that they receive special treatment in comparison to other members of the armed forces. Such treatment is special at all times, whether they are working on the battlefield or captured by the enemy’s forces. In the battlespace, chaplains shall be “respected and protected.”¹⁵⁴ Upon capture, such chaplains may be “retained” in a prisoner of war camp. Below we will see what exactly these phrases mean under international law. In the end, it will be evident that the treatment of chaplains is truly unique, in that they are entitled to a mixture of rights and responsibilities of the various categories of personnel, as well as a few benefits unique to themselves.

A. Treatment In the Battlespace

As mentioned earlier, chaplains in the battlespace shall be “respected and protected in all circumstances,” regardless of whether they are located on land¹⁵⁵ or at sea.¹⁵⁶ What exactly does it mean to be respected and protected? As

¹⁴⁹ COMMENTARY TO GC I, *supra* note 43, at 221.

¹⁵⁰ GP I, *supra* note 126, art. 51, ¶ 2.

¹⁵¹ *Id.*, art. 51, ¶s 2 and 3.

¹⁵² *Id.*

¹⁵³ FMFM 3-6, *supra* note 136, ¶ 3001e(2) (“Chaplains must ensure that [RPs, chaplain assistants, and enlisted Marines who support chaplains], as combatants, maintain their qualification with their T/O weapons.”).

¹⁵⁴ GC I, *supra* note 41, art. 24; GC II, *supra* note 42, art. 37.

¹⁵⁵ GC I, *supra* note 41, art. 24. (“Medical personnel exclusively engaged in the search for, or the collection, transport, or treatment of the wounded or sick, or in the prevention of disease, staff

explained in the Commentaries to the 1949 Conventions, respect is defined to mean “to spare, not to attack.”¹⁵⁷ Protect is defined as “to come to someone’s defence [sic.], to lend help and support.”¹⁵⁸ Therefore, the use of these specific terms “made it unlawful” for an enemy’s forces to “attack, kill, illtreat or in any way harm” such personnel, while simultaneously imposing upon the enemy “an obligation to come to his aid and give him such care as his condition required.”¹⁵⁹

Additionally, the remainder of the phrase “in all circumstances” carries significant import in the 1949 Conventions. It was intended to signify that such persons are to be protected “just as much when they are with their own army or in no man’s land as when they have fallen into the hands of the enemy.”¹⁶⁰ For medical and religious personnel, the Commentary recognized that they must be respected and protected “at all times and in all places, both on the battlefield and behind the lines, and whether retained only temporarily by the enemy or for a lengthy period.”¹⁶¹

As with many of the provisions, Protocol I uses language which is easier to understand than the vague respect-and-protect standard of the original Conventions that had forced readers to rely upon definitions buried in the Commentaries. Specifically, Protocol I directs that chaplains (fitting within the defined category of civilians) “shall not be the object of attack” unless they “take a direct part in hostilities.”¹⁶² Attack is defined under the Protocol as “acts of violence against the adversary, whether in offence [sic] or in defence [sic].”¹⁶³ While this language of Protocol I does not alter the treatment standard set by the Conventions, its clarity assists in comprehending the standard.

B. Treatment Upon Capture

As mentioned above, chaplains must be respected whether they are located on the battlefield or detained by the enemy’s forces. If captured by the

exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.”)

¹⁵⁶ GC II, *supra* note 42, art. 37 (“The religious, medical and hospital personnel assigned to the medical and spiritual care of [members of a nation’s armed forces who are wounded, sick, and shipwrecked at sea] shall, if they fall into the hands of enemy, be respected and protected....”).

¹⁵⁷ COMMENTARY TO GC I, *supra* note 43, at 134.

¹⁵⁸ COMMENTARY TO GC I, *supra* note 43, at 135.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 220.

¹⁶² GP I, *supra* note 126, art. 51, ¶s (2) and (3).

¹⁶³ *Id.*, art. 39(1).

enemy, most members of the armed forces become prisoners of war (POW).¹⁶⁴ POW status mandates a laundry list of treatment benefits delineated in the Third Convention of 1949. Consequently, it is significant and desirable to obtain this benefit-loaded legal status upon capture, as demonstrated in the recent news stories and legal discussions concerning the Al Qaeda and Taliban personnel detained by U.S. forces in Guantanamo Bay, Cuba.¹⁶⁵ These same 1949 Conventions, however, specifically state that chaplains and medical personnel shall not be “deemed”¹⁶⁶ or “considered”¹⁶⁷ prisoners of war. (Because chaplain assistants are lawful combatants, however, they would be entitled to POW status). While this lack of POW status for chaplains might appear at first glance to result in a lesser status, the Conventions substitute POW status for chaplains with a more enhanced standard of treatment which actually gives them similar protections to POWs with additional privileges. Historically, it is worth noting that the question of retention of medical personnel and chaplains was “the most important” issue resolved by the First Convention of 1949.¹⁶⁸ Ultimately, the four Conventions recognized the special status for captured chaplains and medical personnel as “retained persons,” the details of which will be discussed below.

1. Duration of Retention

Upon capture, prisoners of war may generally be held by the enemy until the end of the war.¹⁶⁹ Captured chaplains and medical personnel, however, are held under a different standard under the 1949 Conventions. Specifically, chaplains who are “attached to the armed forces” and who “fall into” the enemy’s hands may be “retained” by the enemy.¹⁷⁰ The parties to the Conventions agreed that it was “necessary to affirm the supra-national and quasi-

¹⁶⁴ GC III, *supra* note 17, art. 4 (“Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces....”).

¹⁶⁵ George Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L. L. 891 (October 2002).

¹⁶⁶ GC I, *supra* note 41, art. 28 (“Personnel designated in Article 24 and 26 who fall into the hands of the adverse Party...shall not be deemed prisoners of war.”)

¹⁶⁷ GC III, *supra* note 17, art. 33. (“Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war.”)

¹⁶⁸ COMMENTARY TO GC I, *supra* note 43, at 235.

¹⁶⁹ GC III, *supra* note 17, art. 118. (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”)

¹⁷⁰ GC I, *supra* note 41, art. 28.

neutral character of personnel whose duties placed them outside the conflict.”¹⁷¹ Customarily, such quasi-neutral personnel should be repatriated if captured. Retention should be “an exceptional measure” with only one purpose in view—helping the detained personnel.¹⁷² Likewise, the stated length of such retention of chaplains is not for a set period of time or for the duration of the armed conflict like POWs. Instead, the term of their retention is conditionally based upon the “necessity”¹⁷³ or “need”¹⁷⁴ for their religious services. Therefore, if their retention is “not indispensable,” then the Conventions mandate that chaplains be returned to their side of the conflict as soon as practicable.¹⁷⁵

2. Entitlement to POW Benefits

While retained chaplains do not receive prisoner of war status, they are entitled to prisoner of war treatment. Specifically, the Conventions state that such retained chaplains are entitled “as a minimum” to all of the “benefits” and “protections” afforded to prisoners of war under the Third Convention.¹⁷⁶ The phrase “as a minimum” indicates that “treatment as prisoners of war should be regarded as a minimum standard” and that retained chaplains “should have a privileged position.”¹⁷⁷ Thus, the Conventions invite belligerents to give retained chaplains “additional advantages over and above those expressly provided for in the Conventions, whenever it is possible to do so.”¹⁷⁸

For the sake of economy, POW benefits will not be discussed in depth here. Generally, the provisions of the Conventions secure a wide range of POW benefits, including: humane treatment, rapid evacuation from the battlefield,

¹⁷¹ JEAN S. PICTET, COMMENTARY TO GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (International Committee of the Red Cross 1952) (hereinafter COMMENTARY TO GC III) at 218.

¹⁷² *Id.*

¹⁷³ GC III, *supra* note 17, art. 37 (“[T]hey may continue to carry out their duties as long as this is necessary for the care of the wounded and sick...If, however, it prove necessary to retain some of this personnel owing to the medical or spiritual needs of prisoners of war, everything possible shall be done for their earliest possible landing.”)

¹⁷⁴ GC I, *supra* note 41, art. 28 (“Personnel designated in Article 24 and 26 who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, spiritual needs and the number of prisoners of war require.”).

¹⁷⁵ GC I, *supra* note 41, art. 30 (“Personnel whose retention is not indispensable by virtue of the provisions of Article 28 shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit.”).

¹⁷⁶ GC I, *supra* note 41, art. 28 (“Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.”); GC III, *supra* note 17, art. 33. (“They shall, however, receive as a minimum the benefits and protection of the present Convention.”)

¹⁷⁷ COMMENTARY TO GC III, *supra* note 171, at 218.

¹⁷⁸ *Id.*

possession of personal property, hygienic and healthful conditions, adequate maintenance (quarters, food, clothing, amenities, and medical care), equality of treatment, limited questioning by captors, right to send and receive correspondence, and religious liberties.¹⁷⁹ If necessary, readers should be prepared to consult the provisions of the Third Geneva Conventions and the corresponding commentaries that generally afford benefits to POWs.

3. Subject to Internal Camp Discipline

Under Article 33 of the Third Convention, retained chaplains shall be subject to the “internal discipline” of the camp.¹⁸⁰ In any military organization, the subordinate personnel are “subject to military discipline.”¹⁸¹ Obviously, this need for good order and discipline is especially necessary in a camp full of enemy prisoners of war. Moreover, complications would surely arise in a military community where enemy personnel live and work in a camp but evade the “discipline common to all.”¹⁸² As such, these retained chaplains will come under the authority of the camp commander, except when they are actually carrying out their religious duties.¹⁸³

4. Performance of Duties

As a general rule, most prisoners of war can be compelled to work on behalf of the enemy.¹⁸⁴ This compelled work is limited to certain types of tasks.¹⁸⁵ More importantly, only enlisted personnel can be required to work in the POW camp.¹⁸⁶ Under no circumstances can commissioned officers be required to work.¹⁸⁷ Ironically, chaplains and medical personnel are the only detained officers who continue to work in a prisoner of war camp. Chaplains shall continue to perform their “spiritual duties” on behalf of the prisoners of war.¹⁸⁸ Apparently, such work by these officers can be mandated, as religious

¹⁷⁹ See GC III, *supra* note 17, arts. 12-38.

¹⁸⁰ GC III, *supra* note 17, art. 33.

¹⁸¹ COMMENTARY TO GC III, *supra* note 171, at 223.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ GC III, *supra* note 17, art. 49. (“The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health.”).

¹⁸⁵ GC III, *supra* note 17, art. 50.

¹⁸⁶ GC III, *supra* note 17, art. 49.

¹⁸⁷ GC III, *supra* note 17, art. 49 (“If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.”).

¹⁸⁸ GC I, *supra* note 41, art. 28 (“Within the framework of the military laws and regulations of the Detaining Power, and under the authority of its competent service, they shall continue to carry out, in

duties shall be “under the orders” of the enemy captors.¹⁸⁹ Such mandated work, however, is limited to their spiritual duties, as they cannot be required to perform any other work duties.¹⁹⁰

Additionally, the enemy captors can regulate the performance of those religious duties,¹⁹¹ but to a limited extent. More specifically, the Conventions set limits upon how much captors can meddle in the doctrinal aspects of religious duties. For example, the First Convention states that retained chaplains can only be used to serve “in accordance with their professional ethics.”¹⁹² Similarly, the Third Convention dictates that they must serve only “in accordance with their professional etiquette.”¹⁹³ Thereafter, the same convention states that retained chaplains may minister “freely” to POWs “of the same religion” and “in accordance with [the chaplain’s] religious conscience.”¹⁹⁴ Therefore, the enemy captors could presumably dictate neither the content nor the methods of worship provided by the retained chaplain.

5. Understanding the Religious Benefits of POWs

In order to effectively perform these spiritual duties, a retained chaplain must first know the parameters of the POW benefits that specifically pertain to their religious faith. The Geneva Conventions recognize the importance of the “morale welfare” of prisoners of war, to include their physical and spiritual needs.¹⁹⁵ With regards to spiritual needs, the Conventions’ drafters cited a frequent “phenomenon” among persons of all religious faiths.¹⁹⁶ Namely, individuals who had abandoned their faith practices as adults actually “reverted to their childhood practices” when they became prisoners of war and “found comfort” in such pursuits.¹⁹⁷

accordance with their professional ethics, their medical and spiritual duties on behalf of prisoners of war, preferably those of the armed forces to which they themselves belong.”).

¹⁸⁹ GC I, *supra* note 41, art. 30 (“They shall continue to fulfill their duties under the orders of the adverse Party....”).

¹⁹⁰ “GC I, *supra* note 41, art. 28(c) (“Although retained personnel in a camp shall be subject to its internal discipline, they shall not, however be required to perform any work outside their medical or religious duties.”); GC III, *supra* note 17, art. 33 (“Although they shall be subject to the internal discipline of the camp in which they are retained, such personnel may not be compelled to carry out any work other than that concerned with their medical or religious duties.”).

¹⁹¹ GC I, *supra* note 41, art. 28 (“...within the scope of the military laws and regulations of the Detaining Power and under the control of its competent services.”).

¹⁹² GC I, *supra* note 41, art. 28.

¹⁹³ GC III, *supra* note 17, art. 33.

¹⁹⁴ GC III, *supra* note 17, art. 35.

¹⁹⁵ COMMENTARY TO GC III, *supra* note 171, at 225.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

The drafters further recognized the inherent value of prisoners who were in a peaceful state of mind. While the Conventions provide a litany of benefits to POWs, the reality of such confinement still “exposes” them to an “hardship.”¹⁹⁸ Recalling one of the overarching principles of LOAC (i.e., humanity), the commentators noted the “humanitarian spirit” of the religious benefits secured by the Conventions.¹⁹⁹ Religion can have “beneficial results” on the individual POW’s “psychological state.”²⁰⁰ Collectively, this improved psychological state within the POW population can benefit the detaining power, as it frequently “eases” their task of confinement.²⁰¹

Based upon these interests, the Third Convention sets forth some basic guarantees for POWs that protect their religious rights. In general, prisoners of war “shall enjoy complete latitude in the exercise of their religious duties,” including the right to attend services of their respective faiths.²⁰² The phrase “complete latitude” was intended to secure religious liberty for all “religious creeds” without “any adverse distinction.”²⁰³

Such religious liberty is conditioned, however, upon whether the POWs comply with the “disciplinary routine” of the enemy captors.²⁰⁴ This phrase was not necessarily intended to condition a POW’s right to exercise religious liberties upon whether they committed misconduct in the camp. Instead, the phrase implies that the exercise of POW religious liberties should be permitted as part of the “normal system of administration, general time-table and other activities” and “without special authorization.”²⁰⁵ Therefore, the Conventions mandate that the camp authorities find a “balance” between the prisoners’ obligation to comply with the disciplinary routine and the camp’s obligation to afford complete latitude in their religious liberties.²⁰⁶

Regarding a location for worship, the Third Convention further secures the right to “adequate premises” for religious services.²⁰⁷ The term “premises” does not mandate that the facility should be used “solely for religious services.”²⁰⁸ Such facilities, however, must be “adequate” in that they must be clean and “constructed as to provide adequate accommodation for those who

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² GC III, *supra* note 17, art. 34.

²⁰³ COMMENTARY TO GC III, *supra* note 171, at 227.

²⁰⁴ GC III, *supra* note 17, art. 34.

²⁰⁵ COMMENTARY TO GC III, *supra* note 171, at 228.

²⁰⁶ *Id.* at 227.

²⁰⁷ GC III, *supra* note 17, art. 34.

²⁰⁸ COMMENTARY TO GC III, *supra* note 171, at 228.

attend the services.”²⁰⁹ Therefore, general-use facilities are sufficient “if necessary modifications can be made.”²¹⁰ For example, a hut, a tent or a room in a building may be “quite suitable.”²¹¹

Regarding the materials needed for worship, the Third Convention envisions some assistance from sources outside the prison camp. Historically, the camp authorities in World War II often provided the required articles for the prisoners’ worship, with some assistance from international relief organizations.²¹² Consequently, a separate provision in the Third Convention allows POWs to receive “individual parcels or collective shipments” of a non-belligerent nature.²¹³ Such permissible categories of items include foodstuffs, clothing, medical supplies and “articles of a religious character which may meet their needs.”²¹⁴ Such articles include, but are not limited to, religious books and devotional articles.²¹⁵

Regarding a time of worship, another provision in the Third Convention secures one day per week which could serve as the Sabbath day for the prisoners. Specifically, the working POWs are “allowed” a full day of “rest” every week.²¹⁶ This day of rest is “preferably” on Sunday or “the day of rest in their country of origin.”²¹⁷ Therefore, the Commentaries recognized that the selection of that weekly date “is often determined by religious rules.”²¹⁸

6. Special Facilities

Historically, other conventions prior to 1949 had addressed religious benefits for POWs. The Hague Convention of 1907 secured the basic religious liberties for POWs.²¹⁹ Additionally, the Geneva Conventions of 1929 authorized retained chaplains to minister “freely” to the POWs.²²⁰ The 1929 Conventions, however, failed to address the logistical collaboration between those retained

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ GC III, *supra* note 17, art. 72.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ GC III, *supra* note 17, art. 53.

²¹⁷ *Id.*

²¹⁸ COMMENTARY TO GC III, *supra* note 171, at 228.

²¹⁹ HR IV, *supra* note 16, art. 18 (“Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.”)

²²⁰ Convention Relative to the Treatment of Prisoners of War (27 July 1929), art. 16, *in* Documents on LOAC, *supra* note 36 (“Ministers of religion, who are prisoners of war, whatever may be their denomination, shall be allowed freely to minister to their co-religionists.”).

chaplains and the camp authorities needed to fully support the POWs' religious benefits. Recognizing this weakness in the previous conventions, the drafters of the 1949 Conventions included additional language which "enlarged in scope" the ways chaplains may promote those benefits.²²¹

Clearly, the 1949 Conventions expect much from the retained chaplains. With all of the expectations for chaplains and the performance of their duties in the camp, the Conventions fortunately do not create a series of "unfunded" mandates, for the lack of a better term. Instead, the Conventions secure special privileges to chaplains so that they can meet those expectations.

Under the 1949 Conventions, retained chaplains are guaranteed several "facilities" for the purpose of "carrying out their...spiritual duties." In this context, the term "facilities" does not necessarily constitute only the common use of that term (e.g., a building), but rather also consists of certain special privileges²²² that facilitate the performance of their spiritual duties. Some facilities may be derived from other convention provisions that address explicit privileges generally geared towards other personnel (e.g., library, reading room, and newspaper privileges).²²³ Other facilities may also be implied from the nature of their religious services (e.g., separate quarters to meet privately with POWs).²²⁴ Most importantly, the Conventions include four significant facilities which are specifically provided to help chaplains perform their duties: the allocation facility, the visitation facility, the access facility, and the correspondence facility.

a. Allocation Facility

To better ensure that more POWs have an opportunity to satisfy their spiritual needs, the Conventions provide that any retained chaplains will be distributed effectively throughout the detention camps. Specifically, the camp authorities must "allocate" the retained chaplains "among the various camps and

²²¹ COMMENTARY TO GC III, *supra* note 171, at 227.

²²² One of the dictionary definitions of facility includes: "Something that permits the easier performance of an action." THE RANDOM HOUSE DICTIONARY 311 (1980).

²²³ COMMENTARY TO GC III, *supra* note 171, at 232 ("The 'necessary' facilities include, in the first place, those listed in Article 33, but that list is by no means exhaustive. Reference should also be made to Section VI, Chapter II (Article 79 and 81) and to the commentary on Article 81, which concerns the prerogatives of prisoners' representatives; libraries, reading rooms or the circulation of a newspaper may prove most useful to chaplains.")

²²⁴ COMMENTARY TO GC III, *supra* note 171, at 232 ("Lastly, it should be noted that the Detaining Power must grant such personal facilities to chaplains as are necessary if they are to carry out their duties. For instance, they should if possible be given separate quarters so that they may converse freely and frankly with prisoners.")

labour detachments.”²²⁵ In order to ensure such ministries reach the intended audiences, the Convention further specifies that allocations should be geared towards POWs who possess a common characteristic as that retained chaplain. Such common characteristics include that they “belong to the same forces,” they “speak the same language,” or they “practice the same religion.”²²⁶ In another provision, the Conventions specifically set a preference of services, in that the retained chaplains shall perform their duties “preferably” for their own nation’s prisoners.²²⁷

b. Visitation Facility

Retained chaplains are authorized to “visit periodically” prisoners of war who are “situated in working detachments or in hospitals outside the camp.”²²⁸ The rationale for this facility is the POWs need medical and spiritual assistance “no matter where they are.”²²⁹ Consequently, their ministers “must be able to leave camp and make whatever journeys are required.”²³⁰

Obviously, a necessary component of the visitation facility is transportation. If the retained chaplain has no access to transportation, then the visitation facility is rendered meaningless. Consequently, the Convention places an affirmative obligation upon the detaining forces. The camp commander is responsible for placing “the necessary means of transport” at the disposal of the retained chaplain.²³¹

At the same time, this visitation facility has its limits. First, the camp authorities may “exercise such supervision as it considers necessary over these journeys.”²³² As part of this ability to supervise, the camp authorities may designate an escort to accompany the visiting chaplain on such trips. Second, these visiting chaplains must not “misuse” this visitation facility. Instead, they must use this unique privilege of leaving the detention camp only for purpose of visiting prisoners “in need of their services.”²³³ In reality, any retained chaplain must also realize and understand that their liberty will inevitably be restricted “to

²²⁵ GC III, *supra* note 17, art. 35.

²²⁶ GC III, *supra* note 17, art. 35.

²²⁷ GC I, *supra* note 41, art. 28; GC III, *supra* note 17, art. 33.

²²⁸ GC III, *supra* note 17, art. 33.

²²⁹ COMMENTARY TO GC I, *supra* note 43, at 248; COMMENTARY TO GC III, *supra* note 171, at 221.

²³⁰ COMMENTARY TO GC I, *supra* note 43, at 248; COMMENTARY TO GC III, *supra* note 171, at 221.

²³¹ GC III, Article 33. “They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting prisoners of war outside their camp.” GC III, *supra* note 17, art. 35.

²³² COMMENTARY TO GC I, *supra* note 43, at 248; COMMENTARY TO GC III, *supra* note 171, at 221.

²³³ COMMENTARY TO GC I, *supra* note 43, at 248; COMMENTARY TO GC III, *supra* note 171, at 221.

some extent,” even though they are “not in captivity” from a strictly legal point of view.²³⁴

c. Access Facility

Typically, prisoners of war who desire to express any complaints or concerns to their captors must do so through their elected prisoner representatives.²³⁵ Retained persons, however, are not obligated to follow that method of communication. Instead, the Geneva Conventions provide that retained chaplains “shall have the right to deal with” camp authorities regarding “all questions relating to their duties.”²³⁶ While both retained medical personnel and retained chaplains enjoy this same facility, the chaplains’ facility is more significant because every chaplain has the privilege, whereas only the senior medical officer has it.²³⁷ The chaplain’s access facility is individualized because chaplains “do not form a separate corps, are few in number, and are often of different denominations.”²³⁸

With the access facility, the chaplain may be called upon to serve as a conduit for the POWs concerning their religious freedoms. Presumably, camp authorities may try to argue that the chaplain is solely or primarily responsible for ensuring that the POWs are able to exercise their religious freedoms and have adequate facilities for doing so. In any negotiation with camp authorities, retained chaplains must understand and point out that their mere presence and service does not absolve the camp authorities from providing religious accommodations and other Convention benefits to the prisoners.²³⁹

d. Correspondence Facility

The fourth facility for performing their spiritual duties is the correspondence facility. In general, all prisoners of war are entitled to send and

²³⁴ COMMENTARY TO GC III, *supra* note 171, at 218.

²³⁵ GC III, *supra* note 17, art. 78.

²³⁶ GC III, *supra* note 17, art. 33.

²³⁷ GC III, *supra* note 17, art. 33 (“The senior medical officer in each camp shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel...This senior medical officer, as well as chaplains, shall have the right to deal with the competent authorities of the camp on all questions related to their duties.”).

²³⁸ COMMENTARY TO GC I, *supra* note 43, at 251; COMMENTARY TO GC III, *supra* note 171, at 222.

²³⁹ GC I, *supra* note 41, art. 28 (“None of the preceding provisions [in Article 28] shall relieve the Detaining Power of the obligations imposed upon it with regard to the medical and spiritual welfare of the prisoners of war.”).

receive letters and cards.²⁴⁰ This correspondence benefit for POWs, however, can be limited by the camp authorities in several significant ways. One such permissible restriction involves the monthly volume of correspondence. Generally, the camp authorities may limit the monthly amounts to two letters and four cards per POW.²⁴¹ Special circumstances may occur, however, that permit the camp authorities to further restrict the volume of correspondence, especially if there are problems in finding adequate translators.²⁴²

In addition to the POW benefit of correspondence, retained chaplains enjoy a work-related privilege of correspondence.²⁴³ To prevent an arbitrary obstacle to zealous performance of duties, this correspondence facility includes an “exemption from restriction as to quantity.”²⁴⁴ Moreover, if censorship efforts by the detaining power results in a backlog, the correspondence facility for retained chaplains includes the “right of priority for censorship.”²⁴⁵ Therefore, the retained chaplains’ cards and letters will be reviewed first, minimizing the delay in the effective performance of their duties.

At the same time, however, the chaplains’ additional correspondence facility does have limits and restrictions. First, such correspondence must address “matters concerning their religious duties.”²⁴⁶ Second, correspondence must be exchanged with either “the ecclesiastical authorities” in that nation or “international religious organizations.”²⁴⁷ Third, as mentioned above, letter-writing is “subject to censorship” by the camp authorities.²⁴⁸ The purpose of such censorship is presumably to ensure the noncombatant purpose of all letters.

7. Code of Conduct Under U.S. Policy

As a matter of international law, the Geneva Conventions establish a general matrix of protections and obligations effective in prisoner of war camps. This matrix assigns expectations for the camp authorities, but also includes expectations for detained prisoners. This matrix of expectations applies to the personnel of all warring nations. In addition, the United States Government has developed other obligations for American servicemembers who are detained by

²⁴⁰ GC III, *supra* note 17, art. 71 (“Prisoners of war shall be allowed to send and receive letters and cards.”).

²⁴¹ GC III, *supra* note 17, art. 71.

²⁴² GC III, *supra* note 17, art. 71.

²⁴³ GC III, *supra* note 17, art. 35 (“Letters and cards which they may send for this purpose shall be in addition to the quota provided for in Article 71.”).

²⁴⁴ COMMENTARY TO GC III, *supra* note 171, at 232.

²⁴⁵ *Id.*

²⁴⁶ GC III, *supra* note 17, art. 35.

²⁴⁷ GC III, *supra* note 17, art. 35.

²⁴⁸ GC III, *supra* note 17, art. 35.

the enemy. These policy principles are commonly known as the Code of Conduct. Arising primarily in response to problems experienced by American POWs during the Korean War, the Code of Conduct was intended to help future American POWs “serve honorably while resisting their captor’s efforts to exploit them to the advantage of the enemies’ cause and the disadvantage of their own.”²⁴⁹ While the Geneva Conventions focus primarily upon the standards of how an enemy should treat the detained personnel in their hands, the Code of Conduct focuses on how American personnel should behave while being so detained.

The Code consists of six tightly constructed articles.²⁵⁰ These six articles specifically apply to all members of the U.S. armed forces.²⁵¹ Further instructional DOD guidance, however, recognizes the special nature of medical and religious personnel. As a result, the implementing policy guidance provides a modicum of “flexibility” and “special allowances” for medical personnel and chaplains in five out of the six articles of the Code.²⁵² These policy differences for chaplains should be considered, and will be examined below.

²⁴⁹ DEPARTMENT OF DEFENSE INSTRUCTION 1300.21, CODE OF CONDUCT TRAINING AND EDUCATION (28 January 2001) [hereinafter DODINST 1300.21].

²⁵⁰ The six articles of the Code of Conduct are as follows:

Article 1. I am an American fighting in the forces that guard my country and our way of life. I am prepared to give my life in their defense.

Article 2. I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.

Article 3. If I am captured, I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

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

Article 5. When questioned, should I become a prisoner of war, I am required to give name, rank, service number and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

Article 6. I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

DEPARTMENT OF DEFENSE DIRECTIVE 1300.7, TRAINING AND EDUCATION TO SUPPORT THE CODE OF CONDUCT (23 Decemeber 1988); Exec. Order 10,631 (17 August 1955), amended by Exec. Order 12,633, 53 Fed. Reg. 10355 (28 March 1988).

²⁵¹ DODINST 1300.21, *supra* note 249.

²⁵² The Instruction provides no special allowances for medical personnel and chaplains regarding Article VI. *Id.*, ¶ E2.3.6.

Under Article I of the Code of Conduct, members of the U.S. armed forces are generally expected to be loyal to the American way of life and its cause. Specifically, they have a duty “to support U.S. interests and oppose U.S. enemies regardless of the circumstances, whether located in a combat environment or in captivity.”²⁵³ With the special status of “retained person,” chaplains who fall into the hands of the enemy are permitted a level of “latitude and flexibility” to perform their professional duties. This latitude, however, does not completely relieve these retained chaplains of their general obligation to abide by the Code.

Under Article II of the Code, members of the U.S. armed forces may never surrender voluntarily, but must continually attempt to evade capture. A member may view himself or herself as captured against his or her will only “when there is no chance for meaningful resistance, evasion is impossible, and further fighting would lead to their death with no significant loss to the enemy.”²⁵⁴ With such conditions, the general standard for capture-against-will requires “utmost necessity and extremity”²⁵⁵ for most U.S. forces. Chaplains, on the other hand, are limited in their use of force under the Geneva Conventions. Specifically, they must refrain from “all aggressive action” and may not “use force to prevent their capture or that of their unit by the enemy.”²⁵⁶ Consequently, chaplains in such situations are “subject to lawful capture.”

Under Article III of the Code, members of the Armed Forces must continue to resist, make every effort to escape, and aid others to escape. The DOD interpretation of this provision of the Code recognizes the special nature of the chaplain’s “retained” status. In order to take advantage of this status, chaplains are obligated—both initially and continually—to assert their rights as retained personnel to perform their religious duties.²⁵⁷ Beyond that assertion, however, the applicability of Article III to chaplains depends upon the detaining power’s response to such assertions. If the detaining power recognizes the special status, treats the chaplain as a retained person, and permits the chaplain to perform his religious duties within the POW community, then that individual chaplain does not have an Article III duty to escape or to actively aid others in escaping.²⁵⁸ On the other hand, if the detaining power does not permit the chaplain to perform his religious duties within the POW community, then that chaplain maintains the general duties and obligations of escape and aiding others

²⁵³ *Id.*, ¶ E2.2.1.1.1.

²⁵⁴ *Id.*, ¶ E2.2.2.1.1.

²⁵⁵ *Id.*

²⁵⁶ *Id.*, ¶ E2.3.2.

²⁵⁷ *Id.*, ¶ E2.3.3.1

²⁵⁸ *Id.*, ¶ E2.3.3.3

to escape.²⁵⁹ Regardless of the posture of the detaining power in this respect, chaplains are never permitted to do anything “detrimental to the POWs or the interests of the United States.”²⁶⁰

Under Article IV of the Code, American POWs are obligated to organize in a military command structure. Specifically, the senior military POW “eligible for command” in the POW community must assume command of that community, and may not evade that responsibility.²⁶¹ Military chaplains, however, are generally ineligible for command and shall not assume command over military personnel in a POW camp.²⁶² Once the senior military POW assumes command of the community, all POWs within that community shall be informed of the chain of command.²⁶³ As part of that notification, the military regulations regarding the command ineligibility of chaplains should be explained to all personnel (if applicable), in order to avoid any later confusion.²⁶⁴ Thereafter, all subordinates within the POW community must obey all lawful orders issued by ranking American military personnel.²⁶⁵

Under Article V of the Code, military personnel within a POW community must provide only limited information when questioned by the detaining power. Specifically, the Code mandates that such personnel provide the proverbial name, rank, date of birth, and serial number. These limited disclosures are mandated under the Geneva Conventions.²⁶⁶ While international law does not require disclosure beyond those four basic facts, the DOD instructive guidance recognizes that “it is unrealistic to expect a POW to remain confined for years reciting only name, rank, service number, and date of birth.”²⁶⁷ Consequently, the guidance generally permits “certain types of conversations” with the detaining power within the camp. With regard to the type of conversations, chaplains may need to communicate with the detaining power “in connection with their professional responsibilities,”²⁶⁸ presumably to raise issues about providing religious services within the POW community.

²⁵⁹ *Id.*, ¶ E2.3.3.4

²⁶⁰ *Id.*

²⁶¹ *Id.*, ¶ E2.2.4.1.4

²⁶² *Id.*, ¶ E2.3.4

²⁶³ *Id.*, ¶ E2.2.4.1.5.

²⁶⁴ *Id.*, ¶ E2.3.4.

²⁶⁵ *Id.*, ¶ E2.2.4.1.5.

²⁶⁶ GC III, *supra* note 17, art. 17 (“Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names, and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.”).

²⁶⁷ DODINST 1300.21, *supra* note 251, ¶ E2.2.5.1.

²⁶⁸ *Id.*, ¶ E2.3.5.

IV. Domestic Role of U.S. Chaplains in Armed Conflict

There is substantial discussion about the chaplain's role as a retained person in the Geneva Conventions. Historically, chaplains of U.S. armed forces faced a strong potential to be captured and become retained persons. In modern warfare, however, the more common role of our chaplains may be the domestic role of advising the detainer and ministering to detainees. As the U.S. Navy chaplain serving at Camp X-ray described his unique duties, "[t]he primary purpose is to advise the commanding general of issues pertinent to the spiritual and religious needs of the detainees. The second purpose is to minister to the detainees directly."²⁶⁹ This dual-hatted role can be complex, and requires knowledge of the law from a slightly different perspective than from a purely international perspective.²⁷⁰

A. Understanding the Status and Treatment Standards for Enemy Detainees

In fulfilling the obligations for the advisor-minister roles, the detaining forces (including the chaplain) must first know the legal status of the detained persons. As should be clear from earlier discussions in the article, the status of a specific person dictates the appropriate standard of treatment when detained. This legal status depends primarily upon the organizational affiliation and the belligerent conduct of the detained persons. More specifically, the appropriate standard of treatment depends upon whether the detained persons are entitled to prisoner-of-war status. If the persons satisfy the prerequisites for prisoner-of-war status, then they are entitled a detailed litany of protections under the Third Geneva Convention.²⁷¹ If the persons fail to satisfy those prerequisites, they are not legally entitled to the conventional protections. At the same time, however, they may be entitled to less stringent protections set forth elsewhere in the conventions or under U.S. policy.

To be entitled to prisoner-of-war status, persons must be involved in a certain nature of armed conflict (i.e., international conflict) and they must fulfill certain conditions (i.e., combatant criteria). First, the Third Geneva Convention only applies to international armed conflict²⁷² – that is, an armed conflict between two nations which are signatories to the convention. Second, the bulk of the

²⁶⁹ Miguel Enesco, *U.S. Muslim Military Chaplain Leads Guantanamo Prisoners in Prayer*, AGENCE FRANCE PRESSE, 25 January 2002.

²⁷⁰ See discussion *supra* Sections IIIB.

²⁷¹ See discussion *supra* Sections IIIB2.

²⁷² GC III, *supra* note 17, art. 2 (“[T]he prevention Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”).

protections of the Third Geneva Convention are reserved for individuals who meet the four conditions of lawful combatant status.²⁷³ Only by satisfying both of these prerequisites will a person be legally entitled to prisoner of war status and its corresponding protections.

In practical terms of modern geopolitics, what might this mean for U.S. armed forces in the near future? The United States is a signatory to the Third Geneva Convention, and is generally obligated to follow its terms in the “right type” of conflict and for the “right type” of persons. Under the nature-of-conflict condition, a conflict with any of the three nations most likely to become a declared enemy of the United States in the near future would result in the “right type” of an international armed conflict. More specifically, President Bush’s recognized “axis of evil”²⁷⁴ of Iraq,²⁷⁵ Iran,²⁷⁶ and North Korea²⁷⁷ are all “contracting parties” that ratified the Third Geneva Convention. Thus, members of these nations’ armed forces would generally be entitled to prisoner-of-war status if detained in an armed conflict with the United States, assuming that such individuals satisfied the four criteria for a lawful combatant.²⁷⁸

²⁷³ See discussion *supra* Section IIC.

²⁷⁴ President’s State of the Union Address to Congress, 29 January 2002, *available at* <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

²⁷⁵ Iraq ratified GC III on 14 February 1956. CHART: GENEVA CONVENTIONS OF 12 AUGUST 1949 AND ADDITIONAL PROTOCOLS OF 8 JUNE 1977: RATIFICATIONS, ACCESSIONS, AND SUCCESSIONS, *available at* www.icrc.org. When this article went to press, the United States had recently commenced Operation Iraqi Freedom. Within five days of commencing hostilities, both sides to the conflict had captured enemy troops. The United States declared that captured Iraqi troops would be afforded prisoner-of-war status under international law and expected the Iraqi military to reciprocate. See ASSISTANT SECRETARY OF DEFENSE VICTORIA CLARKE AND MAJOR GENERAL STANLEY A. MCCHRYSAL, DEPARTMENT OF DEFENSE NEWS BRIEFING (24 March 2003), *available at* http://www.defenselink.mil/news/Mar2003/t03242003_t0324asd.html (“Let me talk for just a minute about the Iraqi treatment of the coalition prisoners of war. As we said yesterday, it is a blatant violation of the Geneva Convention to humiliate and abuse prisoners of war or to harm them in any way. As President Bush said yesterday, those who harm POWs will be found and punished as war criminals. The Iraqi regime must allow the International Red Cross to see the prisoners. In contrast, this abuse of the coalition prisoners, to how well we are treating the Iraqi soldiers, who are our prisoners of war. Right now, more than 50 Iraqis, soldiers and civilians alike, are aboard U.S. Naval vessels receiving medical care and treatment. We are treating all of the POWs in accordance with the Geneva Conventions, with dignity and respect, and they will soon have access to the Red Cross.”).

²⁷⁶ Iran ratified GC III on 20 February 1957. *Id.*

²⁷⁷ North Korea ratified GC III on 24 August 1957. *Id.*

²⁷⁸ For example, in analyzing the legal status of Taliban detainees from the war in Afghanistan, the U.S. Government conceded that Afghanistan was a signatory to the Geneva Conventions of 1949. However, the Bush Administration further concluded that the Taliban detainees were still not entitled to prisoner of war status because they failed to satisfy four-criterion standard for a lawful combatant. See SECRETARY DONALD RUMSFELD AND GENERAL RICHARD MYERS, DEPARTMENT OF DEFENSE DAILY NEWS BRIEFING (8 February 2002), *available at* www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html [HEREINAFTER DOD DETAINEE BRIEFING].

At the same time, however, the global war against terrorism fails to satisfy the legal standard of an international armed conflict in the conventional sense. Members of the Al Qaeda terrorist organization are not affiliated with a contracting state party to the Third Geneva Convention. Therefore, the United States Government has already determined and announced that these terrorists are not entitled to prisoner-of-war status.²⁷⁹ In any event, the national leadership is responsible for making the ultimate decisions of status and will ensure that such decisions are disseminated down the chain of command.

Even if a detained person or persons fail to meet the “right type” of conflict and “right type” of person, the “detaining power” of the U.S. armed forces must still follow certain standards of treatment beyond those required for prisoners of war. For example, “Common”²⁸⁰ Article Three of the Geneva Conventions sets forth minimal standards of treatment for persons who are detained in the midst of a non-international conflict and take “no active part in the hostilities.” Generally, these detained persons must be treated “humanely.”²⁸¹ More specifically, the detaining power must not engage in a list of egregious acts against detainees, such as violence, murder, and torture.²⁸²

In addition to the minimal standard of Common Article Three, the United States has unilaterally raised the bar as a matter of domestic policy. In general, the military leadership has mandated:

The Armed Forces of the United States will comply with the law of war during all armed conflicts; however, such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations.²⁸³

²⁷⁹ *Id.*

²⁸⁰ This article is often referred to as “Common Article Three” because all four Geneva Conventions of 1949 use the same language in their respective third articles.

²⁸¹ GC III, *supra* note 17, art. 3.

²⁸² GC III, *supra* note 17, art. 3 (“...To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages,
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”).

²⁸³ CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 5810.1A, IMPLEMENTATION OF DOD LAW OF WAR PROGRAM (27 August 1999), ¶ 5; DEPARTMENT OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, (9 December 1998), ¶ 5.3.1.

More specifically, in dealing with detainees and prisoners of war, U.S. military leadership has established a detainee program, with the stated objective of “ensur[ing] humane and efficient care and full accountability for all persons captured or detained by the U.S. Military Services throughout the duration of military operations.”²⁸⁴ The detainee program is further implemented by Chief of Naval Operations Instruction (OPNAVINST) 3461.6, which sets forth many of the specific details of how U.S. forces are required to apply the obligations of the Geneva Conventions to enemy prisoners of war and other detainees.²⁸⁵

Recently, the U.S. Government has been presented with a situation in which U.S. forces have captured and detained enemy combatants on the battlefield in Afghanistan. Upon capture, the Bush Administration was forced to analyze the status of those detainees and determine the appropriate standard of treatment. In performing that analysis, the President was admittedly aware of the precedent that it may have upon future conflicts leading to future detainment situations.²⁸⁶ After announcing the President’s decision regarding those specific detainees, Secretary Rumsfeld reaffirmed that all such detainees “will be treated humanely and in a manner that’s consistent with the principles of the Geneva Convention.”²⁸⁷ As a practical matter, what “humane treatment” meant for those detainees was as follows:

They will continue to receive three appropriate meals a day, medical care, clothing, showers, visits from chaplains, Muslim chaplains as appropriate, and the opportunity to worship freely. We will continue to allow the International Committee for the Red Cross to visit each detainee privately, a right that’s normally only accorded to individuals who qualify as prisoners of war under the convention.

As a practical matter, a critical point worth noting is that this formal decision was not announced until February of 2002, several months after the

²⁸⁴ DEPARTMENT OF DEFENSE DIRECTIVE 2310.1, DOD ENEMY POW DETAINEE PROGRAM (18 August 1994) [hereinafter DODDIR 2310.1], ¶ E.1.1.4.

²⁸⁵ DEPARTMENT OF THE NAVY, CHIEF OF NAVAL OPERATIONS INSTRUCTION 3461.6, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 November 1997) [hereinafter OPNAVINST 3461.6]. This regulation was uniformly adopted by the services, as DEPARTMENT OF THE ARMY, ARMY REGULATION 190-8; DEPARTMENT OF THE AIR FORCE, AIR FORCE INSTRUCTION 31-304; AND DEPARTMENT OF THE NAVY, HEADQUARTERS MARINE CORPS, MARINE CORPS ORDER 3461.1, respectively.

²⁸⁶ DOD DETAINEE BRIEFING, *supra* note 278 (“The United States, as I have said, strongly supports the Geneva Conventions. Indeed, because of the importance of the safety and security of our forces, and because of our application of the convention in this situation might very well set legal precedence that could affect future conflicts, prudence dictated that the U.S. government take care in determining the status of Taliban and Al Qaeda detainees in this conflict.”).

²⁸⁷ *Id.*

battle had begun in Afghanistan and enemy personnel were detained. Consequently, despite the standard procedural system in place (i.e., national leadership decides status and tactical forces treat based upon that decision), the reality demonstrates that U.S. forces must be prepared to follow some interim standard of treatment until a status decision is actually made by higher authority.

The precedence of the Al Qaeda/Taliban detainee decision and its bottom-line message appears to be that U.S. forces must be allowed to balance international law mandates with national security interests. If our national leadership determines that a person or group of persons satisfies the standard for prisoner-of-war status, then U.S. forces must follow the “letter of the law” under the obligations of the Geneva Conventions and the implementing service regulations. If, however, that same leadership determines that such detained persons do not satisfy the standard for prisoner-of-war status, then U.S. forces must follow a modified standard of treatment consistent with the “spirit of the law.” Following the principles and spirit of LOAC in handling detainees would include upholding the overarching principle of “humane treatment,” while attempting to accommodate the black-letter requirements of the conventions. In essence, such accommodations would incorporate as many conventional requirements as are reasonably possible, and to the extent reasonably possible. Any limitations to such accommodations would be based primarily upon the need to protect the national security interests (i.e., the security of the United States and the safety of U.S. personnel). As a practical matter, what this means for the detention camp commander, his staff judge advocate, and his chaplain, is that all U.S. forces involved must be knowledgeable, but flexible—informed on the law, but creative in striving toward it.

From all informed accounts in the media, the leadership and staff at Camp X-ray have attempted to balance interests in handling the Al Qaeda/Taliban detainees. While the detaining forces have maintained the security of the situation, they have also found ways to guarantee humane treatment of the detainees. Their methods of treatment have included specific accommodations to the detainees’ spiritual needs. To be sure, such efforts have not been without bumps in the road. They have, however, been steadily progressing forward, to the benefit of all involved. Most importantly, these efforts have consistently involved the service and assistance of a qualified U.S. Navy chaplain. Consequently, some of the details are worth reviewing and highlighting, as many examples of operational teamwork have succeeded in balancing these interests. Likewise, they may carry significant precedence value in similar situations in the future.

B. Advisor Role

A chaplain for U.S. armed forces may be called upon to serve as a critical advisor to the camp commander and security personnel at U.S. detention facilities. To be sure, the staff judge advocate should know the applicable law and regulations in order to properly advise the camp commander. Such legal minds alone, however, have limits. For example, the staff judge advocate may know that a certain LOAC rule mandates a detaining power to provide religiously-suitable meals for enemy prisoners of war. However, that same judge advocate may have zero knowledge or experience as to what would constitute a suitable meal for a particular religion. Only a chaplain of that faith could provide such information. Thus, the religious advisor and the legal advisor may be two individuals, but they must work effectively as a team to ensure that religious standards are met by the commander.

1. U.S. Standard of Treatment

Because the United States is a signatory to the four Geneva Conventions of 1949, all U.S. forces are obligated to follow them as a matter of federal law.²⁸⁸ As mentioned earlier, each of the U.S. armed services has promulgated a directive²⁸⁹ that implements all of the obligations arising from the 1949 Conventions and other conventions, as well as obligations arising from customary international law. The Navy has adopted this directive as OPNAVINST 3461.6. The introductory section of this instruction indicates that it implements the international law regarding enemy prisoners of war (EPWs), retained persons (RPs), civilian internees (CIs), and other detainees (OD). The primary focus, however, is upon the first three categories, with scant guidance for handling other detainees who are not legally entitled to EPW or RP status. Under OPNAVINST 3461.6, the following provisions of the Geneva Conventions are implemented specifically as follows:

<i>Detention Benefit</i>	<i>Geneva Convention Article</i>	<i>OPNAVINST 3461.6 Implementing Paragraph</i>
POWs' Religious Exercise, General	GC III, Art. 34 ²⁹⁰	Paragraph 1-5(g)(1) ²⁹¹

²⁸⁸ U.S. Constitution, Article VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...*")(emphasis added).

²⁸⁹ DODDIR 2310.1, *supra* note 284, ¶ E.1.1.4.

²⁸⁹ OPNAVINST 3461.6. *supra* note 285.

²⁹⁰ See discussion *supra* Section IIIB2.

²⁹¹ "EPW, and RP will enjoy latitude in the exercise of their religious practices, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities."

POWs' Adequate Spaces for Religious Services	GC III, Art. 34 ²⁹²	Paragraph 1-5(g)(1) ²⁹³
Retained Persons, Status	GC I, Art. 28 ²⁹⁴	Paragraph 3-15(b) ²⁹⁵
Retained Persons, Special Identity Card	GC I, Art. 40; GC II, Art. 42 ²⁹⁶	Paragraph 3-15(a) ²⁹⁷ and Paragraph 3-15(e) ²⁹⁸
Retained Persons, Armbands	GC I, Art. 40; GC II, Art. 42 ²⁹⁹	Paragraph 3-15(t) ³⁰⁰
Retained Persons, Enjoyment of POW Benefits	GC I, Art. 28; GC II, Art. 33 ³⁰¹	Paragraph 3-15(c) ³⁰²
Retained Chaplains, Subject to Internal Discipline	GC I, Art. 28; GC II, Art. 33 ³⁰³	Paragraph 3-15(j) ³⁰⁴
Retained Chaplains' Duties, Generally	GC III, Art. 35 ³⁰⁵	Paragraph 1-5(g)(2) ³⁰⁶

²⁹² See discussion *supra* Section IIIB2.

²⁹³ "Adequate space will be provided where religious services may be held." However, it is worth noting that "EPWSs are allowed freedom to worship but will not attend worship services with U.S. personnel." Paragraph 3, Appendix K, Fleet Marine Force Manual 3-61 (Ministry in Combat) (22 Jun 92).

²⁹⁴ See discussion *supra* Section IIIB1.

²⁹⁵ "Enemy personnel, who will fall within any of the following categories, are eligible to be certified as RP:... (3) Chaplains."

²⁹⁶ See discussion *supra* Section IID2.

²⁹⁷ "Enemy personnel entitled to a retained status should have on their person at the time of capture a special identity card attesting to their status. The minimum data shown on the card will be the name, date of birth, grade, and service number of the bearer. The card will state in what capacity the bearer is entitled to the protection of GPW. The card will also bear the photograph of the owner and either the signature or fingerprints or both. It will be embossed with the stamp of the military authority with which the person was serving at time of capture."

²⁹⁸ "Certification of the retained status of personnel will be effected upon the decision that the special identity card held by each such person is valid and authentic. This certification will be decided, if possible, at the time of processing by the camp commander."

²⁹⁹ See discussion *supra* Section IID1.

³⁰⁰ "RP will wear on their left sleeve a water resistant arm band bearing the distinctive emblem (Red Cross, Red Crescent) issued and stamped by the military authority of the power with which they have served. Authorized persons who do not have such armbands in their possession will be provided with Geneva Convention brassards (AR 670-1)."

³⁰¹ See discussion *supra* Section IIIB2.

³⁰² "RP whose status is certified will not be considered as EPW; however, they will receive the benefits and protections of an EPW."

³⁰³ See discussion *supra* Section IIIB3.

³⁰⁴ "RP are subject to the internal discipline of the camp in which they are retained; however, they may not be compelled to do any work except that relating to their medical or religious duties."

³⁰⁵ See discussion *supra* Section IIIB4.

³⁰⁶ "Military chaplains who fall into the hands of the U.S. and who remain or are retained to assist EPW, and RP, will be allowed to minister to EPW, RP, of the same religion. Chaplain will be allocated, among various camps and labor detachments containing EPW, RPE, belonging to the same forces, speaking the same language, or practicing the same religion. They will enjoy the necessary facilities, including the means of transport provided in the Geneva Convention, for visiting the EPW, RP, outside their camp. They will be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with

Retained Chaplains, Allocation Facility	GC III, Art. 35 ³⁰⁷	Paragraph 3-15(k) ³⁰⁸
Retained Chaplains, Correspondence Facility	GC III, Art. 35 ³⁰⁹	Paragraph 3-15(u) ³¹⁰
Retained Chaplains, Visitation Facility	GC I, Art. 38; GC III, Art. 33 and 35 ³¹¹	Paragraph 3-15(u)(2) ³¹²
Retained Chaplains, Access Facility	GC III, Art. 33 ³¹³	Paragraph 3-15(u)(4) ³¹⁴
Prisoners Who Are Ministers of Religion, Generally	GC III, Art. 36 ³¹⁵	Paragraph 1-5(g)(3) ³¹⁶
Prisoners Who Are Ministers, Proof	GC III, Art. 37	Paragraph 3-15(d) ³¹⁷ and Paragraph 3-15(f) ³¹⁸
Prisoners Without A Minister of Their Religion, Generally	GC III, Art. 37 ³¹⁹	Paragraph 1-5(g)(4) ³²⁰

international religious organizations. Chaplains shall not be compelled to carry out any work other than their religious duties.”

³⁰⁷ See discussion *supra* Section IIIB6a.

³⁰⁸ “RP, who are members of the enemy’s Armed Forces, will be assigned to EPW camps. If available, they will be assigned in the ratio of two physicians, two nurses, one chaplain, and seven enlisted medical personnel per 1,000EPW...As much as possible, these RP will be assigned to camps containing EPW from the same Armed Forces upon which the RP depend.”

³⁰⁹ See discussion *supra* Section IIIB6d.

³¹⁰ “RP will enjoy the same correspondence privileges as EPW. Chaplains will be free to correspond, subject to censorship, on matters about their religious duties. Correspondence may be with ecclesiastical authorities both in the country where they are retained and in the country on which they depend, and with international religious organizations.”

³¹¹ See discussion *supra* Section IIIB6b.

³¹² “They will be authorized to visit EPW periodically in branch camps and in hospitals outside the EPW camps in order to carry out their medical, spiritual, or welfare duties.”

³¹³ See discussion *supra* Section IIIB6b.

³¹⁴ “The senior retained medical officer, as well as chaplains, will have the right to correspond and consult with the camp commander or his or her authorized representatives on all questions about their duties.”

³¹⁵ “Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces, shall be at liberty, whatever their denomination, to minister freely to the members of their community. For this purpose, they shall receive the same treatment as the chaplains retained by the Detaining Power. They shall not be obliged to do any other work.”

³¹⁶ “Enemy Prisoners of War, who are ministers of religion, without have officiated as chaplains to their own forces, will be at liberty, whatever their denomination, to minister freely to the members of their faith in U.S. custody. For this purpose, they will receive the same treatment as the chaplains retained by the United States. They are not obligated to do any additional work.”

³¹⁷ “EPW who are certified to be proficient medically or religiously continue to be considered and identified as EPW, as appropriate, but will be administered and treated in the same way prescribed for RP.”

³¹⁸ “The Theater Commander, or CINCUSACOM will confirm the certification of the technical proficiency of the persons described in paragraph 3-15d. Qualified Military medical and religious personnel must first confirm the medical or religious proficiency of each EPW.”

³¹⁹ See discussion *infra* Section IVC.

³²⁰ “If EPW, RP, do not have the assistance of a chaplain or a minister of their faith. A minister belonging to the prisoner’s denomination, or in a minister’s absence, a qualified layman, will be

POWs' Diet	GC III, Article 26 ³²¹	Paragraph 3-4(f) ³²²
POWs' Burial Rites	GC III, Article 120 ³²³	Paragraph 3-10(g) ³²⁴

In light of this detailed guidance, chaplains and staff judge advocates of the U.S. armed forces should become familiar with the applicable provisions in handling enemy prisoners of war and retained persons.

Additionally, a Marine Corps directive provides specific guidance on the U.S. chaplain's role in the detention process. First, U.S. chaplains should "encourage" and "utilize" the enemy retained chaplains or any other EPW ministers to provide religious ministrations for the EPWs and other detained persons.³²⁵ The U.S. commander in charge of the unit at the collection points or holding areas of enemy personnel is responsible for "the coordination of these ministries."³²⁶ Consequently, the U.S. chaplain should serve as the commander's advisor in this task.³²⁷

2. Accommodations at Camp X-ray

Not every enemy fits neatly into the categories of the Geneva Conventions. As discussed above, some enemy detainees are not legally entitled to protected status. Instead, they receive another standard of treatment, which may not be as clearly defined as the provisions set forth above. Therefore, just as the war on terrorism has been a unique experience under the law, the role of a

appointed, at the request of the prisoners, to fill this office. This appointment, subject to the approval of the camp commander, will take place with agreement from the religious community of prisoners concerned and, wherever necessary, with approval of the local religious authorities of the same faith. The appointed person will comply with all regulations established by the United States."

³²¹ "The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners. The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed."

³²² "The daily food rations will be sufficient in quantity, quality, and variety to keep EPW/RP in good health and prevent loss of weight or development of nutritional deficiencies. (1) Account will be taken of the habitual diet of the prisoners."

³²³ "The detaining authorities shall ensure that prisoners of war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, suitably maintained and marked so as to be found at any time. Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place."

³²⁴ "Burial, record of internment, and cremation. Deceased detainees will be buried honorably in a cemetery established for them, according to AR 638-30. Deceased detainees will be buried, if possible, according to the rites of their religion and customs of their military forces."

³²⁵ FMFM 3-61, *supra* note 3, app. K, ¶ 3.

³²⁶ *Id.*

³²⁷ *Id.*

U.S. chaplain in a U.S. detention facility was fairly unprecedented before the 9/11 attacks and the war on terrorism.³²⁸ Nevertheless, U.S. military chaplains have played an active role in advising the task force commanders at Camp X-ray. Less than two weeks after the first Al Qaeda/Taliban detainees arrived in Guantanamo Bay, U.S. military commanders rushed Lieutenant Abuhena Saif-ul-Islam, of the U.S. Navy Chaplains Corps, from his duty station at Camp Pendleton to the detention facility.³²⁹ His primary responsibility was to “advise senior commanders on Islamic issues.”³³⁰ On the day after his arrival, he also began fulfilling his secondary role as he awoke the detainees with his *adhan*, or morning call to prayer.³³¹

Thereafter, a series of religious accommodations were implemented to balance the security interests of the detainers with the spiritual needs of the detainees. These accommodations included the following efforts by Chaplain Saif-ul-Islam in advising the camp commander, staff, and guards:

- Recommending the initiation and continuation of five calls to prayer each day, consistent with the Islamic faith.³³² Thereafter, he taped a series of such *adhans* for occasions when he might be unavailable.³³³
- Reviewing the detainees’ menus to make sure the food “fit within religious dietary restrictions,”³³⁴ (i.e., Muslims do not eat pork). Additionally, he ensured that lamb was served for *Eid al-Adha*, the Islamic Feast of Sacrifice.³³⁵

³²⁸ Tony Perry, *Muslim Chaplain Embraces New Job Ministering to War Detainees*, LOS ANGELES TIMES, 3 February 2002 (“Now, Navy Lt. Abuhena Saif-ul-Islam has another assignment with no historic precedent: to provide spiritual guidance and comfort to the captured Taliban and Al Qaeda fighters being held at the U.S. naval base in Guantanamo, Cuba.”).

³²⁹ Sandi Dolbee, *Muslim Chaplain Receives a Warm Welcome in Cuba*, SAN DIEGO UNION-TRIBUNE, 27 January 2002, at A-1.

³³⁰ *Call to Prayer Made for Detainees Held in Cuba*, CABLE NEWS NETWORK, 25 January 2002, available at www.cnn.com/2002/WORLD/americas/01/24/detainees.cuba/index.html.

³³¹ *Id.*

³³² Noah Adams, *Interview with Lieutenant Saif-ul-Islam*, NATIONAL PUBLIC RADIO’S ALL THINGS CONSIDERED, 4 February 2002.

³³³ Sandi Dolbee, *Mission Accomplished; Camp Pendleton’s First Muslim Chaplain Wraps Up a Three-Year Tour*, SAN DIEGO UNION-TRIBUNE, 9 August 2002, at E-1.

³³⁴ *Id.*; Katharine Q. Seelye, *A Nation Challenged: The Detainees – As Trust Develops, Guards Still Maintain Full Alert*, NEW YORK TIMES, 4 February 2002, sec. A, at 11.

³³⁵ Lisa Fernandez, *Marine Muslim Chaplain Counsels Detainees at Camp X-Ray*, Houston Chronicle, 30 March 2002, at 6; Stephen Kaufman, *Eid al-Adha Observed at Camp X-Ray: Special Meals Prepared for Detainees*, INTERNATIONAL INFORMATION PROGRAMS, U.S. STATE DEPARTMENT, 26 February 2002, available at www.state.gov.

- Advising camp authorities that “after Islamic fast periods, it is preferable to serve meals to the detainees after sundown.”³³⁶
- Obtaining Muslim prayer caps, finger prayer beads, supplemental prayer books and Korans in various languages spoken by the detainees.³³⁷
- Ordering large-type Korans for detainees who have problems with their vision.³³⁸
- Ensuring that the detainees have adequate water and towels for the purification *wadu* before prayers.³³⁹
- Ensuring that a large green sign reading *qibla* in Arabic was posted visibly on one of the guard towers, showing the detainees the correct direction to pray.³⁴⁰
- Advising the detention authorities to not shave the detainees after they had previously been shorn in Afghanistan.³⁴¹
- Establishing “culturally-sensitive” funeral arrangements and procedures, in the event that one of the detainees died.³⁴²
- Providing training to camp guards and other personnel to sensitize them to the elements and culture of Islam.³⁴³

Clearly, each of these initiatives served as an accommodation that balanced the religious interests of the detainees with the security interest of the detainers. Moreover, they serve as a “lessons learned” model of what should be considered in future detention situations involving U.S. forces.

C. Minister Role

As must be evident at this point, international law permits nations to clad their ministers in uniforms and allows them to serve within their military ranks. Consequently, many nations have elected to do so, including the United States. If such a nation were to become the declared enemy of the United States, their uniformed chaplains would enjoy all of the privileges provided in the

³³⁶ Fernandez, *supra* note 335.

³³⁷ Dolbee, *supra* note 329; Adams, *supra* note 332; Fernandez, *supra* note 335; Carol Rosenberg, *Navy Officer Balances Religious Responsibilities*, MIAMI HERALD, 31 January 2002.

³³⁸ Seelye, *supra* note 334; Rosenberg, *supra* note 337.

³³⁹ Laura J. Brown, *Muslim Chaplain Sees to Detainees' Needs at Guantanamo*, INTERNATIONAL INFORMATION PROGRAMS, U.S. STATE DEPARTMENT, 14 February 2002, available at www.state.gov.

³⁴⁰ Kaufman, *supra* note 335.

³⁴¹ Seelye, *supra* note 334.

³⁴² Dolbee, *supra* note 333.

³⁴³ Darren Barbee, *Muslim Chaplain Is Puzzled By Detainees at Cuba Camp*, FORT WORTH STAR TELEGRAM, 16 February 2002, at 1.

Geneva Conventions that we would expect our chaplains to enjoy.³⁴⁴ Modern warfare, however, is not always so convenient. Depending upon the situation and nature of the conflict, U.S. forces might detain enemy personnel who may or may not include their own religious leadership. Therefore, the question arises: what happens when detained personnel lack a minister within their ranks? The answer to that question depends initially upon the legal status and corresponding treatment standard for detained personnel.

If the detained persons are legally entitled to prisoner-of-war status, the Geneva Conventions envision a situation in which those POWs lack a uniformed chaplain within their ranks. In such cases, a minister of the appropriate religious denomination must be appointed by the “detaining power” – that is, the nation running the detainment facility. Procedurally, this appointment involves four basic steps. First, the substitute minister should be requested by the concerned prisoners of war.³⁴⁵ Second, the detaining power has approval authority on the appointment. Third, the concerned EPWs should be given the opportunity to agree to the selection. Fourth, the local religious authorities of the same denomination should be given a similar opportunity to approve the appointment.

It is critical to note that the appointed minister does not have complete autonomy in the performance of his or her duties. Rather, the appointed minister must still adhere to the security regulations established by the camp commander.³⁴⁶ In these situations, the U.S. chaplain would continue to have a role in regulating appointed ministers and advising the camp commander on matters relating to them. As such, U.S. chaplains should be familiar with the details of the religious liberty provided to POWs under the international law.³⁴⁷

If detained personnel are not entitled to prisoner of war status, then the U.S. camp commander would not necessarily be required to follow the “letter of the law” in appointing outside ministers. Instead, U.S. forces may apply a modified standard of treatment that adheres to the spirit and principles of LOAC.³⁴⁸ In such situations, U.S. chaplains may also be called upon to assume roles as substitute ministers, in addition to their roles as religious advisors to the camp commander. Such a role assumption has been the case at Camp X-ray. In addition to providing detailed guidance to military commanders regarding issues of the Islamic faith, Lieutenant Saif-ul-Islam performed the standard responsibilities of a *de facto* chaplain for the detainees. Specifically, published

³⁴⁴ See discussion *supra* Section IIIB.

³⁴⁵ GC III, *supra* note 17, art. 37.

³⁴⁶ GC III, *supra* note 17, art. 37.

³⁴⁷ See discussion *supra* Section IIIB5.

³⁴⁸ See discussion *supra* Section IVA.

reports indicated that he served as their *imam* (spiritual teacher), routinely visiting one on one with the detainees for several hours of each day.³⁴⁹ In addition, he served as their *muwa'zzin*, leading the detainees in their call to prayer five times each day.³⁵⁰

D. Conduit Role

In performing these two distinct roles of advisor and minister, a U.S. chaplain may inevitably perform a third role that straddles between the two conventional roles. Specifically, Chaplain Saif-ul-Islam demonstrated how chaplains must sometimes serve effectively as a conduit between the detainers and the detainees. As he told a reporter, “[t]he main thing was to maintain the balance between the troops and detainees. I was the chaplain for both, who seemed to not like each other very much. The balance between the two was unique and challenging.”³⁵¹

Sometimes that balancing act means persuading the detainers to accommodate the interests of the detainees. From the outset, Chaplain Saif-ul-Islam met with individual detainees not only to provide spiritual counsel to them, but also to “listen to their individual concerns.”³⁵² Thereafter, he brought some of those concerns to the attention of military commanders.³⁵³ While recognizing the security interests involved, he effectively advised the camp commanders of ways “that the U.S. military can safeguard its soldiers while adding a few amenities of everyday Islamic life.”³⁵⁴ For example, soon after the detainees were captured on the battlefield and temporarily held in Kandahar, their heads and beards were shaved off for hygiene reasons as part of the delousing procedures.³⁵⁵ Upon arriving at Camp X-ray, however, Chaplain Saif-ul-Islam requested permission on behalf of the detainees to re-grow their beards.³⁵⁶ This request was granted by the camp authorities.³⁵⁷ Additionally, he has forwarded

³⁴⁹ Dolbee, *supra* note 329; Barbee, *supra* note 343.

³⁵⁰ Barbee, *supra* note 343; Fernandez, *supra* note 335; Kaufman, *supra* note 335.

³⁵¹ Dolbee, *supra* note 333.

³⁵² Perry, *supra* note 328.

³⁵³ Thomas Fields-Meyer, *Keeper of the Peace: Navy Chaplain Abuhena Saifulislam Tends to a Challenging Flock: Taliban Prisoners*, PEOPLE, 22 April 2002, at 128 (“In one incident, a guard took a sheet a prisoner had wrapped around his waist to pray – a common Muslim display of modesty. That led more than 150 of the prisoners to launch a hunger strike, but the chaplain was able to intervene, telling [Task Force Commander] General Lehnert, ‘It’s a small thing. And if there is no security issue, why not?’”)

³⁵⁴ Rosenberg, *supra* note 337.

³⁵⁵ Kaufman, *supra* note 335.

³⁵⁶ Perry, *supra* note 328; Barbee, *supra* note 343.

³⁵⁷ Kaufman, *supra* note 335.

requests on behalf of the detainees for more Korans, skullcaps, and prayer rugs.³⁵⁸

In addition to advising camp commanders of these spiritual accommodations, the chaplain may also need to effectively convey spiritual requirements to the U.S. personnel guarding the detainees. For example, some of the detainees brought it to Chaplain Saif-ul-Islam's attention that the guards had tried to perform their duties during the prayer time, which had consequently disturbed those prayers.³⁵⁹ Thereafter, Chaplain Saif-ul-Islam provided cultural-sensitivity training to the guards that "Islam dictates that worshippers not break concentration during prayers, even it means ignoring an order."³⁶⁰ Consequently, one of the guards responded favorably, "I think if we respect the detainees they will probably be more cooperative with our security measures, making our job much easier."³⁶¹

Other times, wearing this conduit hat means helping detainees understand a policy decision of the detainers. For example, some of the detainees expressed a desire to follow the Islamic tradition of praying in a large group during the Friday call to prayer.³⁶² However, Camp X-ray authorities would not allow the detainees to leave their individual cells and pray as a group, for obvious security reasons. Consequently, the chaplain had the responsibility of explaining this decision to the detainees and counseling them that "under extreme conditions, Islam says it's OK to pray individually in their cells during the Friday juma's prayer."

On another occasion, Chaplain Saif-ul-Islam helped end a hunger strike within the detainee population. In August 2002, approximately 200 of the detainees participated in a hunger strike to protest the conditions of their detention.³⁶³ In response, the Muslim chaplain met with individual detainees and "tried to convince them that Islam, the religion he shared with them, does not condone hurting yourself." After approximately half of those protesters resumed eating, Lieutenant Saif-ul-Islam then sought outside assistance from the Muslim community. Specifically, he contacted a Muslim scholar and requested the writing of a *fatwa*, an interpretation of Islamic law, that supported his position. Based upon these concerted efforts, all but two of the detainees ended their hunger strike.

³⁵⁸ Perry, *supra* note 328.

³⁵⁹ Joshua S. Higgins, *Religion 101: MPs Get Education During Duty*, DEFEND AMERICA, DEPARTMENT OF DEFENSE, available at www.defendamerica.mil.

³⁶⁰ Fernandez, *supra* note 335.

³⁶¹ Higgins, *supra* note 359.

³⁶² Fernandez, *supra* note 335.

³⁶³ Dolbee, *supra* note 333.

E. Potential Conflict of Interest in Performing These Roles

The challenge for one of these multi-hatted U.S. chaplains arises when their duties as a minister conflict with those of staff advisor. Logically, one of the only individuals who interacts directly with the detainees might be the chaplain. Moreover, of the limited number of such first-hand contacts, the chaplain would surely have developed one of the better rapport with the detainees. In fact, one of the Camp X-ray staff who was interviewed about the Muslim chaplain's relationship with the detainees commented, "His interaction with the detainees is markedly different from that of the guards or the interrogators."³⁶⁴ Such close relationships can create the potential for ulterior benefits for the detaining power.

A scenario could be envisioned in which prisoners of war or other detainees could provide good intelligence to the detainer. Likewise, a chaplain serving as a substitute minister may be called upon to serve as a conduit for gathering such intelligence. Historically, for example, a U.S. Army psychologist was utilized for information-gathering by the Commander of the prison which housed the German Nazis awaiting trial before the International Military Tribunal at Nuremberg.³⁶⁵ At the same time, however, it is worth noting that U.S. military policymakers condemned attempts by a U.S. Army chaplain who sought to publish a book based upon his ministering to those same Nazi prisoners.³⁶⁶ Regardless, this hypothetical scenario begs the question: which master³⁶⁷ does the chaplain serve—that is, which role of the chaplain

³⁶⁴ Seelye, *supra* note 334.

³⁶⁵ JOSEPH PERSICO, *NUREMBERG: INFAMY ON TRIAL* (Penguin Books 1994), at 103-104 ("[U.S. Army psychologist Captain Gustav] Gilbert, who had never been summoned to [U.S. Army Colonel Burton] Andrus's office before without [fellow U.S. Army psychologist Major] Kelley, felt apprehensive. [Prison commander] Colonel Andrus greeted Gilbert with forced bonhomie and asked the captain to have a seat. After chitchat about the suitability of Gilbert's quarters, the colonel rose, closed the door, and resumed his place behind the desk. He appreciated, he said, that Gilbert spoke German so well. You could never know what these birds were up to if you could not understand their lingo. Yes, Gilbert was doing fine interpreting, Andrus went on. But, that was only half the job. What he also needed was 'an observer,' Andrus *said*. He wanted Gilbert to hang around with these fellows in the exercise yard, even when they took their weekly showers. Win their confidence, become a friend. Pick up whatever they *said*. And, if it proved interesting, Gilbert should report back to the prison commandant immediately. Andrus wanted him to be a spy, Gilbert realized.").

³⁶⁶ William J. Hourihan, *U.S. Army Chaplain Ministry to German War Criminals at Nuremberg, 1945-1946*, *THE ARMY CHAPLAINCY* (Winter-Spring 2000) ("The objection was based on the ground that the manuscript revealed intimate confidences which were deserving of the secrecy of the confessional. The War Department discourages anything that would possibly suggest to men that chaplains did not zealously guard intimate knowledge and confidence.")

³⁶⁷ Matthew 22:21 ("Give to Caesar what is Caesar's, and to God what is God's."); Matthew 6:24 ("No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to one and despise the other.").

trumps? The answer to that question depends upon what is the appropriate controlling authority, whether legal, regulatory, or ethical.

1. Analysis Under Evidentiary Rules

At first glance, most military lawyers would assume that the appropriate guiding standard for the confidentiality of detainee statements is the clergy-penitent privilege recognized under evidentiary rules. Such analysis, however, is not that simple. Under Military Rule of Evidence 503, a person has a privilege “to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman’s assistant, if such communication is made either as a formal act of religion or as a matter of conscience.”³⁶⁸ Moreover, M.R.E. 503 further defines who is a clergyman,³⁶⁹ when communication is “confidential,”³⁷⁰ and who may claim the privilege³⁷¹ (i.e., personally and/or vicariously). To be sure, such definitions and explanations are helpful in understanding the parameters of this evidentiary privilege, so that any judge advocate could effectively argue related issues before a court-martial.

The basic rule of M.R.E. 503 is broadly-worded with respect to the individuals that it protects. Specifically, the rule states that “a person” has the privilege that permits them to protect communications made by that “person.” Thus, the rule is not confined in its scope to only certain persons, like other narrow rules which specifically protect an accused,³⁷² a victim,³⁷³ or a witness.³⁷⁴ Instead, M.R.E. 503 theoretically protects all the various players in the military justice process (accused, victim, or witness), much like the other privileges recognized within Section V of the Military Rules of Evidence.³⁷⁵ Consequently,

³⁶⁸ MIL. R. EVID. 503(a).

³⁶⁹ MIL. R. EVID. 503(b)(1).

³⁷⁰ MIL. R. EVID. 503(b)(2).

³⁷¹ MIL. R. EVID. 503(c).

³⁷² See, e.g., MIL. R. EVID. 304 (Confessions and Admissions), MIL. R. EVID. 311 (Evidence Obtained from Unlawful Searches and Seizures), MIL. R. EVID. 413 (Evidence of Similar Crimes on Sexual Assault Cases), and MIL. R. EVID. 414 (Evidence of Similar Crimes in Child Molestation Cases).

³⁷³ See, e.g., MIL. R. EVID. 404(a)(2) (Character of Victim) and MIL. R. EVID. 412 (Rape Shield Rule).

³⁷⁴ See, e.g., MIL. R. EVID. 608.

³⁷⁵ The Lawyer-Client privilege generally protects the communications of “a client” and broadly defines client as “a person, public officer, corporation, association, organization, or other entity, either public or private.” MIL. R. EVID. 502(a) and (b)(1). Similarly, the Husband-Wife privilege generally protects “a person.” MIL. R. EVID. 504. Moreover, the Psychotherapist-Patient privilege generally protects the communications of “a patient” and broadly defines patient as “a person” who consults with a psychotherapist. MIL. R. EVID. 513. Additionally, other rules outside Section V

the broad language of the rule alone may appear to apply to confidences that any person (including an enemy detainee) may decide to share with a U.S. military chaplain.

For the hypothetical scenario raised above, however, the critical focus is not on the parameters and scope of this evidentiary rule, but on the general applicability of the rule itself. In other words, in what situations would we actually turn to M.R.E. 503, or the entire set of Military Rules of Evidence for that matter? In the first sentence of the first Military Rule of Evidence, it states: “These rules are applicable in courts-martial, including summary courts-martial, to the extent and with the exceptions stated in Mil. R. Evid. 1101.”³⁷⁶ Turning to that further-referenced rule, it states “The rules with respect to privileges in Section III and V apply at all stages of all actions, cases, and proceedings.”³⁷⁷

Language such as “all actions, cases, and proceedings” implies applicability beyond merely the open hearings at a convened court-martial consisting of a judge and court members. Clearly, the Military Rules of Evidence apply at various phases of court-martial proceedings, whether the court members are present³⁷⁸ or absent.³⁷⁹ Moreover, while many of these rules are limited to courts-martial, the privilege rules apply to other military proceedings, including non-judicial punishment procedures³⁸⁰ and Article 32 pretrial investigations.³⁸¹ None of the formal rules of evidence, however, apply to certain types of administrative military proceedings, such as administrative separation boards³⁸² and field naval aviator evaluation boards.³⁸³ From such analysis, any person (including an enemy detainee) could clearly invoke the privilege for statements in the proceedings of any U.S. court-martial. Practically, the remaining issue for the use of such statements, however, is whether the declarant could be or would be prosecuted in a court-martial convened by the U.S. military.

generally protect “a person” like the rule against degrading questions. *See, e.g.*, MIL. R. EVID. 303.

³⁷⁶ MIL. R. EVID. 101(a).

³⁷⁷ MIL. R. EVID. 1101(b).

³⁷⁸ MIL. R. EVID. 1101(a) (The rules apply “generally to all courts-martial, including summary courts-martial.”).

³⁷⁹ MIL. R. EVID. 1101(a) (The rules apply to “proceedings pursuant to Article 39(a).”)

³⁸⁰ MCM, *supra* note 118, Part V (Nonjudicial Punishment), ¶ 4c(3) (“The Military Rules of Evidence, other than with respect to privileges, do not apply at nonjudicial proceedings.”).

³⁸¹ *Id.*, Part II, R.C.M. 405(i) (“The Military Rules of Evidence – other than Mil. R. EVID. 301, 302, 303, 304 412 and Section V [which includes 503] – shall not apply in pretrial investigations under this rule.”)

³⁸² DEPARTMENT OF THE NAVY, NAVAL MILITARY PERSONNEL MANUAL (22 August 2002) [hereinafter MILPERSMAN], art. 1910-510.

³⁸³ *Id.*, art. 1610-020.

While the prosecution of an enemy detainee in a U.S. court-martial may be technically feasible, it may not necessarily be the primary objective of such detention. As to the feasibility for such case, an enemy detainee—prisoner of war or otherwise—may potentially be prosecuted by court-martial. Article 2 of the Uniform Code of Military Justice states that “prisoners of war in custody of the armed forces” are subject to that Code.³⁸⁴ Additionally, Article 18 of the UCMJ indicates that “General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”³⁸⁵ Under these jurisdictional provisions, an enemy POW or other enemy detainee could be prosecuted by a U.S. court-martial. In such courts-martial, M.R.E. 503 would definitely apply.

At the same time, however, it is uncertain whether U.S. military authorities would ever elect to prosecute a detainee relying upon such statements. For example, with the detainees presently held at Camp X-Ray, their interrogators are admittedly less focused on building a criminal case than with developing actionable intelligence to prevent further terrorist attacks by cohorts who remain at large.³⁸⁶ Therefore, the issue of M.R.E. 503’s applicability may be moot if there is no chance the statements will be used in a U.S. court-martial.

³⁸⁴ UCMJ, art. 2, 10 U.S.C. § 802.

³⁸⁵ *Id.*, art. 18, 10 U.S.C. § 818.

³⁸⁶ SECRETARY DONALD RUMSFELD, DEPARTMENT OF DEFENSE DAILY NEWS BRIEFING (22 October 2002), available at http://www.defenselink.mil/news/Oct2002/t10222002_t1022sd.html (“Well, if you think about the universe of detainees, the ones that have been -- for the most part, they’ve all been interrogated or are being interrogated, the purpose being not law enforcement, but intelligence-gathering. If at a certain moment that process proceeds and someone concludes that they’re very likely not to be of any additional intelligence value, then they’re stuck in a different basket, and they’re then looked at for law enforcement purposes: Is this somebody that our country or some other country would like to prosecute and deal with in a law enforcement as opposed to an intelligence-gathering manner? If the conclusion there is no, that not only are they not interesting from an intelligence-gathering, they’re not interesting from a law enforcement standpoint, the next question is: Are they people who ought to be kept off the street simply because they might be inclined to go back and again engage in activities that would be opposed to the Afghan government or to the United States, or whatever. And if the judgment there is that they’re not people who need to be kept off the street for whatever reason -- health or attitude -- then the goal is to not have them. If you don’t want them for intelligence, and you don’t want them for law enforcement, you don’t need to keep them off the street, then let’s be rid of them. And so that process goes forward.”); UNDERSECRETARY DOUGLAS FEITHS, DEPARTMENT OF DEFENSE NEWS BRIEFING ON MILITARY COMMISSIONS (21 March 2002), available at http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html (“We have had from the beginning a screening process to make sure that we do not take into our custody people that should not be held. Most of the people that we are holding were, I believe, captured not by American forces, in the first instance, but by Afghan forces. And the Afghan forces made available a number of these people to us. They were screened. We had specific criteria that applied to decide whether -- to allow our people to decide whether we wanted to take them into U.S. custody. And it had to do with whether they were higher-level people, whether they posed a particular threat to

Additionally, a special forum now exists for the prosecution of enemy detainees in which neither the Military Rules of Evidence nor any other codified set of evidentiary rules apply. On 13 November 2001, President Bush signed an executive order which authorized the creation of Military Commissions.³⁸⁷ These Commissions would permit the prosecution of terrorists who were not citizens of the United States. Thereafter, Secretary of Defense Donald Rumsfeld promulgated Military Commission Order Number 1.³⁸⁸ That order set forth the procedures for holding such commissions, including the procedures for conducting the actual trials. With regard to procedures of evidence, the only stated standard of admissibility of evidence before such Commissions is as follows:

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.³⁸⁹

With the sole focus of this evidentiary standard on probative value, there appear to be no legal restrictions placed upon the use of confidential communications made by a detainee to a chaplain or any other protected

us, whether we had particular intelligence interests in them. And there were thousands of people who were captured by Afghan forces, and yet we are holding only a fraction of that number. And the people that we're holding we are interrogating. And we're continually reviewing the information that we have about these people that we're getting from interrogations, that we're getting from other countries that are cooperating with us in the field of intelligence or in the field of law enforcement. And if we find that we're holding somebody who is not of intelligence interest to us, is not of law enforcement interest to us, is not a threat, in our view, to Americans, to the United States, to our interests, to our, you know, allies or friends as a terrorist, if we don't have any interest in holding the person, we'll let them go.”); ASSISTANT SECRETARY VICTORIA CLARKE, DEPARTMENT OF DEFENSE NEWS BRIEFING (9 April 2002), *available at* http://www.defenselink.mil/news/Apr2002/t04092002_t0409asd.html (“They're still interviewing, interrogating the detainees to get as much intel as possible and to get as much information as possible about their circumstances. They're working through that progress. [DOD General Counsel] Jim Haynes is working with a team of people to come up with the system, if you will, by which you determine who goes in which one. But again, I'd say, if you need to put a priority on something, put the priority on what kind of intel are we getting to prevent future attacks.”)

³⁸⁷ Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

³⁸⁸ DEPARTMENT OF DEFENSE, MILITARY COMMISSION ORDER NO. 1, PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (21 March 2002).

³⁸⁹ *Id.*, ¶ 6(D).

relationship. Clearly, many statements made in confidence to a chaplain may be probative—that is, tending to prove the guilt of the person. Under the Commission’s single rule of evidence, however, such probative evidence would be admitted.

Taken together, this analysis of M.R.E. 503 could probably be summarized as follows. First, statements made by an enemy POW or any enemy detainee to a U.S. chaplain might be inadmissible in a court-martial. Second, statements made by an enemy POW or other enemy detainee to U.S. chaplains would be admissible at military commissions. Third, evidentiary rules, like the privilege rule, are completely irrelevant and inapplicable if the statements will be used solely for purposes other than disciplinary actions against that individual detainee, such as pure intelligence-gathering. In light of the second and third points, we must consider whether any other source of legal authority exists that prohibits the revelation of statements made in confidence.

2. Analysis Under Service Regulations

Each of the U.S. armed services has a community of uniformed chaplains within their ranks.³⁹⁰ In establishing the duties and responsibilities of those uniformed chaplains, the services have promulgated regulations³⁹¹ or instructions³⁹² concerning their respective religious programs. Those directives address a range of issues arising in military religious programs. One such issue is the status and scope of privileged communications between these chaplains and any persons who may choose to confide in them. The provisions of these service directives must be considered in evaluating the violability of the hypothetical communications between a U.S. chaplain and an enemy detainee.

Of the three services’ directives, the U.S. Army’s regulation has the most explicit discussion of the details of protected communications, as well as the broadest protection for such information. Army Regulation 165-1 defines what communications are protected. Under the section entitled “Religious Responsibilities,” the regulation defines privileged communications.³⁹³ Note that

³⁹⁰ The Marine Corps relies upon Navy chaplains who have been detailed to their units. MCO 1730.6D, *supra* note 136.

³⁹¹ AR 165-1, *supra* note 101.

³⁹² SECNAVINST 1730.7B, *supra* note 99; OPNAVINST 1730.1C, *supra* note 103; AFI 52-101, *supra* note 103.

³⁹³ AR 165-1, *supra* note 101, ¶ 4-4m(1) (“A privileged communication is defined as any communication to a chaplain or chaplain assistant given as a formal act of religion or as a matter of conscience. It is communication that is made in confidence to a chaplain acting as a spiritual advisor or to a chaplain assistant aiding a spiritual advisor. Also, it is not intended to be disclosed to third persons other than those to whom disclosure furthers the purpose of the communication, or to those reasonably necessary for the transmission of the communication.”).

this definition is generally void of a classification of persons entitled to enjoy this privilege, but focuses rather upon on the communication itself. Consequently, its language appears to be broad enough to protect not only U.S. servicemembers, but other individuals such as family members. Arguably, the criterion as a protected “declarant” under this regulation could include an enemy detainee. In any event, the regulation directs that chaplains and their assistants “will not divulge privileged communications without the written consent of the person(s) authorized to claim the privilege.”³⁹⁴

Additionally, the Army regulation also defines another category of communications, which it refers to as “sensitive information.”³⁹⁵ This second category of information appears to serve as a catchall in protecting any communications which fail to satisfy the definition of privileged communications. In general, a chaplain “normally should not” disclose such sensitive information “unless the declarant expressly permits disclosure.”³⁹⁶ Of note, this “sensitive information” category of protected communications is not addressed by the religious regulations of any of the other armed services.

More importantly, the Army Regulation specifically restricts how operational commanders may utilize the services of their detailed chaplains. Under the section entitled “Professional Status of Chaplains,” the regulation includes the earlier-referenced guidance concerning the Army chaplains’ noncombatant status and their restriction against bearing arms.³⁹⁷ Thereafter, the regulation addresses the limits in which any Army commander may utilize their chaplains. Specifically, commanders “will detail or assign chaplains only to duties related to their profession.”³⁹⁸ This restriction then addresses how chaplains may not serve in any official capacity in the military justice process (i.e., as trial counsel, defense counsel, court-martial member, etc.) and may not perform certain collateral duties within the command (e.g., recreation officer, equal opportunity officer, etc.). More pertinent to the present discussion, the

³⁹⁴ *Id.*, ¶ 4-4m(2). Note that the use of the term “persons authorized to claim the privilege” is not intended to address who may be a lawful parishioner in the Army religious program, but refers to direct or vicarious nature of who can invoke the privilege (i.e., “The privilege against disclosure belongs to the declarant, to his or her guardian or conservator, or to his or her personal representative if the person is deceased. The privilege may also be claimed on behalf of the person by the chaplain or the chaplain assistant who received the communication.”).

³⁹⁵ *Id.*, ¶ 4-4n(1) (“Sensitive information includes any nonprivileged communications to a chaplain, chaplain assistant, or other chaplain support personnel that involves personally sensitive information that would not be a proper subject for general dissemination. Examples of sensitive information are knowledge of a soldier’s attendance at an Alcoholics Anonymous program, treatment by a psychiatrist, a prior arrest, or hospitalization for mental illness.”).

³⁹⁶ *Id.*, ¶ 4-4n(2).

³⁹⁷ *Id.*, ¶ 4-3(c); see discussion *supra* at Section III E2.

³⁹⁸ AR 165-1, *supra* note 101, ¶ 4-3(e).

regulation then dictates that commanders will not “require a chaplain to serve in a capacity in which he or she may later be called upon to reveal privileged or sensitive information incident to such service.”³⁹⁹ Such language appears to directly prohibit a bait-and-switch of sorts in which the chaplain is assigned to befriend and counsel an enemy detainee, but is subsequently converted into an information-gathering agent for the commander.

If the Army regulation is the most explicit for the three services, the Navy religious directives are arguably the vaguest. The religious ministries within the Department of the Navy are presently guided by SECNAVINST 1730.7B and OPNAVINST 1730.1C. Both directives are unclear in the two most critical questions arising in the hypothetical scenario: who is entitled to religious services in the Navy program, and what are the limits of the clergy privilege. Both directives indicate that the Navy religious programs are available for “all members of the naval service, eligible family members and other authorized personnel.”⁴⁰⁰ Neither directive, however, specifies who fits within the category “other authorized personnel.” For the sake of analyzing this hypothetical, let us assume that enemy detainees would qualify as “other authorized personnel.” Presumably, the U.S. military leadership would not send a U.S. Navy chaplain to counsel enemy detainees without authorizing such religious services for them. Thus, the remaining question is the nature of the clergy privilege under Navy directives.

These Navy directives are equally vague on the nature of this privilege of communications. While the previous version of SECNAVINST 1730 stated that chaplains must “safeguard the privileged communication of servicemembers,”⁴⁰¹ the present SECNAVINST omits any reference to the privilege. In the current OPNAVINST, Navy commanders and commanding officers are required to “[s]afeguard the privileged communications counselees may claim under reference (g) for communications made to chaplains and RPs.”⁴⁰² “Reference (g)” for this directive is M.R.E. 503, discussed above. Yet the term “counselee” is never defined elsewhere in the directive.

The greatest problem, however, with the Navy’s guidance on this issue is the means by which the directive sets the parameters of the privilege. Specifically, the OPNAVINST defines the privilege purely by incorporation of the Military Rule of Evidence. For example, in a hypothetical unrelated to the

³⁹⁹ *Id.*, ¶ 4-3e(3).

⁴⁰⁰ SECNAVINST 1730.7B, *supra* note 99, ¶ 5; OPNAVINST 1730.1C, *supra* note 103, ¶ 5c.

⁴⁰¹ DEPARTMENT OF THE NAVY, SECRETARY OF THE NAVY INSTRUCTION 1730.7A, RELIGIOUS MINISTRIES WITHIN THE DEPARTMENT OF THE NAVY (2 September 1993), *quoted in* United States v. Isham, 48 M.J. 603 (N-M. Ct. Crim. App. 1998).

⁴⁰² OPNAVINST 1730.1C, *supra* note 103, encl. 1, ¶ 2(i).

detainee situation, this directive would not prevent a U.S. Navy chaplain from revealing otherwise privileged communications made by a servicemember or family member, as long as the confidences were disclosed in a forum other than a military justice proceeding.⁴⁰³ Similarly, these Navy religious directives would not restrict the disclosure of communications made by an enemy detainee to a U.S. Navy chaplain.

While the general directives regarding Navy religious ministries are unclear concerning the nature of the penitent-clergy privilege, the recent policy statement issued by the Navy chaplain leadership would probably restrict any fishing expeditions by Navy chaplains in U.S. detention facilities. Recall that the leadership reminded the chaplain ranks that they are all noncombatants.⁴⁰⁴ As such, the obligations of their noncombatant status dictates that such chaplains “do more than simply refrain from carrying or using weapons; it requires a noncombatant state-of-mind.” Consequently, Navy chaplains “must never participate in *any* activity that compromises [their] noncombatant status, or that of other chaplains.” One of the stated examples, in the policy letter, of such prohibited conduct by chaplains included “carrying or conveying military intelligence.” Notice that the prohibited conduct is not limited only to a chaplain carrying military intelligence on the battlefield from place to place perfidiously using their protected status as a cover. By definition,⁴⁰⁵ the word “conveying” denotes a chaplain who improperly turns over intelligence information regardless of its source—whether couriered on the battlefield on behalf of U.S. intelligence officers or extracted from an enemy detainee under the guise of religious confessions. Consequently, this policy statement would apparently restrict a U.S. chaplain’s ability to reveal information confided by an enemy detainee.

3. Analysis Under Professional Ethics

In addition to the above evidentiary rules and service regulations, each individual U.S. chaplain must also consider the ethical standards of his or her faith community when serving enemy detainees in a U.S. detention facility. As a matter of law in the situation of retained chaplains, the Geneva Conventions specifically allow such retained chaplains to provide spiritual services “in accordance with their professional ethics.”⁴⁰⁶ While this ethical requirement of

⁴⁰³ See discussion *supra* Section IVE1a.

⁴⁰⁴ COC POLICY LETTER, *supra* note 114.

⁴⁰⁵ One of the dictionary definitions of convey includes: “to impart, as information.” THE RANDOM HOUSE DICTIONARY 194 (1980).

⁴⁰⁶ GC I, *supra* note 41, art. 28 (Retained chaplains can only be used to serve “in accordance with their professional ethics.”); GC III, *supra* note 17, art. 33. (Retained chaplains must serve only “in accordance with their professional etiquette.”); GC III, *supra* note 17, art. 35 (Retained chaplains

the conventions applies only to retained chaplains, a U.S. chaplain in a U.S. detention facility is serving as a substitute minister for retained chaplains. As such, that chaplain must arguably comply with the “principles and spirit” of that requirement, in accordance with the DOD Law of War Policy.⁴⁰⁷ Therefore, U.S. chaplains in such situations must apply the appropriate ethical standards concerning the violability of privileged communications.

While each individual faith community presumably has ethical standards, the faith communities have collectively promulgated a unified ethical standard for all faith groups represented by chaplains in the armed forces. At the National Conference on Ministry to the Armed Forces in December of 1994, representatives of the 245 religious bodies recognized by the military services approved “The Covenant and the Code of Ethics for Chaplains of the Armed Forces.”⁴⁰⁸ Specifically, this Code of Ethics stated, “I will hold in confidence any privileged communication received by me during the conduct of my ministry. I will not disclose confidential communications in private or in public.”⁴⁰⁹ The scope and nature of this privilege may vary from faith to faith, and chaplains of all faiths are presumably schooled in great detail as to the limits of that ethical standard within their respective faiths. One fact that remains certain, however, is that any chaplain must adhere to those standards “during the conduct of” their ministries—whether ministering to U.S. servicemembers, enemy detainees, or anyone else.

4. Actual Analysis at Camp X-Ray

In the news coverage concerning the detainees’ treatment at Camp X-ray, the media discussed the nature of the relationship between Chaplain Saif-ul-Islam and the detainees. Some of these discussions actually addressed the status of any information that the detainees shared with him. In one interview with the chaplain, a reporter indicated simply that “Saifulislam wouldn’t reveal private conversations with detainees,” presumably referring to that reporter.⁴¹⁰ In another article written and posted on the website of the U.S. State Department’s International Information Programs, the writer states, “Saiful-Islam often speaks to the detainees one-on-one, in Arabic, his native Bengali, Hindi, or Urdu, and he assures each his promise of confidentiality.”⁴¹¹ In an interview with National Public Radio, the chaplain also indicated that Camp X-ray authorities have not

may minister “freely” to POWs “of the same religion” and “in accordance with [the chaplain’s] religious conscience.”).

⁴⁰⁷ See discussion *supra* Section IVA.

⁴⁰⁸ Isham, *supra* note 401, at 607, n. 4.

⁴⁰⁹ *Id.* at 607.

⁴¹⁰ Fernandez, *supra* note 335.

⁴¹¹ Brown, *supra* note 339.

sought to debrief him or otherwise inquired about the confidences shared by the detainees.⁴¹² In addition, on at least three separate occasions, the media posed hypothetical scenarios to Chaplain Saif-ul-Islam to evaluate how he would handle sensitive information provided by the Al-Qaeda/Taliban detainees.

The first hypothetical scenario posed by the media involved confidences about prior actions committed by the detainee. Specifically, the detainee admits, “Yes, I did it. I’m al-Qaeda, and I helped plan jihad against the West. And I know Osama bin Laden.”⁴¹³ In that given scenario, Chaplain Saif-ul-Islam responded that he would not reveal the confidences, but would encourage the detainee to reveal such matters to the appropriate authorities.

The second scenario involved the potential for an immediate threat against the security of the detention camp. In short, a detainee reveals to him, “I have a weapon.”⁴¹⁴ In that given scenario, Chaplain Saif-ul-Islam responded that he would not reveal such confidences, but he hinted that he would take personal action to remove the weapon from the detainee.

The third scenario—possibly the most telling—involved the detainee’s knowledge of future terrorist attacks. In that given scenario, Chaplain Saif-ul-Islam was apparently inclined to reveal such information to the appropriate authorities. He stated that he “maintains the confidentiality of a cleric when speaking to the men about their private struggles.”⁴¹⁵ In matters which go beyond those private struggles, however, he said, “[A]s a chaplain, we have our

⁴¹² Adams, *supra* note 332 (“[NPR REPORTER NOAH] ADAMS: At the end of your time talking with [the detainees], are you debriefed by your superiors? Do the people running Camp X-ray want to know what’s on the mind of the prisoners?”).

LT. SAIFUL-ISLAM: No, not at all. I have 24-hour access, and nobody asks me anything. There is no question asked. Rather I volunteer sometimes some of the things the detainees may want, but nobody asks me anything.”).

⁴¹³ *Id.* (“ADAMS: Let me ask you a hypothetical question here. If, in counseling, a prisoner through the wire fence – that person said, ‘Yes, I did it. I’m al-Qaeda, and I helped plan jihad against the West. And I know Osama bin Laden,’ what is your responsibility as a naval officer and a chaplain? Is there a conflict there?”).

Lt. SAIFUL-ISLAM: There is a conflict in confidentiality that I may not be able to go and reveal it to the general. But what I can do is to convince him that he should confess this thing to the proper authority for humanity, because wrong is wrong.”).

⁴¹⁴ Rosenberg, *supra* note 337 (“You’re the first-ever American Muslim cleric to minister to a prison camp full of suspected terrorists and one confides he has a weapon. Do you keep the secret? Or do you breach religious confidentiality? If you’re U.S. Navy Lt. Abuhena Mohammad Saiful-Islam you search for a third way to resolve the clear conflict of interest between the crescent moon pin stuck in your left lapel and the lieutenant’s bars on the right side of your uniform. ‘I will say, ‘Give it to me,’ – and not tell the general who had it,’ he says softly but firmly. ‘I’ll make sure that he doesn’t have it.’”).

⁴¹⁵ Barbee, *supra* note 343.

ways to make a judgment call...on a case-by-case basis...We also have a responsibility to make sure that things of a destructive nature do not take place.”

In short, even if a U.S. chaplain determines that a legal or ethical obligation must be afforded to their relationship with enemy detainees, practical limits to that privilege may exist regarding certain communications, depending upon the nature of the information provided.

V. Conclusions

A. Summary

The battlefield status of military chaplains in international armed conflict is significantly different than the status of most members of the armed forces. While most servicemembers are combatants, chaplains are noncombatants. As noncombatants, they are protected against attack by enemy forces. In order to retain such protection, however, they must only perform religious duties and not take part in the hostilities—directly or indirectly. Consequently, U.S. military policy strictly mandates that chaplains must confine themselves to religious duties to minimize any risk of misidentification as a combatant. Other ways to ensure the protection of battlefield chaplains include the two distinction methods of red cross arm bands and special identity cards. Additionally, U.S. military policy directs chaplain assistants to protect chaplains assigned to their Religious Ministry Team and permit such assistants to bear arms in performing those combat duties.

Upon capture by the enemy, the status of chaplains is also unique. While not designated as prisoners of war, captured chaplains are entitled to the benefits generally afforded to such prisoners. Additionally, as retained persons, military chaplains are authorized to perform their spiritual duties in a prisoner-of-war camp and are afforded certain privileges to assist them in the performance of those duties. Under U.S. policy, U.S. chaplains retained by the enemy are simultaneously expected to follow the Code of Conduct to a certain extent.

In modern warfare, U.S. chaplains may also be called upon to serve in a domestic role. This role may include service as an advisor to a camp commander of a U.S. detention facility, as a substitute minister to enemy detainees, and as a conduit between the two interests. As a preliminary matter, such chaplains should understand the actual status of the enemy detainees, as that status determines the appropriate standard of treatment. Thereafter, these

chaplains must serve consistent with the legal standards under international law and U.S. policy. Meanwhile, they should be continuously cognizant of potential conflicts of interest and know how to resolve such conflicts, such as whether they may disclose communications shared by the enemy detainees. The resolution of such privilege issues depends upon legal, service, and ethical standards.

Through this comprehensive review of the major legal aspects of chaplains serving in armed conflict, critical issues of concern have been raised. In conclusion, many of these recommendations are worth highlighting for potential resolution in the near future or thereafter. Such resolution would involve the actions of various links in the religious chains of command of our armed forces. As such, they are divided and organized below.

B. Recommendations for Service Leadership

In order to promote the lawful role of chaplains in armed conflict, the leadership of the Navy should take the following actions:

First, the Chief of Naval Operations and other service chiefs should update the directives regarding religious ministries to reflect a tightening of the arms policy for chaplains. Currently, each of the services has a policy that strictly prohibits chaplains from bearing arms.⁴¹⁶ These policy directives, however, lack any explicit mechanism for enforcement. Consequently, the military leadership should first make a policy decision as to how important it is to uphold the strict nature of this arms-ban. Thereafter, if the leadership determines that adherence to the ban is critical, such policy directives should be updated to include the requisite language to make a violation of the policy prosecutable as a violation of a lawful general order or regulation.

Second, the Chief of Naval Operations and other service chiefs should address the appropriate standard of treatment for enemy detainees who fail to satisfy the criteria for prisoner-of-war status or retained person status. While the present detention directive of all U.S. services refers to “other detainees,” their guidance focuses almost completely on prisoners of war and retained persons.⁴¹⁷ Unfortunately, it fails to provide definitive guidance as to how U.S. forces should treat other detainees who are not prisoners of war. Because the belligerents of modern warfare tend to fall into the “other” category, U.S. forces need clearer guidance on how such detainees should be treated, including the appropriate parameters of their religious freedom.

⁴¹⁶ See discussion *supra* Section IIE2.

⁴¹⁷ See discussion *supra* Section IVB1.

Third, the Bureau of Naval Personnel should revise the Navy Uniform Regulations. Presently, such regulations generally dictate that Navy personnel must wear brassards on their right arm.⁴¹⁸ The Geneva Conventions, however, mandate that military chaplains must wear red cross arm bands on their left arm. Like the Army Regulation, the Navy Uniform Regulations should be realigned to conform to international legal requirements.

C. Recommendations for Chaplain Leadership

Within the leadership of the Navy chaplain community, several other issues must be resolved. First, the Navy chaplain leadership should revise the penitent-clergy privilege in updated service directives. Presently, the Navy directive is flawed in that it defines the privilege by merely incorporating M.R.E. 503.⁴¹⁹ While the privilege may coincidentally mirror the language of M.R.E. 503, the Navy directive should not define the privilege merely by incorporating that rule. Otherwise, too many issues arise as to the limits of that privilege, for the actual applicability of M.R.E. 503 is confined to military justice proceedings. The Army method of defining the privilege should serve as model for the Navy's revisions.

Second, the chaplain leadership should provide definitive guidance as to whether the penitent-clergy privilege specifically applies to communications between U.S. Navy chaplains and enemy detainees. The Navy directive, coupled with the recent policy letter regarding noncombatant status, could arguably prohibit bait-and-switch conversations with detainees, but the guidance should resolve all ambiguity.⁴²⁰ In contrast, the Army regulation appears to resolve the issue definitively. Additionally, this direct guidance should address whether there are situations when otherwise privileged communications may be disclosed, such as the revelation of terrorist acts planned for the future.

Third, the chaplain leadership should provide better guidance regarding the role of Religious Program Specialists (RPs) and other chaplains' assistance on the battlefield. Presently, the key Navy directives fail to even mention the combatant role of the RPs.⁴²¹ Moreover, such revised guidance should also state whether RPs have positional authority over chaplains when their RMT comes under fire. Apparently, chaplains and RPs are currently receiving tactical training that recognizes this limited shifting of authority. The chaplain

⁴¹⁸ See discussion *supra* Section IID1.

⁴¹⁹ See discussion *supra* Section IVE2.

⁴²⁰ See discussion *supra* Section IVE2.

⁴²¹ See discussion *supra* Section IIE5.

leadership should either codify the substance of that training, or ensure that such training is modified to address the proper relationship between the RMT members to the leadership's satisfaction.

D. Recommendations for Individual Chaplains

To effectively perform the religious duties in armed conflict, other actions must be taken beyond revising Navy policies. Primarily, individual chaplains should ensure that certain actions are taken.

First, chaplains should seek out appropriate legal training prior to deployment. Essential training includes learning about the applicable legal references that pertain to performance of spiritual duties as retained chaplains and the Code of Conduct's unique expectations for U.S. chaplains.⁴²² Additionally, they must understand the international and domestic sources of law that control the status and treatment of enemy detainees.⁴²³

Second, chaplains should make sure that they have been issued the appropriate means of distinction permitted under international law, including armbands and special identity cards.⁴²⁴

Third, deploying chaplains should ensure that their assigned RPs have received the appropriate combat-skills training, for that RP is their only legally-permitted method of protection on the battlefield.⁴²⁵

Fourth, deploying chaplains should ensure that they have access to copies of the key references that control the treatment standards for enemy prisoners of war and other enemy detainees. Moreover, they should be prepared mentally to advise their operational commander on how to balance religious needs of enemy detainees with the security interests of U.S. forces.⁴²⁶ Such advice should include suggesting creative accommodations that satisfy both interests.

As stated at the outset of this comprehensive review of chaplains in armed conflict, many individuals work together in the U.S. armed forces to defend our nation. Those individuals have many different roles, yet each is

⁴²² See discussion *supra* Sections IIIB and IIIC.

⁴²³ See discussion *supra* Section IVA and IVB.

⁴²⁴ See discussion *supra* Section IID.

⁴²⁵ See discussion *supra* Section IIE5.

⁴²⁶ See discussion *supra* Section IVB.

critical in its own way to the overall mission of the organization. In essence, they all work for the synergy of the whole with a significant injection of teamwork. In order for this team as a whole to win the deadly “game” of war, they must also comply with the law of armed conflict principles of necessity, humanity, proportionality, and distinction. Moreover, they must follow the specific rules of the game set forth in international law and domestic policy. To comply with the rules, each member of that team must first know and understand the rules that apply to their assigned position on the field. Hopefully, this article has provided thorough guidance to one such starting member of that team about their rules of interest. Ultimately, adhering to those rules of the game will earn chaplains the moniker MVP -- most valuable peacemaker.