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ON THE DAY OF THE OPENING OF OFFENSIVE OPERATIONS by coalition forces in the 1991 Gulf War, a United States Navy guided missile frigate, the USS *Nicholas* (FFG 47), in tactical control of a surface action group (SAG) consisting of itself and several Kuwaiti Navy ships, was ordered to a position amid offshore oil platforms in the northern Gulf. Its missions were to conduct combat search and rescue in support of coalition air attacks, which had just begun, and to conduct anti-surface operations against any Iraqi units that might be in the vicinity. Upon approaching the zone after dark, the *Nicholas* launched reconnaissance helicopters to search the area and to determine if the oil platforms were manned. Thermal imaging by the helicopters disclosed that some of the platforms were indeed manned, and the helicopter personnel observed what appeared to be shelters and bunkers on several of them. Since the wells had been capped and the platforms abandoned before the war, the commanding officer (CO) of the *Nicholas* concluded that the personnel on the platforms were probably Iraqis and that the SAG could not safely operate in the vicinity unless the Iraqi forces were removed. The CO reported his observations to superior authority and requested permission to use force to remove the Iraqi personnel from the platforms.

When permission for the attack was received the next day, the CO sent out helicopters for further reconnaissance. Approaching the platforms to as close as a hundred yards at a 150-foot altitude, the helicopters were not fired upon and their crews were able to observe 23mm anti-aircraft batteries on the top decks of several platforms, ammunition cases next to the guns, personnel in green fatigues standing around on the platforms, sandbagged bunkers and wooden personnel shelters, Zodiac (rubber) boats, diving gear, and communications antennas. They also observed two persons on two separate platforms waving

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white cloths. These observations were reported to the ship, where they were reported to the CO and logged in the Tactical Action Officer's (TAO) log. The log entries included the reports that the helicopter personnel had observed personnel waving "white flags" on two platforms. At no time did the helicopters observe any hostile acts, the manning or training of any weapons, or receive any fire, even though they were very close to the Iraqis and clearly visible, and thus extremely vulnerable. At the direction of the CO, the TAO's reports of the helicopters' observations to higher authority did not include the information on the "white flags."

During the following several hours, the executive officer (XO), having been informed of the white flags by two enlisted personnel, went to the combat information center, informed the CO of his concerns and those of the two men, and recommended that the information on the white flags be forwarded up the chain of command. The CO rejected that course, indicating that he did not want to risk his ship and crew and that it was his decision to make as the on-scene commander. He later testified that he had decided that the white flags did not indicate the intention of all personnel on the platform to surrender, and that his decision was influenced by his close working relationship with the Kuwaitis, who had told him that the Iraqis could not be trusted, having used white flags as a ruse during the Iraq-Iran war.

After coming back on board, the helicopter personnel discussed the white flags among themselves and with their officer in charge, but none of them voiced concern to the CO, nor did the CO attempt to discuss the white flags with any of the helicopter crew who had actually observed them. Of the nine officers on board who were aware of the white cloths, only the executive officer and Tactical Action Officer expressed misgivings to the CO.

After dark, the SAG launched helicopters which attacked the platforms with missiles, rockets, and .50-caliber machine guns. The *Nicholas* and the Kuwaiti ships followed up with 76mm and 40mm gunfire. Following the three-hour engagement, battle damage assessment by the helicopters disclosed survivors in a rubber boat, which the frigate located and took on board. During processing, one of the survivors asked through an interpreter why the ship had fired on them when they had tried to surrender. During the remainder of the night, the American frigate and Kuwaiti ships retrieved prisoners and the bodies of those killed from the platforms and provided medical treatment, food, and clothing. A naval special operations team that went on board the platform the next morning encountered no resistance but discovered large stocks of weapons and communications equipment. Five Iraqi soldiers had been killed in the attack of the day before and twenty-three taken prisoner. The prisoners were subsequently evacuated to Saudi Arabia; in debriefs conducted ashore, only one of them stated that the personnel on the platforms had wanted to surrender.

The subsequent board of investigation recognized the complexity of the situation faced by the frigate's CO. The SAG had been conducting a combat operation; however, the targets were not ships but rather fixed platforms manned by soldiers. The board opined that under the law of naval warfare at sea, a unit must surrender as a unit; individual displays of evidence of surrender must indicate that the unit is surrendering, not just one individual. The normal sign of surrender is the striking of the colors. On the other hand, under the law of land warfare, a white flag displayed by an individual signifies that the individual desires to surrender; the opposing force is required to accept that surrender but is not required to cease firing at other members of the unit who have not indicated a similar intent.

The board concluded that the CO's decision, made in the fog of battle and under difficult conditions at the beginning of combat operations when the attitude of enemy forces toward surrender was unknown, was tactically sound and did not violate the law of armed conflict. It found further, however, that he should have investigated further and discussed his evaluation of the white flags with the XO and key officers, that he should have reported this significant event to his superiors, and that his failure to take these actions represented a serious lapse of judgment. An endorsing senior also faulted other officers of the command who had direct knowledge of the display of white flags for failing to come forward with their advice and concerns.

The foregoing narrative, greatly simplified in the interest of brevity, captures the essence of several dilemmas that may confront members of the armed forces at any level engaged in armed conflict. What are the acceptable "indicia," or indicators, that an enemy is attempting to surrender? What are the obligations of an officer in command upon receiving such indicia from an enemy? And what are his obligations if the signs of surrender are ambiguous or mixed? It is the purpose of this essay to explore these questions.

Some Historical Background

Although the wartime usages of prehistoric peoples are to a large extent lost in the mists of antiquity, it is nevertheless asserted by some scholars that even among the most primitive societies, rudimentary group mores governed the waging of war between families, villages, or tribes. As stated by Quincy Wright in his scholarly treatise, *A Study of War*, "Illustration can be found in the war practices of primitive peoples of the various types of international rules of war known at the present time: rules distinguishing types of enemies; rules defining the circumstances, formalities, and authority for beginning and ending wars; rules describing limitations of persons, time, place, and methods of its conduct; and even rules outlawing war altogether."[1] Among the more advanced primitive

societies, "women and children or even men captured from the enemy [were] spared, usually, to be made slaves."[2]

Among the written records of practices of early civilizations on the treatment of those who had surrendered or were *hors de combat* are Biblical accounts of Joshua's conquest of Jericho, in which the Israelites "utterly destroyed all that was in the city, both man and woman, young and old, and sheep and ass, with the edge of the sword."[3] By contrast, in other campaigns, although all conquered males were slain, women and children might be spared.[4] Professor Leslie Green points out that in that period the victor's treatment of the vanquished enemy might have been determined by the identity of the enemy; idolators were not to be spared, as their evil ways might contaminate the Israelites.[5]

In ancient Greece, the formal rule was, in the words of Herodotus, that "the victors come not off without great harm; and of the vanquished I say not so much as a word, for they are utterly destroyed."[6] In practice, however, more often than not, the vanquished, rather than being put to death, were made slaves, exchanged, or enrolled in the victorious army.[7] In the later Greco-Roman era a primitive law of warfare began to emerge, but it was applicable only to war between civilized states, not to uncivilized barbarians. Prisoners' lives were spared, but they were usually made slaves.[8]

The Middle Ages were a period of sharp contrast. This was the period of knighthood and the emergence of the chivalric code, but it was also a time of cruel barbarity. Under chivalry, the practice of enslaving prisoners gradually disappeared, at least within Christendom, but captured soldiers were routinely held for ransom.[9] On the other hand, some wars were fought to the death with no quarter given;[10] the signal for such a battle was a red flag or banner.[11] In a city taken by storm after siege, there was unlimited license to rape, kill, loot, and pillage. Only churches and churchmen were spared.[12] The notion of *lèse majesté* was used to justify horrible massacres of vanquished foes. In addition, as war within Christendom became transformed from what had been somewhat in the nature of tourneys conducted by aristocrats to "people's" wars, chivalric behavior began to have very little influence. According to Philippe Contamine, the "Flemish communes systematically massacred the vanquished and refused the practice of ransoms, seen by them as cowardly and likely to lead to deception. Inevitably in battles where they faced the communes, nobles adopted a similar attitude. . . . One might link to this style of warfare, devoid of all courtesy, the warlike customs of the Irish and Swiss. The *Kriegsordnung* of Lucerne in 1499 stipulated that no prisoners were to be taken; all the enemy should be put to death. That of Zurich in 1444 thought it necessary to prohibit combatants from tearing out the hearts of their dead enemies and cutting up their bodies."[13]

Even after the Middle Ages gave way to the Age of Discovery in the fifteenth and sixteenth centuries, Hugo Grotius, in his seminal treatise *The Rights of War*[4]

and Peace, published in 1625, expressed the view that the law of nations did not prohibit putting to death all subjects of the enemy, even women and children.[14] "Nor," he added, "did those who offered to surrender always experience the lenity and mercy, which they sought thereby."[15] Writing a century and a quarter later, eminent publicists Emmerich de Vattel and Christian Wolff took a different view. Vattel wrote, "As soon as an enemy submits and hands over his arms we have no longer the right to take away his life. Hence we must give quarter to those who lay down their arms, and when besieging a town we must never refuse to spare the lives of a garrison which offers to surrender."[16]

Wolff, although acknowledging that in former times "it was right to kill those captured in war at any time," nevertheless concluded that "because it is not allowable to kill the subjects of a belligerent, as long as they refrain from all violence and do not show an intention to use force, or as long as you can provide

"[The Nicholas incident] captures the essence of several dilemmas that may confront members of the armed forces at any level engaged in armed conflict."

in another way that this may not happen, it is not allowable to kill those captured in war, not even immediately, much less at any other time, unless some especial offense shall have been committed because of which they are liable for punishment."[17] In a later section he added that it was not permissible to kill those who had surrendered "unconditionally."[18]

Nineteenth-century publicists uniformly adopted the position that it was unlawful to refuse quarter and to attack those who attempted to surrender. Typical of this group is William E. Hall, who stated that the "right to kill and wound armed enemies is subordinated to the condition that those enemies shall be able and willing to continue their resistance. It is unnecessary to kill men who are incapacitated by wounds from doing harm, or who are ready to surrender as prisoners. A belligerent therefore may only kill those enemies whom he is permitted to attack while a combat is actually in progress; he may not as a general rule refuse quarter.[19]

Some authorities suggested that an exception existed in special situations in which it was impossible for a force to be encumbered with prisoners without increasing the danger to itself,[20] but Admiral Charles H. Stockton, a noted American international law authority and former President of the Naval War College, was critical of that article of the United States Army's law-of-war instructions which adopted this exception, claiming that it was obsolete.[21] Certain authorities also acknowledged that in some situations in the heat of battle, such as in the midst of a cavalry charge, it was impossible to distinguish between those who wished to continue the fight and those desiring to surrender.[22]

It can thus be seen that by about 1900, most publicists recognized a customary rule which made it unlawful to refuse quarter or to wound or kill those who unconditionally offered to surrender or no longer had the means to resist.

Codification of the Customary Rule

The first attempt to systematize and codify the rules of war was made during the American Civil War by Professor Francis Lieber of Columbia College in New York. Professor Lieber drew up, at the request of General William H. Halleck (then general in chief of the Union army), a set of instructions which, after review and revision by a board of officers, was promulgated to the field in 1863 by War Department General Order No. 100.[23] This "Lieber Code" included three articles dealing with quarter:

> Art. 60. It is against the usage of modern warfare to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners.
> Art. 61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.
> Art. 62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.[24]

Although the Code was binding only on United States forces, it set the pattern for later international attempts to restrain the violence of warfare. The first of these international efforts was the Declaration of Petersburg, which did not directly address the subject of quarter.[25] The subsequent Brussels Conference of 1874, however, did. In the "Project of an International Declaration Concerning the Laws and Customs of War," annexed to the Final Protocol, the following provisions were included:

> Article 12. The laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.
> Article 13. According to this principle are especially *forbidden:*
> . . .
> (c) Murder of an enemy who, having laid down his arms or having no longer means of defense, has surrendered at discretion;
> (d) The declaration that no quarter will be given.[26]

The Brussels Declaration was not ratified and consequently never entered into force. However, building on this initiative, the Institute of International Law, a society composed of a fixed number of international-law experts from different nations, adopted in 1880 a *Manual on the Laws of War on Land* (the

so-called "Oxford Manual"), which, although not conceived as a treaty, was offered to governments "as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies."[27] Article 9 thereof declared that it was forbidden to "injure or kill an enemy who has surrendered at discretion or is disabled, and to declare in advance that quarter will not be given, even by those who do not ask it for themselves."

Although not itself a binding instrument, the Oxford Manual substantially influenced the development of various treaties at the Hague Peace Conferences of 1899 and 1907. The most important of these latter instruments, insofar as our present inquiry is concerned, are Hague Conventions II and IV "Respecting the Laws and Customs of War on Land."[28] The Conventions contain identical language (Article 23 in each) pertaining to the giving of quarter: "In addition to ['Besides,' in the 1899 Convention] the prohibitions provided by special Conventions, it is especially forbidden—

> . . . (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
> (d) To declare that no quarter will be given.

Although Hague IV is by its own terms applicable only to armed conflict on land, the principle it states in Article 23 is regarded as customary law and applicable to sea warfare as well.[29]

Until the adoption of the Protocols Additional to the 1949 Geneva Conventions in 1977, conventions adopted subsequent to the Hague 1907 Conventions regulating the conduct of armed hostilities did not contain any explicit provisions concerning the giving of quarter or the obligation to cease hostilities against persons seeking to surrender. Both of the Additional Protocols, however, do contain such provisions. Protocol I, which is applicable to international conflicts, provides:

> Article 40—Quarter.
>
> It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.
>
> Article 41—Safeguard of an enemy *hors de combat*.
>
> 1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.
>
> 2. A person is *hors de combat* if:
>
> (a) he is in the power of an adverse party;
>
> (b) he clearly expresses an intention to surrender; or
>
> (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
>
> provided that in any of these cases he abstains from any hostile act and does not attempt to escape.[30]

Protocol II, which is applicable in non-international conflicts, provides "fundamental guarantees" in more abbreviated form, in Article 4: "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors."[31]

Neither Protocol I nor Protocol II is in effect for the United States, and the U.S. government has stated that it will not ratify Protocol I. However, as stated in the U.S. Navy's official annotation of the *Commander's Handbook on the Law of Naval Operations*, NWP 9, the Protocol I and II language is merely a reaffirmation of the Hague IV rule "in more modern language."[32]

From the foregoing discussion, it is clear that under both customary and treaty international law, combatants have the obligation to desist from hostile acts against enemy military persons or units that manifest an unconditional intent to surrender. This is reflected in the U.S. Navy's current operational doctrine, which provides that "enemy warships and military aircraft, including naval and military auxiliaries, are subject to attack, destruction, or capture anywhere beyond neutral territory. It is forbidden, however, to refuse quarter to any enemy who has surrendered in good faith."[33] This simple statement, however, does not provide a full answer to the dilemma of a commander who, like the commanding officer of the *Nicholas*, faces an ambiguous situation in which the enemy's intentions are not clear. How does he determine whether the enemy's sign of surrender is genuine and unconditional?

The Manifestation of an Intent to Surrender

As the board of investigation that inquired into the *Nicholas* incident observed, the "CO was confronted with a unique and ambiguous situation; i.e., some indicia of an intent to surrender by one individual on two separate platforms, by an enemy who is known to have abused the white flag to gain military advantage, where the TAO log notes the presence of both 'white flags' and 'possible gunner' in an oil field where the platforms are relatively close and offer overlapping fields of fire."[34]

Furthermore, the report continued, "under the principles of the Law of Naval Warfare, there is no requirement to accept surrender of an enemy platform (warship or submarine) unless the signal of surrender carries with it the authority of the command. Under the Law of Naval Warfare, an enemy platform is viewed as a unit; consequently when that unit surrenders, there must be an indication that it is the unit that is surrendering, not just one individual. Traditionally, the Law of Naval Warfare recognizes the striking of colors as a command's indication

of an intent to surrender. Similarly, under the Law of Land Warfare, a white flag displayed by an individual may signify only that [that] individual desires to surrender. The opposing force is obliged not to fire on that individual, and to receive his surrender, but is not required to cease firing at other opposing forces who have not indicated an intent to surrender until it is reasonably clear the indication of surrender is a command or organizational indication and applies to the opposing force as a whole. Evidence of this intent might be the dispatch of a spokesperson to negotiate a cease fire, or all troops ceasing fire and throwing down their weapons."[35]

Perhaps some might say that the circumstances of this particular incident were so unique—blending land and naval warfare—that it holds no lessons for the future. But the problem itself is not unique. Once an enemy has submitted himself or his unit to the control of his opponent, the latter has the obligation to accept the burden that submission imposes—to cease hostile fire against such enemy personnel, to take them as prisoners of war, and to accord them all the rights and privileges that this status confers. A number of war crimes convictions following World War II were based on violations of these principles.[36] The trial of a U.S. Army sergeant for unpremeditated murder for killing a Panamanian who had allegedly surrendered following a firefight during the 1989 invasion of Panama represents a recent instance of the United States' adherence to and enforcement of this rule.[37] It is therefore important for American officers in command to understand not only the obligation the rules impose but to recognize situations in which the rules come into play.

As stated in the U.S. Navy's operational law handbook, a warship indicates a readiness to surrender "by hoisting a white flag, by surfacing (in the case of submarines), by stopping engines and responding to the attacker's signals, or by taking to lifeboats."[38] The situation with aircraft is different. NWP 9 notes that "disabled enemy aircraft in air combat are frequently pursued to destruction because of the impossibility of verifying their true status and inability to enforce surrender. Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. Accordingly, surrender in air combat is not generally offered. However, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected."[39] Furthermore, parachutists descending from disabled aircraft may not be attacked while in the air and must be provided an opportunity to surrender upon reaching the ground.[40]

The situation in land warfare is more ambiguous. A noted authority, Professor James M. Spaight, observed in 1911: "Willingness to surrender is usually indicated by the hoisting of a white flag, or some improvised substitute for it, but there is no settled procedure in this matter. Some troops throw down their arms, others hold up their hands (such was the Boer practice). The Prussian

appeal for mercy in 1870 was to raise the butt-end of the needle-gun; this the French considered insufficient and made them fall on their knees. In the war of 1904 the Russians sometimes went to the length of embracing the enemy to whom they wished to surrender. There are so many diverse ways of indicating surrender that it seems desirable for one universal procedure to be settled by international agreement."[41]

Professor Spaight's plea for an international agreement went unheeded, however, and the current U.S. Army field manual on the law of land warfare does not discuss acceptable methods of indicating an intention to surrender.[42] With respect to the use of a white flag, it states that the "white flag, when used by troops, indicates a desire to communicate with the enemy. The hoisting of a white flag has no other signification in international law. . . . If hoisted in action by an individual soldier or a small party, it may signify merely the surrender of that soldier or party. It is essential, therefore, to determine with reasonable certainty that the flag is shown by actual authority of the enemy commander before basing important action upon that assumption. The enemy is not required to cease firing when a white flag is raised."[43]

Confusion on what is a proper sign of surrender in land warfare was amply demonstrated in the recent Gulf War by the incident in which Iraqi tanks approached Saudi Arabian troops with their gun turrets turned to the rear, a sign of surrender in the opinion of some. Instead of surrendering, however, they reversed their guns and fired on the Saudis.[44] If in fact this was a valid sign of surrender, then the subsequent attack on Saudi forces was perfidy, a war crime.[45] If not, it was a lawful ruse of war.[46]

The circumstances of land warfare also complicate the surrender of units or individuals. Again, to quote Spaight, a "regiment, squadron, company or squad of men is not like a ship, which, when it 'hath its bellyful of fighting,' hauls down its colours and is clearly out of the fight."[47] The result, again in Spaight's words, is that "in the storming of a trench, when men's blood is aboil and all is turmoil and confusion, many are cut down or bayoneted who wish to surrender but who cannot be separated from those who continue to resist."[48]

"Rough Practical Judgment"

As can be seen from the foregoing discussion, neither law nor practice provides any clear-cut guidelines for determining when a valid offer to surrender takes place. In evaluating an apparent attempt to surrender, an on-scene commander faces a severe test of his judgment in which the safety of his command may be pitted against his obligation to respect and uphold the humanitarian law of armed conflict.

The foundation stone for this law is the principle that "the right to adopt means of injuring the enemy is not unlimited."[49] One of the limitations imposed

by this law is the requirement to terminate hostilities against an enemy unit, or in some circumstances an individual, that is *hors de combat* or has manifested an unconditional intention to surrender. As we have seen, however, the clarity of the enemy's intention is often obscured by the ambiguity of the signal, by the difficulty of perception or interpretation in the fog of combat, and by the lack of any generally recognized sign or symbolic act for manifesting surrender. Even in situations in which the intent may be clear, it may be impossible for the commander of the force to whom surrender is offered to accept it without increasing the danger to his command—as for example, where surrendering units or individuals are intermingled with others that continue to fight. In the heat of battle it comes down to "a matter of rough practical judgment" as to when hostile fire must cease. When, however, a tactical unit commander has time for deliberation, as was the case for the commanding officer of the *Nicholas*, he should use all the resources available to him to determine whether the offer of surrender he has received is genuine and one he is obligated to accept.

Factors that should be taken into account in making that judgment should include not only the tactical situation, the danger to his own command, and the applicable rules of engagement, but also such other factors as the cultural mores of the enemy force with respect to surrender, the prior history of the enemy forces in similar situations, the enemy's history of compliance with the law of armed conflict, the enemy's reputation for ruses or perfidy, and any other such traits as may bear on the genuineness of the offer. These latter factors may be beyond the knowledge of the commander himself or the members of his command. Thus, where time and the tactical situation permit, he should report ambiguous or otherwise unclear offers of surrender to higher authority, who may be able to provide additional relevant insights on likely enemy behavior as well as data from the larger tactical arena that may bear on the local decision. Commanders at higher echelons will presumably be more experienced and are more likely to have access to additional intelligence and expert advice on the law of armed conflict. In the end, however, unless the on-scene commander receives a specific directive from higher authority, he alone has the final responsibility for making the crucial decision as to whether the manifestation of surrender is genuine and one that he is obligated to accept.

Notes

1. Quincy Wright, *A Study of War* (Ill.: Univ. of Chicago Press, 1942), v. 1, p. 98.
2. *Ibid.* p. 97. See also M.W. Mouton, "History of the Laws and Customs of War up to the Middle Ages," *Revue Internationale de la Croix Rouge*, Supplement, October 1959, pp. 184–186.
3. Leslie C. Green, "What One May Do in Combat—Then and Now," in Astrid J.M. Delissen and Gerard J. Tanja, eds., *Humanitarian Law of Armed Conflict Challenges Ahead* (Dordrecht, Neth.: Martinus Nijhoff, 1991), p. 271, quoting from the Bible, Joshua 6:21.
4. *Ibid.*, citing Deuteronomy 21:10.
5. *Ibid.*

6. Pierre Ducrey, *Warfare in Ancient Greece*, trans. Janet Lloyd (New York: Schocken, 1985) p. 236, quoting Herodotus 7.9, trans. A.D. Godley.

7. *Ibid.*

8. Green, p. 273.

9. Philippe Contamine, *War in the Middle Ages*, trans. Michael Jones (New York: Basil Blackwell, 1986), p. 266.

10. M.H. Keen, *The Laws of War in the Late Middle Ages*, (London: Routledge & Kegan Paul, and Toronto: Univ. of Toronto Press, 1964), p. 105.

11. *Ibid.*

12. *Ibid.*, p. 121.

13. Contamine, p. 291.

14. Hugo Grotius, *The Rights of War and Peace*, trans. Campbell (Washington and London: M. Walter Dunne, 1901), pp. 328–329.

15. *Ibid.*, p. 329 (citing Roman practices).

16. Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* (1758), trans. Charles G. Fenwick (Washington: Carnegie Institntion of Washiugton, 1916), sec. 140, p. 280. Some authorities during this and even later periods asserted that in cases of siege in which a weak defending force obstinately refused to surrender when defense was hopeless, it forfeited its claim to mercy. See, e.g., Edward S. Creasy, *First Platform of International Law* (London: John van Voorst, 1876), pp. 449–451 and authorities cited therein; Thomas J. Lawrence, *The Principles of International Law*, 7th rev. ed., ed. Percy H. Winfield (Boston: D.C. Heath, 1876), p. 377.

17. Christian Wolff, *Jus Gentium: Methodo Scientifica Pertractatum* (1764), trans. Dranke (Oxford: Clarendon Press, 1934), sec. 794, p. 411.

18. *Ibid.*, sec. 797, p. 412.

19. William E. Hall, *A Treatise on International Law*, 4th ed. (Oxford: The Clarendon Press, 1895), sec. 129, pp. 413–414.

20. See, e.g., Hall, p. 414.

21. Charles H. Stockton, *Outlines of International Law* (New York: Charles Scribner's Sons, 1914), p. 324. The "Lieber Code," which will be discussed further below, was promulgated to the U.S. armies as War Department General Order No. 100, "Instructions for the Government of Armies of the United States in the Field," in 1863. See note 23.

22. See, e.g., Lawrence, p. 376.

23. U.S. War Department, General Order No. 100, 24 April 1863, "Instructions for the Government of Armies of the United States in the Field" (hereafter Lieber Code), reprinted in U.S. Naval War College, *International Law Discussions, 1903* (Washington: U.S. Govt. Print. Off., 1904), p. 115; also reprinted in Dietrich Schindler and Jiri Toman, eds., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed. (Dordrecht, Neth.: Martinus Nijhoff, 1988), p. 3.

24. Lieber Code, articles 60–62 (emphasis original). The last clause of article 60 is, of course, the passage that drew Admiral Stockton's criticisin. See note 21.

25. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 29 November/11 December 1868, reproduced in English in Schindler and Toman, p. 101.

26. Project of an International Declaration Concerning the Law and Customs of War, annexed to Final Protocol of the Brussels Conference of 1874, 27 August 1874, reprinted in English in Schindler and Toman, p. 27. It is interesting to note that in paragraph (c) the term used to describe the killing of a soldier who is *hors de combat* is "murder," indicating the criminal character of such an act.

27. Preface to *The Laws of War on Land*, manual published by the Institute of International Law (Oxford Manual), adopted by the Institute of International Law at Oxford, 9 September 1880. Reprinted in Schindler and Toman, p. 35.

28. Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, and Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907. (Hereafter Hague II and IV, respectively.) The 1907 Convention supersedes that of 1899 for those states that have ratified the former. For those states that have not ratified the 1907 Convention, the 1899 Convention remains binding as to their relations with other states that are party thereto. These Conventions are reproduced in a number of official sources, including U.S. Statutes at Large, v. 32, part 2, pp. 1803–1826 (1901–03) (Convention II), and *ibid.*, v. 36, part 2, pp. 2277–2309 (1909–11) (Convention IV). They are reprinted in a side-by-side version in Schindler and Toman, p. 63. Although the 1907 Conference adopted several Conventions concerning naval warfare, none contained a comprehensive code for warfare at sea such as that in Convention IV for land warfare.

29. U.S. Department of the Navy, *Law of Naval Warfare*, NWIP 10-2 (Washington: U.S. Govt. Print. Off., 1955), par. 511c and notes 34 and 35 thereto (hereafter NWIP 10-2); Robert W. Tucker, *U.S. Naval War College International Law Studies 1955, The Law of War and Neutrality at Sea* (Washington: U.S. Govt. Print.

Off., 1957), v. 50, p. 71; Hersch Lauterpacht, ed., *Oppenheim's International Law*, 7th ed. (London: Longmans, Green, 1952), v. 2, p. 474; W. Thomas Mallison, Jr., *U.S. Naval War College International Law Studies 1966, Submarines in General and Limited Wars* (Washington: U.S. Govt. Print. Off., 1968), p. 133; Department of the Navy, Office of the Chief of Naval Operations, *The Commander's Handbook on the Law of Naval Operations*, NWP 9 Rev. A/FMFM 1-10 (Washington, 1989), par. 8.2.1 (hereafter NWP 9).

30. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, reprinted in English in Schindler and Toman, p. 646 (hereafter Protocol I).

31. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, reprinted in English in Schindler and Toman, p. 692 (hereafter Protocol II).

32. Judge Advocate General of the Navy, *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations* (Washington: U.S. Govt. Print. Off., 1989), par. 8.2.1, note 27.

33. NWP 9, par. 8.2.1.

34. Report of the Fact Finding Body Required to Conduct a Hearing into the Facts Surrounding the Attack on Iraqi Oil Platforms by USS *Nicholas* (FFG 47) While Operating in the Northern Arabian Gulf on or About 18 January 1991, opinion number 18.

35. *Ibid.*

36. *The Abbeye Ardenne Case*, U.N. War Crimes Commission, *Law Reports of Trials of War Criminals*, v. 4, p. 97 (1945); *Trial of Helmuth Von Ruchteschell, ibid.*, v. 9, p. 82 (1947); *Trial of Karl Kneip*, U.N. Archives, U.N. War Crimes Commission, Reel 35, British No. 21 (1945).

37. "Soldier Acquitted in Panama Slaying," *Facts on File*, 21 September 1990, p. 696, p. A3.

38. NWP 9, par. 8.2.1, which adopts what is described as the customary practice in the court's opinion in War Crimes Commission, *Trial of Von Ruchteschell, Law Reports of Trials of War Criminals*, v. 9, p. 89 (1949). NWP 9 also states at paragraph 11.10.4 that "customary international law recognizes the white flag as symbolizing a request to cease-fire, negotiate, or surrender." This contradicts, in part, the U.S. Army's Field Manual FM 27-10, *The Law of Land Warfare* (Washington: 1956), which states that the only signification of the white flag in international law is the "desire to communicate with the enemy." See note 43.

39. *Ibid.*, citing in the annotated version U.S. Air Force Pamphlet 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*, par. 4-2d (1976); U.S. Air Force Pamphlet 110-34, *Commander's Handbook on the Law of Armed Conflict 1990*, par. 3-3h; and James M. Spaight, *Air Power and War Rights*, 3d ed. (London: Longmans, Green, 1947), pp. 128-130.

40. NWP 9, par. 11.7, citing in the annotated version, *inter alia*, articles 42 (1) and 42 (2) of Protocol I.

41. James M. Spaight, *War Rights on Land* (London: Macmillan, 1911), p. 95.

42. U.S. Department of the Army, *The Law of Land Warfare*, Field Manual 27-10 (Washington: U.S. Govt. Print. Off., 1956).

43. *Ibid.*, par. 458.

44. See, e.g., Ethan Bronner, "The Law: International Experts Defend U.S. Demands of Iraqis," *The Boston Globe*, 27 February 1991, p. 3.

45. "Feigning surrender in order to lure the enemy into a trap, is an act of perfidy." NWP 9, par. 12.1.2.

46. NWP 9, par. 12.1.

47. Spaight, p. 92.

48. *Ibid.*, p. 91.

49. Hague II and IV, art. 22. Additional Protocol I states the principle in slightly different language as follows: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." Protocol I, art. 35(1).

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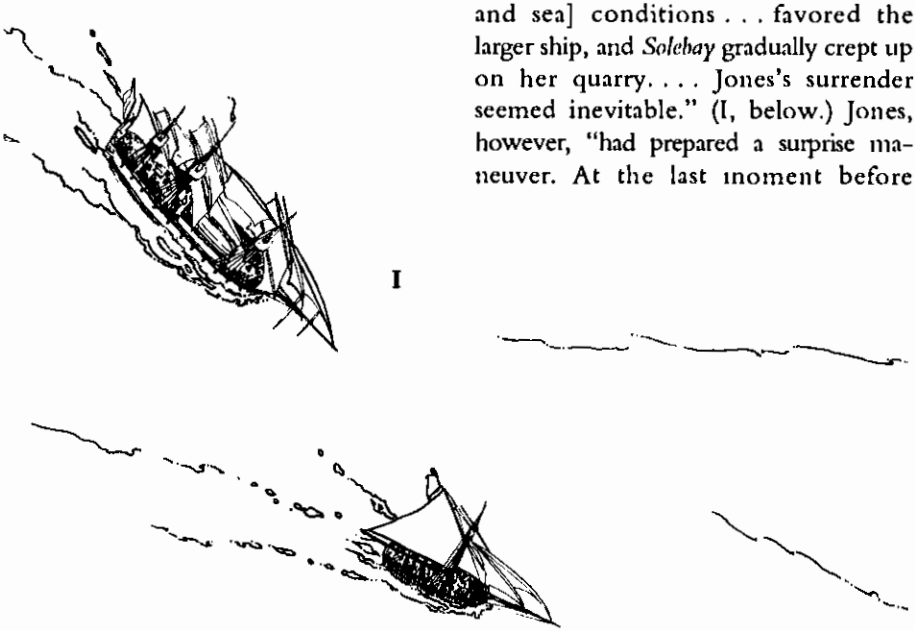
This Issue's Cover

The oil painting, entitled "The Sloop *Providence*, John Paul Jones, Eluding H.M. Frigate *Solebay* and Firing a Swivel Cannon," from which our cover art is taken was painted by William Gilkerson. One of its numbered prints hangs in the Naval War College Museum. Mr. Gilkerson is a professional maritime artist and author of wide and long-standing reputation who now resides in Mahone Bay, Nova Scotia. His art has appeared in museums throughout North America and Hawaii, and his drawings in his several books. (See "Recent Books" in this issue for his most recent.)

This painting's subject, the sloop *Providence*, is a familiar Newport sight—in the form, that is, of a replica built, owned, and operated by the Seaport 76 Foundation (an American Sail Training Association member) for, primarily, sail training. The original was built as the *Katy* to a small, shallow-draft, single-masted design then common in the New England merchant and fishing trades (as well as smuggling). Taken up and renamed by the Continental Navy in 1776 from the short-lived Rhode Island navy, she was armed with twelve four-pounder cannon and a some swivel guns.

As Mr. Gilkerson tells us, the *Providence* "made many successful cruises against the British." On 1 September 1776, however, she had a close call when, John Paul Jones commanding, she approached a British convoy and ran afoul of its escort, H.M. frigate *Solebay*, of twice her size and twenty-six guns. In the artist's words (and his sketches, below and right), "the frigate gave chase, forcing Jones to flee to windward under fore-and-aft sail. . . . The pursuit lasted all afternoon. The less weatherly frigate could not gain to windward of the sloop, but the [wind and sea] conditions . . . favored the larger ship, and *Solebay* gradually crept up on her quarry. . . . Jones's surrender seemed inevitable." (I, below.) Jones, however, "had prepared a surprise maneuver. At the last moment before



I

Providence would come under *Solebay's* cannon, he ordered the helm to be put down [i.e., turned away from the wind], and all of his square sails including studding sails were broken out simultaneously. *Providence* darted down directly across the bows of her pursuer." (II, below right.) At this, "the British commander was taken by complete surprise. . . . and by the time he was able to retrim [his] sails, . . . *Providence* had gained such a lead (III, right) that night would cover her before her pursuer could once again overtake." It is this moment that the painting captures: the little vessel surges ahead, the topmen descend the shrouds, and all hands stare aft as a swivel gun fires to add to the problems of the pursuer, frantically sheeting home his topgallants. (Painting, text, and sketches by permission of William Gilkerson.)