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MCTP 11-10C

THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE





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HEADQUARTERS, DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES MARINE CORPS

Foreword

The lessons of protracted conflict confirm that adherence to the law of armed conflict (LOAC) by the land forces, both in international and non-international armed conflict, must serve as the standard that we train to and apply across the entire range of military operations. Adhering to LOAC enhances the legitimacy of our operations and supports the moral framework of our armed forces. We have learned that we deviate from these norms to our detriment and risk undercutting both domestic and international support for our operations. LOAC has been and remains a vital guide for all military operations conducted by the U.S. Government. This field manual provides a general description of the law of land warfare for Soldiers and Marines, delineated as statements of doctrine and practice, to guide the land forces in conducting disciplined military operations in accordance with the rule of law. The *Department of Defense Law of War Manual* (June 2015, updated December 2016) is the authoritative statement on the law of war for the Department of Defense. In the event of a conflict or discrepancy regarding the legal standards addressed in this publication and the DOD Law of War Manual, the latter takes precedence.

This field manual has been over 20 years in the making and owes much to the judge advocates, Soldiers, Marines, and civilian employees who have endeavored to update The Law of Land Warfare since its publication, as Field Manual (FM) FM 27-10/Marine Corps Tactical Publication (MCTP) 11-10B.1 (changed in 2017 to MCTP 11-10C), in 1956, and the change promulgated in 1976.



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The Commander's Handbook on the Law of Land Warfare

1. This change removes each use of "gender" and replaces it with "sex" in accordance with Executive Order 14168 and its implementing guidance.

2. An asterisk character (*) marks a change in material.

3. FM 6-27/MCTP 11-10C, 21 May 2025, is changed as follows:

Change Version Page(s)	Change Description
page 3-7	Replaces "gender" with "sex"
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1. A plus sign (+) marks new material.

2. FM 6-27/MCTP 11-10C, 20 September 2019, is changed as follows:

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3. File this transmittal sheet in front of the publication for reference purposes.

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Preface

Commanders, staffs, and subordinates must ensure that their decisions and actions comply with applicable U.S., international, and in some cases host-nation laws and regulations. Commanders at all levels will ensure that their Soldiers or Marines operate in accordance with the law of armed conflict (LOAC) and applicable rules of engagement.

This publication provides guidance to Soldiers and Marines on the doctrine and practice related to customary and treaty law applicable to the conduct of warfare on land and to relationships between opposing belligerents, in order to train and prepare for combat operations. Although some of the legal principles set forth herein also apply to warfare at sea and in the air, this publication otherwise concerns itself with the rules peculiar to naval and aerial warfare only to the extent that such rules have some direct bearing on the activities of Soldiers and Marines operating on land.

This is an official publication of the U.S. Army and a referenced publication for the U.S. Marine Corps. It does not necessarily reflect the views of other Department of Defense (DOD) components or the DOD as a whole. This publication is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

The principal audience for this publication is Army and Marine Corps commanders as well as Army and Marine Corps judge advocates. Commanders and staffs of Army and Marine Corps headquarters serving as joint task force or multinational headquarters should also refer to applicable joint or multinational doctrine. Trainers and educators throughout the Army and Marine Corps will also use this publication where appropriate. This publication often describes legal concepts in general terms for non-lawyers rather than exhaustively.

As stated in DOD Directive 2311.01E, the *Department of Defense Law of War Manual* (June 2015, updated December 2016) is the authoritative statement on the law of war for the Department of Defense. The DOD Law of War Manual provides more detail on and discussion of the legal rules and concepts discussed in this manual and addresses other law of war topics. Soldiers and Marines may find it useful to consult Air Force and Navy publications on the law of war when addressing issues related to the air and sea domains.

This publication uses joint or DOD terms where applicable. Selected joint, DOD, and Army terms and definitions appear in both the glossary and the text. When terms are defined by this publication as the proponent for the Department of the Army and the Marine Corps, the terms and definitions are boldfaced and italicized in the text and marked with an asterisk (*) in the glossary. For other definitions shown in the text, the term is italicized and the number of the proponent publication follows the definition.

This publication uses some joint approved and some nonstandard abbreviations for treaty names to enhance readability. The table preface-1 on page vi provides a list of the treaty name abbreviations used in this publication. Readers should consult the Appendix to obtain the full citation for these and other major treaties concerning the law of land warfare.

Table Preface-1. Treaty name abbreviations

Abbreviation	*Treaty Name*
Hague IV; HR	Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land ("The Hague Regulations") (The Hague, October 18, 1907)
GWS	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick In Armed Forces in the Field of August 12, 1949
GWS Sea	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949
GPW	Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949
GC	Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I") (June 8, 1977)
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II") (June 8, 1977)
CCW	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Geneva, October 10, 1980)

This publication applies to the Active Army, Army National Guard, U.S. Army Reserve, and the U.S. Marine Corps total force unless otherwise stated.

The proponent of this publication is the Future Concepts Directorate, The Judge Advocate General's Legal Center and School, U.S. Army. Send written comments and recommendations on DA Form 2028 (*Recommended Changes to Publications and Blank Forms*) directly to Commander, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: CTR-FC, 600 Massie Road, Charlottesville, VA 22903-1781. Send comments and recommendations by e-mail to usarmy.pentagon.hqda-tjaglcs.list.tjaglcsdoctrine@army.mil. Follow the DA Form 2028 format or submit an electronic DA Form 2028.

Introduction

DOD policy requires "[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations" (Department of Defense Directive [DODD] 2311.01E).

This publication addresses topics that are also addressed in the DOD Law of War Manual. In the event of a conflict or discrepancy regarding the legal standards addressed in this publication and the DOD Law of War Manual, the latter takes precedence. In many cases, any apparent conflict or discrepancy may be due to this publication's efforts to provide guidance to Commanders by describing legal concepts more generally rather than exhaustively as found the DOD Law of War Manual. In certain instances, this publication will set out a current policy or practice for Army and Marine forces rather than a legal requirement.

The terms "law of war" and "law of armed conflict" are used interchangeably in practice, but this publication uses the term LOAC. Although the term international humanitarian law (IHL) is favored by academics and some others in the international community, it is the Army and Marine Corps' practice not to use this term as it could confuse practitioners as to the body of law to apply. LOAC is that part of international law that regulates the conduct of hostilities and the protection of war victims.

This publication summarizes the law and practice under LOAC for legal and operational practitioners of the Army and Marine Corps. It draws from treaties to which the United States is a party, customary international law, the DOD Law of War Manual, and other references describing long-standing U.S. military practice. It has precedent in the first comprehensive publication of the U.S. military regulation of LOAC, prepared by Professor Francis Lieber, and approved by President Lincoln in April 1863 in General Orders Number 100. The basic LOAC rules and principles applicable to Soldiers and Marines can be summarized by the following basic *Soldier's Rules* (see AR 350-1)/Marine Corps *Basic Principles* (see MCO 3300.4A), developed by Army and Marine judge advocates to train Soldiers and Marines to conform to LOAC standards applicable in all military operations:

- Fight only enemy combatants.
- Do not harm enemies who surrender. Disarm the enemy and turn them over to your superiors.
- Do not kill or torture enemy prisoners of war or other detainees.
- Collect and care for the wounded, whether friend or foe.
- Do not attack medical personnel, facilities, or equipment.
- Destroy no more than the mission requires.
- Treat all civilians humanely.
- Do not steal. Respect private property and possessions.
- Do your best to prevent violations of the law of war.
- Report all violations of the law of war to your superiors.

Just as the *Soldier's Rules/Basic Principles* provide general and sometimes more narrow guidelines than might be allowed for as a matter of law in specific situations, this publication summarizes the law and practice under LOAC for legal and operational practitioners of the Army and Marine Corps. It provides more detailed guidance than what is provided for in the *Soldier's Rules/Basic Principles*, but it does not go into the extensive detail of the DOD Law of War Manual. This publication is not a definitive explanation of all LOAC issues, but it should assist in developing other doctrine, tactical practices and training that will be understood by individual Soldiers and Marines and units and lead to increased compliance with LOAC.

As a statement of Army and Marine Corps doctrine, this publication should not be interpreted as a source of United States' government views on customary international law, and, unless explicitly noted, the practices described in the publication should not be understood to have been undertaken out of a sense of legal obligation for the purposes of assessing customary international law.

This publication also discusses the relevant and applicable policies, regulations, and other issuances that the Army and Marine Corps have followed in military operations. In discussing such issuances, this publication does not create any policy for Army and Marine Corps forces as the cited document remains the source of any such policy. Such policies, regulations, or other issuance should be reviewed for currency and applicability because they are frequently updated.

Whenever possible, this publication should be used in conjunction with the appropriate treaties, as provided, for example, in documents published by the Army's Judge Advocate General's Legal Center and School, which contain the text of those various treaties. The Appendix references major LOAC treaties, separately referencing those treaties to which the United States is not a party (for example, Additional Protocol I to the Geneva Conventions).

This publication cites applicable authorities within parenthetical references to facilitate quick reference. In certain cases, this publication summarizes or paraphrases treaty provisions. In the event of a conflict or discrepancy between this publication and a binding treaty provision, the treaty provision takes precedence. This publication includes references to Additional Protocol I (AP I), which has not been ratified by the United States and contains some provisions that the United States categorically rejects. These references to API are intended to provide additional content to consider where its provisions are consistent with long-standing practice or principles the United States has generally accepted or where the provision is based on a principle that the United States supports, but is not necessarily militarily acceptable in all respects (API references are noted with *consider* cites; see DOD Law of War Manual 19.20.1). Unless explicitly stated otherwise, reference in this publication to any provision of a treaty to which the United States is not a party is not intended to affirm the status of those provisions as customary international law or as otherwise binding on the United States. The intent is to compare U.S. practice to provisions of those treaties, and to facilitate understanding of likely positions of potential multinational partners who are parties to those treaties.

Based on recent doctrinal changes, certain terms are added for which the DOD Law of War Manual or FM 6-27/MCTP 11-10C is a proponent. The glossary contains acronyms and defined terms. See introductory table-1 for specific changes.

Introductory table-1. New Army terms

Term	***Remarks***
distinction	New definition.
environmental modification technique	New definition.
general license	New definition.
honor	New definition.
humanity	New definition.
international armed conflict	New definition.
jus ad bellum	New definition.
jus in bello	New definition.
levée en masse	New definition.
military necessity	New definition.
military objective	New definition.
military passport	New definition
non-international armed conflict	New definition.
opinio juris	New definition.
parlementaire	New definition.
proportionality	New definition.
protecting power	New definition.
reprisal	New definition.

Introductory table-1. New Army terms (*continued*)

Term	*Remarks*
safe-conduct pass	New definition.
special license	New definition.
suspension of arms	New definition.
unprivileged belligerent	New definition.

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Chapter 1

General Background and Basic Principles of the Law of Armed Conflict

Certain basic principles are foundational to a full understanding of LOAC, rules of engagement, and Army and Marine Corps doctrine. This chapter examines the law governing the resort to the use of armed force (*jus ad bellum*), the purpose and applicability of LOAC in armed conflict and its relationship with other law. After examining the basic LOAC principles, this chapter discusses the classes of persons distinguished within LOAC along with their basic rights, responsibilities, and liabilities. This chapter concludes with a discussion of the tools for implementation of LOAC, such as the role of protecting powers and humanitarian organizations within LOAC, when LOAC no longer applies, and the relationship with human rights law.

INTERNATIONAL LAW AND USE OF FORCE IN INTERNATIONAL RELATIONS

1-1. International law principally governs the relations between States both in peacetime and during armed conflict**. *Jus ad bellum* is that part of international law that regulates the circumstances in which States may resort to the use of force in international relations**. **J*us in bello* is that part of international law relating to the conduct of hostilities and the protection of war victims, from combatants who are wounded and out of combat, to prisoners of war and civilians**.

1-2. Article 2(4) of the United Nations (UN) Charter provides that States are required to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. There are circumstances in which the resort to force will not violate this prohibition, which include when the use of force is authorized by the UN Security Council, when it is undertaken with the consent of the territorial State, and when it is undertaken in the lawful exercise of the inherent right of self-defense (See DOD Law of War Manual, 1.11.4). For example, the United States has used armed force pursuant to an authorization in a UN Security Council Resolution and pursuant to its inherent right of individual or collective self-defense against an armed attack.

1-3. The decision to resort to the use of force in international relations is one that is decided at the national level. Because this publication is intended for Soldiers and Marines operating at lower echelons, it will focus on the *jus in bello* principle, that is, the international law relating to the conduct of hostilities and the protection of war victims, which as discussed in paragraph 1-4 below, is known as LOAC.

LEX SPECIALIS–THE LAW OF ARMED CONFLICT

1-4. LOAC, also referred to as the law of war, is that part of international law that regulates the conduct of hostilities and the protection of war victims both in international and non-international armed conflict; belligerent occupation; and the relationship between belligerent, neutral, and non-belligerent States (see DOD Law of War Manual, 1.3; JP 3-84). The legal maxim *lex specialis derogat legi generali*, also known as the principle of specialty, provides that as a rule, the special law overrides the general law. This means if an action is regulated by both a general provision and a specific one, the latter applies, as it is more specifically directed toward the action. LOAC is the *lex specialis* of armed conflict; it is the controlling body of law and provides the legal standards that apply to the conduct of hostilities and the protection of war victims.

1-5. Although LOAC is part of international law, it is important to understand that different States may have different LOAC obligations. Understanding where these differences may arise is often important in dealing with an enemy; it becomes critical when working with allies and other foreign partners. Partner States are often bound by treaties to which the United States is not a party (for example, Additional Protocol I). Partner States may also have different interpretations of LOAC obligations even where the same treaty provision is at issue. Consequently, those partners often adopt conditions or "caveats" during multinational operations that express those States' interpretations or their differences on issues of national policy.

1-6. DOD policy is that "[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations." (DODD 2311.01E, para. 4.1). Soldiers and Marines must comply with LOAC in all military operations (as well as with any further restrictions imposed by the rules of engagement). Although reciprocity may play an important role in encouraging LOAC compliance, DOD policy is to comply with LOAC even when enemy forces are engaged in violations of their LOAC obligations (see DOD Law of War Manual, 3.6).

PURPOSES OF THE LAW OF ARMED CONFLICT

Purposes of the Law of Armed Conflict

There are two reasons . . . for the preservation and enforcement, as even-handedly as possible, of the laws of war. The first is strictly pragmatic: They work. Violated or ignored as they often are, enough of the rules are observed enough of the time so that mankind is very much better off with them than without them. . . .

Another and, to my mind, even more important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the participants. War does not confer a license to kill for personal reasons – to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the Soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge.

Unless troops are trained and required to draw the distinction between military and non-military killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense of that distinction for the rest of their lives. . . .

As Francis Lieber put the matter in his 1863 Army regulations: "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God." [Lieber Code, art. 15]

Telford Taylor
Nuremberg Prosecutor

1-7. The main purposes of LOAC are:

- Protecting combatants, noncombatants, and civilians from unnecessary suffering;
- Providing certain fundamental protections for persons who fall into the hands of the enemy, particularly prisoners of war, military wounded and sick, and civilians;
- Facilitating the restoration of peace;
- Assisting the commander in ensuring the disciplined, ethical, and effective use of military force;
- Preserving the professionalism and humanity of combatants; and
- Preventing the degeneration of warfare into savagery or brutality.

WHEN THE LAW OF ARMED CONFLICT APPLIES

1-8. Commanders must be prepared to comply with LOAC whenever there is the possibility of military operations or hostile actions. Different LOAC rules can apply to an armed conflict against another State versus an armed conflict against a non-State armed group, such as a terrorist or insurgent group. Guidance

will come from higher authority regarding which rule set may apply; but, if no such guidance is forthcoming, commanders must adhere to the LOAC rules for State-on-State conflict described in paragraph 1-14 below.

1-9. War may be described as the existence of armed hostility between States, between States and non-State armed groups, or between non-State armed groups, although the specific legal definition of "war" may depend on the legal purpose at issue (see DOD Law of War Manual, 1.5). For example, under the U.S. Constitution, Congress has the power to declare war, which it last did formally in World War II. Of course, the United States has often engaged in armed conflict or "war," under international law, since that time, often with congressional support or authorization. Even if parties involved in hostilities do not refer to such actions as "war" or "armed conflict," LOAC applies to the hostilities at issue. For this reason, and because the terms "war" and "armed conflict" often are used interchangeably, this manual uses them as synonyms.

1-10. Whether a LOAC rule applies may depend on whether a war exists. *Jus in bello* treaties often provide that they apply to cases of "declared war or of any other armed conflict," even if a state of war is not recognized by the parties (see Common Article 2, the Geneva Conventions of 1949). This standard has also been understood to result in the application of the customary law of war. A case of "declared war or any other armed conflict" for the purpose of determining whether parties must comply with jus in bello rules may be understood as arising in two ways: (1) when a party intends to conduct hostilities; or (2) when parties are actually conducting hostilities. What specific parts of LOAC apply as a matter of law to a given war may depend on whether the war is characterized as an international armed conflict (IAC) or a non-international armed conflict (NIAC).

EXISTENCE OF A WAR FOR PURPOSES OF APPLYING THE LAW OF ARMED CONFLICT

1-11. Whether an armed conflict exists for the purpose of applying LOAC may be an intent-based analysis. If States or non-State armed groups seek to engage in armed conflict, they are bound by LOAC with respect to the conduct of hostilities and the protection of war victims (see DOD Law of War Manual, 3.4.1). As such, LOAC obligations must be taken into account even before the fighting actually begins, such as in the planning of military operations.

1-12. Whether an armed conflict exists may also be a conduct-based analysis. Armed conflict may exist absent a declaration of war or without the participating States acknowledging they are engaged in armed conflict. The factual existence of an armed conflict is sufficient to trigger LOAC obligations for the conduct of hostilities and the protection of war victims.

1-13. A helpful rule of thumb may be that where parties are, in fact, engaged in activities that LOAC contemplates (including detention of enemy military personnel without criminal charge, or bombardment of military objectives), those activities are subject to LOAC.

INTERNATIONAL ARMED CONFLICT

1-14. An ***international armed conflict*** **(IAC) refers to any declared war between States, or to any other armed conflict between States, even if the state of war is not recognized by one of them**. The Geneva Conventions apply to all cases of international armed conflict and all cases of partial or total occupation of a territory, even if the occupation meets no armed resistance (Common Article 2 to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [GWS], Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea [GWS Sea], Geneva Convention Relative to the Treatment of Prisoners of War [GPW], and Geneva Convention Relative to the Protection of Civilian Persons in Time of War [GC]). Other law of war treaties also generally apply to international armed conflict and occupation (such as Hague Convention (IV) Respecting the Laws and Customs of War on Land [Hague IV], and its Annex: Regulation Concerning the Laws and Customs of War on Land (The Hague, October 18, 1907) [HR]). The United States has interpreted "armed conflict" in Common Article 2 of the 1949 Geneva Conventions to include any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity, or scope of the fighting (see DOD Law of War Manual, 3.4.2).

NON-INTERNATIONAL ARMED CONFLICT

1-15. **A *non-international armed conflict* (NIAC) is an armed conflict not between States, such as a conflict between a State and a non-State armed group or a conflict between two non-State armed groups** (Common Article 3 to GWS, GWS Sea, GPW, and GC). In assessing whether a NIAC exists, thus triggering the applicable LOAC rules, situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature do not amount to armed conflict (see DOD Law of War Manual, 3.4.2.2).

1-16. "Armed conflict not of an international character" for the purpose of applying the obligations in Common Article 3 of the 1949 Geneva Conventions was not specifically defined in those conventions. There is a range of views on what constitutes an "armed conflict not of an international character" for this purpose. The intensity of the conflict and the organization of the parties are criteria that have been assessed to distinguish between a NIAC and "internal disturbances and tensions." A variety of factors have been considered in assessing these criteria and in seeking to distinguish between armed conflict and internal disturbances and tensions.

1-17. The minimum (baseline) legal standard for humane treatment in armed conflict, regardless of the characterization of the conflict, is reflected in Common Article 3, as set forth in Figure 1-1 on page 1-5. As such, the Department of Defense applies the standards articulated in Common Article 3 in the treatment of all detainees (see, Department of Defense Directive [DODD] 2310.01E, *Department of Defense Detainee Program*). Additional humane treatment protections and fundamental guarantees may also apply to persons in the hands of opposing forces depending on the context, particularly in international armed conflicts—for example, the United States applies out of a sense of legal obligation the principles set forth in Article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict ("Additional Protocol I")(June 8, 1977) [AP I], to any individual it detains in an international armed conflict.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1)Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

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.

(2)The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Figure 1-1. Common Article 3

PRINCIPLES OF THE LAW OF ARMED CONFLICT

1-18. When no specific rule applies, the principles of LOAC form the general guide for conduct during war (see DOD Law of War Manual, 2.1.2.2). States acknowledged this idea in treaty law in the Preamble to Hague IV, a provision commonly known as the "Martens Clause," set forth in Figure 1-2 on page 1-6, for its association with Russian representative Fyodor Martens, who first proposed the clause in the preamble to the 1899 Hague Convention II on the Laws and Customs of War on Land). (For other treaties using some form of the Martens Clause, see also GWS art. 63; GWS Sea art. 62; GPW Art. 142; GC art. 158; 1980 United Nations Convention on Conventional Weapons [CCW] preamble; AP I art. 1(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II") (June 8, 1977) [AP II] preamble.).

Martens Clause

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Figure 1-2. Martens Clause

OVERVIEW

1-19. Three interdependent principles—military necessity, humanity, and honor—provide the foundation for other derivative LOAC principles—most importantly, distinction and proportionality—as well as most of the treaty and customary rules of LOAC. Paragraphs 1-23 through 1-48 explain the principles of military necessity, humanity, honor, distinction, and proportionality. See table 1-1.

Table 1-1. Application of basic LOAC principles

Principle	*Alternate Names*	*Paragraphs*	*Summary*
Military Necessity		1-23 to 1-27	Justifies the use of all measures required to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of armed conflict.
Humanity	Humanitarian Principle; Unnecessary Suffering; Superfluous Injury	1-28 to 1-30	Basis of protection for civilians; forbids inflicting suffering, injury, damage, or destruction unnecessary to accomplish a legitimate military purpose.
Honor	Chivalry	1-31 to 1-33	Demands a certain amount of fairness and a certain mutual respect between opposing forces.
Distinction	Discrimination	1-34 to 1-43	Distinguishing between combatants and military objectives on the one hand and civilians and civilian objects on the other in offense and defense.
Proportionality		1-44 to 1-48	Requires commanders to refrain from attacks in which the expected loss or injury to civilians and damage to civilian objects incidental to such attacks would be excessive in relation to the concrete and direct military advantage expected to be gained. It also underlies the requirement to take feasible precautions to reduce the risk of harm to civilians, other protected persons and civilian objects.

1-20. LOAC principles provide the foundation for the specific LOAC rules. These principles, however, are not as specific as rules, and thus interpretations of how principles apply to a given situation may vary. Nonetheless, understanding LOAC principles helps legal practitioners (1) interpret specific treaty or customary rules, (2) apply these rules to novel or complex situations, and (3) understand how LOAC operates as a coherent system to regulate the conduct of hostilities. This section therefore illustrates the operation of the general principles by briefly discussing some specific rules. For information about applying the specific rules, the reader should look to pertinent sections in later chapters that discuss those rules.

1-21. LOAC principles work as interdependent and reinforcing parts of a coherent system. Military necessity justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible that are not prohibited by LOAC. Conversely, humanity forbids certain actions unnecessary to achieve that object. Distinction underpins the parties' responsibility to comport their behavior with military necessity, humanity, and proportionality by requiring parties to a conflict to recognize and respect certain legal categories: principally, the distinctions between combatants and civilians, and between military objectives and civilian objects. Proportionality requires that even when actions may be justified by military necessity, such actions cannot result in excessive civilian loss. Lastly, honor supports the entire system and gives parties confidence in it, and provides legitimacy to the entire endeavor.

1-22. LOAC principles are consistent with military doctrine that are the basis for effective combat operations, and the ethical standards of the military profession. Commanders can use LOAC principles to guide them in making difficult decisions and judgments in military operations. For example, a commander might consider whether there is a legitimate military purpose for an action; the proposed course of action is unreasonable or excessive; or, are there precautions that can be taken to avoid unnecessary suffering.

MILITARY NECESSITY

Military Necessity

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.

List Case, World War II

1-23. ***Military necessity*** **is the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by LOAC** (see DOD Law of War Manual, 2.2; see Lieber Code, articles 15 and 16 for historical reference).

Military Necessity as Justification

1-24. Military necessity justifies actions, such as seizing persons and destroying property. Thus, military necessity underlies LOAC concepts that explain when persons and property may be the object of attack, such as the concepts of "direct participation in hostilities" (see paragraphs 2-11 to 2-21) and "military objective" (see paragraphs 2-29 to 2-57). Military necessity may justify not only violence and destruction, but also alternative means of subduing the enemy. Military necessity also permits certain incidental harms that inevitably result from the actions it justifies. Military necessity may justify the use of overwhelming force to defeat enemy forces because the object of war is not simply to prevail, but to prevail as quickly and efficiently as possible. Military necessity does not require commanders to use the minimum force necessary in a given situation; such an interpretation of military necessity would prolong the fighting and increase suffering.

Military Necessity and the Law of Armed Conflict Rules

1-25. Military necessity does not justify actions that are prohibited by LOAC. In particular, military necessity cannot justify departures from LOAC because States have crafted LOAC specifically with war's exigencies in mind. Prohibitions in LOAC may be understood to reflect States' determinations that those prohibited acts are always militarily unnecessary or otherwise inappropriate or unlawful.

1-26. Although military necessity cannot justify actions that have been prohibited by LOAC (see, for example, GC art. 49 (prohibiting forcible population transfers from occupied territory)), some LOAC rules expressly incorporate military necessity. For example, certain LOAC rules specify that departures from what would otherwise be the rule are permissible when absolutely or imperatively necessary (see, for example, GWS art. 8 (restricting activities of protecting power representatives); GC art. 42 (interning protected persons), and art. 53 (destruction of property during occupation); HR art. 23(g) (seizing enemy property)). In such cases, military necessity must not be conflated with military convenience. As another example, certain LOAC rules may direct that persons comply with an obligation, but only to the extent feasible or consistent with military necessity (see, for example, GWS art. 30 (repatriating retained personnel); GC art. 108 (limiting relief shipments)).

Evaluating Military Necessity

1-27. LOAC seeks to ameliorate any difficulties in applying military necessity in three ways. First, in evaluating military necessity, one may consider the broader imperatives of winning the war as quickly and efficiently as possible and not be restricted to considering only the demands of the specific situation. Second, LOAC recognizes that certain types of actions are militarily necessary *per se*. For example, an attack on enemy combatants is generally lawful. Third, in what is commonly called the Rendulic Rule, LOAC recognizes that commanders must assess the military necessity of an action based on the information available to them at the relevant time; they cannot be judged based on information that subsequently comes to light.

HUMANITY

1-28. ***Humanity* is the LOAC principle that forbids inflicting suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose**. Humanity is sometimes referred to as the principle of avoiding unnecessary suffering or the principle of avoiding superfluous injury. Commanders should exercise leadership to ensure that Soldiers and Marines under their command know that cruelty and the infliction of unnecessary suffering will not be tolerated.

Humanity and Military Necessity

1-29. Humanity is related to military necessity, and these principles logically complement one another. Although military necessity justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible that are not prohibited by LOAC, military necessity cannot justify actions that are not necessary to achieve this purpose, such as cruelty or wanton violence. Moreover, once a military purpose has been achieved, inflicting more suffering is unnecessary and must be avoided. Thus, for example, if an enemy has been incapacitated (rendered *hors de combat*) by being severely wounded or captured, no military purpose is served by continuing to attack that incapacitated enemy. Enemies who are *hors de combat* may not be made the object of attack and must be treated humanely (see generally Common Article 3). Similarly, humanity is the source of the immunity from attack that the civilian population and civilian objects receive because they make no contribution to military action.

Humanity and the Law of Armed Conflict Rules

1-30. Humanity animates LOAC rules focused on humanitarian concerns, including: fundamental safeguards for persons who fall into the hands of the enemy; protections for civilians and civilian objects (see GC section II, art. 53; consider AP I, parts II and III); protections for military medical personnel, units, and transports (see GWS art. 36-40; consider AP I art. 12, 15, 21-30); protection for enemy wounded and sick, as well as respect for the dead (see GWS); restrictions on weapons that may cause superfluous injury or unnecessary suffering to combatants (see HR art. 23(e); consider AP I art. 35); and, prohibitions on weapons that are indiscriminate by nature, or restrictions on weapons that are indiscriminate in their effects on civilians and civilian objects, without special precautions (see CCW; consider AP I art. 51). Humanity is given further effect with the development of the derivative principles of distinction and proportionality.

HONOR

1-31. Honor is a core Army and Marine Corps value. ***Honor*, also called *chivalry*, demands a certain amount of fairness in offense and defense, and a certain mutual respect between opposing forces**. While the word "chivalry" is often associated with a specific historical context—a code of ethics or conduct for knights in Europe during the Middle Ages—honor draws from warriors' codes from a variety of cultures and time periods (see DOD Law of War Manual, 2.6.1). Honor is a matter of carrying out, acting, and living out other core values, such as respect, duty, loyalty, selfless service, integrity, and personal courage, in everything Soldiers and Marines do. It has been vital to the development of LOAC and continues to give LOAC vitality today. Honor also requires adherence to LOAC regardless of the enemy's level of compliance.

Certain Amount of Fairness

1-32. Honor requires a certain amount of fairness in offense and defense. Honor forbids resorting to means, expedients, or conduct that would constitute a breach of trust. Honor reflects the idea that parties to a conflict

must accept that certain limits exist on their ability to conduct hostilities (HR art. 22). The principle of honor does not address what those limits are, as much as require that parties accept that certain legal limits exist. Thus, honor gives rise to rules that help enforce and give effect to LOAC. Honor requires persons to make good faith efforts to comply with LOAC. In addition to shaping the rules that require parties to a conflict to make efforts to comply with LOAC, honor also underlies rules that require parties to refrain from taking advantage of their opponent's adherence to the law by falsely claiming the law's protections. For example, enemies must deal with one another in good faith in their non-hostile relations. Additionally, even in the conduct of hostilities, parties may not engage in treacherous or perfidious killing or wounding of enemy persons. As another example, misuse of a flag of truce is prohibited. If parties could take advantage of their opponent's adherence to LOAC, this would discourage parties from complying with LOAC. Honor, however, does not forbid parties from using ruses and other lawful deceptions against which the enemy ought to take measures to protect itself.

Certain Mutual Respect

1-33. Honor demands a certain mutual respect between opposing military forces. Opposing military forces should respect one another outside of the fighting because they share a profession and they fight one another on behalf of their respective parties and not out of a personal hostility. Honor thus underlies rules that relate to prisoners of war (POWs). For example, POWs and their captors should treat one another with respect. In addition, honor helps establish the requirements for entitlement to POW status or other privileges afforded lawful combatants. For example, an armed group must, among other things, be organized under a responsible command and conduct its operations in accordance with LOAC in order for its members to receive POW status upon capture during international armed conflict.

DISTINCTION

1-34. ***Distinction*, sometimes called discrimination, is the LOAC principle that obliges parties to a conflict to distinguish between combatants and the civilian population and to distinguish between military objectives and protected property and places**. Distinction is a principle that is derivative of both military necessity and humanity.

1-35. Distinction developed over time as States increasingly departed from the practice of war between entire peoples, and instead treated war as a contention between their professional military forces. Distinction requires parties to a conflict to recognize and respect a framework of legal categories for persons and objects, each category with different rights, duties, and liabilities. Principally, distinction separates those taking part in hostilities (whom military necessity justifies as permissible to attack), such as the armed forces, and those taking no active part in hostilities (whom military necessity and humanity protect as unnecessary to attack), such as the civilian population. By requiring parties to recognize and respect different legal categories that derive from military necessity and humanity, distinction seeks to confine the fighting between opposing armed forces and thereby spare the civilian population as much as possible. Distinction also helps parties comport with proportionality and thereby reduces incidental harm.

1-36. Distinction encompasses two interdependent sets of duties. Parties must recognize and respect categories by discriminating in the use of force against the enemy, and by distinguishing a party's own persons and objects (See DOD Law of War Manual, 2.5).

Discrimination in Conducting Attacks Against the Enemy

1-37. Distinction requires parties to a conflict to discriminate in their use of force against the enemy. On the one hand, consistent with military necessity, parties may attack enemy combatants and other military objectives. On the other hand, consistent with military necessity and humanity, parties may not make civilians, civilian objects, and other protected persons and objects the object of an attack. Moreover, persons using force must exercise reasonable care in discriminating between legitimate and illegitimate objects of attack (see DOD Law of War Manual, 2.5.2).

Distinguishing a Party's Own Persons and Objects

1-38. Distinction gives rise to three different types of rules that obligate a party to assist its opponent in discriminating between protected and unprotected persons and objects, principally between a party's armed forces and the civilian population. Parties to a conflict must take certain measures, in offense or defense: (1) to ensure military forces are identifiable from civilians and civilian objects; (2) to separate, as feasible, their military objectives from civilians and civilian objects; and, (3) to refrain from misusing civilians and civilian objects to shield military forces or military objectives (see DOD Law of War Manual, 2.5.3; consider AP I art. 58).

1-39. To ensure military forces are identifiable from civilians and civilian objects, parties must not disguise their armed forces as civilians or as other protected categories in order to kill or wound opposing forces (see DOD Law of War Manual, 2.5.3.1; consider AP I, art. 37). Further, some rules obligate parties to mark protected persons and objects, such as marking hospitals with a red cross, to help them receive the protections of that status (consider AP I art. 18). Additionally, medical personnel should identify (or distinguish) themselves as noncombatants to ensure they receive protection from direct attack to which they are entitled. Conversely, certain rules incentivize parties to a conflict to identify certain persons and objects as unprotected. For example, members of organized resistance movements must, among other requirements, wear fixed, distinctive signs visible at a distance and carry arms openly to distinguish themselves from the civilian population in order for their group to receive POW status upon capture (GPW art. 4A(2)).

1-40. Distinction also creates obligations for parties to a conflict to take feasible measures to separate civilians and civilian objects from military objectives in order to reduce the risk that the opposing party to a conflict will incidentally harm the civilian population and other protected persons and objects. Accordingly, military commanders must take reasonable steps to separate their military units from the civilian population and civilian objects, as far as military requirements permit, such as by evacuating civilians from danger areas. Thus, distinction seeks not only to reduce the risk that civilians will be erroneously attacked, but also to reduce the risk of other incidental harm to civilians, regardless of the attacker's subjective intent.

1-41. Although the duty to separate depends largely on what is feasible, parties to a conflict in all cases must not use protected persons or objects as a shield to protect military objectives, whether by hiding a military objective or by exploiting an adversary's adherence to proportionality considerations.

Misconceptions about Distinction

1-42. Distinction seeks to ensure that protected and unprotected categories are distinct from one another, not distinct in the abstract. For example, using camouflage is consistent with distinction because foliage is not a protected category and because civilians generally do not wear camouflage. Similarly, U.S. forces have worn nonstandard uniforms to blend with local forces while remaining distinct from the civilian population. Furthermore, distinction addresses the different rights, duties, and liabilities of different categories; it does not mandate that a particular person or object must fall within a particular category. For example, a combatant generally may take a civilian object and use it for military purposes, thereby turning it into a military objective, consistent with distinction. Similarly, persons with medical training or who provide medical care on the battlefield are not necessarily noncombatants and need not be identified as such. Rather, a State may reserve the ability to use these persons as combatants (who are liable to attack) by refraining from designating them as protected medical personnel (see DOD Law of War Manual, 2.5.4).

Reinforcing Duties

1-43. Discriminating in conducting attacks against the enemy and distinguishing one's own persons and objects reinforce one another. A party is not relieved of its obligations to discriminate in conducting attacks by the failures of its adversary to distinguish the adversary's military objectives from protected persons and objects. Nonetheless, the practical ability of a party to discriminate in conducting attacks often depends on the degree to which its enemy has distinguished its military objectives from protected persons and objects. For example, if enemy forces intermingle with civilians, an opposing party may be less able to avoid incidentally harming the civilian population. Similarly, if enemy forces do not respect the Red Cross or other distinctive emblem, but instead specifically attack persons wearing it, the party receiving these attacks is less likely to distinguish its medical personnel and transports (see DOD Law of War Manual, 2.5.5).

PROPORTIONALITY

1-44. ***Proportionality*** **is the LOAC principle requiring combatants to refrain from attacks in which the expected loss or injury to civilians and damage to civilian objects incidental to such attacks would be excessive in relation to the concrete and direct military advantage expected to be gained**. It also underlies the requirement to take feasible precautions to reduce the risk of harm to civilians, other protected persons and civilian objects. In other words, even when a party to the conflict is justified in targeting a particular military objective, that party must not cause incidental harm to civilians or to civilian objects excessive in relation to the concrete and direct military advantage expected to be gained from targeting the military objective. The principle of proportionality complements the principle of distinction and, like distinction, derives from and applies both military necessity and humanity.

1-45. Proportionality most often refers to the *jus in bello* (the law related to the conduct of hostilities) requirement to avoid excessive harm to civilians incidental to attacks, often referred to as "collateral damage." It is this *jus in bello* proportionality principle, which underlies the requirement to take feasible precautions, that is discussed here and addressed in this publication. It is a different standard from the proportionality principle in the *jus ad bellum* (the law related to the use of force) principle of proportionality (see para. 1-2), which is beyond the scope of this publication.

1-46. In war, incidental harm to the civilian population and civilian objects is unfortunate, but inevitable. Thus, the proportionality standard does not require that no incidental harm results from attacks. Rather, the combatants must determine whether, in engaging in offensive or defensive operations, his or her actions may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated to be gained (consider AP I art. 51(5)(b), 57(2)(b)). Under LOAC, judgments of proportionality often involve difficult and subjective comparisons. Recognizing these difficulties, States have declined to use the term proportionality in LOAC treaties because it could incorrectly imply that equilibrium or a precise comparison between considerations is possible (see DOD Law of War Manual, 2.4.1.2).

Justification in Acting

1-47. Proportionality is implicated in cases in which one is justified in acting. For example, an attack on a military objective that incidentally damages civilian property would raise proportionality considerations. On the other hand, where there is no justification for acting, such as an unlawful attack directed against the civilian population, a proportionality analysis would not be necessary to reach the conclusion that the attack was unlawful (see DOD Law of War Manual, 2.4.1.1).

Excessive Harm

1-48. Proportionality generally weighs the justification for acting against the expected harms to determine whether the latter is excessive compared with the former. In war, incidental harm to the civilian population and civilian objects is unfortunate and tragic, but inevitable. Thus, the proportionality standard does not require that no incidental harm results from attacks. Rather, combatants must refrain from attacks in which the expected harm of loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, would be excessive in relation to the concrete and direct military advantage anticipated to be gained (see DOD Law of War Manual, 2.4.1.2; consider AP I art. 51(5)(b), 57(2)(b)). Under LOAC, judgments of proportionality often involve difficult and subjective comparisons. Often an equilibrium or a precise comparison between considerations is not possible.

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CLASSES OF PERSONS

1-49. This section addresses different classes of persons under LOAC. In the past, a citizen or national of a State at war, as one of the constituents of a State that is engaged in hostilities, could be subjected to the hardships of war by an enemy State (see "Lieber Code" arts. 21-24). As civilization has advanced and certainly today, however, consistent with the principles of military necessity and humanity, military operations generally may not be directed against civilians (see DOD Law of War Manual, 5.2.2). Thus, under

the principle of distinction, LOAC recognizes that the population of a State that is a party to a conflict is generally divided into two classes—combatants and civilians, which correspond generally to the armed forces and the civilian population. Both classes have distinct rights, duties, and liabilities. No person can exercise the distinct rights afforded both classes at the same time. For example, a person cannot exercise the combatant's right to attack enemy forces while also claiming the civilian's right not to be made the object of attack.

1-50. Thus, in order to help protect the civilian population from the effects of armed conflict, LOAC distinguishes between combatants and civilians, as well as persons directly participating in hostilities and persons taking no part in hostilities. The line between these classes is not always clear, and certain categories of persons are not easily characterized as falling within one of these categories. Nonetheless, the principle of distinction continues to be of the utmost importance in LOAC and underlies many of the rules discussed in this section. This section discusses the identification as well as the rights, duties, and liabilities of various classes of people under LOAC—primarily combatants and civilians, but also certain subcomponents within each of these classes that are subject to rules different from the general treatment of each primary class, such as certain humanitarian personnel, certain civilian supporters of the armed forces, two categories of "unlawful" or "unprivileged" belligerents, and military attachés and diplomatic representatives of neutral States.

LAWFUL COMBATANTS

1-51. Three classes of persons qualify as lawful combatants, often referred to as privileged combatants:

- Members of the armed forces of a State party to a conflict, including members of the regular armed forces of a de facto government or authority not formally recognized by the opposing power, aside from certain categories of medical and religious personnel (GPW art. 4A(1) and 4A(3));
- Members of militia or volunteer corps that are not part of the armed forces of a State but belong to a State party to the conflict, and that meet the following four requirements: commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying their arms openly; and conducting their operations in accordance with LOAC (GPW 4A(2)); and
- Inhabitants of an area who participate in a kind of popular uprising to defend against foreign invaders, known as a *levée en masse* (GPW 4A(6)).

The United States does not accept the Additional Protocol I definition of lawful combatants. A principle U.S. objection to the Additional Protocol I definition is the extent to which it would grant combatant status to individuals who fail to comply with the requirements of GPW for status as a member of a militia or volunteer corps that belong to a State (GPW art. 4A(2)) and thereby undermine the protection of the civilian population. Many U.S. partners that are States Parties to Additional Protocol I, however, are bound by this definition of lawful combatants (as defined in AP I art. 43-44), to the extent they have not taken a reservation, declaration, or understanding limiting the application of this definition.

Rights, Duties, and Liabilities of Lawful Combatants

1-52. Lawful combatants have a special legal status, which affords certain rights, duties, and liabilities. They may lawfully engage in hostilities and are liable to be made the object of attack by lawful combatants from enemy armed forces. Lawful combatants must conduct their operations in accordance with LOAC. They have the right to POW status if they fall into the power of the enemy during international armed conflict. Such lawful combatants also have legal immunity from foreign domestic law (combatant immunity) for belligerent acts done under military authority and in accordance with LOAC.

Nationality and Combatant Status

1-53. Members of enemy armed forces may include nationals of neutral or non-belligerent States. Nationals of a neutral or non-belligerent State who are members of the armed forces of a belligerent State should be treated like other members of that State's armed forces. However, the special privileges international law affords lawful combatants do not apply between nationals and their own State. For example, provisions of the GPW recognize that nationals of the detaining power are not POWs (GPW art. 87). Thus, international

law does not prevent a State from punishing its nationals whom it may capture among the ranks of enemy forces. For example, under U.S. law, not only may U.S. nationals who join enemy forces be subject to attack or detention by U.S. forces, they may also be tried for treason (18 U.S.C. § 2381).

CIVILIANS

1-54. In general, a civilian is a member of the civilian population—that is an individual who is neither part of nor associated with an armed force or group, nor otherwise engaging in hostilities. For example, any person who belongs to any of the combatant categories referred to in GPW Article 4(A)(1), (2), and (3) (these categories are discussed in paragraphs 3-16 to 3-25), are not civilians. For most purposes, the term "civilian" does not include unprivileged belligerents.

1-55. Like combatants, members of the civilian population also have certain rights, duties, and liabilities under LOAC. Civilians may not be made the object of attack, and feasible precautions must be taken to reduce the risk of harm to them. Civilians are generally treated consistent with the GC and many qualify for protections established for protected persons under the convention (GC art. 4). Civilians generally may be temporarily detained when militarily necessary and may be interned for imperative reasons of security. In all circumstances, they are entitled to humane treatment. Civilians lack the combatant's privilege and may be punished by an enemy State for engaging in hostilities against it.

Civilians and the Conduct of Hostilities

1-56. Civilians who take a direct part in hostilities forfeit their protection from being made the object of attack (see DOD Law of War Manual, 5.8; consider AP I art. 51(3); AP II, art. 13(3)). Civilians might be killed incidentally in military operations; however, the principle of proportionality requires that the expected incidental harm to civilians may not be excessive in relation to the concrete and direct military advantage anticipated from an attack, and underlies the requirement that feasible precautions must be taken to avoid harming civilians during military operations. Private persons who join a non-State armed group or otherwise engage in hostilities forfeit the corresponding protections of civilian status and may be liable to treatment in one or more respects as unprivileged belligerents.

Civilians and Detention

1-57. In general, civilians may be subject to non-violent measures of control and security that are justified by military necessity, such as searches or temporary detention. Belligerents or Occupying Powers may take necessary security measures in relation to civilians, including internment or assigned residence for imperative reasons of security (GC arts. 42, 78). Civilians who are interned or confined to assigned residences during international armed conflict or occupation generally are classified as protected persons under the GC and receive a variety of protections. Chapter 5 addresses, in detail, the treatment of civilian internees during international armed conflict and occupation. In all circumstances, detained civilians must be treated humanely.

Civilians' Liability Under an Enemy State's Domestic Law

1-58. Unlike combatants, civilians generally lack any special immunity from the domestic law of the enemy State. Private persons who engage in hostilities or provide support to the enemy may be punished by an opposing State for their conduct pursuant to a conviction following a fair trial. Moreover, a State that is an Occupying Power has additional authority over enemy civilians that extend beyond the ability to punish their unauthorized participation in hostilities. Note, however, the special cases of diplomats, persons authorized to accompany the armed forces, members of the merchant marine, crews of civil aircraft, and participants in a *levée en masse,* who might have certain immunities from foreign domestic law.

MIXED CASES

1-59. Certain classes of persons do not fit neatly within the dichotomy of the armed forces and the peaceful civilian population, that is, combatants and civilians. These classes may be classified into three groups: certain humanitarian personnel; certain civilian supporters of the armed forces; and, unprivileged belligerents. Each of these classes has some attributes of combatant status and some attributes of civilian

status; in certain respects these classes are treated like combatants, but in other respects they are treated like civilians.

CERTAIN HUMANITARIAN PERSONNEL

1-60. Certain categories of medical and religious personnel, both members of the armed forces and civilians, have humanitarian duties that involve participation in hostilities (without committing acts harmful to the enemy), but also provide them with special protections:

- Military medical and religious personnel (GWS art. 24, 33);
- Authorized staff of voluntary aid societies (GWS art. 26);
- Staff of a recognized aid society of a neutral country (GWS art. 27); and
- Auxiliary medical personnel (GWS art. 25).

CERTAIN CIVILIAN SUPPORTERS OF THE ARMED FORCES

1-61. Certain categories of persons are not members of the armed forces and do not have combatant immunity, but are nonetheless authorized to support the armed forces in the fighting (see, for example, Department of Defense Instruction [DODI] 3020.41 [discussing contractors authorized to accompany the force]) and are entitled to POW status if captured during an international armed conflict:

- Persons authorized to accompany the armed forces but who are not members thereof (GPW art. 4A(4)); and
- Members of the crews of merchant marine vessels or civil aircraft (GPW art. 4A(5)).

UNPRIVILEGED BELLIGERENTS

1-62. In addition to distinguishing between combatants and the civilian population, LOAC distinguishes between privileged and unprivileged belligerents. Persons who are not members of the armed forces as described in GPW (art. 4) but who engage in hostilities deprive themselves of many of the privileges attaching to the members of the civilian population. As the U.S. Supreme Court stated in *Ex Parte Quirin*, "Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." (317 U.S. 1 [1942]) ***Unprivileged belligerents*** **are persons who, by engaging in hostilities, have incurred the corresponding liabilities of combatant status (for example, being subject to attack or detention), but who are not entitled to the distinct privileges of combatant status (for example, combatant immunity and POW status upon capture)**.

Unprivileged Belligerents as a Category in Treaty Law

1-63. Although States have defined categories of lawful combatants in treaties (HR art. 1; GWS art. 13; GPW art. 4), States have seldom explicitly recognized in treaties, much less affirmatively defined, legal categories of unprivileged belligerents (see HR art. 29-31; GC art. 5; consider AP I art. 46). States have generally refrained from doing so because LOAC treaties have been understood to reflect restrictions on the conduct of hostilities by States, and States have been reluctant to agree to restrictions on their ability to respond to unprivileged enemy belligerents, or to afford such persons the distinct privileges afforded civilians or lawful combatants. Thus, the concept of unprivileged belligerency has primarily been understood in opposition to the rights, duties, and liabilities of lawful combatants and civilians, and as a necessary implication of creating these two latter legal categories (see, for example, 10 U.S.C. § 948a). Unprivileged belligerents have been viewed either as combatants who have forfeited the privileges of combatant status by engaging in spying or sabotage, or as civilians who have forfeited certain protections of civilian status by joining armed groups that fail to qualify as lawful combatants or by otherwise engaging in acts of hostility against the opposing armed forces.

Cases of Doubt With Respect to POW Status

1-64. During an international armed conflict, should there be any doubt as to whether persons suspected of committing a belligerent act and having fallen into the hands of the enemy are entitled to POW status, such persons shall be treated as POWs pending the determination of their status by a competent tribunal (GPW art. 5).

Types of Unprivileged Belligerents

1-65. As set forth in the following paragraphs (1-65 through 1-71), unprivileged belligerents assume the liabilities of both combatant and civilian status. They may generally be classified into two categories:

- Persons who initially qualify as combatants, but who forfeit those privileges by engaging in spying, sabotage, and other secretive, hostile acts behind enemy lines.
- Persons who never qualified as combatants but who, by engaging in hostilities (such as joining an armed group), have forfeited one or more of the protections of civilian status.

1-66. Persons engaging in spying, sabotage, and other secretive, hostile acts behind enemy lines are persons who may have initially qualified as combatants (that is, by falling into one of the three categories in paragraph 1-50) but who have acted so as to forfeit the privileges of combatant status by engaging in spying or sabotage while acting clandestinely or on false pretenses (HR art. 29). Private persons engaging in acts of hostility are persons who never qualified as combatants, but who, by engaging in hostilities, have forfeited some of the protections of civilian status (see sections 1-85 through 1-92 below for further discussion of when engaged in hostilities may result in an individual being liable for treatment in one or more respects and as an unprivileged belligerent). For example, persons who join armed groups that fail to qualify as combatants are not entitled to the privileges of combatant status, but have incurred the corresponding liabilities of combatant status by virtue of their membership in such groups.

1-67. These two classes of unprivileged belligerents generally receive the same treatment. However, a legal distinction between them—State authorization—may be important. For example, combatants who spy regain their entitlement to the privileges of combatant status upon returning to friendly lines, but the private individuals who spy cannot regain a status to which they were never entitled.

Rights, Duties, and Liabilities of Unprivileged Belligerents

1-68. Unprivileged belligerents have certain rights, duties, and liabilities. In general, unprivileged belligerents lack the distinct privileges afforded to lawful combatants and civilians, and receive the liabilities of both classes. Unprivileged belligerents may be made the object of attack by enemy combatants. They, however, must be afforded fundamental guarantees of humane treatment if *hors de combat*. Unprivileged belligerents may be punished by enemy States for their engagement in hostilities if they are convicted after a fair trial.

Treatment of Unprivileged Belligerents

1-69. Although unprivileged belligerents have not been recognized and protected in treaty law to the same extent as civilians and lawful combatants, basic guarantees of humane treatment protect even unprivileged belligerents (Common Article 3; consider AP I art. 75; consider AP II art. 4-6). Moreover, some treaty protections apply to certain unprivileged belligerents (see, for example, Common Article 3; GC art. 5). In some cases, U.S. practice has, as a matter of domestic law or policy, afforded unprivileged belligerents more favorable treatment than they would be entitled to receive under international law (see paragraph 5-3). Nonetheless, U.S. practice has also recognized that unprivileged belligerents should not be afforded the distinct privileges afforded lawful combatants, nor should they receive all of the protections afforded civilians under LOAC.

Unprivileged Belligerents and the Conduct of Hostilities

1-70. Although unprivileged belligerents lack the right to engage in hostilities, they must observe the same duties as lawful combatants during their conduct of hostilities. In addition, unprivileged belligerents are subject to the same liabilities that combatants have in the conduct of hostilities—that is, they may be made

the object of attack by combatants of opposing armed forces. Nevertheless, unprivileged belligerents who are *hors de combat* may not be made the object of attack and must be treated humanely.

Unprivileged Belligerents and Detention

1-71. Unprivileged belligerents generally may be detained for engaging in hostilities or for other imperative reasons of security. The DOD practice has been to review periodically the detention of all persons not afforded POW status or treatment. Unprivileged belligerents who are detained in order to prevent their further participation in hostilities generally should be released when hostilities have ended. In some cases, continued detention in connection with criminal proceedings may be appropriate.

Necessary Security Measures

1-72. An offended State may take necessary security measures with regard to unprivileged belligerents. Since they have engaged in hostilities, unprivileged belligerents (or persons suspected of being unprivileged belligerents) may be denied certain privileges to which they might otherwise be entitled under LOAC. For example, the rights of unprivileged belligerents who are entitled to protected person status under the GC would be subject to derogation for security reasons (see GC art. 5). Belligerents may take necessary security measures, such as measures to ensure that captured spies do not collect or pass along information. Unprivileged belligerents who are protected by the GC should be afforded its full protections when feasible.

Unprivileged Belligerents' Liability for Participation in Hostilities

1-73. Although international law affords lawful combatants a certain privilege or immunity from prosecution, unprivileged belligerents lack any such protection. Unprivileged belligerents are thus exposed fully to the consequences of engaging in hostilities against a State. A State may punish unprivileged enemy belligerents provided it meets applicable requirements, such as a fair trial (HR art. 30).

Unprivileged Belligerency—as a War Crime

1-74. In contemporary parlance, spying and other forms of unprivileged belligerency generally are not referred to as "LOAC violations" or "war crimes." For example, since spying is permissible under LOAC in the sense that belligerents are not prohibited from employing spies, these activities are punishable by domestic law, but not prohibited under international law. This usage of terminology generally prevails. In some cases, however, offenses of unprivileged belligerency have been characterized as violations of LOAC (see, for example, *Ex Parte Quirin*, referenced in paragraph 1-62). For example, spying and other acts of unprivileged belligerency have been called offenses against the law of nations or LOAC because the punishment of these offenders is a recognized incident or exercise of a belligerent's war powers under LOAC. The difference in these characterizations may be traced to different definitions of war crime that have been used over time and different definitions of LOAC. If one views LOAC as only containing prohibitions, the punishment of unprivileged belligerents, like all exercises of the war powers, emanates from the domestic law of the belligerent State. On the other hand, if one views LOAC as also including sources of authority, the punishment of unprivileged belligerents is also grounded in the international LOAC. Although the relationship between unprivileged belligerency and LOAC has been characterized in different ways, it is well-accepted that States may punish unprivileged enemy belligerents under their domestic law.

SPIES, SABOTEURS, AND OTHER PERSONS ENGAGING IN SECRETIVE, HOSTILE ACTS BEHIND ENEMY LINES

1-75. Spying, committing sabotage, and engaging in other secretive, hostile acts behind enemy lines have a dual character under LOAC; commanders are permitted to employ persons who engage in these activities, but these activities are punishable by the enemy State. Commanders may employ spies and saboteurs consistent with LOAC. However, any person, including individuals who would otherwise receive the privileges of lawful combatants, who engages in spying, sabotage, or other secretive, hostile acts behind enemy lines (for example, spying while disguised as a civilian or member of the enemy force without properly identifying themselves as members of a hostile force) is regarded as an unprivileged belligerent while doing

so. While engaging in these activities, these persons forfeit entitlement to the privileges of combatant status and may be punished after a fair trial if captured (see DOD Law of War Manual, 4.17).

Spies

1-76. A person may be considered a spy when, (1) acting clandestinely or under false pretenses, (2) in the zone of operations of a belligerent, (3) he or she obtains, or endeavors to obtain, information, (4) with the intention of communicating it to a hostile party (HR art. 29; see also Uniform Code of Military Justice [UCMJ] art. 106). During war, any person—military or civilian—whose actions meet all of these elements may be considered a spy under LOAC. The following discussion elaborates upon the elements of spying.

Acting Clandestinely or Under False Pretenses

1-77. Acting clandestinely or under false pretenses means deliberately concealing or misrepresenting one's identity and conduct (see DOD Law of War Manual, 4.17.2.1; consider AP I art. 46(3)). For example, members of the armed forces may meet this element when they wear disguises, such as civilian clothes or enemy uniforms in an attempt to conceal their true identities as members of the opposing armed forces. Soldiers and Marines who act openly, such as by wearing the uniform of the armed forces to which they belong, do not meet this element (consider AP I art. 46(2)). For example, a ground reconnaissance team or couriers who wear their normal military uniforms would not meet this element. In addition, observers on military reconnaissance aircraft are not regarded as acting clandestinely or under false pretenses.

In the Zone of Operations of a Belligerent

1-78. A person must engage in acts of espionage in the zone of operations controlled by a belligerent to be considered a spy. "Zone of operations" has been construed broadly to include areas supporting the war effort. A person, however, who engages in surveillance or information gathering from outside territory controlled by a hostile party would not meet this element and would not be considered a spy.

Obtains, or Endeavors to Obtain, Information

1-79. A person may be punished as a spy regardless of whether he or she succeeds in obtaining information or in transmitting it to the enemy. Nevertheless, a person must obtain or attempt to obtain information to be considered a spy. For example, airmen who parachute into enemy territory after their aircraft has been disabled and disguise themselves in civilian clothing simply to avoid capture would not be spies.

With the Intention of Communicating It to the Hostile Party

1-80. A person must act with the intention of communicating the sought-after information to a hostile party to the conflict to be considered a spy within the meaning of this rule. Nevertheless, people who seek to send information to a State not involved in the conflict may still commit acts punishable by the offended State and their conduct may fall within the broader category of secretive, hostile acts behind enemy lines.

Saboteurs and Other Persons Engaging in Secretive, Hostile Acts Behind Enemy Lines

1-81. In addition to spies, other persons acting clandestinely or under false pretenses (for example, wearing a disguise) with a hostile purpose behind enemy lines are treated like spies under LOAC. They, too, lose the privileges of combatant status while engaged in those activities behind enemy lines. For example, saboteurs acting clandestinely or under false pretenses in the zone of operations of a belligerent are treated as spies. Activities besides sabotage that are helpful to one side's war effort done behind the other side's lines may be punished as well, often under the rubric of war treason, secretly entering the lines, or activities hostile to the security of the State. These kinds of activities almost necessarily take on the character of spying because the person who conducts these activities would also take that opportunity to collect intelligence. Indeed, these actions are often reported as spying even though the actual purpose of these activities may not be to gain or transmit intelligence but to take other sorts of actions that would further the conflict. Thus, a belligerent's presence with a hostile purpose on territory controlled by an opposing State, while operating clandestinely or under false pretenses, suffices to make that person liable to treatment as a spy under LOAC (see DOD Law of War Manual, 4.17.3).

1-82. Under LOAC, belligerents may employ spies and saboteurs. Spying and sabotage are not prohibited by LOAC. For example, spying and sabotage are not prohibited by the 1949 Geneva Conventions, nor defined as a grave breach of those conventions. Similarly, spying and sabotage are not war crimes punishable under the statutes of international criminal tribunals. In addition, LOAC treaties that regulate, but do not prohibit, spying recognize implicitly that belligerents may use these methods of warfare (see HR art. 24, 29-31; consider AP I, art. 46). Although spying and sabotage are not prohibited by LOAC, acting clandestinely or under false pretenses (out of uniform) could, in some circumstances, constitute "feigning a protected status" (such as that of a civilian), one of the elements of perfidy. Persons engaged in these activities and commanders who employ them should take special care not to commit perfidy (*i.e.*, wounding or killing the enemy while engaged in "feigning a protected status.").

Spying and Sabotage – Forfeiture of the Privileges of Combatant Status

1-83. Although LOAC allows belligerents to employ spies, saboteurs, and other persons engaged in secretive hostile activities behind enemy lines, LOAC also permits belligerents to take additional measures to defend against these persons. These individuals, by acting clandestinely or under false pretenses, fail to distinguish themselves as combatants generally must do. Thus, persons entitled to privileges of combatant status, including POW status, forfeit their entitlement to those privileges while engaged in spying, sabotage, or other hostile, secretive activities behind enemy lines. Although not explicitly reflected in the GPW, this understanding was the general understanding at the 1949 Diplomatic Conference of Geneva and is reflected in other treaties (HR art. 31; consider AP I art. 46(1)), cases, military manuals, and scholarly works.

Liability for Previous Acts of Espionage

1-84. Persons who qualify for the privileges of combatant status, engage in spying, and then return to friendly lines incur no responsibility or liability for previous acts of espionage (HR art. 31). Persons who have never qualified for the privileges of combatant status would not benefit from this rule because they cannot regain a status that they never held.

PRIVATE PERSONS WHO ENGAGE IN ACTS OF HOSTILITY

1-85. Like it treats spying and sabotage, international law does not generally prohibit private acts of hostility, but does recognize that opposing States may punish persons who commit these acts. Nonetheless, private persons engaging in hostilities have been described in some contexts as having committed a war crime, a violation of international law, or a violation of LOAC. In more recent times, private persons committing acts of hostility are often punished as committing acts of terrorism. The unauthorized use of violence by private persons to achieve political ends is contrary to the principles of democratic States. Moreover, States have obligations under international law to repress terrorism, especially when conducted on their territory against other States.

1-86. In general, private persons who engage in acts of hostility forfeit many of the protections to which members of the civilian population are entitled and may be liable to treatment as unprivileged belligerents.

Loss of Protections Afforded Civilians

1-87. Taking military action (such as detention) to address the threat posed by civilians engaged in hostilities can be justified by military necessity. The forfeiture of many of the protections of civilian status is also reflected in the principle that a person cannot exercise the distinct rights of both a civilian and a combatant at the same time.

Denial of Combatant Status

1-88. Private persons who engage in hostilities are not entitled to the privileges of combatant status and may be punished, after a fair trial. LOAC does not condone the unprivileged belligerent, for example, a farmer by day and guerilla by night. The denial of the privileges of combatant status to private persons engaging in hostilities is justified principally on the basis that such persons lack the principal qualification for entitlement to the privileges of combatant status—State authorization to engage in hostilities. Denying private persons who engage in hostilities the privileges of combatant status is also justified on humanitarian grounds. Private

persons who engage in hostilities risk undermining the protections afforded to civilians. Further, private persons who engage in hostilities generally have not been trained in LOAC and are not subject to the same disciplinary regime as members of the armed forces.

Engaging in Hostilities or Direct Part in Hostilities

1-89. A number of different formulations may be used to describe when a person has engaged in hostilities so as to deprive that person of a protection that they might otherwise be afforded by LOAC. For example, Common Article 3 of the 1949 Geneva Conventions requires humane treatment for persons no longer taking an "active part in the hostilities." The GPW contemplates interim POW protections for persons "having committed a belligerent act" (GPW art. 5). The GWS explains that the protection afforded medical units "shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy" (GWS art. 21). Additional Protocol I, which is not binding on the United States, provides that civilians forfeit their protection from being made the object of attack "for such time as they take a direct part in hostilities" (consider AP I art. 51(3)). Although these terms often refer to the same conduct, the context in which each term is applied is important, and the scope of each term may depend on the particular legal rule in question. In general, this publication uses the phrase engaging in hostilities to describe those actions that deprive a person of many of the protections of civilian status under LOAC and reserves the use of the phrase "direct part in hostilities" specifically for activity with which civilians forfeit their protection from being made the object of attack, in contrast to other protections (see paragraph 2-13, et. seq).

Activities That Constitute Engaging in Hostilities by Private Persons

1-90. Certain activities, when done by private persons, constitute engaging in hostilities, and may make those who engage in them liable to treatment by the enemy State as unprivileged belligerents.

Being Part of a Non-State Armed Group

1-91. Joining a Non-State armed group is a form of engaging in hostilities that makes private persons liable to treatment in one or more respects as unprivileged belligerents. Such armed groups may be described as insurgents, or terrorist groups. Non-State armed groups exist in both international and non-international armed conflicts; in either case they are generally unprivileged belligerents, but in an international armed conflict, they might qualify as lawful combatants if they fall into one of the categories discussed above in paragraph 1-51.

1-92. Whether a person has joined a Non-State armed group can be a difficult factual question. Non-State armed groups may not use formal indicia of membership (for example, uniforms or identity cards) or members of these groups may seek to conceal their affiliation. Circumstantial or functional information may be appropriate to use to assess whether a person has joined a private armed group. In addition, these armed groups may rely on individuals who are not formally members of the groups but are functionally part of those organizations (for more information on insurgents see FM 3-24, Insurgencies and Countering Insurgencies (2014)). These individuals may be regarded as part of the group constructively, even if not members in fact.

Other Hostile Acts

1-93. In addition to joining Non-State armed groups, other hostile acts can make a person liable to treatment in one or more respects as an unprivileged belligerent under LOAC. For example, private persons who bear arms against enemy personnel or who attempt to kill or injure enemy personnel may become liable to being made the object of attack. Spying, sabotage, and other hostile activities behind enemy lines, may also make private persons who perform them liable to prosecution for such conduct.

MILITARY ATTACHÉS AND DIPLOMATIC REPRESENTATIVES OF NEUTRAL STATES

1-94. Military attachés and diplomatic representatives of neutral States who establish their identity as such and are accompanying an army in the field, whether within the territory of the enemy or in territory occupied by it, are generally not detained provided that they take no part in hostilities or provided that temporary detention is not necessary for security reasons or for their own protection. They may be ordered out of the theater of military operations and, if necessary, transferred to the custody of representatives of their respective

countries. Only if such personnel refuse to quit the theater of military operations may they be interned. Commanders should work through command channels to ensure consultation with the Department of State regarding the appropriate disposition of such persons.

SOURCES OF THE LAW OF ARMED CONFLICT

1-95. LOAC is derived from two principal sources:

- Treaties (or Conventions), such as the Hague and Geneva Conventions. (See Appendix for a non-exhaustive list of treaties binding on the United States, and other treaties not binding on the United States.)
- Customary International Law. Some of LOAC is not created through a treaty. Customary international law results from a general and consistent practice of States followed from a sense of legal obligation, which is known as *opinio juris*.

TREATIES

1-96. A treaty is generally defined as an international agreement concluded between States in written form and governed by international law. Treaties often go by different terms, such as Conventions or Protocols, but regardless of how titled, all treaties in force are legally binding on States Parties as a matter of international law. The Department of State publishes an annual listing of treaties that are in force for the United States.

1-97. States sometimes need to enact domestic legislation to implement treaty provisions. Although such implementing legislation is not international law, it may help interpret treaty provisions or reflect a State's interpretation of those provisions. A State's domestic law, however, cannot excuse that State's noncompliance with a treaty obligation as a matter of international law.

1-98. If there is doubt as to the applicability of a specific U.S. treaty obligation, the commander should seek legal advice from a judge advocate. Judge advocates should refer specific questions through their operational chain of command for resolution to ensure that there are common understandings of the applicability of treaty obligations during military operations. See table 1-2 for a non-exhaustive list of treaties.

Table 1-2. Treaties

Law of armed conflict treaties to which the United States is a party	
Treaty Name	***Reference/Citation***
Washington Convention Regarding the Rights of Neutrals at Sea of October 31, 1854	10 Stat. 1105, TS 300, 11 Bevans 1214
Hague Convention for the Exemption of Hospital Ships in Time of War, from the Payment of all Dues and Taxes Imposed for the Benefit of the State of December 21, 1904	35 Stat. 1854, TS 459, 1 Bevans 430
Hague Convention III of October 18, 1907, Relative to the Opening of Hostilities	36 Stat. 2259, TS 538
Hague Convention IV of October 18, 1907, Respecting the Laws and Customs of War on Land (Hague IV), and the Annex thereto, entitled Regulations Respecting the Laws and Customs of War on Land (HR).	36 Stat. 2277, TS 539, 36 Stat. 2295, TS 539
Hague Convention V of October 18, 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V).	36 Stat. 2310, TS 540
Hague Convention VIII of October 18, 1907, Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII).	36 Stat. 2322, TS 541, 1 Bevans 669
Hague Convention IX of October 18, 1907, Concerning Bombardment by Naval Forces in Time of War (Hague IX).	36 Stat. 2351, TS 542
Hague Convention XI of October 18, 1907, Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI).	36 Stat. 2396, TS 544, 1 Bevans 711
Hague Convention XIII of October 18, 1907, Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII).	36 Stat. 2415, TS 545, 1 Bevans 723

Table 1-2. Treaties (*continued*)

Law of armed conflict treaties to which the United States is a party (continued)	
Treaty Name	***Reference/Citation***
Procès-Verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of April 22, 1930 (London Protocol).	3 Bevans 298
Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments of April 15, 1935	49 Stat. 3267, TS 899, 3 Bevans 254, 167 LNTS 279 (Roerich Pact)
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (GWS).	6 UST 3114, T.I.A.S. 3362, 75 UNTS 31
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (GWS Sea).	6 UST 3217, T.I.A.S. 3363, 75 UNTS 85
Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GPW).	6 UST 3216, T.I.A.S. 3364, 75 UNTS 135
Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (GC).	6 UST 3516, T.I.A.S. 3365, 75 UNTS 287
Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (1954 Hague Cultural Property Convention).	249 UNTS 240
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of October 10, 1980, its Protocols I, II, III, IV, and V, its Amended Protocol II, and its extended scope of application (CCW).	1342 UNTS 137
Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict, May 25, 2000	Optional Protocol on Children in Armed Conflict
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), December 8, 2005	AP III
Arms control agreements to which the United States is a party that are of direct relevance to the law of armed conflict	
Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of June 17, 1925 (1925 Geneva Gas Protocol)	26 UST 571, T.I.A.S. 8061, 94 LNTS 65
Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of April 10, 1972	26 UST 583, T.I.A.S. 8062, 1015 UNTS 163 (BWC)
Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of May 18, 1977	31 UST 333, TIAS 9614 (ENMOD Convention)
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of January 13, 1993	CWC
Law of armed conflict treaties signed but not ratified by the United States	
Protocol (I) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts of June 8, 1977	AP I
Protocol (II) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of June 8, 1977	AP II

Table 1-2. Treaties (*continued*)

Law of armed conflict or relevant arms control treaties or documents of mainly historical value	
Treaty Name	***Reference/Citation***
Law of armed conflict or relevant arms control treaties to which the United States has neither signed nor ratified	
Hague Declaration (IV, 3) Concerning Expanding Bullets of July 29, 1899	187 Consol. T.S. 459
Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities of October 18, 1907	205 Consol. T.S. 305
Hague Convention VII Relating to the Conversion of Merchant Ships into Warships of October 18, 1907	205 Consol. T.S. 319
First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954	
Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction of September 18, 1997	
Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of March 26, 1999	
Convention on Cluster Munitions of May 30, 2008	
Rome Statute of the International Criminal Court of July 17, 1998 (The United States originally signed the Rome Statute on December 31, 2000, but effectively withdrew its signature in May 2002).	Rome Statute
St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight of December 11, 1868	1868 St. Petersburg Declaration
Hague Declaration IV, 1 to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other Methods of a Similar Nature of July 29, 1899	32 Stat. 1839, 1 Bevans 270
Hague Declaration IV, 2 Concerning Asphyxiating Gases of July 29, 1899	187 Consol. T.S. 453
Hague Convention II with Respect to the Laws and Customs of War on Land, with Annex of Regulations of July 29, 1899	32 Stat. 1803, TS 403, 1 Bevans 247 (1899 Hague II)
Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of October 18, 1907	36 Stat. 2371, 205 Consol. T.S. 359
Hague Declaration XIV Prohibiting the Discharge of Projectiles and Explosives from Balloons of October 18, 1907	36 Stat. 2439, TS 546
Washington Treaty Relating to the Use of Submarines and Noxious Gases in Warfare of February 6, 1922	1922 Washington Treaty
Hague Rules of Air Warfare of February 17, 1923	1923 Hague Air Rules
Geneva Convention Amelioration of the Condition of the Wounded and Sick of Armies in the Field of July 27, 1929	47 Stat. 2074; Treaty Series 847 (1929 GWS)
Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929	47 Stat. 2021; Treaty Series 846 (1929 GPW)

AP Additional Protocol Consol. T.S. Consolidated Treaty Service LNTS League of Nations Treaty Service Stat United States Statutes at Large TIAS Treaties and Other International Acts Series TS Treaty Series UNTS United Nations Treaty Series

ADDITIONAL PROTOCOL I

1-99. Additional Protocol I is a significant LOAC treaty that the United States has not ratified. Adopted in 1977, Additional Protocol I contains rules on the conduct of hostilities during international armed conflict. The United States signed Additional Protocol I in 1977 but decided not to ratify it. On January 29, 1987, President Reagan informed the Senate he would not submit Additional Protocol I for the Senate's advice and consent to ratification. Although the United States expressed that Additional Protocol I "is fundamentally

and irreconcilably flawed" and there were major objections to certain provisions of Additional Protocol I (for example, arts. 1(4), 43(1), 44(3), among others), President Reagan also noted "this agreement has certain meritorious elements," and the United States would support "the positive provisions of Protocol I that could be of real humanitarian benefit if generally observed by parties to international armed conflicts." Letter of Transmittal for Additional Protocol II, President Ronald W. Reagan, to the Senate of the United States, 23 Weekly Compilation of Presidential Documents, 91 (Jan. 29, 1987) (quoting a passage in the letter addressing AP I). Consistent with this approach, for example, the Obama Administration announced, "[a]lthough the Administration continues to have significant concerns with Additional Protocol I," the United States "choose[s] out of a sense of legal obligation to treat the principles set forth in Article 75 [of AP I] as applicable to any individual it detains in an international armed conflict[.]" New Actions on Guantanamo and Detainee Policy Fact Sheet, March 2011. http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy.

1-100. While the United States is not bound by Additional Protocol I, U.S. practice is consistent with much of the protocol and many of its provisions support principles that the United States espouses. Further, U.S. Armed Forces have often fought as a multinational partner in armed conflicts alongside countries who are parties to Additional Protocol I. In those conflicts, U.S. military forces, as a matter of practice, have acted consistent with many of its provisions. In addition, later treaties to which the United States is a party have incorporated some Additional Protocol I provisions. For example, Additional Protocol I's definition of military objective is essentially the same as the definition in CCW protocols. (Compare AP I art. 52(2) with CCW Amended Protocol II art. 2(6) and CCW Protocol III art. 1(3)). This publication references AP I provisions, some of which are consistent with U.S. practice. Unless explicitly noted, no determinations are made about whether any of these provisions reflect customary international law. For more information about DOD views with regard to particular AP I provisions, judge advocates should refer to the DOD Law of War Manual (DOD Law of War Manual, 19.20.1).

CUSTOMARY INTERNATIONAL LAW

1-101. Customary international law results from a general and consistent practice of States followed from a sense of legal obligation (*opinio juris*). Unlike a treaty provision, which is readily accessible in an identifiable document that sets forth an agreed-upon, codified rule, it can be difficult to identify and assess evidence of State practice and *opinio juris* when seeking to determine whether State actions in a particular area have resulted in a rule of customary international law. As with issues of treaty applicability and interpretation, questions on customary international law should be referred to judge advocates, and judge advocates should refer specific questions through their operational chain of command for resolution to ensure that there are common understandings of the customary international law requirements during military operations.

1-102. Customary law often may be ascertained using subsidiary means, such as judicial decisions, official statements by governments, and the teachings of the most highly qualified publicists of various nations. Discretion is necessary in weighing sources, however, as some sources are more reliable than others.

1-103. The customary LOAC applies to all cases of declared war or any other armed conflict, even if a party to the conflict does not recognize the state of war. The customary LOAC also applies to all cases of occupation of foreign territory by the exercise of armed force, even if the occupation meets with no armed resistance. It is also important to understand that customary international law applicable in an international armed conflict may, in certain respects, be different from customary international law applicable in a non-international law armed conflict.

THE LAW OF ARMED CONFLICT AS U.S. LAW

1-104. Army and Marine Corps personnel should treat and observe all treaties in force for the United States as federal law. Similarly, Army and Marine Corps personnel should treat and observe customary LOAC as part of U.S. law.

PROTECTING POWERS AND HUMANITARIAN ORGANIZATIONS

1-105. LOAC contemplates ***protecting powers***, **which are neutral or non-belligerent States having humanitarian roles in armed conflict**. The Geneva Conventions of 1949 specifically provide for protecting powers and contemplate the activities of humanitarian organizations.

PROTECTING POWERS

1-106. The Geneva Conventions of 1949 contain certain common provisions regarding the safeguarding of the interests of belligerents by nations designated as "Protecting Powers" (GWS art. 8; GWS Sea art. 8; GPW art. 8; GC art. 9).

APPOINTMENT

1-107. The appointment of a protecting power is a decision made by authorities at the national level. This appointment requires agreement between the belligerent States. The protecting power should be a neutral or non-belligerent with respect to the conflict. The 1949 Geneva Conventions contemplate that when appointment of a protecting power is not possible, States will use the International Committee of the Red Cross (ICRC) or other impartial humanitarian organizations to assume the humanitarian functions performed by a protecting power (GWS art. 10; GWS Sea art. 10; GPW art. 10; GC art. 11). However, protecting powers are rarely appointed specifically for the purposes of implementing the Geneva Conventions, and the ICRC has often performed the humanitarian functions of a protecting power under the 1949 Geneva Conventions.

ACTIVITIES

1-108. A protecting power assists and verifies a belligerent's compliance with the 1949 Geneva Conventions, including with respect to detention. For example, delegates of the protecting power visit interned persons and hear concerns that they raise. A protecting power also facilitates communication between opposing belligerents regarding treaty implementation (GPW art. 11). The protecting power's activities are conducted with the consent of the State on whose territory it serves and the State whose facilities it visits. In addition, the protecting power must ensure that its delegation does not exceed its humanitarian responsibilities and takes into account the imperative necessities of security of the State wherein it carries out its duties (GWS art. 8; GWS Sea art. 8; GPW art. 8; GC art. 9).

RESTRICTION ON REPRESENTATIVES OF THE PROTECTING POWERS

1-109. A belligerent may impose legitimate security restrictions on the activities of the delegates or representatives of the protecting powers working in its territories or facilities. However, belligerents may only restrict the activities of the representatives or delegates of the protecting powers "as an exceptional and temporary measure when this is rendered necessary by imperative military necessities" (GWS art. 8; GWS Sea art. 8; GPW art. 126; GC art. 143). For example, a commander may postpone a visit by protecting power representatives to a POW camp for security or humanitarian reasons, such as tactical movement of its own forces, or to protect protecting power personnel from explosive remnants of war being cleared from recent military operations along the route to the POW camp.

INTERNATIONAL COMMITTEE OF THE RED CROSS AND OTHER IMPARTIAL HUMANITARIAN ORGANIZATIONS

1-110. The 1949 Geneva Conventions contemplate that the ICRC and other impartial humanitarian organizations may, subject to the consent of the parties to the conflict concerned, provide humanitarian aid and seek to ensure the protection of war victims in armed conflict (GWS art. 9; GWS Sea art. 9; GPW art. 9; GC art. 10).

IMPARTIAL

1-111. The humanitarian organization must remain impartial; impartiality distinguishes these organizations from humanitarian organizations that have an allegiance to a party to the conflict (such as the American Red

Cross, which is a voluntary aid society under GWS art. 26). Impartial humanitarian organizations must also act within the terms of their humanitarian mission. In addition, these organizations must refrain from acts harmful to either side, such as direct participation in the conflict. Performing their humanitarian function is not direct participation, however, even if it assists one side or the other by providing medical relief.

ACCESS

1-112. States may control access to their territory, and belligerents may control access to their military operations. The entry of the ICRC or other non-governmental organizations into a State's sovereign territory, or into a theater of military operations, is subject to the consent of relevant States and exceptions for imperative military necessity (GWS art. 9; GWS Sea art. 9; GPW art. 9, 10; GC art. 10, 11; consider AP I art. 71(1)). States may attach conditions to their consent, including necessary security measures. But commanders have discretion, based on legitimate military reasons, to deny requests from impartial humanitarian organizations for military support, including classified or sensitive information, or dedicated security. Amended CCW Protocol II, for example, provides for protecting humanitarian organization personnel from the effects of mined areas "so far as possible" (CCW Amended Protocol II art. 12).

SPECIAL STATUS OF THE ICRC

1-113. The Geneva Conventions explicitly recognize the special position of the ICRC among impartial humanitarian organizations (GPW art. 125; GC art. 142). Similarly, Congress has specifically authorized—and the President has designated—the ICRC to be extended the same privileges and immunities that are afforded public international organizations in which the United States participates (22 United States Code [USC] § 288f-3). The President has also recognized the role of the ICRC in visiting individuals detained in armed conflict (see Executive Order 13491). The ICRC does important work in visiting detainees, facilitating communication between detainees and their families, organizing relief operations, and undertaking similar humanitarian activities during armed conflict; it also provides confidential reports to the detaining power to facilitate humane treatment of detainees. As a practical matter, good relations with ICRC representatives in the field are essential to conducting detainee operations. In common practice the ICRC fulfills the functions of a central information agency for POWs and civilian internees during armed conflict (GPW art. 123; GC art. 140). In addition, the ICRC often issues policy proposals or non-binding interpretive guidance on a variety of international law issues; but, although sometimes influential, these are not binding on States. In some cases, the United States has not accepted the ICRC's proposals or interpretations and instead expressed opposing views.

END OF HOSTILITIES AND LOAC RULES

1-114. In general, LOAC rules for the conduct of hostilities cease to apply when hostilities have ended. Hostilities end when opposing parties decide to end hostilities and actually do so, that is, when neither the intent-based nor conduct-based tests for when armed conflict exists are met (see paragraphs 1-11 through 1-15). Parties to a conflict often have negotiated peace treaties to end hostilities, while armistice agreements are negotiated merely to suspend hostilities (see generally paragraphs 7-65 to 7-121 [armistices]). In addition, the UN Security Council may require certain steps leading to the end of hostilities (see DOD Law of War Manual, 12.14). In drafting and interpreting agreements to end hostilities, it is important to understand the rules normally applicable to the cessation of hostilities. Agreements for cessation of hostilities may refer to provisions in the Geneva Conventions or other LOAC instruments. These agreements may modify or supplement the rules normally applicable to the cessation of hostilities, for example, by specifying precisely when a legal obligation is triggered or satisfied.

1-115. Under LOAC, certain duties that have arisen during hostilities may continue after hostilities have ended. For example, POWs are protected from the moment of capture until their final release and repatriation (GPW art. 5). Also, duties under occupation law may continue after hostilities have ended (GC art. 6).

1-116. Certain obligations are triggered at the end of hostilities. For example, the end of hostilities triggers obligations regarding the marking of minefields, demining, or clearance of unexploded ordnance (see DoD Law of War Manual, 6.12.12 and 6.20.5). In addition, detainees, in general, must be released and returned to the party to the conflict to which they belong (see GPW art. 118; GC art. 133).

HUMAN RIGHTS LAW

1-117. Human rights treaties address primarily the obligations of governments with respect to the rights of individuals, including their own nationals, within its territory and subject to its jurisdiction. For example, governments must refrain from subjecting individuals to arbitrary detention, to arbitrary deprivation of life, or to torture or cruel, inhuman, or degrading treatment or punishment. As a general matter, human rights treaties have been described as primarily applicable to the relationship between a State and individuals in peacetime. Some human rights treaties provide for derogation from certain provisions in emergency situations, as defined within the treaty. Law of war treaties have been described as chiefly concerned with the conditions particular to armed conflict and the relationship between a State and nationals of the enemy State. Law of war treaties generally do not provide for derogation because necessity is not a basis for derogating from law of war rules.

1-118. LOAC and human rights treaties contain many provisions that complement one another and are in many respects mutually reinforcing. In some circumstances, the rules in LOAC and the rules in human rights treaties law appear to conflict. Many of these apparent conflicts are resolved by the principle that LOAC is *lex specialis* during situations of armed conflict and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. For example, the right to challenge the lawfulness of an arrest before a court provided in the International Covenant on Civil and Political Rights (ICCPR) in Article 9 would appear to conflict with the generally recognized authority under LOAC to detain certain persons without judicial process or criminal charge. However, the United States has understood Article 9 of the ICCPR not to affect a State's authority to detain combatants until the end of hostilities as permitted by the GPW.

1-119. A situation of armed conflict does not automatically suspend nor does LOAC automatically displace the application of all international human rights obligations. For example, although the UN Convention Against Torture was not intended to supersede the prohibitions against torture already contained in customary international law and LOAC remains the controlling body of law in armed conflict, a time of war, however, does not suspend the operation of the Convention Against Torture. Furthermore, during armed conflict, human rights treaties would clearly be controlling with respect to matters that are within their scope of application that are not addressed by LOAC. For example, a time of war does not suspend the operation of the ICCPR with respect to matters within its scope of application. Participation in armed conflict generally would not excuse a State Party to the ICCPR from respecting and ensuring the right and opportunity of every citizen to vote and to be elected at genuine periodic elections, except when derogated in times of public emergency that threatens the life of the nation and the existence of which is officially proclaimed (see ICCPR art. 4). Finally, in conducting operations with coalition partners, it may be important to consider that some States may have different perspectives on the applicability of obligations under human rights treaties to particular situations. Such differences may result from different legal interpretations or from the fact that the other State is a Party to different human rights treaties than the United States. For example, the European Court of Human Rights – as well as some European States – have construed certain obligations under the European Convention on Human Rights (ECHR) as applicable to their military forces abroad during occupation.

TRAINING THE LAW OF ARMED CONFLICT

1-120. The Geneva Conventions require State Parties "to respect and to ensure respect" for the Conventions (Common Article 1 to GWS, GWS Sea, GPW and GC). The Geneva Conventions also require dissemination, training, and study of the Conventions by the military forces and the civilian population (GWS art. 47; GWS Sea art. 48; GPW art. 127; GC art. 144). Military or civilian personnel responsible for persons protected by the conventions should receive instruction commensurate with their duties and responsibilities and have copies of the appropriate conventions available to them (see, for example, GPW art. 127).

Chapter 2

Conduct of Hostilities

This chapter addresses application of the basic LOAC principles of military necessity, humanity, distinction, proportionality, and honor on the battlefield. Among other things, it sets forth LOAC rules on the means and methods of warfare, targeting, deception, perfidy, general rules related to the conduct of hostilities, and the process to ensure the legality of U.S. weapons, weapon systems, and munitions.

PRACTICAL GUIDANCE FOR ADHERING TO LOAC

2-1. Soldiers and Marines must comply with LOAC, but they are not expected to be legal experts. They should refer LOAC questions to judge advocates. Questions that arise during military operations that cannot be resolved at lower levels should be referred through the operational chain of command for resolution (see DOD Law of War Manual, 18.3.1.2). In an armed conflict the Parties' right to adopt means of injuring the enemy is not unlimited (HR art. 22; consider AP I art. 35(1)). LOAC regulates the conduct of hostilities through principles and rules concerning the means and methods of warfare. The terms means of warfare and methods of warfare are not synonymous. In general, means of warfare refers to weapons or devices used to conduct warfare, while methods of warfare refer to how warfare is conducted.

2-2. Soldiers and Marines should rely on training and doctrine as LOAC is fundamentally consistent with military doctrine that is the basis for effective military operations. For example, the legal principle of proportionality is consistent with the military concept of economy of force.

2-3. In U.S. military operations, Rules of Engagement (ROE) are generally reviewed by judge advocates for consistency with LOAC, and ROE often impose greater restrictions than LOAC. Conforming to ROE will therefore assist Soldiers and Marines in LOAC compliance. Under the Standing Rules of Engagement, "[u]nit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent" (CJCSI 3121.01B). LOAC does not waive this inherent right of unit self-defense.

DISTINCTION BETWEEN MEANS AND METHODS OF WARFARE

2-4. In an armed conflict the right of parties to a conflict to choose means of injuring the enemy is not unlimited (HR art. 22; consider AP I art. 35(1)). LOAC regulates the conduct of hostilities through principles and rules concerning the means and methods of warfare. The terms "means of warfare" and "methods of warfare" are not synonymous. In general, "means of warfare" refer to weapons or devices used to conduct warfare, while "methods of warfare" refer to how warfare is conducted.

2-5. For example, an analysis of a means of warfare might consider the legality of an artillery projectile; that is, the way in which the projectile is designed to kill or injure enemy combatants. Conversely, a method of warfare analysis might consider the way in which the artillery projectile may be employed, particularly where employment may have an adverse effect on the civilian population.

PROTECTION OF CIVILIANS

2-6. A fundamental objective of LOAC is to protect civilians—including individuals (if not taking a direct part in hostilities) and the general population—from the harmful effects of hostilities. In general, civilians may not be the object of direct (intentional) attack (DOD Law of War Manual, 5.5; consider AP I art. 51(2)). LOAC attempts to protect civilians by requiring combatants to apply the principles of distinction and proportionality, including by taking feasible precautions to avoid incidental harm to civilians when making

decisions during armed conflicts. Commanders and their staffs utilize the risk management process to make informed decisions. Commanders should consider risk to mission, resources, and civilians.

PROTECTION OF CIVILIANS: A SHARED RESPONSIBILITY

2-7. The protection of civilians is a responsibility shared among all belligerents. Parties conducting attacks have two duties in particular: First, they must take feasible precautions to reduce the risk of harm to protected persons and objects. Second, they must refrain from attacks in which the expected harm to civilians and civilian objects would be excessive in relation to the concrete and direct military advantage expected to be gained (DOD Law of War Manual, 5.11, 5.12, and 5.14; consider AP I, art. 57(2)). Military commanders and other officials responsible for the safety of the civilian population have responsibilities as well. They must take feasible precautions to reduce the risk of harm to protected persons and objects for which they are responsible. Feasible precautions are those precautions that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations (CCW Protocol III art. 1, para. 5).

2-8. Military commanders attacking enemy military objectives must make reasonable efforts to reduce the risk of harm to the civilian population when conducting an attack. Military commanders do this by taking feasible precautions to reduce risk to protected persons and object. Military commanders must refrain from attacks that are disproportionate (where the expected harm to civilians and civilian objects would be excessive in relation to the concrete and direct military advantage expected to be gained). Military commanders may consider all relevant facts and circumstances, including the risk to forces under their command, the integrity of their command, and their mission in weighing the decision to use military force in any situation when military forces and civilians are intermingled.

2-9. Military commanders and other officials responsible for the safety of the civilian population must, to the extent feasible, separate the civilian population from military objectives to protect the civilian population from the effects of combat. Examples of how to do this may include evacuating civilians from known danger areas and constructing and using air raid shelters (DOD Law of War manual, 5.14; consider AP I art. 58).

2-10. The civilian population and individual civilians must not be used to shield military objectives or operations from attack (DOD Law of War Manual, 5.16; consider AP I art. 51(7)). The party controlling civilians and civilian objects has the primary responsibility for the protection of civilians and civilian objects, as it has the greater opportunity to minimize risk of harm to civilians. Civilians may also share in the responsibility to take precautions for their own protection. Nonetheless, the military commander engaged in the attack of that military objective remains obligated to take feasible precautions to reduce the risk of harm to protected persons and objects.

CIVILIANS TAKING A DIRECT PART IN HOSTILITIES

2-11. LOAC does not expressly prohibit civilians from taking a direct part in hostilities, but it does provide that civilians who do take a direct part in hostilities forfeit protection from being directly attacked (DOD Law of War Manual, 5.8; consider AP I art. 51(3); AP II, art. 13(3)). Civilians who have ceased to take a direct part in hostilities may not be made the object of attack, but could still be subject to detention for their previous hostile acts. Such civilians generally do not enjoy the combatant's privilege—that is, they do not have combatant immunity, and, if captured, they may be prosecuted for their belligerent acts under the domestic law of the capturing State.

2-12. Civilians engaging in belligerent acts not only forfeit their immunity from direct attack, they also make it more difficult for military personnel to apply the principle of distinction and thereby can put other civilians at greater risk.

2-13. In the context of when civilians may be directly targeted, neither treaty law nor customary international law provides a definition of the phrase "direct part in hostilities." At a minimum, it includes actions that are, by their very nature and purpose, intended to cause actual harm to the enemy. Taking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations. Taking a direct part in hostilities, however, does not encompass the general support that

members of the civilian population provide to their State's war effort, such as working in a munitions factory far from the battlefield or buying war bonds.

2-14. Whether an act constitutes taking a direct part in hostilities is likely to depend on the context. The following considerations may be relevant (see DOD Law of War Manual, 5.8.3):

- The degree to which the act causes harm to the opposing party's persons or objects, such as:
  - Whether the act is the proximate or "but for" cause of death, injury, or damage to persons or objects belonging to the opposing party; or
  - The degree to which the act is likely to adversely affect the military operations or military capacity of the opposing party.
- The degree to which the act is connected to the hostilities, such as:
  - The degree to which the act is temporally or geographically near the fighting; or
  - The degree to which the act is connected to military operations.
- The specific purpose underlying the act, such as:
  - Whether the activity is intended to advance the interests of one party to the conflict to the detriment of the opposing party.
- The military significance of the activity to the party's war effort, such as:
  - The degree to which the act contributes to a party's military action against the opposing party;
  - Whether the act is of comparable or greater value to a party's war effort than acts that are commonly regarded as taking a direct part in hostilities; or
  - Whether the act poses a significant threat to the opposing party.
- The degree to which the activity is viewed inherently or traditionally as a military one, such as:
  - Whether the activity involves making decisions on the conduct of hostilities, such as determining the use or application of combat power; or
  - Whether the act is traditionally performed by military forces in conducting military operations against the enemy (including combat, combat support, and combat service support functions of military forces).

EXAMPLES OF TAKING A DIRECT PART IN HOSTILITIES

2-15. The following acts are generally considered taking a direct part in hostilities, which deprives civilians who perform them of the protection against direct attack. These examples are illustrative and not exhaustive (See DOD Law of War Manual, 5.8.3.1).

- Taking up or bearing arms against the opposing party, or otherwise personally trying to kill, injure, or capture personnel or damage materiel belonging to the opposing party, such as:
  - Defending military objectives against enemy attack (for example, manning an antiaircraft gun or acting as a bodyguard for an enemy combatant);
  - Acting as a member of a weapons crew;
  - Engaging in an act of sabotage; or
  - Emplacing mines or improvised explosive devices.
- Preparing for, moving to, and exfiltrating from combat operations.
- Planning, authorizing, or implementing a combat operation against the opposing party, even if that person does not personally use weapons or otherwise employ destructive force in connection with the operation.
- Providing or relaying information of immediate use in combat operations, such as:
  - Acting as an artillery spotter or member of a ground observer corps or otherwise relaying information to be used to direct an airstrike or mortar attack; and
  - Acting as a guide or lookout for combatants conducting military operations.
- Supplying weapons and ammunition, whether to conventional armed forces or armed non-state groups, or assembling weapons (such as improvised explosive devices) in close geographic or temporal proximity to their use, such as:

- Delivering ammunition to the front lines; or
- Outfitting and preparing a suicide bomber to conduct an attack.

EXAMPLES OF ACTS NOT CONSIDERED TAKING A DIRECT PART IN HOSTILITIES

2-16. The following acts are generally not considered taking a direct part in hostilities that would deprive civilians who perform them of protection against direct attack. These examples are illustrative and not exhaustive.

- Expressing mere sympathy or moral support for a party's cause;
- Making general contributions to a State's war effort (for example, buying war bonds or paying taxes to the government that will ultimately be used to fund the armed forces);
- Providing police services (for example, police officers maintaining public order against common criminals during armed conflict);
- Engaging in independent journalism or public advocacy (for example, opinion journalists writing columns supporting or criticizing a State's war effort);
- Working in a munitions factory or other factory supplying weapons, materiel, or other goods useful to the armed forces of a State but not in geographic or temporal proximity to military operations; or
- Providing medical care or other impartial humanitarian assistance.

Although performing these activities does not make a person liable to direct attack, performing these activities does not immunize a person from attack if that person through other activity takes a direct part in hostilities or is otherwise lawfully made the object of attack (see DOD Law of War Manual, 5.8.3.2).

DURATION OF LIABILITY TO ATTACK

2-17. Civilians who have taken a direct part in hostilities must not be directly attacked after they have permanently ceased their participation because the military necessity for attacking them has passed. The assessment of whether a person has permanently ceased direct participation in hostilities must be based on a good faith assessment of the available information. For example, a civilian might engage in an isolated instance of taking a direct part in hostilities. This isolated instance is likely to involve multiple acts because taking a direct part in hostilities includes deploying or moving to a position of attack and exfiltrating from an attack. If this participation, however, was an isolated instance that will not be repeated, then no military necessity for attacking that person exists after that individual has ceased taking a direct part in hostilities. Accordingly, the civilian must not be made the object of attack after he or she has ceased taking a direct part in hostilities. Other legal consequences from this participation may continue, however. For example, civilians often may be detained, interned, or prosecuted because of these actions.

2-18. LOAC, as applied by the United States, gives no "revolving door" protection; that is the off-and-on protection in a case where a civilian repeatedly forfeits and regains his or her protection from being made the object of attack in the time period between instances of taking a direct part in hostilities (DOD Law of War Manual, 5.8.4.2). Thus, civilians who are assessed to be engaged in a pattern of taking a direct part in hostilities may be made the object of attack without waiting for them to begin their next instance of taking a direct part in hostilities. A "revolving door" of protection would place these civilians who take a direct part in hostilities on a better footing than lawful combatants, who may be made the object of attack even when not taking a direct part in hostilities. The United States has strongly objected to efforts to give the so-called "farmer by day, guerilla by night" greater protections than those afforded to lawful combatants. Adoption of such a rule would risk diminishing the protection of the civilian population.

CIVILIANS WHO TAKE A DIRECT PART IN HOSTILITIES AND THE LAW OF ARMED CONFLICT

2-19. Although the concept of direct participation in hostilities may be discussed in contexts besides targeting, such as in the context of criminal liability or detention, "taking a direct part in hostilities" for targeting purposes often differs significantly from the standards used for assessing whether a civilian may be detained or prosecuted. For example, domestic criminal statutes prohibiting support to enemy armed groups

generally criminalize a much broader range of acts than those acts constituting "direct participation in hostilities" for targeting purposes.

HUMAN SHIELDS

2-20. An adversary's use of human shields can present complex moral, ethical, legal, and policy considerations. The use of civilians as human shields violates the rule that protected persons may not be used to shield, favor, or impede military operations (see DOD Law of War Manual, 5.16; consider AP I art. 51(7)). The party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury, although the attacker may share this responsibility if they fail to take feasible precautions in conducting its attack. If civilians are used as human shields, provided they are not taking a direct part in hostilities, they must be considered as civilians in determining whether a planned attack would be excessive, and feasible precautions must be taken to reduce the risk of harm to them. However, the enemy use of voluntary human shields may be considered as a factor in assessing the legality of an attack. Based on the facts and circumstances of a particular case, the commander may determine that person characterized as voluntary human shields are taking a direct part in hostilities (see DOD Law of War Manual, 5.12.3.4).

2-21. The use of human shields to intentionally shield military objectives should not be understood to prohibit an attack under LOAC. LOAC should not be interpreted in a way that would perversely encourage the use of human shields and allow violations by the defending force to increase the legal obligations of the attacking force. Policy, practice, or mission-specific rules of engagement may provide additional guidance in this area.

TARGETING AND MILITARY OBJECTIVES

2-22. In armed conflict, one of the most difficult tasks for Soldiers and Marines under LOAC is conducting an attack and making targeting decisions. Parties to a conflict must conduct attacks in accordance with the principles of distinction and proportionality. Accordingly, LOAC authorizes combatants to make military objectives the object of an attack, but prohibits directing an attack against civilians not taking a direct part in hostilities, the civilian population as such, civilian objects, or other protected persons or objects (see DOD Law of War Manual, 5.4.2; consider API arts. 51(2) and 52(1)).

TARGETING

2-23. The LOAC principle of distinction obligates each party to a conflict, in its use of force and conduct of military operations, to distinguish between military objectives on the one hand and the civilian population and other protected persons and civilian objects on the other. The principle of distinction applies to each party to a conflict, whether its armed forces are engaged in offensive or defensive operations.

2-24. The principle of distinction does not guarantee the safety of the civilian population or civilian objects. The risk of injury to civilians or damage to civilian objects increases if either are intermingled with military objectives, whether unintentionally or intentionally.

2-25. Military operations may range from operations occurring in regions nearly devoid of civilians or civilian objects (such as deserts) to operations in urban areas, where members of the civilian population are likely to be found and the presence of civilian objects is certain. Similarly, an area normally free of civilians suddenly may become heavily populated due to an influx of displaced persons who are fleeing the effects of military operations elsewhere.

2-26. Military commanders must be prepared for the possibility of an intermingling of civilians with military objectives or that some military objectives (in particular, roads and bridges) are objects commonly used by both the civilian population and military forces. Neither the mere presence of civilians nor intermingling or common use renders a military objective immune from attack. An object used concurrently for civilian and military purposes is liable to attack if it is a military objective (see paragraph 2-36 on "Dual-Use Objects" and paragraphs 2-29 through 2-57 on "Military Objectives" generally). Nor does intermingling or concurrent use preclude otherwise lawful military options under consideration by military planners. Intermingling or concurrent use are factors, however, that military commanders and their staffs must consider in planning and executing military operations through the LOAC principle of proportionality.

2-27. Military commanders based or operating in urban terrain, or in the vicinity of the civilian population, should take reasonable steps to separate military units from the civilian population and civilian objects (see DOD Law of War Manual, 5.14; consider AP I art. 58). This duty does not preclude positioning, locating, or billeting military forces in urban terrain or other areas where civilians are present when the command has legitimate military reasons for doing so. For example, troops may be housed in populated areas for health and sanitation purposes, and to take advantage of pre-existing communications facilities.

2-28. In addition, an urban area may become a military objective if it has become a manmade obstacle to impede or prevent enemy forces' maneuver or advance. Civilian objects that combatants occupy or utilize can become military objectives, and belligerent forces may target them lawfully while they are military objectives. LOAC, however, prohibits positioning military forces among the civilian population when military necessity does not warrant the increased risk to the civilian population or this positioning is undertaken solely for the purpose of utilizing the civilian population to shield military forces from attack.

MILITARY OBJECTIVES

2-29. An attack may be directed only against a military objective (see DOD Law of War Manual, 5.5). A ***military objective*** **refers to certain persons and objects during hostilities which, by their nature, location, purpose, or use, make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage**. Military objectives may be attacked wherever they are located outside of neutral territory, subject to other LOAC considerations, such as proportionality. Certain classes of persons and objects are categorically recognized as military objectives, provided the persons are not hors de combat. Apart from these classes that are categorically military objectives, other objects are assessed as to whether they meet the definition of "military objective" (DOD Law of War Manual, 5.6).

2-30. Certain classes of persons are military objectives and may be made the object of attack. These classes of persons include: combatants, such as personnel in military ground, air, and naval units, or unprivileged belligerents, provided they are not hors de combat; and civilians taking a direct part in hostilities. The following classes of persons are not military objectives: military medical and religious personnel, unless they commit acts harmful to the enemy; military medical units, unless they have forfeited their protected status; combatants placed hors de combat; and parlementaires (see paragraphs 7-17 to 7-40 on parlementaires).

2-31. "Military objective" is a treaty term synonymous with an object that constitutes a "lawful target." A military objective, in so far as objects are concerned, is defined in certain treaties as "any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage" (CCW Amended Protocol II art. 2.6; CCW Protocol III art. 1.3; consider AP I, art. 52(2)). The components of this definition are examined more closely in paragraphs 2-39 through 2-57. This definition may be viewed as a way of evaluating whether military necessity exists to attack an object. It may also be applied outside the context of conducting attacks to assess whether the seizure or destruction of an object is justified by military necessity.

2-32. Military objectives may be attacked in any manner consistent with LOAC. The definition sets forth objective, simple criteria to consider whether an object is a lawful target that may be seized or attacked when military necessity exists. By its language, the treaty definition of military objective is concerned only with objects, not individuals. This definition of military objective is relevant and applicable to objects other than military bases and equipment, which are per se military objectives. Military bases and equipment (other than military medical and religious facilities) may be attacked at any time, wherever located, as lawful targets, without analyzing whether they are military objectives (subject to targeting precautions to protect civilians not taking a direct part in hostilities and civilian objects).

2-33. Likewise, a combatant (such as a member of a military ground, air, or naval unit, or an unprivileged belligerent) is a military objective who may be attacked at any time (subject to targeting precautions to protect civilians not taking a direct part in hostilities and civilian objects), wherever located, regardless of the activity in which he or she is engaged at the time, provided he or she is not hors de combat. Civilians taking a direct part in hostilities are also military objectives and similarly may be made the object of attack.

2-34. As seen in the list of traditional military objectives in paragraph 2-56, military objectives are not limited to military bases, units, equipment, or forces, but can include other objects that make an effective contribution to an opposing party's ability to wage war.

2-35. The term "military target" is a more limited term, as well as redundant, and should not be used. Moreover, the term "civilian target" is an oxymoron and should not be used inasmuch as a civilian object is not a military objective and therefore is immune from intentional attack. If sufficient military necessity exists to justify attacking an object because that objects meets the definition of military objective, then imperative military necessity would also exist to justify seizing or destroying that object by measures short of attack (see paragraphs 2-189 through 2-194).

Dual-Use Object

2-36. Sometimes, "dual-use" is used to describe objects that are used by both the armed forces and the civilian population, such as power stations or communications facilities. From the legal perspective, however, such objects are either military objectives or they are not; there is no intermediate legal category of "dual use." If an object is a military objective, it is not a civilian object and may be made the object of attack. When the attack on a military objective will impact the civilian population or civilian objects, commanders must conduct a proportionality analysis (see DOD Law of War Manual, 5.6.1.2).

Objectives That Are Not Enemy Military Bases or Equipment

2-37. Insofar as objects are concerned, if the objective is not an enemy military base, military equipment, other type of object that is categorically recognized as a military object, such as military facilities or objects containing military objectives, applying the definition of military objective requires a two-part test. Both parts must apply before an object that is normally a civilian object may be considered a military objective: (1) that the object somehow "makes an effective contribution to military action"; and (2) that attacking the object, in the circumstances ruling at the time, offers a definite military advantage (see DOD Law of War Manual, 5.6.5).

2-38. Generally, the reason why the object meets the first part of the definition also satisfies the second part of the definition. In other words, attacking the object in the circumstances ruling at the time would offer a definite military advantage because it could preclude the object from effectively contributing to the enemy's military action. The two parts are not necessarily connected, however, because the concept of definite military advantage is broader than simply denying the adversary the benefit of an object's effective contribution to its military operations. These broader aspects of "military advantage" also may be relevant in evaluating whether an attack is expected to be excessive under the principle of proportionality.

By Its Nature, Location, Purpose, or Use Makes an Effective Contribution to Military Action

2-39. The first part of the test is whether the object, by its nature, location, purpose, or use makes an effective contribution to the enemy's military action.

2-40. Nature, Location, Purpose, or Use. The nature, location, purpose, or use of the object may contribute to the object making an effective contribution to the enemy's military action. The issue is whether, in total, an effective contribution is made; one factor alone need not provide the effective contribution. In addition, nature, location, purpose, or use need not be viewed as mutually exclusive concepts; rather, these concepts may be understood to overlap.

2-41. Nature refers to the type of object and may be understood to refer to objects that are per se military objectives. For example, military equipment and facilities, by their nature, make an effective contribution to military action. On the other hand, "nature" also may be understood to refer to objects that because of their intrinsic nature may be used for military purposes.

2-42. Location includes areas that are militarily important because they must be captured from or denied to an enemy, or because the enemy must be made to surrender or retreat from them. An area of land, such as a mountain pass, or a like route through or around a natural or manmade obstacle, may be a military objective. A town, village, or city may become a military objective, even if it does not contain military objectives, if its

seizure is necessary (for example, to protect a vital line of communications) or for other legitimate military reasons.

2-43. Use refers to the object's present function. For example, using an otherwise civilian building to billet combatant forces makes the building a military objective. Similarly, using civilian equipment and facilities for military purposes, such as using them as a command and control center or a communications station, would result in such objects becoming military objectives because they provide an effective contribution to the enemy's military action.

2-44. Purpose means the intended or possible use in the future. A decision to classify an object as a military objective does not depend on its present use. The potential or intended future use of an otherwise civilian object for military purposes may make it a military objective. For example, runways at a civilian airport could qualify as military objectives because they may be subject to immediate military use in the event runways at military air bases have been rendered unserviceable or inoperable.

2-45. Makes an Effective Contribution to Military Action. The words "nature, location, purpose, or use" allow for wide discretion, but whether an object is a military objective is subject to qualifications stated later in the definition, that is, it "must make an effective contribution to military action" and its destruction, capture, or neutralization must offer a "definite military advantage." "Effective contribution" and "military advantage" do not have to have a geographical connection between them. Attacks on military objectives in the enemy rear and diversionary attacks away from the area of military operations as such (the "contact zone") are lawful.

2-46. Military action is used in the ordinary sense of the words and is not intended to encompass a limited or specific military operation. Military action has a broad meaning and is understood to mean the general prosecution of the war. To be a military objective does not require that the attack of the object provide immediate tactical or operational gains or that the object make an effective contribution to a specific military operation. Rather, the object's effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient. Although terms such as war fighting, war supporting, and war sustaining are not explicitly reflected in the treaty definition of military objective, the United States has interpreted the military objective definition to include these concepts.

Whose Total or Partial Destruction, Capture, or Neutralization, in the Circumstances Ruling at the Time, Offers a Definite Military Advantage

2-47. In addition to the object making an effective contribution to the adversary's military action, the attack of the object must also, in the circumstances ruling at the time, offer a definite military advantage for the object to be considered a military objective.

2-48. Capture or Neutralization. The definition of military objective incorporates considerations beyond whether an object's destruction is justified. It also incorporates considerations of whether the object's capture or neutralization would offer a military advantage. "Capture" refers to the possibility that seizure during the attack (rather than destruction) would confer a military advantage. For example, a city may be a military objective and thereby captured because of its strategic location. "Neutralization" refers to a military action that denies an object to the enemy without capturing or destroying it. For example, a specific area of land may be neutralized by emplacing landmines on or around it, and thus denying it to the enemy.

2-49. The phrase "in the circumstances ruling at the time" is essential. For example, if enemy forces have taken up position in a building that otherwise would be regarded as a civilian object, such as a school or retail store, the building has become a military objective. The circumstances ruling at the time—that is, the military use of the building—permits its attack. If, however, enemy military forces abandon the building, the change of circumstances precludes its attack if it no longer satisfies the definition of a military objective.

2-50. Definite Military Advantage. "Definite" means a concrete and perceptible military advantage, rather than one that is merely hypothetical or speculative. A military commander may regard this requirement as met in seeking to attack, capture or neutralize objects with a common purpose in order to deny their use to the enemy. An example is the attack of all bridges on lines of communication the enemy is using, or may use as alternate lines of communication, in order to reinforce or resupply the enemy's forces. The advantage need not be immediate. For example, the military advantage in the attack of an individual bridge may not be seen

immediately (particularly if, at the time of the attack, no military traffic is in the area), but can be established by the overall effort to deny the enemy use of bridges in order to isolate enemy military forces on the battlefield.

2-51. Military advantage refers to the advantage anticipated from an attack when considered as a whole, and not only from its isolated or particular parts. Similarly, military advantage is not restricted to immediate tactical gains but may be assessed in the full context of war strategy. It may involve a variety of considerations, including the security of the attacking force. The definite military advantage offered by damaging, destroying, or neutralizing the object may result from denying the enemy the ability to use this object in its military operations (that is, to benefit from the object's effective contribution to the military action). For example, the attack or capture of objects with a common military purpose, such as bridges used or available for use in lines of communication, would offer a definite military advantage.

2-52. The military advantage from an attack is broader than only denying the enemy the benefit of that object's contribution to its military action. For example, in a diversionary attack, the military advantage to be gained from attacking an object would result from diverting the enemy's resources and attention. The military advantage from an attack may involve a variety of other considerations, including improving the security of the attacking force. The military advantage from an attack may result from harm to enemy forces' morale. Diminishing the morale of the civilian population and their support for the war effort does not provide a definite military advantage, but its incidental effect is not illegal.

Doubt as to Status of a Person or Object as a Military Objective

2-53. Attacks may not be launched against a civilian or civilian object based on merely hypothetical or speculative considerations regarding its possible current status as a military objective. In assessing whether a person or object that normally does not have any military purpose or use is a military objective, commanders and other decision-makers must make the decision in good faith based on the information available to them in light of the circumstances ruling at the time (DOD Law of War Manual, 5.4.3.2).

2-54. In the context of conducting attacks, Additional Protocol I reflects a presumption in favor of civilian status in cases of doubt. Article 52(3) of AP I provides that "[i]n case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military actions, it shall be presumed not to be so used." Article 50(1) of AP I provides that "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian." In applying the API rules on "doubt," some Parties to API have interpreted it to mean "substantial doubt" (DOD Law of War Manual, 5.4.3.2). The Department of Defense has expressed it concerns with these AP I articles, as under customary international law no legal presumption of civilian status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases (DOD Law of War Manual, 5.4.3.2). The Army and Marine Corps, as a matter of practice due to operational and policy reasons, generally take a more restrictive view than required under LOAC. In cases of doubt whether a person or object is a military objective, Soldiers and Marines should consider that person or object as a civilian or civilian object.

2-55. Doubt frequently exists in combat, often induced by lawful acts of enemy deception. Although technology has advanced, the ability of military commanders to gain a greater intelligence estimate of "what is [or may be] on the other side of the hill" often is limited, and doubt is seldom removed entirely. Accordingly, a commander will make a measured decision, in good faith based upon information available and the prevailing circumstances ruling at that time.

Persons and Objects Often Regarded as Military Objectives

2-56. Following is a list of persons and objects, including military bases, units, and equipment, that have often been regarded as military objectives. The first two are exclusively military in nature and therefore are always military objectives. The remaining objects may become military objectives if they meet the definition set forth in paragraph 2-31:

- Military ground, air, and naval equipment (other than medical units, equipment, or transport), to include vehicles, ships, weapons, munitions, and supplies.

- Military ground, air, and naval units and army, air, and naval bases (other than medical facilities and POW camps), whether used for training, billeting, or staging, or for offensive or defensive purposes, to include headquarters, command and control centers, defense ministries, or intelligence establishments.
- Facilities used by enemy leaders as headquarters for military operations or otherwise to command military operations. In some cases, enemy leaders themselves may be made the object of attack.
- Communications objects (such as facilities, networks, and equipment), that could be used for command and control of military operations or intelligence gathering.
- Economic objects associated with military operations or with war-supporting or war-sustaining industries, to include power sources and oil refining and distribution facilities and objects associated with petroleum, oil, and lubricant products (including production, transportation, storage, and distribution facilities).
- Transportation objects, to include facilities (for example, port facilities and airfields) and equipment that could be part of lines of communication (for example, highways, railroads, waterways, and bridges connecting military forces with logistics depots and storage areas).
- Geographic areas or features of land that are military significant, to include road networks; known or suspected enemy avenues of approach or withdrawal; mountain passes, hills, defiles, and bridgeheads; and villages, towns, or cities whose seizure or defense is militarily important.

2-57. The following persons and objects are not military objectives and so are protected from being made the object of attack, so long as those protections have not been forfeited:

- Individual civilians and the civilian population as such;
- Military medical personnel and chaplains (see Chapter 4 for rules governing these personnel);
- Individuals who are *hors de combat*;
- Civilian objects or other protected objects, that is, all objects that are not military objectives;
- Medical units, transport, and equipment (see Chapter 4 for rules governing these objects); and
- Undefended villages, towns, and cities (see paragraphs 2-122 through 2-129).

COMBATANTS

2-58. In general, combatants, whether privileged or unprivileged, may be made the object of attack at all times regardless of their activity, provided they have not been placed *hors de combat*.

ARMED FORCES AND GROUPS AND LIABILITY TO BEING MADE THE OBJECT OF ATTACK

2-59. Membership in the armed forces or belonging to armed groups, that is, affiliation with these groups, makes a person liable to being made the object of attack regardless of whether he or she is taking a direct part in hostilities. Moreover, the individual, as an agent of the hostile group, may be assigned a combat role at any time, even if the individual normally performs other functions for the group. Thus, with limited exceptions, combatants may be made the object of attack at all times, regardless of the activities in which they are engaged. For example, enemy combatants who are standing in a mess line, engaging in recreational activities, or sleeping remain the lawful object of attack. Exceptions include personnel who are *hors de combat* (see paragraphs 2-106 through 2-116) and provisions for communication with the enemy and special agreements with the enemy (see Chapter 7).

CATEGORIES OF PERSONS WHO ARE COMBATANTS FOR THE PURPOSE OF ASSESSING THEIR LIABILITY TO ATTACK

2-60. For the purpose of assessing liability to attack, the following categories of persons are enemy combatants who may be made the object of attack based on their affiliation with armed forces or armed groups:

- Members of the armed forces of a State and members of the regular armed forces of a government or authority not recognized, except for full-time medical and religious personnel;
- Members of militia and volunteer corps;

- Participants in a *levée en masse*;
- Persons belonging to non-state armed groups (see paragraphs 2-61 through 2-65); and
- Leaders whose responsibilities include the operational command and control of the armed forces of a State or of a non-State armed group (see paragraphs 2-66 through 2-67).

PERSONS BELONGING TO NON-STATE ARMED GROUPS

2-61. In some cases, formal or direct information may indicate an individual has membership in an armed group (for example, information that an individual has sworn allegiance to the group). This may include—

- Adopting a rank, title, or style of communication;
- Taking an oath of loyalty to the group or the group's leader;
- Wearing a uniform or other clothing, adornments, or body markings that identify members of the group; or
- Possessing documents issued by or belonging to the group identifying the individual as a member, such as an identity card or membership list.

Other Indicia of Membership

2-62. Although in some cases members of non-State armed groups may wear distinctive emblems and devices, in many cases members of these groups seek to conceal their affiliation with that group. In such cases, the following may indicate that a person is a member of a non-State armed group:

- Acting at the direction of the group or within its "command structure";
- Performing a function for the group that is analogous to a function normally performed by a member of a State's armed forces;
- Taking a direct part in hostilities, with the frequency, intensity, and duration of such participation as important factors in assessing the strength of this indicator;
- Accessing facilities, such as safe-houses, training camps, or bases used by the group that outsiders would not be permitted to access;
- Traveling along specific clandestine routes used by those groups; or
- Traveling with members of the group in remote locations or while the group conducts operations.

Functional or Constructive Membership

2-63. Some non-State armed groups might not be organized with a formal command structure, as generally is required for POW status. Such groups may lack a formal distinction between those members and non-members who nonetheless participate in the hostile activities of the group. An individual who is integrated into the group may be deemed to be functionally or constructively part of the group, even if not formally a member of the group. The integration of the individual into the non-State armed group and the inference that the individual shares the group's intention to commit hostile acts distinguishes such an individual from others who are merely sympathetic to the group's goals but have not taken steps to otherwise integrate with the group.

2-64. The following may indicate that an individual is functionally or constructively a member of a non-State armed group:

- Following directions issued by the group or its leaders;
- Taking a direct part in hostilities on behalf of the group on a sufficiently frequent or intensive basis; or
- Performing tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role in the armed forces of a State.

Dissociation or Renunciation

2-65. A person may not be made the object of attack based on affiliation with a non-State armed group if that affiliation clearly has been severed. Relevant factors that may be used in determining when an individual has unambiguously ceased to be a member of a non-State armed group may include:

- Whether the individual has formally ceased to be a member of the group such as by filing relevant paperwork or by otherwise formally renouncing any allegiance to the group;
- Whether concrete and verifiable facts or persuasive indicia demonstrate that the individual has affirmatively returned to peaceful pursuits, such as by participating in a reconciliation program or swearing an oath of loyalty to the government; and
- The amount of time that has passed since the person participated in the activities of the group in question, if coupled with other indicia of dissociation or renunciation.

LEADERS

2-66. Military leaders may be subject to attack on the same basis as members of the armed forces. Leaders of non-State armed groups are subject to attack on the same basis as members of the group. Enemy leaders who are not members of an armed force or armed group (including Heads of State, civilian officials, and political leaders) may be made the object of attack if their responsibilities include the operational command or control of the armed forces or the armed group. For example, as the commander-in-chief of the U.S. armed forces, the President would be a legitimate target in wartime, as is, for example, the prime minister of a constitutional monarchy. Attacks against them would not constitute assassination. In contrast, the reigning monarch of a constitutional monarchy with an essentially ceremonial role in State affairs may not be made the object of attack.

2-67. In addition to leaders who have a role in the operational chain of command, leaders taking a direct part in hostilities also may be made the object of attack. Planning or authorizing a combat operation is an example of taking a direct part in hostilities. As a matter of practice, attacks on the national leadership of an enemy State have often been avoided on the basis of comity and to help ensure that authorities exist with whom peace agreements may be concluded.

PROPORTIONALITY IN CONDUCTING ATTACKS – EXCESSIVE INCIDENTAL HARM AND FEASIBLE PRECAUTIONS

2-68. In accordance with the principle of proportionality, combatants must not exercise the right to engage in attacks against military objectives in an unreasonable or excessive way. Therefore, when conducting an attack, combatants must exercise due regard to reduce the risk of incidental harm to the civilian population and other persons and objects that may not be made the object of attack. In particular, the following rules apply: (1) combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage anticipated to be gained (DOD Law of War Manual, 5.12; consider AP I, art, 51(5)(b)); and (2) combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack (DOD Law of War Manual, 5.11; consider AP I, art. 57).

GENERAL NOTES ON APPLYING PROPORTIONALITY IN CONDUCTING ATTACKS

2-69. In conducting attacks, the principle of proportionality imposes duties that apply when civilians or civilian objects are expected to be harmed from attacks on military objectives. It would not impose obligations intended to reduce the risk of harm to military objectives when civilians or civilian objects are not expected to be harmed.

LOSS OF LIFE, INJURY, AND DAMAGE TO PROPERTY

2-70. In conducting attacks on military objectives, the prohibition on attacks expected to cause excessive incidental harm addresses the expected incidental loss of civilian life, injury to civilians, and damage to civilian property. The expected loss of civilian life, injury to civilians, and damage to civilian objects is generally understood to mean such immediate or direct harms foreseeably resulting from the attack. Lesser forms of harm, such as mere inconveniences or temporary disruptions to civilian life need not be considered in applying the proportionality rule. Similarly, remote harms that could result from the attack do not need to be considered in a proportionality analysis. For example, the death of enemy combatants may cause economic

and emotional harm to their family; such loss would not need to be considered in the proportionality analysis. Similarly, the possibility that munitions might not detonate as intended and might injure civilians much later after the attack would not need to be considered in the attacker's proportionality analysis because the harm is too remote (See DOD Law of War Manual, 5.12.1.2 and 5.12.1.3).

PROPORTIONALITY IN TARGETING—HARM TO BE CONSIDERED

2-71. The principle of proportionality imposes duties that apply to the protection of persons and objects that may not be made the object of attack. Harm to certain categories of persons and objects are not considered in applying the prohibition on attacks expected to cause excessive incidental harm, such as military objectives and military medical and religious personnel and military medical units and facilities.

Incidental Harm—Military Objectives

2-72. The principle of proportionality does not impose an obligation to reduce the risk of harm to military objectives. For example, an attack against an enemy combatant might also injure other enemy combatants who were not the specific targets of the attack. There is no obligation under the principle of proportionality to reduce the likelihood of harm to other enemy combatants or other military objectives, even if such harm was an unintended result of the attack (see DOD Law of War Manual, 5.10.1.1).

Incidental Harm—Military Medical and Religious Personnel

2-73. Military medical units and facilities and medical and religious personnel, due to their presence among or in proximity to combatant elements actually engaged are excluded from the proportionality analysis. These units, facilities and personnel are deemed to have accepted the risk of harm due to their proximity to military operations, but feasible precautions must be taken to reduce the risk of their harm.

2-74. Since it is accepted that the defender may employ these persons to support military operations near or within military objectives, the attacker is not required to assess those persons as incidental harm in its proportionality analysis. These persons need not be considered as incidental harm in a proportionality analysis because the obligation of the attacker is related to the corresponding obligation of the defender to take feasible precautions to reduce incidental harm. If these persons could have the effect of prohibiting attacks by the attacking force, then the defending force that added such persons to its forces would be unlawfully using the presence of such persons to shield its operations or its military objectives from attack. If that were the case, the defending force would then have a corresponding obligation not to employ these persons near its forces so as to reduce incidental harm and instead to remove them from areas of military operations.

Excluded From Incidental Harm—Harm Resulting from Enemy Action, or Beyond the Control of Either Party

2-75. The harm caused by the attacking forces' actions in conducting the attack must be considered. Persons or objects harmed through action directly attributable to enemy action, or beyond the control of either party, would be excluded from the attacking force's proportionality analysis. For example, civilians injured or killed in the crash of an attacking aircraft downed by enemy air defenses or by enemy air defense measures, such as spent surface-to-air measures or antiaircraft projectiles, would not be considered in the attacking force's proportionality analysis. Similarly, the risk to the civilian population from the legitimate deception activities of the defending force, such as jamming, obscurants, or chaff, would need not be considered by the attacking force, although the defending force should consider such risks as part of its obligations to take feasible precautions in defense (see DOD Law of War Manual, 5.12.1.4).

"EXCESSIVE"

2-76. Under the principle of proportionality, the potential attack against enemy combatants or other military objectives is prohibited when the expected incidental harm is excessive in relation to the concrete and direct military advantage expected to be gained. The weighing or comparison between the expected incidental harm and the anticipated military advantage does not necessarily lend itself to empirical analyses. On the one hand, striking an ammunition dump or a terrorist training camp would not be prohibited because a farmer is plowing

a field in the area. On the other hand, an extraordinary military advantage would be necessary to justify an operation posing risks of collateral death or injury to thousands of civilians (see DOD Law of War Manual, 5.12.3).

Civilian Workers Who Support Military Operations In or On Military Objectives

2-77. In general, reasonable steps must be taken to separate the civilian population from military objectives. However, sometimes civilian personnel work in or on military objectives in order to support military operations. Provided such civilian workers are not taking a direct part in hostilities, those determining whether a planned attack is excessive must consider such workers, and feasible precautions must be taken to reduce the risk of harm to them (see DOD Law of War Manual, 5.12.3.3).

Use of Human Shields

2-78. An adversary's use of human shields can present complex moral, ethical, legal and policy considerations. The use of human shields violates the rule that protected persons may not be used to shield, favor, or impede military operations. If civilians are being used as human shields, provided they are not taking a direct part in hostilities, they must be considered as civilians in determining whether a planned attack would be excessive and feasible precautions must be taken to reduce the risk of harm to them. However, the enemy use of voluntary human shields may be considered as a factor in assessing the legality of an attack. Based on the facts and circumstances of a particular case, the commander may determine that persons characterized as voluntary human shields are taking a direct part in hostilities (see DOD Law of War Manual, 5.12.3.4).

"Concrete and Direct Military Advantage Expected to Be Gained"

2-79. The expected military advantage gained from an attack must be "concrete and direct." The considerations in assessing a "definite military advantage" in the definition of "military objective" are also relevant in assessing the "concrete and direct military advantage expected to be gained" (see paragraphs 2-47 through 2-52). The military advantage does not need to be "immediate," but it may not be merely hypothetical or speculative. Similarly, military advantage is not restricted to immediate tactical gains, but may be assessed in the full context of the war strategy. The military advantage anticipated from an attack is intended to refer to an attack considered as a whole, rather than only to isolated or particular parts of an attack.

2-80. Military advantage may involve a variety of considerations. Examples include: denying the enemy the ability to benefit from an object's effective contribution to its military action (perhaps by keeping the enemy from using this object in its military operations); improving the security of the attacking force; and diverting the enemy's resources or attention.

2-81. The military advantage expected to be gained from an attack might not be readily apparent to the enemy or to outside observers because, for example, the expected military advantage might depend on the commander's strategy or assessments of classified information.

Feasible Precautions in Planning and Conducting Attacks to Reduce the Risk of Incidental Harm

2-82. In planning and conducting attacks, combatants must take feasible precautions to reduce the risk of incidental harm (see DOD Law of War Manual, 5.11; consider AP I art. 57). What precautions are feasible depends greatly on the context, including operational considerations. Examples of precautions in conducting attacks that may be feasible sometime include: warning before attack, adjusting the timing of the attack, selecting certain weapons to use in the attack, assessing the risk to civilians, identifying zones in which military objectives are more likely to be present or civilians are more likely to be absent, and canceling or suspending an attack based on new information that raises concerns of expected civilian casualties (see DOD Law of War Manual, 5.11).

Warning Before Attack

2-83. Unless circumstances do not permit, effective advance warning must be given of an attack that may affect the civilian population (see DOD Law of War Manual, 5.11.5; HR art. 26; Hague IX art. 6; consider AP I art. 57(2)(c)).

Effective Advance Warning

2-84. LOAC has no set form for warnings. Warnings may be general, communicated to the national leadership of the enemy State, or delivered to the civilian population through military information support operations (MISO), to advise the civilian population of risk of injury if they remain near military objectives. Giving the specific time and place of an attack is not required. Warnings have been used by U.S. forces conducting bombardments in prior conflicts, such as World War II, the Korean War, the 1990-1991 Gulf War, the 2003 Iraq War, and the armed conflict against al Qaeda, the Taliban, and associated forces.

That May Affect the Civilian Population

2-85. The purpose of warning is to facilitate the protection of the civilian population so that it can take measures to avoid the dangers inherent in military operations. If the civilian population will not be affected, then there is no obligation to provide a warning to facilitate their protection.

Unless Circumstances Do Not Permit

2-86. A warning is not required if circumstances do not permit. Such circumstances include legitimate military reasons, such as exploiting the element of surprise in order to provide for mission accomplishment and preserve the attacking force.

Adjusting the Timing of the Attack

2-87. Adjusting the timing of an attack may reduce the risk of incidental harm (see DOD Law of War Manual, 5.11.3; consider AP I art. 57(2)(b)). For example, attacking a military objective when civilians are less likely to be present may be appropriate. Similarly, waiting until enemy forces have departed from populated areas before attacking such forces may be appropriate in order to reduce the risk of incidental harm to civilians and civilian objects.

Selecting Weapons (Weaponeering)

2-88. Depending on the circumstances, the use of certain weapons rather than others may lower the risk of incidental harm while offering the same or superior military advantage in neutralizing or destroying a military objective. For example, employing incendiary weapons may be advantageous in attacking an adversary's repository of biological weapons so as to prevent the biological agents from adversely affecting the civilian population. Similarly, under certain circumstances, using precision-guided munitions may be advantageous to minimize the risk of incidental harm.

2-89. As with other precautions, the decision on which weapon to use will be subject to many practical considerations, including effectiveness, cost, and the need to preserve capabilities for other engagements. For example, a commander may decide not to use precision-guided munitions because he or she determines it is necessary to preserve that capability for another engagement.

LAWFULNESS OF CERTAIN METHODS OF WAGING WARFARE

2-90. This section examines LOAC rules governing attacks against military objectives, attacks that could unleash dangerous forces, protections for undefended population centers, starvation, and environmental concerns.

ATTACK OF ENEMY MILITARY OBJECTIVES AND PERSONNEL

2-91. Combatants may conduct assaults, bombardments, and other attacks, but a number of rules govern these operations. Parties to a conflict must conduct attacks in accordance with the principles of distinction and proportionality. In particular, the following rules must be observed:

- Combatants may make military objectives the object of attack, but may not direct attacks against civilians, civilian objects, or other protected persons and objects. (Civilians directly participating in the hostilities, however, may be made the object of attack.) This applies the principle of distinction.
- Combatants may not conduct attacks that are expected to result in incidental harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated to be gained. This applies the principle of proportionality.
- Combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.
- Combatants must assess in good faith the information that is available to them when conducting attacks.
- Combatants may not kill or wound by acts of perfidy (discussed in paragraphs 2-152 through 2-153). This applies the principle of honor.

2-92. Specific rules apply to the use of certain types of weapons. For instance, the Amended Mines Protocol (CCW Amended Protocol II), places restrictions on the use of anti-personnel landmines, booby-traps, and other devices. Similarly, CCW Protocol III places restrictions on the use of incendiary weapons. The Department of Defense helps ensure that its armed forces only have legal weapons available for use by having a policy that requires a legal review on the acquisition or procurement of all new U.S. weapons, munitions, and weapons systems (see paragraphs 2-201 through 2-216).

Failure of Defender to Separate or Distinguish Does Not Relieve Attacker of the Duty to Discriminate in Conducting Attacks

2-93. A party that is subject to attack might fail to take feasible precautions to minimize the harm to civilians, such as by separating the civilian population from military objectives. In some cases, a party to the conflict might attempt to use the presence or movement of the civilian population or individual civilians in order to shield military objectives from seizure or attack. When enemy persons engage in such behavior, commanders should continue to seek to discriminate in conducting attacks and to take feasible precautions to reduce the risk of harm to the civilian population and civilian objects. This enemy conduct, however, will diminish the ability to discriminate and to reduce the risk of harm to the civilian population.

Permissible Location of Attacks

2-94. In general, attacks may be conducted against military objectives wherever located outside neutral territory. Attacks, however, may not be conducted in special zones established by agreement between the belligerents, such as hospital, safety, or neutralized zones.

2-95. Attacks on military objectives in the enemy rear areas or diversionary attacks away from the current theaters or zones of active military operations are lawful. LOAC does not require that attacks on enemy military personnel or objectives be conducted near on-going fighting, in a theater of active military operations, or in a theater of active armed conflict. For policy or operational reasons, military orders, such as applicable rules of engagement, may limit the locations where attacks may be conducted.

Force That May Be Applied

2-96. In the absence of expected harm to civilians and civilian objects or of the wanton destruction that is not justified by military necessity, LOAC imposes no limit on the degree of force that may be directed against enemy military objectives, including enemy military personnel. For example, LOAC does not require combatants to apply a use-of-force continuum or to employ the least harmful means, such as by attempting to capture enemy combatants before using deadly force against them. In addition, combatants need not warn enemy combatants before attacking, and combatants need not offer opponents an opportunity to surrender

before carrying out an attack. In particular, the following practices are not prohibited: surprise attacks (paragraph 2-97); attacks on retreating forces (paragraph 2-98); harassing fires (paragraph 2-99); and attacks on specific individuals (paragraph 2-100).

Surprise Attacks

2-97. LOAC does not prohibit the use of surprise to conduct attacks, such as the use of surprise in ambushes, sniper attacks, air raids, and attacks by special operations forces carried out behind enemy lines. LOAC does not require that an enemy combatant be warned before being attacked. Rather, warning requirements only apply with respect to the civilian population and other certain protected units, vessels, and facilities, such as military medical facilities (see paragraphs 2-83 through 2-86).

Attacks on Retreating Forces

2-98. Enemy combatants remain liable to attack when retreating. Retreat is not the same as surrender. Retreating forces remain dangerous as the enemy force may recover to counterattack, consolidate a new defensive position, or assist the war effort in other ways. Retreat also may be a ruse. Retreating enemy combatants may have the same amount of force brought to bear upon them as an attacking military force, and a military commander is under no obligation to limit force directed against enemy combatants because they are, or appear to be, in retreat.

Harassing Fires

2-99. Although attacks to terrorize the civilian population are prohibited, harassing fires against enemy combatants are not prohibited. Harassing fires are delivered on enemy locations for the purpose of disturbing enemy forces' rest, curtailing their movement, or lowering their morale.

Attacks on Specific Individuals

2-100. Military operations may be directed against specific enemy combatants. Often U.S. forces have conducted such operations (for example, the attacks against Osama bin Laden and Abu Musab Al Zarqawi).

Siege

2-101. It is lawful to besiege enemy forces, i.e., to encircle them with a view towards inducing their surrender by cutting them off from reinforcements, supplies, and communications with the outside world. The conduct of a siege or encirclement may require the imposition of measures of control to ensure that outsiders may not deliver supplies to the enemy. Thus, the right to conduct a siege or encirclement impliedly recognizes the authority of the military commander to exercise control, such as stopping, searching, and diverting traffic) over civilians and other persons in the immediate vicinity of military operations (DOD Law of War Manual, 5.19.1).

2-102. A force besieging enemy forces may bar all communications and access between the besieged place and the outside. LOAC, however, requires belligerent States to make reasonable, good-faith efforts to conclude local agreements for the removal of wounded, sick, infirm and aged persons, children, and maternity cases from the besieged or encircled area and to permit the passage of ministers of all religions, medical personnel, and medical equipment to such areas (GC art. 17). In the past, it was permissible, but an extreme measure, to refuse to allow civilians to leave a besieged locality and to use force to drive any who attempted to flee back into the besieged locality. However, such actions are now prohibited because they are inconsistent with the duty to take feasible precautions for the protection of civilians (see DOD Law of War Manual, 5.19.4.1).

Denial of Quarter Prohibited

2-103. It is forbidden to declare that no quarter will be given (see HR art. 23(d)). This means that it is prohibited to order that legitimate offers of surrender will be refused or that detainees, such as unprivileged belligerents, will be summarily executed. Moreover, it also is prohibited to conduct hostilities on the basis that there shall be no survivors, or to threaten the adversary with the denial of quarter.

Obligation of Combatants to Distinguish Themselves When Conducting Attacks

2-104. Combatants have an obligation to distinguish themselves that include, but not limited to, when they conduct attacks. For example, militia and volunteer corps must wear fixed, distinctive insignia recognizable at a distance, including when they are conducting attacks. In addition, combatants may not kill or wound by resort to perfidy. Combatants may not fight in the enemy's uniform. Lastly, because they fail to distinguish themselves as enemy combatants, persons engaged in spying or sabotage lack combatant immunity and so risk penalties under the domestic law of enemy States.

2-105. Although military personnel generally conduct military operations while wearing uniforms or other distinctive emblems, there may be occasions, such as a surprise attack by enemy forces, when they are unable to dress in their uniforms before resisting the enemy's assault. Military personnel may resist an attack so long as they are not wearing the enemy's uniform and do not kill or wound treacherously, such as by deliberately seeking to feign civilian status or other protected status while fighting. For example, military personnel who resist the attack and do not purposefully seek to conceal their status as combatants commit no violation of LOAC and remain entitled to the privileges of combatant status. The normal wear of uniforms or other distinctive emblems, however, should resume as soon as practicable because such wear helps protect the civilian population from erroneous attack by helping to distinguish military forces from the civilian population. In addition, combatants may employ non-standard uniforms (for example Special Operations Forces may do this to blend in with the indigenous forces they advise, while distinguishing themselves from the civilian population).

Persons Placed Hors de Combat

2-106. Persons, including combatants placed hors de combat ("out of the battle"; see DOD Law of War Manual, 5.9; consider AP I art. 41) may not be made the object of attack. Persons placed hors de combat include the following categories of persons who are incapable of defending themselves, provided they abstain from any hostile act and do not attempt to escape:

- Persons in the power of an adverse party (paragraph 2-107);
- Persons not yet in custody, who have surrendered (paragraphs 2-108 through 2-112);
- Persons who have been rendered unconscious or otherwise incapacitated by wounds, sickness, or shipwreck (paragraph 2-113); and
- Persons parachuting from aircraft in distress (paragraph 2-114).

2-107. Persons in the Power of an Adverse Party. Persons in the power of an adverse party include all persons detained by an adverse party, such as POWs, unprivileged belligerents, retained personnel, and civilian internees. As with other categories of persons placed hors de combat, detainees must refrain from hostile acts or attempts to escape in order to be considered hors de combat.

2-108. Persons Who Have Surrendered. Persons who are not in custody, but who have surrendered are hors de combat and may not be made the object of attack. In order to make a person hors de combat, the surrender must be genuine (paragraph 2-109); clear and unconditional (paragraph 2-110); and under circumstances in which it is feasible for the opposing party to accept the surrender (paragraphs 2-111 through 2-112).

Genuine

2-109. The offer to surrender must be genuine. In addition to being legally ineffective, feigning the intent to surrender can constitute perfidy if it is done to kill or wound the adversary.

Clear and Unconditional

2-110. The offer to surrender must be clear and unconditional. Any arms being carried should be laid down. All hostile acts or resistance, or manifestations of hostile intent, including efforts to escape or to destroy items, documents, or equipment to prevent their capture by the enemy, would need to cease immediately for the offer to be clear and unconditional. Raising one's hands above one's head to show that one is not preparing to fire a weapon or engage in combat is often a sign of surrender. Waving a white flag technically is not a sign of surrender, but signals a desire to negotiate. The surrender must be "at discretion," that is,

unconditional (see HR art. 23(c)). A person who offers to surrender only if certain demands are met would not be hors de combat until that offer has been accepted.

Under Circumstances in Which It Is Feasible to Accept

2-111. For an offer to surrender to render a person hors de combat, it must be feasible for the opposing party to accept that offer. The feasibility of accepting the surrender refers to whether it is practical and safe for the opposing force to take custody of the surrendering persons in the circumstances. For example, suppose Soldiers manning an antiaircraft gun shoot at an enemy aircraft and then raise their hands to surrender seconds before a second aircraft attacks their position. In these circumstances, it would not be feasible for the crew of the attacking aircraft to land and accept their surrender. The antiaircraft gun crew would not be hors de combat. Similarly, combatants 50 yards from an enemy defensive position in the midst of an infantry assault by their unit could not throw down their weapons and raise their arms to surrender and reasonably expect the defending enemy unit will be able to accept and accomplish their surrender while resisting the ongoing assault by other members of the unit still attacking. Under these circumstances, the combatants are not hors de combat.

2-112. Although the feasibility of accepting surrender includes consideration of whether it is feasible to take custody of the persons offering to surrender, this does not include consideration of whether it is feasible to care for detainees after taking custody. Offers to surrender may not be refused because it would be militarily inconvenient or impractical to guard or care for detainees.

Persons Rendered Unconscious or Otherwise Incapacitated by Wounds, Sickness, or Shipwreck.

2-113. Persons who have been rendered unconscious or otherwise incapacitated by wounds, sickness, or shipwreck such that they are no longer capable of fighting are hors de combat. Shipwrecked persons are those in distress at sea or stranded on the coast who are also helpless. Shipwrecked persons must be in need of assistance and care, and they must refrain from any act of hostility. These persons continue to be considered shipwrecked during rescue provided they continue to refrain from any hostile act. However, persons swimming in waters as part of a combat operation (for example, special forces wearing SCUBA gear) may be made the object of attack. Those rendered unconscious do not include persons who simply fall asleep. Sleeping combatants may generally be made the object of attack.

Persons Parachuting From an Aircraft in Distress

2-114. In general, persons, such as aircrew or embarked passengers, who parachute from an aircraft in distress, are treated as though they are hors de combat, that is, they may not be made the object of attack. This protection is provided because a person descending by parachute is temporarily hors de combat just like someone who is shipwrecked or unconscious. This protection does not extend to persons who commit hostile acts or attempt to evade capture, and to persons deploying into combat by parachute (consider AP I art. 42).

No Hostile Acts or Attempts to Evade Capture

2-115. As with other categories of persons hors de combat, the protection from being made the object of attack is forfeited if the persons engage in hostile acts or attempt to evade capture. Routine “slipping” to steer a parachute or similar actions to facilitate a safe parachute landing does not constitute acts of evasion.

Persons Deploying Into Combat by Parachute

2-116. Persons deploying into combat by parachute may be attacked throughout their descent and upon landing. Persons deploying into combat by parachute may include special operations or reconnaissance personnel, combat control teams, or airborne forces (in other words, specialized combat forces trained to arrive at military objectives by parachute drops). Persons deploying into combat by parachute may be attacked even if they deploy from an aircraft in distress (for example, when the enemy has attacked the aircraft to resist the assault). Airborne forces, however, may parachute from an aircraft in distress outside the context of an airborne assault. Under this circumstance, they would not be “deploying into combat” and would be hors de combat while descending by parachute.

ATTACKS ON FACILITIES, WORK, OR INSTALLATIONS CONTAINING DANGEROUS FORCES

2-117. Certain facilities containing dangerous forces, such as dams, nuclear power plants, or facilities producing weapons of mass destruction, may constitute military objectives. A commander may have a number of reasons to attack them, such as denial of electric power to military sources, use of the forces contained therein to damage or destroy other military objectives (such as lines of communication), or to pre-empt enemy release of the dangerous forces to hamper the movement or advance of friendly forces.

2-118. Attacks of facilities, works, or installations containing dangerous forces, such as dams, nuclear power plants, or facilities producing weapons of mass destruction, are permissible so long as they are conducted in accordance with other applicable rules, including the principles of distinction and proportionality. In light of the increased potential magnitude of incidental harm, additional precautions, such as weaponeering or timing the attack so that weather conditions would minimize dispersion of dangerous materials, may be appropriate to reduce the risk that the release of these dangerous forces may pose to the civilian population. In order to facilitate the identification of such objects, Parties to AP I may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as depicted in figure 2-1. However, the United States has objected to Article 56 of AP I as not reflecting customary international law (see DOD Law of War Manual, 5.13.1).

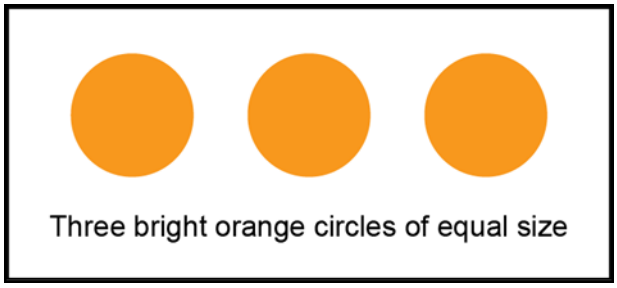


Figure 2-1. Special AP I sign for works and installations containing dangerous forces

Special Considerations

2-119. In light of the risks posed by attacks impacting these objectives, a commander should take additional care when contemplating an attack on a facility, work, or installation containing dangerous forces, or even an object located nearby. After determining whether the object under consideration for attack is a military objective, the commander should consider the following as part of the analysis of the risks of incidental damage to civilian objects and injury to the civilian population:

- The risk of release of the potentially dangerous materials or forces contained within the objective as a result of its attack, or of an attack on military objectives within its immediate vicinity;
- The expected or anticipated risk to the civilian population in the event dangerous materials or forces are released; and
- Methods by which these two risks can be minimized in the event an attack is authorized.

2-120. The fact that the materials or forces contained within a military objective may be released as a result of the attack does not immunize it from attack.

Military Objectives Within the Vicinity

2-121. Enemy military objectives, including military forces and equipment, remain legitimate targets if present in the vicinity of objects containing dangerous forces. This includes military personnel and equipment dedicated to defense of objects containing dangerous forces. These military objectives may be attacked subject to the principle of proportionality, including the special considerations noted in the prior paragraph.

UNDEFENDED VILLAGES, TOWNS, OR CITIES

2-122. Attack, by whatever means, of villages, towns, or cities that are undefended is prohibited (HR art. 25; consider AP I art. 59). Undefended villages, towns, or cities may be captured, however.

2-123. An undefended town, village, or city is any such inhabited place near or in a zone where opposing military forces are in contact with one another that contains no military objectives and is open for immediate physical occupation by enemy military forces without resistance. The term "undefended city" (or town or village, or any other populated area), sometimes referred to as an "open city," does not include a city that has military objectives within it but lacks the means by which to defend them from attack (such as anti-air defenses) (HR art. 25).

2-124. Although there is no explicit treaty requirement that a city be declared undefended before achieving that status, the practice has been to make such declarations to the opposing party (see DOD Law of War Manual, 5.15.3.2). Historically, a village, town, or city might seek undefended status as military forces advanced upon it and the opposing military forces present within it withdrew. Undefended status would essentially surrender the village, town, or city to the advancing force; this would minimize injury to the inhabitants and damage to civilian objects within the locality. This protection of civilian interests remains the primary purpose for designating a locality as undefended.

2-125. An *undefended town*, *village*, or *city* may be established through negotiations with opposing forces, or unilaterally by the party to the conflict in control of it. If the latter, the intent and actions of that party should be communicated to opposing military forces through a declaration to avoid attack on the populated areas that are being designated as undefended. Belligerents may refuse to recognize a declaration that a city is undefended if they assess that it does not satisfy all of the necessary conditions, although they should notify the opposing belligerent of that decision. Absent or until acceptance, military objectives in the locality unilaterally designated as undefended remain subject to attack. Agreement to the undefended designation may be accomplished by a commander with the authority to enforce the corresponding obligations, such as an immediate military commander, theater commander, or by national level authorities.

Conditions

2-126. The area in question must be open and accessible for immediate, unconditional physical occupation by opposing military ground forces. The location may not be defended by artillery or naval gun fire from the flanks or rear, by aircraft, minefields, or any other form of military resistance. A party to the conflict may not declare a city or other population center to be undefended if it is far behind the area of ground conflict and impossible for opposing ground forces to occupy physically. For a populated area to be entitled to be regarded as undefended, each of the following criteria must be satisfied:

- All opposing force combatants, as well as their mobile weapons and mobile military equipment, must have been evacuated.
- No hostile use of fixed military installations or establishments within the city, town, or village may be made.
- The local civilian authorities and the civilian population must not commit hostile acts against the occupying military force.
- No activities in support of military operations may be undertaken.

Loss of Status

2-127. A village, town, or city that fails to fulfill the conditions above will not be entitled to undefended status, or, if granted, will lose that status if these conditions are not fulfilled. Persons and objects within that city, however, may still receive other protections for civilians and civilian objects.

2-128. A locality designated as undefended does not lose that status due to the presence of civilian police forces to maintain local law and order, enemy military medical units and medical personnel, or enemy wounded and sick.

Actions of Occupying Force

2-129. If the occupying military force acts in a manner consistent with the conditions necessary to maintain undefended status, the city, town, or village will remain undefended for the purpose of protecting it against military operations by all parties to the conflict. The occupying force, however, does have the authority unilaterally to use the city, town, or village for military operations, including establishment of defenses to prevent its recapture by the enemy. If it does so, the locality will lose its undefended status and military objectives within the city may be subject to attack and the city itself subject to capture by opposing ground forces.

STARVATION

2-130. Starvation is a legitimate method of war, but it must be conducted in accordance with the principles of discrimination and proportionality, as well as other LOAC rules. It is a legitimate method to starve enemy forces in order to lead to the speedier defeat of the enemy or its submission with fewer friendly force casualties. For example, it is not prohibited to destroy food intended as sustenance for enemy forces with a view towards weakening them and diverting their resources. Enemy forces, for the purpose of this rule, means those persons constituting military objectives (see paragraph 2-60 for categories of persons subject to attack). Starvation specifically directed against the enemy civilian population, however, is prohibited (consider AP I art. 54). For example, it would be prohibited to destroy food or water supplies for the purpose of denying sustenance to the civilian population.

2-131. In this regard, it is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population of an enemy nation, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations, and supplies for irrigation works, for the purpose of denying their sustenance value to the civilian population (consider AP I art. 54(2)).

2-132. This rule would not prohibit attacks that are carried out for specific purposes other than to deny food and water. For example, this rule would not prohibit the destroying of a field of crops to prevent it from being used as concealment by the enemy forces or destroying a supply route that is used to move military supplies but that is also used to supply the civilian population with food, subject to the principle of proportionality, including taking feasible precautions.

2-133. These prohibitions may not apply if these objects may be, or are, used by enemy military forces. Restrictions on starvation do not prohibit measures being taken if their purpose is to deny consumption of food or water by enemy military forces. Military action intended to starve enemy forces must not be taken when it is expected to result in incidental harm to the civilian population that is excessive in relation to the military advantage expected to be gained pursuant to the principle of proportionality.

2-134. Similarly, public utilities (such as electric power grids) may be attacked to deny power to enemy military forces and installations (for example, an integrated air defense system or national command, control, communications, computers, and intelligence assets) even though such attacks may adversely affect the supply of power to the civilian population or civilian objects, or the provision of sustenance for the civilian population (for example, water). Commanders authorizing such attacks should determine the anticipated effect of those attacks on the civilian population to ensure that such effects are not excessive compare to the military advantage expected to be gained. Commanders should also consider taking precautions to ensure that the civilian population is not left with inadequate water supplies. The poisoning of the water supply is prohibited under all circumstances (HR art. 23(a)).

PROTECTION OF THE ENVIRONMENT IN WARTIME

2-135. Wanton destruction of the environment is prohibited.

Specific Prohibition

2-136. The poisoning of the water supply is prohibited under all circumstances (HR art. 23(a)).

Damage Incidental to Combat Operations Not Prohibited

2-137. The general premise in paragraph 2-135 must be viewed in light of the fact that combat has definite adverse effects on the natural environment. Routine conventional military operations involving the employment of air, ground, and naval forces that may cause damage to the environment are not activities prohibited by LOAC.

Environmental Modification Convention

2-138. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), an arms control agreement, prohibits military or other hostile use of environmental modification techniques that have "widespread, long-lasting or severe effects as a means of destruction or damage or injury to another State."

2-139. ***Environmental modification technique*** **refers to any method of warfare for changing—through the deliberate manipulation of natural processes—the dynamics, composition, or structure of the Earth (to include its biota, lithosphere, hydrosphere, and atmosphere) or outer space**. Examples of environmental effects likely to be widespread, long-lasting, or severe could include inducement of a tidal wave and seeding of clouds to induce rainfall.

2-140. An action that constitutes an environmental modification technique would only violate the ENMOD Convention if the action yielded a level of damage meeting one of three criteria as defined in the ENMOD Convention. The ENMOD Convention defines these three criteria as follows:

- Widespread encompasses an area on the scale of several hundred square kilometers.
- Long-lasting means lasting for a period of months, or approximately a season.
- Severe involves serious or significant disruption or harm to human life, natural and economic resources, or other assets.

2-141. As is the case with LOAC prohibitions set forth above, conventional military means or methods of warfare are not techniques calculated to cause the form of damage prohibited by the ENMOD Convention.

AP I Provisions on Environmental Protection

2-142. There are two provisions of AP I that specifically address the protection of the environment. Article 35(3) of AP I prohibits the employment of means or methods of warfare that are intended , or may be expected to cause widespread, long-term and severe damage to the natural environment. Article 55 of AP I provides that care shall be taken to protect the natural environment against such widespread, long-term, and severe damage and prohibits means and methods of warfare which are intended or expected to cause such damage and prejudice the health and survival of the population. Article 55 further prohibits attacks against the natural environment by way of reprisal.

2-143. The United States has not accepted these provisions and repeatedly expressed the view that they are overly broad and ambiguous and do not constitute customary international law. These provisions fail to acknowledge that the use of such weapons is prohibited only if their use would cause incidental injury to the civilian population that is clearly excessive in relation to the concrete and direct overall military advantage anticipated (see DOD Law of War Manual, 6.10.3.1).

Post-Conflict Battlefield Clean-Up

2-144. The environmental effects of conventional armed conflict have the potential to last long after the conflict's conclusion, posing ongoing risks to innocent civilians, and the civilian population as a whole, if permitted to remain. The primary responsibility for cleaning up the battlefield of the so-called "remnants of war" (such as unexploded ordnance) lies with the government that controls the territory in which the remnants remain (CCW Protocol V art. 3). Others, such as international organizations and nongovernmental organizations, may offer and provide assistance.

GOOD FAITH, PERFIDY, AND OTHER UNLAWFUL ACTS, AND LAWFUL DECEPTION AND RUSES OF WAR

2-145. The principle of honor underlies rules concerning good faith, perfidy, certain unlawful acts, and lawful deception and ruses of war. These rules permit certain types of deception to facilitate the conduct of hostilities while limiting other types of deception—killing or wounding by resort to perfidy—to help prevent acts that would undermine protections afforded under LOAC and unduly frustrate efforts to restore peace.

GOOD FAITH

2-146. Absolute good faith between the parties to an armed conflict is essential. Breaches of good faith may undermine the protections LOAC affords to protected persons and objects; impair non-hostile relations between opposing belligerents; and damage or even destroy the basis for a restoration of peace short of the complete annihilation of one belligerent by another.

2-147. Breaches of good faith may put civilians, persons who are hors de combat, or other protected persons or objects at greater risk of harm from a practical viewpoint. This is so because an adversary will find it difficult to respect such protected persons and objects if it believes or suspects its enemy is abusing claims to protection under LOAC in order to achieve a military advantage.

2-148. Breaches of good faith also impair non-hostile relations between opposing belligerents during armed conflict by diminishing the legitimate activities that depend upon a degree of mutual respect and trust between hostile forces. Examples of these legitimate activities include effecting surrender or collecting the dead, wounded, and sick (enemy or friendly) on the battlefield. Military commanders may find it more difficult to ensure that their forces comply with LOAC when treacherous acts by the enemy have resulted in casualties among their own forces.

2-149. Breaches of good faith also damage, and may destroy, the basis for restoration of peace short of the complete annihilation of one belligerent by another. A degree of mutual respect and trust is essential for the negotiation of cease-fires, truces, surrenders, and other agreements necessary to bring an end to hostilities.

2-150. The line between those acts that good faith permits and those that good faith prohibits may appear indistinct and has varied according to State practice. Good faith prohibits: killing or wounding by resort to perfidy; misusing certain signs, including, fighting in the enemy's uniform; feigning non-hostile relations in order to seek a military advantage; and compelling nationals of a hostile party to take part in military operations directed against their own State.

PERFIDY

2-151. Acts of perfidy are acts that invite the confidence of enemy persons to lead them to believe that they are entitled to, or are obligated to accord, protections under LOAC with the intent to betray that confidence. Perfidy involves specific requirements: a killing or wounding of the enemy; the intent (mens rea) to act treacherously (*i.e.,* the intent to kill or wound) (HR art. 23(b)); an entitlement or obligation under LOAC; and a nexus in time (that is, immediate tactical advantage) between the treacherous action and the killing or wounding.

2-152. The key element in perfidy is the false claim to protections under LOAC in order to secure a military advantage to kill or wound an opponent (see DOD Law of War Manual, 5.22.1; consider AP I art. 37).

2-1. Examples of killing or wounding by resort to perfidy include:

- Feigning of intent to negotiate under a flag of truce and then attacking the opponent.
- Feigning surrender and then attacking in order to gain an immediate tactical advantage over enemy forces.
- Feigning that one is wounded, sick, or dead, and then attacking the opponent.
- Feigning of civilian status to obtain an advantage over enemy forces to kill or wound them.

Any combatant feigning surrender and then attacking is taking advantage of the rule that their enemy must give them quarter. Combatants, who feign death or injury to lure their enemy near them so they may attack them, engage in acts of perfidy. However, any combatant who feigns death in the hope of evading capture

has not engaged in perfidy. That individual's act is one of survival or avoidance of capture rather than an act undertaken in order to kill or wound the enemy as a result of the enemy's compliance with LOAC. A civilian who may be regarded as taking a direct part in hostilities, such as a civilian authorized to drive a supply truck in the area of operations, is subject to attack but has not engaged in perfidy. The criteria for determining when a civilian is taking a direct part in hostilities are separate from determinations of perfidy.

Flag of Truce

2-153. A means of initiating negotiations between opposing forces is the display of a white flag, also called a flag of truce. The white flag, when used by military forces, only indicates a desire to communicate with the enemy and has no other significance in LOAC on land. Displaying the flag of truce may indicate the party hoisting it desires to open negotiations with a view to an armistice or surrender. It is important to determine, with reasonable certainty, whether the flag is hoisted by authority of the enemy commander, on behalf of the entire force under his or her command, or whether the flag is hoisted simply by an individual or small party of combatants. (HR art. 32-34; see also Chapter 7).

2-154. The mere display of a flag of truce, without more communication, does not necessarily mean that the unit, or the person waving it, is prepared to surrender. Display of a flag of truce may simply indicate that the party hoisting it desires to communicate with a view to negotiating a cease-fire, such as to enable forces to collect the wounded off the battlefield.

2-155. An opposing force is not required to cease firing merely because a flag of truce has been displayed. Nor is it necessarily a violation of LOAC if the individual displaying the flag of truce is wounded or killed while endeavoring to communicate with opposing forces. The burden is upon the party displaying a flag of truce to communicate their intentions clearly and unequivocally. To indicate that the hoisting of a white flag is authorized by competent authority on behalf of the unit, its appearance must be accompanied or followed promptly by a cessation of all hostile acts or resistance, or other manifestations of hostile intent. This includes ceasing efforts to escape or to destroy items, documents, or equipment in the custody or charge of the party hoisting the white flag. A commander authorizing the display of a flag of truce should promptly send a representative (sometimes referred to as a parliamentary or parlementaire) to communicate the commander's intent (see paragraphs 7-17 through 7-40 on parlementaires).

2-156. The improper use of a flag of truce to feign an intention to negotiate, surrender, or otherwise suspend hostilities is strictly prohibited and is an act of perfidy if used to then kill or wound the enemy. Improper use of a flag of truce includes its employment while engaging in attacks or in order to shield, favor, protect, or otherwise impede military operations. Flags of truce may not be used surreptitiously to obtain military information or merely to obtain time to effect a retreat or withdrawal, secure reinforcements or resupply, or feign surrender in order to carry out a surprise attack on the enemy. Abuse of a flag of truce endangers its future recognition and may justify subsequent rejection of a flag of truce. Isolated instances of abuse of a flag of truce, however, generally will not permit rejection of subsequent displays of the flag absent an express order by competent authority. For Army and Marine forces, this generally would be the theater commander.

Deceptive Use of Enemy Flags, Insignia, or Military Uniforms

2-157. LOAC prohibits the improper use by military forces of enemy flags, military emblems, insignia, or uniforms (see DOD Law of War Manual, 5.23). The use of enemy uniforms is permitted under some circumstances, but not for others. The general rule is subject to the following considerations is paragraphs 2-159 through 2-163.

Customary Practice

2-158. In general, the use of enemy flags, military emblems, insignia, or uniforms is prohibited during combat, but is permissible outside of combat, such as when collecting intelligence in enemy territory or seeking to evade detection by the enemy.

Spying

2-159. Soldiers or Marines captured by an opposing party behind its lines while wearing its uniform may subject them to being treated as spies.

Escaping Prisoners of War

2-160. Escaping POWs may wear enemy military uniforms to facilitate their escape from a POW camp to return to friendly lines, but must not engage in combat while in the enemy's uniform (see DOD Law of War Manual, 5.23.1.4).

Personnel Evading Capture

2-161. Military personnel, such as aircrew downed behind enemy lines, may use enemy military uniforms or civilian clothing as permissible acts of deception to evade capture. Evading personnel must not engage in combat while in the enemy's uniform. Those who are not escaping POWs who are using enemy uniforms to evade capture or to escape, however, may be liable to treatment as spies or saboteurs if caught behind enemy lines.

Use of Enemy Codes, Passwords, and Countersigns

2-162. The prohibition on misuse of enemy flags, emblems, insignia, and uniforms refers only to concrete visual objects rather than enemy codes, passwords, and countersigns. Enemy codes, passwords, and countersigns may be used as a ruse to aid military operations. Use of these measures is permissible because enemy military forces are expected to take measures to guard against the use of their codes, passwords, and countersigns by their adversaries.

Certain Signs and Symbols Specially Protected Against Improper Use

2-163. Certain signs, symbols, or signals reflect a status that receives special protection under LOAC and thus these signs may not be improperly used. They may not be used: (1) while engaging in attacks; (2) in order to shield, favor, or protect one's own military operations; or (3) to impede enemy military operations. Thus, their use may be improper even when that use does not involve killing or wounding, and they may not be used to facilitate espionage (except for signs, emblems, or uniforms of a neutral or non-belligerent State). Paragraphs 2-165 through 2-170 describe the types of signs subject to this broader rule against improper use.

Signs, Emblems, or Uniforms of a Neutral or Non-Belligerent State

2-164. During international armed conflict, the use of signs, emblems, or uniforms of a neutral or other nation not a party to the conflict is prohibited. LOAC recognizes exceptions, however, concerning espionage and warfare at sea.

Distinctive Emblems of the Geneva Convention

2-165. The distinctive emblems of the Red Cross, Red Crescent, and Red Crystal (as well as the Red Lion and Sun, which is currently not in use) are symbols that identify military medical and religious personnel, medical units, and medical transports, or certain other categories of persons engaged in humanitarian work as personnel and objects entitled to special protection. These emblems may not be used except to identify these protected persons and objects. Any unauthorized use is prohibited (see DOD Law of War Manual, 7.15.4).

Markings for POW or Civilian Internee Camps

2-166. Only POW camps under the GPW should be marked using internationally agreed-upon symbols, such as the PW or PG designation (GPW art. 23). Only civilian internee camps under the GC should be marked with an IC designation (GC art. 83).

Markings for Hospital, Safety, or Neutralized Zones

2-167. Markings that distinguish hospital, safety, or neutralized zones established under the 1949 Geneva Conventions may not be used for other purposes.

Distinctive and Visible Signs to Identify Civilian Objects as Such

2-168. Certain distinctive and visible signs that are intended to identify to the enemy that an object is protected as a civilian object under LOAC must not be used by that party for other purposes.

Markings for Cultural Property

2-169. The distinctive emblem for cultural property may not be used for other purposes.

FEIGNING NON-HOSTILE RELATIONS

2-170. Feigning non-hostile relations between belligerents diminishes the legitimate activities that depend upon a degree of mutual respect and trust between hostile forces and therefore is prohibited. (See paragraphs 2-146 through 2-150 on good faith; see generally Chapter 7).

LAWFUL DECEPTION AND RUSES OF WAR

2-171. Deception involves those measures designed to mislead the enemy by manipulation, distortion, or falsification of information to induce it to react in a manner prejudicial to its interests. Ruses of war are lawful acts of deception. Ruses of war are acts that are intended to mislead an adversary or induce it to act recklessly, but that do not infringe upon LOAC and, moreover, are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law with the intent to kill or wound (see DOD Law of War Manual, 5.25.1).

2-172. Ruses of war are methods, resources, and techniques that can be used either to convey false information or deny information to opposing forces. They include physical, technical, or administrative means. Legitimate deception activities include, but are not limited to, using surprise, ambush, camouflage, deceptive lighting, decoys, flares, obscurants, chaff, aerosol material, or dissemination devices; feigning flights, attacks, or withdrawals; simulating quiet or inactivity; using small forces to simulate larger units; transmitting false or misleading messages; intensifying or minimizing message traffic; using enemy codes, signals, or passwords; deliberately planting false information; using dummy material; removing unit identification from units, equipment, or personnel; and using electronic warfare measures.

2-173. Ruses are acts intended to mislead an adversary or induce it to act recklessly. Ruses may be used for a variety of purposes, such as:

- To facilitate surprise attacks or ambushes by:
  - Misleading the enemy as to the planned targets or locations of military operations;
  - Using "bait" to lead the enemy into a trap; or
  - Distracting or disorienting the enemy;
- To induce enemy forces to waste their resources;
- To induce enemy forces to surrender by falsely alleging military superiority;
- To provoke friendly fire among enemy forces; or
- To cause confusion among enemy forces.

2-174. Ruses do not infringe on LOAC. Misusing a protected sign or symbol would not constitute a ruse because it would violate LOAC. Similarly, although fighting in the enemy's uniform would not be perfidy because enemy military personnel are not generally protected by LOAC in this regard, fighting in the enemy's uniform also would not be a lawful ruse or deception because such action would infringe upon the rule against improper use of the enemy's uniform.

2-175. Ruses are not perfidious because they do not invite the confidence of an adversary with respect to protection under LOAC with the intent to kill or wound that adversary.

Examples of Ruses

2-176. Often ruses of war operate by misleading the enemy as to the identity, strength, position, or disposition of one's own forces. Ruses of war include, but are not limited to:

- Using decoys or dummy materials, such as dummy weapons, equipment, and buildings;
- Feigning activity or inactivity, such as:
  - Simulating quiet; and
  - Feigning flights, retreats, attacks, marches, movements (for example, approaching a destination indirectly), supply movements, operations, withdrawals, or camps;
- Mimicking other types of forces, such as:
  - Using small forces to simulate larger units;
  - Units of one type pretending to be units of another type;
  - Removing unit identification from units, equipment, or personnel; and
  - Individuals or units dressing like and mimicking the appearance of enemy friendly forces without engaging in combatant acts;
- Using camouflage or deceptive lighting;
- Removing or altering identifying information, such as moving identifying landmarks;
- Planting false information in a manner that allows enemy forces to intercept it, such as through the use of:
  - False messages among one's own forces;
  - Intensifying or minimizing message traffic; or
  - Bogus messages, dispatches, or newspapers;
- Lying in the course of a POW intelligence interrogation on questions when no obligation to answer correctly exists;
- Feigning enemy military status by using enemy flags, insignia, or military uniforms outside of combat; or
- Using enemy codes, signals, or passwords.

Examples of Other Deceptions That Are Not Prohibited

2-177. Certain deceptions may not meet the definition of "ruses" because they may invite the confidence of an adversary with respect to protection under LOAC. Nevertheless, LOAC does not prohibit some of these deceptions even though, in some cases, they may expose the persons performing them to liability under an enemy State's domestic law. These include:

- Feigning incapacitation or death in order to escape the enemy, such as:
  - Soldiers who feign death in the hope they will be let alone by enemy forces, permitting them to then take evasive actions to return to friendly forces without engaging the enemy; and
  - An aircraft crew that feigns loss of control and the appearance that the aircraft is about to crash in order to dissuade further enemy attack and to break contact with enemy forces.
- Feigning civilian status to facilitate spying or sabotage, such as false use of journalist credentials; and
- Using an informal ceasefire for the purpose of collecting wounded and dead to withdraw unseen by the enemy.

PROHIBITION AGAINST COMPELLING ENEMY NATIONALS TO TAKE PART IN MILITARY OPERATIONS DIRECTED AGAINST THEIR OWN FORCES OR STATE

2-178. During international armed conflict, it is prohibited to compel nationals of the hostile party to take part in military operations directed against their own country or forces, even if they were in the belligerent's service before the commencement of the war (see HR art. 23). Underlying this prohibition is the principle that States must not compel persons to commit treason or otherwise violate their allegiance to their country. Additional restrictions are applicable with respect to POWs, retained personnel, and protected persons (see, for example, GPW art. 52, prohibiting POWs from being employed in dangerous or humiliating work).

Moreover, POWs, retained personnel, and protected persons may not renounce this right (see, for example, GPW art. 7).

2-179. This prohibition applies to attempts to "compel" enemy nationals; it does not apply to measures short of compulsion, such as bribing enemy nationals or seeking to influence them through propaganda. LOAC specifically prohibits, however, an Occupying Power from using propaganda that aims to secure voluntary enlistment of protected persons in its armed forces or auxiliary forces (see GC art. 51).

2-180. This prohibition applies to nationals of a hostile party; LOAC does not prohibit States from compelling their own nationals to serve in the armed forces. Similarly, this rule would not prohibit States from compelling persons to betray an allegiance to a non-State armed group.

INFORMATION GATHERING

2-181. Employing measures necessary to obtain information about the enemy and its country is considered permissible (see HR art. 24). Information gathering, however, must not violate specific LOAC rules. For example, torture or abuse may not be used to question or interrogate detainees. Similarly, LOAC prohibits the improper use of a flag of truce to obtain information (see paragraph 2-157). Some forms of deception used to gather information, although not prohibited by LOAC, may put persons engaging in them at risk of being treated as spies. For instance, combatants wearing civilian attire to collect intelligence in the zone of operations of a belligerent, if caught before returning to friendly lines, jeopardize their status as POWs and could be considered spies by the capturing enemy.

INFORMATION OPERATIONS

2-182. In general, LOAC permits the use of counter-propaganda and information operations (IO), even if it encourages acts that violate an enemy State's domestic law or is directed towards civilians or neutral audiences. Certain types of information operations, however, are prohibited.

2-183. Historically, permissible IO messages have been disseminated through a variety of communications media, including printed materials, loudspeakers, radio and television broadcasts, aircraft, and the internet. Information operations are sometimes used with financial or other incentives, if sanctioned and authorized. They may support intelligence gathering, be directed at enemy civilians and neutrals, or encourage enemy persons to commit acts that would violate the domestic law of the enemy State. For example, it is permissible to encourage enemy combatants to defect, desert, or surrender. Similarly, it is permissible to encourage insurrection among the enemy civilian population.

2-184. Information operations must not incite violations of LOAC. For example, information operations intended to incite attacks against civilians is prohibited. Information operations also must not threaten the commission of LOAC violations. For example, it is prohibited if the propaganda constitutes a measure of intimidation or terrorism against the civilian population, such as threats of violence whose primary purpose is to spread terror among the civilian population. Similarly, it is prohibited to threaten an adversary by declaring that no quarter will be given. Information operations are also prohibited when they would violate LOAC. For example, LOAC specifically prohibits an Occupying Power from using IO messages that are aimed at securing voluntary enlistment of protected persons in its armed or auxiliary forces (see paragraphs 6-133 and 6-134). Similarly, information operations may not be used to subject a detainee to public curiosity or other humiliating or degrading treatment. Additionally, the delivery of the information operations should be consistent with other LOAC obligations.

BRIBERY OR OFFERING OF REWARDS

2-185. In general, it is permissible to offer rewards for assistance in the conduct of hostilities, including rewards intended to corrupt enemy combatants or civilians. Rewards, however, may not be offered to commit violations of LOAC, and rewards may not be offered for the killing of enemy persons.

2-186. It is forbidden to place a price on the head of enemy persons or to offer a reward for enemy persons "dead or alive." Such actions encourage the denial of quarter or encourage private persons to take up arms whose participation in hostilities is often undisciplined and associated with the commission of war crimes.

2-187. This prohibition extends to offers of rewards for the killing or wounding of all enemies, including specific individuals or a class of enemy persons (for example, officers). This rule, however, would not prohibit offering rewards for the capture unharmed of enemy personnel generally or of particular enemy personnel. Similarly, this rule does not prohibit offering rewards for information that may be used by combatants to conduct military operations that attack enemy combatants.

TREATMENT OF ENEMY PROPERTY

2-188. Outside the context of attacks, certain rules apply to the seizure and destruction of enemy property:

- Enemy property may not be seized or destroyed unless imperatively demanded by the necessities of war (HR art. 23(g)).
- Public movable property and certain types of private movable property may customarily be captured as war booty.
- Pillage is prohibited.
- Feasible precautions must be taken to mitigate the burden on civilians, but there is no obligation to compensate the owners of enemy property that is lawfully damaged.
- Enemy private movable property that is not susceptible of direct military use may be appropriated only to the extent that such taking is permissible in occupied areas. Owners should be given receipts and compensation paid, when feasible.

See also paragraphs 6-95 through 6-128 for treatment of enemy property during occupation.

DEFINITION OF ENEMY PROPERTY

2-189. *Enemy property* includes all property located in enemy territory regardless of its ownership.

ENEMY PROPERTY—MILITARY NECESSITY STANDARD

2-190. Enemy property may not be seized or destroyed unless imperatively demanded by the necessities of war (HR, art. 23(g)). In particular, devastation or destruction may not be pursued as an end in itself. The measure of permissible seizure or destruction of enemy property is found in the strict necessities of war. The seizure or destruction of enemy property must have a reasonable connection to the overcoming of enemy forces. The necessities of war may imperatively demand seizing or destroying enemy property in order to support military operations or to diminish the enemy's ability to conduct or sustain operations.

Supporting Military Operations

2-191. The military necessity standard may justify seizing or destroying enemy property to support military operations in many types of scenarios. The following examples are illustrative:

- Using enemy land for the construction of military bases, air fields, or other facilities to support military operations;
- Using enemy buildings to billet military personnel and others supporting them, to house the wounded and sick, for observation and reconnaissance, for concealment and cover, or for defensive purposes;
- Demolishing, cutting down, or removing enemy walls, forests, crops, or buildings to clear a field of fire, to construct bridges, to furnish firewood for billeted military forces, or to provide construction material; and
- Seizing means of transportation for use in military operations.

Diminishing the Enemy's Ability to Conduct or Sustain Operations

2-192. Under the principle of military necessity, seizing or destroying enemy property is permissible to diminish the enemy's ability to conduct or sustain military operations. Thus, LOAC permits seizing or destroying enemy property such as railways, lines of communication, and other war-fighting and war-sustaining infrastructure.

Incidental Damage to Enemy Property

2-193. Damage to enemy property incidental to combat operations that is reasonably related to overcoming enemy forces is justified by military necessity and lawful. For example, the movement of armed forces and equipment may damage roads or fields.

ENEMY MOVABLE PROPERTY ON THE BATTLEFIELD (WAR BOOTY)

2-194. Much of an enemy's movable property on the battlefield, sometimes referred to as "war booty," is subject to seizure by the opposing State. Military units may seize any enemy public movable property on the battlefield. Property is public if it belongs to the enemy State or an agency of the State. In general, enemy private movable property on the battlefield may also be seized, but only if the property is necessary and indispensable for the conduct of war. This includes arms, ammunition, military papers, or property that can be used as military equipment (for example, as a means of transportation or communication). However, certain types of military equipment used for clothing, feeding, or personal protection (for example, helmets and gas masks) may not be seized from POWs, and should remain in their possession.

2-195. All enemy property that is captured or found on the battlefield becomes the property of the capturing State. During international armed conflict, personal property recovered from enemy dead becomes the property of the United States for the purpose of returning it to the next-of-kin of the deceased. The individual service member or civilian accompanying the force who captures or finds such enemy property acquires no title or claim to it.

PILLAGE PROHIBITED

2-196. Pillage is prohibited, both generally (HR art. 28, 47) and specifically with respect to the military wounded, sick, and shipwrecked (GWS art. 15; GWS Sea art. 18); POWs (see GPW art. 18); and civilians (see GC art. 16, 33). This applies in international armed conflict, occupation, and non-international armed conflict. The same applies to cultural property, which is addressed in paragraphs 5-19 through 5-21 and 6-104. LOAC imposes affirmative obligations to prohibit and prevent pillage (GWS art. 15; GWS Sea art. 18; 1954 Hague art. 4(3)).

2-197. Pillage is the taking of private or public movable property (including enemy military equipment) for private or personal use (10 U.S.C. § 950t(5)). It does not include an appropriation of property justified by military necessity. For example, if no time is available for ordinary requisitions to provide food and supplies, or the local inhabitants have fled so that ordinary requisitions are unavailable, the taking of food does not constitute pillage. In the medieval era, pillage served as a form of compensation for private armies, but it ceased to be regarded as lawful with the widespread adoption of standing armies at the end of the 18th century. The later prohibition of pillage was intended, in part, to maintain discipline among the armed forces. Pillage is also referred to as looting (UCMJ art. 103) and plunder.

FEASIBLE PRECAUTIONS SHOULD BE TAKEN TO MITIGATE THE BURDEN ON CIVILIANS

2-198. In seizing or destroying enemy property, feasible precautions should be taken to mitigate the burdens imposed on civilians. For example, in U.S. practice, religious buildings, shrines, and consecrated places employed for worship are used only as aid stations, medical installations, or for the housing of wounded personnel awaiting evacuation, provided in each case that a situation of emergency requires such use. Similarly, if armed forces use a private residence, the inhabitants and owners must be treated humanely and with as much consideration as the circumstances permit. In particular, the armed forces should generally allow the inhabitants to continue to live there and should not expel them if alternate shelter is not available. If imperative military necessity requires the removal of the inhabitants, however, then effort should be made to give them notice and to aid them in taking their essential possessions. If the armed forces take anything, they should leave a note to this effect. There is no obligation, however, to protect abandoned property in the area of active operations.

2-199. LOAC imposes no obligation to compensate for loss of, or damage to, private property when such loss or damage is imperatively demanded by the necessities of war, including damage incidental to combat operations. There is no obligation to compensate for incidental harm to civilian property due to combat

operations, whether such harm arises from attacks on military objectives within proximity to the damaged property, maneuver damage, mechanical error, enemy countermeasures, human error (including mistake of fact), or other actions resulting from the fog or friction of war or from the necessities of war. If time allows, however, a record of the use or damage should be kept or given to the owner so that in the event either belligerent provides funds at the close of hostilities to compensate the owners, evidence may be available to assist the assessors. During certain operations and as a matter of policy not law, the U.S. practice has been to provide ex gratia payments to alleviate the suffering of the civilian populace not involved in the conflict. All enemy public movable property captured or found on a battlefield becomes the property of the capturing State. Other than arms, military papers, military transportation, and other property that is susceptible to military use, enemy private moveable property captured or found on a battlefield may be appropriated only to the extent that such taking is permissible in occupied areas. In particular, receipts should be given and compensation paid, when feasible (see paragraphs 6-95 through 6-128).

ENSURING LEGALITY OF WEAPONS AND WEAPON SYSTEMS

2-200. Under longstanding DOD policies, there are requirements to review the legality of the acquisition or procurement of weapons. Although the United States is not a party to Additional Protocol I, many allies and potential multinational partners of the United States are required to determine the legality of new weapons as a treaty obligation under article 36 of Additional Protocol I.

LEGAL REVIEW REQUIREMENT

2-201. Prior to fielding or deploying any weapon and weapon system, including non-lethal weapons, cyber weapons and cyber weapon systems, DOD requires the legal review of the acquisition or procurement be reviewed to ensure compliance with all applicable U.S. domestic law and international legal obligations of the United States, whether derived from LOAC, international law, international agreements, customary international law. (See DODD 5000.01, ¶E1.1.15). To implement this policy, all weapons, weapon systems, and munitions must receive a legal review by an attorney authorized by the Military Department. For the Marine Corps, the Judge Advocate General of the Navy (Code 10) has been authorized to conduct the legal review (see SECNAVINST 5000.2E) and OTJAG-NSL has been authorized to conduct legal reviews for the Army (see AR 27-53).

Note: The general legality of a weapon, weapon system, or munition discussed in this manual does not obviate the requirement for a legal review of the acquisition or procurement of each new weapon, weapon system, or munition.

SCOPE OF LEGAL REVIEWS

2-202. A review of the legality of a weapon system, weapon or munition under LOAC should address each of the following questions: whether a specific rule of law prohibits or restricts its use, whether the weapon is calculated to cause unnecessary suffering or superfluous injury, and whether the weapon is inherently indiscriminate.

Specific Rule of Law

2-203. Whether a specific rule of law—such as a U.S. treaty obligation, a rule accepted by the United States as customary international law, or a domestic law—prohibits or restricts the use of the weapon in question is first considered. The use of the following types of weapons is prohibited:

- poison, poisoned weapons, poisonous gases, and other chemical weapons;
- biological weapons;
- certain environmental modification techniques;
- weapons that injure by fragments that are non-detectable by X-rays;
- certain types of mines, booby-traps, and other devices; and
- lasers specifically designed to cause permanent blindness to unenhanced vision.

For discussion of these weapons, refer to Chapter VI of the DOD Law of War Manual.

2-204. Certain types of weapons are subject to specific rules that apply to their use by the U.S. armed forces. These rules may reflect U.S. obligations under international law or national policy. These weapons include:

- mines, booby-traps, and other devices (except certain specific classes of prohibited mines, booby-traps, and other devices);
- cluster munitions;
- incendiary weapons;
- laser weapons (except blinding lasers);
- riot control agents;
- herbicides;
- nuclear weapons;
- explosive ordnance.

For more information, consult the DOD Law of War Manual and specific policies and guidance applicable to particular types of weapons. It may be appropriate in the review of such weapons to advise on these types of restrictions or obligations.

2-205. If there is no specific prohibition, the following questions are considered:

- Whether the weapon is calculated to cause superfluous injury, in violation of the Hague Regulations Article 23(e); and
- Whether the weapon is inherently indiscriminate.

Unnecessary Suffering/Superfluous Injury

2-206. A weapon review addresses whether the weapon is calculated to cause unnecessary suffering or superfluous injury in violation of the standard stated in Hague Regulations Article 23(e). The terms "unnecessary suffering" and "superfluous injury" are synonymous in the context of this analysis. Superfluous injury generally is determined in light of the practice of nations and in evaluation of a specific weapon. Superfluous injury is assessed in the sense of the design of a particular weapon or its employment, and not in terms of how a person affected by the weapon would be subjectively affected by it. Use of "calculated to cause" in the Hague Regulations Article 23(e) helps convey that the legal standard is focused on assessing the intended purpose or purposes of the weapon's developer in developing the weapon.

2-207. The prohibition of weapons calculated to cause superfluous injury or unnecessary suffering constitutes acknowledgement that the use of weapons in war causes suffering, including injury and loss of life. A weapon cannot be declared unlawful merely because it may cause severe injury or suffering. Nor is a lawyer reviewing the legality of a weapon required to foresee or anticipate all possible uses or misuses of a weapon, for almost any weapon can be misused in ways that might be prohibited.

2-208. LOAC has no internationally agreed upon definition for superfluous injury. The determination is whether a weapon's employment for its normal or expected use would be prohibited under some or all circumstances. A weapon would be deemed to cause superfluous injury only if it inevitably, or in its normal use, has a particular effect—and the injury caused as a result of this use is considered by governments as manifestly disproportionate to the military necessity for it, that is, to the military advantage to be gained from its employment. This determination cannot be made in isolation from other weapons. A weapon's effects must be weighed in light of comparable, lawful weapons in use on the modern battlefield.

2-209. Importantly, the effect of the use of a weapon in combat is not the sole criterion for determining whether a weapon is calculated to cause superfluous injury; effects will differ widely as a result of the constantly shifting nature of the battlefield. For example, a weapon that can incapacitate or wound lethally at 300 meters or longer ranges may result in a greater degree of incapacitation or greater lethality when used against targets at lesser ranges. Similarly, the necessity for the use of a weapon of sufficient power to destroy materiel or, for example, a reinforced object such as a tank, a bunker, or an aircraft hanger may have a devastating effect on enemy military personnel in, on, or adjacent to it at the time of its attack, or on enemy military personnel struck directly by a weapon intended for a vehicle or entrenched defensive position. In both cases, the use of these weapons would not be unlawful.

2-210. An objective in war is to impose destruction upon the military forces of the enemy and other military objectives that contribute to its ability to wage war. The prohibition of weapons calculated to cause superfluous injury is not intended to limit the legitimate pursuit of those objectives through the employment of lawful weapons against lawful targets. This principle does not prohibit bringing a preponderance of force on an opposing military force in order to subdue or destroy it.

2-211. In summary, in determining whether a weapon causes superfluous injury, a legal review includes all of the following:

- An evaluation of the military necessity of the weapon;
- An analysis of the intended results of its use (including design, that is, what it is designed to do, and intended employment, that is, how it is intended to be used in combat); and
- A comparison of the weapon with lawful comparable weapons already in use.

Inherently Indiscriminate Weapons

2-212. A fundamental principle of LOAC is that in the application of force, a nation's military forces must direct their attacks against enemy military objectives and, furthermore, must distinguish these military objectives from the civilian population, individual civilians not taking a direct part in hostilities, and civilian objects. Only combatants, civilians taking a direct part in hostilities, and other military objectives may be targeted.

2-213. The principle of distinction in targeting requires that the weapon be capable of being directed against a military objective. "Capable of being directed" does not require terminal guidance to the target or use of the most precise weapon under all circumstances. It does, however, prohibit "blind weapons." Such weapons cannot, with any reasonable assurance, be directed against a military objective. Indiscriminate weapons also include those that are essentially random in their effects and would be as likely to hit civilians as combatants.

RELIANCE ON LEGAL REVIEWS FOR WEAPONS

2-214. Soldiers and Marines may presume a weapon to be lawful, that is, consistent with LOAC and arms control obligations of the United States, if it has received the requisite legal review and has been issued in accordance with relevant regulations of the military service concerned. Questions regarding the legality of a particular weapon, weapon system, or munition should be addressed to the appropriate legal officer responsible for the legal review as identified in paragraph 2-202.

2-215. The application of LOAC related to specific targeting issues will often be addressed at the time of employment, to be determined by the on-scene commander under the circumstances ruling at the time. Such issues do not determine the lawfulness of the weapon, weapon system, or munition provided for in the legal review (see DOD Law of War Manual, 6.1.1). The commander authorizing a weapon's use must consider its characteristics, whether civilians are present, and other factors in order to ensure consistency with mission Rules of Engagement and LOAC proscriptions on directing attacks at civilians not taking a direct part in hostilities or who otherwise do not pose a threat to U.S. forces.

Chapter 3

Prisoners of War and Other Detainees

This chapter addresses the protection of POWs, retained personnel, and other detainees under LOAC, and as described below. The Hague Conventions of 1907 was one of the international community's first attempts to codify treatment of captured persons. The 1929 Geneva Convention relative to Prisoners of War provided more substantive treatment than previous treaties and has been refined in the 1949 GPW and in AP I. Since the United States is a party to the GPW, it is binding treaty law and the basis for much of this chapter. This publication uses "POWs" to refer to both friendly and enemy POWs. The treatment and protection of civilian internees are discussed in Chapter 5 of this manual.

PRACTICAL GUIDANCE ON POWS AND DETAINEE OPERATIONS

3-1. Soldiers and Marines must comply with LOAC with respect to the treatment of all detainees. Until a detainee's release, repatriation, or transfer from DOD custody or control, Soldiers and Marines will, without regard to a detainee's legal status, at a minimum apply: (1) common article 3 of the 1949 Geneva Conventions during all military operations; (2) the principles in Article 75 of AP I during international armed conflict and occupation; and (3) the principles in Articles 4-6 of AP II during non-international armed conflict (DODD 2310.01E).

3-2. Certain categories of detainees held during international armed conflict or cases of occupation, such as prisoners of war (POWs), and certain civilian internees (see Chapter 5), enjoy protections and privileges under LOAC beyond the minimum standards of treatment discussed in paragraph 3-5. Such detainees will be afforded all applicable protections and privileges under LOAC until their release, repatriation, or transfer.

3-3. Commanders who expect to conduct detention operations should familiarize themselves with guidance from higher headquarters that implements applicable law, DOD policies, and other regulations applicable to the treatment of POWs and retained personnel, such as DODD 2310.01E, *DOD Detainee Program*; DODD 3115.09, *DOD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*; AR 190-8/Marine Corps Order (MCO) 3461.1, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*. During detention operations, commanders should anticipate, and where appropriate request, guidance on detainee issues from higher headquarters, especially on issues implicating U.S. legal obligations or national policy. Commanders should seek the advice of their servicing judge advocate if they have any questions about the law applicable to the treatment of POWs, retained personnel, and other detainees.

BASIC PROTECTIONS AND HUMANE TREATMENT FOR ALL DETAINEES

3-4. Detainees in all circumstances must be treated humanely and protected against cruel, inhuman, or degrading treatment or punishment (see DOD Law of War Manual, 8.2). Providing humane treatment to an individual or group of individuals does not affect the legal status of that individual, group, or any parties to a conflict (GPW art. 3).

3-5. Detainees must be provided humane care and treatment and with respect for their dignity from the moment they fall into the hands of DOD personnel until their release, transfer out of DOD control, or repatriation. Further, inhumane treatment of detainees is expressly prohibited and is not justified by the stress of combat or deep provocation. Humane treatment and basic protections include, in part:

- Adequate food, drinking water, shelter, and clothing;
- Reasonable access to the open air, reasonable educational and intellectual activities, and appropriate contacts with the outside world (including, where practicable, exchange of letters, phone calls, and video teleconferences with immediate family or next of kind, as well as family visits);
- Safeguards to protect health and hygiene, and protections against the rigors of the climate and dangers of military activities;
- Appropriate medical care and attention required by the detainee's condition, to the extent practicable;
- Free exercise of religion, consistent with the requirements of detention;
- Reasonable access to qualified interpreters and translators, where applicable and practicable;
- Respect for each as a human being without any adverse distinction founded on race, color, religion or faith, political or other opinion, national or social origin, sex, birth, or wealth, or other similar criteria;
- Protection against threats or acts of violence, including rape, forced prostitution, assault, theft, public curiosity, bodily injury, reprisals, torture, and cruel, inhuman, or degrading treatment or punishment; and
- Prohibition on being subject to medical or scientific experiments or to sensory deprivation intended to inflict suffering or serve as punishment (DODD 2310.01E).

3-6. Detainees must not be subject to criminal punishment without a fair trial and other important criminal procedural protections (see DOD Law of War Manual, 8.16).

3-7. Detainees must be removed as soon as practicable from the point of capture and transported to a detainee collection point, temporary holding area, or DOD detention facility. Detainees not released or transferred from DOD custody or control from the detainee collection point or holding area will be transported to a DOD detention facility in a secure location within 14 days of capture, barring exceptional circumstances. Detainees will be promptly informed of the reasons for their detention in a language that they understand. Detainees will remain at a DOD detention facility until their release or transfer from DOD custody or control (DODD 2310.01E).

3-8. Under DOD policy, detainees will receive certain procedural protections.

3-9. Detainees will be registered, and property in their possession will be inventoried. Records of their detention and such property will be maintained according to applicable law, regulation, policy, and other issuances. All detainee records will be maintained and safeguarded. Detainees will be assigned an Internment Serial Number (ISN) normally within 14 days after their capture by, or transfer to, the custody or control of DOD personnel, barring exceptional circumstances.

3-10. The ICRC will be promptly notified of all ISN assignments. The ICRC will be given access to all DOD detention facilities and the detainees housed therein, subject to reasons of imperative military necessity (DODD 2310.01E).

3-11. Alleged detainee abuse must be reported in accordance with DOD policies (see DODD 2310.01E; DODD 2311.01E; DODD 3115.09).

3-12. DOD personnel will review periodically the detention of all individuals in DOD custody or control who do not receive the protections afforded POWs. Such reviews may include: (1) preliminary assessments of the detainee's status and threat; (2) formal determinations of the lawfulness and continued necessity of detention; and (3) determination of the status of unprivileged belligerents held in long-term detention, presided over by a military judge (DODD 2310.01E, para. 3i).

3-13. DOD personnel, including DOD contractors, must not accept the transfer of a detainee from another U.S. Government department or agency, coalition forces, multinational partner personnel, or other personnel not affiliated with the DOD or the U.S. Government, except in accordance with applicable law, regulation, policy, and other issuances. (DODD 2310E, para. 3e). No detainee may be released or transferred from the care, custody, or control of a DOD component except in accordance with applicable law, regulation, policy, and other issuances (DODD 2310.01E, para. 3m).

GPW AND POW PROTECTIONS

3-14. When the GPW and POW protections apply to detainees, they are afforded not only humane treatment protections discussed paragraphs 3-5 through 3-7, but also additional protections under international law and DOD policy. For example, the United States has, in some instances, afforded detainees certain POW protections, even when those protections might not apply as a matter of law (see DOD Law of War Manual, 9.3.1). The applicability of POW protections during a particular armed conflict or operation and the entitlement of armed groups to POW status are generally resolved at the national level. This is a national level decision because providing POW protections to an armed group can affect the group's legal status, and because it is important to have a consistent national approach to how U.S. obligations under international law are to be interpreted with regard to the status of armed groups. Generally, POW protections only apply during international armed conflict, i.e., State versus State armed conflict, and when there are armed forces or groups that qualify for POW protections under article 4 of the GPW (e.g., State military forces).

3-15. If those broader conditions are met, then there might be questions as to whether particular individuals are entitled to POW protections. During international armed conflict, should any doubt arise as to whether a detainee is entitled to the protections and privileges afforded POWs, such detainees shall enjoy treatment as POWs until a tribunal convened in accordance with Article 5 of the GPW determines whether the detainee is entitled to such status or treatment. In practice, an Article 5 tribunal may be used to assess whether an individual detainee is, in fact, a member of a group entitled to POW status.

PERSONS ENTITLED TO PRISONER OF WAR STATUS

3-16. Article 4A of the GPW describes those persons during an international armed conflict and occupation who are entitled to POW status as discussed, infra, in paragraphs 3-17 through 3-30. Captured military medical personnel and chaplains are not POWs but are retained personnel, provided that they meet the criteria in the GPW, including that the organization to which they belong meets the criteria in Article 4A(1), (2), or (3) of the GPW as discussed, infra, in paragraphs 3-35 through 3-42.

MILITARY PERSONNEL

3-17. Members of the armed forces of a State party to a conflict, other than military medical personnel and chaplains attached to the armed forces are entitled to POW status based on their membership in the armed forces. This includes members of militias or volunteer corps that form part of the armed forces (GPW art. 4A(1)).

Non-Standard Uniforms

3-18. Soldiers and Marines who fall within Article 4A(1) of the GPW, including special operations forces, are expected to carry out their operations in standard uniform. However, the wearing of a non-standard uniform, would not necessarily violate the law of war. For example, Soldiers and Marines wearing items of indigenous clothing that represent the distinctive device of a non-standard uniform must be approved by competent authority upon the demonstration of a military requirement. To be considered a "uniform," even a non-standard one, the clothing should distinguish military personnel from ordinary members of the civilian population. Soldiers and Marines who are captured in non-standard uniforms while conducting operations in enemy territory and fail to distinguish themselves from the civilian population may be treated as spies and risk relinquishing their entitlement to POW status.

Civilian Clothing

3-19. Occasions may arise, such as a surprise attack, when military personnel may not have time to dress in their uniforms before resisting an enemy assault. Soldiers and Marines in civilian clothing may resist an attack so long as they do not kill or wound treacherously, such as by deliberately seeking to feign civilian status or other protected status while fighting (see paragraph 2-153). Such military personnel remain entitled to POW status if captured. Soldiers and Marines may be authorized by competent authorities to dress in civilian clothing in order to engage in espionage and sabotage, but such persons may be treated as spies if captured behind enemy lines.

OTHER MILITIA AND VOLUNTEER CORPS

3-20. Militia or other volunteer corps members belonging to a State party to a conflict, including organized resistance movements, whether operating in or outside their own territory are entitled to POW status upon capture provided the group is commanded by a person responsible for his or her subordinates, wears or has a fixed distinctive sign or insignia recognizable at a distance, carries arms openly, and complies with LOAC (GPW art. 4A(2)).

Commanded by a Person Responsible for His or Her Subordinates

3-21. This condition is satisfied if the group has a commander with effective authority over the armed group. This requirement helps ensure that the armed group has sufficient discipline and organization to conduct its operations in accordance with the law of war. The authority of the commander over his or her subordinates gives rise to a corresponding duty to ensure that the group's members conduct their operations in accordance with LOAC (see DOD Law of War Manual, 4.6.3).

Wears or Has a Fixed Distinctive Sign

3-22. The second condition, having a fixed distinctive sign recognizable at a distance, is satisfied by the wearing of a military uniform, but less than the complete uniform will suffice. The essence of this requirement is that members of the armed group are distinguishable from the civilian population. A helmet or headdress that would make the silhouette of the individual readily distinguishable from that of an ordinary civilian would satisfy this requirement. It is also desirable that the individual militia members or volunteer corps wear a badge or brassard permanently affixed to their clothing. It is not necessary to inform the enemy of the distinctive sign, although it may be desirable to do so in order to avoid misunderstanding.

Carry Arms Openly

3-23. This requirement is not satisfied if the group carries weapons concealed on the approach of the enemy. Armed groups are required to carry their arms openly in order to qualify for prisoner of war status.

Comply With the Law of Armed Conflict

3-24. This condition is fulfilled if the group observes the laws and customs of war in its operations, notwithstanding that unauthorized violations by individual members concerned may occur. Evidence that an armed group enforced LOAC (such as by promulgating instructions regarding LOAC requirements and punishing violations by members) would help establish that an armed group meets this condition.

MILITARY PERSONNEL OF UNRECOGNIZED POWERS

3-25. During an international armed conflict, members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power are entitled to POW status. This provision covers members of a regular armed force who remain loyal to their government after its own territory has been occupied (GPW art. 4A(3)), but who continue to fight as part of an international armed conflict, such as the Free French Forces in World War II, as well as other circumstances in which the regular armed forces have "right authority" but the detaining power does not recognize the government or authority of the opposing party.

CIVILIANS SUPPORTING MILITARY OPERATIONS

3-26. Civilians who accompany the armed force with the authorization of the armed force are entitled to POW status (GPW, art. 4A(4)). The United States authorizes civilians, including DOD emergency-essential civilians, civilian contractors, and accredited journalists, to accompany U.S. armed forces on the battlefield. They are entitled to POW status if captured. DOD issues these individuals identity cards to confirm their status. Although each State Party is required to issue an identification card to its personnel who are liable to become a POW (GPW art. 17), possession of the identification card is not a prerequisite for POW status. It does represent, however, a form of confirmation of entitlement to such status.

3-27. Civil aircraft and merchant marine ship crew members of the parties to the conflict are entitled to POW status (GPW art. 4A(5)).

3-28. **A *levée en masse* involves inhabitants of a non-occupied territory who, upon approach of the enemy, spontaneously take up arms to resist the invading forces, with no time to form into regular armed units, provided that they carry their arms openly and respect the laws and customs of war**. A levée en masse may only be formed on the approach of the enemy to non-occupied territory. For example, after an invading power effectively secures invaded territory and places that territory under its authority as an occupying power (HR arts. 2, 42, 43; GPW art. 4A(6)), a levée en masse may not be formed.

OTHER PERSONS TO BE GIVEN PRISONER OF WAR TREATMENT

3-29. Persons who belong, or formerly belonged, to the armed force of an occupied country are entitled to be treated as if they have POW status if the occupying country deems it necessary to detain them (GPW art. 4B(1)).

3-30. Generally, a person who would qualify for POW status as outlined in paragraphs 3-16 through 3-28 and who are in the hands of a neutral or non-belligerent party are entitled to be treated as if they have POW status (GPW art. 4B(2)).

3-31. During an international armed conflict, if there is doubt about the POW status or treatment of someone who has committed a belligerent act and who has fallen into enemy hands (such as, someone in a non-standard uniform who lost his or her identity card or a deserter who does not wish to admit being a member of his or her armed force), that person must still be treated as a POW until such time as his or her status has been determined by a competent tribunal (GPW art. 5; DODD 2310.01E).

3-32. Commanders should use tribunals conducted in accordance with applicable policies and regulations to assess factually whether specific detainees fall within the groups entitled to POW status. Commanders should refer legal questions on the status of the conflict (i.e., international or non-international) or the entitlement of particular armed forces or groups to POW status through the operational chain of command for resolution to ensure consistency of U.S. legal interpretation.

COMMENCEMENT AND DURATION OF STATUS

3-33. The GPW applies to persons referred to in Article 4 of the GPW from the time they fall into the power of the enemy until their final release and repatriation (GPW art. 5). For example, military personnel who are captured by, or who have surrendered to, enemy armed forces or members of the civilian population of the enemy, have "fallen into the power of the enemy" and therefore receive GPW protections. Individuals who defect are not viewed as having fallen into the power of the enemy since they voluntarily chose to switch sides and are not considered to be entitled to POW status (DOD Law of War Manual, 9.3.4.1). POWs or retained personnel are entitled to protections under the GPW until their final release or repatriation, unless their status is changed otherwise by competent authority in a manner consistent with the GPW (GPW art. 5). So long as the individuals are properly classified as POWs or retained personnel, the detaining power has no other basis in treaty to derogate, waive, reclassify, or re-characterize their status.

3-34. Wounded, sick, or injured enemy military personnel remain POWs or retained personnel throughout their treatment and captivity, until released or repatriated (GWS art. 14; GWS Sea art. 16).

RETAINED PERSONNEL

3-35. Military medical personnel and chaplains who are retained in the hands of the enemy to assist POWs are not POWs. They are considered retained personnel, if they meet the criteria in the GWS including that the organization in which they serve meets the criteria outlined in paragraphs 3-21 through 3-24. For example, under the GWS, military medical personnel who exclusively engaged in medical duties would receive special status as retained personnel upon capture and are not considered POWs. Retained personnel should be given, as a minimum, the POW protections under the GPW and they must also be afforded the facilities necessary to carry out their medical and chaplain duties in support of the POWs (GWS art. 28; GPW arts. 33, 35).

3-36. Retained personnel under the GPW must receive GPW protections from the time they fall into the power of the enemy until their final release and repatriation.

3-37. Retained personnel must, at a minimum, be provided the same humanitarian care, respect, and treatment as afforded POWs by the GPW. Retained personnel are subject to the same disciplinary proceedings as POWs.

RETAINED MEDICAL PERSONNEL

3-38. The following rules apply to retained medical personnel (GWS art. 28; GPW art. 33):

- They shall continue to exercise their medical activities for the benefit of POWs, preferably of their own armed forces.
- They shall be authorized and afforded necessary transportation to make periodic visits to POWs and retained persons in labor detachments or hospitals outside the camp.
- Retained medical personnel shall perform their medical duties in accordance with their professional ethics. This occurs under the control of the detaining power's competent service, however, and within the scope of its military laws and regulations. The detaining power retains its responsibility for the health of those in its custody.
- The senior retained medical officer in each camp is responsible for everything connected with the activities of retained medical personnel.
- Retained medical personnel may not be compelled to carry out work other than their medical duties.
- They may propose that POWs or retained persons be examined by Mixed Medical Commissions with a view toward being repatriated or accommodated in a neutral country and an entitlement to attend examinations conducted by Mixed Medical Commissions.
- If their retention is not indispensable to provide for the health of POWs during hostilities, retained medical personnel are to be returned to the party to the conflict to whom they belong, as soon as the road is open for their return and military requirements permit. Upon their departure, they have the right to take their personal property, including medical instruments, with them.

RETAINED MILITARY CHAPLAINS

3-39. POWs may be ministered to by retained military chaplains. Retained military chaplains shall be allocated to camps and labor detachments containing POWs belonging to the same force, speak the same language, and practice the same religion.

3-40. The rights and privileges of retained military chaplains are similar to those of retained medical personnel; for example, retained military chaplains also have the right deal with camp authorities on all questions related to their duties (GWS art. 28; GPW arts. 33, 35). Subject to camp censorship policies, they are free to write on matters concerning their religious duties to recognized international religious organizations and religious authorities of their faith in the country of detention. This correspondence is subject to standard security safeguards, including censorship of outgoing and incoming correspondence (see DOD Law of War Manual, 7.9.5.4).

3-41. POWs who are ministers of religion, without having officiated as military chaplains to their own forces, may minister freely to members of their community. Those who are recognized to act in the capacity of a chaplain should be treated as such, and may not be required to do other work. (GWS art. 28; GPW arts. 33, 36).

3-42. Under Article 37 of the GPW, if no retained military chaplain or POW minister of the appropriate faith is available, one of a similar denomination or a qualified layperson may be appointed at the request of the POWs if it is done with the approval of the detaining authority.

PERSONS NOT ENTITLED TO PRISONER OF WAR STATUS

3-43. Unprivileged belligerents, as described in Chapter 1, including persons engaged in private acts of hostility and members of non-State armed groups who fail to meet the requirements of POW status, are not

entitled to POW status. Unprivileged belligerents must be afforded the basic protections discussed in paragraphs 3-4 through 3-13. In certain cases, treatment of detained persons who do not qualify for POW status will be the same as civilian internees, as discussed in Chapter 5.

3-44. Spies and others acting clandestinely or under false pretenses, such as members of the armed forces out of uniform, who have engaged in secretive and hostile activities behind enemy lines risk being deprived of the privileges of combatant status (e.g., POW status) and are often treated as spies. Espionage and spying are covered in Chapter 1.

BASIC PROTECTIONS AND HUMANE TREATMENT FOR POWS

3-45. From capture until release and repatriation, POWs must be treated humanely at all times (HR art. 4; GPW art. 13). POWs are entitled to respect for their persons and honor in all circumstances (GPW art. 14). Further, POWs must at all times be protected against acts of violence or intimidation, against insults, and against public curiosity (GPW art. 13). Any unlawful act or omission by the detaining power that seriously endangers the health of or causes the death of a POW in custody is considered a serious breach of the GPW (GPW art. 13). POWs must not be denied quarter or murdered; LOAC does not permit derogation from this prohibition for any reason (see DOD Law of War Manual, 9.5.2.1). Additionally, POWs are forbidden to renounce, in whole or in part, their POW rights (GPW ar. 7).

3-46. POWs must be protected against:

- attack by other members of the force, including U.S. or multinational partners, or by members of the civilian population, and by other POWs.
- If wounded or sick, the POW must be treated by qualified medical personnel as promptly as medical priorities permit. If qualified medical personnel are not immediately available and the medical situation warrants treatment, members of the capturing force should apply first-aid measures commensurate with their abilities. Only urgent medical reasons will authorize priority in the order of treatment to be administered (GWS art. 12; GPW arts. 19, 20).

RESPECT FOR THE PERSON OF PRISONERS

3-47. *POWs must be respected for their persons and honor at all times. Female POWs must be treated with all consideration due their sex and will not be treated less favorably than male POWs (GPW arts. 14, 16, 25).

NO ADVERSE DISTINCTION AMONG POWS

3-48. Subject to the preceding provisions concerning due regard for female POWs as well as GPW provisions relating to rank and to any privileged treatment for POWs based on the state of health, age, or professional qualifications, all prisoners are to be treated alike by the detaining power, without adverse distinction based on race, nationality, religious belief, political opinions, or any other distinction based on similar criteria (GPW art. 16). For example, singling out POWs for harsh treatment based on their race would be a violation of this rule.

PROHIBITED ACTS

3-49. *Certain acts or omissions by the detaining power against POWs or retained personnel are expressly prohibited (GPW arts. 3, 13, 23; consider AP I art. 75), and the detaining power has obligations to protect POWs against the following acts or omissions:

- Physical mutilation or medical or scientific experiments that are not justified by the medical, dental, or hospital treatment of the POW concerned and carried out in his interest
- Any unlawful act or omission by the detaining power that causes death or seriously endangers the health of a POW.
- Acts of violence or intimidation.
- Exposure to insults or public curiosity. For example, POWs may not be paraded through city streets and subjected to the insults of the populace; POWs may not be publicly displayed in a

humiliating fashion on television or on the internet. Custodians of POWs, such as escorts, must protect POWs from acts of violence.

- Improper photography and media exposure. For example, DOD policy has generally prohibited the taking of photographs except for authorized purposes in order to protect POWs and other detainees from public curiosity.
- Using POWs as human shields to protect military objectives.
- Acts of reprisal against POWs.
- Bartering and other transactions between members of the forces of the detaining power and POWs concerning the POWs personal effects are not considered proper.
- Adverse discrimination based upon race, sex, nationality, religious belief, political opinions, or any other similar criteria in regard to treatment of POWs. In some cases, however, the captor is permitted, and sometimes required, to make distinctions between POWs or retained personnel as to rank, state of health, age, or professional status, as well as to provide additional protection for women. Also, as explained in paragraph 3-43, distinctions for security purposes are permissible (GPW arts. 14, 16, 30, 43-45, 49, 109-110).

BEGINNING OF CAPTIVITY

3-50. Military commanders have an affirmative duty to take the measures within their ability and appropriate to the circumstances, to protect POWs captured by their unit until they are properly transferred to higher or other competent authority. Commanders may not execute POWs to preserve their unit or to facilitate their unit's movement.

ARTICLE 5 TRIBUNALS

3-51. If, during an international armed conflict, the detaining power has any doubt as to whether a captured person is entitled to POW status or treatment, Article 5 of the GPW requires the detaining power to provide POW treatment for such persons having committed a belligerent act until such time as his or her status has been determined by a competent tribunal. This "Article 5 tribunal" would review the facts and circumstances to determine the status of the individual in doubt. If the detaining power has no doubt regarding the entitlement to POW status or treatment, then Article 5 does not require that the person be provided POW treatment or a tribunal to adjudicate claims of POW status (for example, if the United States has determined that a non-State armed groups does not meet the criteria for its members to be entitled to POW status, then no members of that group may, by asserting membership in that group, assert a right to POW treatment under Article 5 or to an Article 5 tribunal to adjudicate their claim to POW treatment).

3-52. Similarly, if a member of non-State armed group is captured in a non-international armed conflict, then no "Article 5 tribunal" is required as a matter of international law, and POW status or treatment would not be required. However, an administrative tribunal may be useful to determine whether a detainee is a peaceful civilian or an unprivileged belligerent or whether there is a necessity for continued detention (DOD Law of War Manual, 4.27.4).

3-53. If the detaining power has doubt as to whether a captured person is entitled to POW status or treatment and the detaining power wishes not to treat the captured person as a POW, an Article 5 tribunal should be convened within a reasonable period of time following capture, generally upon timely arrival at a corps or higher level POW camp. A detaining power may decline to convene a tribunal only if military exigencies prevent it.

3-54. The details of Article 5 tribunals, such as composition and procedures, are within the discretion of the detaining power. In U.S. practice, tribunals have been three-person administrative boards. A captured person is entitled to notice in a language he or she understands that a tribunal will be held and he or she will be given the opportunity to testify or otherwise address the tribunal. The standard for reaching a determination has been a "preponderance of the evidence." (See details in AR 190-8/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees.)

3-55. If a competent tribunal determines that a person who has committed a belligerent act is not entitled to POW status or treatment, such person may still be entitled to protected person status under the GC or may be

determined to be an unprivileged belligerent who is not entitled to POW status or treatment nor protected person status under the GC. In any event, the person will be treated humanely at all times. (See Chapter 5.)

ADDITIONAL ACTIONS UPON CAPTURE

3-56. *In addition to treating captured individuals humanely, the following actions should occur at the time of capture, subject to the requirements of the GPW (GPW art. 18):

- Captured personnel are to be disarmed.
- Following disarmament, they are to be searched for hidden weapons, identification documents, and items of potential intelligence value.
- Captured enemy personnel may be segregated by rank or grade, service, sex, or nationality. They also may be segregated if they are deserters, civilians, or political indoctrination personnel, or by other categories, so long as the segregation is undertaken in a manner consistent with the prohibition against adverse distinction (see para. 3-35, supra).
- Each captured person should be examined to identify if he or she requires medical treatment. A capture card should be completed at the earliest possible time to facilitate accountability.
- Personal property may be removed for intelligence purposes, but should be returned as soon as possible. This may include sun glasses, watches, family photographs, and personal correspondence.
- Captured personnel are entitled to retain the following items:
  - Clothing, including protective clothing;
  - Equipment for personal protection, such as helmet, body armor, and gas mask;
  - Canteens and mess kits;
  - Military badges of rank, nationality, service, and branch, and specialty badges; and
  - Identity cards, dog tags, or similar identification items.

SECURITY MEASURES BY CAPTURING UNIT

3-57. The GPW does not prohibit routine security measures at the time of capture that are necessary to prevent the escape of a POW, concealment of identity or documents of intelligence value, or similar acts (see DOD Law of War Manual, 9.6). POWs may be disarmed, searched, segregated by rank, and may be ordered to remain silent. The capturing unit may secure the POW's hands with handcuffs or flex cuffs and take other security measures to protect those responsible for the POW's from physical or other abuse.

EVACUATION

3-58. As soon as possible after capture, POWs must be evacuated to camps located sufficiently distant from the combat zone so that they are out of danger. POWs must not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone. A POW may be temporarily kept near the danger zone only when wounds or illness would make the evacuation more hazardous to the POW's health. Furthermore, evacuation should always be done in a humane manner and in conditions similar to those for the forces of the detaining power. POWs must receive sufficient food and potable water, and necessary clothing and medical attention. All feasible precautions must be taken to ensure POWs safety during evacuation. If POWs cannot be evacuated as provided for in Part III, Section I, of the GPW, they may be released, provided that feasible precautions are taken to ensure their safety (GPW arts. 19, 20; see DOD Law of War Manual, 9.9.2 and 9.9.3).

PRISONER OF WAR PROPERTY

3-59. When disarming prisoners at the time of capture, the capturing unit may confiscate firearms, ammunition, knives, bayonets, grenades, or other weapons, or any other device that may pose a threat to capturing force personnel, or any equipment or items that could possibly facilitate escape. Such items may include: flares, compasses, survival maps, or individual emergency radios. Capturing personnel may not confiscate items issued for personal protection, clothing, and feeding unless such an item is being impounded for security reasons.

3-60. Personal items such as a ring, wrist watch, or family photographs may not be taken from a POW or from dead enemy personnel except by authorized personnel, and then only for their safekeeping. Items taken for safekeeping must be itemized, separated, and packaged in order to permit accountability, safekeeping, and return upon a POW's release (GPW art. 18).

3-61. Currency carried by POWs may not be taken except by order of an officer. The amount of currency and the identity of the owner must be recorded in a special register, and an itemized receipt must be provided to the POW (GPW art. 18). The unexplained possession by a POW of a large sum of money justifiably leads to an inference that such funds are not his or her own property and are in fact either property of the enemy government or property that has been looted or otherwise stolen.

INTERROGATION AND ACCOUNTABILITY

3-62. Intelligence interrogation of detainees immediately following capture is essential for purposes of accountability and intelligence collection. For purposes of accountability, the capturing unit is required to establish a list of POWs who are evacuated as soon as possible (GPW art. 20). To facilitate this effort, each POW is obligated to provide name, rank, date of birth, and army, regimental, or service number, or, failing this, equivalent information. Refusal to provide this information is not a basis for denial of POW or retained person status, however, such refusal may justify a restriction of privileges that would otherwise be accorded to a POW's rank or status (GPW art. 17).

3-63. Parties to the conflict are required to provide personnel under their jurisdiction who are "liable to become" POWs with identification cards with the information listed in the previous paragraph. These cards may also have the fingerprints or signatures of the possessor. They shall be shown to the possessor's captors but retained by the cardholder (GPW art. 17). At no time will POWs be without their identification documents. The lack of possession of an identification card does not disqualify a person "liable to become" a POW from being entitled to POW status.

3-64. POWs unable to state their identity due to mental or physical condition shall be handed over to the medical service (GPW art. 17).

3-65. The GPW does not prohibit intelligence interrogation of POWs, but specifies conditions and limitations for conducting such an interrogation. It must be carried out in a language the prisoner understands and in a manner consistent with the requirements for humane treatment, including the prohibition against acts of violence or intimidation, and insults. No physical or mental torture, nor any form of coercion, may be inflicted on POWs to secure information from them of any kind. Prohibited means include imposing inhumane conditions, denial of medical treatment, or the use of mind-altering chemicals. POWs who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind (GPW arts. 13, 17). Intelligence interrogation by Army and Marine Corps personnel must also comply with U.S. law and policy (see Section 1045, National Defense Authorization Act for Fiscal Year 2016; DOD Directive 3115.09, DOD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning; and Field Manual (FM) 2-22.3, Human Intelligence Collector Operations).

INTERNMENT IN PRISONER OF WAR CAMPS

3-66. POWs and retained personnel should be interned in camps that are situated in an area far enough from the combat zone for them to be out of danger. The camps should be located in areas that afford every guarantee of hygiene and healthfulness and to prevent epidemics. If necessary for security reasons or other military reasons, such as to discourage escape or reduce the risk of enemy raids, POW camps may be located outside the theater of operations. Because POW status is not punitive, POWs shall not be interned in penitentiaries unless such internment is in the POWs interest (see DOD Law of War Manual, 9.11.3.2). Military conditions permitting, POW camps should be clearly marked by the letters PG, PW, or other agreed-upon markings so the camps are clearly visible from the air during the day (GPW art. 23).

3-67. POWs may have their movements restricted to certain limits, such as the camp where they are interned, or if the camp is fenced in, of not going outside its perimeter. Subject to the GPW provisions related to penal and disciplinary sanctions, POWs, may not be held in close confinement (for example a room or a cell) except where necessary to safeguard their health and then only during the continuation of circumstances that make such confinement necessary (GPW art. 21; see DOD Law of War Manual, 9.11.1).

3-68. POWs are entitled to the following protections and protective measures in a POW camp (GPW arts. 13, 17, 23).

- POWs and retained personnel shall be protected against acts of violence, including assaults or intimidation.
- POWs and retained personnel shall be protected against insults and public curiosity.
- POWs and retained personnel may not be subjected to medical or scientific experimentation not justified by the medical, dental, or hospital treatment of the POW concerned and carried out in his or her interest.
- POWs and retained personnel are entitled to respect for their persons and honor. For example, rapes and other sexual assault of POWs are forbidden.
- POWs and retained personnel may be interned only in camps on land. POW camps should be situated in an area far enough from the combat zone for POWs to be out of danger.
- POWs and retained personnel may not be sent to or detained in areas where they may be exposed to fire of the combat zone nor may his or her presence be used to render certain points or areas immune from military operations.
- Camps may not be located or designed for the purpose of using POWs or retained personnel as human shields in order to prevent the attack of military objectives.
- POWs and retained personnel must have shelters against bombardment and other hazards of war to the same extent as the local civilian population. If there is a risk of air, missile, or chemical, biological, radiological, or nuclear weapons attack, POWs shall retain their personal protective equipment (such as, helmets, body armor, and protective masks) or be provided comparable equipment for personal protection.

QUARTERS

3-69. POWs and retained personnel must be quartered in camps or camp compounds according to their nationality, language, and customs in order to minimize friction among POWs or groups of POWs, provided that such POWs shall not be separated from POWs belonging to the armed forces with which they were serving at the time of their capture, except with their consent (GPW art. 22). In any camps in which women POWs, as well as men, are accommodated, separate dormitories and separate toilet facilities shall be provided for women POWs. POWs may be segregated according to their known or suspected security risk level. Subject to compliance with the GPW, officer POWs may be separated from enlisted POWs. Female POWs will be under the immediate supervision of women (GPW arts. 21-25).

3-70. In addition to the requirements previously listed, POWs and retained persons shall be quartered under conditions as favorable as those for the forces of the detaining power in the same area. Barracks should be protected from dampness, adequately heated and lighted, and should include all necessary fire prevention measures. Conditions in the quarters must make allowances for the habits and customs of the POWs. In addition, conditions posing health risks should be identified and corrected to ensure that conditions in no case are prejudicial to the POWs' health (GPW art. 25).

3-71. POWs shall have shelter against aerial bombardment and other hazards of war to the same extent as the local population (GPW art. 23).

FOOD, WATER AND TOBACCO

3-72. The food and water ration of POWs and retained personnel should be as consistent as feasible with their actual needs. Medical, cultural, and religious requirements should be considered in determining and ensuring the appropriate diet for POWs. Food rations shall be of sufficient quantity, quality, and variety to keep POWs in good health and to prevent weight loss or the development of nutritional deficiencies. Adequate messing premises shall be provided and additional food provided for those whose labor require it. Tobacco use is to be permitted, but reasonable restrictions on when it is permitted, for health reasons and other legitimate reasons, are permitted. Collective disciplinary measures affecting food are forbidden (GPW art. 26, 28, 31).

CLOTHING

3-73. Adequate supplies of clothing, underwear, and shoes must be provided to POWs free of charge. If available, uniforms of the armed forces to which POWs owe their allegiance should be made available to clothe them. POWs who work shall be provided clothing consistent with their work, to include protective items. Clothing must be suitable for the regional climate (GPW art. 27). Uniforms or other clothing may contain markings denoting the individuals as POWs to help prevent escape, but the markings may not be humiliating or degrading (DOD Law of War Manual, 9.13.4.1).

CANTEENS

3-74. Canteens are similar to a base or post exchange for POWs. They should be established in all permanent POW camps within a reasonable period of time, such as after more basic camp facilities have been established for U.S. forces in the area. The purpose of the canteen is to permit prisoners to purchase items, at a cost not greater than local market prices, for daily use that the detaining power is not otherwise required to provide. These may include, but are not limited to, items such as correspondence materials, foodstuffs, personal hygiene articles, tobacco, soft drinks and other non-alcoholic beverages, and reading materials (see GPW art. 28). U.S. practice has been to provide these materials to POWs free of charge before a canteen can be established (see DOD Law of War Manual, 9.17.1.1).

HYGIENE

3-75. POWs may only be interned in premises affording every guarantee of hygiene and healthfulness. POW camps must have sanitary measures that will ensure the cleanliness and healthfulness of the camps and that will prevent epidemics. POWs interned in unhealthful areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favorable climate (GPW art. 22).

3-76. POWs shall have for their use, accessible day and night, toilets that conform to the rules of hygiene and are maintained in a constant state of cleanliness. Where feasible, toilets should be appropriate for the culture of the POWs. In addition, bathing and laundry facilities with sufficient soap and water are to be provided. Individuals must be provided reasonable opportunity to make use of these facilities. Toilet, bathing, and laundry facilities must be kept clean (GPW art. 29). POWs may be assigned cleaning duties. The detaining power, however, has the ultimate responsibility for the camp's sanitary conditions.

MEDICAL CARE AND INSPECTIONS

3-77. POWs should be disinfected and receive medical examinations on entry into the POW camp. They should receive any necessary inoculations and individuals suffering from infectious or mental disease should be quarantined for the protection of other POWs (GPW arts. 30, 31; see DOD Law of War Manual, 9.11.5.1).

3-78. Every POW camp will have an adequate infirmary where POWs, including those undergoing punishment, can receive medical care they require, as well as an appropriate diet. If necessary, isolation wards must be established for those suffering from contagious or mental diseases. POWs with serious diseases or requiring special treatment must be admitted to any military or civilian medical unit that can provide appropriate treatment. As necessary, specialized medical treatment will be made available for treatment of serious disease or injury. Imminent release and repatriation or transfer does not relieve the detaining power from this responsibility (GPW art. 30).

3-79. POWs who are not members of the medical services of their armed forces but who may be medically trained, may be required to provide medical care for their fellow POWs who belong to the same group. Retained medical personnel should be permitted to perform their respective duties. The detaining power, however, always retains responsibility for prisoner health and medical care. If available, POWs must have access to medical care from personnel of the power on which they depend and, if possible, of their own nationality (GPW art. 30, 32).

3-80. Required medical treatment cannot be denied POWs, and all medical treatment should be documented. The detaining power must bear the cost of medical treatment and of remedial aids such as dentures, crutches, artificial limbs, or eye glasses (GPW arts. 15, 30).

3-81. Only urgent medical reasons will authorize priority in the order of treatment administered (GWS art. 12).

3-82. POWs must receive a medical inspection at least once a month to check on each prisoner's general health, nutrition, and cleanliness, and to detect contagious diseases. Inspection includes checking and recording of each POW's weight (GPW art. 31).

Serious Injuries

3-83. Any serious injury (an injury requiring hospitalization) to or death of a POW will be the basis for an official investigation to determine its cause (GPW art. 121). In addition, Army regulations and DOD policy require reporting and investigation of potential detainee abuse.

Prisoners Who Engage in Medical Duties

3-84. Even if not attached to their own force's medical service branch, POWs who happen to be doctors, nurses, or other medical practitioners may be required to assist in the medical services of their fellow POWs. If so, they may not be compelled to engage in any other work (GPW art. 32).

RELIGIOUS ACTIVITIES

3-85. POWs are entitled to religious worship, including attendance at services, subject to the POW's compliance with camp disciplinary routine. Accommodation for religious services shall be provided (GPW art. 34).

3-86. POWs may be ministered to by retained military chaplains or by other ordained chaplains or qualified laypersons, if available. Retained chaplains shall be allocated to camps and labor detachments containing POWs of the same forces, language, or religion.

INTELLECTUAL AND PHYSICAL ACTIVITIES

3-87. Subject to security requirements and individual preference, the detaining power shall encourage intellectual, educational, and recreational pursuits, including sports and games, and provide adequate facilities and equipment. Each POW camp must contain sufficient open space for POWs and retained persons to be outdoors and to engage in physical exercise, including sports and games (GPW art. 38).

3-88. Intellectual activities, including reading and courses of instruction, shall be available to POWs. POW participation is elective. Educational courses, lectures, and other training methods of instruction on history and democracy are permitted, provided attendance is not compelled and POWs are not punished if they do not participate. This provision does not permit the subjection of POWs to propaganda under the guise of education (see DOD Law of War Manual, 9.16.1).

LEGAL STATUS IN RELATION TO THEIR HOME STATE AND CIVIL CAPACITY

3-89. Although POWs are not subject to the judicial or disciplinary procedures of the State for which they have an allegiance while they are POWs, POWs remain subject to the law, disciplinary authority, and regulations of that State. For example, while they are POWs, they may not conduct disciplinary proceedings against one another; however, they are liable to punishment for violations of their State's domestic law committed during captivity, once they have been released and repatriated (see DOD Law of War Manual, 9.22.2).

3-90. All prisoners retain their full civil capacity that they enjoyed at the time of their capture. The detaining power may not restrict the exercise of the rights such capacity confers, except in so far as the captivity requires (GPW art. 14).

COMMUNICATIONS, SHIPMENTS, AND RELATED ENTITIES

3-91. The GPW provides thorough requirements and guidelines to regulate communications, shipments, and the related entities that facilitate such activities within POW camps.

COMMUNICATIONS WITH THE EXTERIOR

3-92. A point of immediate concern for POWs is their communication with others outside the camp. Once POWs have fallen into the hands of a detaining power, that power must inform the POWs, and the powers upon which the POWs depend of the measures taken to ensure compliance with the GPW. POWs may write to their families and to the Central Prisoners of War Agency informing them of their capture, mailing address, and state of health (GPW art. 70).

CORRESPONDENCE AND CONSIGNMENTS

3-93. POWs may send and receive letters and cards, subject to security requirements. Electronic means, including voice and video conferences, should be considered as time, resources, and circumstances permit. If the detaining power deems it necessary to limit such correspondence, it may not restrict any POW to sending fewer than two letters and four cards monthly, conforming as closely as possible to the models annexed to the GPW, not including capture cards sent to satisfy the notification referenced in the previous paragraph and certain other correspondence the GPW authorizes without counting against any prisoner correspondence quota (see DOD Law of War Manual, 9.20.2.1). The protecting power may permit further limitations only in the interests of the POWs concerned based on the detaining power's inability to find sufficient qualified linguists to carry out the necessary censorship. As a general rule, the correspondence of POWs shall be written in their native language although the parties to the conflict may allow correspondence in other languages. In cases of urgency or of POWs having difficulty communicating with their next of kin, the POWs affected may send telegrams at prisoner expense. Limitations on the correspondence addressed to POWs may only be ordered by the power on which the prisoners depend. Such letters and cards must be conveyed as rapidly as the detaining power can manage; they may not be delayed or retained for disciplinary reasons (GPW art. 71).

3-94. Censorship of correspondence addressed to POWs or sent by them shall be done as quickly as possible. Examination of consignments intended for POWs shall not be carried out under conditions that will expose the goods contained in them to deterioration; except in the case of written or printed matter, it shall be done in the presence of the addressee, or a fellow POW duly delegated by him or her (GPW art. 76).

PRISONERS' REPRESENTATIVE

3-95. The role of the prisoners' representative is to represent POWs before the military authorities, the Protecting Powers, the ICRC, and any other organization that may assist them. The prisoners' representative shall also further the physical, spiritual, and intellectual well-being of POWs. The prisoners' representative facilitates much of the communication and shipments the GPW authorizes on behalf of POWs. If prisoners decide to organize for mutual assistance, their organization will be within the purview of the prisoners' representative. Prisoners' representatives may not be held responsible for any offenses committed by POWs, however, simply by reason of their duties. POWs may freely consult their prisoners' representative. Any POW correspondence limits as referenced in paragraph 3-93 shall not apply to correspondence to or from a prisoner's representative as such (GPW arts. 80, 81).

3-96. The highest ranking military POW officer acts as the prisoners' representative, assisted by advisers chosen by fellow POWs in the camp. In camps without officers, a representative is elected by secret ballot every six months. An elected prisoners' representative must be approved by the detaining power before commencing duties as the representative. If the detaining power refuses to approve the elected representative, it must inform the protecting power or the ICRC of the reason for such refusal and the prisoners are entitled to hold a new election. A prisoners' representative is to have the same nationality, language, and customs as the POWs represented. Thus, a camp having different sections according to differing prisoner nationalities, languages, or customs will have multiple prisoners' representatives (GPW art. 79).

3-97. The detaining power must provide prisoners' representatives all facilities necessary to communicate with the detaining authorities, the protecting power, the ICRC, and those organizations given to assist POWs. Other material facilities shall be granted prisoners' representatives, particularly sufficient freedom of movement to accomplish their duties, such as visits to those premises where POWs are detained, inspection of labor detachments, and receipt of supplies. Prisoners' representatives may appoint assistants they need

from among the POWs. The detaining power may not require prisoners' representatives to perform other work if doing so makes their duties more difficult (GPW art. 81).

3-98. Prisoners' representatives who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs. The reasons for the dismissal of a prisoners' representative must be communicated to the protecting power (GPW art. 81).

THE CENTRAL PRISONERS OF WAR INFORMATION AGENCY AND THE CENTRAL TRACING AGENCY

3-99. The GPW provides for the creation of a Central Prisoners of War Information Agency in a neutral country for the purpose of collecting all the information it may obtain through official or private channels respecting POWs, and to transmit it as rapidly as possible to the POWs' country of origin or power on which they depend (GPW art. 123). This role generally has been performed by the ICRC through its Central Tracing Agency.

INFORMATION BUREAUS FOR POWS

3-100. On outbreak of a conflict and in all cases of occupation, each State party to the conflict must establish an official national information bureau for POWs in its custody. The main purpose of the information bureau is to receive all reportable information concerning POWs in the custody of the detaining party and forward it expeditiously to the parties concerned through the Central Prisoner of War Information Agency and the protecting power (GPW art. 122). In recent practice, the United States has established a National Detainee Reporting Center that can perform this purpose (see Joint Publication [JP] 3-63, Detainee Operations).

3-101. The State concerned must (GPW art. 122):

- Ensure the information bureau has the necessary accommodation, equipment, and staff to discharge its responsibilities efficiently. POWs may be employed in the information bureau under work conditions established in the GPW as outlined in paragraphs 3-109 through 3-114, infra;
- Within the shortest possible period, provide the information bureau identifying information about each person it detains and an address to which correspondence may be sent; and
- When applicable, provide the information bureau in the shortest period possible information related to transfer, release, repatriation, escape, recapture, admission to a hospital, or death. Information concerning the state of health of a POW who is seriously wounded, injured, or sick must be provided regularly, every week if possible.

3-102. The following summarizes the procedure through which reports of enemy POWs captured by U.S. forces or in U.S. hands are processed: The Theater Detainee Information Center receives reports from all subordinate POW facilities, consolidates them, and reconciles any discrepancies. This center then forwards the report to the National Detainee Reporting Center. The National Detainee Reporting Center forwards the reports to the ICRC Central Tracing Agency (and any protecting power). The Central Tracing Agency then transmits the reports to the appropriate country for each POW.

3-103. Information bureau responsibilities include (GPW arts. 122-123):

- On behalf of the detaining power, providing available information regarding POWs to the Central Prisoners of War Information Agency and, if applicable, to the designated protecting power.
- Responding to authorized inquiries received about POWs, consistent with the protection from insults and public curiosity.
- Ensuring that its correspondence is properly authenticated.
- Collecting and forwarding personal valuables, currency, and important documents, left by POWs who died, escaped, or who were repatriated or released to the Central Prisoners of War Information Agency and, if appropriate, the protecting power. These items should be forwarded in sealed packets and accompanied by both an inventory of the packet's contents and statements providing clear and complete information as to the identity of the person who owned the articles.

RELIEF SOCIETIES AND OTHER ORGANIZATIONS

3-104. Subject to the consent of the detaining power, humanitarian organizations may provide collective relief and assistance to, and within, POW camps. Historically, this role has been performed by the ICRC, its special position in this field shall be recognized and respected at all times. Access is subject to security or other practical considerations and the obligation to protect POWs from public curiosity (GPW arts. 9, 13).

REQUESTS AND COMPLAINTS

3-105. POWs have the right to make requests to the military authorities of the detaining power concerning the conditions of their captivity. They also have the right to lodge complaints about such matters to the protecting power if one has been appointed, or to ICRC representatives. Such complaints may be made by the POW or through the prisoners' representative. No restrictions may be placed on requests or complaints. Written complaints must be transmitted without delay and may not be counted against a prisoner's quota of allotted letters if a quota has been established. The individual making the complaint may not be punished, even if the complaint is unfounded (GPW art. 78).

LEGAL DOCUMENTS

3-106. The detaining power must provide POWs all reasonable facilities for the preparation and execution of legal documents in their civil capacity, and for their transmission through the protecting power or Central Prisoners of War Information Agency (GPW art. 77).

RELIEF SHIPMENTS

3-107. POWs are allowed to receive relief shipments containing food, clothing, medical supplies, and articles of a religious, educational, or recreational character and materials allowing POWs to pursue their studies or cultural activities, free of import, customs, or other duties (GPW arts. 72, 74). Procedures for collective relief shipments are delineated in Annex III to the GPW. States may arrange for relief shipments by special agreement as long as the agreement neither restricts the prisoner representative's right to take possession of relief shipments and distribute or dispose of their contents on behalf of the POWs nor restricts the protecting power, the ICRC, or other qualifying organization of their right to supervise shipment distribution (GPW art. 73).

3-108. The only limits that may be placed on these shipments shall be those proposed by the protecting power in the interests of the POWs themselves, or by the ICRC or any other organization giving assistance to the POWs, in respect to their own shipments only, on account of the exceptional strain on transport or communication (GPW art. 72). Relief shipments for POWs are exempt from any postal charges or duties.

LABOR

3-109. Subject to the conditions outlined in Section III of the GPW, the detaining power may employ POWs and retained personnel (GPW art. 33, 49). Retained personnel, however, may not be employed other than for work related to their medical or religious duties (GPW art. 33).

3-110. *Labor assignments for physically fit POW's must, nevertheless, take into consideration a POW's age, sex, rank, and physical aptitude, with a view to maintaining POWs in a good state of physical and mental health. Officers may not be compelled to work. They may be permitted to work if they request to do so and suitable work is available. Noncommissioned officers may be employed, but only in supervisory positions (GPW art. 49).

3-111. POWs may never be employed in labor that places them at risk of violence, intimidation, insults, or public curiosity, or that would be regarded as humiliating if performed by a member of the detaining power's military force. Additionally, unless they volunteer, POWs may not be compelled to perform labor that is unhealthy or dangerous (GPW art. 52). They may not be compelled to take part in military operations directed against their own country.

3-112. POWs may be compelled to engage in a broad range of work, to include camp administration, installation, and maintenance. If they volunteer, POWs may work in a broader range of jobs, to include work

on military bases not directly connected with war operations. The following lists other permissible classes of work in which POWs may be compelled to work (GPW art. 50):

- agriculture;
- industries connected with the production or the extraction of raw materials and manufacturing industries, except metallurgical, machinery and chemical industries;
- public works and building operations that have no military character or purpose;
- transport and handling of stores that are not military in character or purpose;
- commercial businesses, including arts and crafts;
- domestic service; and
- public utilities having no military character or purpose.

3-113. POWs shall be provided with appropriate food, clothing, equipment, conditions, and training for performing their work (GPW art. 51). The treatment of POWs who work for private employers must not be inferior to that provided for under the GPW (GPW art. 57).

3-114. POWs performing labor shall receive working pay at a fair rate established by the detaining power within GPW guidelines (GPW arts. 54, 62). POWs permanently assigned to work for the administration, installation or maintenance of POW camps, and POWs required to perform spiritual or medical duties for their fellow POWs are also entitled to fair working pay (GPW art. 62). The duration of the POWs' daily routines should not be excessive and must comport with GPW standards, which in general require working conditions that are safe and not inferior to those the detaining power affords its nationals (GPW art. 51). Prisoners shall receive one hour of rest in the middle of the day's work and 24 consecutive hours of rest each week. For POWs held by the Department of Defense, further information is provided in chapter 4, AR 190–8/Marine Corps Order 3461.1.

FINANCIAL RESOURCES OF PRISONERS OF WAR

3-115. POWs are entitled to a monthly advance of pay commensurate with their rank. This is paid during captivity so that a POW or retained person may purchase items at the canteen that the detaining power is not otherwise required to provide. Payment of advance pay is not dependent upon performing labor. The detaining power pays the advance on behalf of the party in whose force the POW was serving at the time he or she was captured and the amount of pay is rank-dependent. (GPW art. 60). Reimbursement to the detaining power is to be made at the end of hostilities (GPW art. 67).

3-116. An advance of pay may be made in scrip or vouchers that can be used only in the POW camp in order to prevent POWs from having or hoarding currency, which might create a security concern. Explicit requirements for transfers of funds, maintenance and management of the POWs' accounts, finalizing the accounts at the end of captivity, and payment of claims and compensation are delineated in Articles 63-68 of the GPW and DOD financial management regulations.

CAMP ADMINISTRATION AND DISCIPLINE

3-117. Every POW camp must be put under the immediate authority of a commissioned officer of the detaining power's regular armed force. Officers in charge of POW camps will have copies of the GPW, will ensure the others in charge of camp administration understand and adhere to the GPW, and will ensure it and other camp administration regulations are posted for POWs' reading in languages they understand. Orders addressed to a POW individually must be in a language that the POW understands (GPW arts. 39, 41).

3-118. POWs shall display the same respect and courtesies, such as saluting, to the officers of the detaining power. POWs, with the exception of officers must salute and show external marks of respect to all officers of the detaining power. Officer POWs must salute only Detaining Power officers of higher rank and the commander of the camp (GPW art. 39). POW camp commanders have the right and responsibility to take reasonable measures to maintain good order and discipline within a camp.

3-119. Apart from judicial authorities or superior military authorities, only the camp commander, the officer acting in the commander's place, or the officer to whom the commander has delegated command powers, may award disciplinary punishment. This authority cannot be delegated to POWs (GPW art. 96).

3-120. POWs are entitled to keep their rank insignia, nationality badges or devices, and decorations (GPW art. 18). They must be treated with due regard to their rank and age (GPW art. 44). The detaining power must recognize promotions of POWs during their captivity, when notified by the power on which such POWs depend (GPW art. 43).

3-121. Non-lethal weapons may be used to control rioting or to prevent escape. Deadly force may be used to prevent the escape of a POW or to restore discipline in certain circumstances, such as when POW actions pose an imminent threat of death or serious bodily harm to camp personnel or other POWs.

3-122. The use of weapons against POWs, particularly against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances (GPW art. 42).

3-123. Pursuant to Article 91, GPW, a POW succeeds in an escape attempt if the POW rejoins the armed forces of the power on which the POW depends or joins those of an ally; the POW leaves the territory under the control of the detaining power or its allies; or the POW joins a ship flying the flag of the power on which the POW depends or of an ally, in the territorial waters of the detaining power (provided that this ship is not under the control of the detaining power). POWs who make good their escape and are recaptured may not be punished in respect to their escape (GPW art. 91; DOD Law of War Manual, 9.25.1).

3-124. A POW who attempts to escape but does not succeed before recapture may only be subject to disciplinary punishment, even if it is not a first attempt. If recaptured by civilians, the prisoner should be turned over to local, State, or federal law enforcement authorities for safekeeping so that he or she may be turned over to military custody as soon as possible (GPW art. 92). A recaptured POW must be handed over without delay to the competent military authority. A recaptured individual remains a POW and the responsibility of the detaining power and must be treated accordingly.

3-125. A POW who commits offenses with the sole intention of facilitating escape and whose offenses do not involve violence against life or limb, such as offenses against public property, theft without intention of self-enrichment, the drawing up or use of false papers, or the wearing of civilian clothing, may be subject to disciplinary punishment only. Similarly, a POW who aids or abets an escape or an attempt to escape may be subject to disciplinary punishment only. Escape or attempt to escape may not be considered an aggravating circumstance if the POW is subjected to trial by judicial proceedings in respect of an offense committed during the POW's escape or attempt (GPW art. 93).

PENAL AND DISCIPLINARY SANCTIONS

3-126. A POW is subject to the laws, regulations, and orders that apply to the armed forces of the detaining power (GPW art. 82). The UCMJ applies to POWs held by the United States. POWs also remain subject to the laws of the State to which they claim allegiance, and may be prosecuted by that State following release and repatriation for misconduct committed during their captivity.

3-127. For the purposes of this chapter, "disciplinary measures" means punishment by the commander of the POW camp and other similar punishments by those with authority, and such punishment is equivalent to summary disposition by a commanding officer. "Judicial proceedings" means trial and punishment by a court having jurisdiction to try POWs and is usually equivalent to trial by court-martial.

3-128. This section provides information on the rules for penal and disciplinary sanctions against POWs. It is not intended as a guide for the conduct of penal or disciplinary sanctions against POWs. Commanders should seek the counsel of judge advocates and apply relevant provisions of U.S. law, such as the UCMJ, in accordance with the requirements of the GPW.

JUDICIAL PROCEEDINGS

3-129. POWs should normally be tried in military courts only. However, if the law of the detaining power permits members of its own armed forces to be tried in civilian courts for particular offenses, then civil courts may try POWs under the same conditions. All courts trying POWs must offer essential guarantees of independence, impartiality as generally recognized and, in particular, must be guided by the procedures

provided for under the GPW related to the rights of the accused and to means of defense (GPW arts. 84, 105; consider AP I art. 75).

3-130. In deciding whether proceedings with respect to an offense shall be judicial or disciplinary, the competent authority should exercise the greatest leniency and adopt, where possible, disciplinary rather than judicial measures (GPW art. 83).

DOUBLE JEOPARDY

3-131. A POW may not be punished more than once for the same act or on the same charge (GPW art. 86).

OFFENSES COMMITTED PRIOR TO CAPTURE

3-132. Subject to the requirements of the GPW, a detaining power may try a POW for offenses over which it may exercise jurisdiction committed prior to capture, such as war crimes committed against the detaining power or its co-belligerents. Throughout the trial process and after, even if convicted, a POW retains the status of a POW and the benefits of the GPW (GPW art. 85).

DISCIPLINARY MEASURES AND PRE-TRIAL ISSUES

3-133. Acts that constitute offenses against discipline shall be investigated immediately (GPW art. 96). Investigations related to a POW shall be conducted as rapidly as circumstances permit so that his or her trial may take place as soon as possible (GPW art. 103). No moral or physical coercion may be exerted on a POW to induce an admission of guilt.

3-134. A POW accused of an offense against discipline shall not be confined during investigation and pending any hearing unless the detaining power would similarly confine a member of its own armed forces for the same offense under similar circumstances, or if doing so is otherwise essential to camp order and discipline. Any period a POW spends in confinement awaiting disposal of an offense against discipline shall be as short as possible and shall not exceed fourteen days (GPW art. 95). The period a POW spends in confinement awaiting judicial trial may not exceed three months (GPW art. 103).

3-135. A POW confined as a disciplinary punishment or pending trial continues to enjoy the benefits of the GPW except for those necessarily rendered inapplicable due to the nature of confinement. POWs shall not in any case be transferred to a civilian prison to undergo disciplinary punishment therein; female POWs shall be confined in separate quarters from men and shall remain under the immediate supervision of women (GPW art. 97). Parcels and remittances of money to such a POW may be withheld until completion of confinement; POWs shall meanwhile be entrusted to the prisoners' representative. However, POWs confined for disciplinary punishment or pending trial retains the right to (GPW arts. 98, 103):

- Make requests and complaints and deal with representatives of the protecting power or the ICRC;
- Retain the prerogatives attached to their rank;
- Read, write, receive, and send correspondence;
- Retain access to facilities to ensure individual safety, cleanliness, and health (GPW art. 25, 29);
- Take regular exercise and stay in the open air at least two hours daily; and
- Be present at the daily medical inspections and have the medical care required by their state of health.

3-136. All POWs sentenced to confinement, as a result of judicial proceedings, have the right to (GPW art. 108):

- Make requests and complaints and deal with representatives of the protecting power or the ICRC;
- Receive and send correspondence;
- Receive at least one relief parcel each month;
- Take regular exercise in the open air;
- Have the medical care required by their state of health; and
- Have such spiritual assistance as they may desire.

RIGHTS OF AN ACCUSED

3-137. With respect to disciplinary proceedings, before any disciplinary punishment is announced, the accused must be given precise information regarding the offenses of which the POW is accused and an opportunity to explain the conduct and defend himself or herself. The accused must be allowed to call witnesses and, if necessary, be given the services of a qualified interpreter (GPW art. 96). A record of disciplinary punishments must be maintained by the camp commander and must be open to inspection by representatives of the protecting power (GPW art. 96).

3-138. With respect to judicial proceedings, the detaining power must notify the POWs concerned, the prisoners' representative, and the protecting power of any plan to initiate judicial proceedings against any POWs as soon as possible and at least three weeks before the opening of the trial. The notification must contain the following information (GPW art. 104):

- Surname and first names of the POWs, their rank, their army, regimental, personal or serial numbers, their dates of birth, and their professions or trades, if any;
- Place of internment or confinement;
- Specification of the charge or charges on which the POWs are to be arraigned, giving the legal provisions applicable; and
- Designation of the court that will try the cases and the dates and places fixed for the opening of the trials.

3-139. At trial, accused POWs are (GPW art. 105):

- Assistance by fellow POWs;
- Defense by a qualified advocate or counsel of the POW's own choice;
- The right to call witnesses; and
- If necessary, the assistance of a competent interpreter (GPW art. 105).

SENTENCING AND EXECUTION OF PENALTIES

3-140. Sentences may be passed on POWs only by the same courts, and in accordance with the same procedures, as for members of the armed forces of the detaining power (GPW art. 102). In addition, a sentence may only be passed on POWs if the court complies with the requirements laid out by the GPW. If any time was spent in pre-trial confinement, it must be deducted from any sentence of imprisonment and taken into account when adjudicating any other punishment (GPW art. 103).

3-141. Judgments and sentences pronounced upon a POW must be immediately reported to the protecting power and the prisoners' representative concerned in the form of a summary communication, which shall also indicate whether the POW has the right to appeal with a view to the quashing of the sentence or the reopening of the trial. The communication must also be sent to the POW in a language that the POW understands, if the sentence was not pronounced in the POW's presence (GPW art. 107).

PERMITTED DISCIPLINARY PUNISHMENTS

3-142. The only disciplinary punishments that may be awarded are (GPW art. 89):

- A fine not exceeding fifty percent of advances of pay and working pay for a period of thirty days.
- Discontinuance of privileges granted over and above the treatment provided for by the GPW for not more than thirty days.
- Fatigue duties, not exceeding two hours a day, for not more than thirty days. This punishment may not be given to officers.
- Confinement for not more than thirty days.

In no case shall disciplinary punishments be inhuman, brutal, or dangerous to the health of POWs.

PROHIBITED PENALTIES

3-143. No penalty may be imposed on POWs that is not authorized for members of the armed forces of the detaining power who have committed the same acts. The following punishments are expressly prohibited (GPW art. 87):

- Collective punishments for individual acts;
- Corporal punishment;
- Imprisonment in premises without daylight;
- Any form of torture or cruelty; or
- Deprivation of rank or of the right to wear badges.

3-144. Courts or authorities assessing judicial or disciplinary penalties must consider that the accused does not owe allegiance to the detaining power and may be, for example, under a duty to escape, and is in its power through circumstances beyond his or her control . Consequently, such courts or authorities may reduce the penalty below any minimum penalty prescribed for members of the armed forces of the detaining power. (GPW art. 87).

DEATH PENALTY

3-145. The following are special rules regarding the death sentence for POWs (GPW art. 100):

- A POW and the protecting power shall be informed, as soon as possible, of any offense that is punishable by a death sentence under the laws of the detaining power. Other offenses shall not thereafter be made punishable by the death penalty without the concurrence of the power on which the POWs depend.
- A death sentence may not be pronounced on POWs unless the attention of the court has been drawn particularly to the fact that:
  - Since the accused is not a national of the detaining power, he or she is not bound to it by any duty of allegiance; and
  - That he or she is in the power of the detaining power as the result of circumstances independent of his or her own will.
- If the death penalty is pronounced on a POW, the sentence shall not be executed for at least six months after communication to the protecting power of the details related to the death sentence.

APPEALS

3-146. Every POW must be given the same rights of petition or appeal from any sentence pronounced against him or her as members of the armed forces of the detaining power, with a view to the quashing or revising of the sentence or reopening of the trial. A POW must be fully and immediately informed of those rights and of any applicable time limits. The detaining power must also immediately communicate to the protecting power the POW's decision to exercise or to waive the right to an appeal (GPW arts. 106, 107).

NOTIFICATION OF FINAL CONVICTION

3-147. If a POW is finally convicted or if a death sentence is pronounced, the detaining power must, as soon as possible, send the protecting power written details of (GPW art. 107):

- The precise wording of the finding and sentence.
- A summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and defense cases.
- Notification, if applicable, of the establishment where the sentence will be served or carried out.

CONDITION UNDER WHICH SENTENCES ARE TO BE SERVED

3-148. Any sentence pronounced on a POW must be served in the same establishment and under the same conditions as a member of the detaining power's armed forces would serve a similar sentence. The conditions must in all cases conform to the basic requirements of health and humanity established in the GPW. A POW

deprived of liberty shall retain the benefit of complaints to and access by the ICRC and a protecting power, and other benefits related to spiritual assistance, exercise, correspondence and parcels (GPW art. 108).

3-149. Officers, non-commissioned officers, and men and women POWs undergoing punishment must not be subjected to more severe treatment than members of the armed forces of the detaining power of equivalent rank undergoing the same punishment (GPW art. 108).

3-150. Women are not to be awarded or sentenced to a punishment more severe, or treated more severely while undergoing punishment, than a female or male member of the detaining power's armed forces would be for a similar offense (GPW art. 88). Women sentenced to confinement are to be confined in separate quarters from men and must be under the supervision of women.

Effect Of Disciplinary Punishment Or Sentence Upon Repatriation

3-151. No POW on whom a disciplinary punishment has been imposed and who is eligible for repatriation or for accommodation in a neutral country may be kept back because he or she has not undergone his or her punishment (GPW art. 115).

3-152. POWs detained in connection with a judicial prosecution or conviction, and who are designated for repatriation or accommodation in a neutral country, may benefit by such measures before the end of the proceedings or the completion of the punishment, if the detaining power consents. Parties to the conflict shall communicate to each other the names of any POWs who will detained until the end of the proceedings or the completion of the punishment (GPW art. 115).

TRANSFER OF PRISONERS OF WAR

3-153. The transfer of POWs must be conducted humanely and in conditions not less favorable than those under which the detaining power's forces would be transferred. Adequate precautions must be taken for the health and safety of POWs. If the combat zone draws closer to a camp, the POWs in that camp shall not be transferred unless it can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred. During a transfer, POWs must be protected from harm and provided with sufficient food and water to keep them in good health, and must be provided necessary clothing, shelter, and medical attention. Their personal property should be safeguarded, and relief parcels or mail must be forwarded to them without delay (GPW arts. 46-48).

3-154. POWs who are scheduled for transfer must be identified and listed before departure. POWs must be notified in advance so that they can pack their baggage and have an opportunity to inform their next of kin. POWs must be allowed to take their personal property and any correspondence and parcels that have arrived for them. If the conditions of transfer so require, such as in cases of transport shortages, the detaining power may limit the amount of personal property to what each POW can reasonably carry. No POW may be made to carry more than 25 kilograms (about 55 pounds) each. The camp commander must take measures in agreement with the prisoners' representative to forward any remaining community property or personal property that POWs could not carry. The costs of transfers shall be borne by the detaining power (GPW art. 48).

3-155. Transfer of POWs to or from the custody of another State party may be desirable in some conflicts due to force structure and manpower constraints, costs, and cultural sensitivities, but is subject to a number of rules in the GPW. POWs may only be transferred by the detaining power to a power that is a Party to the GPW and after the detaining power is satisfied of the willingness and ability of such receiving power to apply the GPW. Any transfer must comply with relevant treaty obligations and policy requirements, including that no detainee may be transferred to another country when a competent authority has assessed that it is more likely than not that the detainee would be subject to torture (GPW arts. 46-48; DODD 2310.01E). The U.S. practice has been to negotiate transfer agreements setting forth the terms and conditions of transfer and care. To ensure accountability, a POW should not be transferred prior to formal processing and submission of all required information to the information bureau.

3-156. Once transferred, responsibility to apply the GPW rests upon the State party that has assumed custody of the POWs or retained personnel. Nevertheless, the State party that transferred the POWs retains a residual responsibility for these personnel. If the State receiving the POWs fails to carry out the provisions

of the GPW in any important respect, the transferring power must, upon being notified by the protecting power take effective measures to correct the situation or request the return of the POWs (GPW art. 12).

DEATH OF PRISONERS OF WAR

3-157. The protecting power must be notified of the death or serious injury of POWs caused or suspected to have been caused by a sentry, another POW, or any other person, as well as any death the cause of which is unknown and underlying incidents must be the subject of an official inquiry by the detaining power. If the inquiry indicates the guilt of one or more persons, the detaining power must take all measures for the prosecution of the person or persons responsible (GPW art. 121).

WILLS

3-158. Following the death of a POW, the detaining power must send without delay any will in its possession to the protecting power and a certified copy must be sent to the Central Prisoners of War Information Agency (GPW art. 120).

DEATH CERTIFICATES

3-159. A death certificate must be completed, including at a minimum the information contained in the form annexed to the GPW, for all who die as a POW. It must be certified by a responsible officer and forwarded, as rapidly as possible, to the information bureau. The required information includes (GPW art 120):

- Service number, rank, full names, date of birth, and army, regimental, personal, or serial number, or equivalent information;
- Date and place of death;
- Cause of death;
- Date and place of burial;
- Where applicable, the fact of and reason for, cremation; and
- All information necessary in order to identify the grave or inurnment/columbarium location.

BURIAL OR CREMATION AND INTERMENT

3-160. The GPW establishes procedures that must be followed after the death of a POW (GPW arts. 120, 121). Burial or cremation of a POW or retained person shall be preceded by a medical examination of the body to confirm the death to enable a report on the death to be made, and, where necessary, to establish identity.

TERMINATION OF CAPTIVITY

3-161. POWs shall be released and repatriated without delay after the cessation of active hostilities (GPW art. 118). Note that the GPW allows for the possibility of repatriation or release during hostilities based on serious wounds or sickness, paroles, or exchanges.

WOUNDED AND SICK REPATRIATION

3-162. Before the end of hostilities, parties to a conflict are obligated to repatriate certain POWs who are seriously wounded or seriously sick, after they are fit enough to travel. No such sick or wounded POW may be repatriated against his or her will during the hostilities (GPW art. 109). In accordance with GPW Article 110, the seriously wounded and sick are those POWs who meet one of the criteria listed in paragraph 3-164 below. In the case of certain less seriously wounded or sick persons, parties are obligated to endeavor to make arrangements for their accommodation in neutral countries (GPW arts. 109-110).

3-163. Parties may also conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied POWs who have been in captivity for a long period of time. This is in addition to the general obligation to endeavor to conclude agreements that will enable all POWs to be interned in a neutral country. POWs injured in accidents are subject to the same rules as other sick and wounded persons unless the injuries were self-inflicted (GPW arts. 109-111, 114).

3-164. In accordance with GPW, Article 110, the following are entitled to direct repatriation:

- The incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished;
- The wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment, and whose mental or physical fitness has been gravely diminished; and
- The wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

3-165. Such POWs repatriated before the end of hostilities may not be employed on active military service (GPW art. 117).

MIXED MEDICAL COMMISSIONS

3-166. According to the GPW, mixed medical commissions should be appointed upon the outbreak of hostilities in order to examine sick and wounded POWs and to make appropriate decisions regarding them (GPW art. 112). When necessary, consult AR 190-8 or other applicable guidance on mixed medical commissions.

PAROLE

3-167. The GPW allows parole for POWs subject to certain guidelines and procedures. Upon the outbreak of hostilities, each party to a conflict shall notify the adverse parties of its laws or regulations allowing or forbidding its armed forces to accept liberty on parole or promise (GPW art. 21). U.S. policy prohibits U.S. service members from accepting parole or special favors from the enemy.

RELEASE AND REPATRIATION AT THE END OF HOSTILITIES

3-168. POWs shall be released and repatriated without delay after the cessation of hostilities. Commanders should seek guidance from national-level authorities on negotiating agreements or developing plans for POW release and repatriation after the cessation of hostilities. If the parties have no stipulated agreement on how repatriation will be accomplished, each detaining power shall establish and execute a plan without delay (GPW art. 118). The GPW does not require the detaining power to repatriate forcibly POWs who do not wish to be repatriated. Although the GPW provides that POWs may not renounce the rights secured to them by the GPW, this principle is not violated by the POW rejecting repatriation and requesting asylum, if it is established in a satisfactory manner that the POW is making an informed, voluntary, and personal choice. The policy of the United States has been not to conduct forcible repatriation of POWs and, in particular, not to transfer any person when torture is more likely than not to result (DOD Directive 2310.01E).

PROCEDURES

3-169. Repatriation is effected under conditions similar to those for the transfer of POWs during captivity as outlined in paragraphs 3-153 and 3-156. Costs of repatriation at the end of hostilities are to be equitably borne between the detaining power and the power on which the POWs depend, generally with the detaining power bearing the costs of transport to its border or port of embarkation closest to the territory of the power on which the POWs depend (GPW art. 118). If the two powers are not geographically contiguous, the detaining power and the power on which the POWs depend shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation (GPW art. 118). The detaining power may not delay repatriation solely because the parties to the conflict have not agreed on an equitable allocation of costs (GPW arts. 116, 118, 119).

3-170. Articles of value, and any currency that has not been converted into that of the detaining power, must be returned to the POWs upon repatriation. Any items not returned must be sent to the information bureau. Baggage limitations may be imposed similar to those allowed during the transfer of POWs outlined in paragraph 3-139; those personal effects POWs cannot take with them are forwarded once the parties agree regarding costs and procedures (GPW art. 119).

Chapter 4

The Wounded and Sick

This chapter addresses the protection of the wounded and sick, medical units, facilities, and transports. The 1864 Geneva Convention was one of the international community's earliest attempts to codify protections for the wounded and sick on the battlefield and provide for the use of the Red Cross as a distinctive emblem. The later versions of the Geneva Conventions relative to wounded and sick of the armed forces on land in 1906 and 1929, and the 1907 Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention expanded the standards for the protection of military personnel who are hors de combat, due to illness or wounds on the battlefield or at sea. This standard of treatment was further refined in the GWS, and the GWS Sea, both of August 12, 1949. Since the United States is a party to the two 1949 Geneva Conventions, their provisions are binding on the United States and form the basis for this chapter. Additional Protocol I of 1977 (AP I), though not binding on the United States, also contains provisions for the care of wounded and sick that in certain cases its provisions may reflect customary international law and be consistent with U.S. practice. This chapter also addresses the principles related to the protection of medical care provided by impartial humanitarian organizations during armed conflict.

BASIC PRINCIPLES

4-1. LOAC imposes certain obligations on parties to an international armed conflict regarding the wounded, sick, and shipwrecked, some of which are summarized below. Also, United States Army and Marine Corps' practice is to respect and protect military and civilian sick, wounded, and shipwrecked, as well as those identified as exclusively engaged in collecting, caring for, or transporting them. Soldiers and Marines must:

- Respect and protect wounded, sick, and shipwrecked military and other personnel to whom the Geneva Conventions apply during an armed conflict (GWS art. 12, 15; GWS Sea art. 12, 18; consider AP I art. 10(1)).
- "Respect and protect" means that these persons generally may not be knowingly attacked, fired upon, or unnecessarily interfered with (see DOD Law of War Manual, 7.3.3). Soldiers and Marines have a positive duty to collect and care for the wounded, sick, and shipwrecked, even if they are enemy personnel.
- Provide for the respectful recovery, accounting for, and disposal of enemy dead in a manner that facilitates the identification and proper disposition of remains (GWS art. 16-18; GWS Sea art. 19, 20; consider AP I art. 32-34).
- Respect and protect enemy military medical personnel, facilities, units, and ground transports in the performance of their duties. It is prohibited to make them the object of an attack or unduly interfere with their medical function, provided that those persons do not engage in, and those objects are not used to engage in, acts outside their humanitarian duties that are harmful to the enemy (GWS art. 19-21, 24-27, 35; GWS Sea art. 22-27; consider AP I art. 10, 12, 21).

4-2. The fact that an enemy force has violated its obligations by firing upon U.S. medical personnel endeavoring to care for wounded U.S. military personnel does not provide a basis for U.S. military personnel to respond by violating U.S. obligations by, for example, intentionally firing at enemy medical personnel, or denying medical care to captured enemy military personnel. [For a discussion of reprisals, see para. 4-10 and DOD Law of War Manual, 18.18.3.2.]

PRACTICAL GUIDANCE ON BASIC RULES

4-3. All Soldiers and Marines must adhere to the following LOAC rules relating to the wounded, sick, and dead, and enemy military medical and religious personnel, facilities, units, transports, and equipment:

- Do not knowingly attack, fire upon, or unnecessarily interfere with: (i) the wounded and sick; or (ii) enemy military medical or religious personnel, facilities, units, transports, and equipment.
- Do not steal.
- Do not disrespect the dead.
- Collect and care for the wounded and sick, whether friend or foe.

4-4. Soldiers and Marines who are members of the medical service should understand their special duties and noncombatant status under the law of war. They must, for example:

- Provide medical care to the wounded or sick, whether friend or foe.
- Refrain from engaging in acts harmful to the enemy.
- Continue to care for other members of the U.S. armed forces, if captured by the enemy (see Chapter 3 for discussion of retained personnel).

4-5. Commanders must lead their units' implementation of LOAC obligations related to the wounded, sick and dead. If warranted by their assigned duties and operational context, they should:

- Determine practical steps after combat to search for, collect, and protect the wounded, sick, and dead, such as negotiating local truces to collect them.
- Follow accountability procedures for enemy wounded, sick and dead, such as recording identifying information and safekeeping of property.
- Ensure medical units are not misused to commit acts harmful to the enemy, such as stationing combat forces in a hospital.
- Arrange for humanitarian organizations or other civilian volunteers to help collect and care for the wounded and sick.
- Ensure the appropriate display of the Red Cross.

CLASSES OF PERSONS PROTECTED BY THE GWS AND GWS SEA

4-6. The GWS and GWS Sea protect those persons listed in Article 13 of the GWS and the GWS Sea (including members of the armed forces of a party to a conflict and persons authorized to accompany the armed forces) who are wounded, sick, or shipwrecked—that is, those who are incapacitated by wounds, sickness, or shipwreck such that they are no longer capable of fighting, provided they abstain from any hostile act and do not attempt to escape (see paragraph 2-105 regarding wounded and sick as hors de combat). The GWS also applies to the wounded and sick who are POWs (see paragraphs 4-11 through 4-16). The GWS and GWS Sea also protect military chaplains exclusively engaged in religious ministration and military medical personnel exclusively engaged in the provision of medical care or the administration of medical units and establishments (GWS art. 24; GWS Sea art. 37). Wounded and sick civilians benefit from provisions of the GC pertaining to the treatment and protection of the wounded and sick (GC art. 16).

DURATION OF APPLICATION OF THE GWS

4-7. The GWS applies to persons protected by the GWS who have fallen into the hands of the enemy until their final repatriation (GWS, art. 5). The GSW Sea does not specify when it ceases to apply, but only states that GWS Sea only applies "to forces on board ship." (GWS Sea art. 4). Once persons who are covered by its provisions reach land, the GWS, or possibly, the GPW or GC will be applicable to them.

SPECIAL AGREEMENTS

4-8. The GWS and GWS Sea provide for special agreements to be negotiated between the parties for protection of the wounded and sick (see GWS arts. 6 and 15; GWS Sea arts. 6 and 18). Special agreements may not adversely affect the situation of the wounded and sick or military medical personnel or chaplains, nor can such agreements restrict the rights GWS and GWS Sea confer on them (GWS, art. 6; GWS Sea, art. 6). Wounded and sick and military medical personnel and chaplains will enjoy the benefits of any special

agreements so long as GWS or GWS Sea applies to them, except when express provisions in such agreements or in subsequent agreements provide otherwise or when more favorable measures have been taken with regard to them by one of the parties to the conflict (see GWS, art. 6; GWS Sea, art. 6).

NON-RENUNCIATION OF RIGHTS

4-9. Wounded and sick, as well as military medical personnel and chaplains, may not renounce, in whole or in part, their rights secured to them by the GWS or GWS Sea or by special agreements (GWS, art. 7; GWS Sea, art. 7).

PROHIBITION OF REPRISALS

4-10. During international armed conflict, reprisals against the wounded, sick, personnel, buildings, or equipment protected by the GWS are prohibited (GWS, art. 46; compare with GWS Sea, art. 47).

PROTECTION AND CARE OF THE WOUNDED AND SICK

4-11. All wounded and sick, including members of the armed forces, other persons who are entitled to POW status, and civilians, must be respected and protected in all circumstances, whether or not they have taken part in the armed conflict (see GWS, arts. 12-13; DOD Law of War Manual, 17.14.1; consider AP I, art. 10). They shall be treated humanely and cared for by the party to the conflict in whose hands they have fallen, without any adverse distinction based on sex, race, nationality, religion, political opinions, or any other similar criteria. They shall not be willfully left without medical assistance and care, nor exposed to contagion or infection. They shall not be treated violently, murdered, or exterminated. Only urgent medical reasons will authorize priority in the order of treatment, a process called triage. Women shall be treated with all consideration due to their sex. A party to the conflict that is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit, leave with them part of its medical personnel and materials to assist with their care (GWS, art. 12).

SEARCH FOR CASUALTIES

4-12. At all times, and particularly after a military engagement, parties to the conflict must, without delay, take all possible measures to search for and collect the wounded and sick to protect them from pillage and ill-treatment and to ensure their adequate care. Further, the parties to the conflict shall search for the dead to prevent them from being despoiled. Whenever circumstances permit, armistices or cease-fires must be arranged or local arrangements made to permit such collection and removal as well as transport or exchange wounded and sick from the battlefield. Local arrangements may be made between parties to remove or exchange wounded and sick from besieged areas or allow medical or religious personnel and equipment safe passage to those areas (GWS, art. 15). The obligation to search for, collect, and take affirmative steps to protect the wounded, sick, and dead are subject to practical limitations. Military commanders are to judge what is possible and to what extent they can commit their personnel to these duties (see DOD Law of War Manual, 7.4.4).

RECORD OF WOUNDED FALLING INTO ENEMY HANDS

4-13. Parties to the conflict must record, as soon as possible, any wounded, sick, or dead person under the GWS of the adverse Party who falls into their hands to assist in their identification. If possible, these records should include (GWS, art. 16):

- Designation of the power on which he or she depends;
- Service, unit, personal, or serial number;
- Surname;
- First name or names;
- Date of birth;
- Any other particulars shown on an identity card or disc;

- Date and place of capture or death; and
- Particulars concerning wounds, illness, or cause of death.

4-14. Each party must forward this information as soon as possible to its POW information bureau (see paragraph 3-100 through 3-103), which must transmit the information to the power upon which the person depends through the intermediary of the Protecting Power and of the Central POW agency. Parties to the conflict must also prepare and forward certificates of death and/or authenticated lists of the dead and must ensure items such as identification discs (frequently referred to as dog tags) of the deceased, last wills, other documents of importance to the next of kin, money, or any other item of an intrinsic or sentimental value, which are found on the dead are collected and forwarded through these channels in accordance with the GWS (see GWS, art. 16).

4-15. Burials or cremation of deceased personnel under the GWS must be preceded by a careful examination, if possible by a medical examination, of the bodies with a view to confirm the death, establish identity of the deceased, and enable a report of death to be made. One half of the double-identity disc (or the disc, itself, if it is a single disc) should be left with the body of the deceased interred on land. Cremation may only occur for imperative reasons of hygiene or for motives based on the religion of the deceased. The dead must be honorably interred, if possible, according to the rites of the religion to which they belonged. At the commencement of hostilities, a graves registration service must be established to allow for subsequent exhumations and to ensure the identification of bodies and possible transportation to the home country. The graves registration service will also keep ashes until they may be properly disposed of in accordance with the wishes of the home country. Lists showing the exact location and markings of the graves must be exchanged between parties to the conflict; this will facilitate post-conflict return of remains to the next-of-kin, a practice encouraged by the United States (GWS art. 17; consider AP I art. 32-34).

VOLUNTARY CARE

4-16. The military authorities may appeal for volunteers from the local inhabitants to assist with the collection and care for, under the respective military authority's direction, the wounded and sick under the GWS. Once volunteers are identified, they are to receive necessary protection and facilities. Should the adverse Party take or retake control of the area, that Party must likewise grant these persons the same protection and the same facilities. No one must ever be molested or convicted for having given aid or care to the wounded and sick (GWS art. 18; consider AP I art. 17). On the other hand, local inhabitants' voluntarily giving treatment to the wounded and sick do not relieve military authorities of their obligations to care for the wounded and sick.

MEDICAL UNITS, FACILITIES, PERSONNEL, AND GROUND TRANSPORTS

4-17. Military medical units and facilities, military medical personnel and chaplains, and medical ground transports must not be made the object of attack and are entitled to respect and protection at all times (see GWS arts. 19, 24, 35, 36; GWS Sea art. 23). For example, medical units and establishments are entitled to respect and protection even when they have not yet received any wounded or when no more wounded are with them for the moment. The respect and protection accorded by the GWS to military units and facilities mean that they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions.

LOSS OF PROTECTION

4-18. If military medical units or facilities are used to commit, outside their humanitarian duties, acts harmful to the enemy, they may forfeit their special LOAC protections, but only after due warning (with, in all appropriate cases, a reasonable time limit), and only after such warning has remained unheeded (GWS art. 21; DOD Law of War Manual, 7.10.3). Consistent with DOD policy, misuse of the protected status of any military medical unit or facility, or medical ground transport, whether by U.S. forces, coalition forces, or enemy forces, should be reported immediately through the chain of command to the appropriate combatant commander (see DODD 2311.01E).

4-19. Acts harmful to the enemy by a person of a military medical unit or facility, or a medical ground transport resulting in its loss of protected status do not necessarily warrant denial of respect and protection to that person's unit or facility, or medical ground transport or to other military medical units or facilities, or medical ground transport.

4-20. The obligation to refrain from the use of force against a medical unit acting in violation of its mission and protected status without due warning does not prohibit individuals or units from exercising their right of self-defense (see DOD Law of War Manual, 7.10.3.2).

EXAMPLES OF ACTIONS OR CONDITIONS THAT DO NOT DEPRIVE MEDICAL UNITS AND FACILITIES OR MEDICAL GROUND TRANSPORTS OF PROTECTION

4-21. The following are examples of actions or conditions that do not constitute "acts harmful to the enemy outside of their humanitarian functions" that would cause a medical unit or facility, hospital ship, or medical transport to lose its entitlement to protection (GWS arts. 21, 22, 35; see DOD Law of War Manual, 7.10.3.3):

- **Arming military medical personnel for protection against unlawful attacks**. Military medical personnel and units may be armed for defense of themselves and the wounded and sick in their charge against unlawful attacks (GWS, art. 22).
- **Defensive devices of hospital ships and military medical aircraft**. Equipping hospital ships and military medical aircraft with defensive devices—such as chaff for protection against over-the-horizon weapons or similar threats—is not prohibited, provided that such devices are not used to commit acts harmful to enemy military forces acting in conformity with the law of war.
- **Use of non-medical military personnel for security**. The use of non-medical personnel, in the absence of armed orderlies, as a picket, sentries, or as an escort for security against unlawful attacks does not cause the medical units, facilities, or ground transports to forfeit their protection (GWS, art 22).
- **Temporary presence of small arms and ammunition recovered from the wounded and sick**. The temporary presence of small arms and ammunition recovered from the wounded and sick, within the military medical unit, installation, hospital ship, or sick-bay before they are handed over to competent authorities does not cause the forfeiture of their protection..
- **Presence of military veterinarians and equipment**. The presence of military veterinarians and their equipment within a medical unit or facility or transport to which they are not assigned does not cause the forfeiture of protection.
- **Temporary presence of combatants**. The temporary presence of combatants within a military medical unit or facility (for example, to visit or leave wounded or to escort a prisoner to facilitate the prisoner's care) does not automatically constitute an act harmful to the enemy that result in loss of protected status. As a feasible precaution, combatants should avoid unnecessary presence within a medical unit or facility.
- **Temporary presence of military objectives**. The temporary presence of objects that are military objectives, such as a tactical vehicle or aircraft within a military medical unit or facility (for example, a military vehicle that is not protected as medical aircraft or transport used to deliver the wounded and sick to a medical facility) does not automatically constitute an act harmful to the enemy that forfeits its protection from being made the object of attack (see DOD Law of War Manual, 7.10.3.6). However, commanders of military medical units and facilities should establish procedures during international armed conflict to ensure that the non-medical transports do not remain unnecessarily within or near military medical units or facilities.
- **Care for civilian wounded or sick**. Care for civilian wounded or sick does not cause medical units, facilities, or ground transports to forfeit their protection.
- **Transport of medical equipment and personnel**. Equipment intended exclusively for medical purposes or military medical personnel over and above normal mission requirements, either stockpiled in military medical units and facilities or transported in medical ground transports, does not cause medical units, facilities, or ground transports to forfeit their protection.

LOCATION OF MILITARY MEDICAL UNITS AND FACILITIES

4-22. Responsible authorities must ensure that military medical units and facilities are, as far as possible, placed so as an attack against military objectives cannot imperil their safety (GWS art. 19; consider AP I art. 12(4)). Commanders of tactical units should avoid placing their units in proximity to military medical units and facilities to the extent feasible. In no case may a military medical unit or facility be used to shield military objectives from attack. The obligation to situate medical units and facilities so that attacks against military objectives cannot imperil their safety is limited by practical considerations. For example, in order to perform their medical duties effectively, medical units and facilities may, to some degree, need to be intermingled with military objectives (see DOD Law of War Manual, 7.10.2.1).

CAPTURE OF MILITARY MEDICAL UNITS AND FACILITIES

4-23. Military medical units and facilities may be captured. In the event of capture, its personnel are entitled to continue to perform their medical duties so long as the capturing force has not itself ensured the necessary care for the wounded and sick found in the unit or facility (GWS art. 19). The material of mobile medical units that fall into the hands of the enemy must be reserved for the care of the wounded and sick. The material and stores of mobile medical units and fixed medical establishments that fall into the hands of the enemy must not be intentionally destroyed.

4-24. In the event of urgent military necessity, commanders of forces in the field may make use of the buildings, material, and stores of a fixed military medical establishments, provided they make previous arrangements for the welfare of the wounded and sick who are being cared for in the establishment (see GWS art. 33).

MEDICAL AIRCRAFT

4-25. Medical aircraft, that is to say, aircraft exclusively employed for the removal of the wounded, sick, and shipwrecked, and for the transport of medical personnel and equipment, must not be attacked, but must be respected by the belligerents, while flying at heights and times, and on routes, specifically agreed upon by the belligerents concerned (GWS art. 36). Such aircraft, while designated or operating as medical aircraft, may not be used also for military purposes, such as to transport able-bodied combatants or to carry ammunition to combat forces (see DOD Law of War Manual, 7.14.2). Medical aircraft must obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flights after examination, if any (GWS art. 36).

4-26. Military medical aircraft (i.e., aircraft exclusively employed for the removal of the wounded, sick, and shipwrecked, and for the transport of medical personnel and equipment) must not be attacked, but are to be respected by the belligerents, while flying at heights and times, and on routes, specifically agreed upon by the belligerents concerned. The use of protected medical aircraft generally depends on an agreement between belligerents. However, known medical aircraft, when performing humanitarian functions, must be respected and protected. Such aircraft do not constitute a military objective that is liable to being made the object of attack. Thus, even if not flying pursuant to an agreement, such aircraft shall not be deliberately attacked or fired upon, if identified as protected medical aircraft. For example, if there is no agreement and a military force happens upon a medical aircraft belonging to an enemy State, the aircraft must not be made the object of attack until all other means of control (such as directing the aircraft to land and submit to search) have been exhausted. A medical aircraft that is not flying pursuant to a special agreement that seeks to claim protection as medical aircraft must make every effort to identify itself and to inform the enemy State of its status and operation, such as its flight times and routes. For example, an unknown aircraft within a theater of military operations would often be reasonably presumed to be a military objective, and the aircraft must take affirmative steps to rebut this presumption. In order to maintain its entitlement to protection, such aircraft must obey the directions of the enemy State, such as directions to land and to submit to search (GWS art. 36; see DOD Law of War Manual, 17.14.1).

HOSPITAL SHIPS AND COASTAL AND RESCUE CRAFT

4-27. Military hospital ships (such as ships built or equipped by States specially and solely with a view to assisting, treating, and transporting the wounded, sick, and shipwrecked) may in no circumstances be attacked

or captured, but must be respected and protected, provided their names and descriptions have been notified to the parties to the conflict ten days before the ships are employed (GWS Sea, art. 22). Military hospital ships are to have all exterior surfaces painted white with at least one large, dark red cross (or other protected medical symbol as in paragraph 4-30) on each side of the hull and on the horizontal surfaces and distinctively marked further as specified in Article 43 of GWS Sea. Military hospital ships, commissioned civilian hospital ships, and authorized neutral civilian hospital ships that meet the applicable requirements must be respected and protected and are exempt from capture (GWS Sea art. 24; DOD Law of War Manual, 7.12.4). Hospital ships are exempt from capture and any hospital ship in a port that falls into the hands of the enemy is authorized to leave the port and the religious, medical, and hospital personnel of the ship and its crew may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board (GWS Sea, arts. 29 and 36).

4-28. As long as they have been provided with an official commission by a Party to the conflict and the proper certification from responsible authorities (see GWS Sea, art. 24), and their names and descriptions have been provided to parties to the conflict ten days before they are employed (GWS Sea, art. 22), small craft employed by a State or by the officially recognized lifeboat institutions for coastal rescue operations must be respected and protected, so far as operational requirements permit (GWS Sea, art. 27).

4-29. The phrase "so far as operational requirements permit" acknowledges the risk to which small craft, because of their small size, are exposed when working in a combat environment. Their small size may increase the likelihood of misidentification by enemy or friendly forces, or it may not be feasible to avoid incidental harm to them. They act at their own risk during or after any engagement (GWS Sea, art. 30). Although small craft may be exposed to certain risks, if a party to a conflict has recognized the craft, it is prohibited from making a deliberate attack on them (GWS Sea, art. 27).

4-30. Religious, medical, and hospital personnel under the GWS Sea who are retained to care for the wounded and sick at sea and are later retained to care for the wounded and sick on land are subject to GWS on landing (see GWS Sea, art. 37). Similarly, wounded and sick personnel put ashore who previously may have been engaged in the land-sea battle are subject to GWS once put ashore (see GWS Sea, art. 4).

THE DISTINCTIVE EMBLEMS

4-31. To serve as the visual expression of the protections accorded under the 1949 Geneva Conventions and Additional Protocol III, to medical and religious personnel, and medical units, facilities, transports, and equipment, four distinctive emblems have been established and recognized. As displayed in figure 4-1, they are 1) a Red Cross; 2) a Red Crescent; 3) a Red Crystal, and 4) a Red Lion and Sun (not currently in use) (GWS arts. 38-42; GWS Sea arts. 41-43; consider AP I, art. 18; AP I, Amended Annex I, arts. 3-4; AP II art. 12; and, AP III art. 2). A party may only use one emblem at a time. The chosen emblem will be displayed in red on a white background.

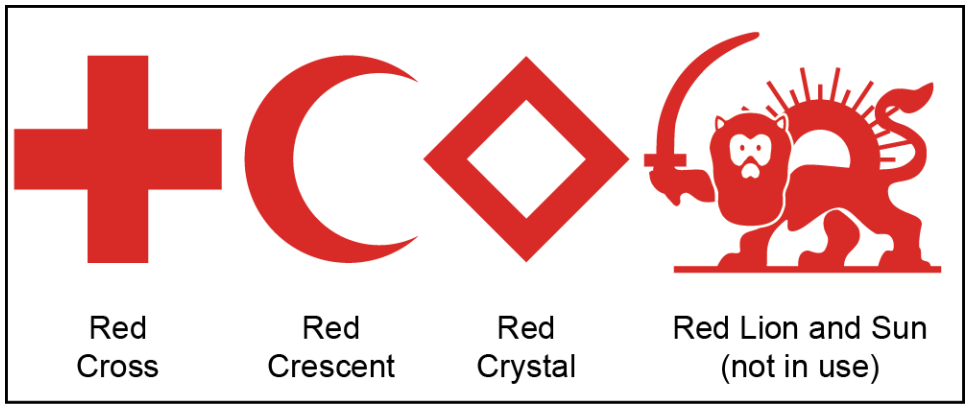


Figure 4-1. The distinctive emblems

4-32. The display of the distinctive emblem is under the direction of the competent military or civilian authority (GWS art. 39; GWS Sea art. 41; consider AP I art. 18 and AP II art. 12). The distinctive emblem may be removed by competent authority for camouflage integrity or other tactical reasons. The fact that medical personnel, land facilities, units, or transports are not displaying the distinctive emblem does not entitle an opposing force to attack them if their status is apparent or otherwise has been established. They retain their protections as long as their mission and use is consistent with their protected status. However, the absence of the distinctive emblem may increase the risk that enemy forces will not recognize the protected status of military medical and religious personnel and other protected persons and objects, and attack them in error (see DOD Law of War Manual, 7.15.3.1).

DISPLAY BY PERSONNEL

4-33. Personnel entitled to wear the distinctive emblem, when authorized by competent authority, include:

- Military medical personnel and chaplains (GWS art. 39, 40; GWS Sea art. 41, 42; consider AP I, Amended Annex I, art. 5(4));
- Auxiliary medical personnel, while carrying out their medical duties (GWS art. 41);
- Members and medical staff of the Red Cross Movement; that is, official representatives of the ICRC, the International Federation of Red Cross and Red Crescent Societies, and national Red Cross societies in accordance with the GWS (see GWS art. 44);
- Staff of recognized aid societies of neutral countries (see GWS art. 27); and
- Staff of national societies or other voluntary aid societies, auxiliary to, or assisting, the military medical services in accordance with the GWS (see GWS art. 26).

4-34. Wearing of the Red Cross armlet by U.S. military medical personnel is subject to service authorization and may be limited by tactical conditions. The emblem does not in itself confer protected status, but it facilitates the identification of protected objects and persons (DOD Law of War Manual, 7.15.3.2). When authorized, such military medical personnel, staff of national Red Cross societies, and staff of recognized aid societies of neutral countries, may wear on the left arm an armlet displaying the appropriate distinctive emblem and issued and stamped by competent military authority (see GWS art. 40). Such personnel are required to bear an identity card that states in what capacity its possessor is entitled to protection under the GWS and that is embossed with the stamp of the military authority (see GC art. 40). Auxiliary medical personnel require similar authorization to wear an armlet in a similar manner and carry similar identification, but such armlets are to bear a smaller distinctive emblem (see GWS art. 41).

DISPLAY BY MEDICAL UNITS AND ESTABLISHMENTS

4-35. The GWS provides for military medical units, both fixed and mobile, and military medical establishments of parties to a conflict to display the distinctive emblem when they are entitled to protection under the GWS, subject to authorization by competent military authority (see GWS art. 42). The GWS also provides for such display by medical units belonging to neutral countries, when authorized to lend their services to a belligerent (see GWS arts. 27, 43).

DISPLAY BY MILITARY MEDICAL AIRCRAFT

4-36. The GWS and GWS Sea require that military medical aircraft (those aircraft exclusively employed for the removal of the wounded, sick, and shipwrecked, and for the transport of medical personnel and equipment), shall bear the distinctive emblem, together with their national insignia, on their lower, upper and lateral surfaces (see GWS art. 36; GWS Sea art. 39).

MANDATORY REMOVAL OF DISTINCTIVE EMBLEM FROM VEHICLES AND AIRCRAFT

4-37. Ground transport or aircraft no longer exclusively employed for medical work related to its former protected status should no longer bear the distinctive emblem.

4-38. If ground transport or aircraft is used temporarily for medical transport work, such ground transport or aircraft should bear the distinctive emblem only while on the medical mission and will be entitled to protection of the Conventions only for its duration. If the vehicle or aircraft is to be used for tactical purposes,

military authorities must take the greatest care to remove all distinctive emblems as soon as the ground transport or aircraft are no longer employed as medical transport (see GWS, arts. 35, 36).

MEDICAL CARE PROVIDED BY IMPARTIAL HUMANITARIAN ORGANIZATIONS

4-39. Impartial humanitarian organizations serve an important function in armed conflict, in particular with respect to the provision of medical care. As noted above in this Chapter, the United States is a party to a number of treaties that address the protection of medical care during armed conflict. In addition, the United States has long supported the fundamental guarantees in Additional Protocol II for the protection of and appropriate care for the wounded and sick during non-international armed conflicts (Secretary of Defense Memorandum, "Principles Related to the Protection of Medical Care Provided by Impartial Humanitarian Organizations During Armed Conflict," October 3, 2016).

4-40. As with military medical units, the following principles related to the protection of medical care provided by impartial humanitarian organizations during international or non-international armed conflict apply and must be respected by all parties to the an armed conflict:

- Medical care during armed conflict is an activity that is fundamentally of a neutral, humanitarian, and non-combat character. Ensuring that medical care during armed conflict is protected requires parties refrain from acts that undermine its protection, and take affirmative steps to distinguish medical care from activities of a combatant character.
- All wounded and sick, whether or not they have taken part in the armed conflict, must be respected and protected. The wounded and sick are persons placed *hors de combat* by sickness and wound. They must not be made the object of attack. Combatants must not use the presences or movement of the wounded and sick to attempt to make certain points or areas immune from seizure; to shield military objectives from attack; or otherwise shield or favor one's own military operations or to impede the adversary's military operations.
- Whenever circumstances permit, and particularly after an engagement, all possible measure shall be taken, without delay, to search for and collect the wounded and sick, to protect them from pillage and ill-treatment, and to ensure their adequate care.
- In all circumstances, the wounded and sick shall be treated humanely without adverse distinction founded on race, color, religion or belief, se, birth wealth, political opinion, and any other similar criteria.
- The wounded and sick shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

4-41. Impartial humanitarian organizations may offer their services to any of the parties to the conflict. States should not arbitrarily withhold their consent to the activities of humanitarian organizations. Where a State has accepted the services of an impartial humanitarian organization, it must not regard such services, including the provision of medical care, as unlawful and subject to punishment. If a State does withhold its consent to the activities of the humanitarian organization and that organization enters the theater of conflict anyway, it does so at its own peril.

4-42. Personnel, units, transports, and facilities belonging to impartial humanitarian organizations providing medical care shall be respected and protected. Such personnel, units, transports, and facilities of impartial humanitarian organizations are those that are exclusively engaged in humanitarian functions. Such personnel, units, transports, and facilities must not be made the object of attack or unnecessarily prevented from discharging their proper functions. The protection to which such units (including units composed of personnel and facilities) and transports are entitled shall not cease unless they are used to commit hostile acts outside their humanitarian function. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded. Any attack must comply with all applicable rules and principles of LOAC, such as the prohibition on attacks that are expected to cause excessive incidental harm and the requirement to take feasible precautions in conducting the attack. Combatants must not use the presence or movement of such personnel, units, transports, and facilities to attempt to make certain points or areas immune from seizure or attack; to shield

military objectives from attack; or otherwise to shield or favor one's own military operations or to impede the adversary's military operations.

4-43. Personnel belonging to impartial humanitarian organizations providing medical care must be granted all available help in the performance of their duties, including by establishing appropriate channels of communication with such organizations. They must not be subject to harassment or attacks for having performed their humanitarian duties for the wounded and sick. They must not be compelled to carry out tasks that are not compatible with their humanitarian mission. In the performance of their duties, they may not be required to give priority to any person except on medical grounds.

4-44. Impartial humanitarian organizations may take appropriate measures to distinguish their personnel, units, transports, and facilities from military objectives, including by marking such personnel, units, transports, and facilities and, where feasible, by situating healthcare facilities away from military objectives. Under the direction of the competent authority concerned, the distinctive emblem of the Red Cross or other distinct emblem must be displayed by medical and religious personnel and medical units of impartial humanitarian organizations, and on their medical transports. The distinctive emblem must be respected in all circumstances and shall not be used improperly. If personnel, units, transports, and facilities that are entitled to protection are recognized as such, they remain entitled to such protection even if the distinctive emblem or other appropriate markings are not displayed.

Chapter 5
Civilians

This chapter addresses the protection of civilians in the hands of a party to the conflict under the law of armed conflict. The protection of civilians is governed by the Geneva and Hague traditions, customary international law, and recent practice consistent with Additional Protocols I and II to the Geneva Conventions. Certain provisions are applicable only in the territory of a party to the conflict, others to belligerently occupied territory, and a number to both or to civilian populations generally. Those relating exclusively to occupied areas appear in Chapter 6, while the requirements of GC having to do with the territory of a belligerent, with both such territory and occupied territory, or with the general protection of civilians are set forth in this chapter. This chapter will focus on detention and treatment standards from the Geneva tradition, with some reference to civilian protections in the conduct of hostilities as outlined in Chapter 2.

PRACTICAL GUIDANCE ON THE PROTECTION OF CIVILIANS

5-1. As discussed in Chapter 2, Soldiers and Marines must comply with LOAC during military operations. With respect to the protection of civilians and civilian objects, all Soldiers and Marines must adhere to the following guidance:

- Do not intentionally target civilians and civilian objects, for example, hospitals, schools, religious buildings, historic monuments. However, as discussed further below, civilians directly participating in hostilities may be targeted.
- When conducting an attack, combatants must exercise due regard to reduce the risk of incidental harm to the civilian population and other persons and objects that may not be made the object of attack.
- Do not abuse, degrade, or seek revenge against civilians, or take other unnecessary actions that could harm civilians.
- When necessary to detain, search, question, or exercise other measures of control over civilians, perform such measures humanely, respectfully, and professionally in accordance with Army and Marine Corps values.
- Do not steal.
- Follow accountability and reporting procedures related to civilians and civilian property. For example:
  - Follow command guidance on reporting the presence of civilians or civilian casualties during military operations.
  - When feasible, give receipts when seizing private enemy property, such as holding for safekeeping or family documents or valuable from civilian internees.
  - Report alleged violations of the law of war against civilians in accordance with applicable DOD policies, including DODD 2311.01E.

5-2. In addition to adhering to the practical guidance on detainee operations and the basic protections provided at the beginning of Chapter 3, Soldiers and Marines who are conducting internment of protected persons under the GC must comply with the GC's requirements and with applicable U.S. law and U.S. and DOD policies.

5-3. Commanders, at all levels, have a great responsibility to exercise the leadership necessary to reduce the risk of harm to civilians and civilian objects. Accordingly, they should, for example:

- Make the necessary judgments and decisions required by the principle of proportionality to ensure that harm to civilians and civilian objects is not excessive compared to the expected military advantage.
- Determine the feasible precautions to take for the protection of civilians in planning and conducting an attack, including canceling or suspending an attack based on new information raising concerns of expected civilian casualties or determining whether it is feasible to provide warnings or to use different types of weapon systems in order to reduce the risk of civilian casualties) (see DOD Law of War Manual, 5.11).
- Administer civilian internment camps in accordance with the GC.
- Arrange for passage of humanitarian relief.

GENERAL PROVISIONS

5-4. As described in Chapter 1 (see paragraph 1-54), a civilian is a member of the civilian population. That is, a civilian is an individual who is neither part of nor associated with an armed force of a State or a non-State armed group that is engaging in hostilities. For example, an ordinary inhabitant of the enemy State would be a civilian, but a member of the enemy armed forces or a member of a terrorist group or a non-State armed group would not be a civilian.

5-5. Like combatants, members of the civilian population have certain rights, duties and liabilities under LOAC. Civilians may not be made the object of an attack, and feasible precautions must be taken to reduce the risk of harm to them. Civilians are generally treated consistent with the GC, and most qualify for protections established for protected persons under the convention (GC art. 4). In general, civilians may be temporarily detained when militarily necessary and may be interned for imperative reasons of security. In all circumstances, they are entitled to humane treatment. Civilians do not enjoy combatant immunity (immunity from prosecution for engaging in hostilities) and may be punished by an enemy State for engaging in hostilities against it. Further, civilians who take a direct part in hostilities forfeit their protection from being made the object of attack (consider AP I art. 50, 51).

PROTECTED PERSONS

5-6. In general, the GC uses the term "protected person" to refer to those individuals who are entitled to receive its protections. Principally, protected persons include persons of enemy nationality living in the territory of a belligerent State and the inhabitants of occupied territory. Even if a person is not a protected person under the GC, other rules may be applicable to them. For example, persons protected by the GPW, the GWS, or the GWS Sea, are not considered protected persons under the GC (GC art. 4). Further, certain baseline rules apply to the treatment of all detainees, including those who are not protected persons or POWs (DOD Law of War Manual, 10.3).

5-7. The GC underlies most of the treaty rules applicable to the United States for the treatment of civilians in the hands of a party to the conflict during international armed conflict and occupation. Although the GC's provisions should be interpreted in light of the principles that underlie the treatment of civilians, protected persons do not simply refer to persons who are civilians. Protected persons may include certain unprivileged belligerents, although certain rights and privileges that unprivileged belligerents receive are subject to derogation for security reasons (see DOD Law of War Manual, 10.3.2.4). Subject to certain exceptions, persons protected by the GC are those who, at a given moment and in any manner whatsoever, find themselves, in the case of occupation or conflict, in the hands of a party to the conflict or occupying State of which they are not nationals (DOD Law of War Manual, 10.3.2). The GC term "protected person" does not, under the framework of the GC, apply to non-international armed conflicts (conflicts against or between non-State armed groups).

5-8. The phrase "in the hands of" is used in an extremely general sense. It is not limited to physical custody or control, such as a prisoner. The mere fact of being in the territory of a party to the conflict or in occupied territory implies the person is in the power or "in the hands of" the Occupying Power.

5-9. Certain individuals do not receive protected person status. Nationals of a State not bound by the GC are explicitly excluded from protected person status. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State (for example, an ally) are not regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State whose hands they are. Nationals of a neutral State in occupied territory, however, are considered as protected persons under the GC (see DOD Law of War Manual, 15.6.4.1).

POLICY AND PRACTICE

5-10. Subject to the derogation provisions discussed in paragraphs 5-11 through 5-13, those persons who have engaged in hostile or belligerent conduct, but are not entitled to treatment as POWs, are not *per se* precluded from receiving protected person status under the GC.

DEROGATIONS

5-11. The GC permits States to derogate from the GC's requirements to provide certain rights and privileges otherwise afforded to protected persons for security reasons. Such derogation may differ based on location of the protected person, such as in occupied territory or in the belligerent's home territory, and the conduct of the civilian (GC art 5; DOD Law of War Manual, 10.4).

In a Belligerent's Home Territory and in Occupied Territory

5-12. In the home territory of a party to the conflict, protected persons who are definitely suspected of or engaged in activities hostile to the security of the State may be deprived of certain rights and privileges under the GC when those rights and privileges, if exercised, would prejudice the security of the State. In occupied territory, a protected person detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, may be deprived of communication rights when military security so requires (GC art. 5; DOD Law of War Manual, 10.4.2). In each case, such persons must nevertheless be treated humanely and in the case of trial must not be deprived of the rights of a fair and regular trial. They must also receive the full rights and privileges of a protected person under the GC at the earliest date consistent with the security of the State (GC art. 5).

Other Areas

5-13. To the extent that the rights and privileges of protected persons afforded by the GC are applied outside the home territory of a party to the conflict or outside occupied territory, it would be reasonable for such rights and privileges similarly to be subject to derogation. Thus, if U.S. forces are satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the United States in other contexts, such person could be deemed not entitled to claim such rights and privileges under the GC as would, if exercised in favor of such individual person, be prejudicial to the security of the United States (see DOD Law of War Manual, 10.4.3). In no case, however, may deviations be taken from the minimum humane treatment standards outlined in paragraphs 5-16 through 5-18.

Authority to Punish

5-14. The derogation provisions of the GC implicitly recognize the power of a party to the conflict to impose the death penalty and lesser punishments (after judgment by a properly constituted court) on protected persons who are spies, saboteurs, and other persons not entitled to be treated as POWs, such as unprivileged belligerents,, except to the extent that that power has been limited or taken away by the GC (see GC art. 68, which limits application of the death penalty and other punishments in the case of protected persons, subject to the U.S. reservation with respect to imposing the death penalty).

Minimum Standards of Treatment

5-15. Even when derogations of other provisions may be appropriate for security reasons, Soldiers and Marines must comply with LOAC with respect to the treatment of all detainees. Until a detainee's release, repatriation, or transfer from DOD custody or control, Soldiers and Marines will, without regard to a detainee's legal status, at a minimum apply: (1) common article 3 of the 1949 Geneva Conventions during

all military operations; (2) the principles in Article 75 of AP I during international armed conflict and occupation; and (3) the principles in Articles 4-6 of AP II during non-international armed conflict (DODD 2310.01E). As a matter of U.S. law and policy, there are no situations in an armed conflict, however characterized, in which individuals are not entitled to at least this humane care and treatment. Further, as a matter of U.S. policy, such care and treatment will be accorded, at a minimum, to detainees in any military operations not involving armed conflict.

Humane Treatment and Other Basic Protections of Detained Civilians

5-16. Detainees must be provided humane care and treatment and with respect for their dignity from the moment they fall into the hands of DOD personnel until their release, transfer out of DOD control, or repatriation. Further, inhumane treatment of detainees is expressly prohibited and is not justified by the stress of combat or deep provocation. Humane treatment includes, in part:

- Adequate food, drinking water, shelter, and clothing; (consider AP II art. 5);
- Regular access to the open air, reasonable educational and intellectual activities, and appropriate contacts with the outside world (including, when practicable, exchange of letters, phone calls, and video teleconferences with family, as well as family visits) (consider AP II art. 4, 5);
- Free exercise of religion, consistent with the requirements of detention (consider AP II art. 5);
- Safeguards to protect health and hygiene, and protections against the rigors of the climate and dangers of military activities (consider AP II art. 5);
- Appropriate medical care and attention required by the detainee's condition, to the extent practicable (consider AP II art. 5);
- Respect for each as a human being without any adverse distinction founded on race, color, religion or faith, political or other opinion, national and social origin, sex, birth, or wealth, or other similar criteria;
- Protection against threats or acts of violence, including rape, forced prostitution, assault, bodily injury, and reprisals, torture, and cruel, inhuman, or degrading treatment or punishment; and
- Prohibition on being subjected to medical or scientific experiments, or to sensory deprivation intended to inflict suffering or serve as punishment (consider AP I art. 75; consider AP II art. 4).

5-17. Detainees must not be subject to criminal punishment without a fair trial and other important criminal procedural protections (DOD Law of War Manual, 8.16).

5-18. Detainees must be removed as soon as practicable from the point of capture and transported to a detainee collection point, temporary holding area, or DOD detention facility. Detainees not released or transferred from DOD custody or control from the detainee collection point or holding area will be transported to a DOD detention facility in a secure location within 14 days of capture, barring exceptional circumstances. Detainees will be promptly informed of the reasons for their detention in a language that they understand. Detainees will remain at a DOD detention facility until their release or transfer from DOD custody or control (DODD 2310.01E).

Procedural Protections

5-19. Under DOD policy, detainees will receive certain procedural protections.

5-20. Detainees will be registered, and property in their possession will be inventoried. Records of their detention and such property will be maintained according to applicable law, regulation, policy, and other issuances. All detainee records will be maintained, safeguarded. Detainees will be assigned an Internment Serial Number (ISN) normally within 14 days after their capture by, or transfer to, the custody or control of DOD personnel, barring exceptional circumstances.

5-21. The ICRC will be promptly notified of all ISN assignments. The ICRC will be given access to all DOD detention facilities and the detainees housed therein, subject to reasons of imperative military necessity. (DODD 2310.01E).

5-22. Alleged detainee abuse must be reported in accordance with DOD policies (see DODD 2310.01E; DODD 2311.01E; DODD 3115.09).

5-23. DOD personnel will review periodically the detention of all individuals in DOD custody or control who do not receive the protections afforded POWs. Such reviews may include: (1) preliminary assessments of the detainee's status and threat; (2) formal determinations of the lawfulness and continued necessity of detention; and (3) determination of the status of unprivileged belligerents held in long-term detention, presided over by a military judge (DODD 2310.01E, para. 3i).

5-24. DOD personnel, including DOD contractors, must not accept the transfer of a detainee from another U.S. Government department or agency, coalition force, multinational partner personnel, or other personnel not affiliated with the DOD or the U.S. Government, except in accordance with applicable law, regulation, policy, and other issuances (DODD 2310.01E, para. 3e). No detainee may be released or transferred from the care, custody, or control of a DOD component except in accordance with applicable law, regulation, policy, and other issuances (DODD 2310.01E, para. 3m).

Greater Protections

5-25. As a matter of law, persons who are entitled to treatment as either POWs or retained personnel under the GPW, or as internees under the GC, are entitled to even greater protections than the minimum humane care and treatment described above.

SPECIAL AGREEMENTS

5-26. Parties to a conflict may conclude special agreements for all matters concerning which they deem it suitable to make separate provision, in addition to those specified by the GC (GC art. 7). No special agreement may adversely affect the situation of protected persons nor restrict the rights the GC confers on them.

5-27. In no circumstances may protected persons renounce the rights secured to them by the GC and by any special agreements negotiated under the GC (GC art. 8).

GENERAL PROTECTION OF POPULATIONS AGAINST CERTAIN CONSEQUENCES OF WAR

5-28. The general protections afforded to civilians are intended to alleviate the sufferings caused by war. As a matter of Army/USMC practice, the general protections of GC Part II (art. 13 – 26) apply to all civilians encountered in military operations (see GC art. 13). These general protections provided by the Army and Marine Corps are also consistent with certain portions of Additional Protocol I outlined in paragraphs 5-29 through 5-65.

PROTECTION OF CIVILIANS AND CIVILIAN PROPERTY IN THE CONDUCT OF MILITARY OPERATIONS

5-29. LOAC provides protections for civilians and civilian property while combatants engage in the conduct of military operations (see generally paragraphs 2-6 through 2-21 and 2-68 through 2-144, prohibiting indiscriminate attacks and the principles of military necessity, humanity, distinction, and proportionality found in Chapter 1). Many of the rules for the protection of civilians are derived from the principles of distinction and proportionality.

5-30. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians, and civilian objects (consider AP I art. 57(1)). In general, military operations must not be directed against enemy civilians. For example, the civilian population as a whole may not be the object of attack. Measures of intimidation or terrorism against the civilian population are prohibited, including acts or threats of violence, the primary purpose of which is to spread terror among the civilian population (consider AP I art. 51(2); AP II art. 13(2)). Civilians must not be made the object of attack, unless they take a direct part in hostilities (see paragraphs 2-11 through 2-21).

5-31. When prosecuting an attack against a military objective, combatants must exercise due regard to reduce the risk of incidental harm to the civilian population and other persons and objects that may not be made the object of attack. In particular, combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack. Also, combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete

and direct military advantage expected to be gained (see DOD Law of War Manual, 5.10). Such feasible precautions can reduce the risk that civilians may become casualties as a result of their proximity to attacks on military objectives.

5-32. Feasible precautions to reduce the risk of harm to civilians must also be taken by the party subject to attack. For example, military commanders and other officials responsible for the safety of the civilian population must take reasonable steps to separate the civilian population, individual civilians, and civilian objects under their control from military objectives and protect the civilian population from the effects of combat. Other feasible precautions may include avoiding locating military objectives within or near densely populated areas, removing civilians and civilian objects from the vicinity of military objectives, and other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control from the dangers resulting from military operations (consider AP I art. 58; see DOD Law of War Manual, 5.14).

5-33. LOAC protects civilian property as well. Outside the context of attacks, certain rules apply to the seizure and destruction of enemy civilian property. For instance, pillage is strictly prohibited (HR art. 28). Enemy property, including enemy civilian property, may not be seized or destroyed unless imperatively demanded by the necessities of war (DOD Law of War Manual, 5.17.2). In general, enemy private movable property on the battlefield may be seized if the property is susceptible to direct military use, i.e., it is necessary and indispensable for the conduct of war. This includes arms, ammunition, military papers, or property that can be used as military equipment (e.g., as a means of transportation or communication) (see DOD Law of War Manual, 5.17.3).

5-34. Enemy private movable property that is not susceptible to direct military use may be appropriated only to the extent that such taking is permissible in occupied areas. In particular, receipts should be given and compensation paid, when feasible (see DOD Law of War Manual, 5.17.3.1). During occupation, other rules relating to the treatment of enemy property apply (HR art. 43; see Chapter 6).

5-35. Cultural property is subject to special protection under LOAC. For example, in general, no use should be made of cultural property, its immediate surroundings, or appliances in use for its protection, for purposes that are likely to expose it to destruction or damage in the event of armed conflict. However, such use is permissible when military necessity imperatively requires such use. Uses that would be likely to expose cultural property to destruction or damage in the event of armed conflict would include: (1) using cultural property for military purposes; (2) placing military objectives near cultural property; or (3) using the cultural property in such a way that an adversary would likely regard it as a military objective (HR art. 27; 1954 Hague art. 4; see DOD Law of War Manual, 5.18.3; consider AP I art. 53). Other feasible precautions should be taken to reduce the risk of harm to cultural property, such as physically shielding cultural property from harm and establishing refuges and evacuating movable cultural property to them (see DOD Law of War Manual, 5.18.4).

5-36. In general, acts of hostility also may not be directed against cultural property, its immediate surroundings, or appliances in use for its protection. Acts of hostility may, however, be directed against cultural property, its immediate surroundings, or appliances in use for its protection, when military necessity imperatively requires such acts (1954 Hague art. 4; see DOD Law of War Manual, 5.18.5).

5-37. Any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property are prohibited. These obligations are not subject to waiver for purposes of "imperative military necessity." Military commanders also have an obligation to take reasonable measures to prevent or stop any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property (see DOD Law of War Manual, 5.18.6.1).

5-38. For the purpose of the 1954 Hague Cultural Property Convention and this publication, cultural property includes, irrespective of ownership or origin: (1) movable and immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art, or history, whether religious or secular; (2) buildings intended to shelter cultural property, such as museums and depositories of archives; and (3) centers containing monuments

MARKINGS

5-39. It may be appropriate to identify protected persons and objects, as such, through the use of distinctive and visible signs. For example, for cultural property, this may include use of the distinctive blue and white shield described by 1954 Hague (1954 Hague arts. 6, 16) and displayed in figure 5-1 below. This may also include identifying civilian hospitals (see paragraphs 5-41 through 5-43 concerning markings for civilian hospitals and places where the sick and wounded are collected). The parties to the conflict must, in so far as military considerations permit, take the necessary steps to make the distinctive emblems clearly visible to the enemy land, air, and naval forces in order to prevent intentional hostile action on the protected sites. Even if not so marked, however, an attacking force may not knowingly target a building or other facility known to enjoy special protection under LOAC. Similarly, attacking forces are not required to observe signs indicating inviolability of buildings if such buildings are known to be used for military purposes, such as quarters for military personnel, warehouses for military equipment and supplies, observation posts, or military communications installations.

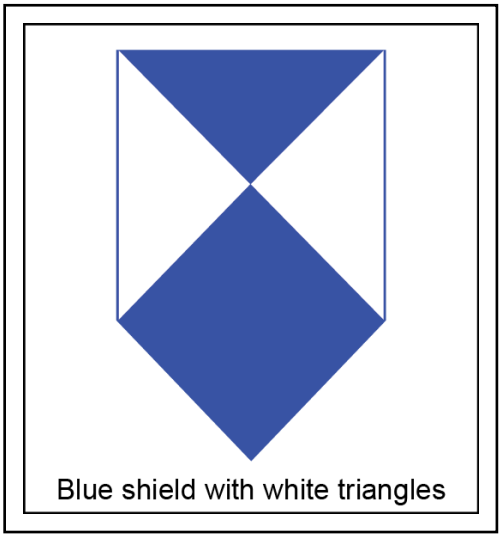


Figure 5-1. The distinctive emblem for the protection of cultural property

PROTECTION OF CIVILIAN SICK AND WOUNDED, HOSPITALS, AND MEDICAL PERSONNEL

5-40. LOAC requires particular protection and respect for the wounded and sick, as well as the infirm and expectant mothers (GC art. 16). The infirm and expectant mothers are given special consideration along with the sick and wounded because they are vulnerable so long as they do not take part in hostilities. As far as military considerations allow, each party to the conflict must facilitate the steps taken to search for the killed or wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment (GC art. 16). Even though civilian authorities would often be responsible for collecting and bringing in civilian casualties, the armed forces may be asked to lead such efforts or to carry out a joint relief operation with civilian authorities (DOD Law of War Manual, 7.16.1). Parties to the conflict may appeal to the civilian population and local aid societies to assist in collecting the sick and wounded and locating the dead (consider AP I art. 17).

Civilian Hospitals

5-41. Civilian hospitals organized to give care to the wounded and sick, the infirm, and maternity cases, may in no circumstances be the object of attack but must at all times be respected and protected by the parties to the conflict (GC art. 18; consider AP I art. 12). The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Civilian hospitals must avoid any interference, direct or indirect, in military operations, such as the use of a hospital as a shelter for able-bodied combatants, as an arms or ammunition store, as a military observation

post, or as a center for liaison with combat forces (see DOD Law of War Manual, 7.17.1.1). However, the fact that sick or wounded members of the armed forces are being cared for in these hospitals, or the presence in these hospitals of small arms and ammunition taken from such combatants and not yet handed to the proper service, are not to be considered acts harmful to the enemy (GC art. 19).

5-42. Protection for civilian hospitals may, however, cease only after due warning has been given, naming in all appropriate cases a reasonable time, and after such warning has remained unheeded (GC art. 19; consider AP I art. 13). The obligation to refrain from the use of force against a civilian hospital acting in violation of its mission and protected status without due warning does not prohibit the exercise of the right of self-defense (see DOD Law of War Manual, 7.17.1.2).

5-43. States that are parties to a conflict must provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings they occupy are not used for any purpose that would deprive these hospitals of protection in accordance with Article 19 of the GC. They must also be marked with the appropriate distinctive emblem provided for in Article 38 of the GWS (as described in paragraph 4-30), but only if authorized by the State. The parties to the conflict must, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals in a manner clearly visible to the enemy land, air, and naval opposing forces in order to obviate the possibility of any hostile action (see also figure 4-1, page 4-8). In view of the dangers to which civilian hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be located as far as possible from military objectives (GC art. 18).

Civilian Medical Personnel

5-44. Persons regularly and solely engaged in the operation and administration of civilian hospitals—including the persons engaged in the search for, removal, transport of, and care for wounded and sick civilians, the infirm, and maternity cases—must be respected and protected by State parties to the conflict (GC art. 20). In occupied territory and in zones of military operations, such persons must be recognizable by means of an identity card certifying their status, bearing the photograph of the holder, and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armlet that they must wear on the left arm while carrying out their duties. This armlet must be issued by the State with control over such persons and shall bear the Red Cross, Red Crescent, or Red Crystal, as applicable (GC art. 20).

Medical Transport

5-45. Means of transport, including vehicles, convoys, and hospital trains, must be respected and protected in the same manner as hospitals as long as they are exclusively engaged in the transport of wounded and sick civilians; they must be appropriately marked (GC art. 21, 22; consider AP I art. 21). Civilian medical aircraft are subject to the same restrictions as military medical aircraft, and should be respected and protected when recognized as such (GC art. 22; consider AP I art. 24-28).

Consignments of Medical Supplies, Food, and Clothing

5-46. Parties to the conflict must allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship for civilians of another State, even if that State is an opposing party. Parties to the conflict must also permit the free passage of consignments of essential food, clothing, and medicine intended for children under 15 years of age, expectant mothers, and maternity cases. A State Party's obligation to allow free passage is subject to the condition that State Party is satisfied that there are no serious reasons to fear: (1) that the consignments may be diverted from their destination; (2) that the control may not be effective; or (3) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services, or facilities as would otherwise be required for production of such goods. Technical arrangements may be negotiated with the opposing side to facilitate such passage (GC art. 23).

Special Zones

5-47. States may establish hospital and safety zones and localities to protect certain persons from the effects of war, namely, wounded, sick, and aged persons, children under the age of 15, expectant mothers, and mothers of children under the age of 7. Parties to a conflict may conclude agreements on the mutual recognition of the hospital zones and localities they have created, drawing upon model agreements that are annexed to the 1949 Geneva Conventions (GC art. 14). The establishment of a zone only binds an adverse party when it agrees to recognize the zone (see DOD Law of War Manual, 5.14.3.1).

5-48. Parties to a conflict may conclude similar agreements to establish neutralized zones to shelter: (1) wounded and sick combatants and non-combatants; and (2) civilians who take no part in hostilities and who, while they reside in the zones, perform no work of a military character (GC art. 15).

CHILDREN AND OTHER SPECIAL CATEGORIES OF CIVILIANS

5-49. In an international armed conflict, the parties to the conflict must take the necessary measures to ensure that children under the age of 15 who are orphaned or who are separated from their families as a result of war, are not left to their own resources, and that their maintenance, the exercise of their religion, and their education are facilitated in all circumstances (GC art. 24). The maintenance of the children concerned means their feeding, clothing, and accommodation, care for their health, and, where necessary, medical and hospital treatment (see DOD Law of War Manual, 4.20.1.1).

5-50. Their education must, as far as possible, be entrusted to persons of a similar cultural tradition.

5-51. The parties to the conflict must facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the protecting power, if any, and under due safeguards for the observance of the above principles. The parties to the conflict must, furthermore, endeavor to arrange for all children under the age of 12 to be identified by the wearing of identity discs, or by some other means (GC art. 24).

5-52. Finally, parties to the conflict should enable personal communications between persons in their home territory or in the territory occupied by them and other members of such protected persons' families, including possibly with the cooperation of national Red Cross societies (GC art. 25, 26).

Children and Their Mothers under Additional Protocol I

5-53. Although the United States is not bound by Additional Protocol I, it contains several provisions that grant enhanced protection to children and their mothers; these provisions should guide Army/Marine Corps practice. For example, pregnant women and mothers having "dependent infants" who are arrested, detained, or interned for reasons related to the armed conflict are to have their cases considered with the "utmost priority" (consider AP I art. 76).

5-54. Additionally, Additional Protocol I provides children shall be the object of "special respect" and must be protected against any form of indecent assault (consider AP I art. 77). Furthermore, the States Party to the conflict are to provide such children with the care and aid they require (consider AP I arts. 70, 77). No party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation when compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety so require. When the parents or legal guardians can be found, their written consent to such an evacuation is required. If they cannot be found, the written consent to the evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation must be supervised by the protecting power in agreement with the parties concerned, namely, the party arranging for the evacuation, the party receiving the children, and any parties whose nationals are being evacuated. In each case, all parties to the conflict must take all feasible precautions to avoid endangering the evacuation. If children are evacuated, their education, including their religious and moral education as their parents' desire, must be provided while they are away with the greatest possible continuity. Furthermore, if children are evacuated, the party arranging for the evacuation and, as appropriate, the authorities of the receiving State must establish for each child a card with photographs, which they must send to the Central Tracing Agency of the ICRC (consider AP I art. 78).

Women

5-55. In the territory of a party to the conflict and in occupied territory, all protected persons, including women, are entitled, in all circumstances, to respect for their person, their honor, their family rights, their religious convictions and practices, and their manners and customs. They are to be humanely treated at all times, and are to be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women must be especially protected against any attack on their honor, in particular against rape, forced prostitution, or any form of indecent assault (GC art. 27).

Journalists

5-56. In general, journalists are civilians and are protected as such under LOAC. Journalists do not form a distinct class of persons under LOAC, but instead receive protection through the general protections afforded civilians. Although journalism is regarded as a civilian activity, the fact that a person performs such work does not preclude that person from otherwise acquiring a different status under LOAC, such as the status of persons authorized to accompany the armed forces or of combatants (DOD Law of War Manual, 4.24). For example, journalists authorized to accompany an armed force during an international armed conflict is a POW upon capture. See paragraph 3-26 regarding the treatment standards of detained war correspondents as "persons authorized to accompany the armed forces."

Civil Defense Personnel

5-57. The GC does not expressly address how civil defense organizations, such as fire and rescue services, should be treated except for those ambulance and similar rescue services that are attached to hospitals and their personnel that would enjoy the protections afforded medical personnel as discussed in paragraphs 5-40 through 5-46. The GC says little else specifically about civil defense organizations or first responders, although as civilians they would be entitled to the protections accorded to civilians generally.

Civil Defense Personnel Under Additional Protocol I

5-58. Articles 61-67 of Additional Protocol I address the performance of certain humanitarian tasks intended to benefit the civilian population. The United States supports the principle that civilian civil defense organizations and their personnel be respected and protected as civilians and be permitted to perform their civil defense tasks except in cases of imperative military necessity. However, a number of operational problems have been identified with respect to the system of protection for civil defense personnel established by Additional Protocol I, and these provisions of Additional Protocol I may be understood not to preclude an attack on an otherwise lawful military objective (see DOD Law of War Manual, 4.22). Articles 61-67 of Additional Protocol I should guide Army/Marine Corps practice in this area.

5-59. Under Additional Protocol I, "civil defense" is broadly defined as the performance of certain humanitarian tasks intended to protect the civilian population against the dangers of armed conflict, to help them recover from the immediate effects of hostilities or disasters, and to provide the conditions necessary for their survival. These tasks include warning, evacuation, management of shelters and blackout measures, rescue and medical services, fire-fighting, detection and marking of danger areas, decontamination and similar services, emergency accommodation and supplies, emergency assistance to restore and maintain order, emergency repair of vital public utilities, emergency disposal of the dead, assistance in preserving objects necessary for survival, and activities that complement the foregoing (consider AP I art. 61).

5-60. Civil defense organizations and their personnel must be respected and protected and are entitled to perform their civil defense tasks except in case of imperative military necessity. This obligation to respect and protect also applies to civilians who, although not members of civilian civil defense organizations, respond to an appeal from the competent authorities and perform civil defense tasks under their control. Buildings and materiel used for civilian civil defense purposes and shelters provided for the civilian population are civilian objects; as such they cannot be the subject of attack or reprisal unless they become military objectives (consider AP I, art 62).

5-61. Additional rules that apply to civil defense organizations and personnel in occupied territories are discussed in paragraphs 6-125 through 6-127. The rules from Additional Protocol I concerning civil defense organizations and personnel also apply to the personnel and materiel of civilian civil defense organizations

of neutral States or other States not parties to the conflict that perform civil defense activities in the territory of a party to the conflict, with the consent and under the control of that party.

Civil Defense Organizations and Acts Harmful to the Enemy

5-62. The protection to which civilian civil defense organizations are entitled ceases if they commit or are used to commit acts harmful to the enemy outside their humanitarian activities. Protection may cease only after a warning has been given that sets, whenever appropriate, a reasonable time-limit for ceasing these activities and such warning has remained unheeded. Merely carrying out civil defense tasks under military direction or control and cooperating with the military in performing civil defense tasks are not considered to be acts harmful to the enemy. Nor is it harmful to the enemy if some military personnel are attached to civilian civil defense organizations or if the performance of civil defense tasks incidentally benefits military victims. Military personnel permanently and exclusively assigned to civil defense organizations (and properly distinguished with civil defense symbols) do not lose their status as POWs if captured, but they could lose their immunity from attack should they directly participate in hostilities, and they may be prosecuted for their hostile acts while acting under the color of civil defense authority.

5-63. Civilian civil defense personnel may bear light individual weapons for the purpose of maintaining order or for self-defense without losing their protections, although in areas where land fighting is taking place or is likely to take place, the parties to the conflict must take measures to limit these weapons to handguns in order to assist in distinguishing between civil defense personnel and combatants. If civil defense personnel bear other light individual weapons in such areas, however, they must nevertheless be respected and protected as soon as they have been recognized as such. The mere formation of civilian civil defense organizations along military lines, and compulsory service in them, does not deprive them of these protections (consider AP I art. 65). If civil defense organizations are participating in military activities, however, like providing warning to military organizations (as well as civilians), they may become military objectives.

Marking of Civil Defense Organizations and Structures

5-64. Under Additional Protocol I, the international distinctive sign of civil defense, displayed in figure 5-2 below, is an equilateral blue triangle on an orange ground when used for the protection of civil defense organizations, their personnel, buildings, and materiel, and for civilian shelters. The parties to the conflict must take measures necessary to supervise the display of the international distinctive sign of civil defense and to prevent and repress its misuse (consider AP I art. 66).

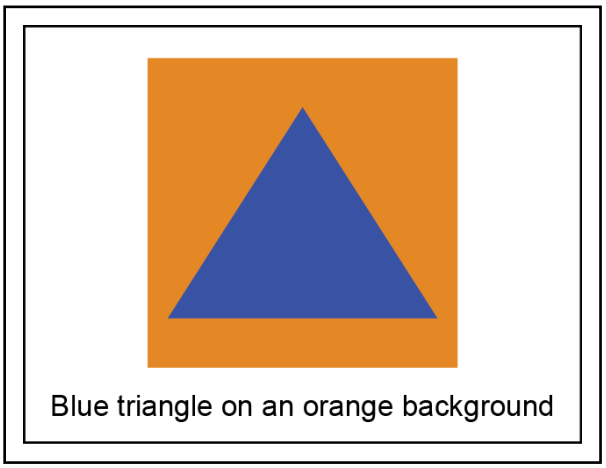


Figure 5-2. The distinctive sign of civil defense

Cultural Property Personnel

5-65. As far as is consistent with the interests of security, personnel engaged in the protection of cultural property must, in the interests of such property, be respected and, if they fall into the hands of the opposing

party, must be allowed to continue to carry out duties whenever the cultural property for which they are responsible has also fallen into the hands of the opposing party (1954 Hague art, 15). Such personnel are analogous to medical and religious personnel who also are to continue to carry out their medical and spiritual duties when they have fallen into the hands of the enemy. Certain Civil Affairs Soldiers and Marines may have training in and assigned duties to help protect cultural property.

PROVISIONS COMMON TO THE TERRITORIES OF THE PARTIES TO THE CONFLICT AND TO OCCUPIED TERRITORIES

5-66. All protected persons are entitled, in all circumstances, to respect for their person, their honor, their family rights, their religious convictions and practices, and their manners and customs. They are to be humanely treated at all times and are to be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

5-67. Women must be especially protected against any attack on their honor, in particular against rape, forced prostitution, or any form of indecent assault (GC art. 27). Although the GC provides special protection for women against these offenses, all individuals, including children and men, should also be protected against these offenses. Indecent assault is generally referred to today as sexual assault (see DOD Law of War Manual, 10.5.1.2).

5-68. Without prejudice to the provisions relating to their state of health, age, and sex, all protected persons are to be treated with the same consideration by the party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion, or political opinion (GC art. 82). Distinctions are permitted, and in some cases required, for humanitarian reasons. For example, the GC provides for special treatment for children during internment. Distinction based on religion, political opinion, or other similar criteria may also be made so long as it is not adverse and it is made to advance legitimate interests, such as maintaining order in a place of internment (see DOD Law of War Manual, 10.5.5).

5-69. The taking of hostages is prohibited (GC art. 34). The presence of protected persons may not be used to render certain points or areas immune from military operations, such as the practice of using "human shields" is prohibited (GC art. 28; consider AP I art. 51(7)).

5-70. Internees must at all times be protected against insults and public curiosity. For example, displaying internees in a humiliating fashion on television or on the internet would be prohibited. For this reason and others, DOD policy has prohibited the taking of photographs of detainees except for authorized purposes (see DOD Law of War Manual, 10.5.2).

5-71. No physical or moral coercion may be exercised against protected persons, in particular to obtain information from them or third parties (GC art. 31). For example, protected persons in occupied territory may not be compelled to provide information about their State's military defenses. Other requirements, including the requirements of U.S. law and policy, would apply to the interrogation of protected persons. The GC's prohibition against the use of coercion does not apply to those measures implicitly or explicitly authorized by the GC, such as the use of force to prevent one internee from harming another, or other lawful measures that are otherwise consistent with the GC, such as the use of force to prevent internees from escaping internment (see DOD Law of War Manual, 10.5.3.1).

5-72. Protected persons must at all times be protected, particularly against acts or threats of violence. For example, murder of protected persons is prohibited. Protected persons should be protected not only against unlawful acts by the agents of the detaining power, but also against violence from other protected persons, such as during internment or, in the case of protected persons in a belligerent's home territory, violence from members of the civilian population (see DOD Law of War Manual, 10.5.1).

5-73. Parties to the GC specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation, and any medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents (GC art. 32).

5-74. No protected person may be punished for an offense that he or she has not personally committed. Collective penalties and, likewise, all measures of intimidation or of terrorism are prohibited. In addition to this specific prohibition in the GC, collective penalties are prohibited as a general matter under LOAC (see DOD Law of War Manual, 10.5.3.2).

5-75. Pillage is prohibited (GC art. 33). In addition to this specific prohibition in the GC, pillage is prohibited as a general matter under LOAC.

5-76. Reprisal against protected persons and their property are prohibited (GC art. 33).

5-77. Protected persons must have every facility for applying to the protecting powers (if designated), to the ICRC, to the national Red Cross or Red Crescent Society of the country where they may be, as well as to any organization that might assist them. These several organizations must be granted full facilities for that purpose by the authorities, within the bounds set by military or security considerations (GC art. 30). For example, relief organizations generally may only access military operations areas or military facilities in coordination with military authorities, and they can be barred from areas under military control if their activities exceed the scope of their humanitarian missions or pose other security concerns.

5-78. Apart from the visits of the delegates of the protecting powers and of the ICRC, provided for by Article 143 of the GC, the detaining power must facilitate as much as possible visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons (GC art. 30).

ALIENS IN THE TERRITORY OF A PARTY TO THE CONFLICT

5-79. Military forces have often been assigned the mission of providing security in their home territory, including by providing for the internment of enemy aliens who find themselves in the territory of the opposing party when hostilities break out between two States. Army and Marine forces assigned to such missions in the United States or its territories during an international armed conflict can expect to receive additional guidance from national authorities.

GENERAL TREATMENT OF PROTECTED PERSONS IN THE TERRITORY OF A PARTY DURING TIME OF WAR

5-80. With the exception of special measures of control authorized by the GC, such as internment, the situation of protected persons in the home territory of a State party to the conflict continue to be regulated, in principle, by the provisions concerning aliens in time of peace (GC art. 38). In any case, the following rights must be granted to them:

- They must be enabled to receive the individual or collective relief that may be sent to them;
- They must, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State in whose hands they are;
- They must be allowed to practice their religion and to receive spiritual assistance from ministers of their faith;
- If they reside in an area particularly exposed to the dangers of war, they must be authorized to move from that area to the same extent as the nationals of the State where they are residing; and
- Children under 15 years of age, pregnant women, and mothers of children under 7 years of age, are to benefit from any preferential treatment to the same extent as the nationals of the State in whose hands they are (GC art. 38).

5-81. Protected persons who, as a result of the war, have lost their gainful employment, must be granted the opportunity to find paid employment. That opportunity must, subject to security considerations to the provisions of Article 40 of the GC, be equal to that enjoyed by the nationals of that State in whose territory they are. When a party to the conflict applies to a protected person methods of control (see paragraphs 5-83 through 5-88) that result in the protected person being unable to support himself or herself, and especially if such person is prevented for reasons of security from finding paid employment on reasonable conditions, the said party must ensure provisions of his or her support and that of his or her dependents. Protected persons may in any case receive allowances from their home country, the protecting power, or relief societies referred

to in Article 30 of the GC (the national Red Cross or Red Crescent society of the country where they may be) (GC art. 39).

5-82. Protected persons may be compelled to work only to the same extent as nationals of the party to the conflict in whose territory they are. If protected persons are of enemy nationality, they may only be compelled to do work that is normally necessary to ensure the feeding, sheltering, clothing, transport, and health of human beings and that is not directly related to the conduct of military operations. In the cases mentioned in the first two paragraphs of Article 40 of the GC (that are described in the preceding two sentences), protected persons compelled to work must have the benefit of the same working conditions and of the same safeguards as national workers, in particular as regards wages, hours of labor, clothing and equipment, previous training, and compensation for occupational accidents and diseases (GC art. 40).

MEASURES OF CONTROL

5-83. Enemy aliens and other protected persons in the home territory of a party to the conflict when hostilities break out between two States are not necessarily made prisoners or interned *en masse*. For example, all protected persons who may desire to leave the territory at the outset of or during a conflict may be entitled to do so, unless their departure is contrary to the national interest of the State (GC art. 35).

5-84. Although the GC provides that the parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war, it does not list every measure that may be implemented (see GC art. 27). Such measures can include many different types of measures. For example, in the home territory of a party to a conflict, measures of control are normally taken with respect to, at the very least, persons known to be active or reserve members of a hostile army (they would be the first POWs), persons who would be liable to service in the enemy forces, and persons who would be expected to furnish information or other aid to a hostile State..

5-85. Other measures may include, for example, requiring protected persons: (1) to register with and report periodically to the police authorities; (2) to carry identity cards or special papers; (3) to refrain from carrying weapons; (4) to refrain from changing their place of residence without permission; (5) to refrain from accessing certain areas; (6) to have an assigned residence; and (7) to be interned.

5-86. Should the State, in whose hands protected persons may be, consider the measures of control mentioned in the GC to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43 of the GC. The internment or placing in assigned residence of protected persons may be ordered only if the security of the detaining power makes it "absolutely necessary." If any person, acting through the representatives of the protecting power, voluntarily demands internment, and if his or her situation renders this step necessary, he or she must be interned by the State in whose hands he or she may be (GC art. 42). All protected persons subject to measures of control are to be provided treatment consistent with the minimum humane treatment standards discussed in paragraphs 5-16 through 5-18.

5-87. Any protected person who has been interned or placed in assigned residence is entitled to have such action reconsidered as soon as possible by an appropriate court or administrative tribunal designated by the detaining power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board must periodically, and at least twice yearly, consider his or her case with a view to favorably amending the initial decision, if circumstances permit (GC art. 43).

5-88. Unless the protected persons concerned object, the detaining power must, as rapidly as possible, give the protecting power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of Article 43 of the GC must also, subject to the same conditions, be notified as rapidly as possible to the protecting power (GC art. 43).

TREATMENT OF INTERNEES

INTERNMENT GENERALLY

5-89. During an international armed conflict, parties to a conflict may not intern protected persons in a belligerent's home territory, except in accordance with the provisions of Articles 41-43, 68, and 78 of the GC. Humane treatment standards of the GC for protected persons described in paragraphs 5-16 through 5-18) also apply to interned protected persons.

Maintenance of Internees and Their Dependents

5-90. Parties to the conflict who intern protected persons are bound to provide free of charge for their maintenance and to grant them also the medical attention required by their state of health. No deduction from the allowances, salaries, or credits due to the internees may be made for the repayment of these costs. The detaining power must provide for the support of those dependent on the internees if such dependents are without adequate means of support or are unable to earn a living (GC art. 81).

Grouping of Internees

5-91. The detaining power must, as far as possible, accommodate the internees according to their nationality, language, and customs. Internees who are nationals of the same country are not to be separated merely because they speak different languages (GC art. 82). Internees must be accommodated and administered separately from POWs and from persons deprived of liberty for any other reason (GC art. 84). Much like internment of POWs, the internment of protected persons is a precautionary measure and should not be confused with the penalty of imprisonment.

PROTECTION FOR WOMEN, FAMILIES, AND CHILDREN

5-92. Throughout the duration of their internment, members of the same family, and in particular parents and children, must be lodged together in the same place of internment except when separation of a temporary nature is required for reasons of employment or health, or for penal and disciplinary purposes. Internees may request that their children who are left at liberty without parental care be interned with them, but one of the parents would not be able to request the internment of a child being cared for by a parent who was not being interned (GC art. 82). Whenever possible, interned members of the same family must be housed in the same premises and given separate accommodations from other internees, together with facilities for leading a proper family life (GC art. 82). Moreover, the parties to the conflict must endeavor during the course of hostilities to conclude agreements for the release, the repatriation, the return to places of residence, or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time (GC art. 132).

Additional Protections

5-93. If interned, expectant and nursing mothers, and children under 15 years of age must be given additional food in proportion to their physiological needs (GC art. 89). The detaining power must encourage intellectual, educational, and recreational pursuits among the internees, including child internees. The education of children and young people must be ensured; they must be allowed to attend schools either within the place of internment or outside. Like all internees, child internees must be given opportunities for physical exercise, sports, and outdoor games. For this purpose, sufficient open spaces must be set aside in all places of internment. Special playgrounds must be reserved for children and young people (GC art. 94).

Women Internees

5-94. Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, women internees must be provided separate sleeping quarters and sanitary conveniences for their use (GC art. 85). Women internees accused or convicted of offenses must be confined in separate quarters from men and must be under the

immediate supervision of women (GC arts. 85 and 126). Women internees undergoing disciplinary punishment must be confined in separate quarters from male internees and under the immediate supervision of women (GC art. 124). A woman internee must not be searched except by a woman (GC art. 97). Sick, wounded, and infirm internees and maternity cases may not be transferred if the journey would be seriously detrimental to them unless their safety imperatively so demands (GC art. 127).

PLACES OF INTERNMENT

5-95. The detaining power may not set up places of internment in areas particularly exposed to the dangers of war. The detaining power must give enemy powers, through the intermediary of the protecting powers, all useful information regarding the geographical location of places of internment. Whenever military considerations permit, internment camps must be indicated by the letters "IC," placed so as to be clearly visible in the daytime from the air. The powers concerned may, however, agree upon any other system of marking. No place, other than an internment camp, may be marked as such (GC art. 83). A detaining power may refrain from marking a camp when it believes that such identification may enable an enemy power to pose a security risk to the camp; for example, if such identification would enable an enemy power to instigate a revolt, provide weapons to internees, or enable escape attempts.

Accommodation; Hygiene Regarding Internees

5-96. The detaining power must take all necessary and possible measures to ensure that protected persons, from the outset of their internment, are accommodated in buildings or quarters that afford every possible safeguard in regard to hygiene and health, and provide efficient protection against the rigors of the climate and the effects of the war. In no case may permanent places of internment be situated in unhealthy areas, or in districts the climate of which is injurious to the internees. In all cases where the district in which a protected person is temporarily interned is in an unhealthy area or has a climate that is harmful to his or her health, he or she must be removed to a more suitable place of internment as rapidly as circumstances permit.

5-97. The premises must be fully protected from dampness and adequately heated and lighted, in particular between dusk and lights-out. The sleeping quarters must be sufficiently spacious and well-ventilated, and the internees must have suitable bedding and sufficient blankets, with account being taken of the climate and of the age, sex, and state of health of the internees.

5-98. Internees must have for their use, day and night, sanitary conveniences (e.g. latrines, bathrooms) that conform to the rules of hygiene and are constantly maintained in a state of cleanliness. They must be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose must be granted to them. Showers or baths must also be available. Necessary time must be set aside for washing and for cleaning (GC art. 85).

Canteens

5-99. Canteens must be installed in every place of internment, except where other suitable facilities are available (for comparison, see paragraph 3-74 for discussion of POW canteens). The purpose of the canteens is to enable internees to make purchases, at prices no higher than local market prices, of food and articles of everyday use, including soap and tobacco, in order to increase their personal well-being and comfort.

5-100. Profits made by canteens must be credited to a welfare fund to be set up for each place of internment, and administered for the benefit of the internees attached to such place of internment. The internee committee (described in paragraphs 5-134 through 5-137) has the right to check the management of the canteen and of its welfare fund. When a place of internment is closed down, the balance of the welfare fund must be transferred to the welfare fund of a place of internment for internees of the same nationality or, if such a place does not exist, to a central welfare fund to be administered for the benefit of all internees remaining in the custody of the detaining power. In case of a general release, the detaining power may keep the profits subject to any agreement to the contrary between the powers concerned (GC art. 87). Internees are not entitled to more favorable treatment than the population at large with respect to canteen facilities and are equally subject to regulations, such as those pertaining to rationing, which are applied to the population generally.

Air-Raid Shelters and Protective Measures for Internees

5-101. In all places of internment exposed to air raids and other hazards of war, shelters adequate in number and structure to ensure the necessary protection of the internees must be installed. In case of alarms, the internees must be free to enter such shelters as quickly as possible, except those who remain for the protection of their quarters against hazards. Any protective measures taken in favor of the population also apply to the internees. All due precautions must be taken in places of internment against the danger of fire (GC art. 88).

FOOD AND CLOTHING

5-102. Daily food rations for internees must be sufficient in quantity, quality, and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account must also be taken of the customary diet of the internees. Internees must be given the means to prepare for themselves any additional food in their possession. Sufficient drinking water must be supplied to internees. Internees who work must receive additional rations in proportion to the kind of labor that they perform (GC art. 89).

5-103. When taken into custody, internees must be given all facilities to provide themselves with the necessary clothing, footwear, and change of underwear, and later on, to procure further supplies if required. In general, internees are expected to provide for their own clothing. Should any internees not have sufficient clothing for the climate and be unable to procure any, the detaining power must provide it free of charge. The clothing the detaining power supplies to internees and the outward markings placed on their own clothes may neither be ignominious nor expose them to ridicule. For example, any uniforms that are provided must not resemble convicts' uniforms.

5-104. Workers must receive suitable working outfits, including protective clothing, whenever the nature of their work so requires (GC art. 90).

MEDICAL CARE

5-105. Parties to the conflict who intern protected persons must grant them the medical attention required by their state of health (GC art. 81).

5-106. Every place of internment must have an adequate infirmary under the direction of a qualified doctor where internees may have the attention they require, as well as an appropriate diet. Isolation wards must be set aside for cases of contagious or mental diseases. Maternity cases and internees suffering from serious diseases, or whose condition requires special treatment, a surgical operation, or hospital care, must be admitted to any institution where adequate treatment can be given. They must receive care not inferior to that provided for the general population.

5-107. Internees must, for preference, have the attention of medical personnel of their own nationality. Internees may not be prevented from presenting themselves to the medical authorities for examination. Upon request, the medical authorities of the detaining power must issue to every internee who has undergone treatment an official certificate showing the nature of his or her illness or injury, and the duration and nature of the treatment given. A duplicate of this certificate must be forwarded to the central information agency for protected persons as described in paragraph 5-139. Treatment, including the provision of any apparatus necessary for the maintenance of internees in good health, particularly dentures and other artificial appliances and spectacles, must be free of charge to the internee (GC art. 91). Internees may receive individual parcels and collective shipments containing medical supplies (GC art. 108). However, medical supplies should be sent in collective shipments so they may be properly administered by the camp medical personnel (see DOD Law of War Manual, 10.23.3.2).

Medical Inspection of Internees

5-108. Medical inspections of internees must be made at least once a month. Their purpose is, in particular, to supervise the general state of health, nutrition, and cleanliness of internees, and to detect contagious diseases, especially tuberculosis, malaria, and venereal diseases. Such inspections must include the checking of weight of each internee and, at least once a year, radioscopic examination (GC art. 92).

Death of Internees

5-109. The death of internees must be certified by a doctor and a death certificate prepared showing the cause of death and the conditions under which it occurred. An official record of the death, duly registered, must be drawn up in accordance with the procedure relating thereto in force in the territory where the place of internment is situated, and a duly certified copy of such record is to be transmitted without delay to the protecting power and the central information agency for protected persons (GC, art. 129). Internees who die while interned must be honorably buried, if possible, in accordance with the cultural and religious practices of the religion to which they belong. Their graves must be respected, properly maintained, and marked in a manner that ensures recognition (GC, art. 130).

RELIGIOUS, INTELLECTUAL, AND PHYSICAL ACTIVITIES, AND WORK

5-110. Internees must enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities. The detaining power must place at the disposal of interned persons, of whatever denomination, premises suitable for the holding of their religious services (GC art. 86). The premises where services are held should have enough space, be clean, and provide effective shelter to those attending services. The premises do not need to be set aside exclusively for religious services (see DOD Law of War Manual, 10.15.1).

5-111. Ministers of religion who are interned must be allowed to minister freely to the members of their community. For this purpose, the detaining power must ensure their equitable allocation among the various places of internment that have internees speaking the same language and belonging to the same religion. Should there be too few ministers, the detaining power must provide them with the necessary facilities, including means of transport, for moving from one place to another, and they must be authorized to visit any internees who are hospitalized. Ministers of religion must be at liberty to correspond on matters concerning their ministry with the religious authorities in the country of detention and as far as possible with the international religious organizations of their faith. Such correspondence must not count against the quota mentioned in Article 107 of the GC as described in paragraph 3-93. It may, however, be subject to censorship, but such censorship must be done as quickly as possible. When internees do not have at their disposal the assistance of ministers of their faith, or should these ministers be too few in number, the local religious authorities of the same faith may appoint, in agreement with the detaining power, a minister of the internees' faith or, if such a course is feasible from a denominational point of view, a minister of similar religion or a qualified layman. The latter must enjoy the facilities granted to the ministry he or she has assumed. Persons so appointed must comply with all regulations laid down by the detaining power in the interests of discipline and security (GC art. 93).

Recreational Study, Sports, and Games for Internees

5-112. The detaining power must encourage intellectual, educational, and recreational pursuits and sports and games among internees, while leaving them free to take part in them or not. It must take all practicable measures to ensure the exercise thereof, in particular by providing suitable premises. All possible facilities must be granted to internees to continue their studies or to take up new subjects. Internees must be given opportunities for physical exercise, sports, and outdoor games. For this purpose, sufficient open spaces must be set aside in all places of internment GC art. 94).

5-113. Apart from the detaining power, internees may receive assistance from a variety of sources that allow them to engage in intellectual, physical, and recreational activities. For example, relief organizations, including the ICRC, may contribute to the ensuring that internees have opportunities for intellectual, physical, and recreational activities. In addition, internees may receive shipments that are intended to allow them to engage in these activities. Lastly, the profits from the canteen may be used in this area (DOD Law of War Manual, 10.16.4).

Working Conditions of Internees

5-114. The detaining power may not employ internees as workers unless the internees desire to work. Employment that if undertaken under compulsion by a protected person not in internment would involve a

breach of the GC provisions concerning employment of aliens in the home country (discussed in paragraph 5-81) or employment of civilians in occupied territory (discussed in paragraphs 6-129 through 6-145), or would involve work of a degrading or humiliating character, is prohibited. After a working period of six weeks, internees are free to give up work at any moment, subject to eight days' notice.

5-115. These two paragraphs of Article 95 of the GC (as described above) do not affect the right of the detaining power to employ interned doctors, dentists, and other medical personnel in their professional capacity on behalf of their fellow internees, or to employ internees for administrative and maintenance work in places of internment, or to detail such persons for work in the kitchens or for other domestic tasks, or to require such persons to undertake duties connected with the protection of internees against aerial bombardment or other war risks. This although internees generally may not be compelled to work, there is an exception for tasks that benefit the internee community as a whole (see DOD Law of War Manual, 10.17.2). No internee may, however, be required to perform tasks for which he or she is, in the opinion of a medical officer, physically unsuited (GC art. 95).

5-116. The detaining power must take entire responsibility for all working conditions, for medical attention, for the payment of wages, and for ensuring that all employed internees receive compensation for occupational accidents and diseases. The standards prescribed for said working conditions and for compensation must be in accordance with national laws and regulations and with existing practice; they must in no case be inferior to those obtaining for work of the same nature in the same district (GC art. 95).

Wages

5-117. Wages for work done must be determined on an equitable basis by special agreements between the internees, the detaining power, and if the case arises, employers other than the detaining power, with due regard being paid to the obligation of the occupying State to provide for free maintenance of internees and for the medical attention that their state of health may require. Whether work is done for the occupying State or for an outside employer, the wages are to be decided by agreement with the internees, bearing in mind the latter have no living expenses to defray.

5-118. Internees permanently detailed for categories of work mentioned in paragraph 5-115, such as doctors, dentists, and other medical personnel in the professional capacity on behalf of their fellow internees; administrative and maintenance work in places of internment, must be paid fair wages by the detaining power. The working conditions and the scale of compensation for occupational accidents and diseases to internees thus detailed may not be inferior to those applicable to work of the same nature in the same district (GC art. 95).

Labor Detachments

5-119. All labor detachments must remain part of, and dependent upon, a place of internment. The competent authorities of the detaining authority and the commandant of a place of internment are responsible for observing the provisions of the GC in a labor detachment. The commandant must keep an up-to-date list of the labor detachments subordinate to him or her, and must communicate the list to the delegates of the protecting power, the ICRC, and other humanitarian organizations who may visit the places of internment (GC art. 96).

Personal Property and Financial Resources

5-120. Internees may retain articles of personal use (CG art. 97). Internees, however, are not entitled to retain items that could be put to a use prejudicial to the legitimate interests of the detaining power, such as items that may pose a risk to security, such as knives or devices that may be used as weapons, or items that may facilitate escape, such as flares, compasses, or maps (DOD Law of War Manual, 10.18.1).

5-121. Items that have "above all" a personal or sentimental value may not be taken away (GC art. 97). If an item of personal or sentimental value presents a security risk (for example, it may be useful as a bribe in an escape attempt), then the detaining power may impound it. Family or identity documents in the possession of internees may not be taken away without a receipt being given (GC art. 97). At no time may internees be left without identity documents. If they have none, they must be issued special documents drawn up by the detaining authorities, which will serve as their identity papers until the end of their internment. Internees may

keep on their persons a certain amount of money, in cash or in the form of purchase coupons, to enable them to make purchases, such as at a canteen (GC art. 97).

5-122. Monies, checks, bonds, and other valuables in the possession of internees may not be taken from them except in accordance with established procedures that include providing detailed receipts (GC art. 96). Amounts taken from an internee are to be paid into the internee's account, as discussed in paragraph 5-125. Such amounts may not be converted into any other currency unless legislation in the territory in which the owner is interned so requires, or the internee consents.

5-123. On release or repatriation, internees must be given all articles, monies, or other valuables taken from them during internment and must receive in currency the balance of any credit to their internee accounts, with the exception of any articles or amounts the detaining power withheld by virtue of its legislation in force. If the property of the internee is withheld, the owner is to receive a detailed receipt (GC art. 97).

5-124. All internees must receive regular allowances sufficient to enable them to purchase goods and articles such as tobacco or toiletries. Allowances may take the form of credits or purchase coupons. Furthermore, internees may receive allowances from the power to which they owe allegiance, the protecting powers, and any organizations that may assist them, or their families, as well as the income on their property in accordance with the law of the detaining power. The amount of allowances granted by the power to which an internee owes allegiance must be the same for each category of internees (such as infirm, sick, or pregnant), but may not be allocated by that power or distributed by the detaining power on the basis of discrimination between internees that is prohibited by Article 27 of the GC, such as race, religion, or political opinion.

5-125. The detaining power must open a regular account for every internee, to which must be credited the allowances discussed in the preceding paragraph, wages earned, remittances received, and with such sums taken from the internee as may be available under the legislation in force in the territory in which he or she is interned. Internees may draw from their accounts the amounts necessary for their personal expenses, within the limits fixed by the detaining power. Internees must be granted all facilities consistent with the legislation in force in such territory to make remittances to their families and to other dependents. Internees must at all times be afforded reasonable facilities for consulting and obtaining account statements. A statement of accounts must be furnished to the protecting power on request, and an account statement must accompany the internee in case of transfer (GC art. 98).

INTERNMENT CAMP ADMINISTRATION

5-126. Every place of internment must be put under the authority of a responsible officer from the regular military forces or the regular civil administration of the detaining power. The officer in charge of a place of internment must have in his or her possession a copy of the GC in an official language of the officer's country and is to be responsible for its application. The staff in control of internees must be instructed in the provisions of the GC and of the administrative measures adopted to ensure its application. The texts of the GC and any special agreements concluded under the GC must be posted inside the place of internment in a language that the internees understand or must be in the possession of the internee committee. Regulations, orders, notices, and publications of every kind must be communicated to the internees and posted inside the places of internment in a language they understand. Every order and command addressed to internees individually must likewise be given in a language they understand (GC art. 99).

Discipline of Internees

5-127. The disciplinary regime in places of internment must be consistent with humanitarian principles, and may not include regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimization. Identification by tattooing or otherwise imprinting signs or markings on the body is prohibited. Prolonged standing and roll-calls, punishment drill, military drill and maneuvers, or the reduction of food rations are prohibited (GC, art, 100). Without prejudice to the competence of courts and higher authorities, disciplinary punishment may be ordered by the commandant of the place of internment, or by a responsible officer or official who replaces him or her, or to whom he or she has delegated his or her disciplinary powers. Before any disciplinary punishment is awarded, the accused internee must be given precise information regarding the offense of which he or she is accused, and given an

opportunity to explain his or her conduct and to defend himself or herself against the allegation (GC art. 123). Disciplinary procedures are similar to those employed in POW camps (see, generally, paragraphs 3-126 through 3-128). Criminal proceedings against internees must comply with the procedures discussed in paragraphs 6-171 through 6-201.

Complaints and Petitions by Internees

5-128. Internees have the right to present to the detaining authorities any petition with regard to the conditions of internment to which they are subjected (GC art. 101). The commander of an internment facility should establish a procedure to facilitate the exercise of an internee's right to petition. This procedure should include a designated point of contact for such petitions.

5-129. Internees also have the right to apply without restriction through the internee committee or, if they consider it necessary, directly to the representatives of the protecting power in order to indicate to them any points on which they may have complaints to make with regard to the conditions of internment. Such complaints may also be made to the delegates of the ICRC, who enjoy the same prerogatives of access to internees as the representatives of the protecting power.

5-130. Such petitions and complaints must be transmitted without delay or alteration. Even if petitions or complaints are unfounded, they may not occasion any punishment.

5-131. The detaining power may examine and censor complaints and petitions for security reasons. Communications for transmittal may be examined to determine whether they legitimately contain complaints or petitions. Security review and censorship must be conducted in accordance with the general rule on censoring internee correspondence. The detaining power may also examine such complaints and reports to the protecting power representatives to verify that they are what they purport to be, and to delete matters not constituting either a complaint or a report within the meaning of the foregoing provision.

5-132. Internee committees may send periodic reports on internee needs and the internment situation to the protecting power representatives (GC art. 101). The detaining power may subject these reports to security review and censorship to ensure these reports are not misused.

Report Allegations

5-133. Any credible allegation of a LOAC violation regarding internees must be reported to the chain of command and the proper investigative authority, such as the service major criminal investigative organization (such as the U.S. Army Criminal Investigation Division [CID]) (see DODD 2310.01E).

Internee Committees

5-134. In every place of internment, the internees are to freely elect, by secret ballot every six months, the members of an internee committee empowered to represent them before the detaining power and the protecting powers, the ICRC, and any other organization that may assist them. Members of the committee are eligible for re-election. Internees so elected enter upon their duties after the detaining authorities approve their election. The reasons for any refusals or dismissals must be communicated to the protecting powers concerned (GC art. 102). Internee committee members who are transferred must be allowed a reasonable time to acquaint their successors with current affairs (GC art. 104).

5-135. The duties of internee committees include, furthering the physical, spiritual, and intellectual well-being of the internees, much like the duties of prisoners' representatives for POWs (see paragraphs 3-81 through 3-84). These general duties imply that internee committees are to undertake a variety of activities to ensure that internees receive proper treatment by the detaining power and to advance their welfare, even activities that are not specified in the GC as constituting their duties. In case the internees decide, in particular, to organize a system of mutual assistance among themselves, this organization would be within the competence of the internee committees, in addition to the specific duties entrusted to them under other provisions of the GC (GC art. 103).

5-136. Members of internee committees may not be required to perform any other work if the work will hinder accomplishment of their duties. Members of internee committees may appoint from among the internees such assistants as they require. All material facilities are to be granted to members of the internee

committees, particularly a certain freedom of movement necessary for the accomplishment of their duties (such as visits to labor detachments or receipt of supplies). This freedom of movement does not require complete freedom, however; for example, a camp commander may restrict movement for security reasons.

5-137. All facilities must likewise be accorded to internee committee members for communication by post and telegraph with the detaining authorities, the protecting powers, the ICRC, and organizations that give assistance to internees. Internee committee members in labor detachments are to enjoy similar facilities to communicate with their internee committee in the principal place of internment. Such communications may not be limited, nor considered as forming a part of the quota for letters and cards mentioned in article 107 of the GC. Censorship of such communications with the protecting powers, the ICRC, or other organizations dedicated to the welfare of the internees is not prohibited, but the detaining power should ensure that delays do not occur to the disadvantage of the internees.

Notification of Measures Taken Regarding Internees

5-138. Immediately upon interning protected persons, the detaining power must inform them, the power to which they owe allegiance, and their protecting power (or the ICRC if it assumed the duties of the protecting power) of the measures taken. The detaining power must likewise inform the parties concerned of any subsequent modifications of such measures (GC art. 105).

Internment Card

5-139. As soon as a person is interned, or at the latest no more than one week after his or her arrival in a place of internment (normally the theater internment facility), and likewise in cases of sickness or transfer to another place of internment or to a hospital, an internee must be enabled to send direct to his or her family and to the central information agency for protected persons described in paragraph 1-111 an internment card that is similar, if possible, to the model in Annex III to the GC, informing their relatives of his or her detention, address, and state of health. The cards must be forwarded as rapidly as possible and may not be delayed in any way (GC art. 106). In US practice, the National Detainee Reporting Center, described in paragraphs 3-86 through 3-89, has served as the National Protected Person Information Bureau responsible under the GC for various functions, including for receiving and transmitting information required by the GC to the Powers concerned, through the intermediary of the protecting powers and the Central Information Agency for protected persons (see DOD Law of War Manual, 10.31.2 and 10.31.4). The role of the Central Information Agency for protected persons has been performed in many conflicts by the ICRC Central Tracing Agency (GC art. 136, 137, 138, 139, 140; see DOD Law of War Manual, 10.31.3).

Chapter 6

Occupation

This chapter concerns the law of military occupation. It discusses when military occupation applies, the duties of the Occupying Power, the administration of the occupied territory, and the protection of the population within occupied territory. It further discusses the rules applicable to relief organizations in occupied territory, the rights and duties of the Occupying Power in regard to enemy property, the rules that concern obtaining services of the inhabitants, public finance in the occupied territory, and penal provisions in the occupied territory.

OVERVIEW AND PRACTICAL GUIDANCE

6-1. Military occupation of enemy territory establishes a special relationship between the government of the Occupying Power, the occupied government, and the civilian population of the territory occupied. The body of international law governing occupations recognizes that the Occupying Power is responsible for the general administration of the occupied territory and its civilian inhabitants, including the maintenance of public order and safety (HR art. 43).

6-2. Military occupation is a temporary measure for administering territory under the control of an invading army, both for purposes of military necessity and of safeguarding the welfare of the population of the occupied territory. To administer occupied territory effectively, the Occupying Power has authority, within certain limits, to enact laws and to suspend certain local laws. (See HR art. 27; GC art. 64.) The Occupying Power generally may not suspend or alter laws that pertain to private matters such as family life, inheritance, and property, except as required to enable the Occupying Power to fulfill its obligations under LOAC, to maintain an orderly government, and to ensure the security of the Occupying Power.

6-3. Commanders should be prepared to apply occupation law, including by planning for the requirements of occupation even before the entry into foreign territory. Successful stability operations may be critical to achieving the political objectives of combat operations. Many of the rules of occupation law reflect sound principles for stability operations that technically occur outside the context of occupation.

6-4. Commanders should be prepared to work and coordinate with a range of organizations and entities on occupation issues to utilize relevant expertise and to ensure consistency with national policy and U.S. legal obligation, such as the Department of State and other national level authorities.

6-5. Commanders should be prepared to take the necessary actions to fulfill the additional responsibilities of an Occupying Power, in particular, the duty to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. Although the primary objective in conducting military occupation is to further the purpose of the war and to ensure the maintenance and security of occupying forces, there are important duties to provide for the interests and welfare of the civilian population of the occupied territory (see DOD Law of War Manual, 11.1). For example:

- Commanders should plan and prepare to take actions to ensure there is sufficient food and clean water and other basic services for the inhabitants of the occupied territory;
- Commanders should plan and prepare to take actions to stop looting after the government of the opposing State has been ousted; and
- Commanders must not make arbitrary changes to the governance of the occupied territory.

6-6. Commanders should be prepared to take the necessary actions to exercise the additional authorities that occupation law confers with respect to the administration of the occupied territory. For example, there are authorities to:

- Enforce obedience from the inhabitants of the occupied territory as may be necessary for the security of occupation forces, the maintenance of law of and order, and for the proper administration of the country;
- Restrict freedom of movement and control means of transportation within the occupied territory;
- Suspend, repeal, or change municipal law applicable to occupied territory; and
- Control property in occupied territory or control private businesses in order to address the needs of the occupied territory.

MILITARY OCCUPATION AND INTERNATIONAL LAW

6-7. In general, the LOAC rules that are not specific to military occupation continue to apply to situations that are addressed by those rules that may arise during occupation. For example, the rules regarding the humane treatment of detainees apply to detention operations during occupation. The fact of occupation triggers the application of additional LOAC rules specific to occupation (see DOD Law of War Manual, 11.1.2.1). There are three primary treaty sources to which the United States is a party that address military occupation.

6-8. Articles 42 through 56 of the HR address military occupation. Although in some cases the HR would not be applicable as a matter of treaty law because belligerent States might not be parties, many of the provisions of Articles 42 through 56 reflect customary international law.

6-9. The 1949 Geneva Conventions apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Articles 47 through 78 of the GC specifically addresses occupied territories. Other provisions of the GC also apply to occupied territory, such as articles 27 through 34 of the GC contain provisions common to the home territories of parties to an armed conflict and occupied territories.

6-10. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague) applies to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets no armed resistance. The 1954 Hague and the Regulations for the Execution of the 1954 Hague have provisions that expressly address occupation. When the 1954 Hague and the GC are both applicable, the 1954 Hague provisions supplement the GC provisions (1954 Hague art. 36). The applicable provisions of the GC and 1954 Hague supplement the HR provisions regarding occupation (see GC art. 154; 1954 Hague art. 36).

WHEN MILITARY OCCUPATION LAW APPLIES

6-11. The law of military occupation applies in international armed conflict and also in all cases of partial or total occupation of a country's territory, even if the occupation meets with no armed resistance (HR art. 2; GC art. 2). Whether military occupation law applies is a question of fact. Even if the requirements of the law of military occupation doe no apply as a matter of law, general LOAC principles and rules will continue to apply (see DOD Law of War Manual, 11.2).

PREREQUISITES AND SCOPE OF MILITARY OCCUPATION

6-12. Whether a situation qualifies as an occupation is a question of fact under LOAC. Under Article 42 of the 1907 Hague Regulations, "Territory is considered occupied when it is actually placed under the authority of a hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Military occupation:

- Must be actual and effective; that is, the organized resistance must have been overcome, and the Occupying Power must have taken measures to establish its authority;
- Requires the suspension of the territorial State's authority and the substitution of the Occupying Power's authority; and
- Occurs when there is a hostile relationship between the State of the invading force and the State of the occupied territory.

WHEN MILITARY OCCUPATION LAW DOES NOT APPLY

6-13. Paragraphs 6-14 through 6-17 describe examples of situations to which military occupation law does not apply. Nonetheless, it may be appropriate to apply rules from the law of military occupation in such situations (see DOD Law of War Manual, 11.1.3).

Invasion or Intervention

6-14. Mere physical presence of a belligerent's military in the territory of its enemy does not constitute military occupation (see HR art. 42) and does not activate military occupation law. Air superiority alone does not constitute an effective occupation. For example, a brief physical holding of enemy territory by a small unit does not constitute military occupation. Capturing a military objective, such as a town or city in the process of defeating enemy forces, and even holding it for an indeterminate period of time, by itself may not constitute a military occupation, as the government of the invaded State may remain capable of exercising its authority.

Liberation of Friendly Territory

6-15. The law of military occupation does not apply to the liberation of friendly territory. Indeed, a military occupation presupposes that the Occupying Power is hostile in relation to the State whose territory is being occupied. The administration of liberated territory may be conducted in accordance with a civil affairs agreement. In the absence of such an agreement, a military government may be established in the area as a provisional and interim measure (DOD Law of War Manual, 11.1.3.2).

Peace Operations or Non-International Armed Conflict

6-16. Generally, the law of military occupation would not apply in a non-international armed conflict because a military occupation presupposes that the Occupying Power is hostile in relation to the State whose territory is being occupied. A State's military forces controlling its own territory would not be regarded as conducting an occupation; similarly, foreign forces conducting operations with the consent of the territorial State would also not be regarded as conducting an occupation. However, the law of military occupation may be applicable to a non-international armed conflict when a non-State party to the conflict has been recognized as a belligerent and the criteria identified in Paragraph 6-12 are met (see DOD Law of War Manual, 11.1.3.3).

Law by Analogy

6-17. Although the law of military occupation does not apply as a matter of law to the foregoing situations, it may be appropriate to apply rules from the law of military occupation in such situations (see DOD Law of War Manual, 11.1.3). For example, the law of military occupation may provide appropriate rules to apply by analogy after the liberation of friendly territory, pending a civil affairs agreement with the territorial State.

EFFECTIVENESS OF OCCUPATION

6-18. Military occupation must be actual and effective. The organized resistance must have been overcome, and the Occupying Power must have taken measures to establish its authority.

6-19. It is sufficient that the occupying force can, within a reasonable time, send detachments of forces to enforce its authority within the occupied district. Military occupation does not require the presence of military forces in all populated areas, although those forces must control the most important places. The type of forces used to maintain the authority of the Occupying Power is not material. For example, the occupation might be maintained by permanently based units or mobile forces, either of which would be able to send detachments of forces to enforce the authority of the Occupying Power within the occupied district.

6-20. Additionally, an occupation may be effective despite the existence of areas in the enemy State that are temporarily controlled by enemy forces or pockets of resistance.

6-21. The fact that a defended location (such as a city or town) still controlled by enemy forces exists within an area declared occupied by the Occupying Power does not render the occupation of the remainder invalid,

provided that continued resistance in such a place does not render the occupier unable to exercise control over the remainder of the occupied territory.

COMMENCEMENT OF OCCUPATION

6-22. There is no specific legal requirement that the Occupying Power issue a proclamation of military occupation. Due to the special relations established between the civilian population of the occupied territory and the Occupying Power, the fact of military occupation and the territory over which it extends should be made known to the citizens of the occupied territory and to other States. The general historical practice of the United States has been to make the fact of occupation known by proclamation or similar notice.

6-23. However, the absence of a proclamation or similar notice, the exact time an occupation commences may be difficult to fix.

LIMITATIONS OF OCCUPATION

6-24. Military occupation of enemy territory involves a complex, trilateral set of legal relations between the Occupying Power, the temporarily ousted sovereign authority, and the inhabitants of the occupied territory. Military occupation does not transfer sovereignty to the Occupying Power, but simply gives the Occupying Power the right to govern the enemy territory temporarily.

6-25. The fact of a military occupation does not authorize the Occupying Power to take certain actions. For example, the Occupying Power is not authorized by the fact of a military occupation to annex occupied territory or create a new State. Nor may the Occupying Power compel the inhabitants of occupied territory to become its nationals or otherwise swear allegiance to it (HR art. 45).

6-26. The U.N. Security Council may call upon Occupying Powers to comply with existing international law. Acting under the Charter of the United Nations, the Security Council may also establish authorities or limitations that might interact with those otherwise applicable under occupation law. For example, a U.N. Security Council Resolution may provide additional authority for an Occupying Power to take action in governing occupied territory that would otherwise not be permissible under the law of belligerent occupation, including such actions related to modifying existing laws of the territorial State, and encouraging political reforms.

TERMINATION OF OCCUPATION

6-27. Military occupation will cease when the conditions for its application are no longer met (see paragraphs 6-11 through 6-12). In particular, the military occupation would cease when the invader no longer factually governs the occupied territory or when a hostile relationship no longer exists between the State of the occupied territory and the Occupying Power. For example, an uprising of the local population may prevent the Occupying Power from actually enforcing its authority. Similarly, the Occupying Power's expulsion or complete withdrawal from the occupied territory would also be sufficient to terminate the military occupation.

6-28. Military occupation also may end when a hostile relationship no longer exists between the Occupying Power and the State of the occupied territory. For example, if a new, independent government of the previously occupied territory assumes control of the territory and consents to the presence of the previously occupying forces, it would no longer be considered a military occupation. Similarly, if a peace treaty legitimately transfers sovereignty of the territory to the Occupying Power, it would no longer be characterized as a military occupation (DOD Law of War Manual, 11.3.1).

6-29. In the territory of the parties to the conflict, the application of the GC will cease on the general close of military operations. In the case of occupied territory, the application of the GC will cease to apply to occupied territory one year after the general close of military operations (GC art. 6). However, the Occupying Power is bound for the duration of the military occupation, to the extent the Occupying Power continues to exercise governmental functions in the occupied territory, by the following Articles of the GC: 1 through 12, 27, 29 through 34, 47, 49, 51 through 53, 59, 61 through 77, and 143 (see GC art. 6).

6-30. Additional Protocol I provides that the 1949 Geneva Conventions and AP I will cease to apply upon the termination of occupation (AP I art. 3(b)). Occupying Powers who are party to AP I would be bound by this rule. The United States is a not a party to AP I. In any case, individuals entitled to GC protection who remain in the custody of the Occupying Power following the end of occupation retain that protection until their release, repatriation, or re-establishment (GC art. 6).

PROTECTED PERSONS

6-31. The GC is concerned in large part with the welfare of "protected persons" located either in occupied territory or the home territory of a party to the conflict. Subject to certain exceptions, persons protected by the GC are those who, at a given moment and in any manner whatsoever, find themselves, in the case of conflict or occupation, "in the hands of" a party to the conflict or occupying State of which they are not nationals (GC art. 4). The following persons are specifically excluded from being considered protected persons under the GC, even though they may nonetheless receive the protection of the population against certain consequences of armed conflict:

- Nationals of any State that is not a party to GC;
- A State's own nationals;
- Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State (for example, nationals of a State that is a multinational partner of the Occupying Power in the armed conflict), while the State of which they are nationals has normal diplomatic representation with the Occupying Power; and
- Persons protected by the GWS, GWS Sea, or GPW (for example, those persons entitled to be treated as POWs or retained personnel if captured by the Occupying Power).

HUMANE TREATMENT AND OTHER BASIC PROTECTIONS FOR PROTECTED PERSONS IN OOCCUPIED TERRITORY

6-32. The requirements of humane treatment and other basic protections for protected persons discussed in Chapter 5 (see paragraphs 5-16 through 5-34) apply to protected persons in occupied territory.

6-33. The Occupying Power has certain obligations to respect the rights of protected persons secured by the GC. For example, protected persons who are in occupied territory must not be deprived, in any case or in any manner whatsoever, of the benefits of the GC by any change introduced, as a result of the occupation of a territory, into the institutions or governments of the occupied territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory (GC art. 47).

6-34. The Occupying Power may not enter into any special agreements that would adversely affect the situation of protected persons, as defined by the GC, nor restrict the rights that the GC confers upon them (GC art. 7). The Occupying Power may also not evade its responsibilities through the purported renunciation by protected persons of the rights secured to them by the GC and by any special agreements referred to in Article 7 of the GC (GC art. 8).

ADMINISTRATION OF THE OCCUPIED TERRITORY

6-35. Under LOAC, once the authority of the legitimate power has in fact passed into the hands of the Occupying Power, the latter must take all the measures in its power to restore and ensure, as far as possible, public order and safety while respecting, unless absolutely prevented, the laws in force of the country (HR art. 43).

DUTIES OF THE OCCUPYING POWER IN GENERAL

6-36. The Occupying Power has a general duty to restore and maintain public order and safety, and to provide for the preservation of the rights of the inhabitants, including rights to their private property.

6-37. The Occupying Power may take measures of control and security necessary to maintain orderly government of the occupied territory, to ensure its own security, and to further the purposes of the war (HR

art. 43; GC art. 27, 47, 64). The Occupying Power may suspend laws that constitute a threat to the Occupying Power's security or the security of the general population, or laws constituting an obstacle to application of the law of occupation, provided it ensures protected persons are humanely treated (GC art. 27). In meeting obligations regarding public order and safety, the Occupying Power will continue to enforce the ordinary civil and criminal laws of the occupied territory, except to the extent authorized by the law of occupation to alter, suspend, or repeal such laws (see HR art. 43; GC art. 64). The Occupying Power is prohibited from arbitrarily exercising its authority to suspend, repeal, or change the municipal law applicable to occupied territory (see DOD Law of War Manual, 11.5.2).

6-38. The Occupying Power's obligations and authorities under the law of occupation are extensive. The Occupying Power has, in particular, the positive obligation and authority to ensure the protection, security, and welfare of the population living under occupation. This includes the obligation and authorities to ensure that the civilian population has adequate food and access to essential medical services, and related to ensuring the working of institutions for the care and education of children (GC arts. 50, 55, 56).

NATURE OF THE OCCUPATION GOVERNMENT

6-39. It is immaterial whether the government over an enemy's territory consists of a military or civil or mixed administration. Its character is the same, and the source of its authority is the same. It is a government imposed by force and the legality of its actions are determined by LOAC (see DOD Law of War Manual, 11.8.6). For example, in the initial stages of a military occupation, authority may be exercised exclusively by military authorities. In later stages, occupation authority is sometimes exercised through a civilian governing authority established by the Occupying Power.

POWER OF THE OCCUPYING POWER OVER THE INHABITANTS

6-40. The Occupying Power, as a belligerent State, may take such measures of control and security in regard to protected persons as may be necessary as a result of the armed conflict. In addition, the Occupying Power may take measures necessary to fulfill its duty to ensure public order and safety.

6-41. The inhabitants of occupied territory have a duty to carry on their ordinary peaceful pursuits, to behave in an absolutely peaceful manner, to take no part whatever in the hostilities carried on, to refrain from all injurious acts toward the forces or in respect to their operations, and to render strict obedience to the orders of the Occupying Power. Subject to the restrictions imposed by international law, the Occupying Power may demand and enforce from the inhabitants of occupied territory such obedience as may be necessary for the security of its forces, for the maintenance of law and order, and for the proper administration of the country.

LOCAL GOVERNMENTS UNDER DURESS OR SURROGATE GOVERNMENTS AND ACTS BY AGENTS

6-42. Obligations of the Occupying Power may not be avoided through appointment of a surrogate or puppet government, central or local, to carry out acts that would be unlawful if performed directly by the Occupying Power. Such acts induced or compelled by the Occupying Power are nonetheless its acts (see GC art. 29).

FUNCTIONS OF GOVERNMENT

6-43. The functions of the hostile government continue only to the extent they are sanctioned by the Occupying Power. The Occupying Power may permit the government of the country to perform some or all of its normal functions.

6-44. The compulsion of civil servants and other officials of local governments to continue to execute their duties must be justified by military necessity and be consistent with applicable provisions of the GC.

GENERAL CONTINUATION OF MUNICIPAL LAW OF OCCUPIED TERRITORY AS BETWEEN INHABITANTS

6-45. In general, the municipal law of the occupied territory (i.e., the ordinary domestic civil and criminal law) and the administration of such law remain in full force so far as the inhabitants of occupied territory are

concerned, unless changed by the Occupying Power. As a foreign State and as the paramount authority in the occupied territory, the Occupying Power is not bound by the municipal law of the occupied territory.

6-46. The duty of the Occupying Power to respect, unless absolutely prevented, the laws in force in the country prohibits it from arbitrarily exercising its authority to suspend, repeal, or change the municipal law applicable to occupied territory. As with other authorities under the LOAC, the Occupying Power must use its power with respect to the municipal law of occupied territory in good faith and not for the purpose of oppressing the population.

6-47. The Occupying Power may subject the population of the occupied territory to provisions: (1) that are essential to enable the Occupying Power to fulfill its obligations under the GC; (2) to maintain the orderly government of the territory; and (3) to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them (GC art. 64).

AUTHORITY TO ALTER, REPEAL, SUSPEND, OR ENACT PENAL LAWS

6-48. The penal laws of the occupied territory are to remain in force during the occupation, except an Occupying Power may repeal or suspend laws where they constitute:

- A threat to its security; or
- An obstacle to the application of the GC (GC art. 64).

Laws that may constitute a threat to the security of occupation forces might include, for example, laws mandating resistance to any occupation or permitting civilian ownership of weapons, munitions, or components thereof. Laws that may be an obstacle to the application of the GC might include laws that are inconsistent with the duties of the Occupying Power, such as laws that permit the use of torture, that contravene the protections from brutality (see GC art. 32), or that permit discrimination based on race, religion, or political opinion (see GC art. 27).

6-49. The Occupying Power may subject the population of the occupied territory to penal provisions:

- That are essential to enable the Occupying Power to fulfill its obligation under the GC;
- To maintain the orderly government of the territory; and
- To ensure the security of the Occupying Power, its forces and property, or the occupying administration, and likewise the establishment and lines of communication used by them (GC art. 64).

PRE-OCCUPATION ACTS OF PROTECTED PERSONS

6-50. Protected persons may not be arrested, prosecuted, or convicted by the Occupying Power for acts committed or opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war (GC art. 70).

6-51. Nationals of the Occupying Power who sought refuge in the territory of the occupied State before the outbreak of hostilities, may not be arrested, prosecuted, convicted, or deported from the occupied territory, except for offenses committed after the outbreak of hostilities or for offenses under common law committed before the outbreak of hostilities that, according to the law of the occupied State, would have justified extradition in time of peace (GC art. 70).

6-52. Protected persons may not be forcibly transferred or deported to another country, nationals of the Occupying Power may be involuntarily removed under certain conditions (see DOD Law of War Manual, 11.11.7.2).

OBLIGATION TO NOTIFY THE POPULATION

6-53. The Occupying Power is not required to adhere to the local procedure for amending municipal law. However, the population of the occupied territory must be informed of any alteration, suspension, or repeal of existing laws and of the enactment of new laws. In particular, penal provisions enacted by an Occupying Power must not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effects of these penal provisions may not be retroactive (GC art. 65).

PROHIBITION OF THE EXTINGUISHING OF RIGHTS

6-54. It is expressly forbidden to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of a hostile party (HR art. 23). This rule has been interpreted to apply solely to enemy areas occupied by a belligerent. It has been interpreted to prohibit a military commander from arbitrarily annulling the results of civil proceedings between private parties (see DOD Law of War Manual, 11.11.1.4).

FUNCTIONING OF LOCAL COURTS AND TRIBUNALS

6-55. In general, the courts and other tribunals of the occupied territory should continue to function. For example, ordinary crimes that do not affect the safety of the Occupying Power or its personnel are normally left to the jurisdiction of the courts in the occupied territory (GC art. 64). However, the administration of justice in occupied territory, like the performance of other governmental functions, is subject to the direction of the Occupying Power (see DOD Law of War Manual, 11.10).

SUSPENSION OF COURTS AND TRIBUNALS

6-56. The ordinary courts in occupied territory should be suspended only if:

- Judges and magistrates are unable or unwilling to perform their duties (GC art. 54);
- The courts are corrupt or unfairly constituted, for example, failing to provide the impartial and regularly constituted courts respecting the generally recognized principles of regular judicial procedure, recognized by international law (consider AP I art. 75); or
- Local judicial administration has collapsed due to the hostilities preceding the occupation (see DOD Law of War Manual, 11.10.1).

In such cases, the Occupying Power may use its own properly constituted, non-political military courts to ensure that offenses against the local population are properly tried (see DOD Law of War Manual, 11.10.1).

IMMUNITY OF OCCUPATION PERSONNEL FROM LOCAL LAW

6-57. Military and civilian personnel of the occupying forces and occupation administration, and persons accompanying them, are not subject to local laws or to the jurisdiction of the local civil or criminal courts of the occupied territory, unless expressly agreed to by a competent officer of the Occupying Power.

CENSORSHIP

6-58. For the purposes of security, an Occupying Power may establish censorship or regulation of any or all forms of media (for example, press, radio, or television) and entertainment (for example, theater or movies), of correspondence, and of other means of communication. For example, an Occupying Power may prohibit entirely the publication of newspapers that pose a threat to security or it may prescribe regulations for the publication or circulation of newspapers or, of other media for the purpose of fulfilling its obligations to restore public order (see DOD Law of War Manual, 11.7.2).

CONTROL OF THE MEANS OF TRANSPORT

6-59. An Occupying Power is entitled to exercise authority over all public and private transportation, whether on land, water or air, within the occupied territory and may seize them and regulate their operation

PROTECTION OF THE POPULATION OF THE OCCUPIED TERRITORY

6-60. Under the law of belligerent occupation, the Occupying Power has certain duties with respect to the population of an occupied territory, including protected persons under the GC.

6-61. The population of an occupied territory, like other protected persons under the GC, are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs (HR art. 46). They must at all times be humanely treated, and must

be protected especially against all acts of violence or threats of violence, and against insults and public curiosity (see DOD Law of War Manual, 11.6.1).

6-62. Other provisions for the humane treatment of protected persons set forth in Articles 27 through 34 of the GC apply to the population of an occupied territory. For example, women must be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault. Reprisals against protected persons and their property are prohibited. The taking of hostages is prohibited. In addition, protected persons in occupied territory must have every facility for making application to the protecting powers (if designated), to the ICRC, to the national red cross or red crescent society of the country where they may be, as well as to any organization that might assist them.

6-63. There are a number of protections for the population of occupied territory that are specific to occupation. For example, specific provision exists for the protection of children in occupied territory. Specific constraints exist on the authority of the Occupying Power to punish protected persons, direct their movement, or compel them to perform labor. Provision also is made with respect to: (1) food and medical supplies of the population; (2) public health and hygiene; (3) spiritual assistance; and (4) relief efforts and consignments (see DOD Law of War Manual, 11.6.2).

6-64. Additionally, it is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile State. No general penalty, pecuniary or otherwise, may be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible (HR art. 50). Such penalties are prohibited, even if authorized under the law of the occupied territory (see DOD Law of War Manual, 11.6.2.2).

6-65. Citizens of neutral States residing within occupied territory are generally treated the same as other residents of occupied territory.

APPLICABILITY OF HUMAN RIGHTS LAW TO OCCUPATION

6-66. Human rights law has some limited relevance and application to military occupation. It has been the U.S. view that the International Covenant on Civil and Political Rights (ICCPR) does not create obligations for an Occupying Power with respect to the occupied territory because a contracting State's obligations under the ICCPR only extend to persons within its territory and subject to its jurisdiction. Although persons within occupied territory are subject to the jurisdiction of the Occupying power for certain purposes, they are not within the Occupying Power's national territory.

6-67. The law of belligerent occupation is specially crafted to address the situation of belligerent occupation. Thus, in cases of apparent conflict with other provisions of law that are not intended to address the situation of belligerent occupation, there might be a presumption that such provisions would not conflict with occupation law or that occupation law would control when addressing belligerent occupation. Other States, including many U.S. allies, interpret their human rights treaty obligations to create obligations for their military operations outside their home territory in the context of belligerent occupation (see DOD Law of War Manual, 11.1.2.5). Further, there are court cases, public pronouncements, and resolutions of international bodies that have sometimes addressed occupations by citing provisions contained in regional and general human rights treaties.

6-68. Although international human rights law is not specifically designed for situations of armed conflict and occupation, it may have relevance to certain situations arising in an occupation. Subject to the Occupying Power's authority to change local law, an occupied State's domestic law that has been enacted pursuant to its human rights treaty obligations or that meets the requirements of the occupied State's human rights treaty obligations may continue to apply during an occupation. (see DOD Law of War Manual, 11.1.2).

MOVEMENT OF PROTECTED PERSONS IN OCCUPIED TERRITORY

6-69. As a general matter, the Occupying Power assumes the authority of the ousted government in controlling the movement of person within the occupied territory, as well as entering or exiting the occupied territory. For example, private individuals, members of private organizations, or representatives of foreign governments or public international organizations seeking to enter the occupied territory may not do so without express authorization from the Occupying Power.

6-70. For security and other valid reasons, including those relating to its duties and responsibilities as an Occupying Power, an Occupying Power may prohibit individuals from changing their residence, restrict freedom of movement within the occupied territory, prohibit visits to certain areas, declare certain areas off limits, prohibit emigration and immigration by protected persons who are nationals of the State whose territory is occupied, and require all individuals carry identification documents.

Departure of Protected Persons Who Are Not Nationals of the State Whose Territory is Occupied

6-71. Protected persons who are not nationals of the power whose territory is occupied may avail themselves of the right to leave the territory, subject to Article 35 of the GC, and decisions thereon must be taken according to the procedure that the Occupying Power must establish (GC art. 48). Article 35 of the GC sets forth rules regarding the departure of protected persons from the home territory of a belligerent State and provides protected persons with a right to depart. But, Article 35 allows a belligerent to prevent such departure if such departure is contrary to the belligerent's national interests, and Article 35 specifies certain procedural requirements (see DOD Law of War Manual, 11.12.2). For example, persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use. If a person is refused permission to leave the territory, he or she is entitled to have the refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Occupying Power for that purpose (GC arts. 35, 48).

Prohibition Against Forcible Transfers and Deportations

6-72. Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power, or of any other country, occupied or not, are prohibited, regardless of their motive. The unlawful deportation or transfer of protected persons in violation of this rule constitutes a grave breach of the GC. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if required for the security of the population or for imperative military reasons. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory, except when, for material reasons, it is impossible to avoid such displacement. The evacuees must be transferred back to their homes as soon as hostilities in the area in question have ceased (GC art. 49). This provision applies only to protected persons under the GC; for example, POWs may be transferred from occupied territory to POW camps in the home territory of a belligerent. Similarly, a person who is not a protected person (such as a national of a neutral or a co-belligerent, who travels to an occupied State to fight the Occupying Power) would not be covered by this prohibition.

6-73. The Occupying Power undertaking such transfers or evacuations must ensure, to the greatest extent practicable: (1) proper accommodation is provided to receive the protected persons; (2) that the evacuations or transfers are effected with satisfactory conditions of hygiene, health, safety and nutrition; and (3) that members of the same family are not separated. The Protecting Power must be informed of any transfers and evacuations as soon as they have taken place (GC art. 49).

6-74. The Occupying Power must not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand. Additionally, the Occupying Power must not deport or transfer parts of its own civilian population into the territory it occupies (GC art. 49).

CHILDREN

6-75. In response to the acute deprivations that children suffered during the two World Wars, the GC places particular emphasis on their safety and well-being. Although the GC does not set forth a specific age criteria for the term "children," for the purposes of article 50 of the GC and its obligations with respect to the protection of children in occupied territory may be understood generally to refer to children under fifteen years of age (GC art. 50).

6-76. The Occupying Power must, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children (GC art. 50). This obligation

goes beyond merely not interfering with such institutions, as it also includes the affirmative duty to support them when the responsible authorities of the country fail to do so.

6-77. The Occupying Power must take all necessary steps to facilitate the identification of children and the registration of their parentage (GC art. 50). The Occupying Power may not, in any case, change their personal status, nor enlist them in formations or subordinate organizations (GC art. 50).

6-78. Should the local institutions be inadequate for the purpose, the Occupying Power must make arrangements for the maintenance and education, if possible by person of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and cannot be adequately cared for by a near relative or friend (GC art. 50).

6-79. A special section of the National Protected Person Information Bureau is to be responsible for taking all necessary steps to identify children whose identity is in doubt (see paragraph 5-33). Particulars of their parents or other near relatives should be recorded if available. The Occupying Power must not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war that may have been adopted prior to the occupation in favor of children under fifteen years of age, expectant mothers, and mothers of children under seven years of age (GC art. 50).

FOOD AND MEDICAL SUPPLIES FOR THE CIVILIAN POPULATION

6-80. The responsibility for providing and maintaining health services falls primarily on the national and local authorities, but where such authorities are unable to provide adequately for the health needs of the civilian population, the Occupying Power has the duty described below. To the fullest extent available to it, the Occupying Power has the duty of ensuring the adequacy of food and medical supplies of the population. In particular, it should bring in the necessary food, medical stores, and other articles if the resources of the occupied territory are insufficient (GC art. 55; consider AP I art. 69).

6-81. The Occupying Power must allow the protecting power to verify the state of the food and medical supplies in occupied territories, at any time, except where temporary restrictions are made necessary by imperative military requirements (GC art. 55).

HYGIENE AND PUBLIC HEALTH

6-82. To the fullest extent available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, medical and hospital establishments, medical services, and public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories must be allowed to carry out their duties (GC art. 56; consider AP I art. 15).

6-83. If new hospitals are set up in occupied territory and if the competent organizations of the occupied State are not operating there, the occupying authorities must, if necessary, grant them the recognition provided for in Article 18 of the GC (GC art. 56). This recognition allows civilian hospitals to show that they are civilian hospitals and that the buildings they occupy are not used for any purpose that would deprive them of protection (see DOD Law of War Manual, 11.15.3). In similar circumstances, the occupying authorities must also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 and 21 of the GC (GC art. 56). This recognition allows such personnel and vehicles to display their entitlement to protection. In adopting measures for purposes of health and hygiene, and in their implementation, the Occupying Power must take into consideration the moral and ethical sensitivities and susceptibilities of the population of the occupied territory (GC art. 56).

REQUISITION OF HOSPITALS AND OF FOOD AND MEDICAL SUPPLIES

6-84. The Occupying Power may requisition civilian hospitals only temporarily and in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the hospital's current patients and for the future needs of the civilian population for hospital accommodation. The material and stores of civilian hospitals may not be requisitioned so long as they are needed for the civilian population (GC art. 57; consider AP I art. 14).

6-85. The Occupying Power may not requisition food, articles, or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been considered. Subject to the provisions of other international agreements, the Occupying Power must make arrangements to ensure that fair value is paid for any requisitioned goods (GC art. 55).

SPIRITUAL ASSISTANCE

6-86. The Occupying Power must permit ministers of religion to give spiritual assistance to the members of their religious communities. The Occupying Power must also accept consignments of books and articles required for religious needs and must facilitate their distribution in occupied territory (GC art. 58).

COLLECTIVE RELIEF

6-87. If the population of an occupied territory is inadequately supplied, the Occupying Power must agree to relief schemes on behalf of the affected population and must facilitate them by all the means at its disposal. Such schemes may be undertaken either by States or by impartial humanitarian organizations, such as the ICRC, and consist, in particular, of food, medical supplies, and clothing (GC art. 59; consider AP I art. 69).

6-88. All parties to the GC must permit the free passage of the consignments and must guarantee their protection. A State granting free passage to consignments on their way to territory occupied by an adverse party to the conflict, must, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied (through the Protecting Power) that these consignments are to be used for the relief of the needy population and not to be used for the benefit of the Occupying Power (GC art. 59).

RESPONSIBILITIES OF THE OCCUPYING POWER

6-89. Relief consignments do not relieve the Occupying Power of its responsibilities under Articles 55, 56, and 59 of the GC, which address the provision of food, medical supplies, and medical services to the population. The Occupying Power may not divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity in the interests of the population of the occupied territory and with the consent of the protecting power (GC art. 60).

DISTRIBUTION

6-90. The distribution of relief consignments referred to in Articles 59 and 60 of the GC must be carried out with the cooperation, and under the supervision, of the protecting power. This duty may be delegated, by agreement between the Occupying Power and the protecting power, to a neutral State, to the ICRC, or any other impartial humanitarian body. Such consignments must be exempt in occupied territory from all charges, taxes, or customs duties unless such are necessary in the interests of the economy of the territory. The Occupying Power must facilitate the rapid distribution of these consignments. All parties to the GC must endeavor to permit the transit and transport of such relief consignments free of charge on their way to occupied territories (GC art. 61). Subject to imperative reasons of security, protected persons in occupied territories must be permitted to receive the individual relief consignments sent to them (GC art. 62; consider AP I art. 71).

NATIONAL RED CROSS OR RED CRESCENT SOCIETIES AND OTHER RELIEF ORGANIZATIONS

6-91. Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power, recognized national Red Cross and Red Crescent Societies must be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies must be permitted to continue their humanitarian activities under similar conditions; the Occupying Power may not require any changes in the personnel or structure of these societies that would prejudice these activities. The same principles are to apply to the activities and personnel of special organizations of a non-military character that already exist or that may be established for the purpose of

ensuring the adequate living conditions of the civilian population by maintaining essential public utility services, distributing relief, providing medical care, and organizing rescues (GC art. 63).

RELIEF SOCIETIES AND PROTECTED PERSONS

6-92. Protected persons must have the ability to apply to the protecting powers, the ICRC, and the National Red Cross or Red Crescent Society of the country where they may be, as well as to any society or organization that might assist them. Within the bounds set by military or security considerations, the authorities must grant these several organizations all facilities for that purpose. Apart from the visits on behalf of protected persons by the delegates of the protecting powers and of the ICRC provided for by the GC (GC art. 143) as described in paragraph 1-113, the detaining or Occupying Power must facilitate as much as possible visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons (GC art. 142; consider AP I art. 81).

RELIEF SOCIETIES AND OTHER ORGANIZATIONS

6-93. Subject to measures that the detaining powers, including Occupying Powers may consider essential to security or other reasonable need, the representatives of religious organizations, relief societies, or other organizations assisting the protected persons must receive from these powers, for themselves or their duly accredited agents, all facilities for visiting protected persons, for distributing relief supplies and material from any source intended for educational, recreational, or religious purposes, or for assisting them in organizing their leisure time within the places of internment. Such societies or organizations may be constituted in the territory of the detaining power, or in any other country, or they may have an international character. The detaining power, including the Occupying Powers, may limit the number of societies and organizations whose delegates are allowed to carry out activities in its territory and under its supervision, on condition, however, that such limitation ay not hinder the supply of effective and adequate relief to all protected persons. The special position of the ICRC must be recognized and respected at all times (GC art. 142; consider AP I art. 81). In addition, such personnel should be respected, protected, and assisted in their mission to the fullest extent practicable. The activities of the relief personnel should only be limited or their movements temporarily restricted in the case of imperative military necessity (consider AP I art. 71).

SUPERVISION BY PROTECTING POWERS

6-94. Representatives or delegates of the protecting powers must be permitted to go to all places where protected persons are located, particularly to places of internment, detention, and work. They must have access to all premises occupied by protected persons and must be able to interview them without witnesses. Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. The duration and frequency of such visits must not be restricted (GC art. 143).

TREATMENT OF ENEMY PROPERTY

6-95. An Occupying Power has certain rights, and assumes certain obligations, with respect to the property of its enemy, including the property of the inhabitants of the occupied territory.

DESTRUCTION OF PROPERTY

6-96. The general prohibitions against pillage and wanton destruction of enemy property that apply to military operations also apply to the occupation of enemy territory. Further, any destruction by the Occupying Power of real (immoveable) or personal (moveable) property belonging individually or collectively to private persons, to the Occupied State, to other public authorities, or to social or cooperative organizations is prohibited except where such destruction is rendered absolutely necessary by military operations (GC art. 53). The GC identifies “extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly” as a grave breach (GC art. 147).

6-97. Although wanton destruction is prohibited, LOAC does not prohibit the destruction of property when absolutely necessary or imperatively demanded for military reasons. The evaluation of whether destruction

of property is militarily necessary in occupation is undertaken by applying the standards that are applied in combat operations. For example, the evaluation of whether the destruction of property is militarily necessary is made by the responsible commander or other authority of the Occupying Power, based on good faith and the information available at the time the decision is made (see DOD Law of War Manual, 11.18.2.1).

SEIZURES AND OTHER TAKINGS OF PROPERTY

6-98. An Occupying Power may always take temporary possession of enemy property (real or personal, and public or private) where required for direct military use in military operations. In the case of private property, an Occupying Power, where possible, should requisition the property and offer compensation to the owner (HR art. 52).

Seizure or Capture and Vesting of Title in the Occupying Power

6-99. In the case of real (immovable) property that is captured or seized, the Occupying Power may use such property for the duration of the occupation but does not take title to the property. In contrast, public property captured or seized, as well as private property validly captured on the battlefield and abandoned property, is the property of the capturing State (see DOD Law of War Manual, 11.18.2.3).

6-100. Valid capture and seizure of property require both intent to seize or capture, and a physical act of seizure or capture. The mere presence within occupied territory of property that is subject to appropriation under international law does not operate to vest title thereto in the Occupying Power (DOD Law of War Manual, 11.18.2.3).

Requisition of Private Enemy Property

6-101. Although private enemy property may not be confiscated (see paras. 6-112 through 6-117), it may be subject to requisition, which is the method of taking private enemy real and personal property for the needs of the army of occupation. Requisitions in kind and services are not to be demanded from municipalities or inhabitants except for the needs of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Requisitions must be made under the authority of the commander of the locality (HR art. 52).

6-102. Contributions in kind must, as far as possible, be paid for in cash; if not, a receipt must be given, and the payment of the amount due must be made as soon as possible (HR art. 52). The prices of articles and services requisitioned will be fixed by agreement if possible, otherwise by military authority (see DOD Law of War Manual, 11.18.7.3).

6-103. Goods and services that are necessary for the maintenance of the occupation army, such as fuel, food, clothing, building materials, machinery, tools, vehicles, or furnishings for quarters, may be requisitioned. Billeting of troops in occupied areas is also authorized.

6-104. However, the Occupying Power may not requisition foodstuffs, articles necessary to support life, or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been considered. Subject to the provisions of other international conventions, the Occupying Power must make arrangements to ensure that fair value is paid for any such requisitioned goods (GC art. 55).

6-105. Coercive measures may be used to enforce requisitions but will be limited to the amount and kind necessary to secure the articles requisitioned.

Seizure/Destruction of Submarine Cables

6-106. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made (HR art. 54). This rule applies only to activities on land and does not deal with seizure or destruction of cables in the open sea (see DOD Law of War Manual, 11.18.2.4).

ENEMY PUBLIC PROPERTY

6-107. In general, an Occupying Power may capture or seize the real (immovable) and personal (movable) property of the occupied State and use it for military operations or the administration of the occupied territory. No compensation needs to be paid to the occupied State or the use or taking of such property.

Public Real (Immovable) Property of Direct Military Use

6-108. Real (immovable) property of the occupied State that is of direct military use, such as forts, arsenals, dockyards, magazines, barracks, railways, bridges, piers, wharves, airfields, and other military facilities, may remain in the hands of the Occupying Power until the close of the hostilities. Such property may also be destroyed or damaged by the Occupying Power if it is deemed necessary to military operations.

Other Public Real (Immovable) Property That is Essentially of a Non-Military Nature

6-109. The Occupying Power is regarded only as an administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State and situated in the occupied territory. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct (HR art. 55). Thus, the Occupying Power may use and enjoy the benefits of public real property belonging to an enemy State, but it does not have the right of sale or unqualified use of such property. Further, it should not exercise its rights in such a wasteful and negligent manner as to seriously impair the value of the property. It may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines. The term of a lease or contract should not extend beyond the conclusion of hostilities (see DOD Law of War Manual, 11.18.5.2).

6-110. Real (immovable) property of the enemy State that is essentially of a non-military nature, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged or destroyed unless military operations render such destruction absolutely necessary.

Public Personal (Movable) Property

6-111. An army of occupation may take possession of cash, funds, and realizable securities that are strictly the property of an enemy State, depots of arms, means of transport, stores, and supplies, and generally, all personal (movable) property belonging to the enemy State that may be used for military operations (HR art. 53). Thus, all personal (movable) property belonging to an enemy State susceptible of military use may be taken possession of and utilized for the benefit of the Occupying Power. Under modern conditions of warfare, a large proportion of State property may be regarded as capable of being used for military purposes. However, personal (movable) property that is not susceptible of military use must be respected and may not be appropriated (DOD Law of War Manual, 11.18.5.3).

ENEMY PRIVATE PROPERTY

6-112. Private property may not be confiscated, that is, it may not be taken without compensation (HR art. 46). This prohibition against confiscation of private property extends not only to outright taking in violation of LOAC, but also to any acts that, through the use of threats, intimidation, or pressure, or by actual exploitation of the power of the Occupying Power, permanently or temporarily, deprive the owner of the use of such property without his or her consent or without authority under international law. The prohibition against confiscation of private property does not extend to takings by way of contribution, requisition, or the valid imposition of penalties.

Seizure of Private Property Susceptible to Direct Military Use

6-113. All appliances, whether on land, at sea, or in the air, adapted from the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made (HR art. 53). Private property susceptible of direct military use, such as cables, telephone and telegraph facilities, radio, television, telecommunications and computer networks and equipment, motor vehicles, railways, railway plants, port facilities, ships in port, barges and

other watercraft, airfields, aircraft, depots of arms (whether military or sporting), documents connected with the conflict, all varieties of military equipment (including that in the hands of manufacturers), component parts of or material suitable only for use in the foregoing, and, in general, all kinds of war material.

6-114. If private property is seized on the grounds that it is susceptible to direct military use, a receipt should be given to the owner, or a record made of the nature and quantity of the property and the name of the owner or person in possession of it, in order that restoration and compensation may be made at the conclusion of the armed conflict.

Private Real (Immovable) Property

6-115. Private real (immovable) property may not under any circumstances be seized. It may, however, be requisitioned (see DOD Law of War Manual, 11.18.6.3).

Property Control

6-116. Public and private property within occupied territory may be controlled to the degree necessary to prevent its use by or for the benefit of hostile forces or in a manner harmful to the Occupying Power. Conservators may be appointed to manage the property of absent persons (including nationals of the United States and of friendly States) and of internees, property managed by such persons, and property of persons whose activities are deemed to be prejudicial to the Occupying Power. When the owners or managers of such property can resume control of their property and the risk of its hostile use no longer exists, it must be returned to them.

6-117. Measures of property control must not extend to confiscation of private property. However, the authority of the Occupying Power to impose such controls does not limit its power to seize or requisition property or take such other action with respect to it as may be authorized by other provisions of law.

Municipal, Religious, Charitable, and Cultural Property

6-118. The property of municipalities and institutions dedicated to religion, charity and education, and the arts and sciences, even when State property, is treated in the same manner as private property. Just as private property may be subject to requisition and us for contribution and certain other purposes during a military occupation, so may such property be subject to such demands (HR art. 56).

Determining Whether Property Is Public or Private

6-119. Under modern conditions, the distinction between public and private property is not always easy to draw. For the treatment of property under military occupation, one must often look beyond strict legal title and ascertain the character of the property based on its beneficial ownership. Thus, for example, trust funds, pension funds, and bank deposits generated by private persons are not to be regarded as public property simply by reason of their being held by a State-owned bank.

6-120. Property that is ostensibly private but is subjected to a large measure of governmental control and management, or property that is used to perform functions that are essentially public, would tend to be viewed in practice as public property. If the Occupying Power appropriates property that is beneficially owned in part by the enemy State and in part by private interests, the occupation authorities should compensate the private owners to the extent of their interest. Such compensation should bear the same relationship to the compensation that would be paid if the property were entirely privately owned. The Occupying Power may take those measures it deems necessary to ensure that no portion of the compensation paid on account of private interests accrues to the enemy State.

Property of Unknown Ownership

6-121. If it is unknown whether certain property is public or private, it should be treated as public property until its ownership is ascertained.

PROTECTION OF CULTURAL PROPERTY

6-122. An Occupying Power is obliged, as far as possible, to support the competent national authorities in safeguarding and preserving the cultural property of the occupied State. Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power must, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation (1954 Hague art. 5).

6-123. Parties to the 1954 Hague have an obligation to prohibit, prevent, and, if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against cultural property. The requisition of movable cultural property situated in the territory of another party to the 1954 Hague is prohibited (1954 Hague art. 4).

6-124. Civil Affairs arts and monuments teams have historically been constituted to assist indigenous populations and institutions and other civil authorities in the protection or restoration of cultural property (1954 Hague art. 7).

PROTECTION OF CIVIL DEFENSE FACILITIES AND PROPERTY

6-125. Additional Protocol I to the Geneva Conventions provides rules for the treatment of civil defense facilities and property in occupied territory (consider AP I art. 63). It states that the Occupying Power shall provide civilian civil defense organizations (such as police, fire, and rescue services), the facilities necessary for the performance of their tasks, provided these services act solely in the civil defense capacity and do not threaten the security of the Occupying Power. Although the United States is not bound by the provisions of Additional Protocol I, these provisions concerning civil defense facilities and property in occupied territories reflect practices that Army and Marine Corps forces generally follow, subject to imperative military necessity (consider AP I art. 61-67).

6-126. Additional Protocol I also provides that personnel of civil defense organizations may not be compelled to perform activities that would interfere with the proper performance of their tasks. The Occupying Power may not change the structure or personnel of such organizations in any way that might jeopardize the efficient performance of their mission. These organizations may not be required to give priority to the nationals or interests of the Occupying Power or to perform their tasks in any manner prejudicial to the interests of the civilian population. The Occupying Power may disarm civil defense personnel for reasons of security and their protection ceases if they commit acts harmful to the Occupying Power (consider AP I art. 65).

6-127. Finally, Additional Protocol I provides that the Occupying Power may not requisition or divert from their proper use buildings or materiel belonging to, or used by, civil defense organizations, if such diversion or requisition would be harmful to the civilian population. The Occupying Power may requisition or divert these resources if the buildings or materiel are necessary for other needs of the civilian population; however, such requisition or diversion may continue only while such necessity exists. The Occupying Power may not divert or requisition shelters provided for the use of the civilian population or that the civilian population needs.

CAPTURE OR SEIZURE AND VESTING OF TITLE IN THE OCCUPYING POWER

6-128. Public property captured or seized from the enemy, as well as abandoned property and private property validly captured on the battlefield, is the property of the Occupying Power. Wrongful failure to turn over such property to the proper authorities is punishable, for example, as a violation of Article 103 of the UCMJ. Further, under Article 103 of the UCMJ, wrongfully buying, selling, trading, dealing in, or disposing of captured or abandoned property in order to receive any personal profit, benefit, or advantage to either themselves or to others connected with themselves is made punishable.

SERVICES OF INHABITANTS AND OFFICIALS

6-129. The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work that is necessary for (1) the needs of the army of occupation; (2) the public utility services; or (3) the feeding, sheltering, clothing, transportation, or health of the population of the occupied country (GC art. 51).

CONDITIONS FOR REQUISITIONED WORK

6-130. Requisitioned work may only be carried out in the occupied territory where the persons whose services have been requisitioned are resident, and such persons, so far as possible, are to be kept in their usual place of employment. Workers must be paid a fair wage, and the work must be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training, and compensation for occupational accidents and diseases are to apply to the protected persons assigned to the work (GC art. 51).

SERVICES THAT MAY BE REQUIRED

6-131. The services that may be obtained from inhabitants by requisition include those of professionals, such as engineers, physicians, and nurses, and of artisans and laborers, such as clerks, carpenters, butchers, bakers, and truck drivers. The officials and employees of (1) railways, trucking companies, airlines, canals, and river or coastal steamship companies; (2) cable, telegraph, telephone, radio, postal and similar services; (3) gas, electric, and water works; and (4) sanitary authorities, whether employed by the State or private companies, may be requisitioned to perform their duties only so long as the duties required do not directly concern the operations of war against their own country. The Occupying Power may also requisition labor to restore the general condition of the public works to that of peacetime, including the repair of roads, bridges, railways, and telecommunication networks, and to perform services on behalf of the local population, such as the care of the wounded and sick, and the burial of the dead (DOD Law of War Manual, 11.20.2.1).

6-132. In general, police, firefighters, prison guards, and others who provide services essential to good order and security in occupied territory may be compelled by an Occupying Power to continue to provide those services. Such a requirement is consistent with the Occupying power's obligation to maintain public order in occupied territory. These officials, however, may not be required to participate in military operations or other measures aimed at countering belligerent acts against the Occupying Power that are performed by privileged combatants under the law of war. For example, civilian police forces in occupied territory may not be compelled to provide security for an occupying force against attacks in compliance with the law of war launched by lawful combatants, including resistance fighters who, if captured, would be entitled to POW status under the GPW (see paragraphs 3-14 through 3-30 regarding POW status). On the other hand, such police forces may be required to continue to perform their normal policing functions with respect to actual or threatened criminal acts, even when the victim of such acts is the Occupying Power.

TYPES OF LABOR THAT MAY NOT BE COMPELLED

6-133. Generally, an Occupying Power may not compel protected persons to perform certain types of labor. The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. Further, no pressure or propaganda that aims at securing voluntary enlistment is permitted (GC art. 51).

6-134. Protected persons may not be compelled to undertake any work that would involve them in the obligation of taking part in military operations (GC art. 51). This prohibition would preclude requisitioning their services in work directly promoting the ends of the war, such as construction of fortifications, entrenchments, and military airfields, or the transportation of supplies or ammunition in the zone of operations.

6-135. A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense (HR art. 44).

6-136. In no case may requisition of labor lead to a mobilization of workers in an organization of a military or semi-military character (GC art. 51).

6-137. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where protected persons are performing compulsory labor (GC art. 51).

6-138. Although the GC prohibits protected persons from being compelled to provide certain work related to military operations, there is no prohibition in the law of war to such persons being employed voluntarily and for pay in such work (see DOD Law of War Manual, 11.20.4).

6-139. All measures aiming at creating unemployment or restricting the opportunities offered to workers in occupied territory in order to induce them to work for the Occupying Power (GC art. 52).

ACCESS TO PROTECTING POWER

6-140. No contract, agreement, or regulation may impair the right of any worker, whether voluntary or not and wherever he or she may be, to apply to the representatives of the protecting power in order to request the protecting power's intervention with the Occupying Power (GC art. 52). It would be improper, for example, to forbid workers who are protected persons, as a condition of work, to renounce their right to apply for assistance to the protecting power concerning work conditions or any other matter (see DOD Law of War Manual, 11.20.5.1).

JUDGES AND OTHER PUBLIC OFFICIALS

6-141. The Occupying Power may not alter the status of "public officials" or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience (GC art. 54). "Public officials" includes officials at both the national and local levels who fulfill public duties.

6-142. This prohibition does not prejudice the application of the second paragraph of Article 51 of the GC. Thus, a public official may be compelled to work to meet the needs of the army of occupation or for public utility services, such as water, electricity, or sanitation.

6-143. This prohibition does not affect the right of the Occupying Power to remove public officials from their posts. For example, the Occupying Power may remove the political leadership and other political agents from their posts to prevent them from undermining the Occupying Power's administration.

OATH OF OFFICIALS

6-144. An Occupying Power may not require the inhabitants of occupied territory, including officials, to swear allegiance to it (HR art. 45). However, the Occupying Power may require such officials who continue in their offices to take an oath to perform their duties conscientiously and not to act to its prejudice. Any official who declines to take the oath may be removed; but, even if the official does not take the oath, the official is required to obey the legitimate orders of the Occupying Power as long as they remain in office.

OFFICIALS' SALARIES

6-145. The salaries of civil officials of the hostile government who remain in the occupied territory and continue the work of their offices, especially those who can properly continue their work under the circumstances arising out of the war—such as judges, administrative or police officers, and officers of city or communal governments—are paid from the public revenues of the occupied territory, until the military government has reason wholly or partially to dispense with their services. Based on consistent practice, salaries or incomes connected with purely honorary titles would be suspended.

PUBLIC FINANCE

6-146. As a result of assuming the functions of government of the occupied territory, the financial administration of the occupied territory passes into the hands of the Occupying Power. During the occupation, the fiscal laws of the occupied territory or State remain in effect, but may be amended or suspended by the Occupying Power under certain circumstances, as discussed below.

6-147. If in the occupied territory, the Occupying Power collects the taxes, dues, and tolls imposed for the benefit of the State, it must do so, as far as possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the ousted government was bound (HR art. 48). The first charge upon such taxes would be for the costs of the administration of the occupied territory. The balance may be used for the purpose of the Occupying Power. The Occupying Power may use tax revenue to defray the cost of maintaining order in the occupied territory or for expenditures that benefit the local population (for example,

infrastructure improvements). Furthermore, the Occupying Power is not required to spend money for the support of any activity opposed to either its military interests or to the restoration of order in the occupied territory, even if the ousted government formerly allocated tax revenues to such activity.

6-148. The Occupying Power, as the paramount authority in the occupied territory, is exempt from indigenous taxation in the occupied territory unless it waives its sovereign immunity and consents to be taxed. Its personnel are also generally exempt from local taxation, as part of their immunity from local law. In practice, the Occupying Power often issues an order to the effect that no taxes of any kind may be levied or assessed within the occupied territory on the persons, agencies, property, instrumentalities, or transactions of the Occupying Power.

METHOD OF TAX COLLECTION

6-149. The Occupying Power may only collect taxes, as far as possible, in accordance with the rules of assessment and incidence in force. If, due to the flight or unwillingness of local officials, it is impracticable to follow the rules of incidence and assessment in force, then the total amount of taxes to be paid may be allotted among the districts, towns, or other subdivisions, and the local authorities may be required to collect it.

6-150. The power of the Occupying Power to collect taxes extends only to persons and property under its actual control. For example, persons and property wholly outside occupied territory generally may not be taxed, but the property of absent inhabitants that is within the occupied territory, such as real estate, may be taxed.

CHANGES IN TAX LAW

6-151. The Occupying Power may suspend the tax laws of the occupied territory, but such a suspension does not affect the Occupying Power's responsibilities related to the occupied territory. Similarly, the Occupying Power may also reduce the rate of taxes under the existing tax laws.

6-152. Unless required to do so by considerations of public order and safety, the Occupying Power may create new taxes. Additional revenue may be raised in some other form, such as monetary contributions or customs duties. UN Security Council resolutions may provide additional authority for the Occupying Power to amend the tax laws.

SOCIAL WELFARE TAXES

6-153. An Occupying Power is often an employer of local civilian labor. Local law may provide that employers are responsible for the deduction and transfer to indigenous agencies of unemployment, health insurance, pensions, and similar welfare contributions. However, in general, the agencies of the Occupying Power do not act as a collector for the local authorities, and will not be responsible for the employer's share of such welfare taxes. On the other hand, the inhabitants retain their obligation to pay their share of such contributions out of their remuneration.

TAXES COLLECTED BY LOCAL AUTHORITIES

6-154. The Occupying Power may only collect those taxes, dues, and tolls imposed "for the benefit of the State" (HR art. 48). The words "for the benefit of the State" were inserted in Article 48 of the Hague IV Regulations to exclude local taxes, dues, and tolls that are collected by local authorities. The Occupying Power may supervise the expenditure of such revenue and prevent its hostile use.

CONTRIBUTIONS

6-155. If, in addition to continuing to collect taxes under the existing law of the occupied territory as permitted by Article 48 of the Hague IV Regulations, the Occupying Power levies other money contributions in the occupied territory, this may only be for the needs of the army or of the administration of the territory in question (HR art. 49). The economy of an occupied territory may only be required to bear the expenses of the occupation, and these expenses should not be greater than what the economy of the occupied territory can reasonably be expected to bear.

Loans

6-156. The Occupying Power may seek contributions from the inhabitants of an occupied territory in the form of forced loans. The Occupying Power is required to repay such loans. As forced loans are viewed as a form of contribution, they are governed by the rules applicable to contributions.

Prohibited Purposes

6-157. Contributions may be levied only for the needs of the occupying forces and the administration of the occupied territory, and may not be levied for the enrichment of the Occupying Power or for the payment of war expenses generally. Furthermore, although fines or pecuniary penalties may be imposed on responsible individuals and entities, contributions may not be levied against the general population for purposes of collective punishment or impoverishing the population in order to pressure the enemy to sue for peace. No general penalty, pecuniary or otherwise, may be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible (HR art. 50).

METHOD OF LEVYING CONTRIBUTIONS

6-158. No contribution shall be collected except under a written order, and on the responsibility of a "commander-in-chief." The collection of contributions may only be affected as far as possible in accordance with the rules of assessment and incidence of the taxes in force. For every contribution a receipt must be given to the contributors (HR art. 51). The term "commander-in-chief" is understood to refer to the highest military officer charged with the administration of the occupied territory. Commanders of small units or detachments may not order the collection of contributions.

6-159. As contributions are money demands, commodities may not be exacted as contributions. However, if the inhabitants of the occupied territory use certain commodities, rather than money, as a medium of exchange and receivable in payment of tax obligations, contributions in-kind limited to such commodities would be permissible. Additionally, if the Occupying Power finds it difficult to secure prompt money payment, it may accept securities and bills of exchange from contributors in lieu of money.

6-160. For every contribution, a receipt must be given to contributor. The Occupying Power, however, is under no obligation to reimburse contributors for such contributions. The receipt is intended to secure for the contributors the possibility of being indemnified afterward by their own government, and does not imply a promise of reimbursement by the Occupying Power.

CUSTOMS DUTIES

6-161. The Occupying Power has the right to continue to exact existing duties as part of its right to collect existing taxes. Such collections must comply with the rules for the collection of taxes. The Occupying Power may also exact new duties as a form of contribution levied against the enemy or its trade. Such new duties must comply with the rules for contributions (see DOD Law of War Manual, 11.22.3). However, relief shipments for POWs, relief shipments for internees, and other relief consignments for occupied territory are exempt from customs duties, unless such duties on other relief consignments for occupied territory are necessary in the interests of the economy of the territory (GPW art. 74; HR art. 16; GC arts. 61 and 110).

ENEMY DEBTS

6-162. Generally, the Occupying Power is not permitted to collect pre-occupation debts owed to the sovereign of the occupied territory because it is not a party to the agreement originating the debt. However, the Occupying Power may collect the debts owed to the sovereign provided that the debts may be legitimately characterized as realizable securities that are strictly the property of the State, such as bearer instruments (see HR art. 53; DOD Law of War Manual, 11.22.4.1).

6-163. The Occupying Power is under no obligation to pay the debts owed by the occupied territory (although it may choose to do so as a matter of policy). The Occupying Power may prevent payments from being made from occupied territory to a hostile belligerent.

6-164. In general, the Occupying Power may not contract new debts on behalf of the occupied territory or collect taxes to pay interest on such debt. However, new debt may be undertaken on behalf of the occupied territory if immediately necessary for the welfare of the inhabitants of occupied territory, and if undertaking such debt constitutes a fair and reasonable transaction (see DOD Law of War Manual, 11.22.4.3). The Occupying Power may refinance or consolidate already existing public debt of the occupied territory if it is clearly in the interest of sound financial administration of that territory and therefore of direct benefit to the inhabitants.

CURRENCY, EXCHANGE CONTROLS, AND PRICE CONTROLS

6-165. The Occupying Power may leave the local currency of the occupied area in circulation. The Occupying Power may also introduce its own currency in the occupied area or issue special currency for use in the occupied area, should the introduction or issuance of such currency become necessary. The Occupying Power may set exchange rates for currency in occupied territory. For example, intentional debasement of currency by the establishment of factitious valuation or exchange rates, or like devices, as well as failure to take reasonable steps to prevent inflation, with the result of enrichment of the Occupying Power, would violate international law (see DOD Law of War Manual, 11.22.5).

6-166. The Occupying Power may also institute exchange controls, including clearing arrangements and, if necessary, the freezing or blocking of certain assets in order to conserve the monetary assets of the occupied territory, as well as for security purposes. Such measures must not, however, be utilized to enrich the Occupying Power or otherwise circumvent the restrictions placed on requisitions, contributions, seizures, and other measures dealing with property.

6-167. The Occupying Power may regulate prices in the occupied territory. Shortages of commodities and increased demand for certain commodities in the occupied territory may result in increased price fluctuations requiring the Occupying Power to resort to measures designed to maintain prices at a reasonable maximum level. The Occupying Power may not use its power over price controls, however, for the purpose of exploiting the occupied territory to its own illegal advantage.

CONTROL OF BUSINESS AND COMMERCIAL INTERCOURSE IN OCCUPIED TERRITORY

6-168. The Occupying Power has the right to regulate commercial intercourse within, into, or out of the occupied territory. It may subject such intercourse to such prohibitions or restrictions as are essential to the purposes of occupation. The Occupying Power may also remove existing commercial restrictions or regulations when essential to the purposes of the occupation. The purposes of the occupation that justify economic regulation may include the military interest of the Occupying Power, the needs of the inhabitants of occupied territory, and applicable law of war obligations (see DOD Law of War Manual, 11.23.1).

6-169. The Occupying Power may exercise controls over private business for the purpose of addressing the needs of the inhabitants of the occupied territory and for military purposes. The Occupying Power may compel a business to continue operations if necessary to serve the needs of the local populace or for military purposes. The Occupying Power may also take steps to increase production from private business, including granting subsidies out of available governmental revenues from the occupied territory. If necessary to serve the needs of the local population or for military purposes, the Occupying Power may assume control and management of such a business. Title to the business in such circumstances remains with the legal owner, and if the Occupying Power earns a profit from the operation of the business, the legal owner must be indemnified to avoid violating the prohibition on confiscating private property. On the other hand, if the Occupying Power determines that the continued operation of a business is detrimental to the interests of the local populace or to the Occupying Power, the Occupying Power may close down the business. For purposes of security and restoration of public order, the Occupying Power may also take steps to prevent hoarding of supplies, to curb or prevent black markets, and to regulate labor conditions, including strikes.

6-170. The Occupying Power may also regulate foreign trade, including completely suspending such trade. For example, the Occupying Power may halt the export of precious metals and other valuable items that are readily converted or exchanged on the international market, such as copper, jewels, and securities. Commercial relations between the occupied territory and the remaining territory of the enemy and its allies are normally suspended.

OBEDIENCE, SECURITY MEASURES, AND PENAL LEGISLATION AND PROCEDURE

6-171. Subject to the restrictions imposed by international law, the Occupying Power may demand and enforce from the inhabitants of occupied territory such obedience as may be necessary for the security of its forces, for the maintenance of law and order, and for the proper administration of the country The inhabitant's obedience to the Occupying Power is generally distinguished from a duty of allegiance. The inhabitant's duty of allegiance to his or her State of nationality is not severed. The inhabitants, however, are not bound to obey their State of nationality.

6-172. Neutral persons resident within an occupied territory are not entitled to claim different treatment, in general, from that accorded other inhabitants. They must refrain from all participation in the war and from all hostile acts, and must observe strictly the rules of the Occupying Power. All nationals of neutral States, whether resident in or temporarily visiting an occupied territory, may be punished offenses committed by them to the same extent and in the same manner as enemy nationals. In addition, it may be possible to extradite nationals of neutral States who have committed offenses to their home States for prosecution. If nationals of neutral States are not "protected persons," they may be deported or expelled for just cause. In the event that such a person is arrested, suspicions must be verified by a serious inquiry, and the arrested neutral person must be given an opportunity to present a defense, and to communicate with his or her national consul, if requested (DOD Law of War Manual, 15.6.4).

PROHIBITION OF CORPORAL PUNISHMENT, TORTURE, AND CERTAIN OTHER ACTS

6-173. An Occupying Power is strictly prohibited from taking any measure of such a character as to cause the physical suffering or death of protected persons in the occupied territory. This prohibition applies not only to murder, torture, corporal punishment, mutilation, and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality, whether applied by civilian or military agents (GC art. 3; consider AP I art. 75).

NO COLLECTIVE PENALTIES

6-174. A protected person may not be punished for an offense that he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited (GC art. 33).

NO REPRISAL

6-175. Reprisals are measures that are otherwise prohibited taken by one State in response to another State's violations of LOAC in order to encourage future compliance. In occupied territory, reprisals against protected persons and their property by an Occupying Power are prohibited (GC art. 33).

NO PILLAGE

6-176. Pillage involves the unlawful seizure or appropriation of private or public property. Pillage is strictly prohibited under LOAC, including in times of occupation (GC art. 33).

NO HOSTAGES

6-177. The taking of hostages for any reason, including that of seeking to intimidate or otherwise pacify the population of the occupied territory, is prohibited (GC art. 34).

SECURITY MEASURES, INCLUDING ASSIGNED RESIDENCE AND INTERNMENT

6-178. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment (GC art. 78).

6-179. Decisions regarding such assigned residence or internment must be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the GC. This procedure must include

the right of appeal for the parties concerned. Appeals must be decided with the least possible delay. In the event of the decision being upheld, it must be subject to periodic review, if possible every six months, by a competent body set up by the said power. Protected persons made subject to assigned residence and thus required to leave their home must enjoy the full benefit of Article 39 of the GC (GC art. 78). For example, the internment standards in the GC should also be a guide for support to protected persons and their dependents who are subject to assigned residence in occupied territory (DOD Law of War Manual, 10.6.4).

6-180. Further discussion of internment is provided in Chapter 5.

PENAL LEGISLATION

6-181. The penal laws of the occupied territory must remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the GC. Subject to the latter consideration and the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory must continue to function in respect of all offenses covered by these laws. The Occupying Power may, however, subject the population of the occupied territory to provisions that are essential to enable the Occupying Power to fulfill its obligations under the GC, to maintain an orderly government over this territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishment and lines of communication used by them (GC art. 64).

6-182. The penal provisions enacted by the Occupying Power may not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions must not be retroactive (GC art. 65).

ESTABLISHMENT OF PROPERLY CONSTITUTED, NON-POLITICAL COURTS

6-183. In case of a breach of the penal provisions promulgated by the Occupying Power by virtue of Article 64 of the GC, the Occupying Power may hand over the accused to its properly constituted non-political military courts, on condition that these courts sit in the occupied country. Courts of appeal must preferably sit in the occupied territory (GC art. 66).

APPLICABLE LAW

6-184. Properly constituted, non-political courts must apply only those provisions of law that were applicable prior to the offense and that are in accordance with general principles of law, in particular the principle that the penalty must be proportionate to the offense. The courts must also take into consideration the fact that the accused is not a national of the Occupying Power (GC art. 67).

PENALTIES

6-185. Protected persons who commit an offense that is solely intended to harm the Occupying Power, but that does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damages the property of the occupying forces or administration, or the installations used by them, are liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offense committed. The minor offense must have been solely intended to harm the Occupying Power in order to trigger these restrictions. For example, an offense such as travelling without a permit or violating exchange control regulations would not fall under this restriction, but, nonetheless, may result in internment or simple imprisonment (see DOD Law of War Manual, 11.11.4).

6-186. Furthermore, internment or imprisonment for such offenses that are solely intended to harm the Occupying Power must be the only measure adopted for depriving protected persons of liberty (GC art. 68). Penalties that do not deprive protected persons of liberty, such as fines, or less severe measures, such as arrest, are not covered by this rule.

6-187. The GC provides that the penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 of the GC may impose the death penalty on a protected person only when the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power, or

of intentional offenses that have caused the death of one or more persons, provided that such offenses were punishable by death under the law of the occupied territory in force before the occupation began (GC art. 68). However, the United States has reserved the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, of the GC without regard to whether the offenses referred to in that paragraph were punishable by death under the law of the occupied territory at the time the occupation begins (see DOD Law of War Manual, 11.11.5).

6-188. The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that because the accused is not a national of the Occupying Power, the accused is not bound to it by any duty of allegiance. In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offense (GC art. 68).

DEDUCTIONS FROM SENTENCES OF PERIOD UNDER ARREST

6-189. The duration of the period during which a protected person accused of an offense is under arrest awaiting trial or punishment must be deducted from any period of imprisonment awarded (GC art. 69).

PENAL PROCEDURE

6-190. No sentence may be pronounced by the competent courts of the Occupying Power except after a regular trial. Accused persons who are prosecuted by the Occupying Power must be promptly informed, in writing in a language that they understand, of the particulars of the charges preferred against them and must be brought to trial as rapidly as possible (GC art. 71).

6-191. The protecting power must be informed of all proceedings instituted by the Occupying Power against protected persons with respect to charges involving the death penalty or imprisonment for two years or more, and must be enabled, at any time, to obtain information regarding the state of such proceedings at any time. Furthermore, the protecting power must be entitled, on request, to be furnished with all particulars of these and any other proceedings instituted by the Occupying Power against protected persons (GC art. 71).

6-192. The notification to the protecting power, as provided for in the second paragraph of Article 71 of the GC, must be sent immediately, and must in any case, reach the protecting power three weeks before the date of the first hearing. The notification must include the following particulars (GC art. 71):

- Description of the accused;
- Place of residence or detention;
- Specification of the charge or charges (with mention of the penal provisions under which it is brought);
- Designation of the court that will hear the case; and
- Place and date of the first hearing.

6-193. Although the GC provides particular trial rights and protections for protected persons, it is important to understand that the procedures applied in these courts must conform to international standards for a regularly constituted court affording all the judicial guarantees that are recognized as "indispensable by civilized peoples" (see GC art. 3; consider AP I art. 75).

RIGHT OF DEFENSE

6-194. Protected persons accused of offenses shall have the right to present evidence necessary to their defense and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defense (GC art. 72).

6-195. If the accused fails to choose an advocate or counsel, the protecting power may provide the accused with an advocate or counsel. When the accused person is facing a serious charge and the protecting power is not functioning, the Occupying Power, subject to the consent of the accused, must provide the accused with an advocate or counsel. Accused persons must, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for the interpreter to be replaced (GC art. 72).

RIGHT OF APPEALS

6-196. A convicted person shall have the right of appeal provided for by the laws applied by the court. The convicted person shall be fully informed of the right to appeal or petition and of the time limit within which to do so. The penal procedures in Section III of the GC (which is the section of the GC pertaining to occupied territories) is to apply, as far as they are applicable, to appeals. Where the laws applied by the court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power (GC art. 73).

ASSISTANCE BY THE PROTECTING POWER

6-197. Representatives of the protecting power shall have the right to attend the trial of any protected person unless, the hearing, as an exceptional measures, must be held in camera in the interests of the security of the Occupying Power, which shall then notify the protecting power. A notification with respect to the date and place of trial must be sent to the protecting power (GC art. 74).

6-198. Any judgment involving a sentence of death or imprisonment for two years or more must be communicated, with the relevant grounds, as rapidly as possible to the protecting power. The notification must contain a reference to the notification made under Article 71 of the GC (as described in paragraph 6-164), and, in the case of sentences of imprisonment, the name of the place where the sentence is to be served. A record of judgments, other than those referred to above, must be kept by the court and must be open to inspection by representatives of the protecting power. Any period allowed for appeal in the case of sentences involving the death penalty or imprisonment of two years or more must not run until notification of judgment has been received by the protecting power (GC art. 74).

DEATH SENTENCE

6-199. In no case may persons condemned to death be deprived of the right of petition for pardon or reprieve. No death sentence may be carried out before the expiration of a period of at least six months from the date of receipt by the protecting power of the notification of the final judgment confirming the death sentence, or of an order denying pardon or reprieve. This six month period of suspension of the death sentence may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the protecting power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities with respect to such death sentences (GC art. 75).

DETENTION OF PROTECTED PERSONS CONVICTED OR ACCUSED OF OFFENSES

6-200. If found in occupied territory, protected persons accused of offenses must be detained in the occupied country, and, if convicted, they shall serve their sentences therein. They must, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene that will be sufficient to keep them in good health, and that will be at least equal to those individuals imprisoned in the occupied country. Much like internees, such protected persons must receive the medical attention required by their state of health, have a right to receive any spiritual assistance that they may require, have the right to receive relief parcels monthly, and have the right to be visited by the protecting power or the ICRC in accordance with Article 43 of the GC. Women must be confined in separate quarters and be under the supervision of women. Proper regard must be paid to the treatment of children under the age of 15 (GC art. 76).

DISPOSITION OF ACCUSED OR CONVICTED PROTECTED PERSONS UPON CLOSE OF OCCUPATION

6-201. Protected persons accused of offenses or convicted by courts in occupied territory must be handed over at the close of occupation with the relevant records to the authorities of the liberated territory (GC art. 77). Pending their transfer to such authorities, such protected persons must continue to be protected by the GC because protected persons whose release, repatriation, or re-establishment may take place after such dates continue to benefit from the protections of the GC (see DOD Law of War Manual, 11.11.8).

Chapter 7

Non-Hostile Relations Between Belligerents

This chapter addresses non-hostile relations between belligerents, particularly at the tactical and operational levels. Although an arcane area of the law, this topic has been essential in assisting military commanders to define the terms and methods of communication with the enemy on the battlefield with respect to conflict termination or other negotiations, in conducting tactical pauses, and in controlling limited commerce between the parties. Many of these terms were first used in the Lieber Code and then in the 1907 Hague Regulations, with little change in the terminology since then. But these rules have been relevant in many armed conflicts since 1907, including recent conflicts in Afghanistan and Iraq.

GENERAL BACKGROUND

7-1. War between nations may result in the termination of formal diplomatic relations and direct communications and exchanges between opposing governments or between the territories occupied by belligerent armies. This is not limited to communications and exchanges, but includes commerce, transportation, and postal services. Termination of communications and exchanges (non-intercourse) may occur with or without special proclamation. The traditional rule of non-intercourse reflects a belligerent's authority under LOAC to limit and regulate intercourse between persons and territory controlled by or belonging to that belligerent and persons and territory controlled by or belonging to the enemy (see DOD Law of War Manual, 12.1.1). Even in the midst of armed conflict, however, opposing forces often find they need to communicate or exchange with each other. Communications and exchanges between opposing forces may occur at the operational or tactical level, often as a result of actions or decisions at higher levels. The mechanisms, legal principles, and rules for these are the subject of this chapter.

7-2. Exceptions to the general rule of non-intercourse during armed conflict have been granted on behalf of individuals only with the approval of national authorities or a designated commander.

7-3. The laws of neutrality and occupation may affect a belligerent's authority to regulate intercourse between territory it controls and territory controlled by the enemy (see DOD Law of War Manual, 12.1.1.1). For example, under the GC, protected persons in a belligerent's home territory, or in territory occupied by a belligerent, are entitled to leave unless such departure is contrary to the interest of the State (see DOD Law of War Manual, 10.8.2, 11.12.2).

7-4. The conduct of military operations and the restoration of peace often necessitate the establishment and maintenance of certain communications and non-hostile relations between belligerents. Traditionally, these relations have been conducted through *parlementaires*, military passports, safe-conducts, safeguards, cartels, armistices, and capitulations, all of which are discussed in this chapter.

7-5. Non-hostile relations may be conducted in other ways. For example, informal communication may take place between opposing State parties to a conflict. These may occur through intermediaries, such as a protecting power, neutral governments, an international organization such as the United Nations (for example, through the Office of the United Nations High Commissioner for Refugees), other envoys recognized by the parties to the conflict, or impartial humanitarian organizations, such as the ICRC.

7-6. Although each of the types of communication mentioned in paragraph 7-5 may affect the missions of tactical and operational commanders, their discussion is beyond the scope of this field manual. A commander's authority to control communication during belligerent occupation is the subject of Chapter 6, Occupation.

7-7. This chapter summarizes several modes of communications and exchanges and the conditions for their implementation. They are not necessarily precise, rigid communications "packages." A "package" may be tailored for the circumstances and mission at hand. Historic examples of communications packages described below generally occurred at the operational level or higher. Communication at the tactical level was less formal, ad hoc, and sometimes occurred without higher command knowledge or express authorization. For example, during the Allied liberation of Italy in World War II, stories abound of the mayor of a town greeting a single U.S. Soldier to declare the city "open." Another example occurred during Operation IRAQI FREEDOM, when a large group of Iraqi soldiers surrendered to a Marine traffic control unit. Commanders' flexibility, ingenuity and familiarity with the concepts in this chapter are invaluable at such times.

7-8. Good faith is essential in all non-hostile relations between belligerents. The most scrupulous good faith should be observed by both parties. Among other things, the principle of good faith in the context of non-hostile relations requires that compacts between belligerents be faithfully adhered to, neither party to a conflict take or attempt to gain an advantage not intended by the opposing party, and the means of conducting non-hostile relations must not be misused (see DOD Law of War Manual, 12.2).

PRACTICAL GUIDANCE FOR COMMANDERS

7-9. Commanders must act in good faith in non-hostile relations with the enemy. In particular, they must strictly comply with agreements made with the enemy, such as armistices, truces, and safe conduct. In applying such agreements, commanders must not take advantages that the adversary did not intend to give. Commanders also must ensure that their forces do not misuse the means of conducting non-hostile relations, such as flags of truce (see DOD Law of War Manual, 12.2).

7-10. Although commanders must act in good faith, this does not prohibit commanders from continuing military operations while negotiations are ongoing. Consistent with the principle of good faith, commanders may decline to respond to offers to negotiate, refuse offers to negotiate, or refuse specific offers from the enemy for reasons of military expediency (see DOD Law of War Manual, 12.2).

7-11. Commanders should be prepared to negotiate agreements like local temporary cease-fires, to for example, allow for the collection of dead and wounded, or agreements for the surrender of enemy forces. Offers by the enemy to negotiate agreements that may have strategic or national-level implications should be reported up the chain of command.

7-12. Under the Code of Conduct for the U.S. armed forces, a commander must never surrender the members of his or her command while they still have the means to resist. Under the Uniform Code of Military Justice, shameful surrenders are punishable. In addition, compelling or attempting to compel a commander to surrender or striking colors or flag to an enemy without proper authority is punishable (see DOD Law of War Manual, 12.8.2.1).

COMMUNICATION BETWEEN BELLIGERENTS

7-13. Belligerents may communicate with one another directly by telecommunications, through diplomatic channels (sometimes through intermediary governments), through a display of a flag of truce and sending of parlementaires, indirectly through a protecting power (Common art. 8 to GWS, GWS (Sea), and GPW; GC art. 9), international organizations, such as the United Nations, or, when a protecting power has not been appointed or agreed upon, through the ICRC or any other impartial humanitarian organization (see DOD Law of War Manual, 12.3).

NECESSITY FOR LOCAL COMMUNICATION

7-14. In addition to communication between opposing State parties to a conflict at the diplomatic level, local communication may be necessary to facilitate the conclusion and implementation of special arrangements, including: an armistice, a temporary ceasefire or other arrangement to search for and collect wounded and sick military personnel (GWS art. 15; GWS (Sea) art. 18) or civilians (GC art. 16, 17); the establishment of agreed routes, heights, and times at which medical aircraft must fly to be entitled to protection from attack (GWS art. 36; GWS (Sea) art. 39; GC art. 22); where authorized, battlefield exchange of POWs and retained personnel during hostilities; or passage of humanitarian relief supplies (GC art. 23). As an armed conflict

approaches an end, communication may also be necessary to arrange for temporary ceasefires leading to a conclusion of hostilities, separation of forces, a formal cessation of hostilities, and repatriation of POWs and retained personnel (see DoD Law of War Manual, 12.1.2.2).

7-15. Local communication between friendly and enemy forces is dependent on various factors, including the commander's mission, an ability to communicate with opposing forces, and a willingness of opposing forces to communicate. A commander is not legally obligated to seek communication with opposing forces. Moreover, a commander is not obligated to respond to an opposing force's attempts to communicate if such communication is inconsistent with the commander's mission or military security (see HR art. 33).

DOCUMENTATION

7-16. Communication between belligerents may be facilitated by the use of military passports, safe conducts, or safeguards (see paragraph 7-47 through 7-64; DOD Law of War Manual, 12.6).

PARLEMENTAIRES

7-17. ***Parlementaires*** **ordinarily are agents or envoys employed by commanders in the field to go in person within the enemy lines for the purpose of communicating or negotiating openly and directly with the enemy commander**. Derived from the same word from which the word "parley," the term parlementaire was adopted by governments at the First Hague Peace Conference (1899), and the 1907 Hague IV Regulations provide that "a person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag." (HR art. 32).

7-18. Although the word parlementaire has been translated as a person bearing a flag of truce, a parlementaire does not need to carry or be the physical bearer of the white flag. The main point is a parlementaire is a representative of a government or its military forces authorized to engage in communication with an enemy government's representatives or its military forces.

7-19. A parlementaire may be civilian or military, and may come alone, or he or she may request to have others, such as an interpreter, accompany him or her. A parlementaire may perform duties at the national (strategic), operational, or tactical level. The Hague Regulations mention a white flag and accompanying "trumpeter, bugler or drummer," (HR art. 32) which emphasizes that the term historically referred primarily to battlefield negotiations, such as to arrange a surrender or temporary ceasefire to collect wounded and sick.

REFUSAL OR ACCEPTANCE OF PARLEMENTAIRE

7-20. A commander to whom a flag of truce is sent is not in all circumstances obligated to receive it (HR art. 33). For instance, a commander may decline to receive a parlementaire for reasons of military necessity. A commander is under no obligation to allow unnecessary repetition of parlementaire visits. However, a belligerent may not declare beforehand, even for a specified period – except in case of reprisal for abuses of the flag of truce – that it will not receive parlementaires. Although commanders may refuse to receive a parlementaire and other envoys seeking to negotiate, commanders may not refuse the unconditional surrender of the adversary or declare that they will refuse unconditional surrender (see DOD Law of War Manual, 12.5.2).

7-21. A commander accepting an offer of a parlementaire is entitled to declare the circumstances and conditions under which the parlementaire will be received. Such commander may set the time, place, number of persons accompanying the parlementaire, authorized method of transport (for example, by foot or vehicle), and other meeting details, to include frequency of meetings if more than one will take place (see DoD Law of War Manual, 12.5.2). Moreover, the receiving commander may take all necessary measures to prevent a parlementaire from taking advantage of their mission to collect intelligence (HR art. 33).

PARLEMENTAIRE MUST BE AUTHORIZED

7-22. A parlementaire must be authorized by a belligerent to enter into communications with the opposing commander. In addition to presenting themselves under the protection of the white flag, a parlementaire must possess—and present—written and signed authorization from the enemy commander the parlementaire

claims to represent. The authorization should clearly specify the commander's name, unit, and the scope of the matters on which the parlementaire is authorized to speak. The receiving command is entitled to know that the representative has the authority to negotiate on the matters on which the representative purports to offer terms, The authorization could read, "I authorize these present [name and rank or title] to negotiate [specifying type and scope of negotiations authorized (for example, a local armistice to collect wounded)] [specifying authority]" and signed by the authorizing commander, identifying the commander's name and unit and, if appropriate, the authority for whom the commander speaks.

PARLEMENTAIRE PARTY MEMBERS

7-23. A parlementaire may come alone or may request to have others accompany him or her, such as an interpreter (see HR art. 32). Historic practice has included flag bearers or drummers to reduce the risk of attack; modern parlementaires may be accompanied by a driver or communications personnel. The receiving command, however, is entitled to limit the size of the parlementaire's party.

PROCEDURES FOR PARLEMENTAIRE PARTY TRAVEL AND CONDUCT

7-24. Parlementaires bear the burden of communicating their status to the enemy. Parlementaires should take appropriate measures to help clarify their status to the enemy.

7-25. Parlementaires have no right to approach or enter opposing lines at any place of their own choosing. They may only enter as and where permitted by the receiving command. Parlementaires should abide by agreed-upon approaches for the purpose of entering the opposing forces protective lines and move slowly and deliberately. While within the lines of the enemy, the parlementaire must obey all instructions given to him or her (see DoD Law of War Manual, 12.5.3).

7-26. If a parlementaire is ordered by the receiving force to suspend their mission and return to their own lines, the parlementaire must do so. If the parlementaire obeys this order, the parlementaire remains entitled to protection and may not be intentionally fired upon or interfered with in any other manner until reaching their own lines.

7-27. Parlementaires should transmit an agreed signal to the receiving force as they approach, or as otherwise directed by the receiving command.

7-28. Once recognized and when authorized, parlementaires and their party will proceed by the approach route designated. They may be provided an escort by the receiving command to accompany and direct them to the latter's lines.

7-29. Parlementaires may be furnished an escort or guard if necessary out of respect for their safety or for the receiving command's security. The parlementaires and their accompanying party may be blindfolded for security purposes.

7-30. If parlementaires are to be received by the commander, the commander may direct that they proceed alone with friendly force escort. Members of his party awaiting the parlementaire's return may be restricted in their movement.

7-31. A parlementaire is not entitled to be received by the commander. The parlementaire's message, if written, may be delivered to the commander outside the parlementaire's presence. If the parlementaire's message is oral, the parlementaire may be required to reduce it to writing or deliver it orally to such person as may be designated to receive it.

7-32. A parlementaire has no right to pass beyond authorized limits within the opposing forces' positions.

7-33. When a decision from higher authority is required or expected, the parlementaire may be expected to wait.

7-34. Parlementaires will be permitted to return to their own lines with the same courtesy, formalities, and precautions as upon their arrival.

INVIOLABILITY OF PARLEMENTAIRE

7-35. Parlementaires have a right of inviolability in the execution of their functions. All members of the parlementaire's party have the same right to inviolability as the parlementaire (HR art. 32).

LOSS OF INVIOLABILITY OF PARLEMENTAIRE

7-36. Parlementaires lose their right of inviolability if it is established in a clear and uncontestable manner that they took advantage of the privileges associated with the position to provoke or commit an act of treachery (HR art. 23(f), 34). That includes engaging in sabotage or the secret gathering of information about the adversary while under the adversary's protection. Parlementaires or any member of their party abusing their privileged position may be detained temporarily (HR art. 33).

7-37. Parlementaires do not take advantage of their privileged position if they report what they observed in plain sight during their mission. As paragraph 7-29 demonstrates, the receiving command may take necessary steps to prevent the parlementaire and his or her party from taking advantage of their mission to obtain information, including by using blindfolds.

OTHER REASONS FOR DETENTION OF A PARLEMENTAIRE

7-38. In addition to a right of detention for abuse of his privileged position, a parlementaire may be detained for other imperative security reasons, such as in case the parlementaire or his or her party saw anything, or otherwise obtained knowledge the receiving commander regards as detrimental to his force, or if their departure might reveal information as to the movement of friendly force units (see DOD Law of War Manual, 12.5.4.3).

7-39. A parlementaire should be detained only for as long as circumstances imperatively require. Information regarding the parlementaire's detention, as well as any other action against the parlementaire, or any member of the parlementaire's party, should be sent to his or her commander.

NEUTRAL AREAS FOR NEGOTIATION

7-40. The parties to the conflict may agree to the establishment of a neutral zone or area as a site for negotiations if prolonged negotiations are anticipated.

SIGNIFICANCE OF THE WHITE FLAG

7-41. A white flag, when used by military forces, indicates a desire to communicate with the enemy. The hoisting of a white flag has no other legal meaning in LOAC.

7-42. Forces displaying a flag of truce must show clearly that they intend to engage in non-hostile relations. The forces bear the burden of communicating their intent to the opposing forces. To indicate that the hoisting of the white flag is authorized by its commander, the force hoisting it should cease fire completely (see DOD Law of War Manual, 12.4.2).

7-43. A party is not required to cease fire or other military operations when a white flag is raised by the other side. Fire must not be directed intentionally on individuals carrying the white flag or on persons near them unless there is a clear manifestation of hostile intent by those persons. It is essential to determine with reasonable certainty that the flag is shown by actual authority of the enemy commander before basing important actions upon that assumption. For example, the force should not assume that all enemy forces in the locality intend to surrender and expose themselves to hostile fire based on the enemy's display of the white flag.

7-44. Marines and Soldiers should be instructed to report promptly the display of the white flag through their chain of command so that the commander may determine if the opposing force seeks to engage in non-hostile relations. The burden is on the party displaying the white flag to establish such intention to its adversary and should consider sending a parlementaire to communicate the commander's intent. If the force displaying the white flag ceases fire and other hostile acts, Marines and Soldiers should seek guidance from their

commander about whether and under what conditions they may wish to engage in non-hostile relations with that force.

7-45. While it is not a legally recognized form of surrender, a white flag hoisted by an individual Soldier may also express a genuine desire or intent to surrender. Its display, however, does not mean that a unit, or the person waving it, is prepared to surrender—nor should this be assumed by opposing forces. Nor does it mean that other enemy soldiers in the immediate area have the same intent. Friendly forces seeing a white flag hoisted by an enemy soldier whom the friendly forces believe is genuinely attempting to surrender should consider whether it is feasible to accept such surrender. Soldiers or Marines must not intentionally direct fire against the person carrying the white flag or a person near him or her unless there is a clear manifestation of hostile intent by those persons.

7-46. Prohibited uses of a white flag include use of a flag of truce to feign an intent to surrender or to negotiate (HR art. 23(f)). To feign an intent to surrender or negotiate in order to kill or wound enemy personnel is perfidy (HR art. 23(b)) (see discussion on perfidy in paragraphs 2-151 through 2-153). Improper use of a flag of truce also includes its use while engaging in attacks or in order to shield, favor, or protect one's own military operations, or otherwise to impede military operations (DOD Law of War Manual, 12.4.2.1). For example, forces may not use the bearer of a white flag as cover to advance or maneuver for hostile purposes.

MILITARY PASSPORTS, SAFE-CONDUCTS, SAFEGUARDS, CARTELS, AND OTHER SPECIAL AGREEMENTS

7-47. **A *military passport* is a document issued by order of a commander of belligerent forces that authorizes a person or persons named therein and residing or sojourning within territory occupied by such forces to travel unmolested within the territory, with or without permission to pass, or to pass and return, by designated routes, through the lines, subject to conditions or limitations imposed by the commander**. A military passport differs from a passport issued by a government agency for peacetime travel, such as a passport issued by the U.S. Department of State for personal, official, or diplomatic travel.

7-48. **A *safe-conduct pass* is similar to a military passport. It is a document issued by a commander of belligerent forces, but to persons residing or traveling outside territory occupied by such forces, to enter and remain within or pass through areas occupied by such forces**. Safe-conduct passes may also refer to similar documents the same authority issues to persons that permit them, whether they reside within or outside areas occupied by the authority's forces, to carry specified goods to or from designated points within those areas and to engage in trade otherwise forbidden by the general rule of non-intercourse (see paragraphs 7-1 through 7-8 for discussion of the general rule of non-intercourse). A safe-conduct pass to engage in a specified trade for goods to which the grantee is given a continuing right for a prescribed period, or until further ordered, may also be referred to as a license to trade.

7-49. Ambassadors and other diplomatic agents of neutral governments accredited to the opposing party to the conflict may receive a safe-conduct pass through territory under opposing force control. A request for a safe-conduct pass is typically granted to them absent military or other security reasons to the contrary, including the safety of the personnel in question, unless they may reach their destination conveniently by another route. There is no legal requirement, however, for issuing such a safe-conduct pass. A safe-conduct pass is usually granted by national level authorities. Refusal of a request is not to be regarded as an international or national affront.

7-50. A *safeguard* is a detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral (see Manual for Courts-Martial (2016), part IV, para. 26 (art. 102)). A safeguard falls within LOAC only when granted and posted by arrangement with the enemy or a neutral. For example, guards posted by a belligerent for the protection of its own personnel or property would not be governed by LOAC. Military personnel on duty as safeguards, on the other hand, occupy a protected status under LOAC. They may not be attacked, and it is customary to send them back, together with their equipment and arms, to their own armed forces when the locality is occupied by the enemy and as soon as military exigencies permit.

7-51. The term "safeguard" also refers to a written order left by a commander with an enemy subject, or posted upon enemy property, for the protection of that person or property. Usually it is directed to the succeeding commander and requests a continued grant of protection.

7-52. The effect of a safeguard is to pledge the honor of the nation that the person or property will be respected by its armed forces. It does not commit the government to its protection or defense against attacks by enemy armed forces or other hostile elements.

7-53. "Forcing a safeguard" means to perform an act or acts in violation of the protection of the safeguard. Any trespass on the protection of the safeguard by persons subject to the UCMJ will constitute an offense under Article 102 (Forcing a Safeguard), UCMJ, whether the safeguard was imposed in time of war or in circumstances amounting to a state of belligerency short of a formal state of war.

CHARACTER OF MILITARY PASSPORTS, SAFE-CONDUCTS, AND RELATED INSTRUMENTS

7-54. Military passports and safe-conducts fall within the scope of international law only when granted by arrangement with opposing forces or with a neutral power. Military passports and safe-conducts issued to persons are both specific to the individual issued the instrument and nontransferable. A safe-conduct for goods, however, while restricted to the articles named in them, may be transferred from one person to another, provided it does not designate who is to carry (or trade) the goods. If the safe-conduct designates a specific licensee, the goods may only be transferred if the authorizing belligerent approves the transferee.

7-55. The terms "pass" or "permit" may be used in lieu of passport. "Pass" is used for a general permission to do certain things, while "permit" is used like "safe-conduct," to signify permission to do a particular thing.

7-56. Documents should be interpreted according to their terms. For example, a document applies to the territories or during the time periods specified in the document.

REVOCATION

7-57. A military passport or safe-conduct may be revoked by the commander issuing them or by the commander's superiors for good reasons of military expediency. Until revoked, they remain valid according to their specific terms. For example, if a time is specified in the document, it is valid only for that period.

7-58. Documents must not be revoked for the purpose of detaining the holder; such persons should be permitted to withdraw in safety unless suspected of unlawful activities. In a case of violation of the terms of the safe-conduct or military passport, the privilege may be revoked.

LICENSES TO TRADE

7-59. Licenses to trade must, as a general rule, emanate from the supreme authority of the State. In an international armed conflict, a State controlling enemy territory may grant licenses to trade that relax its prohibitions on trading with the enemy.

7-60. Licenses to trade issued by military authorities may be either general or special. **A *general license* is a document that generally or partially relaxes the exercise of the rights of war in regard to trade in relation to any community or individuals liable to be affected by their operation**. **A *special license* is a document that allows individuals to take a particular voyage or journey to import or export particular goods**.

CARTELS

7-61. In its narrower sense, a cartel is an agreement entered into by opposing belligerents for the exchange of POWs (see Lieber Code, art. 106). A cartel is a statement commanders agree to at the tactical or operational level (when authorized by higher authority), arranged either through parlementaires, negotiations conducted during a truce, or exchange of letters.

7-62. In its broader sense, a cartel is an agreement concluded between belligerents for the purpose of arranging or regulating certain kinds of non-hostile intercourse that would otherwise be prohibited by the

existence of the armed conflict. These are not limited to matters regarding exchanges of POWs and can include, for example, postal communication or trade in certain goods or commodities.

7-63. Parties to a cartel are honor bound to observe its provisions with the most scrupulous care. A party may void a cartel upon definite proof that the other party has violated it intentionally in an important particular (see DOD Law of War Manual, 12.7).

OTHER SPECIAL AGREEMENTS

7-64. The 1949 Geneva Conventions contemplate the conclusion and implementation of special agreements between opposing parties to an armed conflict (see DOD Law of War Manual, 12.1.2.1). These include, but are not limited to, appointment of protecting powers (art. 10 common to GWS, GWS (Sea), and GPW; GC art. 11), repatriation of wounded or sick POWs or retained personnel (GPW art. 109), and agreements as to the location of hospital zones and localities (GWS art. 23). Other special agreements may be concluded on an ad hoc basis (art. 6 common to GWS, GWS (Sea), and GPW; GC art. 7).

ARMISTICE

7-65. An armistice is an agreed upon cessation of active hostilities between opposing forces for a period agreed upon by the belligerent parties.

7-66. An armistice agreement must be concluded by authorities who are competent to agree to and enforce its terms. Armistices that include more substantive and expansive terms must be concluded by more senior authorities. If the armistice contains political terms, it must be made under authorization from the government concerned or subject to approval by them (see DOD Law of War Manual, 12.11.2). An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties to the conflict (HR art. 36). War, as a legal state of hostilities between the parties, may continue, despite the conclusion of an armistice agreement. In certain instances, for example the Korean War, armistice agreements may be in place for a long time.

7-67. An armistice agreement may arrange for a variety of humanitarian activities, such as the recovery of wounded or shipwrecked from the battlefield (land or sea) or the exchange of POWs.

7-68. Hostilities need not cease during the negotiation of an armistice.

7-69. The existence of an armistice agreement is not a reason to relax either the vigilance or readiness of forces, or to expose positions to the enemy (see DOD Law of War Manual, 12.11.4.4).

TYPES OF ARMISTICE

7-70. An armistice may be general or local. A general armistice suspends military operations between the belligerents everywhere. A local armistice only suspends military operations between certain fractions of the belligerent armies and within a fixed area (HR art. 37). In practice, a local armistice can refer to a partial armistice or a suspension of arms with the primary distinction between the two being the size of the units involved as discussed in paragraphs 7-72 to 7-76.

7-71. Other terms have been and may be used for an armistice, to include truce, local truce, ceasefire, cessation of hostilities, and suspension of arms. Other terms may also be used in other languages. Although a tacit or implied suspension of fighting may precede an armistice, any form of armistice, whether a truce, local truce, suspension of arms, requires agreement between competent authorities. Armistice can be used in a general sense to encompass each of these terms.

General

7-72. A general armistice suspends all (ground, naval, and air) operations between opposing forces throughout the theater of operations. It often is of a combined political and military character. It usually precedes negotiations for peace. Due to its political importance, a general armistice usually is agreed to at the national or diplomatic level, with implementation of the agreed terms by military commanders, such as by the relevant combatant commander.

Local or Partial

7-73. A local or partial armistice suspends military operations between certain portions of opposing forces and within a specified area (HR art. 37). It may suspend combat operations indefinitely or for a specified period of time, ranging from hours to days. The primary distinction between a local or partial armistice and a suspension of arms, discussed in paragraph 7-77, is the size of the units or area affected, and the broader interests than the local military requirements that are addressed in a suspension of arms.

7-74. A partial armistice suspends operations between specified forces or within specified zones. It may apply only to operations of ground forces, for example, or naval operations in an area specified by longitude and latitude, or air operations above a specified parallel.

7-75. A unilateral suspension of operations is not a partial armistice. A unilateral but conditional suspension of operations may be a partial armistice if there is tacit agreement by the opposing force. A partial armistice requires express agreement between the opposing forces or governments.

7-76. A partial armistice may be a cessation of operations between two belligerents. A partial armistice always includes a large number of the forces involved in an armed conflict and a considerable portion of the conflict region. It is not an agreement merely to address some matter of local interest, as would be the case with a suspension of arms, but one of a more general character.

Suspension of Arms

7-77. **A *suspension of arms*, also referred to as a suspension of fire, is a form of local armistice concluded between commanders of military forces for some local military purpose, such as to recover and bury the dead, to collect and care for the wounded and sick, to arrange for exchange of prisoners, or to enable a commander to communicate with his or her government or superior officer**. A suspension of arms is not intended to have, and does not have, any legal or other effect on the war generally, or its political bases. It is intended to serve military interests of local importance only. An opposing commander with the competence to do so can agree upon a suspension of arms.

AUTHORITY TO CONCLUDE AN ARMISTICE

7-78. The degree to which opposing forces seek to suspend hostilities will determine what authorities are needed to conclude the armistice agreement. An armistice agreement must be concluded by authorities who are competent to agree to it and to enforce its terms. An armistice that includes more substantive and expansive terms must be approved by more senior authorities. For example, a commander would not have the authority to conclude an armistice agreement that binds units or areas that are not under his or her command. Similarly, if an armistice contains political terms, it must be made under authorization from the governments concerned or subject to approval by them (see DOD Law of War Manual, 12.11.2). In U.S. practice, any proposed final armistice would be coordinated with higher civilian authority.

7-79. Commanders are presumed to have the authority to conclude a suspension of arms for forces or areas within their control. Regardless of the type of armistice entered into, commanders may not bind units or areas not under their command. Commanders negotiating an armistice agreement have the responsibility in the course of negotiations to inform the opposing force commander of any units or areas within the scope of the armistice over which they lack command authority. The opposing force commander has the right to accept or reject this as a condition for agreement.

7-80. An armistice agreement is not a proper mechanism for resolution of political issues, such as territorial claims or permanent rights to be conferred on the local population. Higher authority may renounce terms of agreement related to political issues that exceed the commander's authority. Renunciation of a non-military provision, however, does not constitute authority to revoke the remaining terms of the armistice

FORM OF ARMISTICE

7-81. No special form for an armistice is prescribed. It should, if possible, be reduced to writing to avoid misunderstandings and for reference should differences of interpretation arise. It should be drafted with the greatest precision and clarity.

WHAT STIPULATIONS AN ARMISTICE SHOULD CONTAIN

7-82. To avoid misunderstanding and to ensure it can accomplish its intended purposes, stipulations regarding the following matters should be incorporated into an armistice agreement:

Date, Day, and Time of Commencement

7-83. The commencement time and duration of an armistice should be fixed as precisely as possible to avoid misunderstanding and an unintentional resumption of hostilities. The specific date, day, and hour for suspension of hostilities should be stipulated. Effective times may differ in different time zones. Time should be specified in Zulu time (Greenwich Mean Time) and each time zone in which the armistice will apply. Armistice commencement time should be specified as beginning immediately upon completion of the terms of the agreement or at a future specified time. In the absence of agreement to the contrary, an armistice commences at the moment it is signed. Agreement to commence at a later time may be necessary, however, in order to ensure all forces receive the order prior to its entry into effect. Unless the duration is specific, as "from 0001 27 August to 2400 29 August," the following is historic practice:

- An armistice "for twenty-four hours" beginning, for example, at 1800 on 1 January concludes at 1800 on 2 January.
- An armistice for a number of days may begin at any time, but concludes at the same hour as the time it began after the elapse of the specified number of days (measured as twenty-four hour time periods). Thus, an armistice "for ten days, commencing at 0700 on 1 January" begins at the time specified and ends at 0700 on 11 January, unless otherwise specified (such as "for ten days, beginning at 0700 on 1 January, concluding at 2400 on 11 January").
- An armistice "from 1 January to 1 April," without specified beginning and ending hours includes the first day but not the last—thus, it begins at 0001 on 1 January and concludes at 2400 on 31 March.

Duration

7-84. The duration of an armistice may be for a definite or indefinite period of time, and with or without a period of notice prior to its expiration.

Indefinite

7-85. When duration of an armistice is indefinite, parties to the armistice may resume combat operations at any time, subject to prior notice to opposing forces in accordance with the terms of the agreement (HR art. 36). An armistice of indefinite duration should include a provision specifying the agreed length of time between the delivery of this notice and the subsequent recommencement of combat operations. Recommencement of combat operations without prior notice (when notice is required by the armistice) in order to gain surprise is inconsistent with the intent of an armistice and is prohibited under LOAC.

7-86. The requirement for notice prior to recommencement of combat operations does not, however, preclude a party to the conflict from reacting to serious violations of the armistice by opposing forces, including recommencing hostilities immediately (HR art. 40). When an armistice violation is not serious, and perhaps the result of a mistake by one side or the other, commands affected by an enemy's breach remain subject to higher authority orders. Nevertheless, they retain the inherent right of self-defense.

Definite

7-87. A "definite" armistice is for an agreed specified, fixed period of time, such as "from 0900 GMT [Greenwich Mean Time][specify local time] on [date] to 0700 GMT [specify local time] on [date]." If the armistice is for a fixed period of time and no agreement has been made for prolonging it, hostilities may recommence without prior notice the moment the period of time has elapsed.

Boundaries, Including Location of Forces

7-88. An exchange of maps or other imagery showing the lines of opposing forces at the time of armistice commencement may facilitate understanding while reducing risk of confrontation. If agreed by the parties, locations of forces may be displayed.

Neutral Zone

7-89. Armistice elements may include a "neutral zone" situated between lines of demarcation sufficient in breadth to minimize risk of unintentional confrontation between opposing forces. A neutral zone does not exist absent express agreement between the relevant parties. One example of a neutral zone is the Demilitarized Zone between North Korea and South Korea.

7-90. In the event of a general ceasefire, it may be sufficient to agree to a line rather than a zone. The line may include a buffer zone of specified depth between forces. It may be necessary for one or both parties to institute a partial withdrawal in order to establish a neutral zone. Whether a line or a zone, specificity as to either (such as through use of maps or Global Position System) is essential in order to minimize the risk of accidental breach or confrontation. For this purpose maps with the lines of the neutral zone indicated may be attached to and made part of the armistice. The extent of the zone will vary according to the circumstances and agreement of the parties. Historical examples have ranged from 1,000 yards to two miles, and in other circumstances have made use of the respective sides of a natural boundary, such as a river.

7-91. A road or roads through the neutral zone should be identified by which communications between opposing forces must pass during the armistice.

7-92. It is usually agreed that military personnel of either side may not encroach upon a neutral zone except by parlementaires or other parties by special arrangement for specified purposes, such as to search for and recover sick, wounded, or dead within the zone.

Signals

7-93. Signals may be agreed to for communication between opposing parties, whether for passage of parlementaire, a start or cessation of an armistice, or for other reasons.

Language

7-94. Unless agreement is possible for an armistice to be drawn up in one language, an armistice should be drawn up in the language of each belligerent force, with each side retaining a copy in its language. Each belligerent should confirm the text in each version to ensure consistency in each language.

ADDITIONAL ELEMENTS

7-95. Occasionally, an armistice contains additional elements that may be appropriate, such as addressing issues of a humanitarian nature.

Relations of Forces with Local Population During Armistice

7-96. In the terms of an armistice agreement, the contracting parties may settle what communications may be held in the theater of war with the inhabitants and between the inhabitants of one belligerent State and those of another (HR art. 39).

7-97. "Communications" are not limited to electronic forms of communication and postal services, but refer to the movement of civilians and commerce as well. The rule applies with respect to citizens of a State divided by military operations between opposing forces. If changes in the relations between the opposing forces and the local population during the armistice are desired, this must be the subject of express agreement between relevant parties to the conflict. Otherwise, the relations remain unchanged. Each belligerent continues to exercise the same rights as before, including the right to deny or control all communications or movement of members of the civilian population between opposing lines.

7-98. An armistice does not alter commanders' responsibilities and authorities to take all necessary measures for the security of their forces and mission. As a state of hostilities continues to exist during an armistice, commanders are entitled to weigh whether civilian movement may place the mission at risk through, for example, the facilitation of espionage by the opposing forces. If nothing is stipulated, communication remains suspended, as during actual hostilities. As a general rule, movement between the territories held by opposing forces remains suspended in the same way as during actual hostilities.

Humanitarian Activities

7-99. Parties to the conflict affected by the armistice may agree to specific humanitarian activities, such as searching for and collecting the sick and wounded from the battlefield or account for the missing (GWS art. 15; GWS (Sea) art. 18; consider API art. 33); providing medical care or food supplies intended only for the civilian population (GC art. 23); seeking the assistance of local civilians to voluntarily collect and care for the wounded and sick under the direction of the military of a State party to the conflict, (GWS art. 18; GWS (Sea) art. 21); and exchanging or repatriating POWs or civilian internees (GPW art. 118; GC arts. 133 and 134). Operations of non-government organizations within an armistice area are subject to the express authorization of the commander affected by their operations and to limitations the commander deems necessary for reasons of military security (GWS art. 9).

Civil Administration of Area Concerned

7-100. Regardless of whether the armistice agreement contains provision for relations between the opposing forces and the local population during the armistice, each commander maintains authority to address issues concerning the civilian population in territory within that commander's control in accordance with other applicable principles of LOAC, such as the law governing belligerent occupation (see Chapter 6). The armistice agreement may stipulate responsibilities of each party for civil administration of areas under its respective control. Where control is shared, the armistice agreement should specify the specific responsibilities of each opposing force commander.

Disposition of Prisoners of War

7-101. If POWs, retained persons, or civilian internees are to be released or exchanged during an armistice, specific provision in this regard must be made within the armistice agreement.

Consultative Mechanism

7-102. The armistice agreement may provide for the establishment of a commission composed of representatives of the opposing forces to supervise implementation of the armistice agreement. If appropriate and agreed upon by all relevant belligerent parties, local authorities may be represented on the commission.

Political and Military Stipulations

7-103. A general armistice may contain political and military stipulations, to include evacuation of territory; disposition of aircraft and shipping; cooperation in the investigation and prosecution of war crimes; recovery and restitution of captured or looted property; maintenance of public utilities, including communications facilities; restoration of civil administration, public safety, and public health needs; and provision of assistance to displaced persons. Political terms require authorization and approval at the national level.

Evacuation or Re-Supply of Besieged Positions

7-104. Parties to the conflict shall endeavor to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel, and medical equipment on their way to such areas (GC art. 17).

NOTIFICATION, COMMENCEMENT OF, AND BINDING EFFECT OF ARMISTICE

7-105. An armistice must be notified officially and in good time to the competent authorities and to the forces. Hostilities are suspended immediately after the notification, or on the date fixed (HR 38). It is the obligation of the contracting authorities to disseminate the armistice officially and in good time to subordinate commands. Commanders are responsible only from the time of receipt of official notification of the armistice. There may be reasonable differences between the agreed time and date for commencement and time of notification at the local unit level. .

7-106. Significant differences between the agreed date and notification may be regarded as tantamount to breach of the agreement. Risk of this situation may be reduced by specifying a reasonable period of time for notification by each side prior to the time and date specified for an armistice to enter into effect. Parties may agree to, or unilaterally execute, a partial armistice pending commencement of an agreed armistice.

PROHIBITED ACTS

7-107. An armistice is a cessation of hostilities for the time period agreed upon by the parties. Belligerent forces affected by an armistice are prohibited from engaging in any act expressly prohibited by the armistice, any act contrary to the express terms of the agreement, and any other act inconsistent with the purpose for the armistice. These acts would include any offensive military operations, such as conducting attacks or seizing territory beyond its lines. For example, an overt penetration of opposing forces' lines or territory or neutral territory, including tunneling to penetrate enemy lines or positions or to escape a besieged position, would constitute a violation of the armistice. Airborne penetration of enemy airspace is prohibited unless expressly agreed otherwise. Each party, however, retains the right to resort to use of force in self-defense if fired upon.

7-108. Absent express agreement, an armistice does not give authorities of a besieged place the right to receive food, water, or other provisions for military forces or the civilian population beyond what LOAC already requires concerning civilians. Obligations concerning the transport of medical supplies, religious supplies, and food to civilians are outlined in Chapter 5 (GC art. 23).

PERMISSIBLE ACTS

7-109. In the absence of written agreement to the contrary, each belligerent is entitled to take steps that are not offensive in character, but will tend to improve its situation. This includes, but is not limited to, troop movement within its own lines; troop reinforcements; construction of new fortifications, installations, and bases; construction and repair of transportation and communications facilities; intelligence collection; movement of supplies and equipment; and in general, taking advantage of the time and means at its disposal to prepare for possible resumption of hostilities.

7-110. Espionage or clandestine ground force reconnaissance behind opposing lines is not prohibited; but individuals captured while engaged in espionage are subject to the risks entailed under LOAC the same as at other times (HR art. 29; consider AP I art. 46).

INDIVIDUAL VIOLATIONS

7-111. An armistice violation by an individual Soldier, Marine, or a small group of Soldiers or Marines acting on their own initiative does not constitute a serious violation of an armistice, nor does it provide a basis for renunciation of the armistice. The injured party, however, is entitled to demand punishment of such Soldiers or Marines for their unauthorized acts, or, if necessary, compensation for the losses sustained (HR art. 41).

7-112. Deliberate violation of the terms of an armistice by individuals is punishable as a war crime. Such violations by individual members of the armed forces or subordinate officers do not justify denunciation of the armistice unless they are proved to have been committed with the knowledge and actual or tacit consent of their own government or commander. Consent may be inferred in the event of a persistent failure to punish such offenders (see DOD Law of War Manual, 12.13.2.2).

7-113. If Service Members acting in their individual capacity to violate the terms of an armistice are captured, they remain entitled to POW status, provided such entitlement exists during general hostilities (GPW art. 4). Deliberate violation of an armistice by an individual Service Member resulting in the killing or wounding of any member of the opposing force is an act of perfidy, punishable as a war crime (consider AP I, art. 37(1)). It does not, however, constitute a basis to deny the Service Member entitlement to POW status (GPW art. 85).

ARMISTICE VIOLATIONS

7-114. The following are serious violations of an armistice:

- A violation of the express terms of an armistice agreement.
- An action taken by opposing forces to gain a military advantage it would not be able to gain but for the armistice.
- An overt manifestation of bad faith.

7-115. Depending on factors discussed above such as notification and the isolated nature of violations, the following actions may constitute serious violations of an armistice:

- movement beyond agreed lines.
- encroachment or unauthorized entry into neutral areas.
- physical seizure of objectives outside agreed lines.
- direct attack of opposing forces.

DENUNCIATION

7-116. Any serious violation of the armistice by one of the parties gives an opposing belligerent the right of denouncing the armistice and even, in cases of urgency, of recommencing hostilities immediately (HR art. 40).

7-117. A belligerent denounces an armistice when it notifies the opposing party of its intent to terminate the armistice. Absent urgent necessity, a delay should occur between denunciation of the armistice and resumption of hostilities. If compelling evidence exists of a serious violation and delay incident to formal denunciation and warning seems likely to provide the violating party a substantial advantage of any kind, the aggrieved party may resume offensive military operations without warning, with or without formal denunciation.

7-118. A commander of a military unit faced with any suspected or apparent violation of an armistice agreement, regardless of its severity, retains the right an obligation to use force in the exercise of unit self-defense.

DENUNCIATION MAY NOT INVOLVE PERFIDY

7-119. An armistice, like other formal arrangements between belligerents, engages the honor of both parties for the exact and complete fulfillment of every obligation imposed. It would be perfidious for either party, without warning, to resume hostilities during the period of an armistice, with or without a formal denunciation thereof, except in case of urgency and upon convincing proof of intentional and serious violation of its terms by the other party.

ARMISTICE EXTENSION

7-120. An armistice may be extended in the same manner as originally concluded or in any other manner satisfactory to each belligerent.

CAPITULATIONS

7-121. A capitulation is an agreement, sometimes with certain conditions, entered into between the commanders of belligerent forces for the surrender of a body of forces, a defended position, other defended town or place, or a particular district of the theater of operations (See DOD Law of War Manual, 12.8.1).

Surrenders of territory sometimes include provisions for the withdrawal defenders from it and allowing the victorious forces to enter into possession. A capitulation is a surrender by agreement; surrender can also occur without capitulation (see paragraphs 7-124 and 7-125).

7-122. Capitulation differs from an armistice in that the former surrenders the capitulating unit, while the latter suspends fighting between opposing forces. Further, a capitulation is permanent while an armistice is temporary (at least in theory—the Korean armistice from 1953 is still in effect awaiting "a final peaceful settlement").

7-123. A capitulation may be of a small unit, such as a squad, platoon, company, or battalion, or of larger forces, such as a division or corps. Commanders have the authority to conclude capitulation agreements only with respect to areas under their control and forces or units under their command.

CAPITULATION AS COMPARED TO SURRENDER

7-124. Capitulation involving personnel refers to unit surrender pursuant to an agreement. Individual Soldiers or groups of Soldiers who throw down their arms and surrender do not capitulate, but surrender. A surrender may occur without a capitulation agreement. For example, individuals or units may surrender themselves unconditionally to the opposite side without a specific capitulation agreement. On the other hand, an unconditional surrender may also be effected through a capitulation instrument.

7-125. Surrender also may be arranged between belligerents at national levels without the involvement of military commanders, possibly through third parties. A capitulation agreement may be negotiated between opposing military forces in local implementation of a surrender negotiated at national levels.

MILITARY HONOR

7-126. Capitulations agreed upon between belligerents must take into account the rules of military honor. Once settled, they must be scrupulously observed by both parties (HR art. 35).

7-127. Executing a capitulation with honor and respect for the adversary is not only the professional way to treat a defeated enemy, but one in which the psychological stigma of capitulation is diminished. Along with humane treatment in accordance with LOAC, treatment with honor and respect provides incentive to an enemy to capitulate rather than fight on without any chance of prevailing.

7-128. Just as a surrendering individual Soldier is to be treated professionally and humanely—but firmly—by the captors, so, too, should acceptance of capitulation be executed.

7-129. Honorable treatment does not serve to diminish illegal acts, or criminal responsibility, by capitulating forces. Military and other personnel entitled to POW status (GPW art. 4) suspected of criminal acts, including violations of LOAC, remain POWs and, as such, remain entitled to protections afforded by their status (GPW art. 85).

AUTHORITY OF COMMANDERS REGARDING CAPITULATION

7-130. Commanders are generally presumed to have the authority to conclude a capitulation agreement with respect to forces under their command or areas under their control. This presumption is essential not only with respect to the authority of a commander offering to capitulate, but for an opposing force commander accepting the capitulation.

7-131. For example, if commanders of military forces conclude continued fighting has become impossible and is unable to communicate with their superiors, under LOAC, they may assume they have authority to surrender their position or forces, or both.

7-132. Unless their respective government has granted authority to do so, commanders do not possess the authority to bind their government to a permanent cession of places under their command, to surrender sovereignty over territory, or to agree to terms of a political nature that will take effect after the termination of hostilities.

7-133. The fact that a commander surrenders in violation of orders or domestic law does not itself invalidate the surrender.

7-134. Commanders who surrender in violation of orders or the law of their own State may be punished by their State. Under the Code of Conduct for U.S. armed forces, a commander must never surrender the members of his or her command while they still have the means to resist. Under the Uniform Code of Military Justice, shameful surrenders are punishable. In addition, compelling or attempting to compel a commander to surrender or striking colors or flag to an enemy without proper authority is punishable (for U.S. practice regarding this type of prosecution, see UCMJ art. 99(2)) (for more information regarding a U.S. commander's authority to capitulate, surrender, and capture with respect to the U.S. Code of Conduct, see para. 7-137).

Violations of Capitulation Agreements by Individual Soldiers

7-135. Capitulations extend to all military personnel under a commander's command. Deliberate violations by individual Soldiers or Marines of the terms of a capitulation agreement may be punished as a war crime Individual Soldiers are also subject to prosecution by their own government for disobeying the capitulation order (see UCMJ art. 92 (10 U.S.C. 892)). Violation of a capitulation agreement, like other pre-capture law of war violations, is not a basis for denying a person POW status, if that person otherwise qualifies for POW status under the GPW (GPW arts. 4 and 85).

Commander's Authority with Respect to Detached Forces

7-136. Commanders' competence to capitulate is limited to forces immediately under their command and does not necessarily extend to detached forces. To avoid misunderstandings, a capitulation agreement should state to what extent detached forces and personnel in outlying defenses are included in the surrender of the military forces.

The Code of Conduct for U.S. Armed Forces

7-137. The Code of Conduct for U.S. Armed Forces is a moral code designed to provide U.S. military personnel with a standard of conduct (see DOD Law of War Manual, 9.3.9). Article II of the Code of Conduct states: "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" (DODI O-3002.05). Code of Conduct (CoC) Training provides that:

- Military personnel must never willingly surrender and must do their best to avoid capture. If a military member is isolated and unable to execute his or her mission or otherwise advance U.S. military objectives, it is his or her duty to evade capture and delay contact with individuals that may lead to capture, rejoin the nearest friendly force, and return to U.S. control (Enclosure 4, para. 2.a).
- Military personnel must understand the difference between surrender and other circumstances resulting in an adversary having control of the individual. Surrender is the voluntary relinquishment of a military member, or his or her subordinates, to an adversary's control. When there is no chance for meaningful resistance, evasion is impossible, and further military engagement will squander life with no significant advancement of U.S. objectives or hindrance to the adversary's objectives, members of Armed Forces should view themselves as "captured' against their will," versus "surrendering." (Enclosure 4, para. 2.b.(1)).
- The responsibility and authority of a commander never extends to the surrender of command, even if isolated, cut off, or surrounded, while the unit has a reasonable power to resist, break out, or evade to rejoin friendly forces (Enclosure 4, para. 2.b.(2)).

To Accept Enemy Capitulation

7-138. A commander possesses the inherent authority to accept enemy surrender or general capitulation. The authority to accept enemy capitulation with conditions, however, is subject to approval by higher authority. A commander's agreement to conditions without higher authority approval is subject to higher command repudiation.

GENERAL NATURE OF CAPITULATION AGREEMENTS

7-139. The general effect of concluding a capitulation agreement is that of an unconditional surrender. In other words, absent specific terms in the capitulation agreement to the contrary, the capitulation agreement should be understood to create the effect of an unconditional surrender by the capitulating party. The capitulating party must generally cease operations and maintain the military status quo at the time in which the capitulation becomes effective. For example, the capitulating forces must not engage in offensive operations against opposing forces. Similarly, although forces may destroy their own weapons and intelligence information to prevent them from falling into the hands of the enemy before they capitulate, after the capitulation is effective, the capitulating forces must abstain from all destruction and damage to their own facilities and equipment, unless expressly permitted by the capitulation agreement. The capturing side is free to confiscate as war booty or, at its discretion, destroy the weapons, ammunition, and military equipment of the capitulating side (see DOD Law of War Manual, 12.8.5).

7-140. Capitulations normally contain nothing but military stipulations, such as addressing issues related to movements and administration of the surrendered forces. Other relevant issues may be addressed, such as the administration of the local civilian population.

FORM

7-141. There is no specified form for a capitulation agreement. They may be oral or in writing. As in the case of armistices, however, a written agreement is preferred to avoid misunderstandings and disputes over the terms. The agreement should be as specific and precise as possible as to terms to be observed on either side, excepting such conditions as are clearly imposed by LOAC. Details of time and procedure should be prescribed in the most exact and unequivocal language.

TERMS AND CONDITIONS USUALLY ADDRESSED IN CAPITULATION AGREEMENTS

7-142. A capitulation agreement may, and often should, include provisions addressing each of the following, insofar as they are relevant to the circumstances:

- Time of surrender
- Forces (including to what extent detached forces or personnel may be included) or territory to be surrendered
- Disposition of surrendered forces
- Disarmament of surrendered forces
- Disposition of Prisoners of war, civilian internees, and other persons held in custody
- Requirement to follow orders of the victorious commander
- Consequences of not following orders of the victorious commander
- Prohibition on acts of destruction by surrendered forces

PROHIBITED ACTS

7-143. Once a capitulation is settled, its terms must be scrupulously observed by all parties concerned (HR art. 35). Personnel of the capitulating side must be handed over to the captor in accordance with the terms of the capitulation. In other words, the capitulating party must maintain the status quo at the time of signature. In turn, surrendering military forces and others entitled to POW status become POWs (or retained personnel).

Damage and Destruction

7-144. Once a capitulation agreement has been signed, the capitulating commanders and their forces are prohibited from causing destruction or damage to installations, arms, ammunition, war material, stores, and equipment under their control, or injury to opposing force personnel. The capitulating commanding officer must abstain and ensure that members of the command abstain from all such destruction, unless the commanding officer is expressly authorized or directed to do so by the terms of the capitulation agreement. Nothing prohibits commanders from destroying military equipment, arms, ammunition, and other military stores prior to their capitulation.

Breaches

7-145. Once capitulation terms have been agreed upon, all parties must scrupulously comply with them (HR art. 35). Breach of the terms of a capitulation agreement subjects the offender to trial for violations of the laws and customs of war. In addition, if the violation is directed by the commander who capitulated or by higher authority, the other belligerent may denounce the capitulation and resume hostilities. Individual Service Member or groups of Service Members acting in violation of the capitulation agreement remain entitled to POW status, but may be prosecuted for their illegal acts (GPW art. 85). For example, following capitulation, a Service Member from the capitulated force no longer enjoys combatant immunity and may be prosecuted for carrying out attacks on enemy military equipment or personnel. If captured, he may be tried for misconduct as a POW in addition to any violation of LOAC (UCMJ art. 105 (10 U.S.C. 905)).

Command Responsibility

7-146. Capitulating units remain military units, subject to LOAC, and commanders remain responsible for the units under their command and for military personnel over whom they exercise authority. As such, commanders remain responsible for criminal misconduct of capitulating forces. Prevention of acts of looting and destruction by capitulating forces, whether of military equipment or civilian objects, remains a responsibility of commanders, for which they may be held criminally accountable.

DENUNCIATION

7-147. A capitulation agreement may be denounced if a party to it violates it based on directions by the commander who capitulated or by higher authority. The other belligerent may denounce the capitulation agreement and resume hostilities. Likewise, a denunciation action may also be taken if the capitulation was obtained through a breach of faith. It may not, however, be denounced because one of the parties has been induced to agree to it by a means consistent with LOAC, such as by a ruse, or by that party's own incapacity, such as by mistake of fact.

ANNULMENT

7-148. A capitulation is null and void if it takes place following the agreement of a general armistice of which the parties to the capitulation had no knowledge, unless the terms of the armistice stipulate that the cessation of hostilities occurs from the time when notification reaches the forces concerned, rather than from the date and time of signature.

Chapter 8

War Crimes and Enforcement of the Law of Armed Conflict

This chapter addresses war crimes and enforcement of LOAC from a U.S. perspective, largely by specifying how U.S. law authorizes criminal prosecution of conduct that also constitutes LOAC violations. Thus, this chapter discusses violations of LOAC generally, what constitutes war crimes, criminal prosecution of war crimes, and remedies available in response to LOAC violations.

PRACTICAL GUIDANCE FOR COMMANDERS AND SOLDIERS OR MARINES

8-1. Commanders must exercise leadership to ensure that the forces under their command comply with LOAC. In addition to being legally required, compliance with LOAC: reinforces military effectiveness; helps maintain public support and political legitimacy; and can encourage reciprocal adherence by the adversary or adherence by adversaries in future conflicts (see DOD Law of War Manual, 18.2). As a matter of policy, commanders should encourage allies and partners to comply with LOAC.

8-2. Commanders have a duty to take appropriate measures as are within their power to control the forces under their command for the prevention of violations of LOAC (DOD Law of War Manual, 18.4). Appropriate measures may include: training subordinates, issuing command guidance or procedures; investigating allegations or incidents; instituting administrative or disciplinary action; and taking other appropriate corrective action.

8-3. Commanders must report "Reportable Incidents" (defined as possible, alleged or suspected violations of LOAC) (see DODD 2311.01E), including Reportable Incidents committed by enemy personnel or by personnel belonging to allied or partner forces (see DODD 2311.01E).

8-4. Commanders may need to direct the investigations of allegations or to refer matters to investigatory authorities in accordance with DOD procedures, such as procedures applicable to a command-directed investigation (for example, Army Regulation 15-6) or to an investigation by a military criminal investigative service (for example, Army Regulation 195-2).

8-5. Commanders should take appropriate action with regard to Reportable Incidents of LOAC in accordance with the UCMJ and the Manual for Courts-Martial. Under international law, commanders must consider whether disciplinary action is warranted in the case of serious violations of LOAC, but there is no absolute or automatic requirement under international law to punish particular offenders within their armed forces in a specific way. Commanders have discretion about how to implement and enforce LOAC in accordance with U.S. domestic law and applicable DOD procedures.

8-6. All Soldiers and Marines must: (1) comply with LOAC in good faith; and (2) refuse to comply with clearly illegal orders to commit violations of LOAC (see DOD Law of War Manual, 18.3).

8-7. When appropriate, Soldiers and Marines should ask questions through appropriate channels and consult with the command legal adviser on issues relating to LOAC (see DOD Law of War Manual, 18.3.1.2).

8-8. Soldiers and Marines should adhere to regulations, procedures, and training, as these policies and doctrinal materials have been reviewed for consistency with LOAC (see DOD Law of War Manual, 18.3.1.2, 18.6.2).

8-9. Commands and orders should not be understood as implicitly authorizing violations of LOAC where other interpretations are reasonably available (see DOD Law of War Manual, 18.3.2.2).

VIOLATIONS OF THE LAW OF ARMED CONFLICT

8-10. For purposes of this publication, a violation of LOAC is an act or omission that contravenes a rule of international law applicable to the conduct of hostilities or the protection of war victims. Depending on the context, violations of the law of neutrality, *jus ad bellum*, or occupation law may also be considered to be violations of LOAC.

STATE RESPONSIBILITY

8-11. Each State Party to the 1949 Geneva Conventions is obligated "to respect and to ensure respect" for the Conventions "in all circumstances" (Common Article 1 of GWS, GWS Sea, GPW and GC). Although this provision does not reflect an obligation to ensure implementation of the conventions by other States or parties to a conflict, the United States, as a matter of policy, often seeks to promote adherence to LOAC by others (see DOD Law of War Manual, 18.1.2.1). Additionally, a State is responsible for ensuring that its armed forces and others acting on its behalf comply with LOAC (Hague IV art. 3; consider AP I art. 91). Compensation referred to in these references is a matter to be determined between States; compensation of individual victims is not an obligation of LOAC (see DOD Law of War Manual, 18.9, 18.16). Note that the *ex gratia* payments that commanders may be authorized to provide in accordance with DOD policy and domestic fiscal authorities are not payments that are required by LOAC. The obligation to ensure LOAC compliance applies even if the enemy fails to comply with LOAC.

ENFORCEMENT

8-12. International law authorizes an injured State to seek redress for violations of LOAC against it (see Hague IV art. 3; DOD Law of War Manual, 18.10). States are not limited solely to judicial redress and may avail themselves of the full panoply of enforcement mechanisms, including reprisals, reparation payments, diplomatic negotiations, arbitration, and voluntarily constituted claims commissions. Individuals may, in certain circumstances, also be prosecuted for LOAC violations, as discussed in greater detail below.

WAR CRIMES

8-13. For purposes of this publication, war crimes are serious violations of LOAC that are punishable by criminal sanctions. The definition of "war crimes" often depends on the legal purpose at issue, and different definitions of "war crimes" are used. Under the Geneva Conventions, States have a responsibility to search for and prosecute those alleged to have committed "grave breaches," of the Conventions. In addition, the United States interprets the penal sanction provisions of the Geneva Conventions (see GC arts. 146, 147) in accordance with its longstanding practice. In order for commanders to exercise appropriate command supervision, prompt reporting and investigation of alleged war crimes and other LOAC violations are essential. These other LOAC violations may not necessarily merit characterization as "war crimes," but the conduct may still be subject to criminal prosecution under U.S. law. In addition to obligations with respect to grave breaches, the United States is responsible for taking all measures necessary to suppress other violations of the Geneva Conventions (see, for example, GC art. 146).

WAR CRIMES IN INTERNATIONAL ARMED CONFLICTS

8-14. Historically, war crimes generally included all crimes that were punishable during armed conflict (see DOD Law of War Manual, 18.9.5), regardless of whether the crimes were violations of LOAC. For example, espionage and other offenses committed by captured enemy personnel, that were not prohibited by LOAC but were punishable by a belligerent State were also characterized as "war crimes." However, "war crimes" now generally refers to only serious violations of LOAC. For example, the War Crimes Act, 18 U.S.C. § 2441, defines "war crime" to include certain serious LOAC violations.

Grave Breaches of the Geneva Conventions

8-15. To reflect the particular seriousness of some violations, the Geneva Conventions characterize certain breaches as "grave." These include willful killing of protected persons; engaging in torture or inhuman treatment, such as biological experiments; willfully causing great suffering or serious injury to body or health;

unlawfully deporting, transferring, or confining a protected person; compelling a protected person to serve in the forces of a hostile power; willfully depriving a protected person of the rights of fair and regular trial; taking of hostages; and causing extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (GWS art. 50; GWS Sea art. 51; GPW art. 130; GC art. 147; consider AP I art. 85). Under the Geneva Conventions, grave breaches involve violations against the person or property of persons specifically protected by the four conventions. Though not binding on the United States, under Additional Protocol I to the Geneva Conventions, the concept of a grave breach is expanded to include violations against civilian persons and property generally. As a matter of international law, the grave breach regime (with its obligation to search for and prosecute) only applies in an international armed conflict, as defined by Common Article 2 of the Geneva Conventions (see GWS art. 2, GWS Sea art. 2, GPW art. 2 and GC art. 2).

Other Violations

8-16. Other LOAC violations that are punishable and may be serious enough to merit characterization as "war crimes" include, but are not limited to, using poisonous weapons or weapons calculated to cause unnecessary suffering; attack or bombardment of undefended cities, towns or villages; pillage of public or private property; maltreatment of dead bodies; poisoning of wells or streams; resorting to perfidy (for example, using a white flag to conduct an attack treacherously); abusing or intentionally firing on a flag of truce; intentionally targeting protected places, objects, or protected persons (HR art. 23a, 23g, 25, 28, 47; War Crimes Act, 18 U.S.C. § 2441; consider AP I art. 85).

WAR CRIMES IN NON-INTERNATIONAL ARMED CONFLICTS

8-17. Common Article 3 provides minimum standards that parties to a conflict are bound to apply in a non-international armed conflict, and its standards are widely considered to apply to all armed conflicts. It explicitly prohibits violence to life and person for those taking no active part in hostilities and protects them from murder; mutilation; cruel treatment; torture; being taken hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment; and sentences passed and executions carried out without a judgment pronounced by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples (see GWS art. 3, GWS Sea art. 3, GPW art. 3 and GC art. 3). Conduct that violates Common Article 3 can be punished by a State competent to exercise jurisdiction with respect to that conduct.

8-18. While nothing in Common Article 3 specifically requires that States impose individual criminal liability for violation of its standards, other treaties and domestic statutes do make reference to Common Article 3 in defining what constitutes a war crime. For example, in the United States, the War Crimes Act and the Military Commissions Act of 2006 criminalize certain violations of Common Article 3 (see, for example, 18 U.S.C. § 2441(c)(3) (War Crimes Act, as amended by the Military Commissions Act of 2006)).

OTHER VIOLATIONS OF THE LAW OF ARMED CONFLICT

8-19. The United States has an obligation to take all measures necessary to prevent acts contrary to the Geneva Conventions. Violations of LOAC that are not sufficiently serious are generally not characterized as "war crimes," but typically may be prosecuted under a State's domestic law or addressed via administrative measures. In the United States, this may include referring charges to a court-martial under the UCMJ (see, for example, UCMJ art. 93, Cruelty and Maltreatment) or taking other actions, such as changing doctrine or tactics, providing additional training, taking administrative or corrective measures, imposing non-judicial punishment, or initiating prosecution before a civilian court, as appropriate.

UNITED STATES' OBLIGATIONS

8-20. The United States has certain treaty obligations with respect to LOAC violations, including the following obligations:

- To enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed and of the grave breaches of the Geneva Conventions;
- To search for persons alleged to have committed, or have ordered to be committed, grave breaches of the Geneva Conventions, and bring such persons regardless of their nationality, before its own courts;
- To take measures necessary for the suppression of all acts contrary to the provisions of the 1949 Geneva Conventions other than grave breaches;
- To provide persons accused of violations of the Geneva Conventions the safeguards of a proper trial and defense (GWS art. 49; GWS Sea art. 50; GPW art. 129; GC art. 146); and
- To pay compensation, when appropriate, for violations of LOAC for which the United States is responsible (see DOD Law of War Manual, 18.16).

8-21. The United States has enacted domestic laws to help meet these obligations (see generally paragraphs 8-22 to 8-56, "Reporting and Investigating LOAC Violations"). U.S. law provides general courts-martial with the requisite authority to try, convict, and punish individuals who commit conduct punishable under LOAC, including war crimes. In addition, the 1996 War Crimes Act establishes federal jurisdiction over certain war crimes when the alleged perpetrator or victim is a U.S. person or member of the U.S. Armed Forces.

REPORTING AND INVESTIGATING LOAC VIOLATIONS

8-22. DOD Directive 2311.01E, *DOD Law of War Program*, requires all military and U.S. civilian employees, contractors, and subcontractors assigned to or accompanying the Armed Forces to report LOAC violations ("reportable incidents" as defined by the Directive; *see also* para. 8-3, above) through their chain of command (contractors must report reportable incidents to the commander of the unit they are accompanying or the installation to which they are assigned or to the Combatant Commander) (DODD 2311.01E). Such reports also may be made through other channels, such as the military police, a judge advocate, or an inspector general. A report to these other entities, however, must be forwarded to the recipient's chain of command. A commander who obtains information about a reportable incident must immediately report the incident through the applicable operational chain of command. Department of Defense policy requires higher authorities receiving an initial report of any reportable incident to submit the report through command channels to the applicable combatant commander by the most expeditious means available (DODD 2311.01E).

Reportable Incidents

8-23. A "reportable incident" is defined as "a possible, suspected, or alleged violation of the law of war for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict" (DODD 2311.01E para. 3.2; CJCSI 5810.01D para. 5b). Supplemental Service guidance provides for reporting of war crimes, or serious LOAC violations, as well as other "serious" incidents that may generate adverse publicity or have serious international consequences (see, for example, AR 190-45 para. 8-1; MCO 3300.4A, Enclosure 6). A commander need not determine that a potential violation occurred, but only that credible information merits further review of the incident. Commanders should consult with their assigned judge advocate for advice as to whether an alleged violation is a reportable incident.

Investigations

8-24. Department of Defense policy requires that reportable incidents be thoroughly investigated. Under DOD policy, commanders receiving an initial report of a reportable incident are also required to request a formal investigation by the appropriate military criminal investigative organization ("MCIO," for example CID, Air Force Office of Special Investigations [OSI], or the Naval Criminal Investigative Service [NCIS]). If, in the course of the investigation, it is determined that U.S. persons are not involved in a reportable incident, any U.S. investigation continues only at the direction of the appropriate combatant commander. Even when U.S. personnel are not involved, reporting of the information through the chain of command may nevertheless be required by DODD 2311.01E.

Command Response

8-25. Commanders receiving information about an alleged LOAC violation involving a member of their command, either as a victim or a perpetrator, may conduct an informal or formal administrative investigation to collect evidence and assess the credibility of the allegations and the involvement of U.S. personnel (AR 15-6; Chapter II of the Manual of the Judge Advocate General of the Navy [JAGMAN]). A commander's decision to direct such an investigation, however, should not delay further reporting up the chain of command or, when appropriate, referral to CID or the NCIS. Further, if a commander's investigation determines there is credible evidence a crime has been committed, the commander should consult the command's judge advocate for advice on determining the appropriate disposition of the charges (Rules for Courts-Martial [RCM] 303, 306).

Department of Justice Involvement

8-26. It is DOD Policy to maintain effective working relationships with the Department of Justice (DOJ) in the investigation and prosecution of crimes involving DOD programs, operations and personnel, including the investigation of some alleged violations of LOAC. DOD and DOJ policy with regard to the investigation and prosecution of criminal matter is set forth in a Memorandum of Understanding (MOU) between the DOD and DOJ (implemented by DODI 5525.07). The MOU is a general policy and not specific to LOAC violations. Under the MOU, DOD generally will investigate most crimes committed on a military installation or during military operations. If the crime was committed by a person subject to the UCMJ, the Military Department concerned generally will take the lead in prosecuting the offender. DOJ is responsible for prosecution when the perpetrator is not subject to the UCMJ. Commanders should consult with a judge advocate and adhere to applicable DOD policies regarding DOJ involvement in a particular matter.

WHO MAY BE HELD ACCOUNTABLE

8-27. Those personnel who commit a war crime may be held individually responsible. In addition to the individual, others may be held responsible, such as the commander, those who aided and abetted an offense, and those who conspired with them to commit the crime—and even those who conspire to commit a war crime that does not occur. Other theories of criminal responsibility under international law include joint criminal enterprise responsibility, command responsibility and responsibility for planning, instigating, or ordering the crime. Under the UCMJ, a person who aids, abets, counsels, commands, or procures the commission of an offense may be punishable (see UCMJ, art. 77).

Individual Responsibility

8-28. Any person who commits an act that constitutes a crime under international law, who aids, abets, or counsels such a crime, or orders the commission of, conspires to commit, or attempts to commit such a crime is responsible for the crime and is liable to punishment (see DOD Law of War Manual, 18.22.1). Even if the act is not punishable as a crime in the person's own State, the individual is not relieved from criminal responsibility under international law (see DOD Law of War Manual, 18.22.2). Further, a person acting pursuant to an order of their government or of a superior is not relieved from responsibility under international law for acts that constitute a crime under international law, provided it was possible in fact for the person to make a moral choice (see DOD Law of War Manual, 18.22.4; but see para. 8-67(describing when superior orders might constitute a legitimate defense)).

Command Responsibility

8-29. Commanders have a duty to maintain order and discipline within their command and to ensure compliance with applicable law by those under their command or control. Commanders, therefore, may be liable for the criminal acts of their subordinates or other persons subject to their control even if the commander did not directly participate in the underlying offenses (see DOD Law of War Manual, 18.23.3). In order for the commander to be liable, however, the commander's personal dereliction must have contributed to or failed to prevent the offense; the commander is required to take necessary and reasonable measures to ensure that their subordinates do not commit violations of LOAC.

8-30. For instance, if soldiers commit massacres or atrocities against POWs or against the civilian population of occupied territory, the responsibility may rest not only with the actual perpetrators, but also with the commander if the commander's dereliction contributed to the offense. If the commander concerned ordered such acts be carried out, then the commander would have direct criminal responsibility (UCMJ, Art. 77: "Any person punishable under this chapter who – commits an offense punishable by this chapter, or… commands… its commission… is a principal.").

8-31. Under international law, criminal responsibility may also fall on commanders or certain civilian superiors with similar authorities and responsibilities as military commanders if they had actual knowledge or constructive knowledge of their subordinates' actions and failed to take "necessary and reasonable" measures to prevent or repress those violations. That is, commanders may be held responsible if they knew or should have known, through reports received by them or by other means, that troops or other persons subject to their control were about to commit or have committed a war crime and did nothing to prevent such crimes or punish the violators. Once established that a commander has knowledge (actual or constructive) of a subordinates' actions, the commander may be liable under international law only where failure to supervise subordinates properly constitutes criminal negligence on the commander's part. That is, the commander may be criminally liable where there is personal neglect amounting to a wanton, immoral disregard of the action of the commander's subordinates that amounts to acquiescence in the crimes.

Aiding and Abetting

8-32. An individual who aids and abets, as well as one who counsels, commands, assists, encourages, advises, or instigates another to commit an offense or one who procures the commission of an offense may be held responsible for an offense equally as one who actually commits the offense (see UCMJ, Art. 77). Aiding and abetting liability for an offense can be usefully analyzed by evaluating: (1) knowledge of the illegal activity being aided, abetted, or counseled; (2) a desire to help the activity succeed; and (3) some act of helping (see DOD Law of War Manual, 18.23.4).

Conspiracy

8-33. A conspiracy exists when two or more persons agree to commit a criminal offense and at least one of the persons does something to effect the agreed-upon offense while the agreement exists. Under U.S. law, conspiracy can take one of two forms. First, it can be based on a completed crime, such as the murder of civilians. Conspiracy entails intentional participation in a common plan to complete a war crime. The individual need not engage in the physical act of the war crime. He or she must intentionally participate in the common plan, although the role can be relatively minor. To be found guilty under U.S. law, an accused need not have prior knowledge of a particular crime, as long as the accused intended to aid acts of similar character, such as the murder of civilians. Second, conspiracy can be charged as a separate, stand-alone offense requiring only an agreement and some overt act furthering the agreement (also known as *inchoate conspiracy*).

8-34. The crime of conspiracy can be found in a number of statutes applicable to war crimes, including the War Crimes Act, other sections of Title 18 of the U.S. Code, the UCMJ, and the Military Commissions Act (MCA). Defendants have argued in litigation that the Constitution does not allow for the offense of conspiracy to be tried by military commission because it is not an offense under the international law of war. The Government has responded to that argument by, among other things, noting that U.S. military commissions tried and convicted a number of defendants on conspiracy charges during the Civil War and World War II. Current appellate litigation in the Military Commissions may afford U.S. practitioners with clarity on this issue. (Compare UCMJ art. 81, 10 U.S.C. § 881, with 10 U.S.C. § 950t (29)).

Joint Criminal Enterprise

8-35. Although not specifically reflected in U.S. law, international criminal tribunals in recent years have held individuals acting together with others pursuant to a common design, guilty of offenses committed by other members of the group, even though the individual did not commit the punishable offense personally; this form of liability is very similar to the first form of conspiracy discussed above (paragraph 8-33) (see, for example, *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, 220 (International Criminal Tribunal for the former Yugoslavia [ICTY] App. Chamber, July 15, 1999)). This basis is sometimes referred to as *joint*

criminal enterprise or "JCE." In other words, under JCE, every person of the joint enterprise may be held equally liable as a conspirator, even if his or her actions are distant from the actual execution of the crimes. It is not a violation itself, but rather a theory upon which an individual can be liable for violations committed by others.

Planning, Instigating, and Ordering

8-36. The ICTY provides that an accused can be liable under international law for planning, instigating, or ordering a violation of LOAC, even though the accused does not physically commit the violation (ICTY art. 7(1)). Under U.S. law, an individual who planned, instigated, or ordered conduct that would constitute a war crime may be liable for that crime as a principal or aider and abettor (see paragraph 8-32).

PROSECUTION OF WAR CRIMES

8-37. Prosecution of war crimes requires individual States with competent authority, or international courts granted authority by competent States, to assert jurisdiction, provide a venue, and authorize punishment in order to try those who violate LOAC. This section examines jurisdiction and venue issues, penalties, and defenses from a U.S. perspective.

JURISDICTION AND VENUE

8-38. Acts that constitute war crimes are within the jurisdiction of general courts-martial (UCMJ art. 18; 10 U.S.C. § 818), military commissions, provost courts, other U.S. military tribunals (UCMJ art. 21; 10 U.S.C. § 821), and U.S. civilian courts.

8-39. An act that constitutes a war crime under LOAC likely also constitutes a crime under U.S. law. Persons subject to the UCMJ are ordinarily charged with violations of a specific provision of the UCMJ rather than a violation of LOAC because charging offenses as specific UCMJ violations prevent adjudication of complex issues, such as proving a state of armed conflict existed. Charging an offense under the UCMJ carries a maximum punishment that is comparable to violations of federal law, and is a method with which military prosecutors are familiar (see RCM 307 Discussion). Before considering to pursue charges against DOD personnel under LOAC, consideration should be given to the availability of prosecution under specific provisions of the UCMJ.

Universality of Jurisdiction

8-40. In respect to grave breaches, the State's obligation under the 1949 Geneva Conventions is to prosecute or, under certain circumstances, to transfer to another State for prosecution, alleged perpetrators regardless of their nationality (see, for example, GPW art. 129). Historically neutral or non-belligerent States have generally not exercised jurisdiction in relation to alleged war crimes, and such efforts in recent years have sometimes met strong objections and generally have not been successful without the consent of belligerent States. The jurisdiction of U.S. military tribunals in connection with war crimes is not limited to offenses committed against U.S. citizens, but extends to offenses committed against nationals of allies, co-belligerents, and stateless persons. Persons subject to the UCMJ who commit LOAC violations are usually prosecuted for offenses under the UCMJ via courts-martial, and the UCMJ explicitly "applies in all places" (10 U.S.C. § 805). Violations of LOAC committed in the United States or committed by other U.S. persons usually constitute violations of federal criminal law and would ordinarily be prosecuted under such laws. Commanders of U.S. service members and civilians must ensure that members of their command who commit war crimes are promptly investigated and, when there is sufficient evidence, adequately punished (see paragraphs 8-13 to 8-18).

Uniform Code of Military Justice

8-41. Persons who are subject to the UCMJ include members of the Active and Reserve Components of the U.S. Armed Forces, POWs in the custody of the United States, and in time of declared war or contingency operations, persons serving with or accompanying the Armed Forces in the field (UCMJ art. 2; 10 U.S.C. § 802). The UCMJ explicitly applies in all places and can be enforced against individuals subject to the UCMJ even if they have committed crimes outside the United States. Accordingly, the UCMJ provides great

flexibility in prosecuting individuals for crimes committed on the battlefield and in occupied territories. Courts-martial can be (and often are) convened outside the territorial limits of the United States by employing military judges and other qualified military personnel who can handle cases in austere environments.

8-42. Long-standing U.S. practice is to charge war crimes as offenses under the UCMJ rather than as separate "war crimes" offenses. Offenses under the UCMJ that could be used to punish conduct that violated LOAC include, but are not limited to:

- Article 81 (10 U.S.C. § 881), Conspiracy;
- Article 93 (10 U.S.C. § 893), Cruelty and maltreatment;
- Article 108 (10 U.S.C. § 908), Military Property of United States – loss, damage, destruction, or wrongful disposition;
- Article 108a (10 U.S.C. § 908a), Captured or abandoned property;
- Article 109 (10 U.S.C. § 909), Property other than military property of United States – waste, spoilage, or destruction;
- Article 118 (10 U.S.C. § 918), Murder;
- Article 119 (10 U.S.C. § 919), Manslaughter;
- Article 119a (10 U.S.C. § 919a), Death or injury of an unborn child;
- Article 120 (10 U.S.C. § 920), Rape and sexual assault generally (including Forcible Sodomy);
- Article 120b (10 U.S.C. § 920b), Rape and sexual assault of a child;
- Article 120c (10 U.S.C. § 920c), Other sexual misconduct;
- Article 125 (10 U.S.C. § 925), Kidnapping;
- Article 126 (10 U.S.C. § 926), Arson;
- Article 128 (10 U.S.C. § 928), Assault;
- Article 128a (10 U.S.C. § 928a), Maiming; and
- Article 130 (10 U.S.C. § 920), Stalking.

8-43. Conduct that violates LOAC can also be charged using the UCMJ's provision against disobedience of lawful orders or general regulations (UCMJ art. 92; 10 U.S.C. § 892), as well as under the UCMJ's general prohibition against conduct prejudicial to good order and discipline in the Armed Forces (UCMJ art. 134; 10 U.S.C. § 934).

Other Federal Crimes

8-44. Prosecutions can also occur under U.S. domestic law for certain violations of LOAC. For example, the War Crimes Act authorizes the prosecution of individuals for certain war crimes, whether such crimes are committed inside or outside the United States, if the victim or the perpetrator is either a U.S. national or a member of the U.S. Armed Forces (18 U.S.C. § 2441). Under this law, war crimes means any conduct:

- Defined as a grave breach of any of the 1949 Geneva Conventions or any protocol to one of those conventions to which the United States is a party (currently only AP III);
- Violations of certain listed articles of the Hague Regulations;
- Which constitutes a grave breaches of Common Article 3 of the 1949 Geneva Conventions as more specifically defined in the War Crimes Act; and
- In relation to an armed conflict and contrary to the provisions the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (CCW Amended Protocol II), when a person willfully kills or causes serious injury to civilians.

8-45. While an individual could be charged with a war crime in a court-martial under article 18, UCMJ, it is difficult (especially in recent conflicts) to define the jurisdictional element of the type of conflict and the substantive crimes under international law. In addition, the wide range of offenses that can be charged under the UCMJ make it unnecessary to use this provision for that purpose, and also charging under this provision may be precluded under the Preemption Doctrine as set forth in the Manual for Courts-Martial United States, Part IV, paragraph 91.c(5)(a). Finally, the War Crimes Act is available to prosecute individuals in U.S. Federal Court in the alternative (upon agreement between the DOD and the DOJ) and also addresses those who are not subject to the UCMJ but otherwise fall within the jurisdiction of the War Crimes Act.

8-46. Other laws criminalize acts of torture, attempts to commit torture, and conspiracy to commit torture outside the United States when the offender is a U.S. national or is located within the United States (18 U.S.C. § 2340A). Other relevant provisions of the law allow for the prosecution of:

- Genocide (18 U.S.C. § 1091);
- Murder or manslaughter of foreign officials, official guests, or internationally protected persons (18 U.S.C. § 1116);
- Piracy (18 U.S.C. §§ 1651-1661);
- Terrorism and material support to terrorists (18 U.S.C. §§ 2331-2339D); and
- Various acts involving biological weapons, chemical weapons, weapons of mass destruction, or nuclear weapons (18 U.S.C. §§ 175, 229, 832, 2332a).

A number of these provisions limit their application to offenses committed within the United States, or by or against citizens of the United States; but others, such as piracy, apply regardless of the location of the offense or the nationality of the offender or victim(s).

Prosecution of Civilians, Former Military Members, Prisoners of War, and Enemy Belligerents

8-47. While the discussion on jurisdiction and venue thus far applies to U.S. Service Members who commit war crimes, the next sections discuss U.S. jurisdiction over and venue for trying non-U.S. service members—civilians, former military members, enemy POWs, and enemy belligerents.

Military Extraterritorial Jurisdiction Act of 2000

8-48. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA) is a venue statute that allows the U.S. government to prosecute individuals who commit certain offenses outside the United States either while employed by or accompanying the U.S. Armed Forces outside the United States or while a member of the U.S. Armed Forces subject to the UCMJ. Under MEJA, the U.S. Government can assert jurisdiction for certain offenses that are not otherwise subject to jurisdiction under U.S. law, including certain offenses committed outside the United States by civilians accompanying the U.S. Armed Forces (such as contractors and civilian employees) or by persons who were military members at the time of the offense, but have been discharged from the U.S. Armed Forces or are no longer subject to the UCMJ. Under MEJA, an individual falling within either of these two categories is subject to prosecution for an offense committed outside the United States if that offense would carry a punishment of more than one year if committed within the special maritime and territorial jurisdiction of the United States. MEJA prosecutions are handled by the Department of Justice. Although not limited to conduct that constitutes LOAC violations, MEJA allows for criminal prosecution of individuals' conduct that constitutes LOAC violations committed outside the United States. Prosecution under MEJA is not limited to U.S. citizens. Foreign nationals employed by or accompanying U.S. forces are also subject to prosecution under MEJA with the exception of host nation nationals or a person ordinarily resident in the host nation.

8-49. A crime charged pursuant to MEJA does not need to be a crime under the law of the country where the crime was committed. When the conduct violates both the laws of the foreign State and is a qualifying offense for MEJA purposes, however, international agreements, such as status of forces agreements, may indicate which country has jurisdiction to prosecute the individual.

8-50. Department of Defense policy requires that all employees or persons accompanying the force outside the United States, particularly those who are not nationals of the United States, are informed of the potential scope of MEJA (see DODI 5525.11). Knowledge of MEJA and its potential criminal sanctions serves a deterrent purpose in helping preserve good order and discipline in military operations outside the United States.

Uniform Code of Military Justice Applicable to Civilians During Military Operations

8-51. Commanders have disciplinary authority pursuant to the UCMJ over civilians accompanying the Armed Forces overseas during military operations. "In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field" are subject to the UCMJ (UCMJ art. 2(a)(10)). It is DOD policy that the requirement for good order and discipline of the Armed Forces outside the United States extends to civilians employed by or accompanying the Armed Forces, and that such persons

who engage in conduct constituting criminal offenses shall be held accountable for their actions, as appropriate (DODI 5525.11).

8-52. When an offense alleged to have been committed by a civilian that violates U.S. federal criminal law occurs, DOD policies may provide for notification of responsible DOJ authorities to afford DOJ the opportunity to pursue prosecution of the case in federal district court (Secretary of Defense Memorandum, "UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations," March 10, 2008). While the notification and decision process is pending, commanders and military criminal investigators should continue to take appropriate action to address the alleged crime. Commanders should also ensure that any preliminary military justice procedures that would be required in support of the exercise of UCMJ jurisdiction continue to be accomplished during the concurrent DOJ notification process. Commanders should be prepared to act, as appropriate, should possible U.S. federal criminal jurisdiction prove to be unavailable to address the alleged criminal behavior.

U.S. Military Commissions

8-53. In the past, military commissions have been used by the United States and other States to prosecute enemy belligerents for violations of the law of war and for acts of unprivileged belligerency. Military commissions have also been used for the trial of offenses under U.S. law where local courts were not open and functioning, such as when martial law applies, and for the trial of violations of occupation ordinances (DOD Law of War Manual, 18.19.3.7).

8-54. Generally, courts-martial may be used in lieu of military commissions to try POWs in U.S. military custody (GPW art. 102; UCMJ art. 2(a)(9)). Military commissions are used to try others, including alien unprivileged belligerents, for LOAC violations and other offenses. Procedures for military commissions are similar to those for general courts-martial under the UCMJ (see, for example, 10 U.S.C. § 948b(c); Manual for Military Commissions (MMC)).

8-55. Under the MCA, thirty-two substantive crimes are triable by military commission (10 U.S.C. § 950t). The jurisdiction of military commissions under the MCA is limited to individuals who are alien unprivileged enemy belligerents (10 U.S.C. §948c). The term "unprivileged enemy belligerent," for purposes of the statute, means an individual (other than a privileged belligerent) who:

- Has engaged in hostilities against the United States or its coalition partners;
- Has purposefully and materially supported hostilities against the United States or its coalition partners; or
- Was a part of al Qaeda at the time of the alleged offense under the MCA (10 U.S.C. § 948a(7)) (compare to paragraph 1-64).

8-56. Under the MCA, an individual subject to a military commission is entitled to fair trial guarantees, including defense counsel; notice of charges alleged; the exclusion of evidence obtained by torture or cruel, inhumane, or degrading treatment; protection against self-incrimination and the inappropriate admission of hearsay evidence; the right to be present at proceedings, offer evidence, and confront witnesses; and to protection against former jeopardy. Procedures for military commissions also address the treatment, admissibility, and discovery of classified information, limits on sentencing, the execution of confinement, and post-trial review procedures (10 U.S.C. §948q(b)- 950j).

International Tribunals

8-57. On a number of occasions since the beginning of the 20th century, war crimes, crimes against humanity, genocide, and crimes against peace were prosecuted by special international tribunals. These tribunals were established to address crimes committed during specific periods or in connection with specific conflicts. In general, these tribunals have applied international law, including the Geneva Conventions and their Additional Protocols, as well as the HRICR. The statute governing each tribunal typically stipulates the specific types of crimes addressed by the tribunal and the standards for culpability. The decisions of these tribunals do not bind the United States and its courts. Their decisions, however, provide useful examples of the application of international law. An example of a special international tribunal, created by Great Britain, France, the United States, and the Union of Soviet Socialist Republics, was the International Military

Tribunal. This tribunal conducted the landmark Trial of Major War Criminals, with 21 Axis defendants, in Nuremberg, Germany, from November 1945 to October 1946. Another post-war tribunal was established in Tokyo to try war criminals in the Pacific Theater of World War II. The jurisprudence of the ICTY, established by the UN Security Council in 1993, also provides numerous examples of war crimes prosecutions.

International Criminal Court and the Rome Statute

8-58. In 1998, 120 Nations at a Diplomatic Conference in Rome voted to approve the final text of the Rome Statute, adopting a treaty that establishes an International Criminal Court (ICC). The Rome Statute entered into force on July 1, 2002. Although the United States did not vote in favor of the treaty and has indicated that it does not intend to become a party to the Rome Statute, the U.S. delegation contributed significantly to its development, including the drafting of the elements of crimes and the inclusion of fundamental due process protections.

8-59. Unlike tribunals that were established for specific conflicts, the ICC, which is located in The Hague, is intended to apply to situations after the establishment of the ICC. The Rome Statute provides that the ICC "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern" and "shall be complementary to national criminal jurisdictions" (Rome Statute art. 1). The latter principle that the ICC's jurisdiction is "complementary" means that the ICC should not investigate or prosecute allegations when a State is or has already genuinely done so. The Rome Statute provides that the ICC has jurisdiction with respect to:

- The crime of genocide,
- Crimes against humanity,
- War crimes, and
- The crime of aggression.

8-60. The Rome Statute generally only confers jurisdiction on the ICC when the accused is a national of a Rome Statute Party; when the conduct occurs on the territory of a Rome Statute Party; or when the conduct occurs in a situation that has been referred to the ICC by the UN Security Council. The ICC will not prosecute an individual when a State has exercised or is in the process of exercising jurisdiction over the matter, unless that State is unwilling or unable to genuinely investigate or prosecute the case (Rome Statute art. 17). While the ICC purports to exercise jurisdiction over non-State Parties to the Rome Statute, the United States has a longstanding and continuing objection to any assertion of jurisdiction by the ICC with respect to nationals of States not Party to the Rome Statute in the absence of consent from such States or a referral by the Security Council (see DOD Law of War Manual, 18.20.3.1). Further, the U.S. Government has negotiated SOFAs and other agreements with many countries, which under a provision of the Rome Statute (art. 98) clarify that U.S. personnel may not be turned over to the ICC by those countries absent U.S. consent. Moreover, in multinational operations or peace operations U.S. personnel may be asked to cooperate with ICC prosecutors who are investigating allegations of genocide, crimes against humanity, or war crimes. Any requests for cooperation by the ICC should be forwarded to DOD because such requests implicate U.S. policy toward the ICC and U.S. law, including the American Service Members' Protection Act, imposes certain restrictions on any support to the ICC.

Forum Considerations Connected to the Status of the Accused

8-61. Ordinarily, U.S. service members should be tried by courts-martial under appropriate provisions of the UCMJ or, if separated from the military, in Federal court pursuant to MEJA (see paragraphs 8-37 and 8-50).

8-62. Civilians who commit war crimes while serving with or accompanying U.S. forces outside the United States face prosecution in Federal court under the War Crimes Act or other Federal law. Additionally, civilians serving with or accompanying the Armed Forces in the field are subject to trial by court-martial for violations of the UCMJ as long as the DOJ does not assert jurisdiction to prosecute in Federal court. The United States may prosecute enemy POWs or retained personnel captured in an international armed conflict who commit war crimes (either pre-capture or while detained) in courts-martial or other proceedings, provided the requirements of the GPW are met (see DOD Law of War Manual, 9.28; see paragraph 8-54).

8-63. An accused who is not a U.S. citizen and who meets the definition of an unprivileged enemy belligerent under the terms of the MCA is subject to trial before a military commission or in Federal court pursuant to U.S. law (see paragraph 8-55).

Sanctions Against Misconduct in Other Military Operations

8-64. When war crimes are charged as "war crimes," the applicable criminal statutes generally also provide a requirement that the conduct occur in the context of and in association with an "armed conflict" (see, 18 U.S.C. § 2441). While U.S. military personnel may engage in operations that do not involve armed conflict, it is DOD policy to comply with LOAC in all military operations regardless of how they are characterized (DODD 2311.01E para. 4.1). The specific criminal sanctions available to enforce compliance with these standards may vary, however, depending on the relationship with other sovereign States in any given operation, especially the host nation. The United States always abides by the "law of the flag"—the legal standards and enforcement mechanisms it brings with the force. Sometimes U.S. service members engaged in peace operations or other military operations short of armed conflict are subject to the laws of the nation in which the activity is conducted, which laws may be more restrictive concerning the use of force than may be permitted under multinational force rules of engagement (JP 3-07.3 para. 3(h)). In general, the application of host-nation law to these other operations is governed by an international agreement, such as a status-of-forces agreement or, for United Nations operations, a status of mission agreement (JP 3-07.3 para. 7(b)). These agreements define the circumstances under which the host nation may exercise jurisdiction over peace operations personnel (both military and civilian) who commit crimes in the host nation. In all cases, however, the UCMJ will apply to the activities of U.S. service members, regardless of the nature of the operation or where the potential crime occurs (RCM 203).

PENALTIES

8-65. Penalties vary depending on the war crime committed and the law pursuant to which the crime is being prosecuted. Authorized punishments can range from fines or letters of reprimand to death. For instance, for the offense of murder under the UCMJ, the accused may be subject to death or life imprisonment (UCMJ, art. 118). Crimes under the War Crimes Act, the MCA, or other U.S. law also carry significant penalties. Generally, violations of the War Crimes Act that result in the death of a victim may be punishable by death (18 U.S.C. § 2441(a)). Grave breaches that authorize the death penalty include willful killing, torture, inhumane treatment, or willfully causing great suffering or injury (GWS art. 50; GWS Sea art. 51; GPW art. 130; GC art. 147).

DEFENSES

8-66. The availability of legal defenses to charges of war crimes may depend on the specific jurisdiction and forum in which charges are brought. The following general information regarding affirmative defenses that negate criminal responsibility under general principles of criminal law and war crimes may be helpful, but commanders should request legal advice if they have specific questions.

General Legal Defenses

8-67. Individuals being tried by a U.S. court-martial for war crimes (either as violations of the UCMJ, as violations of other Federal law, or as LOAC violations) may assert legal defenses available under the UCMJ (RCM 916; MMC pt. II, Rule 916).

Justification

8-68. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful. This includes a privileged belligerent's killing of an enemy combatant in combat and other acts that would otherwise be offenses under local criminal law (RCM 916(c) Discussion; MMC, pt. II, Rule 916(c)).

Self-Defense

8-69. Self-defense generally requires the accused to demonstrate an apprehension, on reasonable grounds, that death or bodily harm was about to be wrongfully inflicted and that the force used by the accused was necessary for protection against such death or bodily harm (RCM 916(e)). The plea of self-defense has been recognized in war crimes trials under much the same circumstances as in trials held under ordinary criminal law (see, for example, MMC pt. II, Rule 916(e)).

Accident

8-70. Death, injury, or damage that occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner (for example, conduct of military operations in accordance with LOAC) is an accident and is excusable. The defense is not available when the act that caused the death, injury, or damage was a negligent act (RCM 916(f); MMC pt. II, Rule 916(f)).

Ignorance or Mistake of Fact

8-71. It is generally a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense (RCM 916(j); MMC pt. II, Rule 916(j)).

LOAC-Specific Discussion of Defenses

8-72. There may be specific LOAC issues with respect to arguments that military necessity, lawful reprisals, superior orders, government officials, or ignorance or mistake of law constitute a valid defense.

Military Necessity is not a Defense to Justify LOAC Violations

8-73. Following World War II, war crimes tribunals specifically rejected defense arguments that military necessity (*Kriegsraison*) could be used to justify LOAC violations (see DOD Law of War Manual, 2.2.2.1, citing the *Krupp* case and others). One may not justify LOAC violations by invoking the need to win the war.

Lawful Reprisals

8-74. Reprisals are acts taken against a party that are otherwise unlawful under LOAC in order to persuade that party to cease violating the law. A reprisal is considered lawful, provided that the stringent conditions for lawful reprisal have been met, including complying with any applicable prohibitions against reprisal. The fact that the conduct was part of a lawful reprisal action thus means that would not need to part of a valid defense (see paras. 8-80 to 8-86 for additional information).

Superior Orders

8-75. The fact that a person acted pursuant to orders of his or her Government or of a superior does not relieve that person from responsibility under international law, provided it was possible in fact for that person to make a moral choice (see DOD Law of War Manual, 18.22.4). Under the RCM and MMC, it is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful (RCM 916(d); MMC pt. II, Rule 916(d)). An order requiring the performance of a military duty or act may be inferred to be lawful, and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime (for example, an order directing the murder of a civilian, a noncombatant, or a combatant who is *hors de combat*, or the abuse or torture of a prisoner) (see, for example, MCM pt. IV, para. 14c(2)(a)(i)). The fact that an offense was committed pursuant to superior orders may also be considered as mitigation to reduce the level of punishment (see, for example, *United States v. Sawada*, V U.N. Law Reports 7-8, 13-22; ICTY art. 7(4)).

Government Officials

8-76. The fact that a person who committed an act that constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him or her of responsibility under

international law (see DOD Law of War Manual, 18.22.3). Most war crimes tribunals have held that the fact a person acted as a Head of State or as a government official is not a defense to prosecution and punishment for war crimes, nor has acting as such been considered as a factor in mitigating punishment (see, for example, Charter of the International Military Tribunal art. 7). Although status as a government official is not a substantive defense to liability under international law, government officials may receive immunities or other procedural protections from a foreign State's exercise of jurisdiction. For example, a Status of Forces Agreement could provide that it is for the sending State to exercise jurisdiction, rather than the host State, in respect of allegations that the sending State's forces had committed war crimes.

Ignorance or Mistake of the Law

8-77. Ignorance or mistake of law ordinarily is not a defense (RCM 916(l)(1); MMC pt. II, Rule 916(l)(1)). Individuals are expected to ascertain and conduct themselves within applicable law (see, for example, *United States v. Flick* (The Flick Case), VI Trials of War Criminals 1208). Ignorance or mistake of law may be a defense in certain circumstances, such as when the mistake relates to a separate non-penal law or potentially when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency (RCM 916(l)(1) Discussion). For example, ignorance of international law may serve as a defense when the accused acts pursuant to superior orders and cannot, under the conditions of military discipline and operations, be expected to weigh scrupulously the legal merits of the order received (*Trial of Karl Buck and Ten Others*, V U.N. Law Reports, 39, 44). Ignorance of international law may also be a mitigating factor in considering punishment (see, for example, *United States v. Sawada*, V U.N. Law Reports 7-8).

REMEDIES FOR VIOLATION OF LOAC

8-78. In the event of a LOAC violation, it may be possible for an injured State to seek to resort to one or more of the following remedies:

- A formal or informal complaint to the offending belligerent through the protecting power or neutral States;
- Publication of the facts, with a view to shaping public opinion against the offending belligerent;
- A formal inquiry among the parties into alleged violations (see paragraph 8-79);
- A UN Security Council resolution to take appropriate action under the UN Charter (UN Charter art. 34);
- Complaints to the offending belligerent, including protest and demand for compensation or punishment of individuals responsible for the violation (Hague IV art. 3; consider AP I art. 91);
- Solicitation of the good offices (that is, the diplomatic assistance), mediation, or intervention of neutral States for purposes of making the offending belligerent observe its obligations under LOAC;
- Punishment of captured individual offenders as war criminals, either by tribunals of the aggrieved belligerent or its co-belligerents, or by international tribunals, if such tribunals have jurisdiction; or
- Reprisals against the offending belligerent in order to pressure it to desist from violations of LOAC (see paragraphs 8-80 to 8-86).

INQUIRIES UNDER THE GENEVA CONVENTIONS

8-79. The 1949 Geneva Conventions provide that, at the request of a party to the conflict, an inquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the 1949 Geneva Convention (DOD Law of War Manual, 18.14.1). If agreement has not been reached concerning the procedure for the inquiry, the Parties should agree on the choice of an "umpire" who will decide upon the procedure to be followed. The Conventions further provide that if the inquiry establishes that a violation has occurred, the parties to the conflict are to put an end to the violation and to repress the violation with the least possible delay (GWS art. 52; GWS Sea art. 53; GPW art. 132; GC art. 149). Article 90 of AP I establishes an International Fact-Finding Commission, which operates on the basis of mutual consent (see DOD Law of War Manual, 18.14.1.1). Although many nations have accepted this provision, the commission

has yet to conduct an inquiry. The United States, which is not a party to AP I has not recognized the competence of this Commission.

REPRISALS

8-80. ***Reprisals* are acts that are otherwise not permitted by LOAC in order to persuade a party to the conflict to cease violating LOAC**. They are taken in response to a prior act in violation of LOAC that was committed by or is attributable to that party. This could include, for example, the use of weapons forbidden by the Hague Regulations to counter the use of the same weapons by an enemy on combatants who have not yet fallen into the hands of the enemy. Reprisals are extreme measures that are only adopted as a last resort to induce the party to desist from violations of LOAC.

Conditions for Reprisals

8-81. Customary international law permits reprisals, subject to certain conditions. Reprisals are highly restricted in treaty provisions (see paragraphs 8-87 and 8-88) and practical considerations may counsel against their use (see DOD Law of War Manual, 18.18.4). The conditions in paragraphs 8-82 to 8-86 are drawn from U.S. practice (see DOD Law of War Manual, Section 18.18).

Careful Inquiry That Reprisals are Justified

8-82. Reprisals shall be resorted to only after a careful inquiry into the facts to determine that the enemy has, in fact, violated the law (see DOD Law of War Manual, 18.18.2.). In many cases, whether a law of war rule has been violated will not be apparent to the opposing side or outside observers.

Proportionality in Reprisal

8-83. To be legal, reprisals must respond in a proportionate manner to the preceding illegal act by the party against which they are taken. Identical reprisals are the easiest to justify as proportionate, because subjective comparisons are not involved. However, the acts resorted to by way of reprisal need not be identical nor of the same type as the violations committed by the enemy. A reprisal should not be unreasonable or excessive compared to the enemy's violation (for example, considering the death, injury, damage, or destruction that the enemy's violation caused).

Exhaustion of Other Means of Securing Compliance

8-84. Before resorting to reprisals, a party must consider other means of securing compliance with LOAC. Other means of securing compliance should be exhausted before resorting to reprisals. For example, the enemy should normally be warned in advance of the specific conduct that may be subject to reprisal and given an opportunity to cease it unlawful acts. Leaders should consider whether reprisals will lead to retaliation rather than compliance. In certain situations, the enemy may be more likely to be persuaded to comply by a steady adherence to LOAC by U.S. forces.

Who May Authorize

8-85. Individual service members may not take reprisal action on their own initiative. That authority is retained at the national level (see DOD Law of War Manual, 18.18.2.3). Commanders who believe a reprisal is warranted should report the enemy's violation promptly through command channels in accordance with DODD 2311.01E, as well as any proposal for reprisal action.

Public Announcement of Reprisals

8-86. In order to fulfill their purpose of dissuading further illegal conduct, reprisals must be made public and announced as such to the offending party.

Treaty Limitations on Reprisal

8-87. Certain treaties limit the individuals and objects against which reprisals may be directed. The following categories are protected from reprisals:

- Combatant personnel who are wounded, sick, or shipwrecked (GWS art. 46; GWS Sea art. 47);
- Medical and religious personnel, medical units and facilities, and hospital ships (GWS art. 46; GWS Sea art. 47);
- POWs (GPW art. 13);
- Persons protected by the GC and their property (GC art. 33;); and
- Cultural property (1954 Hague art. 4(4); consider AP I art. 53).

8-88. Additional Protocol I specified additional restrictions on reprisals that are applicable to AP I Parties that have not taken reservations to these restrictions, including protections against reprisal for:

- Civilians and civilian objects (consider AP I art. 52(1));
- The natural environment (consider AP I art. 55(2));
- Objects "indispensable to the survival of the civilian population" (consider AP I art. 54(4));POWs (GPW art. 13); and
- Public works and installations containing dangerous forces (such as dams, dykes, and nuclear power stations) (consider AP I art. 56(4)).

Some States in ratifying AP I have taken reservations from the additional limitations on reprisal provided for in Additional Protocol I. The U.S. position is that Additional Protocol I's reprisal provisions are counter-productive and remove a significant deterrent that protects civilians and war victims on all sides of a conflict. Reprisals are generally extraordinary measures, and, therefore, generally reserved for decision at the national level.

Appendix A

Major Law of Armed Conflict Treaties and Their Status

A-1. Law of Armed Conflict Treaties to Which the United States is a Party:

- Washington Convention Regarding the Rights of Neutrals at Sea of October 31, 1854 (10 Stat. 1105, TS 300, 11 Bevans 1214).
- Hague Convention for the Exemption of Hospital Ships, in Time of War, from the Payment of all Dues and Taxes Imposed for the Benefit of the State of December 21, 1904 (35 Stat. 1854, TS 459, 1 Bevans 430).
- Hague Convention III of October 18, 1907, Relative to the Opening of Hostilities (36 Stat. 2259, Treaty Series 538).
- Hague Convention IV of October 18, 1907, Respecting the Laws and Customs of War on Land (36 Stat. 2277, TS 539) (Hague IV), and the Annex thereto, entitled Regulations Respecting the Laws and Customs of War on Land (36 Stat. 2295, TS 539) (HR).
- Hague Convention V of October 18, 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (36 Stat. 2310, TS 540) (Hague V).
- Hague Convention VIII of October 18, 1907, Relative to the Laying of Automatic Submarine Contact Mines (36 Stat. 2322, TS 541, 1 Bevans 669) (Hague VIII).
- Hague Convention IX of October 18, 1907, Concerning Bombardment by Naval Forces in Time of War (36 Stat. 2351, TS 542) (Hague IX).
- Hague Convention XI of October 18, 1907, Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (36 Stat. 2396, TS 544, 1 Bevans 711) (Hague XI).
- Hague Convention XIII of October 18, 1907, Concerning the Rights and Duties of Neutral Powers in Naval War (36 Stat. 2415, TS 545, 1 Bevans 723) (Hague XIII).
- Procès-Verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of April 22, 1930 (3 Bevans 298) (London Protocol).
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (6 UST 3114, T.I.A.S. 3362, 75 UNTS 31) (GWS).
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (6 UST 3217, T.I.A.S. 3363, 75 UNTS 85) (GWS Sea).
- Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (6 UST 3216, T.I.A.S. 3364, 75 UNTS 135) (GPW).
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (6 UST 3516, T.I.A.S. 3365, 75 UNTS 287) (GC).
- Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (249 UNTS 240) (1954 Hague Cultural Property Convention).
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of October 10, 1980, its Protocols I, II, III, IV, and V, its Amended Protocol II, and its extended scope of application (1342 UNTS 137) (CCW).
- Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict, May 25, 2000 (Optional Protocol on Children in Armed Conflict).
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), December 8, 2005 (AP III).

A-2. Arms Control Agreements to Which the United States Is a Party That Are of Direct Relevance to the Law of Armed Conflict:

- Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of June 17, 1925 (26 UST 571, T.I.A.S. 8061, 94 LNTS 65) (1925 Geneva Gas Protocol).
- Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of April 10, 1972 (26 UST 583, T.I.A.S. 8062, 1015 UNTS 163) (BWC).
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of May 18, 1977 (31 UST 333, TIAS 9614) (ENMOD Convention).
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of January 13, 1993 (CWC).

A-3. Law of Armed Conflict Treaties Signed but Not Ratified by the United States:

- Protocol (I) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts of June 8, 1977 (AP I).
- Protocol (II) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of June 8, 1977 (AP II).

A-4. Law of Armed Conflict or Relevant Arms Control Treaties to Which the United States Is Neither a Signatory Nor a Party:

- Hague Declaration (IV, 3) Concerning Expanding Bullets of July 29, 1899.
- Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities of October 18, 1907.
- Hague Convention VII Relating to the Conversion of Merchant Ships into Warships of October 18, 1907.
- First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954.
- Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of September 18, 1997.
- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of March 26, 1999.
- Convention on Cluster Munitions of May 30, 2008.
- Rome Statute of the International Criminal Court of July 17, 1988 (Rome Statute)

A-5. Law of Armed Conflict or Relevant Arms Control Treaties or Documents of Mainly Historical Value:

- St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight of December 11, 1868 (1868 St. Petersburg Declaration).
- Hague Declaration IV, 1 to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other Methods of a Similar Nature of July 29, 1899.
- Hague Declaration IV, 2 Concerning Asphyxiating Gases of July 29, 1899.
- Hague Convention II with Respect to the Laws and Customs of War on Land, with Annex of Regulations of July 29, 1899 (32 Stat. 1803, TS 403, 1 Bevans 247) (1899 Hague II).
- Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of October 18, 1907.
- Hague Declaration XIV Prohibiting the Discharge of Projectiles and Explosives from Balloons of October 18, 1907.
- Washington Treaty Relating to the Use of Submarines and Noxious Gases in Warfare of February 6, 1922 (1922 Washington Treaty).
- Hague Rules of Air Warfare of February 17, 1923 (1923 Hague Air Rules).
- Geneva Convention Amelioration of the Condition of the Wounded and Sick of Armies in the Field of July 27, 1929 (47 Stat. 2074; Treaty Series 847) (1929 GWS).
- Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929 (47 Stat. 2021; Treaty Series 846) (1929 GPW).
- Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments of April 15, 1935 (49 Stat. 3267, TS 899, 3 Bevans 254, 167 LNTS 279) (Roerich Pact).

Glossary

The glossary lists acronyms and terms with Army or joint definitions. Terms for which FM 6-27 is the proponent are marked with an asterisk (*). The proponent manual for other terms is listed in parentheses after the definition.

SECTION I – ACRONYMS AND ABBREVIATIONS

ADP	Army doctrine publication
ADRP	Army doctrine references publication
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I") (June 8, 1977). This nonstandard acronym, and its definition, is for this publication only.
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II") (June 8, 1977). This nonstandard acronym, and its definition, is for this publication only.
AR	Army regulation
CCW	1980 United Nations Convention on Conventional Weapons (official title is the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Geneva, October 10, 1980))
CID	criminal investigation division
CJCSI	Chairman of the Joint Chiefs of Staff instruction
DA	Department of the Army
DOD	Department of Defense
DODI	Department of Defense instruction
DODD	Department of Defense directive
DOJ	Department of Justice
FM	field manual
GC	Geneva Convention Relative to the Protection of Civilian Persons in Time of War
GMT	Greenwich Mean Time
GPW	Geneva Convention Relative to the Treatment of Prisoners of War
GWS	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GWS Sea	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
HR	Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex: Regulation Concerning the Laws and Customs of War on Land ("The Hague Regulations") (The Hague, October 18, 1907). This nonstandard acronym, and its definition, is for this publication only.

ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
JP	joint publication
LOAC	the law of armed conflict
MCA	Military Commissions Act
MCO	Marine Corps order
MCTP	Marine Corps tactical publication
MEJA	Military Extraterritorial Jurisdiction Act
MMC	Manual for Military Commissions
NCIS	Naval Criminal Investigative Service
POW	prisoner of war
RCM	Rules for Courts-Martial
UCMJ	Uniform Code of Military Justice
UN	United Nations
U.S.	United States
USC	United States Code

SECTION II – TERMS

Armed Forces of the United States

A term used to denote collectively all components of the Army, Marine Corps, Navy, Air Force, and Coast Guard (when mobilized under Title 10, United States Code, to augment the Navy). (JP 1).

cartel

An agreement entered into by opposing belligerents for the exchange of POWs (see Lieber Code, art. 106).

civilian internee

A civilian who is interned during armed conflict, occupation, or other miltary operation for security reasons, for protection, or because he or she committed an offense against the detaining power. Also called CI. (DODD 2310.01E) (ADP 1-02)

collateral damage

A form of collateral effect that causes unintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time. (JP 3-60)

detainee

Any person captured, detained, or otherwise under the control of Department of Defense personnel. (JP 3-63)

displaced person

A broad term used to refer to internally and externally displaced persons collectively. (JP 3-29)

***distinction**

The LOAC principle that obliges parties to a conflict to distinguish between combatants and the civilian population and to distinguish between military objectives and and protected property and places.

enemy

A party identified as hostile against which the use of force is authorized. (ADP 3-0)

enemy combatant

In general, a person engaged in hostilities against the United States or its coalition partners during an armed conflict. (DODD 2310.01E)

***environmental modification technique**

Any method of warfare for changing—through the deliberate manipulation of natural processes—the dynamics, composition, or structure of the Earth (to include its biota, lithosphere, hydrosphere, and atmosphere) or outer space.

***general license**

A document that generally or partially relaxes the exercise of the rights of war in regards to trade in relation to any community or individuals liable to be affected by their operation.

***honor**

The LOAC prinicple that demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing forces. Also called chivalry.

***humanity**

The LOAC principle that forbids inflicting suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose. Also called unnecessary suffering or superflous injury.

***international armed conflict**

Any declared war between States, or to any other armed conflict between States, even if the state of war is not recognized by one of them.

intelligence interrogation

The systematic process of using approved interrogation approaches to question a captured or detained person to obtain reliable information to satisfy intelligence requirements, consistent with applicable law. (JP 2-01.2)

***jus ad bellum**

That part of international law that regulates the circumstances in which States may resort to the use of force in international relations.

***jus in bello**

That part of international law relating to the conduct of hostilities and the protection of war victims, from combatants who are wounded and out of combat, to prisoners of war and civilians.

law of armed conflict

See law of war. (JP 3-84)

law of war

That part of international law that regulates the conduct of armed hostilities. Also called the law of armed conflict. (JP 3-84)

***levée en masse**

Inhabitants of a non-occupied territory who, upon approach of the enemy, spontaneously take up arms to resist the invading forces, with no time to form into regular armed units, provided that they carry their arms openly and respect the laws and customs of war.

military deception

Actions executed to deliberately mislead adversary military, paramilitary, or violent extremist organization decision makers, thereby causing the adversary to take specific actions (or inactions) that will contribute to the accomplishment of the friendly mission. Also called MILDEC. (JP 3-13.4)

***military necessity**

The principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not forbidden by the law of armed conflict.

***military objective**

Certain persons and objects during hostilities which, by their nature, location, purpose, or use, makes an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

military occupation

A condition in which territory is under the effective control of a foreign armed force. See also occupied territory. (JP 3-0)

***military passport**

A document issued by order of a commander of belligerent forces that authorizes a person or persons named therein and residing or sojourning within territory occupied by such forces to travel unmolested within the territory, with or without permission to pass, or to pass and return, by designated routes, through the lines, subject to conditions or limitations imposed by the commander.

National Detainee Reporting Center

The national-level center that accounts for all persons who pass through the care, custody, and control of the Department of Defense and that obtains and stores information concerning detainees and their confiscated person property. Also called NDRC. (JP 3-63)

nongovernmental organization

A private, self-governing, not-for-profit organization dedicated to alleviating human suffering; and/or promoting education, health care, economic development, environmental protection, human rights, and conflict resolution; and/or encouraging the establishment of democratic institutions and civil society. Also called NGO. (JP 3-08)

***non-international armed conflict**

An armed conflict not between States, such as a conflict between a State and a non-State armed group or a conflict between two non-State armed groups.

objective

1. The clearly defined, decisive, and attainable goal toward which an operation is directed. 2. The specific goal of the action taken which is essential to the commander's plan. See also target. (JP 5-0)

occupied territory

Territory is considered occupied when it is actually placed under the authority of a hostile army. The occupation extends only to the territory where such authority has been established and can be exercised. (HR art. 42)

***opinio juris**

A statement of customary international law resulting from a general and consistent practice of States followed from a sense of legal obligation.

***parlementaire**

Agents or envoys employed by commanders in the field to go in person within the enemy lines for the purpose of communicating or negotiating openly and directly with the enemy commander.

pillage

Intentionally and in the absence of military necessity appropriating or seizing property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure. (10 U.S.C. § 950t(5)). Also called looting and plunder.

prisoner of war

A detained person (as defined in Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949) who, while engaged in combat under orders of his or her government, is captured by the armed forces of the enemy. Also called POW. (JP 3-50)

***proportionality**

The LOAC principle requiring combatants to refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects would be excessive in relation to the concrete and direct military advantage expected to be gained.

protected emblems

The red cross, red crescent, and other symbols that designate that persons, places, or equipment so marked have a protected status under the law of war. Also called the distinctive emblems. (JP 3-60)

protected persons/protected places

Persons (such as enemy prisoners of war) and places (such as hospitals) that enjoy special protections under the law of war and which may or may not be marked with protected emblems. (JP 3-84)

***protecting power**

A neutral or non-belligerent State having a humanitarian role in armed conflict.

repatriation

1. The procedure whereby American citizens and their families are officially processed back into the United States subsequent to an evacuation. See also evacuation. (JP 3-68) 2. The release and return of enemy prisoners of war to their own country in accordance with the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. (JP 1-0)

***reprisal**

Acts that are otherwise not permitted by LOAC in order to persuade a party to the conflict to cease violating LOAC.

retained personnel

Detainees who fall into one of the following categories: a. Designated enemy medical personnel and medical staff administrators who are engaged in either the search for, collection, transport, or treatment of the wounded or sick, or the prevention of disease; b. Staff of National Red Cross and Red Crescent Societies and that of other volunteer aid societies, duly recognized and authorized by their governments to assist medical service personnel of their own armed forces, provided they are exclusively engaged in the search for, or the collection, transport or treatment of wounded or sick, or in the prevention of disease, and provided that the staff of such societies are subject to military laws and regulations; c. Chaplains attached to enemy armed forces. Also called RP. See also personnel. (JP 3-63)

safeguard

A detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral affected by the relationship of belligerent forces in their prosecution of war or during circumstances amounting to a state of belligerency (see Manual for Courts-Martial (2016), part IV, para. 26 (art. 102)).

***safe-conduct pass**

A document issued by a commander of belligerent forces, but to persons residing or traveling outside territory occupied by such forces, to enter and remain within or pass through areas occupied by such forces.

***special license**

A document that allows individuals to take a particular voyage or journey to import or export particular goods.

***suspension of arms**

A form of local armistice concluded between commanders of military forces for some local military purpose, such as to recover and bury the dead, to collect and care for the wounded and sick, to arrange for exchange of prisoners, or to enable a commander to communicate with his or her government or superior. Also called a suspension of fire.

target

An entity or object that performs a function for the threat considered for possible engagement or other action. See also objective area. (JP 3-60)

targeting

The process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities. See also joint targeting coordination board; target. (JP 3-0)

***unprivileged belligerent**

A person who, by engaging in hostilities, has incurred the corresponding liabilities of combatant status (for example, being subject to attack or detention), but who is not entitled to the distinct privileges of combatant status (for example, combatant immunity and POW status upon capture).

weaponeering

The process of determining the specific means required to create a desired effect on a given target. (JP 3-60)

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