

CHAPTER 2

THE LAW OF ARMED CONFLICT

REFERENCES: FOUNDATIONAL INTERNATIONAL LAW TREATIES (ALSO CONTAINED IN THE LOAC DOCUMENTARY SUPPLEMENT)

1. (Hague) Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461, *entered into force and for the United States* Jan. 26, 1910 [hereinafter Hague IV].
2. (Hague) Regulations Respecting the Laws and Customs of War on Land, annex to Hague IV [hereinafter Hague Regulations or HR].
3. (Hague) Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. 540, 1 Bevans 654, 205 Consol. T.S. 299, 3 Martens Nouveau Recueil (ser. 3) 504, *entered into force and for the United States* Jan. 26, 1910 [hereinafter Hague V].
4. (Hague) Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, T.S. 542, 1 Bevans 681, 205 Consol. T.S. 345, 3 Martens Nouveau Recueil (ser. 3) 604, *entered into force and for the United States* Jan. 26, 1910 [hereinafter Hague IX].
5. UNITED NATIONS (U.N.) CHARTER, *entry into force and for the United States* Oct. 24, 1945 [hereinafter U.N. Charter]
6. (Geneva) Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956 [hereinafter GC I].
7. (Geneva) Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956 [hereinafter GC II].
8. (Geneva) Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956 [hereinafter GC III].
9. (Geneva) Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956 [hereinafter GC IV].
10. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977), *entered into force* Dec. 7, 1978 (signed by the United States Dec. 12, 1977, not transmitted to U.S. Senate, see S. TREATY DOC. NO. 100-2) [hereinafter AP I].
11. Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M. 1442 (1977), *entered into force* Dec. 7, 1978 (signed by the United States Dec. 12, 1977, transmitted to the U.S. Senate Jan. 29, 1987, still pending action as S. TREATY DOC. NO. 100-2) [hereinafter AP II].
12. Protocol Additional (III) to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, S. TREATY DOC. NO. 109-10, 45 I.L.M. 558 (2006), *entered into force* Jan. 14, 2007, *for the United States* Sept. 8, 2007 [hereinafter AP III].
13. (Hague) Convention for the Protection of Cultural Property in the Event of Armed Conflict, With Regulations for the Execution of the Convention, May 14, 1954, S. TREATY DOC. NO. 106-1, 249 U.N.T.S. 240, *entered into force* Aug. 7, 1956, *for the United States* Mar. 13, 2009 (First Protocol still pending action, see S. TREATY DOC. NO. 106-1) [hereinafter Hague Cultural Property Convention].

SELECT WEAPONS TREATIES (ALSO CONTAINED IN THE LOAC DOC SUPP)

14. (Geneva) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. 8061, 94 L.N.T.S. 65, *entered into force* Feb. 8, 1928, *for the United States* Apr. 10, 1975 [hereinafter Geneva Gas Protocol].
15. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. 8062, 1015 U.N.T.S. 163, *entered into force and for the United States* Mar. 26, 1975 [hereinafter BWC].
16. (Paris) Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 3, 32 I.L.M. 800, *entered into force and for the United States* Apr. 29, 1997 [hereinafter CWC].
17. Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, S. TREATY DOC. NO. 103-25, 1342 U.N.T.S. 137, 19 I.L.M. 1524, *entered into force* Dec. 2, 1983, *for the United States* Sept. 24, 1995 [hereinafter CCW].

EXECUTIVE ORDERS AND MILITARY REGULATIONS

18. Exec. Order No. 12,333, 3 C.F.R. 200 (1981), as amended by Exec. Order Nos. 13,284 (2003), 13,335 (2004) and 13,470 (2008) [hereinafter E.O. 12333].
19. DEP'T OF DEF. DIRECTIVE 2060.1, IMPLEMENTATION OF, AND COMPLIANCE WITH, ARMS CONTROL AGREEMENTS (9 Jan. 2001) [hereinafter DoDD 2060.1]
20. DEP'T OF DEF. DIRECTIVE 2311.01E, DoD LAW OF WAR PROGRAM (9 May 2006)(Change 1 of 15 Nov. 2010) (canceling DoDD 5100.77, DoD Law of War Program (9 Dec. 1998)) [hereinafter DoDD 2311.01E].
21. DEP'T OF DEF. DIRECTIVE 3000.3, Policy for Non-Lethal Weapons (9 July 1996) [hereinafter DoDD 3000.3].
22. DEP'T OF DEF. DIRECTIVE 5000.01, The Defense Acquisition System (12 May 2003) [hereinafter DoDD 5000.01].
23. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 5810.01D, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (30 Apr 2010) [hereinafter CJCSI 5810.01D].
24. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956) (Change 1, 15 July 1976) [hereinafter FM 27-10].
25. U.S. DEP'T OF ARMY, ARMY REG. 27-53, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW (1 Jan. 1979) [hereinafter AR 27-53].
26. U.S. DEP'T OF NAVY, NAVAL WARFARE PUBLICATION (NWP) 1-14M/U.S. MARINE CORPS WARFIGHTING PUBLICATION (MCWP) 5-12.1/U.S. COAST GUARD COMMANDANT'S PUBLICATION (COMDTPUB) P5800.7A , THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (July 2007) [hereinafter NWP 1-14M].
27. U.S. DEP'T OF NAVY, DEP'T OF NAVY IMPLEMENTATION AND OPERATION OF THE DEFENSE ACQUISITION SYSTEM AND THE JOINT CAPABILITIES INTEGRATION AND DEVELOPMENT SYSTEM (1 Sept. 2011) [hereinafter SECNAVINST 5000.2E].
28. U.S. DEP'T OF AIR FORCE, AIR FORCE POLICY DIRECTIVE 51-4, COMPLIANCE WITH THE LAW OF ARMED CONFLICT (4 Aug. 1993) [hereinafter AFPD 51-4].

I. INTRODUCTION

This Chapter summarizes key Law of Armed Conflict (LOAC) provisions for commanders and military personnel in the conduct of operations in both international and non-international armed conflicts. It discusses the purposes and basic principles of the LOAC, its application in armed conflict, the legal sources of the law, the conduct of hostilities, treatment of protected persons, military occupation of enemy territory, neutrality, and compliance and enforcement measures.

II. DEFINITION

The law of war (LOW) is “that part of international law that regulates the conduct of armed hostilities.”¹ It is often termed the law of armed conflict (LOAC) and sometimes called international humanitarian law (IHL). The LOAC encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law (CIL).² This chapter will use the term LOAC to refer to the LOW or IHL.

III. POLICY

Department of Defense (DoD) policy is to comply with the LOAC “during all armed conflicts, however such conflicts are characterized, and in all other military operations.”³ Every Soldier, Sailor, Airman, Marine, and all others accompanying U.S. forces must comply with the LOAC, particularly its basic principles explained below and its requirements for humane treatment of detainees. The nature and extent of LOAC obligations may differ, however, depending on the laws applicable to the type of armed conflict.

IV. PURPOSES OF THE LAW OF ARMED CONFLICT

A. The fundamental purposes of the LOAC are humanitarian and functional in nature. The humanitarian purposes include:

1. Protecting both combatants and noncombatants from unnecessary suffering;
2. Safeguarding persons who fall into the hands of the enemy; and
3. Facilitating the restoration of peace.

B. The functional purposes include:

1. Ensuring good order and discipline;
2. Fighting in a disciplined manner consistent with national values; and
3. Maintaining domestic and international public support.

V. BASIC PRINCIPLES OF THE LAW OF ARMED CONFLICT

A. **Principle of Military Necessity.** This principle “justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”⁴ Article 23(g) of the Hague Regulations (HR) explicitly recognizes military necessity as valid. It mandates that a belligerent not “destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” Numerous other provisions in the LOAC also acknowledge this principle explicitly or implicitly. As a principle of *jus ad bellum*, military necessity justifies the use of force required to accomplish a lawful mission.

1. **Military necessity does not authorize acts otherwise prohibited by the LOAC.** This principle must be applied in conjunction with other LOAC principles discussed in this chapter as well as other, more specific, legal constraints set forth in LOAC treaties to which the United States is a party.

2. **Military necessity is not a criminal defense for acts expressly prohibited by law.**

a. The LOAC prohibits the intentional targeting of persons protected under any circumstances. Noncombatant military personnel (e.g., chaplains, prisoners of war, or the wounded) and civilians “enjoy the protection afforded [by this rule] unless and for such time as they take a direct part in hostilities.”⁵

¹ DoDD 2311.01E, para. 3.1. Note: This definition will be updated in the next Department of Defense Law of War Manual. The law of war “is that part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and relationships between belligerent, neutral, and non-belligerent states.

² *Id.*

³ *Id.*, para. 4.1.

⁴ FM 27-10, para. 3a.

⁵ AP I, art. 51(3).

b. Civilian objects are generally protected from intentional attack or destruction. However, civilian objects may lose their protections if they are being used for military purposes or if there is a military necessity for their destruction or seizure. Civilian objects may, in such circumstances, become military objectives (as discussed below), and if so, the LOAC permits their destruction.⁶ For example, General Lothar Rendulic was German Commander in Norway in late 1944. Fearing a Russian invasion against German-occupied Norway, he adopted a “scorched-earth” policy, destroying anything that could be used by the Russians. The Nuremberg Tribunal convicted General Rendulic of other charges, but found him not guilty of unlawfully destroying civilian property by his “scorched earth” tactics to thwart an enemy invasion that never came.⁷ Though the Tribunal expressed doubt as to his judgment, it held that HR, Article 23(g) justified his actions, as “the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made.”⁸

c. **The “Rendulic Rule.”** The Rendulic case also stands for a broader standard regarding liability for battlefield acts: commanders and personnel should be evaluated based on **information reasonably available at the time of decision**. In recently ratifying several LOAC treaties, the U.S. Senate attached understandings that “any decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action shall only be judged on the basis of that person’s assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.”⁹

d. There may be situations where, because of incomplete intelligence or the failure of the enemy to abide by the LOAC, civilian casualties occur. Example: The Iraqi Al Firdos C3 Bunker. During the first Persian Gulf War (1991), U.S. military planners identified this Baghdad bunker as an Iraqi military command and control center. Barbed wire surrounded the complex, it was camouflaged, armed sentries guarded its entrance and exit points, and electronic intelligence identified its activation. Unknown to coalition planners, some Iraqi civilians used upper levels of the facility as nighttime sleeping quarters. The bunker was bombed, resulting in over 400 civilian deaths. Was there a violation of the LOAC? Not by U.S. forces, but there was a clear violation of the principle of distinction (discussed *infra*) by Iraqi forces. Based upon information gathered by Coalition planners, the commander made an assessment that the target was a military objective. Although the attack may have resulted in unfortunate civilian deaths, there was no LOAC violation because the attackers acted in good faith based upon the information reasonably available at the time the decision to attack was made.

B. Principle of Distinction. Sometimes referred to as the principle of *discrimination*, this principle requires that belligerents distinguish combatants from civilians and military objectives from civilian objects (i.e., protected property or places). In keeping with this “grandfather” principle of the LOAC, **parties to a conflict must direct their operations only against combatants and military objectives.**¹⁰

1. Additional Protocol I (AP I) prohibits “indiscriminate attacks.” As examples, under Article 51 thereof, paragraph 4, these are attacks that:

- a. are “not directed against a specific military objective,” (e.g., Iraqi SCUD missile attacks on Israeli and Saudi cities during the Persian Gulf War); **or**
- b. “employ a method or means of combat the effects of which cannot be directed at a specified military objective,” (e.g., this might prohibit area bombing in certain populous areas, such as a bombardment “which

⁶ See HR art. 23(g), FM 27-10, paras. 56, 58; compare GC IV, art. 147.

⁷ See “Opinion and Judgment of Military Tribunal V,” United States v. Wilhelm List, X TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1296 (Feb. 19, 1948) (Case 7) [hereinafter *Hostage Case*]. The case consolidated charges against twelve German general officers for their conduct while in command of armies occupying enemy countries, including the alleged taking of civilian hostages.

⁸ *Id.* at 1297.

⁹ S. EXEC. REP. NO. 110–22, at 13 (2008) (CCW Protocols III (incendiary weapons) and IV (blinding laser weapons)); S. EXEC. REP. NO. 106–2, at 20 (2009) (CCW Amended Protocol II (landmines and booby traps)). See also S. EXEC. REP. NO. 110–26, at 10 (2008) (Hague Cultural Property Convention). This chapter discusses these treaties in greater detail below.

¹⁰ AP I, art. 48. As stated above, the United States is not a party to AP I, but does accept many of AP I’s provisions as a matter of policy and views some of them as CIL. This handbook takes no position on which provisions constitute CIL and which provisions are followed as a matter of policy. See the LOAC Documentary Supplement at 232–36 for additional information.

treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, or village . . . ”¹¹); **or**

c. “employ a method or means of combat the effects of which cannot be limited as required” by the Protocol (e.g., release of dangerous forces¹² or collateral damage excessive in relation to concrete and direct military advantage¹³); **and**

d. “consequently, in each case, are of a nature to strike military objectives and civilians or civilian objects without distinction.”¹⁴

2. AP I defines military objectives as “objects 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.”¹⁵ See discussion of Military Objectives *infra*.

3. Distinction applies both offensively and defensively. It requires parties to a conflict to engage only in military operations that distinguish (or discriminate) between combatants and civilians not taking direct part in the hostilities, and direct attacks solely against combatants. Similarly, military force must be directed only against military objectives, not civilian objects. Under the principle of distinction, the civilian population as such, as well as individual civilians, may not be made the object of deliberate attack.¹⁶ Thus, in both pre-planned and dynamic targeting scenarios, commanders must ensure they take reasonable precautions to ensure they are: (1) striking a legitimate military target, and (2) collateral damage (civilian death and injury) will not outweigh the military advantage gained. Defensively, the principle of distinction requires that military forces “distinguish themselves from the civilian population so as not to place the civilian population at undue risk. This includes not only physical separation of military forces and other military objectives from civilian objects . . . but also other actions, such as wearing uniforms.”¹⁷

C. Principle of Proportionality. This principle requires that **the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.**¹⁸ Proportionality is not a separate legal standard as such, but provides a method by which military commanders can balance military necessity and civilian loss or damage in circumstances when an attack may cause incidental damage to civilian personnel or property.

¹¹ AP I, art. 51, para. 4(a).

¹² AP I, art. 56. The United States does not entirely accept this article. See the LOAC DocSupp at 232-235.

¹³ AP I, art. 51, para. 4(b).

¹⁴ AP I, art. 51, para. 4(c).

¹⁵ AP I, art. 52, para. 2; see also CCW Protocol II, art. 2(4); CCW Amended Protocol II, art. 2(6); CCW Protocol III, art. 1(3)

¹⁶ AP I, art. 51, para. 2, art. 52, art. 53. These include hospitals, cultural sites, and other undefended places. Also see 1907 Convention Respecting the Laws and Customs of War on Land, October 18, 1907 (hereinafter Hague IV) art. 27. Hague IV art. 27 states that in bombardments, “all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals, and places where sick and wounded are collected, provided they are not being used at the time for military purposes. AP I art. 53 also protects religious and cultural sites from attack and also bans their use in support of a military effort. One example of this misuse would Nazi Germany’s use of Monte Cassino, an ancient monastery in Italy, as a fortress to slow the Allied advance in 1944.

¹⁷ AP I, art. 57, para. 2. Additional Protocol I states that those who plan an attack shall do everything “feasible” to verify that the objectives to be attacked are neither civilians nor civilian objects, and take all “feasible” precautions in the choice of means and methods of attack to minimize individual civilian losses. In the 1987 Matheson Memo (See Doc. Supp. p. 232), Deputy Department of State Legal Advisor Michael Matheson provided the U.S. interpretation of “feasible” under Art. 57-60 to mean “practicable.” These precautions may include warnings. Per Hague IV art. 26, a warning is required before bombardment if civilians are present, unless the attack is intended as a surprise attack. AP I art. 57 calls for warnings to civilians unless “circumstances do not permit.” On the separate but related issue of distinction, see W. Hays Parks, *Special Forces’ Wear of Non-Standard Uniforms*, 4 CHI. J. INT’L L. 493, 514 (2003). See also HR, art. 1(2) (requiring a fixed distinctive insignia); FM 27-10, para. 74 (noting concealment of combat status, by a member of the armed forces, triggers loss of the right to be treated as a POW. Note however, that FM 27-10 conflicts with more recent views, including that of Mr. Parks, who noted that historically members of the regular armed forces always received POW status once they were identified as such, no matter what they were attired in when captured. Even assuming that members of the armed forces (wearing civilian clothes or enemy uniforms) do get POW status, they can still be tried and punished for violations of the law of war, since combatant immunity only applies to lawful acts.

¹⁸ FM 27-10, para. 41, change 1. While the United States is not a party to AP I, this language is derived from the prohibition on indiscriminate attacks contained in Article 51 of the Protocol.

1. Collateral Damage. Collateral damage, also called incidental damage, consists of both unavoidable and unintentional damage to civilian personnel and property incurred while attacking a military objective. **Incidental damage is not a violation of international law.** While no LOAC treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. For example, AP I, Article 51(5) describes indiscriminate attacks as those causing “*incidental* loss . . . excessive . . . to . . . the military advantage anticipated.”¹⁹

2. Attacks and Military Advantage. The term “attack” is defined in Article 49 of AP I as “acts of violence against the adversary, whether in offence or defence.”²⁰ “Military advantage” is not restricted to tactical gains, but is linked to the full context of one’s war strategy. Balancing between incidental damage to civilian objects and incidental civilian casualties may be done on a target-by-target basis, but also may be done in an overall sense against campaign objectives. At the time of its ratification of AP I, the United Kingdom declared that “the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.” Proportionality balancing typically involves a variety of considerations, including the security of the attacking force.²¹

D. **Principle of Unnecessary Suffering.** Sometimes referred to as the principle of *superfluous injury* or *humanity*, this principle requires military forces to **avoid inflicting gratuitous violence on the enemy.** It arose originally from humanitarian concerns over the sufferings of wounded soldiers, and was codified as a weapons limitation: “It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering.”²² More broadly, this principle also encompasses the humanitarian spirit behind the Geneva Conventions to **limit the effects of war on the civilian population and property**, and serves as a counterbalance to the principle of military necessity.

1. Today, this principle underlies three requirements to ensure the legality of weapons and ammunitions themselves, as well as the methods by which such weapons and ammunition are employed. Military personnel may not use arms **that civilized societies recognize as *per se* causing unnecessary suffering** (e.g., projectiles filled with glass, hollow point or soft-point small caliber ammunition, lances with barbed heads), must scrupulously observe **treaty limitations** on weapons use (e.g., CCW Protocol III’s prohibition on use of certain incendiary munitions near concentrations of civilians), and must not use otherwise lawful weapons in a manner **calculated to cause unnecessary suffering** (i.e., with deliberate intent to inflict *superfluous or gratuitous* injury to the enemy).

2. The prohibition of unnecessary suffering constitutes acknowledgement that *necessary suffering* to combatants is lawful in armed conflict, and may include severe injury or loss of life justified by military necessity. **There is no agreed definition for unnecessary suffering.** A weapon or munition would be deemed to cause unnecessary suffering only if it inevitably or in its normal use has a particular effect, and the injury caused thereby is considered by governments as disproportionate to the military necessity for that effect, that is, the military advantage to be gained from use. This balancing test cannot be conducted in isolation. A weapon’s or munition’s effects must be weighed in light of comparable, lawful weapons or munitions in use on the modern battlefield.

3. A weapon cannot be declared unlawful merely because it *may* cause severe suffering or injury. The appropriate determination is whether a weapon’s or munition’s employment for its *normal or expected use* would be prohibited under some or all circumstances. The correct criterion is whether the employment of a weapon for its normal or expected use inevitably would cause injury or suffering **manifestly disproportionate** to the military advantage realized as a result of the weapon’s use. A State is not required to foresee or anticipate all possible uses or misuses of a weapon, for almost any weapon could be used in ways that might be prohibited.

4. In practice, DoD service TJAGs oversee legal reviews of weapons during the procurement process. JAs should read these legal reviews prior to deployment for all weapons in their unit’s inventory, watch for unauthorized modifications or deliberate misuse, and coordinate with higher headquarters legal counsel if it appears that a weapon’s normal use or effect appears to violate this principle. See also the discussion of the DoD Weapons Review Program, *infra*.

E. *Chivalry.* Though not usually identified as one of the LOAC’s basic legal principles, the concept of chivalry has long been present in the law of armed conflict. Based on notions of honor, trust, good faith, justice, and professionalism, chivalry prohibits armed forces from abusing the law of armed conflict in order to gain an

¹⁹ AP I, art. 51, para. 5(b).

²⁰ AP I, art. 49, para. 1.

²¹ See, e.g., DOD FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR (April 1992), p. 611.

²² HR, art. 23(e).

advantage over their adversaries. Chivalry, therefore, demands a degree of fairness in offense and defense and requires mutual respect and trust between opposing forces. It denounces and forbids resort to dishonorable means, expedients, or conduct that would constitute a breach of trust.²³ While chivalry is not based on reciprocity, it nevertheless must be applied at all times regardless of enemy forces' action.

1. The concept of chivalry, as well as distinction, informs the LOAC's express prohibition of treachery and perfidy, defined as "bad faith." AP I, Article 37, states, "[i]t is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe he is entitled to, or is obligated to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy." Examples of perfidy include feigning surrender in order to draw the enemy closer, and then firing on the enemy at close range, feigning wounded status, misusing protective emblems, such as the Red Cross, and feigning noncombatant or neutral status. Perfidy, therefore, involves injuring the enemy through his adherence to the LOAC. Perfidious behavior degrades the protections and mutual restraints developed in the interest of all Parties, combatants, and civilians.

2. Chivalry does not forbid ruses or deception, which are "admitted as a just and necessary means of hostility, consistent with honorable warfare."²⁴ See discussion of Ruses and Deception, *infra*.

VI. APPLICATION OF THE LAW OF ARMED CONFLICT

A. The LOAC applies to all cases of declared war or any other armed conflicts that arise between the United States and other nations, even if the state of war is not recognized by one of them. **This threshold is codified in Common Article 2 of the Geneva Conventions.** Armed conflicts such as the 1982 Falklands War, the Iran-Iraq War of the 1980s, and the first (1991) and second (2003) U.S.-led coalition wars against Iraq were **international armed conflicts (IACs)** to which the full body of LOAC applied. AP I purported to expand the notion of IAC and application of the full Geneva Conventions to certain wars of "national liberation" for its State parties.²⁵ Though the United States has signed (but not ratified) and accepts several articles of AP I, it has persistently objected to this article. To date, no armed group has successfully invoked this expansion.

B. The LOAC also applies to armed conflicts between one or more States and organized armed groups. **Common Article 3 of the Geneva Conventions** and AP II (signed and largely supported, but not yet ratified by the United States) enumerate specific protections for these **non-international armed conflicts (NIACs)**. State responses to guerrilla warfare, internal rebellions, and transnational terrorist operations could all qualify as NIACs. However, nations experiencing such conflicts (even with significant military response and numerous casualties) rarely formally acknowledge that a NIAC exists. Nevertheless, the legal concept of NIAC remains significant.

C. Not all conflicts between a State and armed actors constitute armed conflicts. For example, Article 1(2) of AP II excludes "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." JAs should look primarily to other sources of law for guidance in such circumstances, such as domestic law, but may also be called upon to help commands develop policies that embody the spirit of LOAC and accompanying principles when confronting escalating violence or threats.

D. In peace operations like those in Somalia, Haiti, and Bosnia, questions regarding the applicability of the LOAC arise frequently. The United States, United Nations, and NATO have long required that their forces would apply the LOAC in these operations,²⁶ but particular treaties often do not specifically mention peace operations and categorization of a conflict as an IAC or NIAC may be uncertain. When facing situations that appear to fall short of the traditional threshold of armed conflict would trigger the LOAC, Judge Advocates (JA) should consult with judge advocates of more senior commands to determine how best to comply with the LOAC and U.S. customary practice.

E. In summary, where the LOAC expressly applies, JAs must advise commanders and U.S. forces to follow its requirements exactly. Even where not directly applicable, U.S. practice has been to comply with the LOAC to the extent "practicable and feasible."²⁷ In military operations short of international armed conflict, LOAC treaties

²³ Hague IV, art. 23; FM 27-10 (1940), para. 4(c).

²⁴ Lieber Code, para. 101.

²⁵ AP I, art. 1(4).

²⁶ See, e.g., DoDD 2311.01E, para. 4.

²⁷ See Memorandum of W. Hays Parks to the Judge Advocate General of the Army, 1 October 1990.

provide an invaluable template for military conduct. The Soldier's Rules²⁸ also provide useful standards for the individual Soldier in the conduct of operations across the conflict spectrum. The military commander, with the JA's assistance and advice, must determine those provisions of LOAC that best fit the mission and situations not covered by formal rules, and train forces accordingly.

VII. SOURCES OF THE LAW OF ARMED CONFLICT.

A. **The Law of The Hague.**²⁹ "Hague Law," which is typically associated with targeting, regulates the "means and methods" of warfare, including: prohibitions against using certain weapons such as poison; humanitarian concerns such as warning the civilian population before a bombardment; and the law of belligerent occupation (particularly with respect to property.) The rules relating to the means and methods of warfare are primarily derived from articles 22 through 41 of the 1907 Regulations Respecting the Laws and Customs of War on Land annexed to Hague IV; hence the term "Hague Regulations."³⁰

B. **Geneva Conventions of 1949.**³¹ As opposed to the "means and methods" approach of Hague Law, the term "Geneva Law" generally refers to a regulatory approach which seeks to protect "victims" of war such as wounded and sick, shipwrecked at sea, prisoners of war, and civilians. Geneva law seeks to ensure humane treatment of the "victims" it aims to "respect and protect."

C. **1977 Additional Protocols to the Geneva Conventions.**³² AP I illustrates the convergence of "Hague Law" and "Geneva Law" by updating and including both traditions in one document. Although the United States has not ratified either AP I or AP II, many nations have. U.S. commanders must be informed that AP I and AP II bind numerous allied forces, including all members of NATO except Turkey. The United States also believes some provisions of AP I and II to be CIL, and follows others as a matter of policy.³³ Documents outlining the specific provisions of AP I which the US regards as CIL can be found in pages 232 to 235 of the Documentary Supplement. This difference in obligation has not proven to be a major obstacle to U.S. allied or multinational operations. In 2007, the United States ratified AP III to the Geneva Conventions, which recognizes the Red Crystal as a symbol equal to the Red Cross and Red Crescent.

D. Other U.S. Sources. Numerous weapons treaties, such as the CCW and its Protocols, prohibit or regulate weapons use. Many of these are discussed below and reprinted in the LOAC DocSupp. Implementing LOAC guidance for U.S. armed forces is found in DoD, joint, and service regulations, policies, manuals, and doctrine.³⁴

VIII. COMBATANTS AND PROTECTED PERSONS

A. General Rules. The LOAC permits intentional attacks against combatants, but not civilians or noncombatants. As such, the civilian population is protected from direct attack. An individual civilian is protected from direct attack unless and for such time as he or she takes a direct part in hostilities (DPH).³⁵ The phrase "protected persons" is a more narrow legal term of art specific to GC IV, as discussed below. The term noncombatant appears in GC IV, Article 15 but is not precisely defined in the LOAC. It can refer to various categories of military personnel protected from attack, such as military medical personnel and chaplains, plus those out of combat like prisoners of war and the wounded, sick, and shipwrecked, as well as to civilians.

B. Privileges of Lawful Combatants

1. Combatants. Generally, **combatants are military personnel lawfully engaging in hostilities in an armed conflict on behalf of a party to the conflict.** Combatants are lawful targets unless *hors de combat*, that is, out of combat status—captured, wounded, sick or shipwrecked and no longer engaged in hostilities. Combatants also are *privileged* belligerents, i.e., authorized to use force against the enemy on behalf of the State.

²⁸ Included *infra* in this chapter, Appendix A.

²⁹ See Hague IV and Hague IX (1907).

³⁰ Hague IV, arts. 22-41.

³¹ See generally GC I; GC II; GC III; GC IV.

³² See generally AP I; AP II; AP III.

³³ See Memorandum from Hays Parks, Chief International Law Branch, to Mr. John H. McNeill, Assistance General Counsel (International), OSD, subject: 1977 Protocols Additional to the Geneva Conventions, Customary International Law Implications (9 May 1986), reprinted in the LOAC DocSupp at 234-35.

³⁴ See, e.g., FM 27-10; NWP 1-14M; FM 1-10; AFD 51-4; Joint Publication 3-60, *Joint Targeting* (13 April 2007).

³⁵ AP I, art. 51(3).

- a. Under the 1949 Geneva Conventions,³⁶ **combatants** include:
 - (1) The regular armed forces of a State Party to the conflict; and
 - (2) Militia, volunteer corps, and organized resistance movements belonging to a State Party to the conflict that are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and members of regular armed forces who profess allegiance to a government not recognized by a detaining authority or occupying power.
- b. Lawful Combatants as defined in the LOAC:
 - (1) Are entitled to carry out attacks on enemy military personnel and equipment;
 - (2) May be the subject of lawful attack by enemy military personnel;
 - (3) Have a *combatant's privilege*, i.e., they bear no criminal responsibility for killing or injuring enemy military personnel or civilians taking an active part in hostilities, or for causing damage or destruction to property, provided their acts comply with the LOAC;
 - (4) May be tried for breaches of the LOAC;
 - (5) May only be punished for breaches of the LOAC as a result of a fair and regular trial (similar to procedure for capturing nation's soldiers; and
 - (6) If captured, must be treated humanely and are entitled to prisoner of war (POW) status.

2. **Unprivileged enemy belligerents**, also called unlawful combatants, may include spies, saboteurs, or civilians directly participating in hostilities or who otherwise engage in unauthorized attacks or combatant acts. These individuals do not qualify for GC III POW status and may be prosecuted for their unlawful acts. If directly participating in hostilities (DPH), they may also be attacked as discussed below.

- a. Article 44(3) of AP I allows a belligerent to attain combatant status by carrying his arms openly during each military engagement and when visible to an adversary while deploying for an attack. This Article lowers the threshold for obtaining combatant status (and therefore combatant immunity and POW status) by eliminating the classic requirement for "having a fixed distinctive sign recognizable at a distance,"³⁷ and requiring such guerrilla fighters only to carry arms openly while engaged in hostile acts.

- b. The United States rejected AP I in part due to this provision, has long vehemently opposed it, and does *not* accept it as customary law. Encouraging enemy forces to blur the distinction between combatants and civilians undermines a core principle and obligation of the LOAC. Through reservations and/or statements of understanding, other governments such as the United Kingdom have narrowly restricted or virtually eliminated application of AP I, Article 44(3).

C. Protections for the Wounded and Sick in the Field and at Sea. GC I and II provide protections for military wounded, sick, and shipwrecked at sea. This section provides a brief summary of these protections:

1. *Hors de Combat*. A person is *hors de combat* if he is in the power of an adverse party, if he clearly expresses intention to surrender, or is "incapacitated by wounds or sickness."³⁸ It is prohibited to attack enemy personnel who are "*out of combat*,"³⁹ they must be treated humanely and, at a minimum, in accordance with the protections set forth in Common Article 3 of the Geneva Conventions.

- a. Members of the armed forces who are wounded or sick⁴⁰ and who cease to fight are to be respected and protected, as are shipwrecked members of the armed forces at sea.⁴¹ "Shipwrecked persons include those in peril at sea or in other waters as a result of the sinking, grounding, or other damage to a vessel in which they

³⁶ GC III, art. 4; GC I, art. 13.

³⁷ GC III, art. 4.A.(2)(b).

³⁸ AP I, art. 41, para. 2(a)–(c).

³⁹ GC I–IV, art. 3; *see also* AP I, art. 41, para. 1.

⁴⁰ GC III, art. 12.

⁴¹ GC II, art. 12.

are embarked, or of the downing or distress of an aircraft.”⁴² The term “shipwrecked” includes both military personnel and civilians.⁴³

b. Respect means to spare, not to attack. Protect means to come to someone’s defense; to lend help and support. Each belligerent must treat his fallen adversaries as he would the wounded of his own army.⁴⁴ The order of treatment is determined solely by urgent medical reasons. No adverse distinctions in treatment may be established based on gender, race, nationality, religion, political opinions, or any other similar criteria.⁴⁵ Treatment is accorded using triage principles which provide the greatest medical assets to those with significant injuries who may benefit from treatment. Wounded who will die regardless of treatment and those wounded whose injuries are not life-threatening are given lesser priority.⁴⁶

c. Parties are obligated to search for and collect the wounded, sick, and shipwrecked as conditions permit, and particularly *after* an engagement, in recognition that military operations can make the obligation to search for the fallen impracticable.⁴⁷ If compelled to abandon the wounded and sick to the enemy, commanders must leave medical personnel/material to assist in their care, “as far as military considerations permit.”⁴⁸

d. Medical units and establishments may not be attacked intentionally.⁴⁹ However, incidental damage to medical facilities situated near military objectives is not a violation of the LOAC. Medical units lose their protection if committing “acts harmful to the enemy”⁵⁰ and, if after a reasonable time, they fail to heed a warning to desist.⁵¹ A medical unit will not be deprived of protection if unit personnel carry small arms for their own defense and the unit is protected by a picket or sentries. Nor will protection cease if small arms removed from the wounded are present in the unit, or if personnel from the veterinary service are found with the unit, or the unit is providing care to civilian wounded and sick.⁵²

e. Permanent medical personnel “exclusively engaged” in medical duties,⁵³ chaplains,⁵⁴ personnel of national Red Cross Societies, and other recognized relief organizations,⁵⁵ are considered noncombatants and shall not be intentionally attacked. To enjoy immunity, these noncombatants must abstain from any form of participation – even indirect – in hostile acts.⁵⁶ In recognition of the necessity of self-defense, however, medical personnel may be armed with small arms for their own defense or for the protection of the wounded and sick under their charge. They may only employ their weapons if attacked in violation of the LOAC. They may not employ arms against enemy forces acting in conformity with the LOAC and may not use force to prevent the capture of their unit by the enemy (it is, on the other hand, perfectly legitimate for a medical unit to withdraw in the face of the enemy).⁵⁷ Upon capture they are “retained personnel,” not POWs; however, at a minimum they receive POW protections. While detained, they are to perform only medical or religious duties. They are to be retained as long as required to treat the health and spiritual needs of POWs. If their medical or spiritual services are not required, they are to be repatriated.⁵⁸ Personnel of aid societies of neutral countries cannot be retained, and must be returned as soon as possible.

f. Civilian medical care remains the primary responsibility of the civilian authorities. If a civilian is accepted into a military medical facility, care must be offered solely on the basis of medical priority⁵⁹

⁴² NWP 1-14M, para. 11.6.

⁴³ AP I, art. 8, para. 2.

⁴⁴ Pictet’s Commentaries, GC I, p. 134-137.

⁴⁵ GC I, art. 12.

⁴⁶ FM 4-02.6, para. C-3; FM 8-42, para. J-3.

⁴⁷ GC I, art. 15, GC II, art. 18.

⁴⁸ GC I, art. 12.

⁴⁹ GC I, art. 19.

⁵⁰ Such acts include, but are not limited to, utilizing a hospital as a command and control center, ammunition storage facility, or troop billeting, or conducting attacks from the hospital.

⁵¹ GC I, art. 21.

⁵² GC I, art. 22.

⁵³ GC I, art. 24.

⁵⁴ *Id.*

⁵⁵ GC I, art. 26,

⁵⁶ Pictet’s Commentaries, GC I, p. 221.

⁵⁷ FM 4-02.

⁵⁸ GC I, art. 28.

⁵⁹ GC I, art. 12. *See also* GC IV, art. 16; FM 4-02.6, para. A-4.

g. Parties to the conflict shall prevent the dead from being despoiled and shall ensure that burial of the dead is carried out honorably and individually as far as circumstances permit. Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. Prior to burial or cremation, there shall be a careful examination (medical examination if possible) to confirm death and establish identity. Graves shall be respected, maintained and marked. Parties to the conflict shall forward to each other information concerning the dead and, in general, all articles of an intrinsic or sentimental value which are found on the dead.⁶⁰

2. Parachutists vs. paratroopers.⁶¹ Descending *paratroopers* are presumed to be on a military mission and therefore may be targeted. *Parachutists* are pilots and crewmen of a disabled/downed aircraft. They are presumed to be out of combat and may not be targeted unless it is apparent they are engaged on a hostile mission or are taking steps to resist or evade capture while descending. Parachutists “shall be given the opportunity to surrender before being made the object of attack.”⁶²

D. Protections for Prisoners of War.⁶³ Geneva Convention III sets forth several protections for POWs. This section briefly summarizes some of those protections and related rules:

1. **Detainees.** POW status arises only during international armed conflicts of the kind described in Common Article 2 of the Geneva Conventions.⁶⁴ In non-international armed conflict or peacekeeping situations (e.g., Somalia, Haiti, Bosnia, as discussed above), persons who commit hostile acts against U.S. forces or serious criminal acts resulting in their capture would not be entitled to POW protection. These persons may be termed “detainees” instead of POWs. GC III nonetheless provides a useful template for detainee protection and care, and, in keeping with Geneva Convention Common Article 3, it is DOD Policy that all detainees will be treated humanely.⁶⁵

2. **Surrender.** Surrender may be made by any means that communicates the intent to give up the fight. There is no clear-cut rule as to what constitutes surrender. However, most agree surrender constitutes a cessation of resistance and placement of one’s self at the discretion of the captor. The onus is on the person or force surrendering to clearly communicate intent to surrender. Captors must *respect* (not attack) and *protect* (care for) those who surrender—reprisals are prohibited.⁶⁶ Civilians who are captured accompanying the force also receive POW status.⁶⁷

3. **Identification and Status.** The initial combat phase will likely result in the capture of a wide array of individuals.⁶⁸ DoD Directive 2311.01E, the DoD Law of War Program, states that U.S. forces will comply with the LOAC regardless of how the conflict is characterized. In future conflicts, JAs should advise commanders that, regardless of the nature of the conflict, **all enemy personnel should initially be accorded the protections of GC III**, at least until their status has been determined. In that regard, recall that **“status” is a legal term, while “treatment” is descriptive**. When drafting or reviewing guidance to Soldiers, ensure that the guidance mandates treatment, not status. For example, a TACSOP should state that persons who have fallen into the power of U.S. Forces will be “treated as POWs,” not that such persons “will have the status of POW.” When doubt exists as to whether captured enemy personnel warrant continued POW status, Article 5 (GC III) Tribunals must be convened. It is important that JAs be prepared for such tribunals. During the Vietnam conflict, a theater directive established procedures for the conduct of Article 5 Tribunals. The combatant commander or Army component commander may promulgate a comparable directive when appropriate.⁶⁹

⁶⁰ GC I, arts. 15-17.

⁶¹ FM 27-10, para. 30.

⁶² AP I, art. 42.

⁶³ GC III, art. 4; Hague IV, art. 23(c)-(d).

⁶⁴ GC III, art. 2.

⁶⁵ See DoDD 2310.01E for current terminology and application of POW/detainee concepts to the GWOT.

⁶⁶ GC III, art. 13.

⁶⁷ GC III, art. 4(a)(4).

⁶⁸ For example, in two days of fighting in Grenada, Army forces captured approximately 450 Cubans and 500 hostile Grenadian. Panama provided large numbers of detainees, both civilian and “PDF” (Panamanian Defense Force/police force) for the Army to sort out. The surrender of almost overwhelming numbers of Iraqi forces in Desert Storm was well publicized.

⁶⁹ No Article 5 Tribunals were conducted in Grenada or Panama, as all captured enemy personnel were repatriated as soon as possible. In the Gulf War, Operation DESERT STORM netted a large number of persons thought to be Enemy Prisoners of War, who were actually displaced civilians. Subsequent interrogations determined that they had taken no hostile action against

4. **Treatment.** There is a legal obligation to provide a wide array of rights and protections to POWs, including adequate food,⁷⁰ facilities,⁷¹ and medical aid⁷² to all POWs. This obligation poses significant logistical problems in fast-moving tactical situations; thus, JAs must be aware of how to meet this obligation while placing a minimum burden on operational assets.⁷³ POWs must be protected from physical and mental harm.⁷⁴ They must be transported from the combat zone as quickly as circumstances permit. Subject to valid security reasons, POWs must be allowed to retain possession of their personal property, protective gear, valuables, and money. These items must not be taken unless properly receipted for and recorded as required by GC III. In no event can a POW's rank insignia, decorations, personal effects (other than weapons or other weapons that might facilitate escape), or identification cards be taken. These protections continue through all stages of captivity, including interrogation.

E. **Protections for Civilians.** Geneva Convention IV sets forth several protections for civilians, notably augmented by AP I. This section briefly summarizes several of those protections:

1. **General Rule.** The civilian population, individual civilians, and civilian property are protected as a matter of their *status*, and may not be the object of direct (intentional) attack.⁷⁵ Under the Geneva Conventions and AP I, civilians are those whom are not members of a nation's armed forces.⁷⁶

2. **Specific Protections.**

a. **Indiscriminate Attacks.** As discussed above in Part V above, AP I protects the civilian population from indiscriminate attacks. An attack may also be indiscriminate if it fails to distinguish between legitimate targets and civilians not taking part in hostilities. Such attacks include those where the incidental loss of civilian life, or damage to civilian objects, would be excessive in relation to the concrete and direct military advantage anticipated.⁷⁷

b. **Civilian Medical and Religious Personnel.** Such personnel shall be respected and protected.⁷⁸ They receive the benefits of the provisions of the Geneva Conventions and the Protocols concerning the protection and identification of medical personnel so long as they do not engage in acts inconsistent with their protected status.

c. **Journalists.** Protected as "civilians" provided they take no action inconsistent with their status.⁷⁹ This provision has not attained the status of CIL, but historically the United States has supported it. If captured while accompanying military forces in the field, a journalist or war correspondent is entitled to POW status.⁸⁰

Coalition Forces. In some cases, they had surrendered to Coalition Forces to receive food and water. Tribunals were conducted to verify the status of the detainees. Upon determination that they were civilians who had taken no part in hostilities, they were transferred to detainment camps. Whether the tribunals were necessary as a matter of law is open to debate—the civilians had not "committed a belligerent act," nor was their status "in doubt." No Article 5 tribunals were held in Operation Enduring Freedom (OEF) but limited numbers of Article 5 tribunals were held in the opening stages of Operation Iraqi Freedom (OIF).

⁷⁰ GC III, art. 26.

⁷¹ GC III, art. 24.

⁷² GC III, arts. 29–32.

⁷³ The following examples are illustrative. When U.S. Forces landed in Grenada, they did not possess the food necessary to feed the large number of POWs and detainees who would come under their control. Thus, U.S. Forces used captured foodstuffs to feed them. Similar situations occurred in Panama. Thus, by using captured food, the U.S. met its obligation under GC III, and the ground commanders were able to conserve valuable assets. Initially, POW facilities in Grenada, Panama, and the Gulf were each inadequate in their own ways. They consisted of dilapidated buildings, with no sanitation facilities or electricity, or were simply non-existent (in the desert). The ground commanders could not afford to use critically needed combat personnel (the personnel necessary to handle POWs were not initially available) to construct POW camps. Because the LOAC does not require combatants to use their own assets to construct POW camps, the U.S. used captured property and POWs to construct adequate camps. (In fact, in Grenada the POWs were Cuban construction workers.) Medical assets also tend to be in high demand and short supply during combat. The LOAC, however, prohibits willful denial of needed medical assistance to POWs, and priority of treatment must be based on medical reasons. While the Capturing Party has the obligation to ensure adequate medical care for enemy wounded, GC I encourages the use of "retained persons" to treat enemy wounded. The United States has made use of this provision as well. As these examples indicate, the JA must be familiar with and apply the LOAC in a practical manner. In doing so, he enables the commander to comply with legal requirements, without jeopardizing the mission.

⁷⁴ GC III, art. 13.

⁷⁵ AP I, arts. 48, 51(2).

⁷⁶ AP I, art. 50(1) defines civilians as those persons not belonging to one of the categories of persons referred to in Third Geneva Convention, article 4(A)(1), (2), (3) and (6), and Article 43 of AP I. The United States contests the reference to Article 43.

⁷⁷ AP I, art. 51(4).

⁷⁸ GC IV, art. 20; AP I, art. 15.

⁷⁹ AP I, art. 79.

d. Personnel Engaged in the Protection of Cultural Property. Article 17 of the Hague Cultural Property Convention established a duty to respect (not directly attack) persons protecting such property. Regulations attached to the Convention provide for identification and filling of specific positions as cultural protectors. As these individuals would likely be civilians, they are entitled to protection from intentional attack due to their civilian status. (To date, the United States has ratified the Convention itself, but not the Regulations).

e. Contractors. Civilians who *accompany* the armed forces in the field in time of armed conflict are protected from direct attack unless and for such time as they take a direct part in hostilities (DPH).⁸¹ They may be at risk of death or injury incident to lawful enemy attacks on military objectives. If captured, they are entitled to POW status, pursuant to GC III, Article 4(4). See the next section for a discussion of DPH.

3. Exception to General Rule: Direct Participation in Hostilities

a. AP I, Article 51(3) states that civilians enjoy protection from direct attack “unless and for such time as they take a direct part in hostilities” (DPH). Those who directly participate in hostilities may be attacked in the same manner as identified members of an opposing armed force.

b. The notion of permitting direct attack on civilians, and the meaning and limits of Article 51(3)’s individual terms remains hotly contested.⁸² Many commentators agree that during their commission, some acts meet the definition of DPH and justify a response by deadly force (e.g., personally engaging in potentially lethal acts like firing small arms at Soldiers). Likewise, many agree that extremely remote or indirect acts do not constitute DPH (e.g., contractor factory workers distant from the battlefield, general public support for a nation’s war effort). Also, many agree that the mere presence of civilians does not immunize military objectives from direct attack, but rather presents a question of proportionality (not distinction). (E.g., a contractor supply truck driven to the front lines may be attacked, with the civilian driver considered collateral damage).

c. More difficult cases arise as conduct becomes more indirect to actual hostilities, remote in location, or attenuated in time. For the past decade, the United States has faced determined enemies who are not members of nation state forces, but rather transnational organized armed groups in constantly shifting alliances, sometimes in locations where governments are unable or unwilling to respond. These foes deliberately and illegally use the civilian population and civilian objects to conduct or conceal their attacks as a strategy of war. Further complicating the issue, U.S. and other forces increasingly utilize civilian or contractor support in battlefield or targeting roles, and rely on sophisticated technology and intelligence to plan and conduct attacks.

d. Thus far, universally agreed-upon definitions of DPH have proven elusive. The International Committee of the Red Cross (ICRC) proposed a narrow reading of DPH requiring a (1) threshold showing or likelihood of harm, (2) a direct causal link between the act in question and that harm, and (3) a belligerent nexus to the conflict as shown by specific intent to help or harm one or more sides. The ICRC also proposed that those individuals engaged in “continuous combat functions” could be attacked at any time, but suggested that combatants

⁸⁰ GC III, art. 4(a)(4).

⁸¹ *Id.*

⁸² This paragraph is based on the editor’s best understanding of accepted parameters in an ongoing debate both academic and real world. JAs should be aware that the International Committee of the Red Cross recently published “interpretive guidance” on what constitutes direct participation in hostilities. See NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 78 (2009) *available at* <http://www.icrc.org/web/eng/siteeng0.nsf/html/p0990> [hereinafter ICRC Interpretive Guidance]. The guidance was published after six years of expert meetings; however, many experts, including both U.S. experts assigned to those meetings, withdrew their names from the final product in protest over the process by which Melzer reached the conclusions contained in the study. The United States has not officially responded to the guidance but many of the experts, including Michael Schmitt, Col (Ret.) Hays Parks, and Brigadier General (Ret.) Kenneth Watkin, have published independent responses to the ICRC’s guidance. See, e.g., Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC’Y J. 5 (2010), *available at* http://www.harvardnsj.com/wp-content/uploads/2010/05/Vol.-1_Schmitt_Final.pdf; and W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 INT’L L. & POL. 769, 778–80 (2010) (Mr. Parks, a retired Marine Colonel, was one of the two U.S. experts assigned to the study); and Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010).

should attempt to capture civilians first and use deadly force as a last resort. These proposals and others remain debated by nations, warfighters, and scholars alike, with some allies moving to implement all or part.⁸³

e. **The United States has not adopted the complex ICRC position, nor its vocabulary.** Instead, the United States relies on a case-by-case approach to both organized armed groups and individuals. U.S. forces use a functional⁸⁴ DPH analysis based on the notions of hostile act and hostile intent as defined in the Standing Rules of Engagement, and the criticality of an individual's contribution to enemy war efforts. After considering factors such as intelligence, threat assessments, the conflict's maturity, specific function(s) performed and individual acts and intent, appropriate senior authorities may designate groups or individuals as hostile. Those designated as hostile become status-based targets, subject to attack or capture at any time if operating on active battlefields or in areas where authorities consent or are unwilling or unable to capture or control them.⁸⁵ These designations and processes normally remain classified due to the sensitive nature of intelligence sources and technology, the need for operational security in military planning, and classic principles of war such as retaining the element of surprise. JAs should gather the facts and closely consult all available guidance, particularly the Rules of Engagement and theater-specific directives or references, as well as host nation laws and sensitivities.

IX. MILITARY OBJECTIVES AND PROTECTED PLACES

A. **Military Objectives.** AP I and CCW Protocols II and III define military objectives as “objects 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.”⁸⁶

1. **Determining Military Objectives Using the AP I Definition/Test.** Military personnel, equipment, units, and bases are always military objectives. Other objects not expressly military become military objectives when they satisfy both elements of the two-part test provided by AP I, Article 52(2).

a. Military objective is a treaty synonym for a potential lawful target. The AP I definition/test sets forth objective, simple criteria establishing when military necessity may exist to consider an object a lawful target that may be seized or attacked. First, the target must by virtue of its nature, location, purpose or use, make an effective contribution to military action. Second, the total or partial destruction, capture or neutralization of the target must, under the circumstances ruling at the time, offer a definite military advantage. The United States now follows this definition, as evidenced by its incorporation in FM 27-10, Change 1, and ratification of several CCW Protocols with identical definitions.

b. A military objective is not limited to military bases, forces, or equipment, but includes other objects that contribute to an opposing state's ability to wage war. AP I does not alter the traditional understanding of military necessity contained in the Lieber Code which permits a commander to take “those measures which are indispensable for securing the ends of war” and not expressly prohibited by the LOAC. This may be accomplished through intentional attack of enemy military forces or other military objectives enabling enemy forces to wage war.

⁸³ See Melzer, ICRC Interpretive Guidance, *supra* note 81, proposed rules IV, V, and IX and related discussion. For a brief discussion of specific examples by the ICRC, see ICRC, Direct Participation in Hostilities: Questions and Answers, Feb. 6, 2009, at <http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>. These examples may prove helpful in facilitating discussion with foreign counterparts regarding their position on the ICRC Interpretive Guidance, but should *not* be read as representative of the U.S. position on DPH.

⁸⁴ See generally Parks, *supra* note 82; Schmitt, *supra* note 82. See also Col W. Hays Parks, USMCR (Ret), *Memo. of Law, Executive Order 12333 and Assassination*, 2 November 1989, THE ARMY LAWYER, Dec. 1989, at 5–6 (arguing that attacks on military objective with civilians present, or civilians participating in efforts vital to the enemy war effort, do not constitute prohibited attacks *per se*); Col W. Hays Parks, USMCR (Ret), Memorandum of Law, Law of War Status of Civilians Accompanying Military Forces in the Field, 6 May 1999 (unpublished and on file with TJAGLCS International and Operational Law Dep't, pp. 2-4) (advising that, for example, civilians entering a theater of operations in support or operation of sensitive or high value equipment such as a weapon system, may be at risk of intentional attack because of the importance of their duties).

⁸⁵ See, e.g., U.S. Dep't of Justice, Attorney General Eric Holder Speaks at Northwestern University School of Law, Mar. 5, 2012, available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (“[T]here are instances where [the U.S.] government has the clear authority – and, I would argue, the responsibility – to defend the United States through the appropriate and lawful use of lethal force. . . . [I]t is entirely lawful – under both United States law and applicable law of war principles – to target specific senior operational leaders of al Qaeda and associated forces.”). See also Chapter 5 *infra* on Rules of Engagement.

⁸⁶ AP I art. 52(2).

c. Compared to “military objective,” the term “military target” is more limited and redundant, and should not be used. In contrast, the term “civilian target” is an oxymoron, inasmuch as a *civilian object* is an object that is not a military objective, and therefore is immune from intentional attack unless and until it loses its protected status through enemy abuse of that status. Consequently, the term “civilian target” is inappropriate and should not be used. If military necessity exists (and the above two-part test can be satisfied) for the seizure or destruction of a civilian object (or a civilian person who is directly participating in hostilities) then that object (or person) has been converted to military use (i.e., become a military objective) and ceased to be a civilian object. Converted objects may regain their civilian status if military use ceases.

2. **Applying the Article 52 Standard.** The AP I military objective definition/test, which FM 27-10 and several weapons treaties⁸⁷ ratified by the United States also adopt, contains two main elements: (1) the nature, location, purpose or use makes an effective contribution to military action, *and* (2) total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. If the objective is not enemy military forces and equipment, the second part of the test limits the ability to lethally target the objective. Both parts must apply before an object that is normally a civilian object can be considered a military objective. Recall also that attacks on military objectives which may cause incidental damage to civilian objects or incidental injury to civilians not engaged in DPH are not prohibited, if one complies with the principles of the LOAC (e.g., proportionality).

a. Nature, location, purpose or use as making an effective contribution to military action:

(1) **Nature** refers to the type of object. Examples of enemy military objectives which by their nature make an effective contribution to military action include: combatants, tanks and other armored fighting vehicles, weapons, fortifications, combat aircraft and helicopters, supply depots of ammunition and petroleum, military transports, command and control centers, communication stations, etc.

(2) **Location** includes areas that are militarily important because they must be captured or denied an enemy, or because the enemy must be made to retreat from them. Examples of enemy military objectives which by their location make an effective contribution to military action include: a narrow mountain pass through which the enemy formation must pass, a bridge over which the enemy’s main supply route (MSR) crosses, a key road intersection through which the enemy’s reserve will pass, etc. A town, village, or city may become a military objective even if it does not contain military objectives if its seizure is necessary to protect a vital line of communications or for other legitimate military reasons.

(3) **Purpose** means the future intended or possible use. Examples of enemy military objectives which by their purpose make an effective contribution to military action include: civilian buses or trucks which are being transported to the front to move soldiers from point A to B, a factory which is producing ball bearings for the military, the Autobahn in Germany, etc. While the criterion of purpose is concerned with the intended, suspected, or possible future use of an object, the potential military use of a civilian object, such as a civilian airport, may make it a military objective because of its future intended or potential military use.

(4) **Use** refers to how an object is presently being used. Examples of enemy military objectives which by their use make an effective contribution to military action include: an enemy headquarters located in a school, an enemy supply dump located in a residence, or a hotel which is used as billets for enemy troops.

b. Destruction, capture or neutralization offers a definite military advantage:

(1) The connection of some objects to an enemy’s war fighting or war-sustaining effort may be direct, indirect, or even discrete. A decision as to classification of an object as a military objective and allocation of resources for its attack depends upon its value to an enemy nation’s war fighting or war sustaining effort (including its ability to be converted to a more direct connection), and not solely to its overt or present connection or use.

(2) The words “nature, location, purpose or use” allow wide discretion, but are subject to qualifications stated in the definition/test, such as that the object makes an “effective contribution to military action” and that its destruction, capture, or neutralization offers a “definite military advantage” under the circumstances. No geographical connection between effective contribution and military advantage is required. Attacks on military objectives in the enemy rear, or diversionary attacks away from the area of military operations are lawful.

⁸⁷ FM 27-10, Change 1, para. 40c.; CCW Protocol II, art. 2(4); CCW Amended Protocol II, art. 2(6); CCW Protocol III, art. 1(3).

(3) Military action is used in the ordinary sense of the words, and is not intended to encompass a limited or specific military operation.

(4) The phrase “in the circumstances ruling at the time” is important. If, for example, enemy military forces take position in a building otherwise regarded as a civilian object (e.g., a school, store, or museum), then the building can become a military objective. The circumstances ruling at the time, that is, military use of the building, permit its attack if its attack offers a definite military advantage. If the enemy military forces permanently abandon the building, this change of circumstances precludes its treatment as a military objective.

B. **Warning Requirement.**⁸⁸

1. Civilians at large. The general requirement to provide warning before a bombardment only applies if civilians are present. Exception: if it is an *assault* (an attack where surprise is a key element), no warning is required under Hague IV Art. 26 and FM 27-10 para. 43. Under AP I Art. 57, a warning is not required if “circumstances do not permit.” Warnings need not be specific as to time and location of the attack, but can be general and issued through broadcasts, leaflets, etc. If civilians are present, a duty also exists to take feasible (meaning “practicable” under the US view in the 1987 Matheson Memo) precautions to minimize civilian casualties. See AP I Art. 51, 52 and 57.

2. Religious, Cultural, and Historic Sites. These are protected from attack as long as they are not used in support of the enemy’s military effort AP I Art. 53 bans acts of hostility against cultural, historic, and religious sites but also prohibits their misuse in support of a military effort.. Article 53 does not explicitly state that these sites can be attacked when supporting a military effort illegally. However, Hague IV Art. 27 (1907) and Hague Cultural Property Convention do state or imply that these targets can be attacked if misused. The warning requirements for these sites are similar to those applicable to the civilian population as a whole. Normally, warning will be required in the case that a protected site is misused to support a war effort, unless a circumstances do not permit such a warning. See Hague IV Art. 27, API Art. 53, 57.

3. Hospitals. Hospitals are also protected from attack under GC I. Hospitals and medical facilities that are currently being used wrongfully for military purposes nonetheless **always** require warnings before attack under Art. 19 and 21 of GC I and AP I Art. 13. The **sole exception** to this rule is when a unit is actively taking fire from the hospital and is returning fire in self-defense.⁸⁹ Warnings need not be specific as to time and location of the attack, but can be general and issued through broadcasts, leaflets, etc.

C. **Defended Places.**⁹⁰ As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include: a fort or fortified place; a place occupied by a combatant force or through which a force is passing; and a city or town that is surrounded by defensive positions under circumstances where the city or town is indivisible from the defensive positions.

D. **Undefended places.** The attack or bombardment of towns or villages, which are undefended, is prohibited.⁹¹

1. An inhabited place may be declared an undefended place (and open for occupation) if the following criteria are met:
 - a. All combatants and mobile military equipment are removed;
 - b. No hostile use is made of fixed military installations or establishments;
 - c. No acts of hostilities shall be committed by the authorities or by the population; and
 - d. No activities in support of military operations shall be undertaken (the presence of enemy medical units, enemy sick and wounded, and enemy police forces are allowed).⁹²

⁸⁸ Hague IV, art. 26. Hague IV art. 26 calls for warnings if civilians are present for bombardment, unless a surprise attack is planned. AP I art. 57 calls for advance warning if attacks may effect civilian targets, unless “circumstances do not permit.”

⁸⁹ *Id.*, art. 26-27. Note that while the law does not always require a warning for some protected sites, an individual nation’s policy/ROE may be more strict.

⁹⁰ FM 27-10, paras. 39-40.

⁹¹ Hague IV, art. 25.

⁹² FM 27-10, para. 39b.

2. While the HR, Article 25, prohibits attacking undefended “habitations or buildings,” the term was used in the context of intentional bombardment. Given the definition of military objective, such structures remain civilian objects and immune from intentional attack unless (a) used by the enemy for military purposes, and (b) destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. To gain protection as an undefended place, a city or town must be open to physical occupation by ground forces of the adverse party.

E. **Protected Areas.** Hospital or safety zones may be established for the protection of the wounded and sick or civilians.⁹³ Such hospital or safety zones require agreement of the Parties to the conflict. Articles 8 and 11 of the Hague Cultural Property Convention allows certain cultural sites to be designated in an “International Register of Cultural Property under Special Protections.” For example, the Vatican has qualified for and been registered as “specially protected.” Special Protection status requires strict adherence to avoidance of any military use of the property or the area in its immediate vicinity, such as movement of military personnel or materiel, even in transit.

F. **Protected Individuals and Property.**

1. Civilians. As discussed above, individual civilians, the civilian population as such, and civilian objects are protected from intentional attack.⁹⁴ A presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, school, etc.⁹⁵) as contrasted with military objectives. The presence of civilians in a military objective does not alter its status as a military objective.

2. Medical Units and Establishments; Hospitals.⁹⁶ Fixed or mobile medical units shall be respected and protected. They shall not be intentionally attacked. Protection shall not cease, unless they are used to commit “acts harmful to the enemy.”⁹⁷ A warning is required before attacking a hospital in which individuals are committing “acts harmful to the enemy.” The hospital must be given a reasonable time to comply with the warning before an attack.⁹⁸ When *currently* receiving fire from a hospital, there is no duty to warn before returning fire in self-defense. Example: Richmond Hills Hospital, Grenada.

3. Captured Medical Facilities and Supplies of the Armed Forces.⁹⁹ Fixed facilities should be used for the care of the wounded and sick, but they may be used by captors for other than medical care, in cases of urgent military necessity, provided proper arrangements are made for the wounded and sick who are present. Captors may keep mobile medical facilities, provided they are reserved for care of the wounded and sick. Medical Supplies may not be destroyed.

4. Medical Transport. Transports of the wounded and sick or of medical equipment shall not be attacked.¹⁰⁰ Under GC I, article 36, medical aircraft are protected from direct attack *only if* they fly in accordance with a previous agreement between the parties as to their route, time, and altitude. AP I contains a new regime for medical aircraft protection.¹⁰¹ To date, there is no State practice with respect to implementation of this regime. As the United States is not a State Party to AP I, it continues to apply the criteria for protection contained in GC I, Article 36. The Distinctive Emblem and other devices set forth in the Amended Annex I to AP I are to facilitate identification, but they do not establish status. However, it is U.S. policy that known medical aircraft shall be respected and protected when performing their humanitarian functions.

5. Cultural Property.¹⁰² The Hague Cultural Property Convention prohibits targeting cultural property, and sets forth conditions when cultural property may be used by a defender or attacked. Although the United States did not ratify the treaty until 2008, it has always regarded the treaty’s provisions as relevant to the targeting process: “United States policy and the conduct of operations are entirely consistent with the Convention’s provisions. In large measure, the practices required by the convention to protect cultural property were based upon the practices of

⁹³ GC I, art. 23; GC IV, art. 14.

⁹⁴ FM 27-10, para. 246; AP I, art. 51, para. 2.

⁹⁵ AP I, art. 52(3).

⁹⁶ FM 27-10, paras. 257- 58; GC I, art. 19.; GC IV, arts. 18 & 19.

⁹⁷ GC I, art. 21.

⁹⁸ AP I, art. 13.

⁹⁹ FM 27-10, para. 234.

¹⁰⁰ GC I, art. 35.

¹⁰¹ AP I, arts. 24-31.

¹⁰² See generally 1954 Cultural Property Convention.

U.S. military forces during World War II.”¹⁰³ Cultural property is protected from intentional attack so long as it is not being used for military purposes, or otherwise may be regarded as a military objective. The Convention defines cultural property as “movable or immovable property of great importance to the cultural heritage of every people.” Cultural property includes *inter alia* buildings dedicated to religion, art, and historic monuments. Misuse will subject such property to attack. While the enemy has a duty to indicate the presence of such buildings with visible and distinctive signs, state adherence to the marking requirement has been limited. U.S. practice has been to rely on its intelligence collection to identify such objects in order to avoid attacking or damaging them.

G. Works and Installations Containing Dangerous Forces.¹⁰⁴ These rules are not United States law but should be *considered* because of pervasive international acceptance of AP I and II. Under the Protocol, dams, dikes, and nuclear electrical generating stations shall not be attacked (even if military objectives) if the attack will cause the release of dangerous forces and cause “severe losses” among the civilian population. Military objectives near these potentially dangerous forces are also immune from attack if the attack may cause release of the dangerous forces (parties also have a duty to avoid locating military objectives near such locations). Works and installations containing dangerous forces may be attacked only if they provide “significant and direct support” to military operations, attack is the only feasible way to terminate support, and only after scrutinizing the attack under the principle of proportionality

H. Objects Indispensable to the Survival of the Civilian Population. Article 54 of AP I prohibits starvation as a method of warfare. It is prohibited to attack, destroy, remove, or render useless objects indispensable for survival of the civilian population, such as foodstuffs, crops, livestock, water installations, and irrigation works. The United States rejects, however, broad prohibitions on attacking such objects when used to support enemy forces.

I. Protective Emblems.¹⁰⁵ Objects and personnel displaying certain protective emblems are presumed to be protected under the Conventions.¹⁰⁶

1. Medical and Religious Emblems. The recognized emblems are the Red Cross, Red Crescent, and the newly-ratified Red Crystal.¹⁰⁷ The Red Lion and Sun, though protected by GC I, is no longer used. Also, the Red Star of David was proposed as an additional emblem, and, while never officially recognized by treaty, was protected as a matter of practice during the periods it was used.

2. Cultural Property Emblems. Cultural property is marked with “[a] shield, consisting of a royal blue square, one of the angles of which forms the point of the shield and of a royal blue triangle above the square, the space on either side being taken up by a white triangle.”¹⁰⁸ Examples of cultural property include museums, ancient ruins, and monuments with historical significance.

3. Works and Installations Containing Dangerous Forces. Such works are marked with three bright orange circles, of similar size, placed on the same axis, the distance between each circle being one radius.¹⁰⁹ Works and installations containing dangerous forces include dams, dikes, and nuclear power facilities.

X. MEANS OF WARFARE: WEAPONS

A. Means and Methods: The laws of war guide two related choices in combat: (1) the *means*, that is, the weapons used to fight; and (2) the *methods*, that is, the tactics of fighting. Parties to a conflict must observe the LOAC, or face consequences. “The right of belligerents to adopt means of injuring the enemy is not unlimited.”¹¹⁰ To properly advise war fighters, JAs must be proficient not only in *what* legally may be targeted, but *how* the objective can be targeted.

¹⁰³ President William J. Clinton, Message to the Senate Transmitting the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Jan. 6, 1999).

¹⁰⁴ AP I, art. 56; AP II, art. 15.

¹⁰⁵ FM 27-10, para. 238.

¹⁰⁶ GC I, art. 38.

¹⁰⁷ AP III.

¹⁰⁸ 1954 Cultural Property Convention, arts. 16, 17.

¹⁰⁹ AP I, annex I, art. 16.

¹¹⁰ Hague IV, art. 22.

B. **Legal Review.** All U.S. weapons, weapons systems, and munitions must be reviewed by authorized attorneys within DoD for legality under the LOAC.¹¹¹ Per DoDD 5000.01, this review occurs before the award of the engineering and manufacturing development contract and again before the award of the initial production contract. Legal review of new weapons is also required under Article 36 of AP I.

1. **Effect of legal review. The weapons review process of the United States entitles commanders and all other personnel to assume that any weapon or munition contained in the U.S. military inventory and issued to military personnel is lawful.** If there are any doubts, questions may be directed to the International and Operational Law Division (HQDA, DAJA-IO), Office of The Judge Advocate General of the Army. The Center for Law and Military Operations (CLAMO) at The Judge Advocate General's Legal Center and School (TJAGLCS) maintains a database of approved weapons reviews.¹¹²

2. **Illegal Weapons.**

a. Weapons causing unnecessary suffering as determined by the "usage of states," are *per se* illegal. Examples of such illegal weapons include lances with barbed heads and projectiles filled with glass.¹¹³

b. Other weapons have been rendered illegal by agreement or prohibited by specific treaties. Certain land mines, booby traps, and "blinding laser weapons" are prohibited by Protocols to the CCW. Anti-personnel land mines and booby traps were regulated (and, in some cases, certain types prohibited) in order to provide increased protection for the civilian population. Specific weapons prohibitions are discussed more below.

3. **Improper use of legal weapons.** Any weapon may be used unlawfully; for example, use of an M9 pistol to murder a POW. This may not be a violation of the principle of "unnecessary suffering," but would most likely violate the principles of necessity and distinction. However, use of an M9 pistol to wound a combatant in various parts of his body with the intent to watch that combatant suffer would be a violation of the principle of unnecessary suffering.

C. **Specific Weapons Treaties.** Certain weapons are the subject of specific treaties or other international law instruments of which JAs need to be aware:

1. **Certain Conventional Weapons.**¹¹⁴ The 1980 United Nations Convention on Certain Conventional Weapons (CCW) is the leading and preferred U.S. framework to restrict, regulate, or prohibit the use of certain otherwise lawful conventional weapons. The United States has ratified the CCW and its five Protocols described below, plus Amended Protocol II. The LOAC DocSupp reprints the CCW and its Protocols. In summary:

a. **Protocol I** prohibits any weapon whose primary effect is to injure by fragments which, when in the human body, escape **detection by x-ray**.

b. **Protocol II** regulates use of **mines, booby-traps, and other devices**, while prohibiting certain types of anti-personnel mines to increase protection for the civilian population. Amended Mines Protocol (AMP) II has since replaced the original Protocol II. The United States regards certain land mines (anti-personnel and anti-vehicle) as lawful weapons, subject to the restrictions contained in CCW AMP II and national policy. U.S. military doctrine and mine inventory comply with each, for example, command detonated Claymore mines. The United States also possesses air dropped GATOR mines which comply with CCW Protocol II, as the "minelets" become harmless after the passage of a set period of time. Many nations (but not the United States) are party to a competing (and more comprehensive) treaty, the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (also known as the Ottawa Treaty or Anti-Personnel Mine Ban Convention), an NGO-initiated treaty that bans all anti-personnel landmines, with the exception of limited numbers for training purposes only. Claymore mines utilizing a human operator are still legal under the Ottawa treaty.¹¹⁵ Per a February 2004 U.S. Presidential Memorandum under George W. Bush, and after its 2010 deadline, the United States no longer employed anti-personnel landmines that do not automatically self-destruct or self-neutralize (sometimes called "dumb" or "persistent" anti-personnel land (APL) mines).¹¹⁶ **However, on September**

¹¹¹ See generally DoDD 5000.01; AR 27-53; SECNAVINST 5000.2E; U.S. DEP'T OF AIR FORCE, AIR FORCE INSTRUCTION 51-402, WEAPONS REVIEW (27 Jul 2011) [hereinafter AFI 51-402].

¹¹² See CLAMO website at <http://www.jagcnet.army.mil/clamo> (contact CLAMO for authorization).

¹¹³ FM 27-10, para. 34.

¹¹⁴ See generally CCW.

¹¹⁵ See The International Campaign to Ban Land Mines, at <http://www.icbl.org/> (includes treaty history, text, and parties).

¹¹⁶ U.S. Land Mine Policy can be found at <http://www.state.gov/t/pm/wra/>.

23, 2014, the Obama Administration went further and announced that it would discontinue production of ALL anti-personnel landmines, regardless of whether they were persistent or non-persistent. The new policy also halted any service life extension of existing APLs through maintenance. In addition, the new policy statement prohibited the *use* of ANY anti-personnel landmines (persistent or non-persistent) outside the Korean peninsula. Today, anti-personnel landmines (only non-persistent types existed in the current U.S. inventory after 2010) are authorized for storage and possible use on the Korean peninsula only.¹¹⁷

c. **Protocol III** does not ban **incendiary weapons** but restricts their use near civilian areas to increase civilian population protections. Napalm, flame-throwers, and thermite/thermate type weapons are incendiary weapons. Protocol III, Article 1(b) states that incendiaries *do not include* munitions with *incidental* incendiary effects such as “illuminants, tracers, smoke or signaling systems;” or munitions *designed to combine* “penetration, blast, or fragmentation effects with an additional incendiary effect”—particularly when the munition’s primary purpose is not burn injury to persons. Thus, white phosphorous is legal when used as a tracer or illuminant, or in appropriate combined effects munitions. The United States ratified Protocol III with the reservation that incendiary weapons may be used against military objectives in areas of civilian concentrations if such use will cause **fewer civilian casualties**; for example, against a chemical munitions factory in a city to incinerate escaping poisonous gases.

d. **Protocol IV** prohibits “**blinding laser weapons**,” defined as laser weapons specifically designed to cause permanent blindness to unenhanced vision. Other lasers are lawful, even those that may cause injuries including permanent blindness, incidental to their legitimate military use (range-finding, targeting, etc.).

e. **Protocol V** on **explosive remnants of war** requires the parties to an armed conflict, where feasible, to clear or assist the host nation or others in clearance of unexploded ordnance or abandoned explosive ordnance after cessation of active hostilities.

2. **Cluster Bombs or Combined Effects Munitions (CM).** CM constitute effective weapons against a variety of targets, such as air defense radars, armor, soft-skinned vehicles, artillery, and large enemy personnel concentrations. In particular, they are far more effective than conventional bombs against large area target that are lightly armored. Since the bomblets or submunitions dispense over a relatively large area and a small percentage typically fail to detonate, this may create an unexploded ordinance (UXO) hazard. **Under U.S. policy, CMs are not mines, are legal under the laws of armed conflict, and are not timed to go off as anti-personnel devices.** However, disturbing or disassembling submunitions may explode them and cause civilian casualties.

a. Another NGO-initiated treaty, the 2008 Convention on Cluster Munitions (CCM), prohibits development, production, stockpiling, retention or transfer of cluster munitions (CM) between signatory States. Also known as the Oslo Process, this recent treaty binds many U.S. allies, including France, Germany, and the United Kingdom, but the nations that manufacture or use CMs (Russia, China, India, Israel) still reject it. The United States is not a party as it continues to use CMs for certain targets as described above, but lobbied to preserve interoperability for non-signatory states to use and stockpile CM even during multinational operations.

b. The Secretary of Defense has signed a DoD Cluster Munitions Policy mandating by 2018 a reduction of obsolete CM stocks, improvement of CM UXO standards to 1%, and replacement of existing stocks. Prior to the arrival of 2018, the use of CM with a higher UXO rate than 1% requires Combatant Commander level approval¹¹⁸ From 2008-2011, the United States also sponsored an unsuccessful effort to add a new CCW Protocol regulating—but not banning—cluster munitions.¹¹⁹ Current U.S. practice is to mark coordinates and munitions

¹¹⁷ Press Statement from Ms. Jen Psaki, State Department Spokesperson, U.S. Landmine Policy (Sept. 23, 2014). Critics have argued that this new policy is a “backdoor” accession to the Ottawa Convention. Due to the finite service life of landmines, and the cessation of new production and existing mine maintenance (such as battery replacement), the mere passage of time will effectively strip all anti-personnel landmines from the US arsenal, even in the Korean peninsula. Note: Persistent APLs still exist in the DMZ, but they are owned and emplaced by the Governments of North and South Korea, not the United States.

¹¹⁸ See Robert M. Gates, Memorandum for Secretaries of the Military Dep’ts et. al., SUBJECT: DoD Policy on Cluster Munitions and Unintended Harm to Civilians, 19 June 2008, available at <http://www.defense.gov/news/d20080709cmpolicy.pdf>. Also see ANDREW FEICKERT AND PAUL K. KERR, CONG. RESEARCH SERV., RS 22907, CLUSTER MUNITIONS: BACKGROUND AND ISSUES FOR CONGRESS 4 (2014).

¹¹⁹ See U.S. Dep’t of State, Statement of the [US] on the Outcome of the Fourth Review Conference of the CCW, Nov. 25, 2011, at <http://geneva.usmission.gov/2011/11/25/u-s-deeply-disappointed-by-ccws-failure-to-conclude-prococol-on-cluster-munitions/>.

expended for all uses of cluster munitions, and to engage in early and aggressive EOD clearing efforts as soon as practicable.¹²⁰ The Obama Administration has reiterated its opposition to the CCM.

3. **Small Arms Projectiles.** The 1868 Declaration of St. Petersburg prohibits exploding rounds of less than 400 grams. The United States is not a State Party to this declaration, and does not regard it as CIL. **State practice since 1868 has limited this prohibition to projectiles weighing less than 400 grams specifically designed to detonate in the human body.**¹²¹ The prohibition on projectile weight must be distinguished from overall cartridge weight. Expanding military small arms ammunition—that is, so called ‘dum-dum’ projectiles, such as soft-nosed (exposed lead core) or hollow point projectiles—are prohibited by the 1899 Hague Declaration Concerning Expanding Bullets. The United States is not a party to this treaty, but has taken the position that it will adhere to its terms in its military operations in international armed conflict to the extent that its application is consistent with the object and purpose of Article 23(e) of Hague IV. **The prohibition on hollow point/soft nosed military projectiles does not prohibit full-metal jacketed projectiles that yaw or fragment, or “open tip” rifle projectiles containing a tiny aperture to increase accuracy.**

4. **Hollow point or soft point ammunition.** Hollow point or soft-point ammunition contain projectiles with either a hollow point that bores into the lead core or an exposed lead core that flattens easily in the human body. These types of ammunition are designed to expand dramatically upon impact at all ranges.

a. There are situations during which use of this ammunition is lawful because its use will significantly reduce the risk of incidental damage to innocent civilians and friendly force personnel, protected property (e.g., during a hostage rescue or for aircraft security), and material containing hazardous materials. Military law enforcement personnel may be authorized to use this ammunition for law enforcement missions outside an active theater of operations.

b. Military units or personnel are not entitled to possess or use small arms ammunition not issued to them or expressly authorized. Private acquisition of small arms ammunition for operational use is prohibited.

c. “MatchKing” ammunition (or similar rifle projectiles produced by other manufacturers) has an open tip, with a tiny aperture not designed to cause expansion. This design enhances accuracy only, and does not function like hollow or soft point projectiles. “MatchKing” ammunition is lawful for use across the conflict spectrum, provided that the ammunition was issued and not personally procured. However, this ammunition may not be modified by soldiers (such as through further opening the tiny aperture to increase the possibility of expansion).

5. **Poison.** Poison has been outlawed for generations, and is prohibited by treaty.¹²²

6. **Biological Weapons.**¹²³ The 1925 Geneva Gas Protocol prohibited only biological (bacteriological) weapon use. The 1972 Biological Weapons Convention (BWC) extended this prohibition, prohibiting development, production, stockpiling, acquisition, or retention of biological agents or toxins, weapons, equipment or means of delivery designed to use such toxins for hostile purposes or in armed conflict.¹²⁴ The United States has renounced all use of biological and toxin weapons.

7. **Chemical Weapons.**¹²⁵ The 1925 Geneva Gas Protocol prohibits use in war of asphyxiating, poisonous, or other gases (and bacteriological weapons; see below). Initially, the United States reserved the right to respond with chemical weapons to a chemical or biological weapons attack by the enemy. This reservation became moot when the United States in 1997 ratified the Chemical Weapons Convention (CWC), which prohibits production, acquisition, stockpiling, retention, and use of chemical weapons—even in retaliation.

a. **Key Provisions.** There are twenty-four articles in the CWC. Article 1 is the most important, and states Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. **It strictly forbids retaliatory (second) use**, which represents a significant departure from the

¹²⁰ See U.S. DoD Report to Congress: Kosovo/Operation Allied Force After Action Report. See also Thomas Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F.L. REV. 229 (2001).

¹²¹ 400 grams refers to projectile weight, not the full cartridge weight. For the purposes of visualization, 400 grams is roughly the projectile weight of a 25 mm cannon round.

¹²² Hague IV, art. 23(a).

¹²³ See 1925 Geneva Protocol; BWC.

¹²⁴ See BWC.

¹²⁵ See generally Geneva Gas Protocol; CWC.

Geneva Gas Protocol. The CWC requires the destruction of chemical stockpiles. **It also forbids the use of Riot Control Agents (RCA) as a “method of warfare.”** Article 3 requires parties to declare stocks of chemical weapons and facilities they possess. Articles 4 and 5 provide procedures for destruction and verification, including routine on-site inspections. Article 8 establishes the Organization for the Prohibition of Chemical Weapons (OPWC). Article 9 establishes the procedures for “challenge inspection,” which is a short-notice inspection in response to another party’s allegation of non-compliance.

b. **Riot Control Agents (RCA).** U.S. RCA Policy is found in Executive Order 11850. The policy applies to the use of Riot Control Agents and Herbicides, requiring presidential approval before first use in an international armed conflict.

(1) Executive Order 11850.¹²⁶ The order renounces first use of RCA in international armed conflicts *except* in defensive military modes to save lives. Such defensive lifesaving measures include: controlling riots in areas under direct and distinct U.S. military control, to include rioting prisoners of war; dispersing civilians where the enemy uses them to mask or screen an attack; rescue missions for downed pilots/passengers and escaping POWs in remote or isolated areas; and, in our rear echelon areas outside the zone of immediate combat, to protect convoys from civil disturbances, terrorists, and paramilitary organizations.

(2) The CWC prohibits RCA use as a “method of warfare.” “Method of warfare” is undefined. The Senate’s resolution of advice and consent for ratification to the CWC¹²⁷ required that the President must certify that the United States is not restricted by the CWC in its use of riot control agents, including the use against “combatants” in any of the following cases: when the U.S. is not a party to the conflict, in consensual peacekeeping operations, and in Chapter VII (UN Charter) peace enforcement operations.¹²⁸

(3) The implementation section of the Senate resolution requires that the President not modify E.O. 11850. The President’s certification document of 25 April 1997 states that “the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the United States is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces.” Thus, the authority to use RCA is potentially easier to obtain when the United States is not involved in a “war” – an international armed conflict to which the US is a party.

(4) Oleoresin Capsicum Pepper Spray (OC), or Cayenne Pepper Spray. The United States classifies OC as a Riot Control Agent.¹²⁹

c. **Herbicides.** E.O. 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas.

XI. MEANS OF WARFARE: STRATEGIES AND TACTICS

A. **Ruses.**¹³⁰ A ruse is “a trick of war designed to deceive the adversary, usually involving the deliberate exposure of false information to the adversary’s intelligence collection system,”¹³¹ and involves injuring the enemy by **legitimate deception**.¹³² Ruses of war are permissible.¹³³ Examples of ruses include the following:

1. Land Warfare. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit, feints, etc.¹³⁴

¹²⁶ Exec. Order No. 11850, 3 C.F.R., 1971-1975 Comp, p. 980 (1975).

¹²⁷ U.S. Senate Consent to Ratification of the CWC, S. Exec. Res. 75 sec. (2)(26), 105th Cong. (1997).

¹²⁸ U.N. Charter ch. VI.

¹²⁹ See DAJA-IO, Information Paper of 15 August 1996, Use of Oleoresin Capsicum (OC) Pepper Spray and other Riot Control Agents (RCAs); DAJA-IO Memo of 20 September 1994, Subject: Request for Legal Review - Use of Oleoresin Capsicum Pepper Spray for Law Enforcement Purposes; CJCS Memo of 1 July 1994, Subject: Use of Riot Control Agents.

¹³⁰ FM 27-10, para. 48.

¹³¹ See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 317 (8 Nov. 2010, as amended through 31 Dec. 2010) (citation omitted).

¹³² Deception is defined as “[t]hose measures designed to mislead the enemy by manipulation, distortion, or falsification of evidence to induce the enemy to react in a manner prejudicial to the enemy’s interests.” *Id.* at 97.

¹³³ Hague IV, art. 24.

¹³⁴ FM 27-10, para. 51.

EXAMPLE: 1991 Gulf War: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used phony weapons to create the impression that they were going to attack near the Kuwaiti boot heel, as opposed to the “left hook” strategy actually implemented.¹³⁵ Perhaps the most famous example of a ruse is the D-Day landings in Normandy. Before the invasion, the Allies deployed huge numbers of dummy weapons across the English Channel from the French town of Calais, to convince the Germans that the Allies planned to land there.

2. Use of Enemy Property. Use of enemy property to deceive is limited. Enemy property may be used to deceive under the following conditions:

a. Uniforms.¹³⁶ **Under the U.S. position, Combatants may wear enemy uniforms but cannot fight in them with the intent to deceive.** An escaping POW may wear an enemy uniform or civilian clothing to affect his escape.¹³⁷ Military personnel captured in enemy uniform or civilian clothing risk being treated as spies.¹³⁸ In contrast, under the European view espoused by Article 39 of Additional Protocol I, the use of enemy uniforms is prohibited in virtually all cases.

b. Colors. The U.S. position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the United States interprets the “improper use” of a national flag¹³⁹ to permit the use of national colors and insignia of the enemy as a ruse as long as they are not employed during actual combat.¹⁴⁰

c. Equipment. Forces must remove all enemy insignia in order to fight with the equipment. Captured supplies may be seized and used if state property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made.¹⁴¹

d. AP I, Article 39(2), prohibits the use in international armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or “to shield, favor, protect or impede military operations.” The United States does not consider this article reflective of customary law. This article, however, expressly does not apply to naval warfare.¹⁴² The current and long-standing U.S. position is that under the customary international law of naval warfare, it is permissible for a belligerent warship (both surface and subsurface) to fly false colors (including neutral and enemy colors) and display neutral or enemy markings or otherwise disguise its outward appearance (such as the use of deceptive lighting) in ways to deceive the enemy into believing the warship is of neutral or enemy nationality or is other than a warship. However, a warship must display her true colors and status prior to engaging in hostilities.¹⁴³

B. Military Information Support Operations (MISO). Formerly known as psychological operations (PSYOP), MISO are lawful. In the 1991 Gulf War, U.S. PSYOP units distributed over 29 million leaflets to Iraqi forces. The themes of the leaflets were the “futility of resistance; inevitability of defeat; surrender; desertion and defection; abandonment of equipment; and blaming the war on Saddam Hussein.” It was estimated that nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets affected their decision to surrender.¹⁴⁴

C. Treachery and Perfidy. Treachery and perfidy are prohibited under the LOAC.¹⁴⁵ The HR forbid killing or wounding treacherously individuals belonging to the hostile nation or armed forces.¹⁴⁶ Perfidy involves injuring the enemy by his adherence to the LOAC (actions are in bad faith). Perfidy degrades the protections and mutual restraints developed in the interest of all Parties, combatants, and civilians. In practice, combatants find it difficult

¹³⁵ RICK ATKINSON, *CRUSADE* 331-33 (1993).

¹³⁶ For detailed discussion of uniform requirements for U.S. forces, see W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 44 CHI. J. INT'L L. 494 (2003).

¹³⁷ GC III, art. 93.

¹³⁸ FM 27-10, paras. 54, 74; NWP 1-14M, para. 12.5.3; U.S. DEP'T OF THE AIR FORCE, AIR FORCE PAMPHLET 110-31, THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (Nov. 1976), paras. 8-6.

¹³⁹ Hague IV, art. 23(f).

¹⁴⁰ FM 27-10, para. 54; NWP 1-14M, para 12.5. AP I, article 39(2) outlaws such use, but the United States objects to this term.

¹⁴¹ Hague IV, art. 53.

¹⁴² AP I, art. 39(3).

¹⁴³ NWP 1-14M, paras. 12.3.1 & 12.5.1.

¹⁴⁴ See R. B. Adolph, *PSYOP: The Gulf War Force Multiplier*, Army Magazine 16 (Dec. 1992).

¹⁴⁵ Hague IV. art. 23(b).

¹⁴⁶ *Id.*

to respect protected persons and objects if experience causes them to believe or suspect that the adversaries are abusing their claim to protection under the LOAC to gain a military advantage.¹⁴⁷

1. Feigning and Misuse. Feigning is treachery that results in killing, wounding, or capture of the enemy. Misuse is an act of treachery resulting in some other advantage to the enemy. According to AP I, Article 37(1), the killing, wounding, or capture by “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence [are perfidious, and thus prohibited acts]” as such. An act is perfidious only where the feigning of civilian status or other act is a proximate cause in the killing of enemy combatants. Perfidy was not made a grave breach in AP I, and the prohibition applies only in international armed conflict.

2. Other prohibited acts include:

- a. Use of a flag of truce to gain time for retreats or reinforcements.¹⁴⁸
- b. Feigning incapacitation by wounds/sickness.¹⁴⁹
- c. Feigning surrender or the intent to negotiate under a flag of truce.¹⁵⁰
- d. Misuse of the Red Cross, Red Crescent, Red Crystal and cultural property symbols. This provision is designed to reinforce/reaffirm the protections those symbols provide.¹⁵¹ GC I requires that military wounded and sick, military medical personnel (including chaplains), hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected from intentional attack.
- e. Declaring that no quarter will be given or killing/injuring enemy personnel who surrender.¹⁵²
- f. Compelling nationals of the enemy state to take part in hostilities against their own country.¹⁵³

D. **Espionage.**¹⁵⁴ Espionage involves clandestine action (under false pretenses) to obtain information for transmission back to one’s own side. Gathering intelligence while in uniform is not espionage. **Espionage is not a LOAC violation; however, the Geneva Conventions do not protect acts of espionage.** If captured, a spy may be tried under the laws of the capturing nation.¹⁵⁵ Reaching friendly lines immunizes the spy for past espionage activities; therefore, upon later capture as a lawful combatant, the alleged “spy” cannot be tried for past espionage.

E. **Assassination.** Hiring assassins, putting a price on the enemy’s head, and offering rewards for an enemy “dead or alive” are prohibited as treacherous conduct.¹⁵⁶ Offering rewards for information leading to capture of an individual, or attacking military command and control or personnel is not assassination, nor prohibited.¹⁵⁷

F. **Reprisals.** Reprisals are conduct which otherwise would be unlawful, resorted to by one belligerent against enemy personnel or property in response to acts of warfare committed by the other belligerent in violation of the LOAC, for the sole purpose of enforcing future compliance with the LOAC.¹⁵⁸ Individual U.S. military personnel, commanders and units do not have the authority to conduct a reprisal. That authority is retained at the national level.

G. **War Trophies/Souvenirs.** The LOAC authorizes the confiscation of enemy military property. War trophies or souvenirs taken from enemy military property are legal under the LOAC. War trophy personal retention by an individual soldier is restricted under U.S. domestic law. Confiscated enemy military property is property of the United States. The property becomes a war trophy, and capable of legal retention by an individual Soldier as a

¹⁴⁷ FM 27-10, para. 50.

¹⁴⁸ Hague IV, art 23(f).

¹⁴⁹ AP I, art. 37(1)(b).

¹⁵⁰ AP I, art 37(1)(a).

¹⁵¹ Hague IV, art. 23(f).

¹⁵² Hague IV, art. 23.

¹⁵³ *Id.*

¹⁵⁴ FM 27-10, para. 75; AP I, art. 46.

¹⁵⁵ See UCMJ art. 106.

¹⁵⁶ FM 27-10, para 31; E.O. 12333.

¹⁵⁷ See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW, Dec. 1989, at 4.

¹⁵⁸ FM 27-10, para. 49.

souvenir, only as authorized by higher authority. Pillage, that is, the unauthorized taking of private or personal property for personal gain or use, is expressly prohibited.¹⁵⁹

1. War Trophy Policy. 10 U.S.C. § 2579 requires that all enemy material captured or found abandoned shall be turned in to “appropriate” personnel. The law, which directs the promulgation of an implementing directive and service regulations, contemplates that members of the armed forces may request enemy items as souvenirs. The request would be reviewed by an officer who shall act on the request “consistent with military customs, traditions, and regulations.” The law authorizes the retention of captured weapons as souvenirs if rendered unserviceable and approved jointly by DoD and the Bureau of Alcohol, Tobacco, and Firearms (BATF). Implementing directives have not been promulgated.¹⁶⁰

2. Guidance. USCENTCOM General Order Number 1 is an example of a war trophy order. These regulations and policies, and relevant provisions of the UCMJ which may be used to enforce those regulations and policies, must be made known to U.S. forces prior to combat. War trophy regulations must be emphasized early and often, for even those who are aware of the regulations may be tempted to disregard them if they see others doing so.

a. An 11 February 2004 Deputy Secretary of Defense memorandum establishes interim guidance on the collection of war souvenirs for the duration of OPERATION IRAQI FREEDOM (OIF) and will remain in effect until an updated DoD Directive is implemented. This memorandum provides the following:

(1) War souvenirs shall be permitted by this interim guidance only if they are acquired and retained in accordance with the LOAC obligations of the United States. Law of armed conflict violations should be prevented and, if committed by U.S. persons, promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

(2) All U.S. military personnel and civilians subject to this policy, operating in the Iraqi theater of operations during OIF shall turn over to officials designated by CDRUSCENTCOM all captured, found abandoned, or otherwise acquired material, and may not, except in accordance with this interim guidance, take from the Iraqi theater of operations as a souvenir any item captured, found abandoned, or otherwise acquired.

(3) An individual who desires to retain as a war souvenir an item acquired in the Iraqi theater of operations shall request to have the item returned to them as a war souvenir at the time it is turned over to persons designated by CDRUSCENTCOM. Such a request shall be in writing, identify the item, and explain how it was acquired.

(4) The guidance defines “War Souvenir” as any item of enemy public or private property utilized as war material (i.e., military accouterments) acquired in the Iraqi area of operations during OIF and authorized to be retained by an individual pursuant to this memorandum. War souvenirs are limited to the following items: (1) helmets and head coverings; (2) uniforms and uniform items such as insignia and patches; (3) canteens, compasses, rucksacks, pouches, and load-bearing equipment; (4) flags (not otherwise prohibited by 10 U.S.C. 4714 and 7216); (5) knives or bayonets, other than those defined as weaponry [in paragraph 3 below]; (6) military training manuals, books, and pamphlets; (7) posters, placards, and photographs; (8) currency of the former regime; or (9) other similar items that clearly pose no safety or health risk, and are not otherwise prohibited by law or regulation. Under this interim guidance, a war souvenir does not include weaponry.

(5) Acquired. A war souvenir is acquired if it is captured, found abandoned, or obtained by any other lawful means. “Abandoned” for purposes of this interim guidance means property left behind by the enemy.

(6) Weaponry. For this guidance, weaponry includes, but is not limited to: weapons; weapons systems; firearms; ammunition; cartridge casings (“brass”); explosives of any type; switchblade knives; knives with an automatic blade opener including knives in which the blade snaps forth from the grip (a) on pressing a button or lever or on releasing a catch with which the blade can be locked (spring knife), (b) by weight or by swinging motion and is locked automatically (gravity knife), or (c) by any operation, alone or in combination, of gravity or spring mechanism and can be locked; club-type hand weapons (for example, blackjacks, brass knuckles, nunchaku); and blades that are (a) particularly equipped to be collapsed, telescoped or shortened, (b) stripped beyond the normal extent required for hunting or sporting, or (c) concealed in other devices (for example, walking sticks, umbrellas,

¹⁵⁹ Hague IV, art. 47; GC I, art. 15; GC II, art. 18; GC IV, art. 33.

¹⁶⁰ The Marine Corps still lists as active Marine Corps Order (MCO) 5800.6A dtd 28 Aug. 1969 (Personal Affairs Control and Registration of War Trophies and War Trophy Firearms). This is a joint order (AR 608-4; OPNAVINST 3460.7A, and AFR 125-13).

tubes). This definition applies whether an item is, in whole or in part, militarized or demilitarized, standing alone or incorporated into other items (e.g., plaques or frames).

(7) *Prohibited Items*. For the purposes of this interim guidance, prohibited items include weaponry and personal items belonging to enemy combatants or civilians including, but not limited to: letters, family pictures, identification cards, and “dog tags.”

b. See also U.S. CENTCOM General Order Number 1B, contained as an appendix to the Criminal Law chapter.

3. The key to a clear and workable war trophy policy is to publicize the policy before deployment, work the policy into all exercises and plans, and train with the policy. When drafting a trophy policy, consider “6 Cs”:

- a. COMMON SENSE—does the policy make sense?
- b. CLARITY—can it be understood at the lowest level?
- c. COMMAND INFORMATION—is the word out through all means available? (Post on unit bulletin boards, post in mess facilities, put in post newspaper, put in PSA on radio, etc.).
- d. CONSISTENCY—are we applying the policy across all layers and levels of command? (A policy promulgated for an entire Corps is better than diverse policies within subordinate divisions; a policy that is promulgated by the unified command and applies to all of its components is better still).
- e. CUSTOMS—prepare for customs inspections, “courtesy” inspections prior to redeployment, and amnesty procedures.
- f. CAUTION—Remember one of the primary purposes of a war trophy policy: to limit soldiers from exposing themselves to danger (in both Panama and the 1991 Persian Gulf War, soldiers were killed or seriously injured by exploding ordnance encountered when they were looking for souvenirs). Consider prohibitions on unauthorized “bunkering,” “souvenir hunting,” “climbing in or on enemy vehicles and equipment.” A good maxim for areas where unexploded ordnance or booby-traps are problems: “If you didn’t drop it, don’t pick it up.”

XII. MILITARY OCCUPATION

A. **The Nature of Military Occupation.** Territory is considered occupied when it is actually placed under the authority of the hostile armed forces. The occupation extends only to territory where such authority has been established and can effectively be exercised.¹⁶¹ Thus, occupation is a question of fact based on the invader's ability to render the invaded government incapable of exercising public authority. Simply put, occupation must be both actual and effective.¹⁶² However, military occupation (also termed belligerent occupation) is not conquest; it does not involve a transfer of sovereignty to the occupying force. Indeed, it is unlawful for a belligerent occupant to annex occupied territory or to create a new state therein while hostilities are still in progress.¹⁶³ It is also forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile occupying power.¹⁶⁴ Occupation is thus provisional in nature, and is terminated if the occupying power is driven out or voluntarily ends the occupation.

B. **Administration of Occupied Territory.** Occupied territory is administered by military government, due to the inability of the legitimate government to exercise its functions, or the undesirability of allowing it to do so. The occupying power therefore bears a legal duty to restore and maintain public order and safety, while respecting, “unless absolutely prevented,” the laws of the occupied nation.¹⁶⁵ The occupying power may allow the local authorities to exercise some or all of their normal governmental functions, subject to the paramount authority of the occupant. The source of the occupant's authority is its imposition of government by force, and the legality of its actions is determined by the LOAC.¹⁶⁶

¹⁶¹ Hague IV, art. 42.

¹⁶² FM 27-10, para. 352.

¹⁶³ See GC IV, art. 47.

¹⁶⁴ Hague IV, art. 45.

¹⁶⁵ Hague IV, art. 43.

¹⁶⁶ See Elyce Santere, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 MIL. L. REV. 111 (1989). Confiscation - permanent taking without compensation; Seizure - taking with payment or return after the

1. In restoring public order and safety, the occupant is required to continue in force the normal civil and criminal laws of the occupied nation, unless they would jeopardize the security of the occupying force or create obstacles to application of the GC IV.¹⁶⁷ However, the military and civilian personnel of the occupying power remain immune from the jurisdiction of local law enforcement.

2. Articles 46-63 of the GC IV establish important fundamental protections and benefits for the civilian population in occupied territory. Family honor, life, property, and religious convictions must be respected. Individual or mass forcible deportations of protected persons from the occupied territory to the territory of the occupying power or to a third state are prohibited.¹⁶⁸ The occupying power has the duty of ensuring that the population is provided with adequate food, medical supplies and treatment facilities, hygiene, and public health measures.¹⁶⁹ In addition, children are subject to special protection and care, particularly with respect to their education, food, medical care, and protection against the effects of war.¹⁷⁰

3. The occupying power is forbidden from destroying or seizing enemy property unless such action is "imperatively demanded by the necessities of war,"¹⁷¹ or "rendered absolutely necessary by military operations."¹⁷² Pillage, that is, the unauthorized taking of private or personal property for personal gain or use, is expressly prohibited.¹⁷³ However, the occupying power may requisition goods and services from the local populace to sustain the needs of the occupying force "in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in operations of the war against their country." The occupying power is obliged to pay cash for such requisitions or provide a receipt and make payment as soon as possible.¹⁷⁴

4. The occupying power may not compel protected persons to serve in its armed forces, nor may it compel them to work unless they are over eighteen years old, and then only on work that: (1) is necessary for the needs of the occupying force; (2) is necessary for public utility services; or (3) for the feeding, sheltering, clothing, transportation or health of the populace of the occupied country. The occupied country's labor laws regarding such matters as wages, hours, and compensation for occupational accidents and diseases remain applicable to the protected persons assigned to work by the occupant.¹⁷⁵

5. The occupying power is specifically prohibited from forcing the inhabitants to take part in military operations against their own country, and this precludes requiring their services in work directly promoting the military efforts of the occupying force, such as construction of fortifications, entrenchments, and military airfields.¹⁷⁶ However, the inhabitants may be employed voluntarily in such activities.

C. Security of the Occupying Force: Penal Law and Procedure

1. The occupant is authorized to demand and enforce the populace's obedience as necessary for the security of the occupying forces, the maintenance of law and order, and the proper administration of the country. The inhabitants are obliged to behave peaceably and take no part in hostilities.

2. If the occupant considers it necessary, as a matter of imperative security needs, it may assign protected persons to specific residences or internment camps.¹⁷⁷ Security detainees should not be subjected to "prolonged arbitrary detention."¹⁷⁸ The occupying power may also enact penal law provisions, but these may not come into

armed conflict; Requisition - appropriation of private property by occupying force with compensation as soon as possible; Contribution - a form of taxation under occupation law.

¹⁶⁷ See GC IV art. 64.

¹⁶⁸ GC IV, art. 49.

¹⁶⁹ GC IV, art. 55.

¹⁷⁰ GC IV, art. 50.

¹⁷¹ Hague IV, art. 23.

¹⁷² GC IV, art. 53.

¹⁷³ Hague IV, art. 47; GC I, art. 15; GC II, art. 18; GC IV, art. 33.

¹⁷⁴ Hague IV, art. 52; FM 27-10, para. 412.

¹⁷⁵ GC IV, art. 51.

¹⁷⁶ See GC IV, art. 51.

¹⁷⁷ GC IV, art. 78.

¹⁷⁸ In OIF, for example, the cases of security detainees were reviewed periodically by the MNF I Combined Review and Release Board and various other administrative boards, and detainees may have been also referred to the Central Criminal Court of Iraq for prosecution. Periodic status review procedures were also adopted by multi-national forces in Haiti, Bosnia, and Kosovo.

force until they have been published and otherwise brought to the knowledge of the inhabitants in their own language. Penal provisions shall not have retroactive effect.¹⁷⁹

3. The occupying power's tribunals may not impose sentences for violation of penal laws until after a regular trial. The accused person must be informed in writing in his own language of the charges against him, and is entitled to the assistance of counsel at trial, to present evidence and call witnesses, and to be assisted by an interpreter. The occupying power shall notify the protecting power of all penal proceedings it institutes in occupied territory. Sentences shall be proportionate to the offense committed. The accused, if convicted, shall have a right to appeal under the provisions of the tribunal's procedures or, if no appeal is provided for, he is entitled to petition against his conviction and sentence to the competent authority of the occupying power.¹⁸⁰

4. Under the provisions of the GC IV, the occupying power may impose the death penalty on a protected person only if found guilty of espionage or serious acts of sabotage directed against the occupying power, or of intentional offenses causing 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.¹⁸¹ However, the United States has reserved the right to impose the death penalty for such offenses resulting in homicide irrespective of whether such offenses were previously capital offenses under the law of the occupied state. In any case, the death penalty may not be imposed by the occupying power on any protected person who was under the age of eighteen years at the time of the offense.¹⁸²

5. The occupying power must promptly notify the protecting power of any sentence of death or imprisonment for two years or more, and no death sentence may be carried out until at least six months after such notification.¹⁸³

6. The occupying power is prohibited from imposing mass (collective) punishments on the populace for individual offenses. That is, "[n]o general penalty, pecuniary or otherwise, shall be inflicted upon the populations on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."¹⁸⁴

7. In areas occupied by U.S. forces, military jurisdiction over individuals, other than members of the U.S. armed forces, may be exercised by courts of a military government. Although sometimes designated by other names, these military tribunals are actually military commissions. They preside in and for the occupied territory and thus exercise their jurisdiction on a territorial basis.

XIII. NEUTRALITY

A. Neutrality on the part of a state not a party to an armed conflict consists in refraining from all participation in the conflict, and in preventing, tolerating, and regulating certain acts on its own part, by its nationals, and by the belligerents. In response, belligerents have a duty to respect the territory and rights of neutral states. Hague V is a primary source of law. The degree to which traditional "neutrality" has been modified by the Charter of the United Nations is unclear; it is generally accepted that neutrality law still provides some guidance, particularly regarding collective self-defense actions and *jus ad bellum* analysis. Historically, neutrality rights include the following:

1. The territory of the neutral state is inviolable.¹⁸⁵ This prohibits any unauthorized entry into the territory of the neutral state, its territorial waters, or the airspace over such areas by troops or instrumentalities of war. Thus, belligerents are also specifically prohibited from moving troops or convoys of war munitions or supplies across the territory of a neutral state.¹⁸⁶ In consequence, the efforts of the neutral to resist, even by force, attempts to violate its territory cannot be regarded as hostile acts by the offending belligerents.¹⁸⁷ However, if the neutral is "**unwilling or unable**" to prevent such violations of its neutrality by the troops of one belligerent, that belligerent's enemy may be justified in attacking those troops in neutral territory.

¹⁷⁹ GC IV, art. 65.

¹⁸⁰ GC IV, arts. 72, 73.

¹⁸¹ GC IV, art. 68.

¹⁸² GC IV, art. 68.

¹⁸³ GC IV, arts. 74, 75.

¹⁸⁴ Hague, IV, art. 50; GC IV, art. 33.

¹⁸⁵ Hague V, art. 1.

¹⁸⁶ Hague V, art. 2.

¹⁸⁷ Hague V, art. 10.

2. Belligerents are also prohibited from establishing radio communications stations in neutral territory to communicate with their armed forces, or from using such facilities previously established before the outbreak of hostilities for that purpose.¹⁸⁸ However, a neutral state may permit the use of its own communications facilities to transmit messages on behalf of the belligerents, so long as such usage does not lend assistance to the forces of only one side of the conflict. Indeed, the neutral must ensure that the measure it takes in its status as a neutral state is impartial, as applied to all belligerents.¹⁸⁹

3. While a neutral state is under no obligation to allow passage of convoys or aircraft carrying the sick and wounded of belligerents through its territory or airspace, it may do so without forfeiting its neutral status. However, the neutral must exercise necessary control or restrictive measures concerning the convoys or medical aircraft, must ensure that neither personnel nor material other than that necessary for the care of the sick and wounded is carried, and must accord the belligerents impartial treatment.¹⁹⁰ In particular, if the wounded and sick or prisoners of war are brought into neutral territory by their captor, they must be detained and interned by the neutral state so as to prevent them from taking part in further hostilities.¹⁹¹

4. The nationals of a neutral state are also considered as neutrals.¹⁹² However, if such neutrals reside in occupied territory during the conflict, they are not entitled to claim different treatment, in general, from that accorded the other inhabitants; the law presumes that they will be treated under the law of nations pertaining to foreign visitors, as long as there is an open and functioning diplomatic presence of their State.¹⁹³ They are likewise obliged to refrain from participation in hostilities, and must observe the rules of the occupying power. Moreover, such neutral residents of occupied territory may be punished by the occupying power for penal offenses to the same extent as nationals of the occupied nation.

5. A national of a neutral state forfeits his neutral status if he commits hostile acts against a belligerent, or commits acts in favor of a belligerent, such as enlisting in its armed forces. However, he is not to be more severely treated by the belligerent against whom he acted, than would be a national of the enemy state for the same acts.¹⁹⁴

6. The United States has supplemented the above-described rules of international law concerning neutrality by enacting federal criminal statutes that define offenses and prescribe penalties for violations against U.S. neutrality. Some of these statutes are effective only during a war in which the United States is a declared neutral, while others are in full force and effect at all times.¹⁹⁵

B. Impact of the United Nations Charter Regime on the Law of Neutrality

1. In the event of any threat to or breach of international peace and security, the United Nations Security Council may call for action under Articles 39 through 42 of the UN Charter. In particular, the Security Council may make recommendations, call for employment of measures short of force, or order forcible action to maintain or restore international peace and security.

2. For a UN member nation, these provisions of the Charter, if implemented, may qualify that member nation's right to remain neutral in a particular conflict. For example, if a member nation is called on by the Security Council, pursuant to Articles 42 and 43 of the Charter, to join in collective military action against an aggressor state, that member nation loses its *right* to remain neutral. However, the member nation would actually lose its neutral status only if it complied with the Security Council mandate and took hostile action against the aggressor.

XIV. COMPLIANCE WITH THE LAW OF ARMED CONFLICT

A. The Role of Protecting Powers and the ICRC

¹⁸⁸ Hague V, art. 3.

¹⁸⁹ Hague V, art. 9. Note that this theory has application to the cyber realm today. Some analysts argue that the transmission of computer code/packets through neutral countries is not a neutrality violation as long as "effects" are not being created in the neutral state.

¹⁹⁰ Hague V, art. 14; *see* GC I, art. 37.

¹⁹¹ GC I, art. 37.

¹⁹² Hague V, art. 16.

¹⁹³ *See* GC IV, art. 4.

¹⁹⁴ Hague V, art. 17.

¹⁹⁵ *See* 18 U.S.C. 956-68; 22 U.S.C. 441-57, 461-65.

1. The System of Protecting Powers. During international armed conflicts, Common Articles 8-11 of the Geneva Conventions authorize “the cooperation and . . . scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict.” The diplomatic institution of Protecting Powers, which developed over the centuries independent of the LOAC, enables a neutral sovereign state, through its designated diplomatic representatives, to safeguard interests of a second state in the territory of a third state. Such activities in wartime were first given formal recognition in the Geneva Prisoner of War Convention of 1929.¹⁹⁶

a. Such protecting power activities may be of value when belligerent State Parties sever diplomatic relations. The Protecting Power attends to the humanitarian interests of those citizens of the second state who are within the territory and under the control of the third state, such as prisoners of war and civilian detainees.

b. Protecting Power activities reached their zenith during World War II, as the limited number of neutral states acting as protecting powers assumed a role as representatives not merely of particular belligerents, but rather as representatives of the humanitarian interests of the world community. Since that time, the role of Protecting Powers has been fulfilled by the International Committee of the Red Cross, as authorized by GC I–III, Article 10, GC IV, Article 11.

B. The Contributions and Role of the International Committee of the Red Cross (ICRC). Founded in 1863, the ICRC is a private, non-governmental organization of Swiss citizens that has played a seminal role in the development and implementation of the LOAC relating to the protection of war victims. During World War II, the ICRC supplemented the efforts of the protecting powers, and undertook prodigious efforts on behalf of POWs. Those efforts included the establishment of a Central Prisoner of War Agency with 40 million index cards, the conduct of 11,000 visits to POW camps, and the distribution of 450,000 tons of relief items.

1. The role of the ICRC as an impartial humanitarian organization is formally recognized in GC III, Common Articles 9-11 and Article 125, and GC IV, Article 63. Since World War II, the Protecting Power system has not been widely used, and the ICRC has stepped into the breach as a substitute for government Protecting Powers in international armed conflicts, subject to the consent of the Parties to the conflict.

2. With respect to NIACs, Common Article 3 of the Geneva Conventions recognizes the prerogative of the ICRC or other impartial humanitarian organizations to offer its services to the parties to the conflict.

3. Relations between U.S. Military and the ICRC

a. Subject to essential security needs, mission requirements and other legitimate, practical limitations, the ICRC must be permitted to visit POWs and provide them certain types of relief. Typically, the United States will invite the ICRC to observe POW, civilian internee or detainee conditions as soon as circumstances permit. The invitation to the ICRC for its assistance is made by the U.S. Government (Department of State, in coordination with the Department of Defense), and not by the Combatant Commander. As a consequence, there is SECDEF guidance on reporting of all ICRC contacts, inspections, or meetings through operational channels.¹⁹⁷

b. Given a JA’s professional qualifications and specialized training in the LOAC, he or she should be integrated into the command’s interaction with the ICRC.¹⁹⁸ The JA can quickly identify and resolve many LOAC issues before they become a problem for the commander. For those LOAC matters requiring command decision, the JA is best suited to provide advice to the commander and obtain timely responses. These same skills are essential in dealing with ICRC observers. The JA can best serve as the commander’s skilled advocate in discussions with the ICRC concerning the LOAC.

c. It is important to note that the ICRC has a vital role as an impartial humanitarian organization. While the ICRC’s views may not always align with U.S. policy, the organization is capable of providing assistance

¹⁹⁶ Geneva Convention Relative to the Treatment of Prisoners of War of 27 July 1929 (47 Stat. 2021; Treaty Series 846). This treaty was replaced, as to the contracting parties, with the Geneva Conventions of 1949.

¹⁹⁷ Memorandum, Sec’y of Def, SUBJECT: Handling of Reports from the [ICRC] (14 July 2004).

¹⁹⁸ General Prugh (former TJAG) fulfilled the task of “interfacing” with the ICRC when he was the legal advisor to CDR, MACV in Vietnam. General Prugh relates that during the early stages of Viet Nam, OTJAG concluded that the U.S. was involved in an Art 3, not Art 2, conflict. In June ‘65 the situation had changed, and by Aug ‘65 a formal announcement was made that art. 2 now applied. Soon, ICRC delegates began to arrive, and it fell upon the judge advocates to meet with the delegates. This role continued in operations in Grenada, Panama, Somalia, Haiti, and during the Gulf War. The development of this liaison role was also apparent in Haiti, particularly in the operation of Joint Detention Facility.

in a variety of ways. In recent conflicts, the ICRC assisted in making arrangements for the transportation of the remains of dead enemy combatants and for repatriating POWs and civilian detainees. Maintaining a close working relationship with ICRC representatives can assist the JA in identifying potential LOAC issues in the command's AOR and the organization can serve as an additional resource to resolve various legal and humanitarian matters.

XV. REMEDIES FOR VIOLATIONS OF THE LAW OF ARMED CONFLICT

A. U.S. Military and Civilian Criminal Jurisdiction

1. The historic practice of the military services is to charge members of the U.S. military who commit offenses regarded as a "war crime" under existing, enumerated articles of the UCMJ.¹⁹⁹

2. In the case of other persons subject to trial by general courts-martial for violating the laws of war²⁰⁰ the charge shall be "Violation of the Laws of War" rather than a specific UCMJ article.

3. The War Crimes Act of 1997²⁰¹ provides federal courts with jurisdiction to prosecute any person inside or outside the U.S. for war crimes where a U.S. national or member of the armed forces is involved as an accused or as a victim.

4. The Act defines "war crimes" as: (1) grave breaches as defined in the Geneva Conventions of 1949 and any Protocol thereto to which the U.S. is a party; (2) violations of Articles 23, 25, 27, 28 of the Annex to the Hague Convention IV; (3) violations of Common Article 3 of the Geneva Conventions of 1949 and any Protocol thereto to which the U.S. is a party and deals with a non-international armed conflict; (4) violations of provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps & Other Devices (Protocol II as amended May, 1996) when the U.S. is a party and the violator willfully kills or causes serious injury to civilians.

5. U.S. policy on application of the LOAC is stated in DoD Directive 2311.01E (9 May 2006): "It is DoD policy that ... [m]embers of the DoD Components [including U.S. civilians and contractors assigned to or accompanying the armed forces] comply with the LOAC during all armed conflicts, however such conflicts are characterized, and in all other military operations."

B. Command Responsibility.

1. Commanders are legally responsible for war crimes committed by their subordinates when any one of three circumstances applies:

- a. The commander ordered the commission of the act;
- b. The commander knew of the act, either before or during its commission, and did nothing to prevent or stop it; or
- c. The commander should have known, "through reports received by him or through other means, that troops or other persons subject to his control [were] about to commit or [had] committed a war crime and he fail[ed] to take the necessary and reasonable steps to ensure compliance with the LOAC or to punish violators thereof."²⁰² While this principle has long been recognized in the Army Field Manual, recent initiatives by the ICRC have concluded that this principle of command responsibility also operates as a matter of customary international law.²⁰³

2. JAs must keep their commanders informed of their responsibilities concerning the investigation and prosecution of war crimes. The commander must also be aware of his potential responsibility for war crimes committed by his subordinates. "At all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, legal advisors will provide advice concerning law of armed conflict compliance."²⁰⁴ JAs should also help ensure that LOAC investigating and reporting requirements are integrated into all appropriate policies, directives, and operation and concept plans.

¹⁹⁹ FM 27-10, para. 507.

²⁰⁰ UCMJ, art. 18.

²⁰¹ 18 U.S.C. § 2441.

²⁰² FM 27-10, para. 501.

²⁰³ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 211 (2005).

²⁰⁴ CJCSI 5801.01C para. 4b.

3. Investigative Assets. Several assets are available to assist commanders investigating suspected violations of the LOAC. The primary responsibility for an investigation of a suspected, alleged, or possible war crime resides in the U.S. Army Criminal Investigation Command (CID) or, for other military services, CID Command's equivalent offices. For minor offenses, investigations can be conducted with organic assets and legal support, using AR 15-6 or RCM 303 commander's inquiry procedures.²⁰⁵ (Command regulations, drafted in accordance with DoD Directive 2311.01E, should prescribe the manner and level of unit investigation.) CID has investigative jurisdiction over suspected war crimes in two instances. The first is when the suspected offense is one of the violations of the UCMJ listed in Appendix B to AR 195-2, Criminal Investigation Activities (generally felony-level offenses). The second is when the investigation is directed by HQDA.²⁰⁶

4. In addition to CID, and organic assets and legal support, a commander may have Reserve Component JAGSO teams available to assist in the investigation of war crimes committed by the enemy against U.S. forces. JAGSO teams perform JA duties related to international law, including the investigation and reporting of violations of the LOAC, the preparation for trials resulting from such investigations, and the provision of legal advice concerning all operational law matters. Other available investigative assets include the military police, counterintelligence personnel, and JAs.

C. Reports. WHEN IN DOUBT, REPORT. Report a "reportable incident" by the fastest means possible, through command channels, to the responsible combatant commander. A "reportable incident" is a possible, suspected, or alleged violation of the LOAC for which there is credible information. The reporting requirement should be stated not only in a "27 series" regulation or legal appendix to an OPLAN or OPORD, but also in the unit TACSOP or FSOP. Normally, an OPREP-3 report established in Joint Pub 1-03.6, JRS, Event/Incident Reports, will be required. Alleged violations of the LOAC, whether committed by or against U.S. or enemy personnel, are to be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

D. Prevention of War Crimes. Commanders must take steps to ensure that members of their commands do not violate the LOAC. The two principal means of affecting this goal are to recognize the factors which may lead to the commission of war crimes, and to train subordinate commanders and troops to standard concerning compliance with the LOAC and proper responses to orders that violate the LOAC.

1. Awareness of the factors that have historically led to the commission of war crimes allows the commander to take preventive action. The following is a list of some of the factors that the commander and the judge advocate should monitor in subordinate units.

- a. High friendly losses.
- b. High turnover rate in the chain of command.
- c. Dehumanization of the enemy (derogatory names or epithets).
- d. Poorly trained or inexperienced troops.
- e. The lack of a clearly defined enemy.
- f. Unclear orders.
- g. High frustration level among the troops.

2. Clear, unambiguous orders are a responsibility of good leadership. Soldiers who receive ambiguous orders or who receive orders that clearly violate the LOAC must understand how to react to such orders. Accordingly, the judge advocate must ensure that soldiers receive instruction in this area. Troops who receive unclear orders must insist on clarification. Normally, the superior issuing the unclear directive will make it clear, when queried, that it was not his intent to commit a war crime. If the superior insists that his illegal order be obeyed, however, the soldier has an affirmative legal obligation to disobey the order and report the incident to the next superior commander, military police, CID, nearest judge advocate, or local inspector general.

²⁰⁵ U.S. DEP'T OF ARMY, ARMY REGULATIONS 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2006); Rules for Courts Martial (RCM) 303.

²⁰⁶ U.S. DEP'T OF ARMY, ARMY REGULATIONS 195-2, CRIMINAL INVESTIGATIVE ACTIVITIES para. 3-3a(7) (1985).

E. International Criminal Tribunals

Violations of the LOAC, as crimes defined by international law, may also be prosecuted under the auspices of international tribunals, such as the Nuremberg, Tokyo, and Manila tribunals established by the Allies to prosecute German and Japanese war criminals after World War II. The formation of the United Nations has also resulted in the exercise of criminal jurisdiction over war crimes by the international community, with the Security Council's creation of the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia.

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APPENDIX A

TROOP INFORMATION

I. REASONS TO COMPLY WITH THE LOAC—EVEN IF THE ENEMY DOES NOT

A. Compliance ends the conflict more quickly. During Operation DESERT STORM, favorable treatment of Iraqi EPWs by coalition forces helped end the war quickly as reports of such treatment likely encouraged massive surrender by the enemy. Mistreatment of EPWs encourages enemy soldiers to fight harder and resist capture.

B. Compliance enhances public support of our military mission. Violations of the LOAC reduce support at home and abroad, undermine the mission, and place fellow Soldiers at risk by turning the public against them.

C. Compliance encourages reciprocal conduct by enemy soldiers. Mistreatment of EPWs by our Soldiers may encourage enemy soldiers to retaliate and treat captured U.S. Soldiers in the same manner.

D. Compliance not only accelerates termination of the conflict, but it also reduces the waste of our resources in combat and the costs of reconstruction after the conflict ends.

E. Compliance is required by law. LOAC arises in large part from treaties that are part of our national law. Violation of the LOAC is a serious crime punishable by death in some cases.

II. SOLDIER'S GENERAL RESPONSIBILITIES IN WARTIME

A. Carry out all lawful orders promptly and aggressively.

B. In rare cases when an order seems unlawful, do not carry it out right away, but do not ignore it either. Instead, immediately and respectfully seek clarification of that order. “Sir/Ma’am, are you ordering me to _____?”

1. Soldiers may be held criminally responsible for unlawful acts they personally commit in time of war. There is no “statute of limitations” on prosecution of war crimes, so Soldiers may be prosecuted years later.

2. If a Soldier is court-martialed for carrying out an obviously unlawful order, the “I just followed orders” defense usually fails. By training and common sense, Soldiers must recognize unlawful orders and act appropriately.

C. Know:

1. The Soldier’s Rules.
2. Forbidden targets, tactics, and techniques. (See related material above).
3. Rules regarding captured soldiers.
4. Rules for the protection of civilians and private property. (See related material above).
5. Obligations to prevent and report LOAC violations.

III. THE SOLDIER'S RULES

A. Fight only enemy combatants.

B. Do not harm enemies who surrender — disarm them and turn them over to your superior.

C. Do not kill or torture EPW, or other detainees.

D. Collect and care for the wounded, whether friend or foe.

E. Do not attack medical personnel, facilities, or equipment.

F. Destroy no more than the mission requires.

G. Treat all civilians humanely.

H. Do not steal — respect private property and possessions.

I. Do your best to prevent violations of the law of armed conflict

J. Report all violations to your superior.

IV. RULES REGARDING CAPTURED SOLDIERS

A. Handling Surrender of Enemy Soldiers.

1. Be cautious. Follow unit procedures in allowing enemy soldiers to approach your position and surrender.
2. Waiving the white flag may not mean surrender; it may simply mean that the enemy wants a brief cease-fire so they can safely meet with us. The enemy may seek such a meeting to arrange surrender, but the meeting may also be sought for other reasons (e.g., to pass a message from their commander to our headquarters or to arrange removal of wounded from the battlefield).
3. Enemy soldiers must be allowed to surrender if they clearly indicate a desire to—weapons dropped, hands up, etc. Any order not to accept a clear surrender and continue killing the enemy is unlawful.

B. Treatment of Captured Soldiers on the Battlefield.

1. Follow established unit procedures for the handling of EPWs (recall the “5 Ss and T” process).
2. Treat EPWs humanely. The willful killing, torture, or other inhumane treatment of an EPW is a very serious LOAC violation—a “grave breach.” Other LOAC violations are referred to as “simple breaches.”
3. Do not take EPW personal property except to keep it safe pending release or movement elsewhere.
4. Protect and otherwise care for EPWs in your custody. Because this is often difficult in combat, forces must move EPWs to the rear as soon as possible.
5. Certain captured enemy personnel are not technically EPWs, but are rather referred to as “retained personnel.” Such retained personnel include medical personnel and chaplains. Ask JA for advice.

C. Your Rights and Responsibilities If Captured.

1. In General. Follow training on Code of Conduct, SERE, etc., which provides additional guidance.
2. Rights as a Prisoner of War (POW). POWs are entitled to certain mandatory protections and other care from their captors, including food, housing, medical care, mail delivery, and retention of most personal property with a person when captured. Generally, the POW cannot waive such rights.
3. Responsibilities as a POW.
 - a. POWs must obey reasonable camp regulations.
 - b. Information: If asked, a captured Soldier must provide four items of information (name, rank, service number, and DOB). Such information is needed by the capturing country to fulfill reporting obligations under international law.
 - c. Work. In addition, junior enlisted POWs may be compelled to work provided the work does not support the enemy’s war effort. NCOs may be tasked to supervise. POWs are entitled to payment for their work. Commissioned officer POWs may volunteer to work or supervise, but may not be compelled to do so.

V. OBLIGATIONS TO PREVENT AND REPORT LOAC VIOLATIONS

A. Prevention. Soldiers not only must avoid committing LOAC violations; they must also attempt to prevent violations of the LOAC by other U.S. Soldiers.

B. Reporting Obligation. Soldiers must promptly report any actual or suspected violations of the LOAC to their superiors. If that is not feasible, Soldiers report to other appropriate military officers (e.g., IG, JA, or Chaplain). DoDD 2311.01E.

APPENDIX B

LAW OF ARMED CONFLICT CONSIDERATIONS IN THE ACQUISITION OF SUPPLIES AND SERVICES DURING MILITARY OPERATIONS

We cannot rely only on the laws of armed conflict (LOAC) for the acquisition of supplies and services to support military operations. Limitations under the LOAC make it imperative that we normally acquire supplies and services using U.S. acquisition laws. (See Chapter 15, Contingency and Deployment Contracting, in this Handbook). Nevertheless, battlefield acquisition techniques (confiscation, seizure, and requisition) may prove a valuable means of supporting some needs of a deployed force when active combat or actual occupation of hostile territory occurs.

I. U.S. RIGHTS AND OBLIGATIONS UNDER THE LAW OF ARMED CONFLICT RELATING TO BATTLEFIELD PROCUREMENT OF GOODS

A. The law of land warfare regulates the taking and use of property by military forces. The rights and obligations of military forces vary depending on the ownership of the property, the type of property, and whether the taking occurs on the battlefield or under military occupation. Certain categories of property are completely protected from military action (e.g., historic monuments, museums, and scientific, artistic, and cultural institutions).

B. Acquisition of Enemy Property in Combat.

1. **Confiscation** is the permanent taking or destruction of enemy *public* property found on the battlefield. (Hague IV, art. 23(g) and 53; FM 27-10 paras. 59, 393-424). When required by military necessity, confiscated property becomes the property of the capturing state. The concept of state ownership includes the requirement to preserve property. Confiscation is a taking without compensation to the owner. Thus, a commander may acquire the supplies of an enemy armed force and its government. Public buildings may also be used for military purposes. When military necessity requires it, if ownership is not known, a commander may treat the property as public property until ownership is determined.

2. **Seizure** is the temporary taking of private or state property. When the use of private real property on the battlefield is required by military necessity, military forces may temporarily use it without compensation. (Use of private real property is discouraged; try to use public real property [firehouses or abandoned palaces make excellent CPs]. Anything other than a transient use of private real property will require a lease [typically retroactive] concluded by the Corps of Engineers.) Private personal property, if taken, must be returned when no longer required, or else the user must compensate the owner. (Hague IV, art. 53; FM 27-10, para. 406-10). Examples of property which might be seized include arms and ammunition in contractor factories; radio, TV, and other communication equipment and facilities; construction equipment; privately owned vehicles, aircraft, ships, etc.

3. To the maximum extent possible, avoid seizing private property. Use enemy public (government or military) property instead. If private property must be seized, give a receipt for the property, if possible, and record the condition of the property and the circumstances of seizure. Units should produce duplicate forms for this purpose, not only to document the seizure, but to notify operators and logisticians of the availability of the property. An example of such a form is reproduced at the end of Chapter 16. Units likely to seize property (typically airborne and light units with few organic vehicles) should train on seizure, recordation, and reporting procedures. Vehicle seizure procedures should be in the TACSOP of such units. Marking of seized vehicles (with spray paint or marker panels) should be addressed in the TACSOP to minimize the likelihood of fratricide.

C. Acquisition of Enemy Property in Occupied Territories

1. An occupation is the control of territory by an invading army. (Hague IV, art. 42; FM 27-10, para. 351). Public personal property that has some military use may be confiscated without compensation. (FM 27-10, para. 403). The occupying military force may use public real property, if it has some military use or is necessary to prosecute the war. (FM 27-10, para. 401). However, no ownership rights transfer.

2. Private property capable of direct military use may be seized and used in the war effort. Users must compensate the owner at the end of the war. (FM 27-10, para. 403).

3. DoD makes a distinction between those instances in which a contractual obligation has arisen and those in which the private owner must initiate a non-contractual claim for compensation. The first category involves products or services acquired as result of express or implied in fact contract. The second category which gives rise

to potential compensation claims arises when a government representative unilaterally takes possession of the property. In both cases, an owner may have extraordinary relief available (Pub. L. 85-804). In no case, however, is relief under Pub. L. 85-804, or under any other contractual remedy, available to pay for combat damage.

4. **Requisition** is the taking of private or state property or services needed to support the occupying military force. Unlike seizure, requisition can only occur upon the order of the local commander. Users must compensate the owner as soon as possible. (FM 27-10, para. 417). The command may levy the occupied populace to support its force, i.e., pay for the requisition. Requisition is the right of the occupying force to buy from an unwilling populace. Requisitions apply to both personal and real property. It also includes services.

5. **Common Article 2 Threshold.** If a host nation government invites U.S. forces into its territory, the territory is not occupied and U.S. forces have no right to take property. The LOAC and the property rules therein have not been triggered. The Host Nation may agree to provide for some needs of U.S. forces that cannot be met by contracting. Examples: (1) Saudi Arabia in Operation DESERT SHIELD/STORM (1990-91), (2) Haiti in Operation UPHOLD DEMOCRACY (1994-95), and (3) Bosnia-Herzegovina, in Operation JOINT ENDEAVOR (1995-96).

II. U.S. RIGHTS AND OBLIGATIONS UNDER THE LAW OF ARMED CONFLICT RELATING TO BATTLEFIELD PROCUREMENT OF SERVICES

The LOAC also regulates use of prisoners of war (POW) and the local populace as a source of services for military forces. POWs and civilians may not be compelled to perform services of a military character or purpose.

A. **Use of POWs as Source for Services in Time of War.** POWs may be used as a source of labor; however, the work that POWs may perform is very limited. (GC III, art. 49; FM 27-10, para. 125-33). POWs may not be used as a source of labor for work of a military character or purpose. (GC III, art. 49; FM 27-10, para. 126). The regulation governing POW labor is AR 190-8, which requires a legal review (with copy to OTJAG) of proposed POW labor in case of doubt concerning whether the labor is authorized under the LOAC. Note that POWs may be used to construct and support (food preparation, e.g.) POW camps.

B. Use of Civilian Persons as Source for Services in Time of War.

1. Civilian persons may not be compelled to work unless they are over 18, and then only on work necessary either for the needs of the army of occupation, for public utility services, or for the feeding, sheltering, clothing, transportation, or health of the population of the occupied country. (GC IV art. 51; FM 27-10, para. 418-24). Civilians considered protected persons may not be compelled to take part in military operations against their own country. (GC IV, art. 51; FM 27-10, para. 418).

2. The prohibition against forced labor in military operations precludes requisitioning the services of civilian persons upon work directly promoting the ends of war, such as construction of fortifications, entrenchments, or military airfields; or transportation of supplies/ammunition in the Area of Operations. There is no prohibition against their being employed voluntarily and paid for this work. (FM 27-10, para. 420).

III. CONCLUSION

The uncertainty of these principles (confiscation, seizure, and requisition) as a reliable source for the acquisition of supplies and services make them a less-preferred means of fulfilling the requirements of U.S. forces than traditional contracting methods. However, these principles do provide an expedient complement to other acquisition techniques that should not be overlooked in appropriate circumstances. Before using these acquisition techniques, however, consider the impact that takings of private property or forced labor inevitably have on the populace. Consider also the difficulty in accurately computing compensation owed if accurate records do not exist (units must set up a system for recording takings of private property in SOPs if battlefield acquisitions are anticipated).