

# HANDBOOK ON INTERNATIONAL RULES GOVERNING MILITARY OPERATIONS



ICRC



**ICRC**

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# FOREWORD

Training armed forces in the law of armed conflict (LOAC) is a challenge that is steadily becoming more important as armed conflicts, both international and internal, continue to occur globally and modern weaponry becomes more capable of inflicting destruction on an ever-increasing scale. The law is largely derived from over thirty international treaties and from customary international humanitarian law. One method of training might be to conduct academic courses in military establishments consisting of numerous lectures outlining the content of the treaties and the meaning of the customary law principles.

In 1974 Colonel Frédéric de Mulinen of the Swiss Army, tasked to run LOAC (or law of war, the term used at the time) courses at the International Institute of Humanitarian Law in San Remo, Italy, realized that this was not the way to teach and train the armed forces. As a military man he had insight into the armed forces' practical way of operating in order to achieve their mission, and was determined that the proposed courses in San Remo would follow a practical military line.

Having devised the San Remo course as a module extending over two weeks and consisting of a number of introductory days followed by military exercises in which LOAC was applied at all command levels, he concluded that a handbook was required to help the participants identify the various rules that should be applied in all operational situations. Some of these provisions came directly from the law and some could be derived from treaty provisions or from the customary principles. On this premise, the first *Handbook on the Law of War for Armed Forces* was conceived.

The *Handbook on International Rules governing Military Operations* follows the same practical military line of its predecessor, while incorporating modern computerized methods in a digital format available on CD-ROM and online.

It retains the de Mulinen method of applying strategic guidelines compatible with the international law governing military operations. All concerned with the application of LOAC and relevant human rights law rules can use this Handbook, but the emphasis is laid on providing guidance for military commanders and staffs engaged in combat, law enforcement, and peace support operations.

The Handbook will not replace national military manuals, which are required to comprehensively cover the international rules governing military operations and applicable to a State. However, it will supplement such manuals by putting the law into a practical and workable framework for

military operations. Many of the provisions it contains set guidelines for compliance with the law, which can be refined by national policy as outlined in the national manual and in accordance with more specific treaty provisions. An example of this is the requirement for a commander to plan an attack with reference to rules on targeting incorporated in such manuals, taking the principles of proportionality and precaution into account in his planning, distinguishing between opposing armed forces and civilians, and ensuring that incidental loss to the civilian population or objects is not excessive in relation to the military advantage anticipated.

Armed conflict in the 21st century is more diverse than conflicts of the 19th or 20th centuries when most of the treaty law was being developed. Military strategy and tactics have evolved in such a way that the entire population of a country or region is directly affected by a conflict to a greater or lesser degree. While the 1868 St Petersburg Declaration that *the only legitimate objective which States should endeavour to accomplish during war is to weaken the military forces of the enemy* is as relevant today as it was then, its meaning in this era of potential total warfare has been greatly expanded. Today's military commanders can expect to be assigned a mission to destroy the war-fighting capability of a belligerent by attacking the infrastructure of the state or region. In achieving their mission, such commanders must take steps to ensure that the rules of humanity are incorporated into their concept of operations. This handbook will guide commanders and their staffs on how to do just that.

Experience down through the ages has shown that a disciplined force, which implements humanitarian rules, will achieve its mission more effectively than an undisciplined one, which disregards such rules. This new updated Handbook will assist armed forces in achieving their mission in an efficient and effective manner by incorporating LOAC and relevant human rights law into the planning process, and is a fitting successor to the original *Handbook on the Law of War for Armed Forces* compiled by Frédéric de Mulinen and first published by the ICRC more than thirty years ago.

**Bill Nott**  
Colonel

June 2012

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# INTRODUCTION

The *Handbook on International Rules governing Military Operations* is not a legal textbook. Rather, it is a reference work collecting summaries of the most important provisions of the law of armed conflict and international human rights law that have a bearing on modern military operations. It is geared mainly towards land forces, and is primarily intended for the use of operational commanders and their staffs. However, it will be useful to anyone who seeks to understand this body of law and its impact upon military operations.

A common complaint heard from legal and non-legal military officers alike is that the international law relevant to their operations is a patchwork of provisions from many different treaties and customary rules, often without obvious operational meaning; and that these instruments are difficult to stitch together into operationally-relevant doctrine, education and field training. Another common complaint is that intricate terminology tends to dominate discussions of this body of law. These are serious concerns, since military commanders stand at the interface between the law and its application in the field.

Accordingly, the aim of this Handbook is to draw together the most important elements of international law governing military operations, formulating and structuring them in such a way that they become accessible to all armed forces. It clarifies the law by placing it in the context of those operations with the greatest humanitarian impact worldwide: combat operations in armed conflict; law enforcement operations; and peace support operations. Finally, it serves as a guide to integrating that body of law into the operational practice of armed forces, which is key to ensuring legally-compliant behaviour.

Although the vast majority of rules contained in this Handbook are non-contentious, certain important areas – for example, details of the legal treatment of non-State armed groups interned in armed conflict, interpretation of the concept of direct civilian participation in hostilities in international humanitarian law, and the dividing line between armed conflict and other situations of violence – are the subject of ongoing legal discussion. In the spirit of Colonel de Mulinen's original *Handbook on the Law of War for Armed Forces*, this new text provides non-binding guidance on these issues that is in line with the humanitarian object and purpose of the underlying rules, all the while reflecting a balance with military necessity. Ultimately, adherence to the international rules governing armed conflict and other situations of violence is a question of military discipline. The Handbook aims to assist armed forces in converting that law into a meaningful support for military strategy, operations and tactics.

The focus is placed exclusively upon the international legal frameworks governing the use of armed force in combat, law enforcement, and peace support operations respectively. The analysis is generic in nature, bearing in mind the different legal obligations of States based on the treaties to which they are party.

## **Using the Handbook**

The Handbook is divided into fifteen Chapters as follows:

1. Integrating the Law
2. Basic Principles of Operational law
3. Definitions
4. General Obligations during Armed Conflict
5. Targeting
6. Means and Methods of Warfare
7. Detention and Internment in Armed Conflict
8. Command Responsibility
9. Penal Matters and Enforcement Mechanisms
10. Logistics
11. Strategic Control of Armed Conflict
12. Occupation
13. Neutrality
14. Law Enforcement Operations
15. Peace Support Operations

The text relies on the assumption that readers have a general understanding of the fundamentals of the law of armed conflict and international human rights law, which are outlined in Chapter 2. Obviously, in the event of a discrepancy between the text of the Handbook and the applicable customary or treaty provision, the latter must be followed.

The present version will be complemented by a future digital version. A major advantage of the digital format is that this Handbook will be updated on a regular basis to reflect new developments in the law, and comments from the readership, which are always welcome. It is truly a living document, intended to be put to practical use.

**Andrew J. Carswell**

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## ABBREVIATIONS AND ACRONYMS

<b>ACHR</b>	American Convention on Human Rights
<b>AP Mine Ban Conv.</b>	Anti-Personnel Mine Ban Convention
<b>AU</b>	African Union
<b>BPPPD</b>	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
<b>BPTP</b>	Basic Principles for the Treatment of Prisoners
<b>BPUFF</b>	Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
<b>BWC</b>	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
<b>CAT</b>	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CCG</b>	Convention on the Prevention and Punishment of the Crime of Genocide
<b>CCLEO</b>	Code of Conduct for Law Enforcement Officials
<b>CCM</b>	Convention on Cluster Munitions
<b>CCW</b>	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects
<b>CCW.P</b>	Protocols to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects
<b>ICPPED</b>	International Convention for the Protection of All Persons from Enforced Disappearance
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>CERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>CILS</b>	Customary International Humanitarian Law Study
<b>CRC</b>	Convention on the Rights of the Child
<b>CRC OPI</b>	Optional Protocol to the Convention on the Rights of the Child: on the Involvement of Children in Armed Conflicts
<b>CRSR</b>	Convention relating to the Status of Refugees
<b>CWC</b>	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
<b>DPH</b>	Direct participation in hostilities

<b>DPKO</b>	United Nations Department of Peace-keeping Operations
<b>ECHR</b>	European Convention of Human Rights
<b>ENMOD</b>	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
<b>EU</b>	European Union
<b>G.BC</b>	Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare
<b>GC</b>	Geneva Convention
<b>H</b>	Hague Convention
<b>Hague Decl.</b>	Declaration concerning Expanding Bullets
<b>H.CP</b>	Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict
<b>H.CP.I and II</b>	First and Second Protocols to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict
<b>H.IV</b>	Hague Convention (IV) respecting the Laws and Customs of War on Land
<b>H.IV.R</b>	Hague Regulations respecting the Laws and Customs of War on Land
<b>H.V</b>	Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land
<b>H.XIII</b>	Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War
<b>HPCR</b>	Harvard University Program on Humanitarian Policy and Conflict Research
<b>IAC</b>	International armed conflict
<b>ICBS</b>	International Committee of the Blue Shield
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Court of Justice
<b>ICRC</b>	International Committee of the Red Cross
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>IHL</b>	International humanitarian law
<b>IHRL</b>	International human rights law
<b>LOAC</b>	Law of armed conflict
<b>NATO</b>	North Atlantic Treaty Organization

<b>NIAC</b>	Non-international armed conflict
<b>P I, P II</b>	Additional Protocols I and II (to the Geneva Conventions)
<b>POW</b>	Prisoner of war
<b>PPIEASE</b>	Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions
<b>PSO</b>	Peace support operation
<b>RoE</b>	Rules of engagement
<b>SCSL</b>	Special Court for Sierra Leone
<b>SMRTP</b>	Standard Minimum Rules for the Treatment of Prisoners
<b>SOFA</b>	Status of forces agreement
<b>SOTAC</b>	Situations other than armed conflict
<b>SSR</b>	Security surveillance radar
<b>St. Petersburg Decl.</b>	Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight
<b>STL</b>	Special Tribunal for Lebanon
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organisation
<b>UNSC</b>	United Nations Security Council
<b>UNSCR</b>	United Nations Security Council Resolution
<b>UNSG</b>	United Nations Secretary-General
<b>UNSMRNM</b>	United Nations Standard Minimum Rules for Non-custodial Measures
<b>UXO</b>	Unexploded ordnance
<b>VCLT</b>	Vienna Convention on the Law of Treaties
<b>WMA</b>	World Medical Association



# PART I



# CHAPTER 1

# INTEGRATING THE LAW

# 1 INTEGRATING THE LAW

This Chapter discusses integration of the law, i.e. the process of transposing legal rules into concrete mechanisms or measures to ensure compliance, and adopting the means required to achieve this end. Law enforcement or combat duties entail considerable powers, such as the power to search people or their property and to use force – including firearms – to prevent a deadly offence or to put people out of action by wounding or killing them. However, such powers go hand in hand with equivalent responsibilities. In performing those duties the use of force is therefore not unlimited, and always occurs within a specific legal framework. As set out in later Chapters, at the international level these rules and legal standards are enshrined in the law of armed conflict (LOAC) and international human rights law (IHRL).

Many authorities and arms carriers around the world have made great efforts to ensure compliance with the applicable law during operations, and some have achieved good results. However, violations still occur, and compliance needs to be enhanced further. Integration of the law at the national level is imperative to achieve this.

Integration is a continuous process. It must address military doctrine, education, training and equipment issues and be backed up by an effective system of sanctions.

**1.1 National implementation of applicable law** presents the legal framework applicable to the use of force and the responsibilities of the highest political authorities for its implementation and dissemination.

**1.2 Integration** refers more specifically to arms carriers and addresses the technical aspects of integrating the relevant law into doctrine, education, training and equipment, plus the crucial role that sanctions play.

**1.3 ICRC support** discusses the ICRC's relationship with international law and how the organization can actively support efforts to promote lawful behaviour.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## **1.1 National implementation of applicable law**

### **1.1.1 Legal framework**

This subsection provides a brief overview of the sources of law that need to be integrated into military operations. For a more thorough discussion of these sources, see Chapter 2.

#### **1.1.1.1 Applicable law: law of armed conflict (LOAC) and international human rights law (IHRL)**

The use of force is limited by LOAC and by specific provisions of IHRL. LOAC and IHRL are complementary. Both strive to protect the lives, health and dignity of individuals, albeit from a different angle. Both also directly address issues related to the use of force. LOAC has been codified and developed to regulate the use of force in the exceptional situation of armed conflict; it aims to protect persons who are not (or are no longer) taking part in hostilities and imposes duties on all parties. IHRL protects the individual at all times, in peace and war alike; it benefits everyone and its principal goal is to protect individuals from arbitrary behaviour by their own governments. For these protections to be effective, international provisions must be reflected in national legislation.

Most human rights instruments allow governments, under strict conditions, to derogate from certain rights when confronted with a serious public threat, for instance during internal disturbances or armed conflict. However, there is a “hard core” of basic rights from which governments cannot derogate under any circumstances. No derogations are permitted under LOAC, as this branch of law was designed from the outset to strike a balance, in emergency situations, between the right to use force and the obligation to protect the rights and dignity of individuals. There is therefore no vacuum, and the use of force always occurs within a legal framework.

#### **1.1.1.2 Law of armed conflict (LOAC)**

The Geneva Conventions – revised and expanded in 1949 – lay down rules to protect the following groups of people from the effects of hostilities:

- First Convention – sick and wounded on the battlefield
- Second Convention – wounded, sick and shipwrecked at sea
- Third Convention – prisoners of war
- Fourth Convention – civilians in time of war

Having achieved universal acceptance, the four Geneva Conventions are the most widely accepted international treaties.

The rules governing the conduct of hostilities are set out in the Hague Conventions of 1899 and 1907. They limit the methods and means of warfare that parties to a conflict may use. In essence, they regulate the conduct of

military operations in an armed conflict by defining proper and permissible uses of weapons and military tactics.

Rules on the protection of individuals and the conduct of hostilities were brought together and updated in the two 1977 Protocols additional to the Geneva Conventions. Several other treaties complement these provisions, such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1980 Convention on Certain Conventional Weapons, the 1997 Convention on the Prohibition of Anti-personnel Mines and on their Destruction, the 1998 Rome Statute of the International Criminal Court and the 2005 Protocol additional to the Geneva Conventions (Protocol III), establishing an additional emblem (commonly referred to as the red crystal) alongside the red cross and the red crescent.

Treaties bind only those States that have agreed to be bound by them, usually through ratification. These written obligations are complemented by customary law derived from a general practice accepted as law.

#### **1.1.1.3 International human rights law (IHRL)**

IHRL consists of a set of principles and rules on the basis of which individuals or groups can expect certain standards of protection, conduct or benefits from the authorities, simply because they are human beings. The main universal IHRL texts now in force include the:

- Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948
- International Covenant on Civil and Political Rights, of 1966
- International Covenant on Economic, Social and Cultural Rights, of 1966
- Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, of 1984
- Convention on the Rights of the Child, of 1989

Regional instruments – such as the European Convention on Human Rights, the Charter of the Organization of American States, or the African Charter on Human and Peoples' Rights – complement the universal treaties.

#### **1.1.1.4 Soft-law instruments**

Important additional documents are the United Nations Code of Conduct for Law Enforcement Officials (CLEO, 1979) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF, 1990). These two documents do not set legally binding obligations, and are therefore part of what is commonly known as “soft law”. However, they give useful guidance on specific issues related to the maintenance of law and order.

### 1.1.1.5 The “hard core” of human rights

Certain fundamental rights laid down in IHRL instruments can never be derogated from. In particular, these include the right to life, the prohibition of torture and inhuman treatment or punishment, the prohibition of slavery and servitude, and the principle of legality and non-retroactivity of the law. Since IHL applies precisely to exceptional situations, the “hard core” of IHRL tends to converge with the fundamental and legal guarantees provided by IHL. Article 3 common to the four Geneva Conventions of 1949, applicable in non-international armed conflicts, provides a good summary of these “hard core” rights, setting the minimum basic rules regulating the use of force when internal violence attains the threshold of an armed conflict.

## 1.1.2 National implementation

### 1.1.2.1 Inclusion in national law

To be effective, international treaties and conventions must be incorporated into national legislation. Becoming a party to international treaties and conventions is only a first step. States have a clear obligation to adopt measures implementing the international regulations they subscribe to. While this is true of any rules, it is even more crucial for rules governing warfare and law enforcement, since the latter are meant to regulate the most intricate and intimate sphere of sovereignty: the use of force.

To prepare an environment conducive to compliance with the law, the political leadership must take a whole range of measures and implement them throughout the chain of command. Some of these measures are relevant to LOAC and IHRL alike, while others are more specific to LOAC. For additional guidance, see Chapter 11, Strategic control of armed conflict.

The process is clearly interdisciplinary and normally involves several ministries, the legislature, the courts and armed forces or law enforcement bodies. It therefore needs careful planning by the highest political authorities and close coordination within several bodies.

### 1.1.2.2 Measures common to LOAC and IHRL

Political authorities must take a number of measures, some of relatively common sense, others requiring complex implementation processes and specific expertise. The main measures are:

- to have the international treaties and conventions translated into national language(s);
- to spread knowledge of their provisions as widely as possible, both among arms carriers and among the population as a whole;
- to bring national legislation in line with the provisions of the international treaties and conventions and to enact criminal legislation prohibiting and

punishing violations of the law, either by adopting a separate law or by amending existing legislation; and

- to ensure that judicial and other fundamental guarantees are respected.

### 1.1.2.3 Specific measures required by LOAC

Implementation of LOAC requires some additional measures to be taken. These include the following:

- ensuring that protected persons and objects are properly identified and marked;
- adopting measures to prevent the misuse of the red cross, the red crescent, the red crystal and other protective emblems or symbols specified in conventions and protocols;
- appointing and training personnel, in particular legal advisers within the armed forces;
- providing for the establishment and/or regulation of National Red Cross or Red Crescent Societies and other voluntary aid societies, civil defence organizations and information bureaux (responsible for managing information about protected persons); and
- locating military sites in such a way as not to endanger protected persons or objects.

### 1.1.2.4 A holistic approach

Several ministries are involved in the national implementation process, in addition to those of defence and internal affairs. The most relevant are the ministries of justice, finance, education, culture and foreign affairs. For instance, the ministry of culture will clearly be involved in applying the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The ministry of education is required to prepare young people to understand the principles of LOAC and IHRL. To address the problem of people going missing during armed conflict, administrative measures are also required, such as the establishment of a National Information Bureau (usually under the responsibility of the ministry of foreign affairs).

Many States have established national humanitarian or human rights committees or similar bodies to steer the process. These decision-making and coordination platforms bring together representatives of government ministries, national organizations, professional bodies and others with responsibilities or expertise in the field of implementation. Such bodies have generally proved to be an effective means of promoting national implementation.

### 1.1.3 Responsibilities

#### 1.1.3.1 Responsibility of the highest authorities

The highest authorities are ultimately responsible for compliance with the law. Concrete measures, means and mechanisms must be put in place to fulfil the obligations imposed by the law, including its wide dissemination and the prevention and repression of violations. The ultimate responsibility for this clearly lies in the hands of the highest authorities. This has been widely and explicitly laid down in the LOAC and IHRL treaties.

While the political leadership and the highest levels of the hierarchy of arms carriers bear overall responsibility, specific responsibilities in this domain are also attributed to other levels, in accordance with their respective duties and functions.

#### 1.1.3.2 Responsibilities derived from LOAC treaties

Clear responsibilities were recognized early in the different conventions. Hence, for instance, by ratifying the Hague Convention of 18 October 1907 respecting the Laws and Customs of War on Land, States undertook to “issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention” (Art. 1).

The four Geneva Conventions of 12 August 1949 also make several references to the responsibilities of States. Beyond the general necessity to “respect and to ensure respect for the present Convention in all circumstances” (Art. 1), other articles refer to the obligation to “disseminate the text as widely as possible” and to “include the study thereof in their programmes of military instruction”. More specifically, the Third Geneva Convention even provides for “any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war” to be “specially instructed” (Art. 127).

Protocol I of 8 June 1977 additional to the Geneva Conventions further spells out this obligation. It provides, *inter alia*, that parties shall “without delay take all necessary measures for the execution of their obligations” and “give orders and instructions to ensure observance” and “supervise their execution” (Art. 80); that “any military ... authorities ... shall be fully acquainted with the text thereof” (Art. 83.2); and that “commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations” (Art. 87.2).

Protocol II additional to the Geneva Conventions, applicable in non-international armed conflicts, stipulates that its content “shall be disseminated as widely as possible” (Art.19). This obligation, like that of respecting the law,

is therefore not limited to government forces but also applies to all armed groups taking part in hostilities.

The obligation to disseminate LOAC and provide instruction on this subject to arms carriers has been so widely recognized that it has become customary law.

### 1.1.3.3 Responsibilities derived from IHRL treaties

Human rights instruments contain several references to States' responsibility for implementing international treaties. For instance, the 1966 International Covenant on Civil and Political Rights stipulates that "each State Party ... undertakes to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant" (Art. 2). To specify what is meant by "other measures", the United Nations Human Rights Committee refers, in its General Comment No. 31 on the Covenant, to the need to "adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations" (para. 7).

Similarly, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment asserts that each State Party shall ensure "that all acts of torture are offences under its criminal law" (Art.4) and "that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment" (Art. 10).

In the 1989 Convention on the Rights of the Child, States Parties "undertake to make the principles and provisions ... widely known, by appropriate and active means" (Art. 42).

General references to leadership responsibilities also appear in "soft-law" documents like the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which states for instance that the basic principles in that document "should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public".

### 1.1.4 Reality check

Violations of the law do occur. Knowledge alone is no guarantee of compliance. In spite of the existence of a whole set of international rules

aimed at regulating the use of force, it must be recognized that violations of LOAC and/or IHRL regularly occur. Practically all arms carriers commit such violations, even those with the longest experience and the most sophisticated training.

Of course, only negative behaviour makes the news, so it is virtually impossible to establish the amount of lawful behaviour. Still, the obligation for arms carriers to respect and ensure respect for the law persists. Moreover, even though violations do occur, the law remains an appropriate and effective tool for protecting people in situations of armed conflict and internal violence.

To determine the measures, means and mechanisms required to avoid unlawful behaviour, it is essential to understand the reasons behind violations. It is often argued that these occur because of a lack of knowledge of the applicable law. An in-depth analysis of the behaviour of arms carriers shows, however, that violations are also committed by people who know or even adhere to the basic principles of the law.

Experience shows that the failure to comply with the essential norms of LOAC and IHRL can in fact be ascribed to several factors, which often coincide. These include insufficient skills, faulty attitudes, wrongful behaviour, lack of adequate equipment, lack of will, inadequate knowledge or understanding of the law (its contents, scope or purpose) and lack of effective sanctions for violations. Clearly, the crux of the problem is not that people do not know the law: the problem lies in translating knowledge into appropriate behaviour.

## **1.2 Integration**

### **1.2.1 The concept of integration**

#### **1.2.1.1 Translation of the law into conduct**

To prevent violations, the law must become an integral part of the conduct of operations. Ratifying LOAC or IHRL treaties and incorporating them into domestic law are essential steps towards compliance. Disseminating their content as widely as possible is another important element of any strategy aimed at creating an environment conducive to lawful behaviour.

However, these measures are not enough. The behaviour of arms carriers during operations is shaped by four main factors:

- doctrine;
- education;
- training and equipment; and
- sanctions.

In order for operations to be conducted in compliance with the law, the law must therefore become an integral part of each of those four factors.

This is not to suggest that provisions of LOAC or IHRL should systematically be included – or even quoted – in doctrine or manuals, nor to advocate that every arms carrier should be at ease with sometimes quite complex legal matters. The relevant law must be translated into concrete measures, means and mechanisms – at doctrine, education, training and equipment and/or sanctions levels – conducive to compliance.

Law is actually a set of general rules, sometimes too general to serve as a guide for practical behaviour in combat or law enforcement. It is therefore necessary to interpret it, analyse its operational implications, and identify consequences at all levels.

### 1.2.1.2 Key elements of integration

Doctrine, education, training and equipment are closely interrelated and change constantly, forming a kind of virtuous circle. Lessons learned during operations, together with changes in the law, equipment and the nature of the threat and mission demand regular revision of all elements. Sanctions must also be enforced and regularly adapted. Integrating the law into the whole process is therefore a continuous, never-ending, circular process.

### 1.2.1.3 Taking action

Legitimate questions may arise as to how to apply LOAC and IHRL in daily practice. It is crucial to understand the operational implications of each rule and to identify the action to be taken – at doctrine, education, training and equipment and/or sanctions levels – to ensure compliance.

The process of getting from the specific legal provisions to their practical application can be illustrated as follows:



To illustrate how this model works, practical examples with regard to combat and law enforcement operations are given below.

## 1.2.2 Basic requirements

### 1.2.2.1 Commitment

Political will and capacity are the basic prerequisites for integration. Integration is a mid- to long-term process that requires strategic vision and a global overview of the implications for the organization concerned: commitment at the highest level of command is therefore necessary. The process must clearly be a top-down one, and the commitment must go beyond acceptance of the

need to disseminate, teach or periodically give training in the law: it must send a strong, formal signal to all subordinate levels, setting compliance with the law as a clear priority for the organization. Words must clearly be backed by actions and, as personnel move on, commitment must be periodically renewed to ensure the stability and continuity of the process.

#### **1.2.2.2 Capacity**

To be successful, integration must take place in a favourable environment. The capacity of arms carriers to comply with LOAC depends on some basic but crucial requirements: national legislation incorporating the provisions of the relevant international law; dissuasive criminal legislation to prevent and repress violations; an effective chain of command and internal sanctions system; a stable education and training structure; a common doctrine, whatever its name or form. For arms carriers, this basically amounts to possessing some kind of structure related to the four factors shaping behaviour in action (doctrine, education, training and equipment, and sanctions) that the integration process can act upon. Should one or more factors be weak or inexistent, the process of integration will only be partial and probably less effective.

#### **1.2.2.3 Integration within the existing structure and resources**

The whole process is carried out within the existing structure and with the existing resources. High costs are not to be expected, no significant additional education and training time is needed, nor will it be necessary to increase the number of teachers, professors or trainers.

#### **1.2.2.4 Advisable: integration in peacetime**

The process of integration is more easily carried out in peacetime or when armed conflict has not reached high levels of intensity; when armed forces or groups are engaged in major combat operations, other priorities will inevitably replace these long-term concerns.

### **1.2.3 The integration programme**

#### **1.2.3.1 Key requirements**

Running a comprehensive, well-devised programme is the key to enhancing integration. As a multidisciplinary, top-down process, integration involves the highest levels of the State, including the national leaders and a number of ministries besides those of defence, security or the interior. Among arms carriers, all levels of the chain of command must be involved, from the strategic down to the tactical. Top-level commanders must set the scene by insisting that the law be incorporated into the planning, organization and execution of all combat and/or law enforcement operations. This is normally achieved by issuing a written standing order.

However, issuing an order is not enough. The order must be translated into a concrete programme, project or plan of action. In turn, the programme needs to be properly managed; the authorities must therefore formally appoint an officer or one of their staff directorates for the task. Regular evaluation of the programme's achievements is also needed and will make it possible to adjust means and objectives during the process.

As threat and mission evolve and as operations constantly oblige arms carriers to adapt, learn lessons and take action accordingly, integration is a continuous and almost never-ending process. It must therefore be continuously sustained by commanders at every level.

#### **1.2.3.2 Managing the programme**

Managing the complexity of an integration programme requires classic "project management" tools and skills. The programme is usually formalized in an official document. On the basis of an assessment of the existing level of integration, it defines objectives, together with responsibilities and deadlines for their achievement. The programme details the concrete steps to be taken, year by year, to achieve the planned goals, together with the appointments required to manage and carry out the various tasks.

#### **1.2.3.3 Execution by operations directorate**

Experience demonstrates that the creation of an international humanitarian law and/or human rights directorate tends to hinder, rather than accelerate the process. Indeed these directorates, often set apart from the rest of the chain of command, tend sometimes to become an end in themselves. It is vastly preferable to entrust this responsibility to the operations directorate, which is usually also responsible for training.

#### **1.2.3.4 Monitoring and evaluation**

A monitoring and evaluation body should also be established to oversee the implementation process and assess whether the partial objectives have been achieved. This task is usually assigned to the inspector general or to a body with equivalent powers. Depending on the intermediate results, adjustments to the plan of action should be submitted for approval to the top levels of the hierarchy.

### **1.2.4 Integration into doctrine**

#### **1.2.4.1 Doctrine: definition**

Doctrine must provide guidance for lawful behaviour. Here, doctrine is understood as being all standard principles that guide the action of arms carriers at strategic, operational and tactical levels, independently of the forms

these principles take. It therefore encompasses all directives, policies, procedures, codes of conduct, reference manuals and rules of engagement – or their equivalents – that serve to educate, train and guide arms carriers during their careers, giving them a common vocabulary and shaping the decision-making process, tactics and behaviour in operations.

#### **1.2.4.2 Integration into doctrine: codes of conduct, manuals and procedures**

Integrating the law into doctrine is not achieved through the mere inclusion or quotation of rules and principles of applicable law in codes of conduct, manuals and procedures. The relevant principles of the law, together with the means and mechanisms to ensure respect for specially protected persons and objects, must become a natural and integral part of every component of doctrine.

The revision of manuals and procedures related to the decision-making process is essential to compliance with the law.

The challenges of modern warfare and law enforcement are so complex that the responsibility for compliance with LOAC and/or IHRL should not be left to one post within the staff. The appointed staff (personnel management, intelligence, operations, logistics) must, as for any operational or tactical matter, know exactly what they are expected to do to secure compliance. It is furthermore of paramount importance to ensure that decision-making procedures include the requisite information-sharing and coordination mechanisms, so that no issue is overlooked and the commander receives, in good time, all the necessary information available.

Reference manuals for the different specialists and areas of action, at the different levels of the chain of command, must also be reviewed or adapted, so that orders, procedures and rules of engagement allow compliance with the law in the varied and complex situations faced during operations (e.g. presence of military objectives in populated areas, maintaining law and order during violent demonstrations).

#### **1.2.4.3 Examples of integration into doctrine**

The following examples illustrate, in both combat and law enforcement scenarios, the integration of relevant legal provisions into doctrine.

<b>Combat</b>		
<p><b>Legal provisions</b></p> <p>“Among others, the following types of attacks are to be considered as indiscriminate:</p> <p>b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”</p> <p>(Additional Protocol I, Art. 51.5 (b))</p>	<p><b>Operational implications</b></p> <p>How can one assess incidental loss and anticipated military advantage?</p> <p>How can one rate each in relation to the other?</p> <p>How can one strike a balance between the two?</p> <p>How can one make sure that this is done for each and every decision?</p>	<p><b>Consequences</b></p> <p>Doctrine must provide:</p> <ul style="list-style-type: none"> <li>• definitions of military advantage and incidental injury or damage;</li> <li>• means of rating them when choosing between different courses of action available;</li> <li>• mechanisms for achieving an effective balance and recommendations to the commander during the decision-making process;</li> <li>• measures for recording the balance and decision;</li> <li>• specific responsibilities of intelligence and operations officers or others in this regard.</li> </ul>

<b>Law enforcement</b>		
<p><b>Legal provision</b></p> <p>“Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”</p> <p>(Code of Conduct for Law Enforcement Officials, Art. 3)</p>	<p><b>Operational implications</b></p> <p>In which circumstances may force be used?</p> <p>How should force be applied to ensure a gradual and proportionate response?</p> <p>How can one strike a balance between necessity and proportionality?</p>	<p><b>Consequences</b></p> <p>Policies and procedures must provide:</p> <ul style="list-style-type: none"> <li>• definitions of the principle of necessity and of the circumstances in which use of force is authorized;</li> <li>• means and mechanisms allowing an effective balance in the decision-making process between necessity and proportionality;</li> <li>• measures for recording the balance and the decision;</li> <li>• specific responsibilities at the different levels of the chain of command with regard to the assessment of the situation and the progressive use of force in the response.</li> </ul>

## 1.2.5 Integration into education

### 1.2.5.1 Education: definition

Means and mechanisms for compliance with the law must become an integral part of all matters taught. Education focuses on providing personnel with theoretical knowledge on what to do. Teaching the content of applicable law during such courses is one straightforward step. The number of teaching

hours and the proportion of theory to practice must be tailored to the needs of the audience, according to their rank, service, branch or occupation. Teaching must always be as practical and as realistic as possible, but an increasingly academic approach can be adopted the higher the rank and level of responsibility of the audience.

But knowledge of the relevant law alone is not enough. The measures, means and mechanisms for compliance with the law, as established by revised doctrine and procedures, must be an integral part of all subjects taught. This does not mean that all courses must include a module on the applicable law or explicitly or constantly make reference to it. Wherever relevant, however, the subject matter should include realistic dilemmas related to compliance with the law, allowing all ranks to learn how to respect the law in a given situation.

### 1.2.5.2 Examples of integration into education

The following examples illustrate, for both combat and law enforcement situations, the integration of relevant legal provisions into education.

Combat		
Legal provision	Operational implications	Consequences
<p>"In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."</p> <p>(Additional Protocol I, Art. 57.1)</p>	<p>What are the "civilian population, civilians and civilian objects"?</p> <p>What concrete measures can be taken to respect them?</p> <p>How can one ensure that these measures are applied at all times?</p>	<p>Education must provide theoretical knowledge of:</p> <ul style="list-style-type: none"> <li>• what exactly "civilian population, civilians and civilian objects" are;</li> <li>• the responsibilities within the chain of command (according to the different levels and specializations) for sparing protected persons and objects;</li> <li>• preparing personnel to think of alternative courses of action;</li> <li>• planning and conducting operations without putting protected persons and objects at risk;</li> <li>• planning and conducting the evacuation of civilians;</li> <li>• implementing safety distances;</li> <li>• selecting weapons according to each situation and observing their effects in order to limit incidental damage.</li> </ul>

Law enforcement		
<b>Legal provision</b>	<b>Operational implications</b>	<b>Consequences</b>
<p>“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”</p> <p>(International Covenant on Civil and Political Rights, Art. 9,1)</p>	<p>Under which circumstances can liberty be curtailed?</p> <p>How can one ensure that arrests or detention are not arbitrary?</p> <p>How can one strike a balance between use of force and the individual’s right to security?</p>	<p>Education must provide theoretical knowledge of:</p> <ul style="list-style-type: none"> <li>• the circumstances under which arrest and detention are legal;</li> <li>• what constitutes arbitrary arrest and detention;</li> <li>• what procedures must be followed, according to the law, to ensure that arrest and detention are not arbitrary;</li> <li>• responsibilities along the chain of command, and according to specialization, for tasks related to deprivation of freedom;</li> <li>• means and mechanisms allowing for lawful arrest and detention and for recording these actions.</li> </ul>

## 1.2.6 Integration into training

### 1.2.6.1 Training: definition

Training must include LOAC and/or IHRL components in a realistic manner. The training of arms carriers focuses on providing personnel with practical experience of how to perform their functions while complying with the law. It enables officers, NCOs and the rank and file to acquire skills and experience, and must lead to acquiring the correct reflexes, until they become second nature. This can only be achieved by repeated practice, and the person best suited and the most effective for inculcating such behaviour is the direct superior.

It is of paramount importance that the principles of the law be included as realistically as possible in daily training, along with the measures, means and mechanisms for compliance as provided by revised doctrine, tactics and procedures. Merely adding a few hours on LOAC and/or IHRL to the existing training programme without modifying its content is far from effective.

It has been proven that the most effective instruction method is practical exercise: this approach enables participants to retain nearly 90% of the content, weeks later. The ratio of theoretical to practical instruction at each level of the hierarchy is determined by rank and responsibilities, but there is little doubt that training must be as practical and realistic as possible, as much for the success of future operations as for compliance with the law.

The effectiveness of training must also be constantly evaluated. Behaviour during operations remains the ultimate test, and after-action reviews are a key tool in assessing the effectiveness of the established means and mechanisms, but lessons learnt through daily training and exercises are also an essential component of the evaluation process. Should training demonstrate that the means and mechanisms established through the integration process are inadequate to enable personnel to respect the law, corrective measures will need to be taken at doctrine and education levels and training will have to be modified accordingly.

**1.2.6.2 Examples of integration into training**

The following examples illustrate, for both combat and law enforcement situations, the integration of relevant legal provisions into training.

Combat		
Legal provisions	Operational implications	Consequences
<p>"Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.</p> <p>Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are may be temporarily kept back in a danger zone.</p> <p>Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone."</p> <p>(Third Geneva Convention, Art.19)</p>	<p>How are the forces to carry out these tasks?</p> <p>Do subordinate formations perform their tasks as expected by higher echelons?</p> <p>How will the fighting elements coordinate with logistics and medics?</p> <p>Are the measures laid down in doctrine practical and realistic?</p>	<p>All exercises – in the field, on maps or computer assisted – must include the processing of prisoners of war, so that personnel at the different levels acquire the practical experience needed to perform this task correctly under pressure.</p> <p>Accordingly:</p> <ul style="list-style-type: none"> <li>• combat troops at the lowest level must know what to do when they capture prisoners of war;</li> <li>• collection points must be manned and relevant duties practised;</li> <li>• logistics personnel must be able to effectively process prisoners;</li> <li>• the whole procedure must be part of the evaluation and lessons-learned process, leading to corrective measures or improvements, including at the doctrine and education levels.</li> </ul>

Law enforcement		
<p><b>Legal provision</b></p> <p>“In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.”</p> <p>(Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Art.13)</p>	<p><b>Operational implications</b></p> <p>How can law enforcement officers disperse non-violent unlawful assemblies without resorting to force?</p> <p>If force is used, what is the “minimum” and “necessary” level in different sets of circumstances?</p> <p>Do the means and mechanisms provided for in policies and procedures and the instruction in their use effectively allow for a lawful response?</p>	<p><b>Consequences</b></p> <p>Training must give law enforcement officers the practical experience needed to perform this task correctly under pressure.</p> <p>Accordingly:</p> <ul style="list-style-type: none"> <li>• officers must be able to use the various peaceful means available for responding to these situations (e.g. negotiation, persuasion, planning escape routes for the crowd);</li> <li>• officers at the lowest levels must be able to use the various types of force at their disposal appropriately and in proportion to the threat;</li> <li>• the whole process must be part of the evaluation and lessons-learned process, leading to corrective measures or improvements, including at policy, procedure and education levels.</li> </ul>

## 1.2.7 Equipment

### 1.2.7.1 Equipment: review and testing

Equipment must allow a lawful response to each situation. It gives personnel the assets needed to conduct missions in accordance with the law. The highest level of command must provide personnel with means and methods that are legal, and therefore has the obligation to determine whether the employment of a specific weapon (i.e. the weapon itself and the way it is used) would, in some or all circumstances, be restricted or prohibited by LOAC and/or IHRL.

To check whether equipment allows compliance with the law, it should be tested during training in situations as close to reality as possible.

Beyond weaponry, an exercise in which personnel search for, treat and evacuate casualties during and after operations will show whether the resources of the medical unit are sufficient and appropriate. For instance, wheeled ambulances may prove unfit for terrain that has been churned up by heavy tracked vehicles, such as main battle tanks, or when streets are littered with wreckage and debris following a riot.

### 1.2.7.2 Examples of integration: selection of equipment

The following examples illustrate, for both combat and law enforcement situations, the integration of legal provisions into the selection of equipment.

Combat		
Legal provisions	Operational implications	Consequences
<p>"It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."</p> <p>(Additional Protocol I, Art. 35.2)</p>	<p>What is the intended military purpose or expected military advantage?</p> <p>What types of injury will be inflicted?</p> <p>On the basis of the answers to the two previous questions, should the injury be considered superfluous or the suffering unnecessary?</p> <p>Which specific expertise is required to determine this?</p> <p>Who decides on the legality of means and methods before they are introduced?</p> <p>Who makes sure that lawful means and methods are not modified?</p>	<p>A review mechanism must be established, with the following main characteristics:</p> <ul style="list-style-type: none"> <li>• the final responsibility is assigned to an individual or a committee as laid down by legislation, regulation, administrative order, instruction or guidelines;</li> <li>• this individual or committee defines the review and decision-making process;</li> <li>• accountability to the ministry of defence or an inter-departmental entity;</li> <li>• review is conducted by representatives from different sectors and departments;</li> <li>• records are systematically kept.</li> </ul> <p>Beyond the review of means of warfare, the chain of command is responsible for making sure that troops do not modify means or use them in any way that would make them illegal.</p>

<b>Law enforcement</b>		
<p><b>Legal provision</b></p> <p>“Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”</p> <p>(Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Art. 4)</p>	<p><b>Operational implications</b></p> <p>What are the non-violent means that will enable officers to delay the use of force and firearms?</p> <p>What measures are proportionate to which offence?</p> <p>How much equipment can an officer reasonably carry and master?</p>	<p><b>Consequences</b></p> <p>Law enforcement officers should have access to the following equipment:</p> <ul style="list-style-type: none"> <li>• appropriate protective gear and other equipment to delay the use of force and firearms;</li> <li>• a range of non-violent means of controlling the situation, and of communicating with officers and with offenders;</li> <li>• a range of different means that enable officers to respond in a graduated and proportionate manner.</li> </ul> <p>Officers must know the effects caused by the different means at their disposal.</p> <p>Officers operating alone will not have the whole range of means available. They therefore need to be able to communicate and master other techniques, such as negotiation and conflict resolution.</p> <p>Officers operating in teams must individually master each of the different means available.</p>

## 1.2.8 Effective sanctions

### 1.2.8.1 Role of sanctions

Sanctions play a key preventive role and must be visible, predictable and effective. Experience shows that the more visible they are and the more predictable their application, the more dissuasive they will be. They also serve as an effective punishment for those who have failed to obey the law. They therefore offer commanders a means of enforcing orders and discipline and of showing that the whole chain of command is firm in defending its fundamental values.

### 1.2.8.2 Penal and disciplinary measures

Sanctions can be enforced through penal or disciplinary measures. While penal sanctions are doubtless necessary, they must be backed by effective disciplinary sanctions at all levels of the chain of command. These administrative measures, actually under the responsibility of the direct

superior, offer two key advantages: they can be enforced rapidly and they are highly visible to the offender's peers. Their dissuasive effect is therefore immediate, preventing unacceptable behaviour from becoming tolerated or even accepted.

### **1.3 ICRC support**

#### **1.3.1 The ICRC and international law**

##### **1.3.1.1 The mission of the ICRC**

The ICRC promotes compliance with IHL and other fundamental rules protecting people in situations of violence. The ICRC's exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and internal violence and to provide them with assistance. In this endeavour, the ICRC strives to prevent suffering by promoting and strengthening international humanitarian law and the relevant provisions of international human rights law.

##### **1.3.1.2 Basis of the ICRC's mandate**

The ICRC derives its core humanitarian mandate related to situations of armed conflict and the promotion of IHL from the international community, through the Geneva Conventions and their Additional Protocols. The Statutes of the International Red Cross and Red Crescent Movement confer a broader right of humanitarian initiative on the ICRC, allowing it to offer its services in situations of violence not amounting to armed conflict.

To address the humanitarian consequences of the use of force in these situations, the ICRC will not refer to the whole and varied spectrum of IHRL treaties, but to a set of fundamental rules protecting people in situations of violence. These constitute a small but essential part of IHRL.

##### **1.3.1.3 The ICRC's right of initiative**

The ICRC's right of initiative is laid down in the Statutes of the International Red Cross and Red Crescent Movement. These are adopted by International Conferences, which are four-yearly events bringing together delegations both from States party to the Geneva Conventions and from the Red Cross and Red Crescent organizations (the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies, and the National Red Cross and Red Crescent Societies).

Article 5 of the Statutes, which outlines the ICRC's role and responsibilities within the Movement, assigns to the ICRC the duty "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof" (Art. 5.2(g)). It also makes clear that the ICRC "may take any humanitarian initiative which comes within its role as a specifically neutral and independent

institution and intermediary, and may consider any question requiring examination by such an institution" (Art. 5.3).

#### **1.3.1.4 Fundamental rules protecting human beings**

It is beyond the scope of this Chapter of the Handbook to list all the fundamental IHRL rules to which the ICRC refers in order to carry out its humanitarian mandate. However, they generally relate to:

- the protection of life, physical and psychological well being and human dignity (the "hard core" rules, the recruitment of children);
- the use of force by law enforcement officials (lawfulness, appropriateness, proportionality, no use of prohibited weapons);
- the right to due process of law (judicial or procedural guarantees, no arbitrary arrest or detention);
- the obligation to ensure access to the minimum conditions necessary for survival (food, water, hygiene, clothing, shelter, medical care);
- respect for the family unit (no inappropriate restrictions thereon);
- missing persons, and their families (no secret or undisclosed detention, the right to receive family news);
- the movement of persons (no arbitrary displacement or exile, the right to seek safety and asylum);
- property (no deprivation thereof through illegal or arbitrary destruction or appropriation);
- education and religious worship (no inappropriate restrictions thereon in situations of occupation or of deprivation of freedom).

### **1.3.2 The role of the ICRC**

#### **1.3.2.1 Supporting integration**

When basic requirements are met, the ICRC supports efforts to integrate the law. Clearly, treaty obligations belong to States party to the treaties, not to the ICRC. The same goes for the responsibility to make LOAC an integral part of military training and action.

Thanks to its long-term field presence and to the dialogue it maintains with authorities and all kinds of arms carriers around the world, the ICRC has developed considerable experience in supporting efforts to prevent violations. Recognizing that the mere teaching of legal norms will not lead, in itself, to a change in attitude or behaviour, the ICRC approach has gradually shifted in the past two decades from dissemination to integration.

When authorities are genuinely committed and possess the necessary capacity to sustain the process in the long term, the ICRC is ready to assume the supportive role enshrined in the Protocols additional to the Geneva Conventions (see below) or to act upon its statutory right of initiative.

### 1.3.2.2 Dialogue with arms carriers

To provide appropriate support to arms carriers during the integration process, the ICRC has a specialized unit at its headquarters in Geneva and a number of specialist delegates (with previous military or police experience) in the field. The ICRC does not provide arms carriers with practical technical training; it focuses on the legal framework within which they have to perform their duties, helping them to identify its operational implications and what they must and must not do in order to comply with the law.

Through its network of delegations, the ICRC is currently supporting integration of the relevant law by arms carriers around the world.

### 1.3.2.3 Resolution 21

The Diplomatic Conference which led to the adoption of the 1977 Protocols additional to the Geneva Conventions also adopted Resolution 21 in which it explicitly encourages “the authorities concerned to plan and give effect, if necessary with the assistance and advice of the International Committee of the Red Cross, to arrangements to teach international humanitarian law, particularly to the armed forces and to appropriate administrative authorities, in a manner suited to national circumstances” (2.a).

It also “invites the International Committee of the Red Cross to participate actively in the effort to disseminate knowledge of international humanitarian law by, *inter alia*:

- publishing material that will assist in teaching international humanitarian law, and circulating appropriate information for the dissemination of the Geneva Conventions and the Protocols;
- organizing, on its own initiative or when requested by Governments or National Societies, seminars and courses on international humanitarian law, and co-operating for that purpose with States and appropriate institutions”.

### 1.3.2.4 ICRC support to arms carriers

The first step taken by the ICRC is to discuss with the relevant authorities and arms carriers’ leadership their responsibilities regarding integration of the law and the issues to be tackled during the process.

Should the leadership request ICRC support, the organization may offer its advice on the drafting of standing orders and the programme. During the whole process, and according to the context, the ICRC may initiate courses aimed at teaching the relevant law to teachers, trainers or legal advisers or even carry out specific seminars or workshops for the production or revision of existing doctrine, curricula, teaching files and manuals. If necessary, it can offer support and advice on the production of more high-tech products such as videos or interactive CD-ROMs or DVDs.

In recent years, ICRC specialist delegates have increasingly been involved in armed forces' field and computerized command-post exercises. Besides portraying the role of the organization during armed conflict, ICRC delegates work closely with the exercise controllers to ensure that the relevant law is integrated.

Contacts have also been made with private companies regularly contracted by some States to produce international exercises.

#### **1.3.2.5 The scope of ICRC support**

The ICRC will support arms carriers in interpreting the law, understanding its operational implications and identifying the consequences. The final step, for instance that of writing a new tactics manual, adopting new curricula, reviewing and modifying doctrine or buying new equipment, clearly remains the responsibility of the authorities and arms carriers themselves.

# **CHAPTER 2**

# **BASIC INTERNATIONAL RULES**

# **ON MILITARY OPERATIONS**

## 2 BASIC INTERNATIONAL RULES ON MILITARY OPERATIONS

This Chapter explains the basic principles of international law, including the law of armed conflict (LOAC) and human rights law; how to classify armed conflicts; and the respective legal framework governing international armed conflicts, non-international armed conflicts, and situations of violence other than armed conflict. It also explains the approach adopted in this Handbook in the presentation of the rules applicable in international and non-international armed conflicts.

**2.1 Introduction to international law** summarizes key points relevant for the armed forces.

**2.2 The law of armed conflict: definition, sources and fundamental principles** provides the definition of the law of armed conflict, outlines its history and development, lists the relevant sources, and explains the fundamental principles underlying this body of law, which are frequently referred to in the Handbook.

**2.3 Classification of conflict and application of the law of armed conflict** explains the classification of international and non-international armed conflicts and the threshold for application of the law of armed conflict for each type of conflict.

**2.4 Human rights law** addresses the sources of international human rights law, derogations and restrictions, and the relationship between human rights law and the law of armed conflict.

**2.5 Legal framework for each type of armed conflict** sets out the legal framework for international and non-international armed conflicts.

**2.6 Legal framework for law enforcement operations** sets out the legal framework applicable to law enforcement operations by armed forces in situations of internal tensions, violence and disturbances.

**2.7 Approach adopted in presenting the rules of the law of armed conflict** explains the approach taken in this Handbook in setting out the rules applicable in international and non-international armed conflicts, as well as rules common to both.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## 2.1 Introduction to international law

This Section sets out a definition of international law and gives an overview of its sources and of the basic concepts concerning its application.

### 2.1.0.1 International law

International law is the body of rules governing relations between subjects of international law, mostly States.

### 2.1.0.2 International law and armed forces

There are three main categories of international law applicable to armed forces which are discussed in this Handbook:

- the law of armed conflict (see Sections 2.2 and 2.3)
- international human rights law (see Section 2.4); and
- international criminal law (see Chapter 9).

Another related area of international law which is not discussed in detail in this Handbook is the law governing the right of States to resort to armed force in their international relations (*jus ad bellum*).

### 2.1.0.3 Sources of international law

The main sources of international law are:

- treaties;
- customary law; and
- general principles.

It should be noted that in some cases courts also use judicial decisions and teachings of the most highly qualified scholars as a secondary means to determine international law.

This Handbook contains references to either treaty rules or customary law as set out in the ICRC Customary International Humanitarian Law Study (see 2.2.2.4).

In a few cases, the Handbook provides references to the most influential judicial decisions.

[Statute of the ICJ, 38]

### 2.1.0.4 Customary international law

Customary international law is defined in the Statute of the International Court of Justice as “a general practice accepted as law”.

The existence of a rule of customary international law requires two elements:

- consistent State practice, and
- a belief on the part of States that such practice is required by law.

The legal terms often used for the two elements are, respectively, *usus* and *opinio juris*.

[ICJ Statute, 38 / 1 CILS, pp. xxxi to xxxii]

#### **2.1.0.5 What is a treaty?**

A “treaty” is an agreement concluded between subjects of international law, considered by the parties as binding and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation.

It does not matter if the treaty bears another title such as “convention”, “protocol” or “agreement”. It is still a treaty if it meets the above definition.

International law governing the use and interpretation of treaties between States is set out in the Vienna Convention on the Law of Treaties, 1969 (VCLT).

#### **2.1.0.6 Who is bound by treaties?**

Most treaties are concluded between States. A State is bound by a treaty if it has consented to be bound by it.

A State which has consented to be bound by the treaty and for which the treaty is in force is known as a “Party” to the treaty.

A State may consent to be bound by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

[VCLT, 1, 11]

#### **2.1.0.7 States not party to a treaty**

A State that is not a party to a treaty is not bound by the provisions in the treaty.

A State that is not a party to a treaty may, however, consent to apply parts or all of the provisions of the treaty, if the treaty so permits or other Contracting States agree.

[VCLT, 17]

#### **2.1.0.8 Treaty law declaratory of customary law**

Sometimes a treaty provision reiterates customary law. Such a treaty provision is binding on every State as customary law, even if a State is not party to the treaty concerned.

### 2.1.0.9 Reservations

A State can make a reservation to a treaty.

A “reservation” is “a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”

[VCLT, 1(d)]

A State may not make a reservation to a particular treaty if:

- the treaty text specifies that the reservation is prohibited;
- the treaty text provides that only specified reservations, which do not include the reservation in question, may be made; or
- the reservation is incompatible with the object and purpose of the treaty.

[VCLT, 19]

Reservations should be distinguished from interpretative declarations or statements, in which a State simply expresses its understanding of a given provision of an international treaty.

## 2.2 The law of armed conflict: definition, sources, and fundamental principles

This Section addresses the definition of the law of armed conflict, the sources of the law of armed conflict, and the fundamental principles underlying this body of law.

### 2.2.1 Introduction

#### 2.2.1.1 Definition

The law of armed conflict is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities, and restricts the means and methods of warfare available to the parties to the conflict to those which are necessary to weaken the military potential of the enemy.

As such, the rules of the law of armed conflict strike a balance between considerations of military necessity and the requirements of humanity.

[St. Petersburg Decl., Preamble / H.IV.R, 22]

#### 2.2.1.2 Terminology

Other commonly used terms for the law of armed conflict are: “international humanitarian law” (IHL), the “law of war” and “*jus in bello*”.

Historically, the law of armed conflict was divided into two parts and referred to according to the place where the various international conferences on particular categories of treaties took place. Under this system “Geneva law” referred to the protection of the victims of armed conflict and “Hague law” referred to the conduct of hostilities.

This distinction has lost its relevance, since the two bodies of law have now largely merged (in particular in the Additional Protocols to the four 1949 Geneva Conventions).

Nevertheless, some documents or publications may still refer to the “Law of Geneva” or the “Law of The Hague”.

### **2.2.1.3 Difference between the law of armed conflict and the law on the use of force**

The law of armed conflict, or *jus in bello*, applies to armed conflict and to the peacetime measures designed to ensure a State’s preparedness to abide by the law in the event of an armed conflict.

It does not regulate whether a State may legitimately resort to the use of force in its international relations; this is governed by an important but distinct part of international law, known as *jus ad bellum*, which is set out in the United Nations Charter.

### **2.2.1.4 Separation of the law of armed conflict from the law on the use of force**

The origins and justness of war are political topics, which are always hotly debated by both sides in a conflict but should be seen separately from the objective humanitarian consequences of war. It is therefore of fundamental importance that questions of *jus in bello* remain distinct from *jus ad bellum*. As stated by Sassoli and Bouvier:

"Although armed conflicts are prohibited, they happen, and it is today recognised that international law has to address this reality of international life not only by combating the phenomenon, but also by regulating it to ensure a minimum of humanity in this inhumane and illegal situation. For practical, policy and humanitarian reasons, IHL has however to be the same for both belligerents: the one resorting lawfully to force and the one resorting unlawfully to force. From a practical point of view, the respect of IHL could otherwise not be obtained, as, at least between the belligerents, it is always controversial which belligerent is resorting to force in conformity [with the law]. In addition, from a humanitarian point of view, the victims of the conflict on both sides need the same protection, and they are not necessarily responsible for the violation of the *jus ad bellum* committed by 'their' party.

IHL has therefore to be respected independently of any argument of *jus ad bellum* and has to be completely distinguished from *jus ad bellum*."

[Sassoli & Bouvier, *How Does Law Protect in War?*, second ed., vol. I, 2006, pp. 102-03; UN Charter, Art. 2(4), Chapter VII, Art. 51]

### 2.2.1.5 Sources of the law of armed conflict

The two main sources of the law of armed conflict (LOAC) are:

- customary law of armed conflict (see 2.2.2); and
- treaties (see 2.2.3).

### 2.2.1.6 Duty to respect and ensure respect

Parties to armed conflicts must "respect and ensure respect" for the law of armed conflict "in all circumstances". This means that a State has the obligation to do everything in its power to comply with the rules of LOAC, but also to compel other States to abide by them, and to take national measures in order to ensure respect for LOAC by its subjects. This obligation is owed by the State to all other States party to LOAC treaties. In addition to the obligation of the State directly affected by a particular violation to take action, all other States Parties have a concurrent obligation. The phrase "in all circumstances" reiterates that the obligation does not cease when others do not respect their obligations (see reciprocity below) and that the obligation is not confined to times of war.

The duty to respect and ensure respect for the law of armed conflict applies in international and non-international armed conflicts alike.

[GC I-IV, 2 / P I, 1 / 1 CILS, 139 / *Case Concerning Military & Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.)*, Merits, I.C.J. Rpts. 1986, at ¶¶ 220, 255 (I.C.J. 1986)]

### 2.2.1.7 Reciprocity

A State Party's obligation to respect the law of armed conflict does not depend on reciprocity. In other words, a party to a conflict may not justify a violation of a law of armed conflict provision on the grounds that another party to the conflict has violated that provision. Reprisals are only permitted in highly restricted circumstances, and cannot be taken against protected persons and objects.

With regard to the reciprocity of application of treaties, if certain parties to the conflict are not party to the same treaty, the States Parties are still bound to respect the treaty in their mutual relations.

[GC I-IV, 1, 2 / P I, 1 / 1 CILS, 140, 145-148 / VCLT, 60]

## 2.2.2 Customary law of armed conflict

### 2.2.2.1 Terminology and definition

In this Handbook, the terms "customary law of armed conflict" or "customary international humanitarian law" are used to refer to the customary international law applicable in armed conflicts.

### 2.2.2.2 Who is bound by the customary law of armed conflict?

The customary law of armed conflict is binding on:

- all States; and
- as relevant, organized armed groups that are parties to non-international armed conflicts.

### 2.2.2.3 Complementary function of customary law (Martens Clause)

Many treaties on the law of armed conflict explicitly recognize the continued importance of the customary law of armed conflict.

For example, Additional Protocol I provides that in cases not covered by treaty law, civilians, combatants, and members of organized armed groups remain under the protection and authority of the principles of international law derived from:

- established custom;
- the principles of humanity; and
- the dictates of public conscience.

This wording is based on the Martens Clause, which first appeared in the preamble to the Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899.

[H.II, Preamble / P I, 1]

### 2.2.2.4 ICRC Customary International Humanitarian Law Study

The ICRC was mandated by the International Conference of the Red Cross and Red Crescent to carry out a study to help clarify the content of the customary law of armed conflict. The study identified 161 rules which were found to be customary law.

According to this study, a large number of customary rules are binding on all parties to an armed conflict, including organized armed groups.

This Handbook provides references to specific customary law of armed conflict rules where they are potentially applicable to the topic under discussion. The following is a reference to the full set of 161 rules:

[Henkaerts & Beck, *Customary International Humanitarian Law*, ICRC/Cambridge University Press, 2006, vol. 1, *Rules* (1 CILS), vol. 2, *Practice* ]

## 2.2.3 Law of armed conflict treaties

### 2.2.3.1 General law of armed conflict treaties

The main treaties regulating armed conflicts are the:

- Convention (IV) respecting the Laws and Customs of War on Land and the Annex thereto: Regulations respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 [H.IV and H.IV.R];
- Four 1949 Geneva Conventions:
  - Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (“First Geneva Convention”) [GCI];
  - Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949 (“Second Geneva Convention”) [GC II];
  - Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (“Third Geneva Convention”) [GC III]; and
  - Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (“Fourth Geneva Convention”) [GC IV].
- Three Additional Protocols to the Geneva Conventions:
  - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (“Additional Protocol I”) [P I];
  - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (“Additional Protocol II”) [P II]; and
  - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Additional Protocol III) of 8 December 2005 [P III].

### 2.2.3.2 Treaties: protection of cultural property

The main treaties regulating the protection of cultural property are the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954 [H.CP], and its two protocols:

- Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954 [H.CP.P.I]; and
- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999 [H.CP.P.II]

### 2.2.3.3 Treaties: regulation and prohibition of certain types of weapons

The following law of armed conflict treaties prohibit or impose restrictions/limitations on the use of specific weapons for warfare on land, and are discussed in this Handbook:

- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, 29 November/11 December 1868 [St. Petersburg Decl.];
- Declaration concerning Expanding Bullets, The Hague, 29 July 1899 [Hague Decl.];
- Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 [H.IV] and the Regulations respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 [H.IV.R];
- Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925 [G.BC];
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972 [BWC];
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 10 December 1976 [ENMOD];
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980 [CCW], and its Protocols:
  - Amended Article 1, Geneva, 21 December 2001 [CCW.Art.1];
  - Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980 [CCW.P.I];
  - Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980 [CCW.P.II];
  - Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended), Geneva, 3 May 1996 [CCW.P.II Amend.];
  - Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980 [CCW.P.III];
  - Protocol on Blinding Laser Weapons (Protocol IV), Vienna, 13 October 1995 [CCW.P.IV]; and
  - Protocol on Explosive Remnants of War (Protocol V), 28 November 2003 [CCW.P.V.];
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993 [CWC];
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, 18 September 1997 [AP Mine Ban Conv.]; and
- Convention on Cluster Munitions, Dublin, 30 May 2008 [CCM].

#### 2.2.3.4 Treaties: the law of neutrality

The law of neutrality is covered by the:

- Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, 18 October 1907 [H.V.]; and
- Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907 [H.XIII].

[Sassoli and Bouvier, *How Does Law Protect in War?*, Second ed., vol. I, 2006, pp. 102-03 / UN Charter, Art. 2(4), Chapter VII, Art. 51]

#### 2.2.3.5 Law of armed conflict: no derogations

No derogations are permitted under the law of armed conflict because this branch of law was designed to apply in extreme situations. See 1.4.2.1 for an explanation on derogations as they exist in e.g. human rights law.

The only limited exceptions to this are derogations explicitly set out in the text of law of armed conflict treaties, such as the derogations in Article 5 of the Fourth Geneva Convention.

[GC IV, 5]

#### 2.2.3.6 Additional resource for law of armed conflict treaties: ICRC website

This Handbook provides references to the main law of armed conflict treaties. Additional resources are available on the website of the ICRC in its International Humanitarian Law database, which contains the full text of 100 treaties and other texts.

The ICRC website also includes information on the current status of signatures, ratifications, accessions and successions to law of armed conflict treaties as well as the full texts of reservations, declarations and objections made by States.

At the time of writing, the International Humanitarian Law database is available at <http://www.icrc.org/ihl>.

### 2.2.4 Fundamental principles of the law of armed conflict

#### 2.2.4.1 Fundamental principles

The law of armed conflict is based on several fundamental principles:

- military necessity;
- humanity;
- distinction;
- proportionality;
- precaution; and
- limitation.

These principles underlie treaty and customary law of armed conflict, and assist in its interpretation, but are not a substitute for the law itself. Factual scenarios with law of armed conflict relevance must be resolved with primary reference to specific treaty or customary law provisions.

#### **1.2.4.2 Military necessity**

The principle of military necessity permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by the law of armed conflict. In the case of an armed conflict the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict.

[St. Petersburg Decl. / ICRC Commentary, P I, 35]

#### **2.2.4.3 Humanity**

The principle of humanity prohibits the infliction of death, injury and destruction not actually necessary to achieve a legitimate military purpose.

[DPH Study, p. 79]

#### **2.2.4.4 Distinction**

The principle of distinction requires parties to a conflict to distinguish between civilians and combatants and between civilian objects and military objectives, and to direct their operations only against combatants and military objectives.

[P I, 48, 51 / P II, 13 / 1 CILS, 1-10]

#### **2.2.4.5 Proportionality**

The principle of proportionality prohibits attacks against combatants and military objectives which are expected to cause loss of civilian life, injury to civilians, or damage to civilian objects, or a combination thereof, which would be excessive in relation to the anticipated concrete and direct military advantage.

[P I, 51 / 1 CILS, 14]

#### **2.2.4.6 Precaution**

The principle of precaution requires parties to a conflict to take constant care to spare civilians, the civilian population, and civilian objects.

[P I, 57, 58 / 1 CILS, 15-24]

### 2.2.4.7 Limitation

The principle of limitation means that the right of the parties to an armed conflict to choose means or methods of warfare is not unlimited, and that the infliction of unnecessary suffering is prohibited.

[P I, 35 / H.IV.R, 22]

## 2.3 Classification of conflict and application of the law of armed conflict

This Section discusses how to classify armed conflicts, and the beginning and end of application of the law of armed conflict for each type of conflict.

### 2.3.1 Introduction to classification of the conflict

#### 2.3.1.1 Introduction: law of armed conflict and classification

By definition, the law of armed conflict only applies to military operations when they take place within the context of an armed conflict as defined by international law.

The first step is the determination of whether an armed conflict is international or non-international, because the classification of the conflict determines the specific set of rules which apply to the conduct of military operations.

[GC I, 2, 3, 5 / GC II, 2, 3, 5 / GC III, 2, 3, 5 / GC IV, 2, 3, 6 / H.CP, 18, 19 / P I, 1, 3 / P II, 1, 2]

#### 2.3.1.2 Introduction: beginning of application of the law of armed conflict

The law of armed conflict applies when one of the following situations exists:

- an international armed conflict; or
- a non-international armed conflict.

Today, the definition of armed conflict set out by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case is widely accepted as the definition of an armed conflict:

“an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”

The Appeals Chamber further stated that the law of armed conflict applies “from the initiation of such armed conflicts.”

[GC I, 3 / GC II, 3 / GC III, 3 / GC IV, 3 / *Tadic*, 1995 Appeals, ¶ 70]

## 2.3.2 International armed conflicts

### 2.3.2.1 Treaty definition

An international armed conflict is defined in the four Geneva Conventions as “all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties”, plus “all cases of partial or total occupation of the territory of a High Contracting Party even if the said occupation meets with no armed resistance”.

[GC I – IV, 2]

### 2.3.2.2 Types of international armed conflict

An armed conflict exists regardless of the reasons, duration, scope or intensity of this inter-State confrontation.

There are several situations which amount to an international armed conflict:

#### Inter-State conflicts

These are armed conflicts between States. Organized armed groups may also be involved, but as long as there is at least one State using force against another State, that particular conflict is international, regardless of any parallel non-international armed conflicts. A declaration of war is not necessary.

#### Proxy armed conflicts

Generally speaking, an armed conflict between a State and an organized armed group is a non-international armed conflict. However, a conflict between a State and an organized armed group qualifies as international armed conflict if another State exerts “overall control” over the organized armed group. The existence of “overall control” requires that the latter State be involved in the planning and supervising of military operations – the mere provision of financing and equipment is insufficient.

[*Tadic Appeals*, 1999]

#### Occupation

A territory is considered to be occupied when it is actually placed under the authority of hostile foreign armed forces. There is an occupation of one State by another even if it meets with no armed resistance, and is not preceded or followed by hostilities. Thus occupation may be the sole manifestation of a State of war between two States. It is possible that only parts of a State's territory be occupied. See Chapter 12 on the law of occupation.

[H.IV.R, 42]

### **National liberation war**

Additional Protocol I added another type of armed conflict to the category of international armed conflict: “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”

For the law of international armed conflict to come into effect in the case of a conflict of this type, the authority representing the said peoples must make a unilateral declaration addressed to the depositary of the Geneva Conventions.

[P I, 1, 96]

#### **2.3.2.3 Special agreements**

The rules of an international armed conflict can come into play when States and belligerent parties conclude special agreements on particular matters. In special agreements States may agree to take on more obligations and to provide more protections to persons and objects than they are otherwise required to provide under the law of armed conflict.

However, such agreements may not reduce or restrict the protection already granted by the law of armed conflict to persons and objects.

[GC I, 3, 6 / GC II, 3, 6 / GC III, 3, 6 / GC IV, 3, 7 / H.CP, 24]

#### **2.3.2.4 State consent to the presence of another State in its territory**

When one State consents to the presence and conduct of military operations by another State in its territory, there is no international armed conflict between those States.

For example, if State A sends its armed forces over its border with State B to attack an organized armed group with State B's consent, then there is not an international armed conflict between State A and State B.

#### **2.3.2.5 Beginning of application of the law of armed conflict**

The law of armed conflict applies in an international armed conflict whenever there is “a resort to armed force between States”, or from the beginning of an occupation. It applies regardless of whether the parties involved recognize that there is a state of war.

No minimum level of intensity of violence or fighting and no minimum of military organization, duration and control of territory is required for the law of armed conflict to apply in an international armed conflict.

[GC I, 2 / GC II, 2 / GC III, 2 / GC IV, 2 / *Tadic* Appeals, 1995]

### 2.3.2.6 End of application of the law of armed conflict

The law of international armed conflict ceases to apply at the general close of military operations, subject to certain exceptions.

General close of military operations means “the final end to fighting between all those concerned”, according to the ICRC Commentary on the Geneva Conventions. The general close of military operations may be marked by an armistice, a capitulation, or a situation in which one State occupies the entire territory of another and all hostilities cease.

There are two exceptions to the above rule, in which the provisions of LOAC continue to apply after the general close of military operations: these exceptions refer to certain rules of occupation law, as well as the obligation to repatriate persons detained in relation to the conflict.

[GC I, 2, 5 / GC II, 2 / GC III, 2, 5 / GC IV, 2, 6 / ICRC Commentary, GC IV, 6 / H.IV.R. 35-41/ *Tadic* Appeals, 1995].

### 2.3.2.7 End of application: occupied territory

In the case of occupied territory, the Fourth Geneva Convention ceases to apply one year after the general close of military operations (except for certain enumerated provisions).

For parties to Additional Protocol I, this treaty states that the law of armed conflict (including all of the Fourth Geneva Convention) ceases to apply in occupied territory on the termination of the occupation.

[GC IV, 2, 6 / P I, 3]

### 2.3.2.8 End of application: persons who are interned or detained

For persons who are interned or detained, the application of the law of armed conflict ceases only after their release, repatriation or re-establishment in their last place of residence.

The obligation to repatriate or release these persons is triggered by the cessation of active hostilities, which has to be differentiated from the general close of military operations; the cessation of active hostilities occurs when fighting has ceased and is unlikely to resume.

[GC I, 2, 5 / GC II, 2 / GC III, 2, 5 118(3) / GC IV, 2, 6, 133(1) / P I, 3]

### 2.3.2.9 Measures applicable in peacetime

There are numerous provisions of the law of armed conflict which relate to measures of implementation or of a preparatory nature (for example, training in and dissemination of the law of armed conflict). These provisions apply during peacetime as well.

In addition, a State's duty to investigate and prosecute grave breaches applies even when there is currently no armed conflict.

[1 CILS, 142, 158]

## 2.3.3 Non-international armed conflicts

### 2.3.3.1 Non-international armed conflicts: basic definition

Non-international armed conflict may take place either between government forces and non-governmental armed groups, or between such groups. Two main legal sources must be examined in order to determine what constitutes a non-international armed conflict:

- Article 3 common to the four Geneva Conventions of 1949 (i.e. this article is identical in each of the Conventions); and
- Article 1 of Additional Protocol II.

All non-international armed conflicts are governed by common Article 3, whereas only those meeting additional legal requirements are further governed by Additional Protocol II.

### 2.3.3.2 Classification: threshold for application of common Article 3

Common Article 3 applies in the case of an "armed conflict not of an international character"; however, this term is not defined in the Geneva Conventions.

In order to distinguish an armed conflict from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of protracted armed confrontation, meaning that:

- the confrontation has reached a minimum level of intensity; this may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces – the use of heavier military weapons (i.e. beyond the normal selection of law enforcement equipment) on a regular and sustained basis would tend to indicate that the level of intensity required for classification of the situation as an armed conflict has been met;

- the parties involved in the confrontation show at least a minimum of organization, making them parties to a conflict; this means that these forces have to be under a certain command structure, and have the capacity to sustain military operations.

#### 2.3.3.3 Higher threshold for application of Additional Protocol II

The threshold for the application of Additional Protocol II is higher than the threshold for application of common Article 3:

- first, Additional Protocol II only applies to armed conflicts which take place on the territory of a party to Additional Protocol II;
- second, the armed conflict must be between the State's armed forces and dissident armed forces or other organized armed group;
- finally, the organized armed group must be under "responsible command" and must "exercise such control over a part of its territory as to enable [it] to carry out sustained and concerted military operations and to implement [Additional Protocol II]".

[P II, 1]

#### 2.3.3.4 Situations of internal disturbances, riots, isolated acts of violence

The law of armed conflict does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

This wording is taken from Additional Protocol II, but also forms the lower boundary for a common Article 3 armed conflict.

For information on the rules that apply to armed forces involved in such situations, see Chapter 14, Law Enforcement Operations.

[P II, 1]

#### 2.3.3.5 End of application: general

The application of the law of armed conflict in a non-international armed conflict "extends beyond the cessation of hostilities ... until a peaceful settlement is achieved," according to the ICTY Appeals Chamber in the *Tadic* case.

[*Tadic* 1995 Appeals, ¶ 70]

### **2.3.3.6 End of application: persons deprived of liberty for reasons related to the conflict**

The provisions of Additional Protocol II concerning the deprivation of liberty and penal prosecution for reasons related to the armed conflict continue to apply after the end of the armed conflict to all persons deprived of liberty.

[P II, 2, 5, 6]

## **2.3.4 Classification, selected issues**

### **2.3.4.1 Classification: who decides?**

In practice, the State(s) involved in a situation of violence are the ones who decide whether that situation constitutes an armed conflict; and if so, whether the nature of the armed conflict is international or non-international. It is of fundamental importance that this determination be made objectively on the basis of the facts available, and not on the basis of political considerations.

The ICRC classifies conflicts in order to remind parties of their obligations under the law of armed conflict. These qualifications may also be made public.

National courts, international tribunals or other judicial bodies may classify a conflict in the context of a criminal prosecution for war crimes, a settlement of damages, or other legal proceedings.

### **2.3.4.2 Involvement of new parties**

The classification of an armed conflict may change if new parties become involved.

For example, a non-international armed conflict becomes an international armed conflict when:

- a foreign State decides to intervene militarily in support of an organized armed group in an existing armed conflict between a State and that organized armed group – this means there is now an international armed conflict, possibly alongside the existing non-international armed conflict;
- a foreign State takes overall control of an organized armed group in an existing armed conflict between a State and that organized armed group, so that effectively one State is fighting against another;
- an existing State breaks up (by secession or dismemberment) into several independent States during a non-international armed conflict.

If, on the other hand, a foreign State intervenes in a non-international armed conflict with the consent of the host State, then the classification of the conflict does not change, regardless of the fact that one of the States party to it is fighting on foreign soil.

## 2.4 Human rights law

This Section addresses the sources of international human rights law, derogations and restrictions, and the relationship between human rights law and the law of armed conflict. Although the application of the law of armed conflict evidently relates to situations of armed conflict, human rights law applies at all times. Accordingly, during an armed conflict both bodies of law apply concurrently, subject to the possible derogations of certain human rights law provisions as discussed below. In times of armed conflict, LOAC is the more specialized law and will have primacy, but when human rights law has a complementary value, or covers a more precise situation, it has to be taken into account. In situations other than armed conflict, human rights law applies in addition to domestic law.

### 2.4.1 Sources

#### 2.4.1.1 Definition

International human rights law consists of a set of principles and rules, on the basis of which individuals or groups can expect certain standards of protection, conduct or benefits from State authorities, simply because they are human beings.

#### 2.4.1.2 Human rights instruments

One of the main purposes of the United Nations is to promote and encourage respect for human rights. [Preamble, UN Charter, 1, 55, 56]

This fundamental purpose has been implemented in various human rights treaties and other instruments, in particular in the:

- 1948 Convention on the Prevention and Punishment of the Crime of Genocide [CCG];
- 1948 Universal Declaration of Human Rights [UDHR];
- 1951 Convention Relating to the Status of Refugees [CRSR];
- 1965 International Convention on the Elimination of All Forms of Racial Discrimination [CERD];
- 1966 International Covenant on Civil and Political Rights [ICCPR];
- 1966 International Covenant on Economic, Social and Cultural Rights [ICESCR];
- 1979 Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW];
- 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT];
- 1989 Convention on the Rights of the Child [CRC];
- 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts [CRC OP I]; and
- 2006 International Convention for the Protection of All Persons from Enforced Disappearance [ICPPED].

This Handbook includes references to these main human rights treaties where they are relevant to the topic under discussion.

#### **2.4.1.3 Regional human rights treaties**

Various regional human rights treaties are also in force. Some examples of regional human rights treaties are the following:

- Americas: the 1969 American Convention on Human Rights and the 1985 Inter-American Convention to Prevent and Punish Torture;
- Europe: the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; and
- Africa: 1981 African Charter on Human and Peoples' Rights.

This Handbook does not provide references to specific provisions of the regional human rights treaties.

#### **2.4.1.4 Customary international law**

Some human rights have also been accepted as customary international law. One example of a human right which has been accepted as being of a customary nature is the prohibition of torture.

#### **2.4.1.5 Soft-law standards**

There are a number of soft-law standards which are relevant to law enforcement and detention in armed conflict and other situations of violence. While soft-law standards are not binding in and of themselves, they provide guidance for the application of the binding rules in treaties.

The following are key soft-law standards which may apply to armed forces either during an armed conflict, other situations of violence or a peace support operation:

- Standard Minimum Rules for the Treatment of Prisoners (1955) [SMRTP];
- Code of Conduct for Law Enforcement Officials (1979) [CCLEO];
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) [BPPDI];
- Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989) [PPIEASE];
- Basic Principles for the Treatment of Prisoners (1990) [BPTP];
- United Nations Standard Minimum Rules for Non-custodial Measures (1990) [UNSMRNM];
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) [BPUFF]; and
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990).

This Handbook provides references to specific provisions of these soft-law standards where they are applicable to the topic under discussion.

#### **2.4.1.6 Principal human rights**

Some of the main human rights are the following:

- right to life;
- prohibition of torture, cruel, inhuman or degrading treatment or punishment;
- prohibition of slavery, slave-trade and servitude;
- right to liberty and security of person;
- right to a fair trial;
- prohibition of retroactivity of criminal law;
- right to privacy and family life;
- freedom of thought, conscience and religion;
- freedom of expression;
- freedom of assembly and association;
- right to education;
- right to health; and
- right to housing.

[UDHR / ICCPR / CESC]

#### **2.4.1.7 Duties of States**

States party to the main human rights treaties have a duty to respect human rights and to ensure them to all individuals under their jurisdiction and on their territory. The State is responsible for its own acts, but also for its omissions in failing to prevent violations.

States are in particular bound:

- to enact adequate legislation in order to implement human rights;
- to take adequate measures to prevent the violation of human rights;
- to provide accessible and effective remedies for violations of human rights; and
- to make reparation and to bring to justice those responsible.

Applicable human rights law must be respected at all times: in peacetime, during peace support operations (PSOs), during armed conflicts and during other situations of violence.

Human rights must be respected by State agents, including but not limited to civilian authorities, police, prison officials, paramilitary troops, and members of the armed forces.

[ICCPR, 2 / Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13]

### 2.4.1.8 Extraterritorial application

One contentious issue is whether human rights law applies to the actions of armed forces (or other agents of the State) who are deployed outside the territory of the State.

Most human rights treaties contain a provision on the scope of application of the treaty. For example, the ICCPR specifies that each State Party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”.

[ICCPR, 2]

The UN Human Rights Committee has interpreted this language to mean that the treaty covers persons “within the power or effective control” of the armed forces of a State operating outside that State's territory. The International Court of Justice (ICJ) similarly decided that human rights conventions apply extraterritorially. Some States, however, adopt the position that human rights treaties do not apply to their armed forces or other personnel operating outside the territory of their own State.

[Human Rights Committee, General Comment 31, ¶ 10, CCPR/C/21/Rev.1/Add.13 / *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004* / *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, ICJ Reports 2005*]

### 2.4.1.9 Additional resources: human rights law

The website of the Office of the High Commissioner for Human Rights provides links to the full text of UN human rights treaties and to information on the status of ratifications, reservations and declarations. The website also provides links to the full text of many soft-law instruments. At the time of writing, the OHCHR website is available at: <http://www2.ohchr.org/english/law>.

## 2.4.2 Derogations and restrictions

### 2.4.2.1 Derogations

Some human rights treaties permit States to derogate from (temporarily waive) treaty provisions when taking measures in situations of emergency.

In order to derogate from a human right in the ICCPR the following conditions must be fulfilled:

- there must be a public emergency which threatens the life of the nation;
- the State must officially proclaim that there is a public emergency, using the procedures in its national law or constitution for declaring a state of emergency;

- the derogation must be limited to the extent strictly required by the exigencies of the situation (strict necessity/proportionality);
- the derogation must not be inconsistent with the State's other obligations under international law (including the law of armed conflict);
- the derogation must not involve discrimination (on the ground of race, colour, sex, language, religions, or social origin); and
- finally, international notification is required: the State must inform the other States party to the treaty through the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and the reasons for its derogation.

[ICCPR, 4 / Human Rights Committee, General Comment 29, UN Doc. CCPR/C/21/Rev.1/Add.11]

#### 2.4.2.2 Non-derogable rights

Certain core rights may never be derogated from; they are absolute and no exceptions are permitted. These rights are known as non-derogable rights.

The ICCPR explicitly states that the following rights are non-derogable:

- the right to life;
- the right to be free from torture and cruel, inhuman or degrading treatment;
- the right to be free from slavery, the slave trade, and servitude;
- the prohibition of detention for debt;
- the prohibition of retroactivity in criminal law;
- the right to freedom of thought, conscience and religion; and
- the right to recognition as a person before the law.

In addition, the United Nations Human Rights Committee has issued a general comment in which it states its views that other rights are also non-derogable, such as the prohibition of arbitrary detention and the guarantees of fair trial.

[ICCPR, 4 / Human Rights Committee, General Comment 29, UN Doc. CCPR/C/21/Rev.1/Add.11]

#### 2.4.2.3 Restrictions

Some human rights treaty provisions contain a limitation clause which allows for restrictions of the particular right, without the need for a situation of emergency, for the reasons set out in the provision itself.

For example, a limitation clause might allow restriction of a right in the case of necessity for reasons of national security, public health or public order.

Generally, a State may only restrict a right when necessary for reasons and purposes set out in the limitation clause. In addition, the restriction must be proportionate to the protected interest.

[Human Rights Committee, General Comment 27, UN Doc. CCPR/C/21/Rev.1/Add.9 / General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13]

## **2.4.3 Law of armed conflict and human rights law**

### **2.4.3.1 Law of armed conflict and human rights law: main features and differences**

The law of armed conflict and international human rights law are both geared to the protection of the person, but there are specific differences in scope, purpose and application between them.

The law of armed conflict is exclusively applicable in cases of armed conflict, either international or non-international. It consists of standards of protection for persons who are not or no longer taking part in the armed conflict, and of rules for the conduct of hostilities. In principle, no derogations are possible to this branch of law, which applies to all parties to the conflict, including non-State parties.

Human rights law, in contrast, is aimed at protecting the individual from arbitrary behaviour by the government in whose power they find themselves, and at guaranteeing respect for the rights and freedoms (whether civil, political, economic, social or cultural) of all individuals at all times. It applies in peacetime as well as in armed conflict.

States may derogate from certain human rights, but they may never derogate from human rights law in a manner inconsistent with the law of armed conflict. For the requirements of a valid derogation, see 2.4.2.1.

Historically, the law of armed conflict and human rights law have developed along separate lines, but there has been a clear convergence over the last decades and some recent treaties include provisions from both bodies of law (e.g. the Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict).

During armed conflict, the law of armed conflict and human rights law apply side by side and are cumulative and complementary. Because the law of non-international armed conflict consists of limited provisions, human rights law often supplements that law or fills in the gaps.

[ICCPR, 4]

## 2.5 Legal framework for each type of armed conflict

### 2.5.1 International armed conflict

#### 2.5.1.1 Legal framework

The legal framework in an international armed conflict consists of the following:

- the law of armed conflict, including in particular,
  - the four Geneva Conventions
  - Additional Protocol I
  - treaties on the protection of cultural property
  - treaties that prohibit or impose restrictions / limitations on the use of specific weapons
  - the customary law of armed conflict
- human rights law
  - check for derogations
- any additional obligations agreed to in special agreements

#### 2.5.1.2 Non-renunciation of rights

No person may, under any circumstance, renounce in part or in entirety the rights secured to them by the law of armed conflict and by the special agreements concluded by the States or the belligerent parties concerned.

[GC I, 7 / GC II, 7 / GC III, 7 / GC IV, 8]

#### 2.5.1.3 International Committee of the Red Cross: mandate to act

The ICRC has a mandate to protect the lives and dignity of victims of war and to provide them with assistance. In international armed conflict, this includes the right to visit detained civilians as well as POWs, amongst other rights set out in the four Geneva Conventions and Additional Protocol I.

[GC I-IV 9/9/9/10 / P I, 81 (1) / GC III, 126 (5) / GC IV, 143 (5)]

### 2.5.2 Non-international armed conflicts

#### 2.5.2.1 Legal framework

The legal framework in a non-international armed conflict includes:

- the law of armed conflict, including in particular,
  - Article 3 common to the four Geneva Conventions
  - Additional Protocol II
  - treaties on the protection of cultural property
  - treaties that prohibit or impose restrictions / limitations on the use of specific weapons
  - the customary law of armed conflict
- human rights law
  - check for derogations
- any additional obligations agreed to in special agreements

### 2.5.2.2 International Committee of the Red Cross: right of initiative

In a non-international armed conflict the ICRC has the right, recognized by the law of armed conflict, to offer its services.

The ICRC may in particular offer its services to the parties to the armed conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict, in order to verify the conditions of detention and to restore contact between those persons and their families.

[GC I-IV, 3]

## 2.6 Legal framework for law enforcement operations

This Section sets out the applicable legal framework for armed forces operating in a law enforcement operation. For a full discussion of the issues faced by armed forces in such operations, refer to Chapter 14.

### 2.6.0.1 Introduction

While civilian authorities such as the police have the primary responsibility for law enforcement (i.e. to maintain domestic law and order), in some cases armed forces may be called on to assist civilian authorities in dealing with law enforcement responsibilities.

### 2.6.0.2 Legal framework for law enforcement operations

The legal framework in law enforcement operations includes:

- human rights law
  - check for derogations
- domestic law of the State

### 2.6.0.3 Human rights law

When armed forces operate in a law enforcement operation, they are required to comply with the same international human rights obligations as civilian law enforcement authorities. Refer to Section 2.4 and Chapter 14 for further discussion of human rights law.

[CCLEO, 1, commentary]

### 2.6.0.4 Domestic law

The domestic law of the State related to the maintenance of law and order applies to armed forces in law enforcement operations. In the case of multinational forces on the territory of another State, the domestic law of the sending State and that of the host State may come into play (see Chapter 15).

Domestic law on law enforcement must be consistent with the human rights treaty obligations of the State concerned as well as with customary international human rights law.

In some cases of internal violence, the State may proclaim a State of emergency under its domestic law and derogate from human rights treaties or activate a limitation clause in a human rights treaty provision.

For a discussion of derogations and restrictions, see 2.4.2.

#### **2.6.0.5 Law enforcement during an armed conflict**

Even if a State is involved in an armed conflict, not all military operations on the territory of that State are governed by the law of armed conflict regulating the conduct of hostilities. Law enforcement operations that are not part of the State's conduct of hostilities against another party to the armed conflict are governed by the legal framework applicable to civilian law enforcement officials. However, any detention related to the armed conflict is governed by the relevant law of armed conflict (in addition to human rights law), even if that detention takes place in the context of a law enforcement operation.

For example, if armed forces are called upon to maintain law and order during a civilian demonstration in occupied territory, then the legal rules governing resort to the use of force and firearms are those for law enforcement officials during assemblies and demonstrations, i.e. human rights law and domestic law. If it is decided to detain one of the demonstrators for reasons related to the armed conflict, then that person's rights would be determined in accordance with the law of armed conflict (in particular, the Fourth Geneva Convention).

#### **2.6.0.6 International Committee of the Red Cross: right of initiative**

In situations of violence other than armed conflict, the International Committee of the Red Cross has a recognized right of initiative.

The fact that the International Committee of the Red Cross offers its services in such situations cannot be considered to constitute interference in the internal affairs of the State concerned.

This right of initiative is laid down in the Statutes of the International Red Cross and Red Crescent Movement.

[RC Movement Statutes, 5]

## 2.7 Approach adopted in presenting the rules of the law of armed conflict

Although there are separate legal frameworks for non-international armed conflict [NIAC] and international armed conflict [IAC], in reality the basic conduct and behaviour required of armed forces in particular circumstances is similar, and may even be the same, in all armed conflicts. To take one example: regardless of the type of armed conflict, the wounded and sick must be collected and cared for.

In recent years, the bodies of law governing non-international and international armed conflict have increasingly converged. The Rome Statute of the International Criminal Court and the case law of international tribunals have determined that certain international crimes previously only recognized as such if committed in IACs also apply to NIACs. Moreover, several treaties now include rules that are applicable to both situations, and the majority of customary rules govern both types of conflict equally.

In each relevant Chapter or Section, this Handbook therefore first sets out the basic rules and principles that apply in all armed conflicts. If there are variations between the law of international and non-international armed conflict, these are noted in the text.

Then, depending on the structure of the particular Chapter or Section, the Handbook sets out the rules that are applicable only in a non-international armed conflict or only in an international armed conflict. In many cases, a basic rule or principle applies in all armed conflicts, but there is a detailed, specific set of rules in the law of international armed conflict to implement that principle. For example, it is prohibited in all armed conflicts to attack medical transports, but the specific and very detailed provisions concerning medical aircraft are only set out in the law of international armed conflict. Thus, where there are no specific rules in the law of non-international armed conflict on a particular topic, a commander may want to read the rules applicable in an international armed conflict and consider whether to apply them by analogy – provided that such an application would not conflict with other legal obligations such as human rights law or domestic law.

In addition, where certain topics are exclusively governed by the law of international armed conflict, such as occupation or the treatment of prisoners of war, this is clearly indicated.



# CHAPTER 3

# DEFINITIONS

## 3 DEFINITIONS

This Chapter is an alphabetical glossary of defined terms used elsewhere in the Handbook.

Many of the definitions set out below are derived from the law of armed conflict governing international armed conflict (IAC), which is more detailed than the law governing non-international armed conflict (NIAC). For the most part, however, definitions taken from the law of international armed conflict can be used by analogy in a non-international armed conflict.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

### A

#### Archipelagic States

“Archipelagic State” means a State constituted wholly by one or more archipelagos and may include other islands.

“Archipelago” means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such. For the specific rules concerning the definition of territorial waters for archipelagic States, refer to the United Nations Convention on the Law of the Sea (UNCLOS).

[UNCLOS, 46-48]

#### Armed forces

The “armed forces” of a State party to an armed conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.

Individual membership in the armed forces of a State is regulated by domestic law.

Paramilitary forces and law enforcement agencies may be incorporated into the armed forces.

[H.IV.R, 1 / P I, 43 / 1 CILS, 4 / DPH Study, pp. 21-25, 30-31] [IAC/NIAC]

In this Handbook, the armed forces or armed wing of a non-State party to a non-international armed conflict are referred to as an organized armed group (OAG).

### **Armistice**

An “armistice” is an agreement suspending military operations between the belligerent parties.

An armistice can be local (i.e. suspend operations in just one area) or general (i.e. suspend all operations). If the duration of the armistice is not defined, the belligerent parties may resume operations at any time, subject to previous warning in accordance with the terms of the armistice.

In case of a serious violation of the armistice by one belligerent party, an opposing party may denounce it and, in cases of urgency, restart hostilities immediately.

[H.IV.R, 36, 37, 38, 39]

### **Arrest**

“Arrest” means the act of apprehending a person for the alleged commission of an offence or by the action of an authority.

This definition is used in law enforcement operations.

[BPPDDI, terms]

### **Assemblies and demonstrations**

“Assemblies and demonstrations” are the terms used in this Handbook to describe the phenomenon of people taking to the streets to express their opinion publicly.

This definition is used in law enforcement operations.

[ICRC, Violence and the Use of Force, 15]

### **Attack**

“Attack” means an act of violence against the adversary, whether in offence or defence. The rules related to attacks apply in both offensive and defensive operations (see Chapters 4, 5, 6).

[P I, 49]

**B****Belligerent party**

A “belligerent party” is a party to an international armed conflict.

**Biological weapons**

The use of biological weapons is prohibited.

Biological weapons include:

- microbial or other biological agents or toxins; and
- weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes in an armed conflict.

[BWC, 1 / 1 CILS, 73 / ICC, 8] [IAC/NIAC]

**C****Capitulation**

A “capitulation” is a military agreement concluded between the commanders of two opposing armed forces fixing the terms of surrender of a given town, place, unit or whole armed force.

[H.IV.R, 35] [IAC]

**Central Tracing Agency**

Armed violence and natural or man-made disasters may lead to massive population displacement and the separation of families. Working as a rule in close cooperation with National Societies, the ICRC provides services for restoring family links, including reuniting family members. It pays particular attention and gives priority to children separated from their families and those demobilized from fighting forces, as they may encounter specific protection problems.

The family-links network – comprising the ICRC’s “Central Tracing Agency”, ICRC delegations and National Society tracing services – provides essential services to those with needs in this domain. It enables people to communicate with one another and strives to reunite separated family members, to locate missing relatives and to recover and identify human remains. The ICRC acts both in its direct operational capacity and in its lead role within the Movement for restoring family links. As such, it acts as the Movement’s technical adviser in this field and as coordinator of the related international response, including in situations of natural disaster occurring outside conflict zones or violence-prone areas.

[GC III, 123 / GC IV, 140 / P I, 33]

## Chemical weapon

“Chemical weapon” means the following, together or separately.

- Toxic chemicals and their precursors except where intended for uses not prohibited by the law of armed conflict, as long as the types and quantities are consistent with such purposes, where:
  - “Toxic chemical” means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.
  - “Precursors” means any chemical reactant which takes part at any stage in the production of a toxic chemical.
- Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in the first bullet point, which would be released as a result of the use of such munitions and devices; or
- Any equipment specifically designed for use directly in connection with the use of munitions and devices specified in the second bullet point.

[CWC, 1, 2]

## Civil defence

“Civil defence” means the performance of specific humanitarian tasks for the protection of the civilian population against the dangers of, and to help it recover from, the immediate effects of armed conflict or disasters, and also to provide the conditions necessary for the survival of the civilian population.

[P I, 61]

## Civil defence organization

“Civil defence organization” means any establishment or unit which is organized or authorized by a competent authority of a party to a conflict and assigned exclusively to those humanitarian tasks which would be covered by “Civil defence”.

[P I, 61]

## Civil defence personnel

“Civil defence personnel” means personnel assigned exclusively to civil defence tasks, including personnel assigned exclusively to the administration of these organizations.

[P I, 61]

**Civil defence task (IAC)**

The specific “civil defence tasks” provided for by the law of armed conflict are the following:

- warning;
- evacuation;
- management of shelters;
- management of blackout measures;
- rescue;
- medical services, including first aid, and religious assistance;
- fire-fighting;
- detection and marking of danger areas;
- decontamination and similar protective measures;
- provision of emergency accommodation and supplies;
- emergency assistance in the restoration and maintenance of order in distressed areas;
- emergency repair of indispensable public utilities;
- emergency disposal of the dead;
- assistance in the preservation of objects essential for survival; and
- complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization.

[P I, 61]

**Civil defence material**

“Civil defence material” means any equipment, supplies and transports used by these organizations for the performance of civil defence tasks.

[P I, 61]

**Civilian**

“Civilian” means, in an international armed conflict, any person who does not belong to the armed forces and does not take part in a “*levée en masse*”.

In case of doubt whether a person is a civilian or not, that person must be considered to be a civilian.

[H IV, R, 2 / GC IV, 4 / P I, 50 / 1 CILS, 5 / DPH Study, p. 16] [IAC]

“Civilian” means, in a non-international armed conflict, all persons who are neither members of State armed forces nor members of an organized armed group.

[1 CILS, 5 / DPH Study, p. 16] [NIAC]

The definitions of “civilian” given here are for use only with regard to who may or may not be targeted during the conduct of hostilities. They are not intended to serve as a basis for interpreting IHL rules regulating the status, rights and protection of persons outside the conduct of hostilities – such as those deprived of liberty.

### **Civilian object**

“Civilian object” is any object which is not a military objective.

A civilian object must not be attacked unless it is used in a way that renders it a military objective.

In case of doubt whether an object which is normally a civilian object (e.g., a place of worship, a house or other dwellings, a school) is a military objective, it must be considered as a civilian object.

[P I, 52 / CCW.P.II.Amend, 2 / CCW.P.III, 1 / 1 CILS, 9, 10]

### **Civilian population**

The “civilian population” comprises all persons who are civilians.

The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character (IAC).

[P I, 50 / 1 CILS, 5]

### **Continuous combat function**

A “continuous combat function” determines membership in an organized armed group (OAG). Unlike State armed forces, membership in an OAG is rarely formalized through an act of integration other than taking up a certain function for the group. Accordingly, a member of an OAG is a person who assumes a continuous combat function on behalf of that group.

A continuous combat function requires lasting integration into the OAG, and includes both direct combat functions and the preparation, execution or command of acts or operations amounting to direct participation in hostilities.

In addition, an individual who is recruited, trained and equipped by an OAG for the purpose of continuously and directly participating in hostilities is considered as taking on a continuous combat function even before he first carries out a hostile act.

An individual's continuous combat function may be openly expressed by wearing a uniform or distinctive sign or by carrying weapons, but not necessarily so. It may also be deduced from conclusive behaviour indicating continuous (and not sporadic, temporary or unorganized) direct participation in hostilities.

A member of an OAG ceases to be a civilian (for the purposes of targeting), and loses his protection against direct attack, for the duration of his membership (i.e. for as long as he assumes a continuous combat function).

[DPH 32-35, 70-73] [NIAC]

### **Combatant**

"Combatant" refers to those persons with a right to directly participate in hostilities between States.

The following persons are combatants in an international armed conflict:

- members of the armed forces, except medical personnel and religious personnel;
- members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - they are commanded by a person responsible for his subordinates;
  - they wear a fixed distinctive sign recognizable at a distance;
  - they carry their arms openly; and
  - they conduct their operations in accordance with the laws and customs of war;
- members of the regular armed forces who profess allegiance to a government or authority not recognized by the other party to the conflict; and
- participants in a *levée en masse*.

Combatants are required to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.

A combatant who fails to distinguish himself while he is engaged in an attack or in a military operation preparatory to an attack loses his combatant status if he is captured, which means that he does not have prisoner-of-war status and can be tried for an act of war.

However, he is to be given protections equivalent in all respects to those provided to prisoners of war under the Third Geneva Convention.

[GC III, 4 / P I, 44 / 1 CILS, 106] [IAC]

It should be noted that in international armed conflicts governed by Additional Protocol I, a combatant distinguishes himself sufficiently if he carries his arms openly:

- during each military engagement; and
- during such time as he is visible to the adversary while engaged in a military deployment preceding the launching of an attack in which he is to participate.

[P I, 44] [IAC]

A combatant who falls into the power of an adverse party to a conflict is a prisoner of war.

[H IV. R, 2 / GC III, 4 / P I, 43 / 1 CILS, 3] [IAC]

### **Commander**

The term “commander” means military superiors, whether officially appointed or effectively acting as commanders, who are responsible for the conduct of their subordinates. It includes the entire range of commanders, from high-level strategic leaders down to those non-commissioned members with only a few subordinates under their command.

[P I, 86, 87 / ICRC Commentary, P I, 87]

### **Concentration of civilians**

“Concentration of civilians” means any cluster of civilians such as in inhabited parts of cities, towns or villages, or in camps or columns of refugees or evacuees, or groups of nomads.

[CCW.P.III, 1]

### **Cultural property**

“Cultural property” means movable or immovable property of great importance to the cultural heritage of every people, such as:

- monuments of architecture, art or history; archaeological sites; groups of buildings which, as a whole, are of historical interest; works of art; books and other objects of artistic, historical or archaeological interest; scientific collections; and important collections of books or archives;
- buildings whose main purpose is to preserve and/or to exhibit movable cultural property such as museums, large libraries, depositories of archives, and refuges intended to shelter cultural property in an armed conflict; and
- centres containing a large amount of immovable cultural property.

[H.CP, 1]

### **Cultural property under enhanced protection**

“Cultural property under enhanced protection” means cultural property which is included on the H.C.P.II list of cultural property benefiting from enhanced protection.

Cultural property must meet the following conditions to be included in the above-mentioned list:

- it is of the greatest importance for humanity;
- it is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection; and
- it is not used for military purposes or to shield military sites, and a declaration has been made by the party which has control over the property confirming that it will not be so used.

The list of cultural property under enhanced protection is the responsibility of the Committee for the Protection of Cultural Property in the Event of Armed Conflict.

[H.C.P.II, 10, 11, 24, 27]

### **Cultural property under special protection**

“Cultural property under special protection” means an object of exceptional value, such as a shelter containing cultural property, a centre containing immovable cultural property, or other cultural property of very great importance.

Such cultural property must be:

- situated at an adequate distance from any large industrial centre or from any important military objective; and
- not be used for military purposes.

A refuge for movable cultural property may also be placed under special protection, whatever its location, if it is so constructed that, in all probability, it will not be damaged by bombs.

If any such cultural property is situated near an important military objective, it may nevertheless be placed under special protection if the party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective.

Special protection is granted to cultural property by its entry in the “International Register of Cultural Property under Special Protection”.

The International Register of Cultural Property under Special Protection is under the authority of the Director-General of UNESCO.

[H.CP, 8 / H.CPR.,12]

### **Cultural property personnel**

“Cultural property personnel” means personnel engaged in the protection of cultural property.

[H.CP, 15]

## **D**

### **Demilitarized zone**

A “demilitarized zone” is an area, agreed upon between the parties to an armed conflict, which cannot be occupied or used for military purposes by any party to the conflict. Demilitarized zones can be established by a verbal or written agreement in times of peace or during an armed conflict.

The subject of the agreement is normally an area which fulfils the following conditions:

- all combatants as well as mobile weapons and mobile military equipment have been evacuated;
- no hostile use is made of fixed military installations or establishments;
- no acts of hostility are committed by the authorities or by the population; and
- all activity linked to the military effort has ceased.

The agreement should define and describe, with precision, the limits of the demilitarized zone and, if appropriate, lay down the methods of supervision.

[1 CILS, p. 120 / P I, 60]

### **Derogation**

A “derogation” is a temporary suspension of an obligation under international law, which takes place under specific circumstances. In particular, in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, a State may take measures derogating from some of its obligations to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations of the said State under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Not all obligations under international law are derogable. There is a hard core of obligations, known as *ius cogens*, from which no derogation is permitted. For the rest, the derogation is only valid to the extent that – and for such time as – the above conditions are met.

[ICCPR, 4 / VCLT, 53]

### **Direct participation in hostilities**

In the law of armed conflict the concept of “direct participation in hostilities” refers to conduct which, if carried out by a civilian, suspends his protection against the dangers arising from military operations. Most notably, for the duration of his direct participation in hostilities, a civilian may be directly attacked as if he were a combatant.

The law of armed conflict does not define direct participation. A study published by the ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (DPH Study), provides recommendations for interpretation of the law of armed conflict in that regard. The recommendations and the accompanying commentary do not change binding rules of treaty law or customary law of armed conflict, but they reflect the ICRC's institutional position as to how the existing law of armed conflict should be interpreted in light of the circumstances prevailing in contemporary armed conflicts.

Direct participation in hostilities consists of specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

- the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
- there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
- the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

[DPH Study, pp. 9, 12, 16-17]

Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.

[DPH Study, p. 17]

In a non-international armed conflict, an individual whose continuous function involves the preparation, execution or command of operations amounting to direct participation in hostilities on behalf of an organized armed group is considered a member of that group ("continuous combat function"), and loses his protection against the dangers arising from military operations for the duration of that membership.

### **Distinction, principle of**

The "principle of distinction" requires parties to distinguish at all times between civilians and combatants and between civilian objects and military objectives, in order to ensure respect and protection for civilians and civilian objects, and accordingly direct their operations only against military objectives. Civilians enjoy protection from direct attack unless and for such time as they take a direct part in hostilities.

[P I, 48, 51 / P II, 13 / 1 CILS, 1-10]

### **Distinctive emblem of cultural property**

The "distinctive emblem of cultural property" consists of a blue and white shield.

[H.CP, 16]

### **Distinctive sign of civil defence**

The "distinctive sign of civil defence" consists of an equilateral blue triangle on a square orange background.

[P I, 66 / P I, Annex I, Chapter V] [IAC]

### **Distinctive sign of medical service**

The "distinctive sign of the medical service" consists of a red cross on a white background, a red crescent on a white background or a red crystal on a white background. The distinctive sign of the medical service is also referred to as the "emblem".

[GC I, 38 / GC II, 41 / P III, 2]

**Distinctive sign of works and installations containing dangerous forces**

The “distinctive sign of works and installations containing dangerous forces” consists of a group of three bright orange circles placed on the same axis.

[P I, 56, Annex 1, 17] [IAC]

**Distinctive signals of medical service**

The “distinctive signals of the medical service” are the following, which are specified for the exclusive identification of medical units or transports:

- light signal (flashing blue light);
- radio signal; or
- Secondary Surveillance Radar (SSR) system.

[P I, 18, Annex I, Chapter III]

**E****Expanding bullet**

An “expanding bullet” is a bullet that expands or flattens easily in the human body.

[H.Decl. / 1 CILS, 77]

**Exploding bullet**

An “exploding bullet” is a projectile, filled with explosives, that detonates on impact with soft or hard targets.

[St. Petersburg Decl./ 1 CILS, 78 / 1 CILS, pp. 272-74]

**Explosive ordnance**

“Explosive ordnance” means conventional munitions containing explosives except for mines, booby-traps and other devices as defined in the Amended Protocol II to the Conventional Weapons Convention. [CCW.P.II.Amend.]

**Explosive remnant of war**

“Explosive remnants of war” means:

- unexploded ordnance, i.e. explosive ordnance that has been primed, fused, armed or otherwise prepared for use and used in an armed conflict, which should have exploded but failed to do so; and
- abandoned explosive ordnance, i.e. explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict and which is no longer under the control of such a party. It need not have been primed, fused, armed or otherwise prepared for use.

[CCW. P.V, 2]

## G

### Graves Registration Service

At the commencement of hostilities, the parties to a conflict need to establish an official graves registration service. Its main task is to arrange exhumations and identifications of bodies and their transportation to their home country.

[GC I, 17 / GC II, 20 / GC III, 120 / P I, 34]

## H

### High seas

The “high seas” are all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.

[UNCLOS, 86]

### *Hors de combat*

A person is “*hors de combat*” if:

- he is in the power of an adverse party;
- he clearly expresses an intention to surrender; or
- he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself,

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

[GI-IV, 3 / P I, 41 / 1 CILS, 47]

A fundamental rule of the law of armed conflict is that persons who are *hors de combat* must not be attacked and must be treated humanely.

[H.IV.R, 23 / GC I, 3, 12 / GC II, 3, 12 / GC III, 3, 13 / GC IV, 3, 16 / P I, 10, 41, 42 / P II, 4, 7 / 1 CILS, 47]

### Hospital ship

“Hospital ship” means a ship built or equipped exclusively to assist the wounded, sick and shipwrecked, to care for them and to transport them.

[GC II, 22, 24, 25, 26]

### Hospital zone and locality

A “hospital zone and locality” is an area organized to protect from the effects of hostilities:

- the wounded and sick;
- medical personnel; and
- personnel entrusted with the organization and administration of the area.

A hospital zone and locality can be established in time of peace or during hostilities. Upon the outbreak and during the course of hostilities, the parties concerned may conclude agreements to mutually recognize the hospital zones and localities they have established.

A draft hospital zone and locality agreement is annexed to the First Geneva Convention.

[GC I, 23, Annex I (draft agreement)]

### **Hospital and safety zone and locality**

A “hospital and safety zone and locality” is similar to a hospital zone and locality, except that such zones and localities, in addition to the wounded and sick, may offer shelter to:

- aged persons;
- children under fifteen; and
- expectant mothers and mothers of children under seven.

A hospital and safety zone and locality can be established in time of peace or during hostilities. Upon the outbreak and during the course of hostilities, the parties concerned may conclude agreements to mutually recognize the hospital and safety zones and localities they have established.

A draft hospital and safety zone and locality agreement is annexed to the Fourth Geneva Convention.

[G IV, 14, Annex I (draft agreement)]

### **Human shield**

“Human shield” is not defined in the law of armed conflict. However, provisions of the law of armed conflict suggest the following definition for the use of human shields: “an intentional collocation of military objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives.”

[1 CILS, pp. 339-40]

## **Incendiary weapons**

“Incendiary weapon” means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target.

Incendiary weapons can take the form of flamethrowers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances (e.g. napalm, phosphorus).

The following are not incendiary weapons:

- munitions which may have incidental incendiary effects, such as illuminants, tracer, smoke or signalling systems; and
- munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives such as armoured vehicles, aircraft and installations or facilities (e.g. anti-tank missiles).

[CCW.P.III, 1]

## **Indiscriminate attacks**

“Indiscriminate attacks” are prohibited. They are attacks that are:

- not directed at a specific military objective (or person);
- employ a means or method of warfare which is not capable of being directed at a specific military objective (or person); or
- employ a means or method of warfare the effects of which cannot be limited as required by the law of armed conflict,

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

The following types of attacks are also considered to be examples of an indiscriminate attack:

- an attack on clearly separated and distinct military objectives in an area containing a concentration of civilians or civilian objects which treats these objectives as a single military objective; and
- an attack which violates the principle of proportionality, i.e. which may be expected to cause incidental loss of civilian life, injury to civilians, damage

to civilian objects, or combination thereof, which would be excessive in relation to the concrete and direct military advantage expected.

[P I, 51 / CCW.P.II.Amend, 3 / 1 CILS, 11-13]

### **Internal waters**

“Internal waters” are waters on the landward side of the baseline of the territorial sea.

[UNCLOS, 8]

### **Internment/administrative detention**

“Internment or administrative detention” is defined as the deprivation of liberty of a person that has been initiated/ordered by the executive branch – and not the judiciary – without criminal charges being brought against the internee/administrative detainee.

[RC Annex, pp. 375-76 / ICRC Commentary, P I, 75]

## **J**

### **Journalists**

“Journalists” are civilians and therefore enjoy the protection accorded to civilians unless and for such time as they take a direct part in hostilities.

The law of international armed conflict distinguishes two categories of journalists.

- Accredited correspondents (war correspondents), who have a special authorization permitting them to accompany the armed forces.  
Accredited correspondents are included among persons who accompany the armed forces without being members thereof. Their status must be attested by an identity card. Captured accredited correspondents are prisoners of war.
- Independent journalists engaged on dangerous missions in areas affected by hostilities.  
Independent journalists operating in areas of armed conflict may obtain an identity card attesting their status as a journalist. Independent journalists who fall into the power of a party to a conflict are civilians entitled to the ordinary protection granted to civilians by the law of armed conflict.

Members of the armed forces who have an information-related function within the armed forces (press service, cinematographic service, etc.) are not journalists.

[GC I, 13 / GC II, 13 / GC III, 4 / P I, 79, 1 CILS, 34]

**L****Law enforcement**

“Law enforcement” encompasses the following basic responsibilities:

- maintenance of public order and security;
- prevention and detection of crime; and
- aid and assistance in emergencies of all kinds.

**Law enforcement operation**

A “law enforcement operation” is an operation involving activities included in the definition of law enforcement.

**Law enforcement official**

This Handbook adopts the definition of “law enforcement official” used in the CCLEO and BPUFF:

“all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.”

“Law enforcement officials” may thus include members of armed forces when they are engaged in law enforcement operations, as long as they do not form part of the conduct of hostilities between parties to the armed conflict.

[CCLEO, commentary, 1 / BPUFF, note 1]

**Limitation, principle of**

The principle of limitation means that the right of the parties to an armed conflict to choose means or methods of warfare is not unlimited.

[P I, 35 / H.IV.R, 22]

***Levée en masse***

“*Levée en masse*” is defined as inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into organized armed units, provided they carry arms openly and respect the law of armed conflict.

[H.IV.R, 2 / GC III, 4] [IAC]

**Logistics bases**

“Logistics bases” means in this Handbook:

- military supply and maintenance bases; and
- military medical service bases.

**M****Means and methods of warfare**

“Means and methods of warfare” is a term referring to weapons in the widest sense as well as the way in which they are used.

[ICRC Commentary, P I, 35]

**Medical aircraft**

“Medical aircraft” is any means of medical transport by air.

[P I, 8]

**Medical material**

“Medical material” means any medical equipment or supplies (such as operating tables, surgical instruments, medication, etc.). It also includes resources used exclusively for the provision of medical services and care to the wounded and sick (this includes functional equipment like the kitchen or heating system, and functional supplies like linens or food service).

[GC I, 33 / P I, 8, 14 / ICRC Commentary, P I, 8, 14]

**Medical object**

“Medical objects” include, in this Handbook, medical units, medical transports and medical material.

**Medical personnel**

The term “medical personnel” refers to personnel assigned, by a party to a conflict, exclusively to the search for, collection, transportation, diagnosis or treatment, including first-aid treatment, of the wounded, sick and shipwrecked, and the prevention of disease; to the administration of medical units; or to the operation or administration of medical transports. Such assignments may be either permanent or temporary.

The term “medical personnel” covers not only personnel with medical training such as doctors, nurses, dentists or pharmacists, but also drivers, pilots, cooks, and maintenance and administrative staff exclusively attached to the medical service.

[GC I, 24 / GC II, 36, 37 / P I, 8 / ICRC Commentary, P I, 8]

**Medical purposes**

“Medical purposes” means the search for, collection, transportation, diagnosis or treatment (including first-aid treatment) of the wounded, sick and shipwrecked, or the prevention of disease.

[P I, 8]

**Medical ships and craft**

“Medical ships and craft” include any medical transports by water, such as hospital ships, coastal rescue craft, small craft employed for coastal rescue operations, and their lifeboats and small craft.

[GC II, 22, 24, 25, 26, 27 / P I, 8, 22]

**Medical transport**

“Medical transport” is any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a party to a conflict.

[GC I, 35 / GC II, 22, 24, 25, 26, 27 / P I, 8, 22]

**Medical transportation**

“Medical transportation” means the conveyance by land, water or air of the wounded, sick, shipwrecked, of medical and religious personnel, or of medical material.

[P I, 8]

**Medical unit**

“Medical unit” means any establishment, whether military or civilian, organized for medical purposes. The term comprises in particular hospitals, similar units, blood transfusion centres, preventive medicine centres and institutes, medical transportation locations, medical depots and the medical and pharmaceutical stores of such establishments. Medical units may be fixed or mobile, permanent or temporary.

[GC I, 19 / GC II 23 / P I, 8]

**Medical vehicle**

“Medical vehicles” means medical transports by land.

[P I, 8]

### **Mercenaries**

A “mercenary” is a person who takes a direct part in hostilities and is motivated essentially by the desire for private gain.

A captured mercenary is not a prisoner of war.

Article 47 of Additional Protocol I spells out six cumulative conditions for a person to be a mercenary. The person must:

- be specially recruited locally or abroad in order to fight in an armed conflict;
- take a direct part in the hostilities;
- be motivated to take part in the hostilities essentially by the desire for private gain and to be promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;
- not be a national of a party to the conflict or a resident of territory controlled by a party to the conflict;
- not be a member of the armed forces of a party to the conflict; and
- not have been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

The 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries extends this definition to persons recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a government or otherwise undermining the constitutional order of a State, or at undermining the territorial integrity of a State.

A national of a neutral State who enlists in the armed forces of a party to a conflict is not a mercenary.

[H.V, 17 / P I, 47 / Conv. Mercenaries, 1]

### **Military necessity, principle of**

The “principle of military necessity” permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by the law of armed conflict. In the case of an armed conflict the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict.

[St. Petersburg Decl. / ICRC Commentary, P I, 35]

### **Military objectives**

“Military objectives” are limited to those objects which:

- by their nature, location, purpose or use make an effective contribution to military action, and

- whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

[P I, 52 / 1 CILS, 8 / CCW.P.II.Amend., 2 / CCW.P.III, 1 / H.CP.P.II, 1]

### **Mines**

“Mine” means any munition designed to be placed under, on or near the ground or other surface area and to be detonated or exploded by the presence, proximity or contact of a person or a vehicle.

[CCW.P.II.Amend., 2 / AP Mine Ban Conv., 2]

## **N**

### **National airspace**

“National airspace” comprises the airspace above the land territory, the internal waters and the territorial waters and, where applicable, the archipelagic waters of the State.

[UNCLOS, 2]

### **National Information Bureau**

A “National Information Bureau” operates at the national level to collect and register information and conduct enquiries regarding the fate and whereabouts of protected persons. It transmits all this information through the Protecting Power, the ICRC or the National Red Cross or Red Crescent Societies to the State(s) concerned.

[GC III, 122 / GC IV, 136-139]

### **Natural environment**

“Natural environment” is defined in the ICRC Commentary as the “external conditions and influences which affect the life, development and the survival of the civilian population and living organisms” or, in other words, the “system of inextricable interrelations between living organisms and their inanimate environment”.

[ICRC Commentary, P I, 35]

### **Neutral person**

A “neutral person” is a national of a neutral State.

[H.V, 16-18]

**Neutral space**

“Neutral space” is defined in this Handbook as a neutral State’s:

- land territory;
- internal waters;
- territorial sea; and
- national airspace.

[UNCLOS, 2, 3-16, 46-48]

**Neutral State**

A “neutral State” is a State which is not a party to a particular armed conflict.

**Neutralized zones**

A “neutralized zone” is an area in the region where fighting is taking place that is intended to shelter from the effects of the conflict, without distinction:

- wounded and sick combatants and non-combatants; and
- civilians who take no part in the hostilities and perform no work of a military character (while they reside in the zone).

Neutralized zones are established by a written agreement which sets out the geographical position, the administration and supervision, the food supply, and the beginning and duration of the neutralized zone.

[GC IV, 15]

**Non-defended locality**

A “non-defended locality” is any inhabited place near or in a zone where armed forces are in contact and which is open for occupation by an adverse party.

A party to an armed conflict may unilaterally declare that an area is a non-defended locality.

Such a locality must fulfil the following conditions:

- all combatants as well as mobile weapons and mobile military equipment must have been evacuated;
- no hostile use is made of fixed military installations or establishments;
- no acts of hostility are committed by the authorities or by the population; and
- no activities in support of military operations are undertaken.

The declaration must be addressed to the adverse party, and must define and describe, as precisely as possible, the limits of the non-defended locality. The receiving party must acknowledge receipt of this notification and must treat the area as a non-defended locality (e.g. refrain from attack). If the above

conditions are not met, then the party receiving the notification must inform the other party.

Although not strictly required, for greater safety formal agreements are recommended for the establishment of non-defended localities.

Alternatively, the parties to an armed conflict may also agree on the establishment of non-defended localities which do not satisfy the conditions listed above. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality.

It is prohibited to attack a non-defended locality.

[P I, 59]

### ***Non-refoulement, principle of***

The “principle of *non-refoulement*” prohibits the expulsion or forcible return of a refugee in any manner whatsoever to a State or territory where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.

The principle has gradually been extended to every person, irrespective of whether the conditions for refugee status are fulfilled, when expulsion, extradition or forcible return in any other way to a State or territory (by resettlement, repatriation or re-establishment) would expose such person to a serious risk of torture or other cruel, inhuman or degrading treatment.

[CRSR, 33 / CAT, 3]

## **O**

### **Objects indispensable to the survival of the civilian population**

The term “objects indispensable to the survival of the civilian population” is not defined in the law of armed conflict. Instead, the relevant provisions provide a non-exhaustive list of examples such as foodstuffs, agricultural areas, crops, livestock, drinking water installations and supplies, and irrigation works.

[P I, 54 / P II, 14 / 1 CILS, p. 193]

### **Occupied territory (IAC)**

“Occupied territory” is territory that is actually placed under the authority of adverse foreign armed forces.

The occupation extends only to the territory where such authority has been established and can be exercised. A State's territory may therefore be only partially occupied, in which case the laws and obligations of occupation apply only in the territory that is actually occupied. When a State consents to the presence of foreign troops, there is no occupation.

[H.IV.R, 42] [IAC]

### **Occupying Power (IAC)**

The "Occupying Power" is the State authority that exerts effective control over a territory, in whole or in part, in the place of, and without the consent of, the legitimate sovereign.

### **Organized armed group (NIAC)**

An "organized armed group (OAG)" is the armed wing of a non-State party to a non-international armed conflict, and may consist of either:

- dissident armed forces (for example breakaway parts of government armed forces); or
- other organized armed groups which recruit their members primarily from the civilian population but have developed a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict.

The term OAG refers exclusively to the armed or military wing of a non-State party to a non-international armed conflict. It does not include those segments of the civilian population that are supportive of the non-State party, such as its political wing.

[DPH Study, pp. 31-32]

### **Other medical ships and craft**

"Other medical ships and craft" are medical ships and craft other than military and civilian hospital ships, coastal rescue craft, and their lifeboats and small craft, and other than ships chartered to transport equipment to be used to care for the military wounded and sick.

[P I, 23] [IAC]

## **P**

### ***Parlementaire***

"*Parlementaire*" is defined as a person belonging to a party to a conflict who is authorized to act as an intermediary with another party. *Parlementaires* may make themselves known by advancing bearing a white flag.

[1 CILS, pp. 227-33 / H.IV.R, 32]

**Peace support operation**

"Peace support operations" (PSOs) encompass all multifunctional operations, conducted impartially, normally by States or by international or regional organizations such as the United Nations (UN), the European Union (EU), the African Union (AU) or the North Atlantic Treaty Organization (NATO), involving military forces and diplomatic and humanitarian agencies, and are designed to achieve a long-term political settlement or other specified objective.

**Perfidy**

"Perfidy" consists in committing an act inviting the confidence of an adversary to lead him to believe that he is entitled to or obliged to accord protection under the rules of the law of armed conflict, with intent to betray that confidence. The essence of perfidy is to invite, obtain, and then breach the adversary's confidence, i.e. an abuse of good faith.

[P I, 37, 38 / 1 CILS, 65 / 1 CILS, p. 223]

**Pillage**

"Pillage" is the forcible taking of private property by an invading or conquering army from the enemy's subjects.

[*Black's Law Dictionary*, quoted in 1 CILS, p. 185]

**Precaution, principle of**

The "principle of precaution" requires parties to a conflict to take constant care to spare civilians, the civilian population, and civilian objects.

[P I, 57, 58 / 1 CILS, 15-24]

**Prisoner of war**

"Prisoners of war" are combatants who have fallen into the hands of the enemy, or specific non-combatants to whom the status of prisoner of war is granted by the law of armed conflict.

The following categories of persons are prisoners of war:

- members of the armed forces of a party to the conflict, including members of militias or volunteer corps forming part of such armed forces (this includes members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power);
- members of other militias or other volunteer corps that belong to a party to the conflict, provided that such groups:
  - are under responsible command;
  - have a fixed distinctive sign recognizable at a distance;
  - carry arms openly; and
  - conduct operations in accordance with the law of armed conflict;

- civilians who accompany the armed forces, provided they are authorized to do so by the armed force they accompany;
- members of crews of merchant marine and civilian aircraft of a party to the conflict who do not benefit from more favourable treatment under international law;
- participants in a *levée en masse*; and
- the military wounded, sick and shipwrecked who fall into the hands of an enemy.

[GC I, 14 / GC II, 16 / GC III, 4 / P I, 43] [IAC]

Combatants are required to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.

If a combatant fails to distinguish himself while engaged in an attack or in a military operation preparatory to an attack and is captured, he loses his combatant status, which means that, if captured, he does not have prisoner-of-war status and can be tried for an act of war.

However, he must be given protections equivalent in all respects to those accorded to prisoners of war by the Third Geneva Convention.

[GC III, 4 / P I, 44 / 1 CILS, 106] [IAC]

It should be noted that in international armed conflicts governed by Additional Protocol I, a combatant distinguishes himself sufficiently if he carries his arms openly:

- during each military engagement; and
- during such time as he is visible to the adversary while engaged in a military deployment preceding the launching of an attack in which he is to participate.

[P I, 44] [IAC]

The following persons are explicitly excluded from prisoner-of-war status in the law of armed conflict:

- members of the armed forces of a party who fall into the power of the adverse party while engaging in espionage; and
- mercenaries.

[GC IV, 4, 5 / P I, 46, 47 / 1 CILS, 107, 108] [IAC]

### **Prohibited recruitment into the armed forces**

The following provisions concern "prohibited recruitment" into the armed forces.

- Enemy nationals may not be compelled to take part in military operations against their own State.

[H.IV.R, 23 / GC III, 130/ ICC Stat., 8]

- Children under the age of fifteen years must not be recruited into the armed forces – in recruiting among persons having attained the age of fifteen years but not the age of eighteen years, priority must be given to those who are oldest.

Many States have committed themselves through binding international treaty obligations:

- not to recruit children into their armed forces; or
- to fix the minimum age for the enlistment of children at 18 years of age.

[P I, 77 / P II, 4 / CRC, 1, 38 / CRC, OPAC 1,2,4 / ICC, 8 / 1 CILS, 136, 137]

### **Proportionality, principle of**

The “principle of proportionality” prohibits attacks against military objectives which are expected to cause loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the anticipated concrete and direct military advantage.

[P I, 51 / 1 CILS, 14]

### **Protected person**

“Protected persons” in this Handbook refers to persons who are protected under the Fourth Geneva Convention.

In general, the term “protected persons” means those persons to whom a particular treaty applies, i.e. who are covered by the protective rules laid down in that treaty and thus enjoy certain rights when they are in the power of the enemy. It thus includes prisoners of war, the wounded and sick, and medical and religious personnel.

The basic definition of protected persons under the Fourth Geneva Convention is:

“Protected persons” are civilians who find themselves in the hands of a party to a conflict of which they are not nationals.

The Fourth Convention excludes the nationals of some States from the category of protected persons, because their State of origin can presumably protect them by the ordinary diplomatic means that apply in times of peace and continue to apply during an armed conflict:

- in the territory of a party to the conflict, nationals of a co-belligerent (allied) or neutral State are excluded as long as their State of nationality maintains normal diplomatic representation in the State in whose hands they are;
- in occupied territory, only nationals of a co-belligerent (allied) State are excluded, provided that their State of nationality maintains normal diplomatic representation in the State in whose hands they are – the nationals of neutral States remain protected persons in occupied territory.

[GC IV, 4, 5, 44/ P I, 73 / ICRC Commentary, GC IV, 4]

### **Protected zone**

A “protected zone” is a zone established by the parties to a conflict by agreement (or in the case of a non-defended locality, unilaterally). Such agreements usually provide that the zone is protected from attack and set out the conditions for loss of such protection. The law of armed conflict recognizes the following types of protected zones:

- protected zones to shelter civilians, wounded and sick from the effects of hostilities including, in an international armed conflict:
  - hospital zones,
  - hospital and safety zones, and
  - neutralized zones;
- demilitarized zones; and
- non-defended localities.

[GC I, 23, Annex / GC IV, 14, 15, Annex / P I, 59, 60 / I CILS, 35, 36, 37]

### **Protecting Power**

A "Protecting Power" is a neutral State or other State not party to a conflict which has been designated by a party to the conflict and accepted by the enemy party and has agreed to carry out the functions assigned to a Protecting Power under the law of armed conflict.

In the absence of an agreement on a Protecting Power, the International Committee of the Red Cross (ICRC) or any other impartial humanitarian organization should be designated as a substitute.

In practice, the Protecting Powers system has not been used in recent years. Instead, the ICRC has come to be recognized as a substitute for the Protecting Power.

Throughout this Handbook, the ICRC has been substituted where a provision of the law of armed conflict refers to the “Protecting Power”. This does not imply that Protecting Powers cannot be agreed upon and utilized in the future.

[GC I, 10 / GC II, 10 / GC III, 10 / GC IV, 11 / P I, 5] [IAC]

## R

### Religious objects

“Religious objects” means objects and articles of a religious character (e.g. books, devotional articles).

[GC III, 72 / GC IV, 58]

### Religious personnel

“Religious personnel” means military or civilian persons, such as chaplains, engaged exclusively in their ministry and attached:

- to the armed forces of a party to a conflict;
- to medical units and transports of a party to a conflict, or made available to a party to a conflict; and
- to civil defence organizations of a party to a conflict.

The provisions governing medical personnel also apply to religious personnel.

[GC I, 24 / GC II, 36, 37 / P I, 8, 15]

### Reprisal

A “reprisal” is a breach of the law of armed conflict, which would otherwise be unlawful but in exceptional cases is considered lawful as an enforcement measure in response to a previous breach of the law of armed conflict by the enemy, with the purpose of terminating the enemy’s violation.

Thus, reprisals are intended to put pressure on the enemy in order to obtain the enemy’s compliance with the law of armed conflict.

Reprisals are only allowed under very strict conditions and there is a trend towards outlawing reprisals in the law of armed conflict. See the reference below for the conditions set out in the ICRC’s Customary International Humanitarian Law study.

[1 CILS, p. 513]

### Riot control agent

A “riot-control agent” is any chemical not listed in a schedule to the CWC which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

[CWC, 2]

### Ruse of war

A “ruse of war” or “stratagem” is any act not amounting to perfidy that is intended:

- to mislead the enemy; or
- to induce the enemy to act recklessly.

Examples of ruses of war are:

- camouflage (natural, paints, nets, smoke);
- displays (decoys, feints);
- simulations and mock operations; and
- dissemination of false information.

[P I, 37 / 1 CILS, 57]

## S

### Shipwrecked

“Shipwrecked” means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility.

The shipwrecked keep their status as shipwrecked during the rescue or evacuation until they acquire another status according to the rules of the law of armed conflict.

[GC II, 12 / P I, 8]

### Specifically protected objects

The law of armed conflict prohibits or restricts attacks on “specifically protected objects” or “objects under specific protection.” Nevertheless, such objects can become lawful targets if the specific conditions for loss of protection are met. For details, refer to Chapter 5.

The following objects are specifically protected objects, and attacks are prohibited or restricted (as indicated):

- military medical objects (units, transports, material);
- civilian medical objects (units, transports, material);
- religious objects;
- objects used in a peacekeeping operation, for so long as they are entitled to civilian protection;
- objects used for humanitarian relief operations;
- civil defence organizations, transports and objects;
- works and installations containing dangerous forces (restricted);

- objects indispensable for the survival of the civilian population;
- the natural environment (restricted); and
- cultural property (restricted).

### **Spies**

A “spy” is a person who secretly, in disguise or under false pretences, gathers or attempts to gather information while in territory controlled by an adverse party with the intention of communicating it to the enemy.

A spy is not entitled to prisoner-of-war status. He is a civilian and a determination must be made whether he is a protected person under the Fourth Geneva Convention.

Spying does not include searching for information of military value while in uniform. Combatants caught while engaged in such military action are prisoners of war.

[H.IV.R, 29, 30 / GC IV, 4, 5 / P I, 46 / ICRC Commentary, P I, 46 / 1 CILS, 107]

### **State of emergency**

“State of emergency” in this Handbook refers to a situation when a State follows the procedures to declare a state of emergency under its domestic law.

### **Strait used for international navigation**

A “strait used for international navigation” is a strait used for navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

The exceptions to this definition are set out in the United Nations Convention on the Law of the Sea (UNCLOS).

[UNCLOS, 34-45]

## **T**

### **Temporary medical personnel**

“Temporary medical personnel” are members of the armed forces who are specially trained for employment, in case of need, as hospital orderlies, nurses, auxiliary stretcher-bearers or any other medical assignment.

[GC I, 25, 29 / P I, 8]

“Temporary medical personnel, units, transports and material” means those exclusively assigned for medical purposes during a limited period of time (e.g. for the duration of an evacuation).

[P I, 8]

### **Territorial sea**

“Territorial sea” is a belt of sea beyond a State’s land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, over which a State has sovereignty.

The specific rules concerning the limits of the territorial sea are set out in UNCLOS.

[UNCLOS, 2, 3-16]

### **Transport under special protection**

“Transport under special protection” means transport exclusively engaged in the transfer of cultural property, whether within a territory or to another territory. A request must first be made to the Commissioner-General for Cultural Property at UNESCO that meets the conditions set out in the Regulations to the Hague Convention for the Protection of Cultural Property, in order to qualify as transport under special protection.

[H.CP, 12, R.]

## **W**

### **Works and installations containing dangerous forces**

“Works and installations containing dangerous forces” means a dam, a dyke or a nuclear power plant containing forces the release of which would result in severe losses among the civilian population.

[P I, 56]

### **Wounded and sick**

“Wounded and sick” means any person, whether military or civilian, who because of trauma, disease or other physical or mental disorder or disability is in need of medical assistance or care, and who refrains from any act of hostility.

These terms also cover maternity cases, newborn babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.

[GC I, 12, 13 / GC II, 12, 13 / P I, 8]

# PART II



# **CHAPTER 4**

# **GENERAL OBLIGATIONS**

# **DURING COMBAT**

## 4 GENERAL OBLIGATIONS DURING COMBAT

This Chapter addresses obligations that apply to military operations during the conduct of hostilities, other than the rules on targeting (see Chapter 5), means and methods of warfare (see Chapter 6), and logistics (see Chapter 10). It should be read in conjunction with those three Chapters.

**4.1 Care for victims of combat** addresses the obligation to search, collect and care for such victims.

**4.2 Humanitarian relief** explains the rules related to the passage of humanitarian supplies.

**4.3 Precautions against the effects of attacks** discusses precautionary measures to minimize the impact of armed conflict on the civilian population, civilian objects and cultural property under the control of a party to a conflict.

**4.4 Non-hostile contacts with other parties to an armed conflict** concerns contacts between parties to an armed conflict, including unilateral communications and communications through intermediaries.

**4.5 Civil defence** sets out the rules related to civil defence and participation by armed forces in civil defence tasks.

**4.6 Distinctive signs and signals** outlines the rules for the use of the distinctive red cross, red crescent and red crystal emblems as well as other distinctive signs and signals.

**4.7 Respect for medical work** discusses the provisions of the law of armed conflict protecting legitimate medical activities during an armed conflict.

**4.8 Treatment of protected persons in the territory of a party to conflict (IAC)** addresses the specific rights applicable to civilians and other persons protected by the Fourth Geneva Convention who are aliens in the sovereign territory of an opposing party. These provisions only apply to international armed conflict.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## 4.1 Care for victims of combat

This Section addresses the obligation to search, collect and care for victims of combat.

### 4.1.1 All armed conflicts

#### 4.1.1.1 Search for victims: rule

As soon as the tactical situation permits, a military commander must take the necessary measures to:

- search for, collect, and care for the wounded, sick and shipwrecked; and
- search for and collect the dead.

It must be stressed that these responsibilities are not restricted to medical units. It is incumbent upon commanders to determine the most efficient means of carrying them out. Combatants themselves must give medical personnel all possible assistance in this regard.

[GC I, 3, 15 / GC II, 3, 18 / GC III, 3 / GC IV, 3, 16 / P II, 8 / 1 CILS, 109, 112]  
[IAC/NIAC]

#### 4.1.1.2 Care of wounded, sick and shipwrecked

The wounded, sick and shipwrecked in the power of a party to a conflict must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their state of health.

There must be no distinction between the wounded and sick founded on any grounds other than medical ones. In other words, it is permitted to prioritize treatment for a medical reason (the medical concept of “triage”), but it is prohibited to prioritize treatment on the basis of nationality, race, sex, religion, political opinions, etc.

The wounded, sick and shipwrecked must be treated humanely, and protected in particular against ill-treatment and pillage of their personal property.

[GC I, 3, 12, 15 / GC II, 3, 12, 18 / GC III, 3, 15, 30, 31 / GC IV, 3, 16, 81, 85, 91, 92 / P I, 10, 11 / P II, 5, 7, 8 / 1 CILS, 109, 110, 111, 118 / BPPPD, 24, 26]  
[IAC/NIAC]

#### 4.1.1.3 Detention and internment of wounded and sick

Once in the power of a party to a conflict, all wounded and sick are entitled to the treatment set out in Chapter 7. In every case they must, as a minimum, benefit from the fundamental guarantees of treatment listed in Section 7.2.

## **4.1.2 Specific rules in international armed conflicts**

### **4.1.2.1 Suspension of fire**

Whenever circumstances permit, an armistice or a suspension of fire must be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.

[GC I, 15]

### **4.1.2.2 Search for victims: by civilians and national relief societies**

The parties to an international armed conflict must permit civilians and aid societies such as National Red Cross or Red Crescent Societies, even on their own initiative, to search for, collect and care for the wounded, sick and shipwrecked.

No one may be harmed, prosecuted or punished for such acts.

[GC I, 18 / GC II, 21 / P I, 17] [IAC]

### **4.1.2.3 Search for victims: appeal for help**

Commanders may appeal to the civilian population, to aid societies such as National Red Cross or Red Crescent Societies, and to commanders of neutral merchant vessels, yachts or other craft, to collect and care for the wounded, sick and shipwrecked.

[GC I, 18 / GC II, 21 / P I, 17] [IAC]

Military commanders may appeal to commanders of neutral merchant vessels, yachts or other craft to collect the dead, and may appeal to aid societies and the civilian population to search for and report the location of the dead.

[GC II, 21] [IAC]

### **4.1.2.4 Search for victims: by civil defence personnel**

Civil defence units and personnel should be permitted to participate in the search for victims, particularly when there are civilian casualties, except in cases of imperative military necessity.

[P I, 61, 62] [IAC]

### **4.1.2.5 Besieged or encircled areas**

The parties to the conflict must endeavour to conclude agreements to remove from besieged or encircled areas the wounded, sick, infirm, elderly, children and pregnant women.

[GC IV, 17]

Local arrangements may be concluded between the parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area.

[GC I, 15]

#### **4.1.2.6 Recording of personal data**

As soon as possible, parties to the conflict must record the particulars of each wounded, sick, shipwrecked or dead person of the adverse party who falls into their hands. This data must be forwarded to the National Information Bureau as soon as possible.

[GC I, 16 / GC II, 19 / GC III 122]

### **4.1.3 Specific rule in a non-international armed conflict**

#### **4.1.3.1 Search for victims: by civilians and national relief societies (NIAC)**

In a non-international armed conflict, relief societies such as the National Red Cross or Red Crescent Societies may offer their services and civilians may, on their own initiative, offer to collect and care for the wounded, sick and shipwrecked. Furthermore, an impartial humanitarian body such as the International Committee of the Red Cross may offer its services in this regard.

[GC I, 3 / GC II, 3 / GC III, 3 / GC IV, 3 / P II, 18] [NIAC]

## **4.2 Humanitarian relief**

This Section details the rules for the passage of humanitarian relief.

### **4.2.1 All armed conflicts**

#### **4.2.1.1 Relief: general rule**

The parties to the conflict must allow and facilitate the rapid and unimpeded passage of relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to the parties' right of control.

[1 CILS, 55 / 1 CILS, pp.193-200] [IAC/NIAC]

#### **4.2.1.2 Relief: prohibition of starvation of the civilian population**

Starvation of the civilian population as a method of warfare is prohibited, and is a war crime in an international armed conflict. This includes wilfully impeding relief supplies.

[P I, 54 / P II, 14 / 1 CILS, 53 / ICC Stat., 8 / 1 CILS, p. 197] [IAC/NIAC]

**4.2.1.3 Relief: freedom of movement of humanitarian relief personnel**

The parties to a conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in a case of imperative military necessity may their movements be temporarily restricted.

[P I, 71 / 1 CILS, 56] [IAC/NIAC]

**4.2.1.4 Relief: protection of personnel and objects**

Humanitarian relief personnel and objects used for humanitarian relief must be respected and protected. They may not be attacked.

[P I, 70, 71 / 1 CILS, 31, 32] [IAC/NIAC]

**4.2.2 Specific rule in a non-international armed conflict****4.2.2.1 Humanitarian relief (NIAC)**

If the civilian population is suffering undue hardship due to the lack of supplies essential for its own survival, such as foodstuffs and medical supplies, relief operations for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction must be undertaken, subject to the consent of the State allowing passage.

[P II, 18] [NIAC]

**4.2.3 Specific rules in an international armed conflict****4.2.3.1 Impartial relief operations by humanitarian organizations**

If the civilian population is not adequately supplied with food, medical supplies, clothing, bedding, means of shelter and other supplies essential to their survival, relief operations must be undertaken by humanitarian relief personnel and organizations, including the ICRC, subject to the agreement of the parties to the armed conflict.

Such relief must be humanitarian and impartial in character and conducted without any adverse distinction. However, priority in the distribution of relief consignments should be given to children, expectant mothers, maternity cases and nursing mothers.

All States party to Additional Protocol I, and in particular the parties to the conflict, must encourage and facilitate effective international coordination of such relief.

[GC IV, 23 / P I, 70, 71 / ICRC Commentary, P I, 70] [IAC]

#### 4.2.3.2 Passage of impartial relief consignments

The parties to the conflict and States party to Protocol I which are not engaged in the conflict must allow and facilitate rapid and unimpeded passage of such impartial relief consignments, equipment and personnel, even if this assistance is destined for the civilian population of the adverse party. They must protect the consignments and facilitate their rapid distribution.

However, the party allowing passage:

- has the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
- may make permission for passage conditional on the distribution of this assistance being carried out under the local supervision of the ICRC.

The party allowing passage must not divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

[P I, 70 / ICRC Commentary, P I, 70 / GC IV, 23] [IAC]

#### 4.2.3.3 Relief: humanitarian personnel

Relief personnel charged with transporting and distributing relief consignments must be respected and protected. A party that receives such consignments is obliged to assist the relief personnel in question. Only in cases of imperative military necessity may the activities and movements of relief personnel be temporarily restricted.

However, the work of relief personnel is subject to the approval of the party in whose territory they will carry out their duties. If humanitarian relief personnel exceed the terms of their impartial humanitarian mission, for example by distributing food to combatants, their mission may be terminated.

[P I, 71] [IAC]

#### 4.2.3.4 Besieged or encircled areas

The parties to the conflict must endeavour to conclude local agreements to allow passage of medical and religious personnel and medical equipment destined for besieged or encircled areas.

[GC IV, 17]

### **4.3 Precautions against the effects of attacks**

#### **4.3.1 Basic principles**

##### **4.3.1.1 Precautions**

The parties to an armed conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.

[P I, 58 / 1 CILS, 22] [IAC/NIAC]

##### **4.3.1.2 Location of military objectives outside densely populated areas**

Military objectives must, to the maximum extent feasible, be located outside densely populated areas.

[P I, 58 / 1 CILS, 23] [IAC/arguably NIAC]

##### **4.3.1.3 Removal of civilians**

Civilians must, to the maximum extent feasible, be removed from places where the risk of attack is greatest, i.e. the vicinity of military objectives.

The removal of civilians from the vicinity of military objectives must preferably be to a safe location that they know. This may require preparatory measures to be taken when there is a foreseeable risk of hostilities impacting the civilian population, since during conflict circumstances may change rapidly and civilians may need to be evacuated on an emergency basis.

[P I, 58 / 1 CILS, 24] [IAC/arguably NIAC]

##### **4.3.1.4 Removal of civilian objects**

Moveable civilian objects must, to the maximum extent feasible, be removed from places where the risk of attack is greatest, i.e. from the vicinity of military objectives.

[P I, 58 / 1 CILS, 24] [IAC/arguably NIAC]

##### **4.3.1.5 Specifically protected objects**

The marking of specifically protected objects is an important precautionary measure against the effects of attacks. For the specific rules on the different types of specifically protected property and on the markings to be applied, see Section 4.6.

##### **4.3.1.6 Cooperation with civilian authorities**

Commanders may need to seek the cooperation of local civilian authorities in order to take precautionary measures to protect the civilian population and civilian objects against the effects of attacks.

Local commanders should, when the tactical situation permits, cooperate with civilian authorities and other civilians on the ground to reduce the danger incurred by civilian persons and objects.

Examples of cooperation are:

- removal of civilians from an area of actual or potential danger from hostilities;
- exchange of information relevant to civilian safety (e.g. location of shelters, first aid posts); and
- coordination of action (e.g. in or near populated areas, specifically protected objects, protected zones).

#### **4.3.1.7 Protected zones**

The rules governing protected zones are set out in Section 5.5. In order to ensure compliance with those rules, commanders must take the action needed for such zones within their area of responsibility to be duly respected.

It includes:

- issuing adequate instructions to ensure that the terms of any agreements establishing protected zones are respected by their subordinates (e.g. the removal of any military personnel and objectives);
- ensuring that protected zones are marked as required; and
- cooperating with civilian authorities regarding such zones (e.g. providing information on the existence and perimeter of protected zones, on acts that will deprive the zone of its legal protection, etc.).

[GC I, 23, Annex / GC IV, 14, 15, Annex / P I, 59, 60 / 1 CILS, 35, 36, 37]  
[IAC/NIAC]

#### **4.3.1.8 Works and installations containing dangerous forces**

A party may place defences on a work or installation containing dangerous forces for the sole purpose of ensuring its defence from attack. Such defences must not themselves be made the object of attack, provided that:

- they are not used in hostilities, except for defensive actions necessary to respond to attacks against the protected work or installation; and
- their armament is limited to weapons capable only of repelling hostile action against the protected work or installation.

[P I, 56]

### **4.3.2 Military movements and locations**

#### **4.3.2.1 General rule**

Precautions against the effects of attacks are particularly important with respect to movements and locations of military personnel and objects, due to the risk of harm to civilian persons and objects caused by their presence.

Precautions include, to the maximum extent feasible:

- ensuring that military movements take place and locations are established outside densely populated areas and protected zones (see 4.3.1.2 and 4.3.1.7); and
- removing civilians and civilian objects from the vicinity of military movements and locations (see 4.3.1.3 and 4.3.1.4).

[P I, 57 / H.CP.P.II, 8 / 1 CILS, 15] [IAC/NIAC]

#### 4.3.2.2 Movements: rapid execution

When military units must pass through or close to populated areas, their movements should be executed rapidly.

[P I, 57, 58 / H.CP.P.II, 8 / 1 CILS, 15, 22, 23] [IAC/NIAC, except 1 CILS, 23, which is arguably NIAC]

#### 4.3.2.3 Movements: interruption

The interruption of military unit movements (e.g. rest stops after given periods of time, occasional stops, forming of convoys) must, when the tactical situation permits, take place outside populated areas or at least in less densely populated areas. It should be borne in mind that the presence of a military unit in an area populated by civilians may increase the risk of harm to civilians and civilian objects, and therefore any interruption in movements should be carried out in such a way as to minimize this risk.

[P I, 57, 58 / H.CP.P.II, 8 / 1 CILS, 15, 22, 23] [IAC/NIAC except 1 CILS, 23, which is arguably NIAC]

#### 4.3.2.4 Location in a populated area: precautions

In circumstances where a mobile military unit is located in a concentration of civilians or civilian objects, the commander in charge must take additional danger-reducing measures in order to avoid or at least minimize the risk of loss of civilian life, injury to civilians and/or damage to civilian objects which arises from the presence of the military unit.

Examples of such measures include:

- marking the limits of military unit locations;
- restricting and regulating access to locations containing military units;
- issuing safety information to the civilian population, and
- temporarily removing the civilian population living within the vicinity of the military presence.

[P I, 57, 58 / 1 CILS, 15, 22, 23, 24] [IAC/NIAC (1 CILS, 15, 22), arguably NIAC (1 CILS, 23, 24)]

### 4.3.3 Cultural property

#### 4.3.3.1 Cultural property: introduction

Cultural property is protected by international law, and each party to an armed conflict has obligations with respect to its protection (see the definition of cultural property in Chapter 3, C). These include taking precautions against the effects of enemy attacks so as to preserve such property.

The obligation of commanders to protect cultural property from the effects of their own attacks is discussed in 5.4.6.

#### 4.3.3.2 Military use of cultural property is prohibited

Property of great importance to the cultural heritage of every people must not be used for a purpose which is likely to expose it to destruction, unless such use is imperatively required by military necessity.

Thus, for example, a historic religious structure cannot be used to store weapons, because the latter are military objectives and furthermore render the structure a military objective subject to attack.

[1 CILS, 39] [IAC/NIAC]

#### 4.3.3.3 Cultural property: further restrictions in conflicts covered by P I or P II

In armed conflicts in which either P I or P II is in effect, it is prohibited to use historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples in support of the military effort.

These provisions are without prejudice to the provisions of the H.CP and H.CP.P.II set out below.

The difference between the Additional Protocols and the customary international law provisions above is that the latter allow for a waiver in cases of military necessity, whereas the Additional Protocols do not.

[P I, 53 / P II, 16] [IAC/NIAC]

#### 4.3.3.4 Cultural property in situations covered by H.CP and H.CP.P.II

Together, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (H.CP) and its 1999 Second Additional Protocol (H.CP.P.II) lay down a three-part regime providing different levels of protection for different types of cultural property:

- cultural property;
- cultural property under special protection; and
- cultural property under enhanced protection.

For the definition of these terms, see Chapter 3,C.

#### 4.3.3.5 Cultural property: basic rule (H.CP, H.CP.P.II)

States party to the H.CP must refrain from using cultural property, its immediate surroundings, and the appliances in use for the protection of the cultural property for purposes which are likely to expose it to destruction or damage in the event of an armed conflict. Thus, parties to a conflict must not use cultural property in a manner that converts it into a military objective.

This obligation may be waived only in cases of imperative military necessity.

[H.CP, 4]

A waiver for imperative military necessity may only be invoked when and for as long as no choice is possible between the use of the cultural property for purposes which are likely to expose it to destruction or damage and another feasible method for obtaining a similar military advantage.

The decision to invoke imperative military necessity must be taken by the commander of a force the equivalent of a battalion in size or larger, or of a force smaller in size where the circumstances do not permit otherwise.

[H.CP.P.II, 6]

In addition, the parties to an armed conflict must, to the maximum extent feasible, remove all moveable cultural property from the vicinity of military objectives or provide for adequate *in situ* protection, and avoid locating military objectives near cultural property.

[H.CP.P.II, 8]

#### 4.3.3.6 Cultural property under special protection (H.CP)

States party to the H.CP must refrain from using cultural property under special protection or its surroundings for military purposes. This includes the use of such property for defensive measures.

This rule is particularly important because once a party has used such cultural property for military purposes, the opposing party is released from its obligation to ensure the immunity of that particular property until the violation of the rule ceases.

However, wherever possible the opposing party must first request a cessation of the violation.

[H.CP, 9, 11]

Immunity can be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity for matters of defence. A decision to withdraw immunity may only be made by the commander of a force the equivalent of a division in size or larger. The highest authorities must regulate, in Rules of Engagement or equivalent orders, which commanders are given the authority to determine that such an unavoidable military necessity exists. The opposing party must, whenever circumstances permit, be notified in advance of the decision to withdraw immunity.

[H.CP, 11]

#### **4.3.3.7 Cultural property under enhanced protection (H.CP.P.II)**

Parties to an armed conflict must refrain from using cultural property under enhanced protection or its immediate surroundings in support of a military operation, including a defensive operation, or in any other way that would render such property a military objective.

This rule is important, because cultural property that has by its use become a military objective loses its enhanced protection and may be attacked, subject to certain restrictions (see 5.4.6.9).

Furthermore, the use, in support of military operations, of cultural property under enhanced protection may entail cancellation or suspension of its enhanced protection status by the Committee for the Protection of Cultural Property in the Event of Armed Conflict.

[H.CP.P.II, 12, 13, 14]

#### **4.3.3.8 Guarding cultural property**

The guarding or protecting of cultural property (e.g. against theft, pillage or acts of vandalism) by police forces or by armed custodians specially empowered to do so shall not be considered as military action.

[H.CP, 4, 8 / H.CP.P.II, 5, 9] [IAC/NIAC]

### **4.4 Non-hostile contacts with other parties to an armed conflict**

This Section concerns non-hostile contacts among parties to an armed conflict, including unilateral communications such as warnings and notifications, agreements between the parties concluded during the armed conflict, and communications via intermediaries.

#### **4.4.1 Unilateral notifications**

##### **4.4.1.1 Unilateral notifications: subject matter**

The Geneva Conventions and Additional Protocol I contain numerous provisions requiring or recommending that parties to an armed conflict give notification to each other of the following items, among others:

- the names, descriptions and other particulars of medical ships;
- the locations of fixed medical units;
- the overflight of medical aircraft over areas not controlled by an adverse party;
- the names of societies authorized to render assistance to their armed forces' regular medical service;
- the incorporation of law enforcement or paramilitary troops into their armed forces;
- various notifications related to POW accounts; and
- the escape of POWs.

For the procedures for such notifications, refer to the specific treaty provisions below.

[GC I, 26 / GC II, 22-25, 38, 43 / GC III, 21, 63, 65, 94 / P I, 12, 23, 25-29, 43] [IAC]

#### **4.4.2 Agreements**

##### **4.4.2.1 Local arrangements for the removal of casualties**

Local arrangements and/or an armistice or suspension of fire must be concluded for the search, removal, exchange and evacuation of the wounded, sick and shipwrecked, whenever circumstances permit.

[GC I, 15 / GC II, 18] [IAC]

##### **4.4.2.2 Local arrangements for besieged and encircled areas**

Local arrangements may also be concluded for the removal of the wounded, sick, shipwrecked, infirm, elderly, children and maternity cases from a besieged or encircled area, and for the passage of medical and/or religious personnel and their equipment on their way to such areas.

[GC I, 15 / GC II, 18 / GC IV, 17] [IAC]

##### **4.4.2.3 Other special agreements**

The Geneva Conventions and Additional Protocol I contain numerous provisions related to special agreements between parties to an international armed conflict including, but not limited to:

- the establishment of hospital or safety zones, neutralized zones and demilitarized zones;
- agreed markings or signs for particular objects beyond those already set out in the Conventions and Additional Protocol I;

- repatriation of protected persons as defined in the Fourth Geneva Convention, including civilian internees and retained medical personnel;
- direct repatriation or accommodation in a neutral country of prisoners of war;
- the establishment of teams to search for, identify and recover the dead, the facilitation of access to gravesites, and the return of remains and personal effects of the deceased;
- relief parcels and collective shipments to civilian internees and prisoners of war;
- overflights of aircraft;
- additional forms of protection beyond those already required in Additional Protocol I for objects containing dangerous forces; and
- inquiry procedures concerning violations of the law of armed conflict.

[GC I, 6, 10, 15, 23, 28, 31, 36, 37, 52 / GC II, 6, 10, 18, 31, 38-40, 44, 43, 53 / GC III, 6, 10, 23, 28, 33, 60, 65-67, 72, 73, 75, 109, 110, 118 / GC IV, 7, 11, 14, 15, 17, 36, 83, 108, 109, 132, 133, 149 / P I, 26-29, 33, 34, 56, 66, 59, 60] [IAC]

#### 4.4.2.4 Agreements: rule

Commanders of opposing armed forces may conclude agreements at any time. Such agreements must not adversely affect the situation of protected persons and objects as defined by international treaties.

The form an agreement should take depends on the subject matter, as set out below.

[GC I, 6 / GC II, 6 / GC IV, 7, 47]

#### 4.4.2.5 Agreements: local and short term

Very local, short-term or urgent agreements can be concluded orally, depending on the nature or urgency of the situation, such as:

- local agreements for the search of wounded, shipwrecked and dead after combat action;
- prior agreement for a single overflight by a medical aircraft of a small enemy-controlled area.

[GC I, 15 / GC II, 18 / P I, 27]

#### 4.4.2.6 Agreements: longer periods

Large-scale or longer-term agreements should be concluded in writing (e.g. on neutralized zones, non-defended localities, overflight by medical aircraft of large enemy-controlled areas, evacuation of a besieged area).

Such agreements can be modelled on detailed provisions of the law of armed conflict (e.g. for hospital zones, demilitarized and non-defended zones and localities). See 4.4.2.3.

### 4.4.3 Direct communications and intermediaries

#### 4.4.3.1 Direct contact between commanders

Commanders may take up non-hostile contact with opposing armed forces at any time, using any available technical means of communication (telephone, radio, etc.).

Such contacts must be based on good faith.

[1 CILS, 66] [IAC/NIAC]

#### 4.4.3.2 Bearers of a white flag or “*parlementaires*”

Communications between parties to conflict may be conducted by persons authorized by their respective party to act as intermediaries vis-à-vis the adversary. They often make themselves known by “advancing bearing a white flag”. In the Hague Conventions such persons are referred to as “*parlementaires*”.

Such intermediaries must be respected. Their inviolability extends to a vehicle flying a white flag used by them, as well as to persons accompanying them (driver, interpreter, etc.).

*Parlementaires* may not use their privileged position to engage in intelligence gathering.

They lose their inviolability if they take advantage of their privileged position to commit an act contrary to international law and detrimental to the adversary. They may then be arrested and tried.

Commanders are not obliged to receive them in all circumstances.

The commander receiving them may take the necessary precautions to prevent their presence from being prejudicial. For example, he may impose safety measures (e.g. blindfolding).

[H.IV.R, 32-34 / 1 CILS, 67-69 / 1 CILS, pp. 227-33] [IAC/NIAC]

#### 4.4.3.3 Contact through a third party (intermediary)

Commanders may also ask a third party such as the International Committee of the Red Cross, an international organization, or members of a peace support operation to act as an intermediary between parties to the armed conflict.

[1 CILS, p. 228 / GC I, 8-10, 23 / GC II, 8-10 / GC IV, 9-11, 14 / H.CP, 21, 23 / P I, 5, 60, 81 / H.CP.II, 34/]

References to draft agreements are provided below.

[GC I, Annex I (draft agreement) / GC III, Annex 1 / GC IV, Annex 1]

## **4.5 Civil defence**

This Section sets out the rules related to civil defence and participation by armed forces in civil defence tasks. These rules apply only in international armed conflicts.

### **4.5.0.1 Definition: civil defence**

“Civil defence” is a series of specific tasks designed to protect the civilian population against the dangers arising from armed conflict and disasters, and to help it to recover from their immediate effects. It aims to ensure the civilian population's survival.

[P I, 61] [IAC]

### **4.5.0.2 Definition: civil defence tasks**

The specific “civil defence tasks” provided for by the law of armed conflict are the following:

- warning;
- evacuation;
- management of shelters;
- management of blackout measures;
- rescue;
- medical services, including first aid and religious assistance;
- fire-fighting;
- detection and marking of danger areas;
- decontamination and similar protective measures;
- provision of emergency accommodation and supplies;
- emergency assistance in the restoration and maintenance of order in distressed areas;
- emergency repair of indispensable public utilities;
- emergency disposal of the dead;
- assistance in the preservation of objects essential for survival; and
- complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization.

[P I, 61] [IAC]

### **4.5.0.3 Authorization**

Civil defence organizations must be organized and authorized by the competent authorities of a party to the armed conflict.

[P I, 61] [IAC]

#### 4.5.0.4 Protection from attack

Civil defence organizations, transports, objects and personnel must be respected and protected. They must not be the target of an attack. They must be permitted to carry out their civil defence tasks except in case of imperative military necessity.

Civilian civil defence organizations and their personnel lose their protection from attack if they commit, outside their proper tasks, acts harmful to the enemy. Protection from attack must not cease unless there has been a warning, with reasonable time to comply.

Buildings and material used for civil defence purposes and shelters for the civilian population have the same protection from attack as other civilian objects.

[P I, 62, 65] [IAC]

#### 4.5.0.5 Distinctive sign

The distinctive sign of civil defence consists of an equilateral blue triangle on a square orange ground.

Each party to the conflict must endeavour to make the following clearly identifiable by means of the distinctive sign:

- civil defence organizations, personnel, buildings and material; and
- shelters exclusively used by the civilian population.

[P I, 66 / P I, Annex I, Chapter V] [IAC]

#### 4.5.0.6 Distinctive signals

In addition to the distinctive sign, the belligerent parties may agree upon the use of distinctive signals.

[P I, 66] [IAC]

#### 4.5.0.7 Weapons

Civil defence personnel may only be armed with light individual weapons for their own protection or for the purpose of maintaining order.

However, in areas where land fighting takes place or is likely to take place, the parties to the conflict must limit these weapons to pistols, in order to facilitate distinction between civil defence personnel and combatants.

[P I, 65] [IAC]

#### 4.5.0.8 Cooperation with military authorities

Civil defence personnel and military personnel may cooperate in the performance of civil defence tasks.

[P I, 65] [IAC]

#### 4.5.0.9 Combatants and military units

Combatants and military units may be assigned permanently to civil defence tasks. However, their status as military personnel remains unchanged.

To benefit from the protection accorded to persons engaged in civil defence activities, military personnel so assigned must clearly display the distinctive sign of civil defence and their activity must be limited to civil defence tasks. They may only perform civil defence tasks in the national territory of the party on which they depend.

Military personnel serving within a civil defence organization who fall into the power of the enemy are prisoners of war.

[P I, 67] [IAC]

### 4.6 Distinctive signs and symbols

This Section sets out the rules on the use of the distinctive emblem of the medical service as well as other distinctive signs and symbols.

#### 4.6.1 The distinctive emblem of the medical service

##### 4.6.1.1 Distinctive emblem of the medical service

The distinctive emblem of the medical service consists of a red cross on a white ground, a red crescent on a white ground or a red crystal on a white ground.

[GC I, 38 / GC II, 41 / P III, 2] [IAC]

##### 4.6.1.2 Use of the distinctive emblem

There are two permitted uses of the emblem: protective use and indicative use.

Protective use is when a person or object entitled to protection under the law of armed conflict displays the distinctive emblem during an armed conflict. Such persons or objects benefit from the underlying protection provided by the law, and the emblem serves as a visual manifestation of this protection.

Only medical units, transports and material, and medical and religious personnel, may use the distinctive emblem for protective purposes (as set

out in more detail in the following paragraphs). National Red Cross and Red Crescent Societies which have been authorized by a party to render assistance to its armed forces' medical service may also use the emblem for protective purposes.

When the distinctive emblem is used for protective purposes it must be as large and visible as the tactical situation permits (e.g. illuminated at night, infrared visibility).

Indicative use is use of the emblem during peacetime or during an armed conflict to show that a person or object is linked to the International Red Cross and Red Crescent Movement, without implying protection under the Geneva Conventions or any intention to invoke it.

When the emblem is used during an armed conflict for indicative purposes it must be small, and must not be placed on rooftops or on armlets.

The ICRC may use the distinctive emblem at all times.

[GC I, 38-44 / GC II, 41-45 / P I, 18, Annex I, Chapter II / P II, 12 / P III, 1, 2, 4, 5]  
[IAC/NIAC]

#### **4.6.1.3 Responsibility of military authority**

Distinctive emblems and signals are used under the authority of the party to the conflict concerned.

[GC I, 38-44, Annex, II / GC II, 41-45 / P I, 18 / P II, 12] [IAC/NIAC]

#### **4.6.1.4 Medical and religious personnel**

Permanent medical and religious personnel must wear on the left arm a water-resistant armlet displaying the distinctive emblem, issued and stamped by the military authority.

Temporary medical personnel must wear the emblem only when carrying out medical duties.

Medical and religious personnel should also carry a special water-resistant identity card bearing the emblem (for details of the card refer to the articles and annexes indicated below).

Medical and religious personnel working in the battle area should as far as possible wear headgear and clothing with the emblem.

[GC I, 40, 41 / GC II, 42 / P I, 15, 18, Annex II / P II, 12] [IAC/NIAC]

#### 4.6.1.5 Medical units

Medical units must be marked with the distinctive emblem. With the consent of the military authorities, they may hoist a flag displaying the emblem. They may also fly their national flag, but only as long as they have not been captured. Medical units of neutral States may continue to fly their national flag after capture.

[GC I, 42, 43 / P I, 18 / P II, 12] [IAC/NIAC]

#### 4.6.1.6 Medical ships and craft

Medical ships and craft must be clearly marked as follows:

All exterior surfaces of hospital ships must be white. One or more dark red crosses must be painted and displayed on each side of the hull and on the horizontal surfaces. The distinctive emblems must be as large as possible, and placed so as to afford the greatest possible visibility.

Lifeboats, coastal lifeboats, and all small craft used by the medical service must be painted white with dark red crosses prominently displayed.

Hospital ships must hoist a white flag with a red cross and their national flag (and those of neutral States must also fly the flag of the party to the conflict whose direction they have accepted). If detained, a ship must temporarily haul down the national flags.

At night and in case of reduced visibility, medical ships may take steps to render the distinctive emblem sufficiently apparent (lighting, etc.).

[GC II, 43 / P I, 18, 22, 23] [IAC]

#### 4.6.1.7 Other medical ships and craft

Other medical ships and craft, whether at sea or in other waters, must be marked as far as possible in the same way as described in the previous paragraph.

[P I, 23] [IAC]

#### 4.6.1.8 Medical vehicles

Medical vehicles must be marked with the distinctive emblem.

[GC I, 35 / P I, 18, 21 / P II, 11, 12 / 1 CILS, 29] [IAC/NIAC]

**4.6.1.9 Medical aircraft**

Medical aircraft must be marked with the distinctive emblem, together with their national colours, on their lower, upper and lateral surfaces.

[GC I, 36 / P I, 24 / P II, 11, 12 / 1 CILS, 29] [IAC/NIAC]

**4.6.1.10 Distinctive signals**

In addition to the distinctive emblems, the parties to a conflict may authorize the use of distinctive signals.

These signals apply primarily to medical aircraft and ships.

The distinctive signals are:

- light signal (flashing blue light);
- radio signal; or
- secondary surveillance radar (SSR).

For the technical specifications for the signals, refer to the Annex below.

[P I, 18, Annex I, Chapter III] [IAC]

**4.6.1.11 Misuse of the distinctive emblem of the medical service**

Use of the distinctive emblem of the medical service for any purpose other than those set out above is prohibited.

[GC I, 53 / P I, 38 / CIL, 59] [IAC/NIAC]

**4.6.1.12 War crime of perfidy**

The perfidious use of the distinctive emblem of the medical service is a war crime.

It is therefore a war crime to use the distinctive emblem in order to kill, injure or capture an adversary.

[P I, 37, 85] [IAC]

**4.6.2 Other signs and signals****4.6.2.1 Civil defence: distinctive sign**

The distinctive sign of civil defence consists of an equilateral blue triangle on a square orange ground.

Each party to the conflict must endeavour to make the following clearly identifiable by means of the distinctive sign:

- civil defence organizations, personnel, buildings and material; and
- shelters exclusively used by the civilian population.

Civil defence personnel should also be issued an identification card.

In addition to the distinctive sign, the parties to the conflict may agree upon the use of distinctive signals.

Civil defence medical and religious personnel, medical units and transports must use the distinctive sign of the medical service as set out in 4.6.1.

[P I, 66 / P I, Annex I, Chapter V]

#### **4.6.2.2 Distinctive emblem of cultural property**

The distinctive emblem of cultural property consists of a blue and white shield. As set out below, the emblem may be used alone or repeated three times.

[H.CP, 16]

#### **4.6.2.3 Distinctive emblem: single use**

The following persons and objects can be marked with one emblem:

- cultural property personnel; and
- cultural property not under special protection.

[H.CP, 17]

#### **4.6.2.4 Distinctive emblem: repeated three times**

The following objects can be marked with three emblems (in triangular formation, one sign below):

- immovable cultural property under special protection;
- cultural property transports under special protection or which meet the conditions for the transport of such property in urgent cases; and
- improvised refuges.

[H.CP, 17]

#### **4.6.2.5 Distinctive emblem of cultural property: use**

Cultural property under special protection and transports under special protection *must* display the distinctive emblem during an armed conflict.

Other cultural property *may* bear the distinctive emblem.

The emblem must also be visible from the ground at regular intervals sufficient to indicate clearly the perimeter of a centre containing monuments under special protection, and at the entrance to other immovable cultural property under special protection.

[H.CP, 6, 10, 12, 16, 17, 20]

#### **4.6.2.6 Distinctive sign of works and installations containing dangerous forces**

The distinctive sign of works and installations containing dangerous forces consists of a group of three bright orange circles placed on the same axis.

The distinctive sign is used under the authority of the party to the conflict concerned.

The sign must be large and visible.

The marking of works and installations containing dangerous forces is optional and their protection does not depend on such marking.

Parties to the conflict may use additional measures in order to ensure protection, e.g. communicating to the adverse party the list of protected works and installations and their geographical coordinates.

[P I, 56, Annex 1, 17] [IAC]

#### **4.6.2.7 *Ad hoc* distinctive signs**

A party in control of a demilitarized zone or a non-defended locality must mark it by such signs as are agreed upon by the parties concerned.

[P I, 59, 60] [IAC/NIAC]

#### **4.6.2.8 Misuse of distinctive signs and signals**

It is prohibited to make improper use of the following distinctive signs and signals. Improper use means to mark, or to affix distinctive signs and signal transmitters to, persons or objects other than those entitled to use them for protective purposes:

- the distinctive emblem of the red cross, red crescent or red crystal, and signals of the medical services;
- the distinctive sign of civil defence;
- the distinctive sign of cultural property;
- the distinctive sign of works and installations containing dangerous forces;
- the white flag (flag of truce); and

- other internationally recognized distinctive signs and signals (e.g. *ad hoc* signs for demilitarized zones, for non-defended localities, or *ad hoc* signals for civil defence).

[P I, 38 / H.CP, 17 / 1 CILS, 58, 59, 61] [IAC/NIAC]

## 4.7 Respect for medical work

### 4.7.0.1 Humanitarian problem: health care under attack

Since 2008, the ICRC has been documenting violence against health-care facilities and personnel, and against patients, in 16 countries where it is working. The number of incidents that have been recorded is striking. But statistics represent only the tip of the iceberg: they do not capture the compounded cost of violence – health-care staff leaving their posts, hospitals running out of supplies and vaccination campaigns coming to a halt. These knock-on effects dramatically limit access to health care for entire communities, many of whose members may be suffering from chronic or war-related health problems.

Deliberate attacks on health-care facilities and personnel and on patients and medical vehicles virtually always violate international law. The Geneva Conventions and their Additional Protocols assert the right of the wounded and the sick – combatants and civilians alike – to be spared further suffering during armed conflict and to receive assistance. To ensure this in practice, health-care facilities and personnel, and medical vehicles, are given protected status as long as they maintain their neutrality and treat all patients – irrespective of their political, religious or ethnic affiliation – equally. Medical installations, vehicles and personnel are clearly identified by protective symbols such as the red cross, red crescent and red crystal. Furthermore, all parties to a conflict are obliged by law to search for and collect the wounded after battle, and to facilitate their access to health-care facilities. (See also 5.2.0.3, 5.3.3.2, 5.3.3.3, 5.4.1 and 5.4.2).

[GC I, 12-44, 50 / GC II, 12-45, 51 / GC III, 29-32 / GC IV, 55-57, 91-92 / P I, 10-31, 41, 85 / P II, 7-12 / 1 CILS, 25-30, 109-111] [IAC / NIAC]

### 4.7.0.2 Medical activities: ethics

In the context of an armed conflict, the term “medical ethics” refers to “the moral duties incumbent upon the medical profession. Such duties are generally decreed by the medical corps of each State in the form of professional duties.”

[ICRC Commentary, P I, 16] [IAC]

The international understanding of medical ethics is synthesized in two documents adopted by the World Medical Association (WMA):

- International Code of Medical Ethics; and
- Ethical Principles for Medical Research Involving Human Subjects (Declaration of Helsinki).

The particular case of medical ethics during armed conflict is dealt with in the WMA Regulations in Times of Armed Conflict, which states as a general principle that “medical ethics in times of armed conflict is identical to medical ethics in times of peace”, and urges physicians performing their duty in times of armed conflict to “adhere to international conventions on human rights, international humanitarian law and WMA declarations on medical ethics.” It should be noted that the WMA documents are not treaties, and are not binding on States.

[P I, 11, 16 / WMA Regulations in Times of Armed Conflict, 1]

#### **4.7.0.3 Medical activities: procedures**

Medical procedures must:

- be determined by the health needs of the person concerned; and
- be consistent with generally accepted medical standards and medical ethics.

[P I, 11 / P II, 5] [IAC/NIAC]

#### **4.7.0.4 Medical activities: priority**

Only urgent medical reasons determine the priority of treatment to be administered (the concept of “triage”).

Treatment criteria based on nationality, rank or any similar grounds are prohibited.

[GC I, 3, 12 / GC II, 3, 12 / GC III, 3 / GC IV, 3 / P I, 10 / P II, 9 / 1 CILS, 110] [IAC/NIAC]

#### **4.7.0.5 Medical activities: no physical mutilation, no medical or scientific experiments**

Mutilation, medical or scientific experiments, or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited.

[GC I, 3, 12, 50 / GC II, 3, 12, 51 / GC III, 3, 13, 130 / GC IV, 3, 32, 147 / P I, 11, 75, 85 / P II, 4 / 1 CILS, 92 / ICC Stat., 8] [IAC/NIAC]

#### 4.7.0.6 Medical activities: transplants

It is prohibited to remove tissue or organs for transplants from protected persons, even with their consent.

An exception exists for donations of blood for transfusion and for skin for grafts where these procedures are:

- consented to voluntarily and without any coercion or inducement;
- only for therapeutic purposes; and
- only done under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

[P I, 11] [IAC]

#### 4.7.0.7 Medical activities: protection

No person may be punished for performing medical activities compatible with medical ethics, regardless of the person benefiting from the medical care.

Persons engaged in medical activities must not be compelled:

- to perform acts or to carry out work contrary to medical ethics and/or generally accepted medical standards; or
- to refrain from performing acts or from carrying out work required by medical ethics and/or generally accepted medical standards.

[P I, 16 / P II, 10] [IAC/NIAC]

#### 4.7.0.8 Medical activities: reporting

No person engaged in medical activities (e.g. doctor, surgeon, nurse) may be compelled to give any information to anyone concerning the wounded and sick who are or who have been under their care, if such information would in their opinion prove harmful to the patients concerned or to their families.

However, information must be given:

- when required by the law of the party to the conflict to which the person engaged in medical activities belongs;
- when required by regulations for the compulsory notification of communicable diseases; and
- in every case of donation of blood for transfusion or skin for grafting made under the responsibility of the party to the conflict, in the form of a record available to the International Committee of the Red Cross.

[P I, 11, 16 / P II, 10] [IAC/NIAC]

## 4.8 Treatment of aliens in the territory of a party to conflict (IAC)

This Section addresses the specific rights applicable to civilians and other persons protected by the Fourth Geneva Convention who are aliens in the sovereign territory of an opposing party. It is only applicable to international armed conflict. It is important to note that all persons, including those who are not specifically protected by the Fourth Geneva Convention, also benefit from the fundamental guarantees of treatment contained in Section 7.2.

For a discussion of the specific treatment of protected persons in occupied territory, see Chapter 12.

For a discussion of the internment of protected persons, see Section 7.4.

### 4.8.0.1 Definition: protected persons

The primary goal of the Fourth Geneva Convention is to protect civilians during an international armed conflict. As set out in 12.1.2.3, that Convention provides for several cumulative levels of protection for civilians and other protected persons. It lays down specific protections for the category of persons who have historically been most vulnerable to abuse, namely persons who are nationals of an opposing party (to the detaining State) and find themselves either in the detaining State's own territory, or in territory occupied by the detaining State.

The basic definition of protected persons under the Fourth Geneva Convention is the following:

“Protected persons” are those persons who find themselves in the hands of a party to the conflict of which they are not nationals.

The Fourth Convention excludes the nationals of some States from the category of protected persons, because presumably their State of origin can protect them by the ordinary diplomatic means that apply in times of peace and continue to apply during an armed conflict:

- First, in the territory of a party to the conflict, the category of protected persons excludes nationals of a co-belligerent (allied) or neutral State, as long as the State of nationality maintains normal diplomatic representation with the State in whose hands they are.
- Second, in occupied territory, the category of protected persons excludes only nationals of a co-belligerent (allied) State, provided that the State of nationality maintains normal diplomatic representation with the Occupying Power. The nationals of neutral States remain protected persons in occupied territory.

The category of persons explicitly protected by the Fourth Geneva Convention also excludes persons already protected by the First, Second and Third Geneva Conventions (wounded/sick/shipwrecked combatants and prisoners of war).

It is important to note that any persons who meet the above definition are “protected persons” within the meaning of the Fourth Geneva Convention. Accordingly, individuals who are labelled as “mercenaries”, “spies”, “terrorists” or otherwise who meet the requirements above are still entitled to protected person status under the Fourth Geneva Convention, subject to the right of derogation discussed in 4.8.0.5. Those who do not meet the Convention's requirements for specific protection still benefit from the fundamental guarantees of treatment listed in Section 7.2. In any event, there are no persons who are left in a legal void.

Refugees and stateless persons are always specifically protected persons because they are in the hands of a party to the conflict of which they are not nationals.

[GC IV, 4, 5, 44/ P I, 73 / ICRC Commentary, GC IV, 4]

#### **4.8.0.2 General rule**

The legal situation of protected persons is governed by the laws and regulations applicable to them in peacetime, except for special rules concerning control, security and internment.

[GC IV, 38]

#### **4.8.0.3 No renunciation of rights**

Protected persons may not renounce their rights under the law of armed conflict in any circumstances.

[GC IV, 8]

#### **4.8.0.4 Responsibility**

The party exercising control over protected persons is responsible for the treatment of those persons, irrespective of any individual responsibility which may be incurred.

[GC IV, 29]

#### **4.8.0.5 Derogations**

A party to the conflict may derogate from some of the protections accorded to protected persons (i.e. restrict their rights) in the following limited circumstances.

If the party is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, that person may not claim any rights and privileges under the Fourth Geneva Convention that would be prejudicial to the security of the State.

In all cases, such persons must be treated with humanity and cannot be deprived of the right to a fair trial. In addition, at the earliest date consistent with the security of the State, they must be granted the full rights and privileges of a protected person.

Furthermore, it must be noted that such persons are still entitled to the fundamental protections set out in Additional Protocol I, Article 75, which are detailed in Section 7.2.

[GC IV, 5 / P I, 75]

#### **4.8.0.6 Humane treatment**

Protected persons must be humanely treated, and must be protected against all acts of violence and threats thereof, rape, indecent assault, enforced prostitution, torture, murder, extermination, corporal punishment, mutilation, medical or scientific experiment, and any other measures of brutality whether applied by civilian or military agents, and against all insults and public curiosity.

They must be treated in all circumstances with respect for their persons, their honour, their family rights, and their religious convictions, manners and customs.

In addition, reprisals, collective punishments, all measures of intimidation, the taking of hostages, and pillage are prohibited.

Lastly, the fundamental protections for all persons discussed in Section 7.2 apply.

[GC IV, 27, 32-34 / Section 7.2]

#### **4.8.0.7 Religion**

The religious convictions and practices of all persons must be respected.

[GC IV, 27, 58]

#### **4.8.0.8 Prohibition of physical or mental coercion**

No physical or mental coercion may be used against protected persons.

[GC IV, 31, 32]

#### 4.8.0.9 Compulsion to work

With regard to work, protected persons:

- may be compelled to work only to the same extent as nationals of the belligerent party in whose territory they are;
- may only be compelled to do work which is necessary to ensure food, shelter, clothing, transport and health for human beings and which is not directly related to military operations; and
- must have the benefit of the same working conditions and of the same safeguards as nationals of the belligerent party, in particular wages, hours of work, clothing, equipment, training, and compensation for occupational accidents and diseases.

[GC IV, 40]

#### 4.8.0.10 Right to leave the territory

Protected persons who desire to leave the territory at the outset of or during an armed conflict are entitled to do so, unless their departure is contrary to the national interests of the State.

The application to leave must be decided in accordance with a regularly established procedure. If rejected, an appeal may be made to a court or administrative board designated for that purpose.

[GC IV, 35, 36]

#### 4.8.0.11 Security measures against protected persons

Measures of control and security may be taken with regard to protected persons as a necessary result of the armed conflict. These can include for example a curfew, restrictions of movement, or a ban on carrying arms. Broad discretion is allowed in the choice of such measures, but they may not diminish the fundamental rights of the persons concerned. For example, all medical services need to remain operational and enjoy freedom of movement.

[GC IV, 27, 41 / ICRC Commentary, GC IV, 27]

#### 4.8.0.12 Internment/administrative detention

Protected persons may be interned or placed in assigned residence only if it is necessary for imperative reasons of security.

For a discussion of the internment/administrative detention of protected persons, see Section 7.4.

[GC IV, 41, 42, 43]

#### **4.8.0.13 Transfer to another State**

Protected persons may be transferred by the Detaining Power only to a State which is party to the Fourth Geneva Convention. The Detaining Power must satisfy itself of the willingness and ability of the transferee State to apply the Convention. Furthermore, if the transferee State fails to carry out the provisions of the Convention, then the transferring power must take effective measures to correct the situation or request the return of the protected persons.

A protected person must not be transferred to a State where he or she may have reason to fear persecution based on his or her political opinions or religious beliefs.

[GC IV, 45]

#### **4.8.0.14 Penal matters**

For a discussion of the judicial guarantees to which protected persons are entitled in the event of criminal prosecution related to the armed conflict, see Section 9.7.

#### **4.8.0.15 ICRC right of access**

Representatives of the ICRC must be given access to all places where there are protected persons, including all places of internment, detention and work. They must be permitted to interview protected persons without witnesses, and with the aid of interpreters if necessary. The duration and frequency of visits must not be limited. The ICRC representatives must have full liberty to select the places they wish to visit.

ICRC visits must not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

[GC IV, 143]

# CHAPTER 5

# TARGETING

## 5 TARGETING

In the conduct of operations during armed conflict, armed forces are bound by provisions of the law of armed conflict that are designed to limit, as much as possible, the effects of war to those persons directly participating in hostilities and the objects they use to accomplish their military goals. Accordingly, a set of rules governs who and what may be targeted by armed forces in military operations.

This Chapter addresses the rules governing land-to-land, air-to-land and sea-to-land targeting during combat operations. Although similar provisions (mostly of customary international law) apply to land-to-air, air-to-air, sea-to-air, land-to-sea, air-to-sea and sea-to-sea combat, they are not specifically dealt with here. This Chapter applies to all forms of targeting, from a soldier firing his gun at an enemy soldier to an aircraft dropping a 1,000 lb bomb on a military objective.

The legal framework governing attacks, whether offensive or defensive, is discussed, as well as the range of permissible conduct vis-à-vis protected objects and zones. The principles cited below must be applied by all those involved in the planning and execution of military operations.

This Chapter should be read in conjunction with Chapter 4, which addresses general combat obligations, as well as Chapter 6 concerning restrictions and prohibitions on the use of certain means and methods of warfare.

**5.1 Introduction to the legal aspects of targeting** sets out the general framework of rules for targeting operations and the underlying principles that guide commanders regarding who and what may be lawfully targeted.

**5.2 Legal fundamentals of targeting: distinction, proportionality and precaution** discusses these three fundamental principles, which apply to all targeting decisions, and includes a legal checklist for planning and executing attacks.

**5.3 Categories of persons in armed conflict** sets out the different categories of individuals who may be affected by military operations, and the rules determining whether and in what circumstances each category of persons may be targeted.

**5.4 Categories of objects in armed conflict** describes the different categories of objects in armed conflict, including specifically protected objects, and the rules determining whether and in what circumstances each category may be targeted.

**5.5 Protected zones** examines the protection of specifically protected zones.

**5.6 Information requirements** provides a checklist of the types of information commanders should gather both before and during targeting operations in order to ensure that targeting decisions comply with the principles of distinction, proportionality and precautions in attack.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## **5.1 Introduction to the legal aspects of targeting**

### **5.1.0.1 Basic principles of targeting**

The law of armed conflict sets out rules as to who and what may be directly attacked in the course of military operations.

These rules reflect a fundamental compromise between military necessity and humanity. The law of armed conflict allows the use of force that is necessary to wage war and gain a military advantage, as long as that force is not directed against and does not cause excessive incidental harm to the civilian population, to persons who are not or no longer taking a direct part in hostilities, or to the environment.

[St. Petersburg Decl., preamble / ICRC Commentary, P I, 48]

This compromise is in turn reflected in the principle of distinction, which requires armed forces to distinguish clearly in their targeting between members of armed forces of a party to the conflict and military objectives on the one hand, and civilian persons and objects on the other. Distinction gives rise to the related principles of proportionality, i.e. striking a balance between the concrete and direct military advantage anticipated and the expected incidental harm to civilians and civilian objects; and precautions in attack, i.e. essentially ensuring that all feasible measures are taken to implement the principles of distinction and proportionality and to avoid incidental harm to civilians and civilian objects.

Much of the law of targeting can be summed up in these three principles: distinction, proportionality and precautions in attack. They apply in both international and non-international armed conflict.

Section 5.2 analyses these three principles and gives basic guidelines for the planning and execution of military attacks. References are provided to the more detailed discussion of the concepts that appear later in this Chapter.

### 5.1.0.2 Categories of persons in armed conflicts

In order to apply the principle of distinction, it is critical to understand the legal categories of persons in an armed conflict, and whether and in what circumstances each category of persons can be targeted.

In general, armed forces belonging to the States party to an international armed conflict are “combatants” and are entitled to take part in hostilities against the armed forces of enemy States. The concept of a combatant as a legal category, i.e. a person who is entitled to fight on behalf of his State without criminal sanction for (lawful) acts of war, exists only in an international armed conflict.

A non-international armed conflict confronts armed forces (belonging to a State party to the conflict) with an organized armed group (belonging to a non-State party); or, in some cases, two or more organized armed groups against each other. The law of armed conflict does not prohibit members of either State or non-State armed forces from engaging in such hostilities, but strives instead to mitigate the conflict's effects.

However, organized armed groups will in most cases violate domestic criminal law by the mere fact of carrying weapons, let alone directing those weapons against either State or non-State armed forces. Whether or not participants in the conflict are granted an amnesty from criminal prosecution after the armed conflict depends on the authorities in power. The law requires such authorities to “endeavour” to do so in the interest of lasting peace.

[P II, 6(5)]

In all armed conflicts, civilians are protected from direct attack, “unless and for such time as they take a direct part in hostilities.” In essence, civilians are all persons who are not members of the armed forces of a party to a conflict. In an international armed conflict, this means that all persons other than members of the belligerent States’ armed forces are “civilians” (for the special category of a spontaneous uprising or *levée en masse*, see 5.3.1.2 below). In a non-international armed conflict, civilians are all persons who are neither members of the armed forces of the State concerned, nor members of an organized armed group fighting on behalf of a non-State party.

The law of armed conflict makes it clear that parties to a conflict are not expected to protect those civilians who take direct part in hostilities against them and consequently represent a direct threat to their safety and mission. The concept of direct participation in hostilities, which is contained but not defined in the law of armed conflict, is elaborated in an ICRC *Interpretive Guidance* document (DPH Study) on that subject.

The legal categories of persons in armed conflict, including the concept of direct participation in hostilities, are discussed in Section 5.3.

### 5.1.0.3. Categories of objects in armed conflicts

The law of targeting stipulates that parties to an armed conflict must distinguish between military objectives and civilian objects. Military objectives may be directly attacked, whereas civilian objects may not. Civilian objects are defined negatively as all objects other than military objectives. Accordingly, the definition of a military objective is crucial (see 5.4.1.2).

In addition, the law of targeting prohibits or restricts attacks on specifically protected objects, including certain cultural property, medical installations, religious objects, and works and installations containing dangerous forces, as set out below.

The legal categories of objects in armed conflicts are discussed in Section 5.4.

## 5.2 Legal fundamentals of targeting: distinction, proportionality and precaution

This Section discusses the legal fundamentals of targeting which apply to all targeting decisions during an armed conflict, from planning to execution. The following paragraphs are designed to be used as guidelines, with the specific definition of key terms set out below as indicated.

### 5.2.0.1 Rule

In all armed conflicts, an attack must adhere to all three of the following principles:

- it must be directed at a lawful military target (principle of distinction);
- it must not violate the principle of proportionality; and
- it must abide by the principle of precautions in attack.

In addition, the means and methods employed for the attack must be lawful (see Chapter 6).

### 5.2.0.2 Definition: attack

“Attack” means an act of violence against the adversary, whether in offence or defence.

The following principles therefore apply in both offensive and defensive operations.

[P I, 49]

## 5.2.1 Principle 1: distinction

### 5.2.1.1 Rule

Any attack must be directed at a lawful military target\* (principle of distinction).

### 5.2.1.2 Lawful military target

#### International armed conflict

In an international armed conflict, lawful military targets\* are:

- military objectives (see 5.4.1.2);
- combatants, unless they are *hors de combat* (see 5.3.1.2 and 5.3.3.2 – including participants in a “*levée en masse*”); medical and religious personnel must not be targeted (see 5.3.3.3 for exception to this rule);
- civilians (and any other persons) for such time as they directly participate in hostilities (see 5.3.1.5).

#### Non-international armed conflict

In a non-international armed conflict, lawful military targets\* are:

- military objectives (see 5.4.1.2);
- armed forces of a State party to the conflict unless they are *hors de combat* (see 5.3.2.2 and 5.3.3.2); medical and religious personnel must not be targeted (see 5.3.3.3 for exception to this rule);
- members of an organized armed group (armed forces of a non-State party to the conflict), unless they are *hors de combat* (see 5.3.2.4 and 5.3.3.2); and
- civilians (and any other persons) for such time as they directly participate in hostilities (see 5.3.1.5).

[P I, 48, 49, 52 / 1 CILS, 1, 7, 10]

### 5.2.1.3 Persons protected against attack

In all armed conflicts the following categories of persons must not be the object of attack, except for such time as they are engaging in specific acts that cause a loss of their protection (as set out below).

- civilians (see 5.3.1.3 and 5.3.2.5);
- members of fighting forces who are *hors de combat* (see 5.3.3.2);
- medical personnel (see 5.3.3.3);
- religious personnel (see 5.3.3.3);
- humanitarian relief personnel (see 5.3.3.3);
- civilian journalists (see 5.3.3.3);
- personnel involved in peace support operations (see 5.3.3.3); and
- civil defence personnel (see 5.3.3.3).

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\*Note: Within the meaning of the law of armed conflict, and subject to military necessity. This is without prejudice to the fact that domestic law generally prohibits persons other than members of State armed forces from directly participating in hostilities.

#### 5.2.1.4 Objects protected against attack

In all armed conflicts attacks on the following objects are prohibited or restricted. Protected objects can lose their protection from attack if the specific conditions for loss of protection are met, whereas restricted targets can lose their protection from attack if all restrictions are complied with (as set out below).

- civilian objects (see 5.4.1.3);
- objects under specific protection:
  - military medical objects (units, transports, material) (see 5.4.2);
  - civilian medical objects (units, transports, material) (see 5.4.2);
  - religious objects;
  - objects used in a peace support operation;
  - objects used for humanitarian relief operations;
  - civil defence organizations, transports and objects;
  - works and installations containing dangerous forces (restricted) (see 5.4.3);
  - objects indispensable for the survival of the civilian population (see 5.4.4);
  - the natural environment (restricted) (see 5.4.5); and
  - cultural property (restricted) (see 5.4.6).
- protected zones (see Section 5.5).

#### 5.2.1.5 Prohibition on indiscriminate attacks

Indiscriminate attacks are prohibited. Accordingly, any attack:

- must be directed at a specific lawful military target;
- must employ means and methods of combat which are capable of being directed at a specific lawful military target;
- must employ means and methods of combat the effects of which can be limited as required by the law of armed conflict; and
- if the proposed attack is aimed at clearly separated and distinct military objectives in an area containing a concentration of civilians or civilian objects, it must be conducted as separate attacks on each military objective.

[P I, 51 / CCW.P.II.Amend., 3 / 1 CILS, 11-13]

### 5.2.2 Principle 2: proportionality

#### 5.2.2.1 Rule

Any attack must not violate the principle of proportionality.

An attack is prohibited when it may be expected to cause incidental harm to civilians and civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated.

Incidental harm to civilians and civilian objects consists of incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof.

[P I, 35, 51, 57 / 1 CILS, 14 / CCW.P.II.Amend., 3 / H.CP.P.II, 7]

#### **5.2.2.2 Military advantage**

The expression “concrete and direct military advantage” means that the advantage concerned should be substantial and relatively close. The analysis of military advantage is both quantitative and qualitative; for example, the sheer number of anticipated combatant deaths and injuries in an attack is an important aspect of proportionality, but qualitative aspects such as their rank, position, influence, apparent mission, weapons and location will also have a direct bearing on the military advantage anticipated. A similar quantitative/qualitative analysis must be made with respect to military objectives (e.g. type, effect, use, potential harm, directness of contribution to military effort, economic value, ability to replace, strategic/operational/tactical value, etc.).

#### **5.2.2.3 Incidental harm to civilians**

On the other hand, the expected incidental harm to civilians and civilian objects must be gauged with reference to the probability of their being affected (which depends for example on their location, the terrain, size and accuracy of weapons used, weather conditions, the nature of the military objectives concerned, etc.). Whether the expected harm outweighs the anticipated concrete and direct military advantage of the attack will then depend on a quantitative and qualitative analysis of the civilians and civilian objects that are expected to be harmed by the attack (i.e. number of civilians likely to suffer injury or death, importance of civilian infrastructure likely to be damaged, etc.).

#### **5.2.2.4 Considerations**

A key point of the proportionality analysis is that it is based upon the “anticipated” military advantage and the “expected” incidental harm to civilians and civilian objects. Military advantage and incidental harm to civilians and civilian objects are two very dissimilar concepts, and it is therefore difficult to strike a balance between them as the law requires. There is no mathematical formula that will decide whether the destruction of a particular military objective warrants the reasonably foreseen death or other harm to X number of civilians or civilian objects of a particular type. Nevertheless, the law requires both officers and soldiers to make such a good faith assessment, based on all information reasonably available to them, and to decide whether a proposed attack crosses the threshold of expected “excessive” incidental harm.

[ICRC Commentary, P I, 51, 57]

## **5.2.3 Principle 3: precautions in attack**

### **5.2.3.1 Rule**

Any attack must abide by the principle of precautions in attack.

The principle of precautions in attack is that constant care must be taken by all those involved in the conduct of military operations to spare the civilian population, civilians and civilian objects.

### **5.2.3.2 Specific obligations**

The basic rule of precaution includes, in particular, the following obligations:

#### **Taking all feasible precautions**

All feasible precautions, notably in the choice of means and methods of warfare, must be taken with a view to avoiding or, in any event, minimizing incidental harm to civilians and civilian objects. The feasible precautions required by the law also include every practically possible measure to ensure compliance with the principles of distinction and proportionality.

Such precautions include, but are not limited to, all of the following measures:

- verification, based on the information reasonably available, that the attack will not violate Principle 1, distinction;
- determination that the attack will not violate Principle 2, proportionality;
- choosing weapons systems, weapons and munitions, as well as choosing tactics (such as timing, angle and altitude of attack) with a view to avoiding, or in any event minimizing, incidental harm to civilians and civilian objects.

#### **Issuing effective advance warnings**

- Effective advance warnings must be issued to civilians when the targeting of military objectives may harm civilians, unless the tactical situation does not permit.
- Commanders must give warnings by appropriate means to ensure that they are effective (e.g. orally, by radio, by megaphone or with commonly understandable signs or leaflets).
- Effective advance warnings must be given before attacking objects entitled to special protection (see 5.4.1.5) which have been used to commit acts harmful to the enemy. Such warnings must, to the extent that circumstances permit, include a time limit to redress the situation.

#### **Choosing the target causing the least danger to civilians/civilian objects**

When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be the one where the attack may be expected to cause the least danger to civilian lives and to civilian objects, or to other protected persons and objects.

### Cancelling/suspending the attack

An attack must be cancelled or suspended if it becomes apparent that it will violate Principle 1, distinction or Principle 2, proportionality.

[GC I, 21/ GC II, 34 / GC IV, 19 / P I, 57, 65 / P II, 11 / H.IV.R, 26 / H.CP.P.II, 7 / CCW.P.II.Amend., 3 / 1 CILS, 15-21] [IAC/NIAC (1 CILS, 21, is arguably NIAC)]

## 5.3 Categories of persons in armed conflict

This Section sets out the different categories of persons under the law of armed conflict and the rules on whether and in what circumstances each category of persons may be lawfully targeted.

### 5.3.1 International armed conflict (persons)

#### 5.3.1.1 Lawful targets in an international armed conflict

In an international armed conflict, the following persons are lawful military targets:\*

- combatants, unless they are *hors de combat* (see 5.3.1.2 and 5.3.3.2 – including participants in a “*levée en masse*”);
- civilians (and any other persons) for such time as they directly participate in hostilities (see 5.3.1.5).

[P I, 48, 51, 52 / 1 CILS, 1, 6, 7, 10 / DPH Study, pp. 20-26, 77-82]

#### 5.3.1.2 Combatants

The category of “combatants” includes:

- The regular armed forces of a State party to the conflict, other than medical and religious personnel. The armed forces consist of all organized armed forces, groups and units under a command responsible to a State party to the conflict for the conduct of its subordinates.

Individual membership in the regular armed forces is normally determined in accordance with the domestic law of the State (e.g. commissioning of an officer).

- Irregular armed forces belonging to a State party to the conflict (e.g. militias, volunteer corps, organized resistance movements), as long as they fight on behalf of and with the agreement of that State, and are under responsible command.

In the absence of formal regulation in domestic law, membership in an irregular armed force is determined on the basis of whether an individual – in actual fact – assumes a “continuous combat function” within the group. The criteria are the same as those governing membership in an organized armed group in a non-international armed conflict, discussed at 5.3.2.4.

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\***Note:** Within the meaning of the law of armed conflict, and subject to military necessity. This is without prejudice to the fact that domestic law generally prohibits persons other than members of State armed forces from directly participating in hostilities.

- Inhabitants of non-occupied territory who “spontaneously take up arms to resist the invading forces”, without having had time to form themselves into regular armed units, provided they carry their arms openly and respect the laws and customs of war. This is a very rare category of combatants known as “*levée en masse*”, which exists only when it is truly spontaneous in the face of an invasion.
- Members of the regular armed forces who profess allegiance to a government or authority not recognized by the other party to the conflict.

[H.IV.R, 1, 2 / GC III, 4 / P I, 43 / 1 CILS, 3, 4 / DPH Study, pp. 21-26, 77-82] [IAC]

### 5.3.1.3 Civilians

In an international armed conflict, a “civilian” is any person who does not belong to the State armed forces (regular or irregular) and does not take part in a “*levée en masse*”.

[GC IV, 4 / P I, 50 / 1 CILS, 5] [IAC]

It is prohibited to directly attack a civilian, unless and for such time as he takes a direct part in hostilities.

The concept of “direct participation in hostilities” is defined below at 5.3.1.5.

[P I, 51 / 1 CILS, 6] [IAC]

### 5.3.1.4 Status of civilians accompanying the armed forces

Civilians who are authorized to accompany the armed forces (e.g. private contractors, civilian employees, technicians, supply contractors, administrative personnel) are still civilians.

Such civilians must not be directly attacked, unless and for such time as they take a direct part in hostilities. Their presence must be taken into account in the required proportionality assessment for an attack on the State armed forces and its objects. However, the fact that they accompany the armed forces renders them more likely to sustain incidental harm.

To avoid confusion, they must not wear military uniforms or military-like clothing. Instead, their authorization to accompany the armed forces must be attested by an identity card.

[GC III, 4 / P I, 50 / DPH Study, p. 37] [IAC]

### 5.3.1.5 Direct participation in hostilities: acts amounting to

Not all acts carried out by civilians in relation to the armed conflict will amount to “direct participation in hostilities”.

For a particular act to qualify as direct participation in hostilities, the following three cumulative criteria must be met:

- the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm);
- there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
- the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another party (belligerent nexus).

[DPH Study, pp. 16-17]

### 5.3.1.6 Direct participation in hostilities: temporal scope of loss of protection

A civilian loses his protection against direct attack only for the duration of each specific act that amounts to direct participation in hostilities. When a civilian ceases to take direct part in hostilities, he regains full civilian protection. This has been referred to as the “revolving door” of civilian protection.

Measures preparatory to the execution of the specific act, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act. In other words, for the purposes of the principle of distinction, preparatory measures, deployment, and return form part of an act of direct participation, and the civilian in question loses his protection from direct attack during those times.

[DPH Study, pp. 17, 35, 70-71]

None of the foregoing prevents a State from detaining civilians and subjecting them to security internment in appropriate cases, as provided for in the law of armed conflict (see Chapter 7). Nor does it prevent the State, including its armed forces, from carrying out law enforcement functions including the use of force and firearms in self-defence and defence of others under domestic law and international human rights law (see Chapter 14).

### 5.3.1.7 Direct participation in hostilities: doubtful cases

All feasible precautions must be taken to verify whether a person is civilian and, if so, whether that civilian is directly participating in hostilities.

If there is doubt as to whether a person is a civilian, and if so whether that civilian has lost his protection from direct attack, he must be presumed to be protected.

[DPH Study, p. 17]

### 5.3.2 Non-international armed conflict (persons)

#### 5.3.2.1 Lawful targets in a non-international armed conflict

In a non-international armed conflict, the following persons are lawful military targets:\*

- members of the armed forces of a State party to the conflict, unless they are *hors de combat* (see 5.3.2.2 and 5.3.3.2);
- members of an organized armed group (armed forces of a non-State party to the conflict), unless they are *hors de combat* (see 5.3.2.4 and 5.3.3.2);
- civilians (and any other persons) for such time as they directly participate in hostilities (see 5.3.1.5).

[P II, 4, 13 / 1 CILS, 1, 6, 7, 10]

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#### 5.3.2.2 State armed forces

“State armed forces” consist of all organized armed forces, groups and units which are under a command responsible to the State for the conduct of its subordinates.

Membership in State armed forces is normally determined in accordance with domestic law.

In a non-international armed conflict, the law of armed conflict does not provide for a formal combatant status and neither prohibits nor privileges direct participation in hostilities. The entitlement of members of State armed forces to directly participate in hostilities in exercise of their function therefore depends on domestic law.

The law of armed conflict does not prevent members of an organized armed group from attacking opposing State armed forces, unless they are *hors de combat*. It does however exclude medical and religious personnel from being targeted in any such attacks, which certainly violate domestic law and can accordingly be the subject of criminal prosecution by the State.

[1 CILS, 1, 4, 7 / DPH Study, pp. 30-31]

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\***Note:** Within the meaning of the law of armed conflict, and subject to military necessity. This is without prejudice to the fact that domestic law generally prohibits persons other than members of State armed forces from directly participating in hostilities.

### 5.3.2.3 Organized armed groups (OAG)

An organized armed group is the armed wing of a non-State party to a non-international armed conflict. Such groups may be either:

- dissident armed forces (breakaway parts of State armed forces); or
- other organized armed groups which recruit their members primarily from the civilian population but have developed a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict.

The term OAG refers exclusively to the armed or military wing of a non-State party to a non-international armed conflict. It does not include other segments of the civilian population that are supportive of the non-State party, such as its political or humanitarian wings.

[DPH Study, pp. 31-32]

### 5.3.2.4 Members of an organized armed group

This category includes members of dissident armed forces as well as members of other organized armed groups.

To the extent that, and for as long as, members of a dissident armed force remain organized under the structures of the State armed forces to which they formerly belonged, those structures should continue to determine individual membership in the dissident armed forces as well.

Unlike State armed forces, organized armed groups rarely formalize their recruitment. Accordingly, membership is normally gauged according to a person's actual function. Membership in an OAG is attributed to those individuals who take on a continuous combat function on behalf of that group. Membership in the OAG lasts for as long as the person carries out that function (which could potentially be for months or years).

A continuous combat function requires lasting integration into the OAG, and includes both direct combat functions as well as preparation, execution or command of acts or operations amounting to direct participation in hostilities (discussed at 5.3.2.7).

In addition, an individual who is recruited, trained and equipped by an OAG for the purpose of continuously directly participating in hostilities assumes a continuous combat function and loses his protection against direct attack even before he carries out a hostile act.

Depending on the circumstances, an individual's continuous combat function may be openly expressed through the wearing of a uniform or distinctive sign or the carrying of weapons, but may also be deduced from conclusive

behaviour indicating continuous (and not sporadic, temporary or unorganized) direct participation in hostilities. There is no single type of behaviour that indicates a continuous combat function. However, one example is where a person repeatedly directly participates in hostilities in support of an OAG in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic or temporary role assumed for the duration of a particular operation.

For the purposes of the principle of distinction, a member of an OAG ceases to be a civilian and loses his protection against direct attack for as long as he maintains a continuous combat function, i.e. for as long as he is a member of the OAG (unless he is *hors de combat*).

A member of an OAG loses civilian protection until he conclusively expresses through his actions that he has disengaged from his continuous combat function and, therefore, can no longer be regarded as a member of the group in question (e.g. he is a deserter).

[DPH Study, pp. 32-35, 70, 74] [NIAC]

#### 5.3.2.5 Civilians

In a non-international armed conflict, “civilians” are all persons who are neither members of State armed forces nor members of an organized armed group.

Civilians may not be directly attacked unless and for such time as they take a direct part in hostilities.

[GC I, 3 / GC II, 3 / GC III, 3 / GC IV, 3 / P II, 13 / 1 CILS, 5, 10 / DPH Study, p. 27] [NIAC]

#### 5.3.2.6 Status of civilians who accompany or support an organized armed group

Persons who accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of the OAG. Instead, they are civilians engaged in a support function. Thus, financiers, recruiters, trainers and propagandists are not members of the OAG, unless their function additionally involves acts amounting to direct participation in hostilities. Similarly, persons whose function is to smuggle, manufacture or maintain weapons or other equipment outside of specific military operations are not members of the OAG.

Such civilians must not be directly attacked, unless and for such time as they take a direct part in hostilities. Their presence must be taken into account in the required proportionality assessment for an attack on an OAG and its

military objectives. However, the fact that they accompany the armed forces renders them more likely to sustain incidental harm.

[DPH Study, pp. 34, 35]

#### **5.3.2.7 Direct participation in hostilities: acts amounting to**

The concept of direct participation in hostilities is the same in all armed conflicts. In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

- the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm);
- there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
- the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another party (belligerent nexus).

#### **5.3.2.8 Direct participation in hostilities: temporal scope of loss of protection**

A civilian loses his protection against direct attack only for the duration of each specific act that amounts to direct participation in hostilities. When a civilian ceases his direct participation in hostilities, he regains full civilian protection. This has been referred to as the “revolving door” of civilian protection.

Measures preparatory to the execution of the specific act, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act. In other words, for the purposes of the principle of distinction, preparatory measures, deployment, and return form part of an act of direct participation, and the civilian in question loses his protection from direct attack during those times.

It is important to recall that an individual who takes on a continuous combat function (see 5.3.2.4) for an OAG becomes a *de facto* member of that group, and thereby forfeits his civilian protection for as long as he assumes his continuous combat function. He may only regain civilian status through disengagement from the group.

[P II, 13 / 1 CILS, 10 / DPH Study, pp. 16-17] [IAC/NIAC]

None of the foregoing prevents a State, including its armed forces, from detaining civilians and subjecting them to security internment in appropriate cases, as provided for in the law of armed conflict (see Chapter 7). It also does not prevent the State from carrying out law enforcement functions including the use of force and firearms in self-defence and defence of others under domestic law and international human rights law (see Chapter 14).

### 5.3.2.9 Direct participation in hostilities: doubtful cases

All feasible precautions must be taken to verify whether a person is civilian, and if so, whether that civilian is directly participating in hostilities.

If there is doubt as to whether a civilian has lost his protection from direct attack, he must be presumed to be protected.

[DPH Study, p. 17]

## 5.3.3 All armed conflicts (persons)

### 5.3.3.1. Rule

In all armed conflicts the following categories of persons must not be directly attacked, except for such time as they are engaging in specific acts that cause a loss of protection:

- civilians (see 5.3.1.3 and 5.3.2.5);
- persons who are *hors de combat* (see 5.3.3.2) ; and
- specifically protected personnel (see 5.3.3.3), including:
  - medical personnel
  - religious personnel
  - humanitarian relief personnel
  - civilian journalists
  - personnel involved in peace support operations
  - civil defence personnel

[GC I, 3 / GC II, 3 / GC III, 3 / GC IV, 3, 27 / P I, 51 / P II, 13 / 1 CILS, 6]

### 5.3.3.2 Persons *hors de combat*

A fundamental rule of the law of armed conflict is that persons who are "*hors de combat*" must not be attacked and must be treated humanely.

[H.IV.R, 23 / GC I, 3, 12 / GC II, 3, 12 / GC III, 3, 13 / GC IV, 3, 16 / P I, 10, 41, 42, 75 / P II, 4, 7 / 1 CILS, 47, 48] [IAC/NIAC]

A person is "*hors de combat*" if:

- he is in the power of an adverse party;
- he clearly expresses an intention to surrender; or
- he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself,

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

[GI-IV, 3 / P I, 41 / 1 CILS, 47] [IAC/NIAC]

A person is protected from the instant he is *hors de combat*, i.e. already before and independently from his capture.

### 5.3.3.3 Specifically protected personnel

#### Medical and religious personnel

It is prohibited to attack medical or religious personnel exclusively assigned to medical or religious duties.

Medical or religious personnel lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. However, their protection ceases only after a warning has been issued, setting, whenever appropriate, a reasonable time-limit to redress the situation. Carrying small arms for self-defence or defence of their patients is not considered to be an act harmful to the enemy. However, medical and religious personnel do not have the combatant's right to directly participate in hostilities.

Members of the armed forces specially trained as *non-permanent* medical staff (e.g. temporary/auxiliary stretcher-bearers) must not be attacked *when they are carrying out these duties*.

[GC I, 24-26 / GC II, 36 / GC IV, 20 / P I, 15 / P II, 9 / 1 CILS, 25, 27, 30] [IAC/NIAC]

#### Other personnel

In addition to medical and religious personnel, it is prohibited to direct an attack against:

- humanitarian relief personnel (unless and for such time as they take direct part in hostilities);
- civilian journalists (same proviso);
- personnel involved in a peace support operation. These are considered protected "civilians", but lose this protection if their sending State or the international organization they represent becomes a party to an armed conflict, or when and for such time as they are taking direct part in hostilities (see Chapter 15);
- civil defence personnel. In international armed conflict they lose their protection from direct attack if they commit acts that are harmful to the enemy outside their proper tasks, but prior to attack they must be warned and given, whenever appropriate, reasonable time to cease the harmful acts. In non-international armed conflict, civilian civil defence personnel

are protected from direct attack unless and for such time as they directly participate in hostilities.

[1 CILS, 31, 33, 34 / P I, 62, 65, 71, 79] [IAC/NIAC]

#### 5.3.3.4 Prohibition of reprisals against protected persons

Reprisals against protected persons are prohibited.

[GC I, 46 / GC II, 47 / GC III, 13 / GC IV, 33 / P I, 51 / 1 CILS 146, 148] [IAC/NIAC]

## 5.4 Categories of objects in armed conflict

### 5.4.1 Basic categories: military objectives, civilian objects, and specifically protected objects

#### 5.4.1.1 Rule

In all armed conflicts, military objectives are lawful military targets within the meaning of the law of armed conflict (see 5.4.1.2).

Attacks on the following objects are prohibited or restricted. Protected objects can become lawful targets if the specific conditions for loss of protection are met; whereas restricted targets can become lawful targets if all restrictions are complied with, as set out below:

- civilian objects (see 5.4.1.3);
- objects under specific protection:
  - military medical objects (units, transports, material) (see 5.4.2);
  - civilian medical objects (units, transports, material) (see 5.4.2);
  - religious objects;
  - objects used in a peace support operation;
  - objects used for humanitarian relief operations;
  - civil defence organizations, transports and objects;
  - works and installations containing dangerous forces (restricted) (see 5.4.3);
  - objects indispensable for the survival of the civilian population (see 5.4.4);
  - the natural environment (restricted) (see 5.4.5); and
  - cultural property (restricted) (see 5.4.6);
- protected zones (see Section 5.5).

[GC I, 19, 20, 33, 35, 36 / GC II, 22-27, 39 / GC IV, 18, 21, 22 / P I 12, 21-24, 48, 53, 54, 55, 56, 62 / P II, 11, 14, 15, 16 / H.CP 4, 9 / H.CP.II, 12 / 1 CILS, 7, 8, 9, 28, 29, 30, 32, 33, 38, 42, 43, 54] [IAC/NIAC]

#### 5.4.1.2 Military objectives

Military objectives are limited to those objects which have the following two characteristics:

- by their nature, location, purpose or use make an effective contribution to military action; and
- whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

##### Effective contribution to military action

Some objects by their very nature meet the targeting requirement of effective contribution to military action, such as tanks, artillery pieces, weapons depots and military barracks. All objects directly employed in combat by armed forces, such as weapons, equipment, transports, fortifications, depots, buildings occupied by combatants, staff headquarters, military communications centres, etc., are military objectives.

Other objects, which are not by nature military, meet these requirements by their location, e.g. a bridge of tactical importance.

Finally, some objects are military objectives by virtue of their present use. For example, a harmless civilian vehicle can quickly become a military objective if enemy forces mount a machine gun on top of it. Similarly, a civilian house that is evacuated and turned into a military headquarters thereby becomes a military objective.

Some objects are dual-use, meaning that they are used for both civilian and military purposes, e.g. a bridge used to re-supply enemy forces, which is also used by civilian vehicles. These objects become military objectives (insofar as they make an effective contribution to military action and their destruction offers a definite military advantage in the circumstances), but can only be attacked if such attack does not violate the principles of *proportionality* and *precautions in attack* (see Section 5.2).

The criterion of purpose is concerned with the intended future use of an object. However, as discussed in the following paragraph, it is not lawful to launch an attack which only offers potential or indeterminate advantages.

##### Definite military advantage

It is important to note the phrase “in the circumstances ruling at the time”. An object may have a possible future military use, but if it is not being used for military purposes at the present time, or if such use is not imminent, then it cannot be targeted.

Regarding the phrase “definite military advantage”, it is not lawful to launch an attack that only offers potential or indeterminate advantages.

[P I, 48, 52 / 1 CILS, 7, 8 / CCW.P.II.Amend., 2 / CCW.P.III, 1 / H.CP.P.II, 1] [IAC/NIAC]

#### 5.4.1.3 Civilian objects

Civilian objects are all objects that are not military objectives. Civilian objects must not be targeted.

[P I, 52 / CCW.P.II, 2 / CCW.P.III, 1 / 1 CILS, 9, 10] [IAC/NIAC]

In case of doubt whether an object which is normally dedicated to civilian purposes (e.g. a place of worship, a house or a school) is a military objective, it must be presumed to be a civilian object.

[P I, 52] IAC

#### 5.4.1.4 Basic rule: specifically protected objects

It is prohibited to directly attack specifically protected objects, subject to the exception below.

[GC I, 19, 20, 33, 35, 36 / GC II, 22-27, 39 / GC IV, 18, 21, 22 / P I 12, 21-24, 53, 54, 55, 56, 62 / P II, 11, 14, 15, 16 / H.CP 4, 9 / H.CP.P.II, 12 / 1 CILS, 28, 29, 30, 32, 33, 38, 42, 43, 54] [IAC/NIAC]

#### 5.4.1.5 Loss of protection

The protection of specifically protected objects ceases only if they are used to commit acts harmful to the enemy.

It is important to note, however, that, not every harmful use of specifically protected objects causes the loss of protection. In addition, even when specifically protected objects have lost protection from attack, there may still be restrictions on permitted attacks (for rules specific to a particular object, see below).

In general, when specifically protected objects are being used to commit acts harmful to the enemy, protection may cease only after:

- due warning is given; and
- in all appropriate cases, a reasonable time limit has been set after which the warning has remained unheeded.

Thus, before a commander orders an attack on a specifically protected object being used to commit harmful acts, the commander must first warn the

enemy to put an end to the harmful acts and (unless circumstances do not permit) must fix a time limit to allow the unlawful acts to be stopped.

[GC I, 21, 22 / GC II, 34, 35 / GC IV, 19 / H.CP, 4, 11 / P I, 13, 54, 56, 65 / P II, 11 / H.CP.P.II, 6, 13 / 1 CILS, 28, 29, 33, 38, 43, 54] [IAC/NIAC]

It is prohibited to make civilian objects the object of reprisals.

[GC I 46 / GC II 47 / GC IV 33 / 1 CILS 147, 148] [IAC/NIAC]

## 5.4.2 Medical objects

### 5.4.2.1 Protection of medical objects

It is prohibited to attack medical objects of any kind, including both civilian and military medical objects, except in limited circumstances, as set out in 5.4.2.2.

Medical objects include:

- medical units, i.e. any establishment and other unit organized for medical purposes (namely, the search for, collection, transportation, diagnosis or treatment of the wounded, sick and shipwrecked, or for the prevention of disease); the term comprises in particular hospitals, similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such establishments – medical units may be fixed or mobile, permanent or temporary;
- medical transports, i.e. any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to the conveyance by land, water or air of the wounded, sick, shipwrecked, medical and religious personnel and medical material, and under the control of a competent authority of a party to a conflict; and
- medical material, i.e. any medical equipment or supplies.

In an international armed conflict, in order for civilian medical units and transports to benefit from specific protection, they must:

- belong to a party to the conflict;
- be recognized and authorized by the competent authority of one of the parties to the conflict; or
- be authorized by a party to the conflict (provided that the adverse party is notified).

[GC I, 19, 20, 33, 35 / GC II, 22, 23, 24, 25, 27 / GC IV, 18 / P I, 8, 9, 12 / P II, 12 / 1 CILS, 28-30] [IAC/NIAC]

### 5.4.2.2 Cessation of protection: medical objects

The protection to which medical objects are entitled is mandatory and does not cease *unless* they are being used outside their humanitarian function to commit acts harmful to the enemy. In such cases, their protection may cease only after a warning has been given and has remained unheeded. Whenever appropriate, a reasonable time limit must be given.

[1 CILS, 28, 29] [IAC/NIAC]

In an international armed conflict, the following in relation to medical units and hospitals will *not* be deemed to be acts harmful to the enemy justifying the loss of protection:

- that the personnel of the unit are armed, and that they use the arms in their own defence, or that of the wounded and sick in their charge;
- that the unit is protected by a picket or by sentries or by an escort (in the absence of armed orderlies);
- that small arms and ammunition taken from the wounded and sick and not yet handed to the proper service are found in the unit; and
- that members of the armed forces, other combatants or civilians are in the unit for medical reasons.

[GC I, 21, 22 / GC II, 34, 35 / GC IV, 19 / P I, 13]

It is prohibited to make medical objects the object of reprisals.

[GC I 46 / GC II 47 / 1 CILS 147, 148] [IAC/NIAC]

### 5.4.3 Objects containing dangerous forces

#### 5.4.3.1 Definition

Works containing dangerous forces, namely dams, dykes and nuclear power plants, are specifically protected by the law of armed conflict.

#### 5.4.3.2 Protection of objects containing dangerous forces

It is prohibited to attack works and installations containing dangerous forces even when they are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

It is similarly prohibited to attack military objectives located at or in the vicinity of these works and installations if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

[P I, 56 / P II, 15 / 1 CILS, 42]

### 5.4.3.3 Cessation of protection: objects containing dangerous forces

A dam or dyke loses its special protection against attack only if:

- it provides regular, significant and direct support for military operations;
- that support is other than its normal function; and
- an attack against that work or installation is the only way to terminate such support.

A nuclear power plant loses its special protection against attack only if:

- it provides electric power in regular, significant and direct support of military operations; and
- an attack against the nuclear power plant is the only feasible way to terminate such support.

A military objective in the vicinity of works or installations containing dangerous forces loses its special protection against attack only if:

- it is used in regular, significant and direct support of military operations; and
- such an attack is the only feasible way to terminate such support.

If protection ceases, attacks on objects containing dangerous forces are still subject to the principles of proportionality and precautions in attack. In addition, all practical precautions must be taken to avoid the release of the dangerous forces.

It is prohibited to make an object containing dangerous forces, as defined above, the object of reprisals.

[P I, 56 ] [IAC]

## 5.4.4 Objects indispensable to the survival of the civilian population

### 5.4.4.1 Prohibition of attacks on objects indispensable to the survival of the civilian population

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population (e.g. food, agricultural areas producing food, crops, livestock, drinking water installations and supplies, irrigation works) for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whether in order to starve out civilians, to cause them to move away, or for any other motive.

[P I, 54 / P II, 14 / 1 CILS, 54, 55] [IAC/NIAC]

#### 5.4.4.2 Exceptions and derogations

Objects indispensable to the survival of the civilian population are not protected against attack if:

- they are used solely for sustenance of the armed forces; or
- they are used in direct support of military action (however, the civilian population may not be thereby reduced to starvation or forced to move).

In international armed conflict, a party to a conflict may, within its own territory which remains under its control, derogate from the obligation not to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, when this is required by imperative military necessity.

On the other hand, it may not carry out such destruction in the part of its territory which is under enemy control.

Similarly, it may not carry out such destruction in occupied territory.

It is prohibited to make objects indispensable to the survival of the civilian population the object of reprisals.

[P I, 54 / 1 CILS, 53, 54 / ICRC Commentary P I, 54] [IAC/NIAC]

### 5.4.5 The natural environment

#### 5.4.5.1 Introduction

The law of armed conflict contains specific provisions protecting the natural environment. These protections are important not only to protect the civilian population against the effects of war and to minimize unnecessary suffering both during and after the armed conflict, but also to protect the natural environment itself.

The rules break down into two categories: rules that aim to minimize the incidental effects on the natural environment caused by attacks on military objectives, and rules that restrict attacks on the natural environment as a target.

[1 CILS, 43 / ICRC Commentary P I, 35]

#### 5.4.5.2 Definition

The term “natural environment” is defined in the ICRC Commentary as the “external conditions and influences which affect the life, development and the survival of the civilian population and living organisms” or, in other words, the “system of inextricable interrelations between living organisms and their inanimate environment”.

[ICRC Commentary, P I, 35]

**5.4.5.3 Restrictions on attacks on the natural environment as a target**

It is prohibited to direct an attack against part of the natural environment, unless it is a military objective.

It is prohibited to destroy any part of the natural environment, unless required by imperative military necessity.

[1 CILS, 43]

**5.4.5.4 Prohibition on attacks causing widespread, long-term and severe damage to the natural environment**

It is prohibited to engage in an attack that is intended or which may be expected to cause widespread, long-term and severe damage to the natural environment.

[P I, 35, 55 / 1 CILS, 43, 44, 45] [IAC/NIAC, but 1 CILS, 44 and 45 are arguably NIAC]

**5.4.5.5 Incidental effects on the environment: proportionality**

It is prohibited to launch an attack against a military objective which is expected to cause incidental damage to the natural environment that is excessive in relation to the concrete and direct military advantage anticipated.

[1 CILS, 43] [IAC/NIAC]

**5.4.5.6 Incidental effects on the environment: precaution**

All feasible precautions must be taken during military operations to protect the environment against widespread, long-term and severe damage.

It is prohibited to attack the natural environment by way of reprisal.

[P I, 55 / 1 CILS, 44] [IAC/arguably NIAC]

**5.4.6 Cultural property**

This subsection sets out the regime for the protection of cultural property and the restrictions on attacks on cultural property.

**5.4.6.1 Introduction**

Cultural property is protected by international law. Each party to a conflict has obligations with regard to cultural property, and attacks against cultural property are restricted. (See the definition of cultural property in Chapter 3, C).

#### 5.4.6.2 Cultural property: general restrictions on attacks

Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments, unless they are military objectives.

Property of great importance to the cultural heritage of every people must not be the object of an attack unless imperatively required by military necessity.

[1 CILS, 38] [IAC/NIAC]

#### 5.4.6.3 Cultural property: use

Property of great importance to the cultural heritage of every people must not be used for a purpose which is likely to expose it to destruction, unless imperatively required by military necessity.

Thus, for example, unless imperatively required by military necessity, a historic religious structure cannot be used to store weapons, because those weapons are military objectives and their presence in the religious structure may render it a military objective (i.e. a lawful target).

[1 CILS, 39] [IAC/NIAC]

#### 5.4.6.4 Cultural property: armed conflicts covered by P I or P II

In the case of armed conflicts governed by Additional Protocol I or II to the Geneva Conventions, it is prohibited to:

- attack historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- to use such objects in support of the military effort, and
- to make such objects the object of reprisals (IAC).

The Additional Protocols do not allow for a waiver in cases of military necessity.

It is important to note that these provisions are without prejudice to the provisions of the H.CP and H.CP.P.II set out below.

[P I, 53 / P II, 16]

#### 5.4.6.5 Cultural property in situations covered by the H.CP and H.CP.P.II

Together, the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (H.CP) and its 1999 Second Additional Protocol

(H.CP.P.II) set out a three-part regime providing different levels of protection for different types of cultural property:

- cultural property;
- cultural property under special protection; and
- cultural property under enhanced protection.

For the definition of these terms, refer to Chapter 3,C.

The remainder of subsection 5.4.6 applies only to States party to the H.CP.P.II and/or the H.CP.

#### **5.4.6.6 Prohibition on targeting cultural property**

The default rule is that all three types of cultural property must not be targeted.

However, in certain circumstances the protection of cultural property may be lost or waived. The circumstances resulting in a waiver or loss of protection depend on which of the three types of cultural property the potential target is.

[H.CP, 4, 9, 11 / H.CP.P.II, 12, 13, 14]

#### **5.4.6.7 Cultural property: waiver**

In case of imperative military necessity it is permitted to attack cultural property that is not under special or enhanced protection.

[H.CP, 4] [IAC/NIAC]

The decision to invoke imperative military necessity must be made by a commander of a force the equivalent of a battalion in size or larger, or of a force smaller in size where the circumstances do not permit otherwise.

The commander may only invoke imperative military necessity when and so long as:

- the cultural property has, by its function, been rendered a military objective; and
- there is no feasible alternative available to obtain a similar military advantage to that offered by attacking the cultural property.

Before an attack is commenced on cultural property, an effective advance warning must be provided whenever circumstances permit.

[H.CP, 4 / H.CP.P.II, 6] [IAC/NIAC]

#### 5.4.6.8 Cultural property under special protection: loss of immunity

Cultural property under special protection can lose this protection in two ways:

- the cultural property or its surroundings are used for military purposes; or
- in exceptional cases of unavoidable military necessity.

Attacks are permitted when cultural property under special protection or its surroundings are being used for military purposes, for so long as the property is being used in that manner. Before proceeding with such an attack, the party about to engage in it must, whenever possible, first request a cessation within a reasonable time of the use for military purposes.

Attacks on cultural property under special protection are only permitted in exceptional cases of unavoidable military necessity, and only for such time as that necessity exists, provided that the following conditions are met:

- a commander of a force the equivalent of a division in size or larger must establish the unavoidable necessity; and
- whenever circumstances permit, the opposing party must be notified in advance in reasonable time of the decision to withdraw the immunity of the cultural property.

In both cases, the party withdrawing the immunity must notify the Commissioner-General for Cultural Property in writing and state the reasons justifying the attack.

[H.CP, 11] [IAC/NIAC]

#### 5.4.6.9 Cultural property under enhanced protection: loss of protection

Cultural property under enhanced protection can lose such protection in two ways.

First, the Committee for the Protection of Cultural Property in the Event of an Armed Conflict may suspend or cancel the protection of cultural property under enhanced protection if it no longer meets the criteria for such protection.

Second, attacks are permitted on cultural property under enhanced protection if and for so long as such cultural property has become by its use a military objective, provided that the following conditions are met:

- the attack is the only feasible means of terminating the use making the object a military objective;
- all feasible precautions are taken in the choice of means and methods of attack to terminate the use of the cultural property as a military objective and to avoid or in any event minimize, damage to it; and

- unless circumstances do not permit for reasons of immediate self-defence:
  - the attack is ordered at the highest operational level of command;
  - effective advance warning is issued to the opposing forces, requiring the termination of the use concerned; and
  - reasonable time is given to the opposing forces to redress the situation.

[H.CP.II, 13, 14] [IAC/NIAC]

#### **5.4.6.10 Transports of cultural property**

The H.CP provides for two categories of protection for transports of cultural property:

- transport under special protection; and
- transport in urgent cases.

Parties to an armed conflict must not target transports under special protection and must, as far as possible, take the necessary precautions to avoid attacks on transports displaying the emblem and transporting cultural property in urgent cases.

The details concerning the procedures for these two categories of transport are discussed in 10.1.4).

[H.CP, 12-14] [IAC/NIAC]

#### **5.4.6.11 Precautionary measures: cultural property**

A party to an armed conflict must in planning and carrying out an attack:

- take all feasible precautions to verify that the target is not cultural property;
- take all feasible precautions in the choice of means and methods of attack to avoid, and in any event minimize, incidental damage to cultural property;
- refrain from launching an attack that may be expected to cause incidental damage to cultural property which would be excessive in relation to the concrete and direct military advantage anticipated; and
- cancel or suspend an attack if it becomes apparent:
  - that the target is cultural property; or
  - that the attack may be expected to cause incidental damage to cultural property which would be excessive in relation to the concrete and direct military advantage anticipated.

These precautions must be taken in attacks on military objectives as well as in attacks on cultural property which conform to the restrictions set out above.

[H.CP.II, 7]

## 5.5 Protected zones

The law of armed conflict provides for the creation of protected zones. This Section describes the prohibitions on attacks on protected zones and the circumstances in which protected zones lose their protection from attack.

### 5.5.0.1 Protected zones and localities: recognition by agreement

The parties to an armed conflict may mutually agree to recognize the following types of protected zones and localities:

- protected zones to shelter the wounded, sick and civilians from the effects of hostilities, including:
  - hospital zones;
  - hospital and safety zones;
  - neutralized zones;
- demilitarized zones; and
- non-defended localities (may also be unilaterally declared, as set out in 5.5.0.5).

Protected zones may be established and agreed upon in all armed conflicts.

[GC I, 23, Annex I / GC IV, 14, 15, Annex I / P I, 59, 60, 85 / 1 CILS, 35, 36, 37]  
[IAC/NIAC]

### 5.5.0.2 Protected zones: protection and loss thereof

The agreement establishing recognition of the protected zone usually stipulates that it is prohibited to attack and/or extend military operations to the protected zone.

Such agreements usually also specify the conditions under which a protected zone loses its protection from attack.

Commanders need to know about the existence, location, and agreements concerning the protection/loss of protection of all protected zones in their area of operation, in order to make decisions with regard to targeting and military operations in such zones.

### 5.5.0.3 Demilitarized zones

A demilitarized zone is an area that cannot be occupied or used for military purposes by any party to a conflict.

[1 CILS, 36]

Demilitarized zones are created by agreements, which should set out the limits of the zone as well as means of supervision.

Demilitarized zones are usually required to fulfil the following conditions:

- all combatants as well as mobile weapons and mobile military equipment have been evacuated;
- no hostile use is made of fixed military installations or establishments;
- no acts of hostility are committed by the authorities or by the population; and
- all activity linked to the military effort has ceased.

It is prohibited to extend military operations to demilitarized zones, provided that the parties have so agreed. It is also prohibited to use the zone for purposes related to the conduct of military operations or to unilaterally revoke the status of the zone, provided that the parties have so agreed.

[P I, 60]

#### **5.5.0.4 Non-defended locality: definition**

A non-defended locality (or open town) is an inhabited place situated near or in a zone where armed forces are in contact and which is open for occupation by an opposing party to an armed conflict.

[P I, 59] [IAC]

#### **5.5.0.5 Non-defended locality: procedure**

A party to an armed conflict may unilaterally declare that an area is a non-defended locality, provided that it meets all of the following conditions:

- all combatants, as well as mobile weapons and mobile military equipment, have been evacuated;
- no hostile use is made of fixed military installations or establishments;
- no acts of hostility are committed by the authorities or by the population; and
- no activities in support of military operations are undertaken.

Alternatively, the parties to an armed conflict may agree on the establishment of non-defended localities that do not satisfy the conditions listed above. The agreement will define the limits of the non-defended locality as precisely as possible.

[P I, 59] [IAC]

#### **5.5.0.6 Non-defended locality: protection and loss of status**

It is prohibited to attack a non-defended locality.

A non-defended locality loses its status as a non-defended locality if it ceases to fulfil one of the required conditions listed in 5.5.0.5 or the conditions set out in the agreement between the parties establishing it. However, the locality

continues to benefit from protection against attack unless it becomes a military objective.

Commanders need to know about the existence and location of non-defended localities in their areas of operation and, when such localities were established by agreement, the terms of the agreement concerning loss of status as a non-defended locality.

[P I, 59/ 1 CILS, 37] [IAC/NIAC]

#### **5.5.0.7 Protected zones, *ad hoc* distinctive signs**

As far as possible, de-militarized zones and non-defended localities must be marked with an *ad hoc* distinctive sign agreed between the parties. The signs must be displayed where they are clearly visible (e.g. from the air and from land), and in particular on the perimeter and limits of the zones and on its highways.

It is also recommended that the agreements establishing zones to protect the wounded and sick and/or civilians require that the parties mark the zones with either the red cross, red crescent or red crystal emblem (for zones containing only the wounded, sick, and medical personnel) or another agreed sign (for zones containing civilians).

[P I, 59, 60 / GC I, Annex I / GC IV, Annex I] [IAC]

### **5.6 Information requirements**

This Section sets out a checklist of information required by commanders and soldiers to comply with the principles of distinction, proportionality and precautions in attack.

#### **5.6.0.1 Scope of information required**

In order to comply with the principles of distinction, proportionality and precautions in attack, a commander needs appropriate information about the enemy, the planned targets and the overall environment. This must include the following types of information.

- Evidence that the selected target is a lawful military target, including:
  - facts verifying that the proposed target is indeed a lawful military target;
  - facts verifying that the target, if it is a civilian object or a specifically protected object, is being used in a way that has caused it to lose its protected status and become a military objective;
  - if the attack is to take place in a protected zone, facts verifying that the zone has indeed been used in a way resulting in loss of protection;
  - facts verifying that a civilian is indeed taking direct part in hostilities;

- Details of the existence, nature and location of specifically protected objects.
- Details of the existence, nature and location of protected zones, as well as:
  - the terms of the agreements establishing the zones; and
  - the conditions under which the zones lose protection.
- Details of the nature of built-up areas (towns, villages, shelters, etc.), including:
  - proximity of military objectives to civilians and civilian objects;
  - concentrations of civilians;
  - presence of specifically protected objects and their proximity to military objectives.
- Information on the natural environment.
- Information necessary to verify that the attack complies with the principle of proportionality:
  - information concerning the expected incidental effects on civilians if the attack is carried out; and
  - information on the anticipated military advantage of the attack.
- Information necessary to comply with the principle of precautions in attack, including:
  - the presence and proximity of any civilians and civilian objects to the target;
  - expected civilian movements in the area of the target;
  - the presence and proximity of any persons or objects under specific protection to the target;
  - the feasibility of providing an effective advance warning of attacks which may harm civilians or civilian objects;
  - information necessary to choose the means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental harm to civilians and civilian objects;
  - information necessary to make a choice between two different possible military objectives when both will yield a similar military advantage – e.g. on the level of expected danger to civilian lives or objects resulting from attacks on each objective;
  - updated information necessary to cancel or suspend an attack if it becomes apparent that it will violate Principle 1, i.e. distinction, or Principle 2, i.e. proportionality.

# CHAPTER 6

# MEANS AND METHODS

# OF WARFARE

## 6 MEANS AND METHODS OF WARFARE

This Chapter addresses the use of means and methods of warfare during an armed conflict.

It should be read in conjunction with Chapter 4 and Chapter 5.

**6.1 Introduction to weapons** introduces the general framework of rules for the use of weapons. It also sets out a checklist for making decisions concerning the use of weapons.

**6.2 General rules for the use of weapons** outlines the general rules which apply every time a weapon is used in a military operation.

**6.3 Prohibited weapons** identifies specific weapons, the use of which is prohibited by the law of armed conflict.

**6.4 Mines, booby-traps and similar devices** sets out the definitions of and rules governing the use of these weapons.

**6.5 Incendiary weapons** sets out the definition of and rules governing the use of incendiary weapons.

**6.6 Herbicides** describes the restrictions placed on this type of weapon.

**6.7 Nuclear weapons** recalls the status of such weapons under the law of armed conflict.

**6.8 Explosive remnants of war** discusses the obligations of parties to an armed conflict with respect to unexploded and abandoned explosive ordnance.

**6.9 Methods of warfare** describes the legal restrictions and prohibitions placed upon particular methods of warfare.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## **6.1 Introduction to weapons**

### **6.1.1 Principles and framework**

#### **6.1.1.1 Principle of limitation**

A fundamental principle of the law of armed conflict is that the right to choose means and methods of warfare is *not* unlimited. This is sometimes referred to as the principle of limitation, which is reflected in a series of treaty-based rules restricting specific means and methods of warfare.

In the law of armed conflict, means and methods of warfare include weapons in the widest sense as well as the way in which they are used. Therefore, the law of armed conflict limits both the types of weapons that may be used and the manner in which they may be used.

[H.IV.R, 22 / ICRC Commentary, P I, 35 / CCW, Preamble / AP Mine Ban Conv., Preamble] [IAC/NIAC]

#### **6.1.1.2 Distinction, proportionality, precaution**

In addition to the principle of limitation, the principles of distinction, proportionality and precaution (see Section 5.1) are reflected in rules governing the choice and use of weapons.

#### **6.1.1.3 Use of weapons: general framework**

With regard to weapons, the principles of limitation, distinction, proportionality and precaution are expressed in:

- general rules concerning the use of weapons (see Section 6.2);
- prohibitions on the use of specific weapons (see Section 6.3); and
- restrictions/limitations on the use of specific weapons (see Sections 6.4 – 6.8).

#### **6.1.1.4 Use of weapons: legal framework**

The general rules for the use of weapons are found in treaties, particularly in the parts of Additional Protocol I concerning the conduct of hostilities, and in the customary law of armed conflict.

The rules concerning prohibitions and restrictions/limitations on specific weapons are found in treaties and in the customary law of armed conflict. In general, the treaty provisions are more detailed than the customary law of armed conflict rules. Only States party to a particular treaty are bound by the treaty provisions, whereas all parties to an armed conflict must abide by the customary law of armed conflict.

This Chapter of the Handbook cites both the relevant treaty provisions and the customary law of armed conflict. Readers should consult their legal advisers or the ICRC treaty database to determine the treaties to which their State is party.

### 6.1.1.5 Treaties prohibiting or restricting the use of specific weapons

The following treaties prohibit or impose restrictions/limitations on the use of specific weapons for warfare on land:

- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, 29 November/11 December 1868 (St. Petersburg Decl.);
- Declaration concerning Expanding Bullets, The Hague, 29 July 1899 (Hague Decl.);
- Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 (H.IV), and the Regulations respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 (H.IV.R);
- Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925 (G.BC);
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972 (BWC);
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 10 December 1976 (ENMOD);
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980 (CCW) and its Protocols:
  - Amended Article 1, Geneva, 21 December 2001 (CCW.Art.1),
  - Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980 (CCW.P.I),
  - Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980 and 3 May 1996 (CCW.P.II.Amend.),
  - Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980 (CCW.P.III),
  - Protocol on Blinding Laser Weapons (Protocol IV), Vienna, 13 October 1995 (CCW.P.IV),
  - Protocol on Explosive Remnants of War (Protocol V), 28 November 2003 (CCW.P.V);
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993 (CWC);
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa 18 September 1997 (AP Mine Ban Conv.); and
- Convention on Cluster Munitions, Dublin, 30 May 2008 (CCM).

## 6.1.2 Checklist for the selection and use of weapons

- The use of the following types of weapons and ammunition is prohibited in all armed conflicts:
  - exploding bullets (for anti-personnel use) (see 6.3.0.1);
  - expanding bullets (see 6.3.0.2);
  - weapons that injure by non-detectable fragments (see 6.3.0.3);
  - poison and poisoned weapons (see 6.3.0.4);
  - biological weapons (see 6.3.0.5);
  - chemical weapons (see 6.3.0.6);
  - riot control agents (see 6.3.0.7);
  - blinding laser weapons (see 6.3.0.8);
  - armed forces of States party to the Convention on Cluster Munitions are prohibited from using cluster munitions (see 6.3.0.9); and
  - armed forces of States party to the Anti-Personnel Mine Ban Convention are prohibited from using anti-personnel mines (see 6.3.0.10).
  
- If the specific weapon is a type of weapon whose use is restricted/limited, its use must comply with all restrictions/limitations.  
The use of the following specific weapons is restricted/limited, depending on the State's treaty obligations :
  - mines, booby-traps, and other devices (see Section 6.4);
  - incendiary weapons (see Section 6.5);
  - herbicides (see Section 6.6); and
  - explosive remnants of war (see Section 6.8).
  
- The weapon and the way it is used must comply with the general rules on the use of weapons:
  - the weapon and the way it is used must not cause superfluous injury or unnecessary suffering to combatants (see 6.2.1.1);
  - the weapon must be capable of being directed at a specific military objective (see 6.2.1.2);
  - the effects of the weapon must be capable of being limited as required by the law of armed conflict (see 6.2.1.2);
  - the weapon must not be used in an indiscriminate manner (see 6.2.1.3);
  - the use of the weapon must not be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (principle of proportionality) (see 6.2.1.4);
  - when choosing a weapon, all feasible precautions must be taken to avoid or minimize incidental effects on civilians (principle of precaution) (see 6.2.1.5);

- the weapon and the way it is used must not be intended or expected to cause widespread, long-term and severe damage to the natural environment (see 6.2.1.6); and
- the planned attack using the weapon must comply with the rules on targeting in Chapter 5.

## 6.2 General rules for the use of weapons

This Section sets out the general rules that apply every time a weapon is used during military operations (see 6.2.1), as well as some additional general obligations regarding weapons (see 6.2.2).

### 6.2.1 General rules

#### 6.2.1.1 Weapons causing unnecessary suffering

It is prohibited to use means of warfare of a nature to cause superfluous injury or unnecessary suffering.

Therefore, it is prohibited to use a weapon that by its very nature causes superfluous injury or unnecessary suffering to combatants, or to use any weapon in a manner that causes superfluous injury or unnecessary suffering.

[H.IV.R, 23 / P I, 35 / 1 CILS, 70 / ICRC Commentary, P I, 35 / CCW, Preamble / AP Mine Ban Conv., Preamble / St Petersburg Decl.] [IAC/NIAC]

#### 6.2.1.2 Indiscriminate weapons by nature

It is prohibited to use a weapon which:

- is not capable of being directed at a specific military objective; or
- the effects of which cannot be limited as required by the law of armed conflict.

In other words, it is prohibited to use a weapon which is *by its very nature* “indiscriminate.”

Attacks using such weapons constitute “indiscriminate attacks” and are prohibited.

The reason such weapons and attacks are prohibited is that they do not distinguish between military objectives and civilians or civilian objects, in violation of the principle of distinction (see Section 5.1).

[P I, 51 / 1 CILS, 70-71] [IAC/NIAC]

#### 6.2.1.3 Use of weapons in an indiscriminate manner

It is also prohibited to use a weapon or means of warfare *in a manner* that is indiscriminate (see Chapter 5).

In particular it is prohibited to use a weapon when:

- it is *not* directed at a specific military objective;
- its use does *not* comply with the principle of proportionality; and
- it is used in an attack that treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town or other area containing a concentration of civilians or civilian objects.

[P I, 51 / 1 CILS, 11-13] [IAC/NIAC]

#### **6.2.1.4 Proportionality**

It is prohibited to engage in an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

[P I, 51, 57 / 1 CILS, 14] [IAC/NIAC]

#### **6.2.1.5 Precaution: choice of weapon**

When choosing a weapon, all feasible precautions must be taken with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

[P I, 57 / 1 CILS, 17] [IAC/NIAC]

#### **6.2.1.6 Weapons causing damage to the natural environment**

It is prohibited to use weapons that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Destruction of the natural environment may not be used as a weapon.

[P I, 35 / 1 CILS, 45] [IAC/arguably NIAC]

### **6.2.2 Other general obligations**

This subsection addresses other general obligations concerning weapons.

#### **6.2.2.1 New weapons**

When a State studies, develops, acquires or adopts a new weapon, means or method of warfare, it must determine whether its use would, in some or all circumstances, be prohibited by any applicable rule of the law of armed conflict.

The legal review should involve a multidisciplinary approach including military, legal, environmental and health-related considerations.

[P I, 36 / ICRC, *Guide to the Legal Review of New Weapons, Means and Methods of Warfare*, 1, 4, 7, 22 (2006)]

### 6.2.2.2 Captured weapons

The rules on the use of weapons apply equally to captured weapons. Therefore, before using captured weapons or ammunition, an armed force must confirm that the use of the captured items is not prohibited by any rule of the law of armed conflict applicable to it.

### 6.2.2.3 Precise instructions

Each State, and each party to an armed conflict, has a legal obligation to issue precise instructions to its armed forces on the use of weapons (e.g. standard operating procedures, rules of engagement).

These instructions must serve to clarify the particular rules governing the use of specific weapons in given conflict situations.

In addition, States and belligerent parties must impose a clear prohibition on the modification of approved weapons or means or methods of warfare by individual combatants and/or units.

[P I, 80]

## 6.3 Prohibited weapons

This Section identifies specific weapons the use of which is prohibited by the treaties and/or the customary law of armed conflict.

### 6.3.0.1 Exploding bullets

The anti-personnel use of bullets that explode within the human body is prohibited.

However, the use of exploding bullets against objects ("*anti-matériel*" use) is permitted (e.g. anti-aircraft bullets, small exploding ammunition used in land warfare against armoured vehicles).

The practice of employing exploding bullets for *anti-matériel* use has modified the rule in the St. Petersburg Declaration, which prohibits all use of explosive projectiles under 400 grammes. However, the object and purpose of the Declaration, namely to avoid the use of projectiles which inflict unnecessary suffering, remain valid.

[St. Petersburg Decl. / 1 CILS, 78 / 1 CILS, pp. 272-74] [IAC/NIAC]

### 6.3.0.2 Expanding bullets

The use of bullets that expand or flatten easily in the human body is prohibited.

Examples of expanding bullets are bullets with hard envelopes which do not entirely cover the core, or bullets which have a hollow point.

[H.Decl. / 1 CILS, 77 / ICC, 8] [IAC/NIAC]

This rule applies during an armed conflict. Some States use such bullets in domestic law enforcement operations, in particular to ensure that a bullet fired at its target does not pass through the target's body into another person.

[1 CILS, p. 270]

#### **6.3.0.3 Non-detectable fragments**

The use of weapons whose primary effect is to injure by fragments that are not detectable in the human body by X-rays is prohibited.

[CCW.P.I, 1 / 1 CILS, 79] [IAC/NIAC]

#### **6.3.0.4 Poison, poisoned weapons**

The use of poison or poisoned weapons is prohibited.

[H.IV.R, 23 / 1 CILS, 72 / ICC, 8] [IAC/NIAC]

#### **6.3.0.5 Biological weapons**

The use of biological weapons is prohibited.

Biological weapons include:

- microbial or other biological agents or toxins; and
- weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes in an armed conflict.

[BWC, 1 / 1 CILS, 73 / ICC, 8] [IAC/NIAC]

#### **6.3.0.6 Chemical weapons**

The use of chemical weapons is prohibited. The CWC defines "chemical weapons" as the following, together or separately:

- Toxic chemicals and their precursors, except where intended for uses not prohibited by the law of armed conflict, as long as the types and quantities are consistent with such purposes, where
  - "toxic chemicals" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere; and

- “precursors” means any chemical reactant which takes part at any stage in the production of a toxic chemical.
- Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in the first bullet point, which would be released as a result of the use of such munitions and devices; and
- Any equipment specifically designed for use directly in connection with the use of munitions and devices specified in the second bullet point.

[G.BC / CWC, 1, 2 / 1 CILS, 74, 75, 76 / ICC, 8] [IAC/NIAC]

#### **6.3.0.7 Riot-control agents: rule**

The use of riot-control agents as a method of warfare is prohibited.

The use of riot-control agents is only permitted for purposes of law enforcement, including domestic riot control.

The CWC defines a riot-control agent as any chemical not listed in a schedule to the treaty, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

[CWC, 1, 2 / 1 CILS, 74, 75 / 1 CILS, p. 264] [IAC/NIAC]

#### **6.3.0.8 Blinding laser weapons**

The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited.

Unenhanced vision means both the naked eye and the eye with corrective eyesight devices (e.g. glasses or contact lenses).

In the employment of military laser systems (e.g. rangefinders, laser designators), all feasible precautions must be taken to avoid the incidence of permanent blindness to unenhanced vision. Such precautions must in particular include specific training on this requirement for personnel using such systems.

[CCW.P.IV, 1-4 / 1 CILS, 86] [IAC/NIAC]

#### **6.3.0.9 Cluster munitions**

The 2008 Convention on Cluster Munitions (CCM) contains a ban on the use, development, production, stockpiling and transfer of cluster munitions. States party to this treaty are bound by its provisions.

A cluster munition is defined under the CCM as a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms. A weapon is *not* considered a cluster munition under the treaty if:

- it contains fewer than 10 submunitions;
- each submunition weighs over 4 kg;
- each submunition can detect and engage a specific target object; and
- each is equipped with electronic self-destruction and self-deactivation features.

Furthermore, munitions or submunitions designed:

- to dispense flares, smoke, pyrotechnics or chaff;
- for use in an air defence role; and
- to produce electrical or electronic effects

do not constitute cluster munitions under the treaty.

[CCM, 1, 2]

### 6.3.0.10 Anti-personnel mines

More than 160 States have ratified the Anti-Personnel Mine Ban Convention.

For these States and their armed forces the use of anti-personnel mines is prohibited.

In addition, these States and their armed forces must not:

- use, develop, produce, otherwise acquire, stockpile, retain, or transfer anti-personnel mines; or
- assist, encourage or induce, in any way, anyone to engage in any of these prohibited activities.

[AP Mine Ban Conv. 1] [IAC/NIAC]

## 6.4 Mines, booby-traps and similar devices

This Section explains the definitions of and rules governing the use of mines, booby-traps and other similar devices. It should be read in conjunction with the general rules for the use of weapons set out in Section 6.2.

### 6.4.1 Legal framework

#### 6.4.1.1 Legal framework regulating mines, booby-traps and other devices

There are two main treaties regulating such weapons:

- 1996 Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices [CCW.P.II Amend], which regulates the use of both anti-personnel and anti-vehicle mines, and

- 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction [AP Mine Ban Conv.], prohibiting the use in all circumstances of anti-personnel mines.

In addition, for a limited number of States the 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices [CCW.P.II] [IAC] remains in force. This Handbook provides references to the provisions in the CCW.P.II.Amend., which are now considered to be the minimum norms to reduce the impact of these weapons on civilians. Armed forces from States for which the CCW.P.II is still in force should consult the provisions in that treaty, which are similar in many respects.

In addition to treaty law, there are some provisions of customary law governing the use of these devices which apply to all States. These are set out in 6.4.6.

Finally, the choice and use of mines, booby-traps and other devices must be guided by the general rules on the use of weapons set out in Section 6.2.

#### **6.4.1.2 Legal framework: anti-personnel mines**

The legal framework regulating the use of anti-personnel mines by armed forces depends on the treaties to which their State is party.

As stated above, if the State is party to the Anti-Personnel Mine Ban Convention, then its armed forces are prohibited from using anti-personnel mines.

If the State is a party to the CCW.P.II.Amend. (or CCW.P.II), its armed forces must follow:

- the general rules restricting the use of all mines, booby-traps and other devices (see 6.4.3);
- the specific rules restricting the use of anti-personnel mines (see 6.4.4); and
- the general rules for the use of weapons, many of which are reiterated in the CCW.P.II.Amend. (see Section 6.2).

If the State is not party to one of these treaties, then its armed forces must follow:

- the customary law of armed conflict rules on the use of landmines (see 6.4.6); and
- the general rules for the use of weapons (see Section 6.2).

[CCW.P.II.Amend., 2 / AP Mine Ban Conv., 2] [IAC/NIAC]

#### **6.4.2 Definitions**

The CCW.P.II.Amend. and AP Mine Ban Conv. define mines, booby-traps and other devices as follows.

#### 6.4.2.1 Mine

“Mine” means any munition designed to be placed under, on or near the ground or other surface area and to be detonated or exploded by the presence, proximity or contact of a person or a vehicle.

[CCW.P.II.Amend., 2 / AP Mine Ban Conv., 2] [IAC/NIAC]

#### 6.4.2.2 Remotely-delivered mine

“Remotely-delivered mine” means any mine not directly emplaced but delivered by artillery, missile, rocket, mortar or similar means, or dropped from an aircraft.

[CCW.P.II.Amend., 2] [IAC/NIAC]

#### 6.4.2.3 Anti-personnel mine

“Anti-personnel mine” means a mine which is designed to be exploded by the presence, proximity or contact of a person, and which will incapacitate, injure or kill one or more persons.

[CCW.P.II.Amend., 2 / AP Mine Ban Conv., 2] [IAC/NIAC]

#### 6.4.2.4 Booby-trap

“Booby-trap” means any device or material which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act (e.g. opening a door).

[CCW.P.II.Amend., 2] [IAC/NIAC]

#### 6.4.2.5 Other devices

“Other devices” means manually emplaced munitions and devices, including improvised explosive devices, designed to kill, injure or damage and which are activated manually, by remote control or automatically after a lapse of time.

[CCW.P.II.Amend., 2] [IAC/NIAC]

### 6.4.3 General rules: mines, booby-traps and other devices

The general rules in this subsection apply every time a mine, booby-trap or other device is used in an armed conflict.

In addition, there are specific rules for anti-personnel mines (see 6.4.4), as well as booby-traps and other devices (see 6.4.5).

This subsection is applicable to States party to the CCW.P.II.Amend.

#### **6.4.3.1 General prohibitions and restrictions on the use of mines, booby-traps and other devices**

Prohibitions and restrictions on the use of mines, booby-traps and other devices are in force in the following cases.

- It is prohibited in all circumstances to direct mines, booby-traps and other devices against the civilian population as such or against individual civilians or civilian objects.
- It is prohibited to use any mine, booby-trap or other device:
  - which is designed or of a nature to cause superfluous injury or unnecessary suffering; or
  - which employs a mechanism or device which is specifically designed to detonate the munition by the presence of commonly available mine detectors.
- It is prohibited to use a self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning.
- The indiscriminate use of mines, booby-traps and other devices is prohibited. This includes placement of such weapons:
  - which is not on, or directed against, a military objective (in case of doubt of whether a civilian object is being used to make an effective contribution to military action, it must be presumed not to be so used);
  - which employs a method or means of delivery which cannot be directed at a specific military objective; or
  - which may be expected to cause incidental loss of civilian life, injury to civilians and/or damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.

[CCW.P.II.Amend., 3] [IAC/NIAC]

#### **6.4.3.2 Precautionary measures**

Parties to an armed conflict who use mines, booby-traps or other devices must:

- take all feasible precautions to protect civilians from the effects of these weapons, i.e. all precautions which are practicable or practically possible taking into account the circumstances ruling at the time, including both humanitarian and military considerations; and
- give effective advance warning of any placement of such weapons which may affect the civilian population, unless circumstances do not permit.

[CCW.P.II.Amend., 3] [IAC/NIAC]

### 6.4.3.3 Record keeping

Parties that use mines, booby-traps and other devices must maintain a precise record of the locations of such weapons, in accordance with the specifications set out in the Technical Annex to the CCW.P.II.Amend.

[CCW.P.II.Amend., 9, Technical Annex] [IAC/NIAC]

### 6.4.3.4 Protection of the United Nations, the ICRC and other humanitarian organizations

Parties who use mines, booby-traps and other devices must take measures to protect the missions of the United Nations, the ICRC and other humanitarian organizations from the effects of these weapons.

[CCW.P.II.Amend., 12] [IAC/NIAC]

### 6.4.3.5 Obligation to clear

Without delay after the cessation of active hostilities, all laid mines, booby-traps and other devices must be cleared, removed or destroyed by the party to the conflict whose forces are in control of the affected area. Prior to clearing, removal or destruction, affected areas must be effectively perimeter-marked, protected by fencing or other means, and monitored to ensure the effective exclusion of civilians.

If the party that has laid such mines, booby-traps and other devices no longer has control of the affected area, it must:

- inform the party whose forces are in control of the affected area (and, if necessary, the United Nations) of the location of such weapons; and
- facilitate their removal (e.g. through technical or material assistance).

The parties to an armed conflict must endeavour to reach agreement(s) in this respect, both among themselves and, where appropriate, with third-party States and with international organizations.

[CCW.P.II.Amend., 3(2), 9, 10] [IAC/NIAC]

### 6.4.3.6 International signs for minefields and mined areas

In the marking of minefields and mined areas, the internationally recognized sign must be used to ensure their visibility and recognition by the civilian population.

The international sign for minefields and mined areas must meet the following specifications.

- Shape: either square or triangular, and red or orange in colour with a yellow reflecting border.

- Symbol: indicating the presence of mines and containing the word “mines” in one of the six official languages of the United Nations and in the language(s) prevalent in the affected area.
- Size: at least 15 cm per side for square signs and 28 cm x 20 cm for triangular signs (in order to ensure visibility).
- Spacing: placed around the minefield or mined area at a distance sufficient to ensure visibility by a civilian approaching the area.

[CCW.P.II.Amend., Technical Annex 4] [IAC/NIAC]

#### **6.4.4 Specific restrictions on the use of anti-personnel mines**

This subsection sets out specific additional restrictions on the use of anti-personnel mines. It applies to States party to the CCW.P.II.Amend., and should be read in conjunction with 6.4.3 and Section 6.2.

##### **6.4.4.1 Detection of anti-personnel mines**

Anti-personnel mines must be detectable using commonly available mine-detection equipment, in accordance with the specifications in the Technical Annex.

[CCW.P.II.Amend., 4, Technical Annex, 2] [IAC/NIAC]

##### **6.4.4.2 Anti-personnel mines other than remotely-delivered mines**

Anti-personnel mines other than remotely-delivered mines must be equipped with the self-destruction and self-deactivation mechanisms set out in the Technical Annex unless they are:

- placed within a perimeter-marked area monitored by military personnel and protected by fencing or other means to ensure the effective exclusion of civilians from the area; and
- cleared before the area is abandoned.

A party to a conflict is relieved from further compliance with the above-mentioned safeguards only if such compliance is not feasible due to forcible loss of control over the area as a result of enemy military action. If that party regains control over the area, it must resume compliance with them.

If the armed forces of a party to a conflict gain control over an area in which anti-personnel mines other than remotely-delivered mines have been laid, the armed forces must, to the maximum extent feasible, maintain or establish the protections set out above until such weapons have been cleared.

[CCW.P.II.Amend., 5, Technical Annex] [IAC/NIAC]

#### 6.4.4.3 Remotely-delivered mines

Remotely-delivered anti-personnel mines must in all cases be equipped with the self-destruction and self-deactivation mechanisms set out in the Technical Annex.

Remotely-delivered mines other than anti-personnel mines must, to the extent feasible, be equipped with an effective self-destruction or self-neutralization mechanism and have a back-up self-deactivation feature.

The location, number and type of mines laid, the date and time of laying and the self-destruction time periods must be recorded as set out in the Technical Annex.

Effective advance warning must be given of any delivery or dropping of remotely-delivered anti-personnel mines which may affect the civilian population, unless circumstances do not permit.

[CCW.P.II.Amend., 6, Technical Annex] [IAC/NIAC]

#### 6.4.5 Specific restrictions on the use of booby-traps and other devices

This subsection sets out specific restrictions on the use of such weapons in the CCW.P.II Amend., and should be read in conjunction with 6.4.3 and Section 6.2.

##### 6.4.5.1 Booby-traps and other devices: prohibited placement

The use of booby-traps or other devices which are in any way attached to or associated with the following persons or objects is prohibited:

- internationally recognized protective emblems, signs or signals;
- sick, wounded or dead persons;
- burial or cremation sites or graves;
- medical facilities, medical equipment, medical supplies or medical transportation;
- children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
- food or drink;
- kitchen utensils or appliances except in military establishments, military locations or military supply depots;
- objects clearly of a religious nature;
- historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; and
- animals or their carcasses.

[CCW.P.II.Amend., 7] [IAC/NIAC]

#### **6.4.5.2 Booby-traps and other devices: prohibited objects**

The use of any booby-trap or other device in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material is prohibited.

[CCW.P.II.Amend., 7] [IAC/NIAC]

#### **6.4.5.3 Booby-traps and other devices: prohibited places and circumstances**

The use of any booby-trap or other device in areas containing a concentration of civilians in which combat action between ground forces is not taking place or does not appear to be imminent is prohibited, unless:

- such a weapon is placed on or in the close vicinity of a military objective; or
- measures are taken to protect civilians from the effects of such a weapon (e.g. by posting warning sentries or warning signs or by the provision of fences).

[CCW.P.II, 6 / CCW.P.II Amend., 7] [IAC/NIAC]

### **6.4.6 Customary law: landmines and booby-traps**

This subsection applies to the armed forces of all States.

#### **6.4.6.1 Landmines: customary law**

When landmines are used, particular care must be taken to minimize their indiscriminate effects.

A party to the conflict must, as far as possible, record their emplacement.

At the end of the hostilities a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal.

[1 CILS, 81-83] [IAC/NIAC, except 1 CILS, 82 which is arguably NIAC]

#### **6.4.6.2 Booby-traps: customary law**

The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law, or objects that are likely to attract civilians, is prohibited.

[1 CILS, 80] [IAC/NIAC]

## 6.5 Incendiary weapons

This Section sets out the definition of incendiary weapons and specific rules restricting their use. It should be read in conjunction with the general rules for the use of weapons outlined in Section 6.2.

Subsections 6.5.1 and 6.5.2 apply to the armed forces of States party to the CCW.P.III, whereas 6.5.3 applies to the armed forces of all States.

### 6.5.1 Definitions

#### 6.5.1.1 Incendiary weapons

“Incendiary weapon” means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target.

Incendiary weapons can take the form of flamethrowers, shells, rockets, grenades, mines, bombs, improvised explosive devices and other containers of incendiary substances (e.g. napalm, phosphorus).

[CCW.P.III, 1] [IAC/NIAC]

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#### 6.5.1.2 Weapons not considered incendiary weapons

The following are *not* incendiary weapons within the meaning of the law of armed conflict:

- munitions which may have incidental incendiary effects, such as illuminants, tracer, smoke or signalling systems;
- munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities (e.g. anti-tank missiles).

[CCW.P.III, 1] [IAC/NIAC]

### 6.5.2 Prohibitions: incendiary weapons

#### 6.5.2.1 Prohibited use of incendiary weapons

It is prohibited in all circumstances to attack civilians and/or civilian objects with incendiary weapons (or indeed any weapon).

[CCW.P.III, 2] [IAC/NIAC]

### 6.5.2.2 Air-delivered incendiary weapons

It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.

[CCW.P.III, 2] [IAC/NIAC]

### 6.5.2.3 Non-air-delivered incendiary weapons

It is furthermore prohibited to make any military objective located within a concentration of civilians the object of attack by non-air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians.

[CCW.P.III, 2] [IAC/NIAC]

### 6.5.2.4 Attacks on plant cover with incendiary weapons

It is prohibited to make forests or other kinds of plant cover the object of attack with incendiary weapons, except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

[CCW.P.III, 2] [IAC/NIAC]

## 6.5.3 Customary law on incendiary weapons

The following are the minimum rules applicable to the use of incendiary weapons in the customary law of armed conflict. These rules are binding on all States.

### 6.5.3.1 Anti-personnel use of incendiary weapons

The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*.

[1 CILS, 85] [IAC/NIAC]

### 6.5.3.2 Precaution

If incendiary weapons are used, particular care must be taken to avoid, and in any event minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

[1 CILS, 84] [IAC]

## 6.6 Herbicides

The law of armed conflict places limits on the type of herbicides that may be used, the permitted targets of herbicides (military objectives only), and the incidental effects of such herbicides (proportionality).

### 6.6.0.1 Herbicides

The use of herbicides as a method of warfare is prohibited if they:

- are of a nature to be prohibited chemical weapons (see 6.3.0.6);
- are of a nature to be prohibited biological weapons (see 6.3.0.5);
- are aimed at vegetation that is not a military objective (see Section 5.4);
- would cause incidental loss of civilian life, injury to civilians and/or damage to civilian objects which may be expected to be excessive in relation to the concrete and direct military advantage anticipated (proportionality); or
- would cause widespread, long-term and severe damage to the natural environment.

[P I, 35(3), 55 / ENMOD 1 / 1 CILS, 76] [IAC/NIAC]

## 6.7 Nuclear weapons

### 6.7.0.1 Law of armed conflict

The use of nuclear weapons is subject to the general law of conflict rules applicable to weapons.

In particular, this includes the rules of distinction, proportionality and precaution, the prohibition on using weapons which inflict superfluous injury or unnecessary suffering, the prohibition on using weapons which are by their nature indiscriminate, and the provisions related to the protection of the natural environment.

[ICJ, *Nuclear Weapons Case*, *Advis. Op.*, 8 July 1996, ICJ Rpts. 1996, p. 226]

## 6.8 Explosive remnants of war

This Section discusses the obligations of parties to a conflict with respect to unexploded and abandoned explosive ordnance and applies to States party to Protocol (V) to the CCW on Explosive Remnants of War.

### 6.8.0.1 Definition

Explosive remnants of war means:

- unexploded ordnance (UXO), i.e. explosive ordnance that has been primed, fused, armed or otherwise prepared for use and used in an armed conflict, which should have exploded but failed to do so; and
- abandoned explosive ordnance, i.e. explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by

a party to an armed conflict, and which is no longer under control of such a party. It need not have been primed, fused, armed or otherwise prepared for use.

The generic term “explosive ordnance” means conventional munitions containing explosives, except for mines, booby-traps and other devices as defined in CCW.P.II.Amend.

[CCW.P.V, 2] [IAC/NIAC]

#### 6.8.0.2 Obligations

In order to facilitate measures to minimize the suffering caused by explosive remnants of war, parties to an armed conflict must, during the armed conflict:

- record and retain information on explosive ordnance used or abandoned by their armed forces (e.g. technical characteristics and methods of identifying the various types used, approximate number, locations);
- take all feasible precautions to protect civilians and civilian objects from the effects of explosive remnants of war, including marking and fencing off dangerous areas, warning the population of the risks, and setting up risk education programmes; and
- protect, as far as feasible, humanitarian missions and organizations operating in the area and, upon request, provide information on the location of all explosive remnants of war where the humanitarian mission or organization is or will be operating.

After an armed conflict, parties that have used or abandoned explosive ordnance must, as soon as feasible:

- continue to take all feasible precautions to protect civilians and civilian objects from the effects of explosive remnants of war, including marking and fencing off dangerous areas, warning the population of the risks, and setting up risk education programmes;
- survey and assess the threat posed by explosive remnants of war in areas under their control, then mark and clear them (priority should be given to those areas where there is a serious humanitarian risk);
- provide assistance (e.g. technical, material or human resources) for the removal of explosive remnants of war left by their armed forces in areas not under their control; and
- release or transmit recorded information on explosive ordnance used or abandoned by their armed forces (e.g. technical characteristics and methods of identifying the various types used, approximate number, locations) to the party in control of the affected areas, the United Nations, or organizations involved in clearance activities.

[CCW.P.V, 3-9, Technical Annex] [IAC/NIAC]

## 6.9 Prohibited methods of warfare

This Section discusses the legal framework which prohibits or restricts certain methods of warfare. It is closely linked to the legality of weapons (see Sections 6.1 to 6.8) and targeting (see Chapter 5).

### 6.9.1 Introduction to methods of warfare

#### 6.9.1.1 Principle of limitation

As stated above, a fundamental principle of the law of armed conflict is that the right to choose methods or means of warfare is *not* unlimited. This is sometimes referred to as the principle of limitation.

In the law of armed conflict, methods and means of warfare include weapons in the widest sense as well as the way in which they are used.

[ICRC Commentary, P I, 35 / H.IV.R, 22 / P I, 35 / CCW, Preamble / AP Mine Ban Convention, Preamble] [IAC/NIAC]

#### 6.9.1.2 Methods of warfare, general framework

With regard to the choice of *methods* of warfare, the principle of limitation is expressed in:

- prohibitions on specific methods of warfare against persons (see 6.9.3), including the prohibition on the use of human shields (see 6.9.4);
- prohibitions on specific methods of warfare against objects (see 6.9.5);
- restrictions on reprisals (see 6.9.6); and
- restrictions on the use of deception (see 6.9.7).

### 6.9.2 Checklist for methods of warfare

- The following methods of warfare are prohibited with regard to persons:
  - methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering;
  - starvation of the civilian population (see 6.9.3.1);
  - acts of terror (see 6.9.3.2);
  - denial of quarter (see 6.9.3.3);
  - taking of hostages (see 6.9.3.4);
  - sexual violence (see 6.9.3.5);
  - use of human shields (see 6.9.4.1); and
  - reprisals against persons protected by the law of armed conflict (see 6.9.6.3).
- The following methods of warfare are prohibited with regard to objects:
  - pillage (see 6.9.5.1);
  - unnecessary destruction (see 6.9.5.2);
  - unnecessary seizure (see 6.9.5.3);

- methods of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment (see 6.9.5.5); and
  - reprisals against objects protected under the law of armed conflict (see 6.9.6.4);
- Only permitted forms of deception may be used as a method of warfare (see 6.9.7). Thus:
    - ruses of war that do not violate the law of armed conflict are permitted;
    - perfidy is prohibited.
  - Any planned attack must comply with the rules on targeting outlined in Chapter 5.
  - Any use of weapons must comply with the rules on weapons outlined in the foregoing Sections 6.1 to 6.8.

### **6.9.3 Prohibitions on specific methods of warfare against persons**

#### **6.9.3.1 Prohibition of starvation as a method of warfare**

Starvation of civilians as a method of warfare is prohibited.

This includes wilfully impeding relief supplies. For details on the rules concerning the passage of humanitarian assistance, see Section 4.2.

[P I, 54 / P II, 14 / ICC Stat., 8 / 1 CILS, 53] [IAC/NIAC]

#### **6.9.3.2 Acts of terror**

Acts or threats of violence with the primary purpose of spreading terror among the civilian population are prohibited.

While acts of violence related to a state of war generally give rise to some degree of terror, this prohibition relates specifically to those acts which are deliberately aimed at spreading terror among the civilian population.

[GC IV, 33 / P I, 51 / P II, 4, 13 / 1 CILS, 2]

#### **6.9.3.3 Threat or order to take no prisoners (denial of quarter)**

It is prohibited to order that there shall be no survivors, to threaten the enemy therewith or to conduct operations on this basis.

[H.IV.R, 23 / P I, 40 / P II, 4 / ICC Stat., 8 / 1 CILS, 46] [IAC/NIAC]

#### 6.9.3.4 Prohibition of hostage-taking

Hostage-taking is prohibited in all armed conflicts. This includes taking hostages as a method of warfare.

[GC I, 3 / GC II, 3 / GC III, 3 / GC IV, 3, 34 / P I, 75 / P II, 4 / 1 CILS, 96] [IAC/NIAC]

#### 6.9.3.5 Prohibition of sexual violence as a method of warfare

Sexual violence, including rape, forced prostitution, forced pregnancy and enforced sterilization, is prohibited in all armed conflicts. This includes using sexual violence as a means of warfare.

[GC I, 3 / GC II, 3 / GC III, 3, 14 / GC IV, 3, 27 / P I, 75, 76, 77 / P II, 4 / ICC Stat. 8 / 1 CILS, 93]

### 6.9.4 Human shields

#### 6.9.4.1 Prohibition of the use of human shields.

The use of human shields is prohibited in all armed conflicts.

[1 CILS, 97] [IAC/NIAC]

#### 6.9.4.2 Human shields (IAC)

The law of international armed conflict (IAC) lays down the prohibition on the use of human shields in greater detail.

In particular, the parties to such a conflict may not use the presence of civilian populations, individual civilians, prisoners of war or persons protected by the Fourth Geneva Convention to render certain points or areas immune from military operations. Furthermore, the parties must not attempt to shield military objectives from attacks, or to shield military operations by directing the movement of the civilian population or individual civilians accordingly.

[GC III, 23 / GC IV, 28 / P I, 51 / ICC Stat., 8] [IAC]

In addition, it is prohibited to use medical units in an attempt to shield military objectives from attack.

[P I, 12] [IAC]

#### 6.9.4.3 Voluntary human shields; civilians directly participating in hostilities

The presence of human shields in the vicinity of a military objective raises issues for a party that wishes to target the shielded military objective.

One such issue is the status of civilians who act as *voluntary* human shields. Do they qualify as civilians directly participating in hostilities, which means that they can be directly targeted? Or are they deemed to be ordinary civilians, which means that they may *not* be targeted and that their presence must be taken into account in the proportionality assessment for an attack on the military objectives they are shielding?

The ICRC addresses this question in its manual *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (DPH Study).

According to that study, this question hinges on whether the act committed by the voluntary human shield directly causes harm that reaches the threshold of harm necessary for its qualification as direct participation (direct causation). See Section 5.3.

In a situation where several voluntary human shields use their bodies to create a physical obstacle to military operations (e.g. preventing the movement of infantry troops in an urban area), the required threshold of harm might be reached, because the actions of the civilians may be enough to adversely affect the capacity of the attacker to achieve its military objective. On the other hand, in a situation involving the use of powerful weapons capable of accurate targeting, the presence of a few voluntary human shields may have no adverse impact on the attacker's capacity to identify and destroy the shielded military objective. In the former case, the voluntary human shields may meet the definition of civilians directly participating in hostilities, while in the latter case they would not, because they would not directly cause the required level of harm.

However, in practice it may not be easy to determine whether civilians are voluntarily present in the vicinity of military objectives, or whether their presence is accidental or forced.

[DPH Study, pp. 56-57]

#### **6.9.4.4 Involuntary human shields**

Persons used as involuntary human shields are *not* civilians directly participating in hostilities.

Such persons cannot be regarded as performing an action (i.e. as *doing something* in any meaningful sense) and therefore remain protected against direct attack. As a result, the presence of such persons must be taken into account in the proportionality assessment during any military operation likely to inflict incidental harm on them.

[DPH Study, p. 60]

## 6.9.5 Prohibited methods of warfare: objects

### 6.9.5.1 Prohibition of pillage

Pillage is prohibited.

Black's Law Dictionary defines "pillage" as "the forcible taking of private property by an invading or conquering army from the enemy's subjects". [*Black's Law Dictionary*, quoted in 1 CILS, p. 185].

[H.IV.R, 28, 47 / GC I, 15 / GC II, 18 / GC IV, 16, 33 / P II, 4 / 1 CILS, 52 / ICC Stat., 8] [IAC/NIAC]

Pillage of cultural property is also prohibited in the conventions on cultural property.

[H.CP, 4 / H.CP.II, 15].

### 6.9.5.2 Prohibition of unnecessary destruction

The destruction of enemy property, unless required by imperative military necessity, is prohibited.

This does *not* apply to:

- objects constituting military objectives; and
- civilian objects incidentally destroyed by an attack directed against a military objective, when the destruction is not excessive in relation to the concrete and direct military advantage anticipated (principle of proportionality).

[H.IV.R, 23, 56 / GC I, 50 / GC II, 51 / GC IV, 53, 147 / H.CP.II, 15 / 1 CILS, 50 / ICC Stat., 8] [IAC/NIAC]

### 6.9.5.3 Prohibition of unnecessary seizure

The seizure of enemy property, unless required by imperative military necessity, is prohibited.

[H.IV.R, 23 / GC I, 50 / GC II, 51 / GC IV, 147 / 1 CILS, 50 / ICC Stat., 8] [IAC/NIAC]

### 6.9.5.4 War crime: excessive destruction and appropriation of property

Excessive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly is a war crime.

[GC I, 50 / GC II, 51 / GC IV, 147 / ICC Stat., 8] [IAC/NIAC]

### 6.9.5.5 Natural environment

It is prohibited to employ methods of warfare that are intended or may be expected to cause widespread, long-term and severe damage to the natural environment, and thereby to prejudice the health or survival of the population.

[P I, 55 / 1 CILS, 44] [IAC / arguably NIAC]

## 6.9.6 Reprisals

### 6.9.6.1 Definition and purpose of reprisals

A “reprisal” is an action that would otherwise be unlawful, but that in exceptional cases is considered lawful under international law when used as an enforcement measure in reaction to unlawful acts of an adversary.

Accordingly, reprisals are intended to put pressure on the enemy in order to obtain the enemy's compliance with the law of armed conflict.

[1 CILS, p. 513]

### 6.9.6.2 Prohibited reprisals (NIAC)

Reprisals by parties to an armed conflict are prohibited in non-international armed conflicts. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited.

[1 CILS, 148] [NIAC]

### 6.9.6.3 Reprisals against persons (IAC)

Reprisals against persons protected by the Geneva Conventions are prohibited. This includes civilians, the wounded, sick and shipwrecked, prisoners of war, protected persons under the Fourth Geneva Convention, and medical and religious personnel.

[GC I, 46 / GC II, 47 / GC III, 13 / GC IV, 33 / P I, 20, 51 / 1 CILS, 146] [IAC]

### 6.9.6.4 Reprisals against objects (IAC)

Reprisals against objects protected under the Geneva Conventions and the Hague Convention for the Protection of Cultural Property are prohibited.

[GC I, 46 / GC II, 47 / H.IV.R, 23, 56 / P I, 20, 52, 53, 54, 55, 56 / H.CP, 4 / 1 CILS, 147] [IAC]

It is also prohibited to attack the natural environment as a reprisal.

[P I, 55] [IAC]

### 6.9.6.5 Permitted reprisals: rules

Reprisals must remain the last resort to restore compliance with the law of armed conflict. With the evolution of international law on the subject, reprisals can, in effect, only be taken against combatants and military objectives in very limited circumstances and under strict conditions.

Pursuant to the ICRC's customary international humanitarian law study (1 CILS), reprisals are lawful only if the following five conditions are met:

- reprisals may only be taken in reaction to a prior serious violation of the law of armed conflict, and only for the purpose of inducing the adversary to comply with the law;
- reprisals may only be carried out as a measure of last resort, when no other lawful measures are available to induce the adversary to respect the law – some military manuals stress that a prior warning must be provided;
- reprisal action must be proportionate to the violation it aims to stop;
- the decision to resort to reprisals must be taken at the highest level of government; and
- reprisal action must cease as soon as the adversary complies with the law.

[1 CILS, pp. 513-518] [IAC]

## 6.9.7 Deception: ruses of war and perfidy

### 6.9.7.1 Introduction

To accomplish his mission, a commander may mask his intentions and action from the other parties to the conflict in order to induce the latter to react in a manner prejudicial to their interests.

To comply with the law of armed conflict, a commander must distinguish between permissible ruses of war on one hand and prohibited deception, including perfidy, on the other.

[P I, 37 / 1 CILS, 57] [IAC/NIAC]

### 6.9.7.2 Permitted deception: ruses of war

Ruses of war are permitted as long as they do not infringe a rule of the law of armed conflict.

A "ruse of war" or "stratagem" is any act not amounting to perfidy that is intended:

- to mislead the enemy; or
- to induce the enemy to act recklessly.

[P I, 37 / 1 CILS, 57] [IAC/NIAC]

Examples of ruses of war are:

- camouflage (natural, paints, nets, smoke);
- decoys, feints;
- simulations and mock operations; and
- dissemination of false information.

[P I, 37] [IAC/ NIAC]

### 6.9.7.3 Prohibited deception: definition of perfidy

“Perfidy” consists of committing an act inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of the law of armed conflict, with intent to betray that confidence. The essence of perfidy is the invitation to obtain, and then breach, the adversary’s confidence, i.e. an abuse of good faith.

[1 CILS, p. 223]

The following acts, if committed with the required intent, are examples of perfidy:

- to simulate an intent to negotiate under a flag of truce;
- to pretend to surrender;
- to pretend to be incapacitated by wounds or sickness, or to feign distress (e.g. if a warship sends a distress signal with the intention of launching an attack);
- to pretend to be a civilian or non-combatant (i.e. medical or religious personnel);
- to pretend to have protected status by using the flags, emblems or uniforms of the United Nations or of neutral States; and
- to pretend to have protected status by using the emblems of the red cross, red crescent or red crystal.

[P I, 37 / 1 CILS, 65] [IAC/NIAC]

### 6.9.7.4 Prohibited deception: perfidy

It is prohibited to kill, injure or capture an enemy by resort to perfidy.

It should be noted that while it is prohibited to kill, injure or capture by resort to perfidy, the war crime of perfidy only covers killing and injuring by resort to perfidy.

[H.IV.R, 23 / P I, 37 / 1 CILS, 65 / ICC Stat., 8] [IAC/NIAC]

### 6.9.7.5 Restricted deception: emblems of nationality of enemy States

It is prohibited to use the flags, military emblems, insignia or uniforms of the enemy:

- while engaging in combat action; or
- in order to shield, favour, protect or impede military operations.

This covers attacks, i.e. acts of violence committed against the adversary, whether these acts are offensive or defensive, in addition to all situations directly related to military operations.

[H.IV.R, 23 / P I, 39 / 1 CILS, 62] [IAC/arguably NIAC]

### 6.9.7.6 Prohibited deception: emblems of nationality of neutral States

It is prohibited to use the flags, military emblems, insignia or uniforms of neutral States in an armed conflict.

[H.IV.R, 23 / P I, 39 / 1 CILS, 63] [IAC/arguably NIAC]

### 6.9.7.7 Prohibited deception: emblems of the United Nations

It is prohibited to use the distinctive emblem of the United Nations, except as authorized by that Organization.

[P I, 38/ 1 CILS, 60] [IAC/NIAC]

### 6.9.7.8 Prohibited deception: improper use of distinctive signs and signals

It is prohibited to make improper use of the following distinctive signs and signals (i.e. to mark or affix distinctive signs and signals to persons or objects other than those entitled to use them for protective purposes):

- the distinctive emblems of the red cross, red crescent and red crystal;
- the distinctive signs and signals of medical service;
- the distinctive sign of civil defence;
- the distinctive sign of cultural property;
- the distinctive sign of works and installations containing dangerous forces;
- the white flag (flag of truce);
- other internationally recognized distinctive signs and signals (e.g. *ad hoc* signs for demilitarized zones, for non-defended localities, *ad hoc* signals for civil defence).

[P I, 38 / 1 CILS, 58, 59, 61] [IAC/NIAC]

#### **6.9.7.9 Restricted deception: conclusion of agreements**

It is prohibited to conclude an agreement to suspend combat with the intention of attacking by surprise an enemy relying on that agreement.

[1 CILS, 64] [IAC/NIAC]

# **CHAPTER 7**

# **DETENTION AND INTERNMENT**

# **IN ARMED CONFLICT**

## 7 DETENTION AND INTERNMENT IN ARMED CONFLICT

This Chapter covers the detention and internment of persons during an armed conflict. The judicial guarantees applicable to penal proceedings against persons deprived of their liberty in an armed conflict are specifically dealt with in Section 9.7 and are not repeated here.

The fundamental principle that governs detention and internment is that every person has the right not to be subjected to arbitrary deprivation of liberty. This means that there must be a legal basis for detention in the national law of the State and/or in the law of armed conflict. The deprivation of liberty of a particular person in any particular case must be based on grounds and carried out in accordance with procedures laid down by law.

Another important principle of the law of armed conflict is that persons in the hands of a party to an armed conflict must be treated humanely, and are entitled to certain fundamental guarantees of treatment.

For a review of detention in situations other than armed conflict, see Chapter 14.

**7.1 Introduction and road map** is a guide designed to assist the reader to determine which of the following Sections apply to the internment or detention of particular categories of persons in international and non-international armed conflict respectively.

**7.2 Fundamental guarantees of treatment (all armed conflicts)** discusses the legal guarantees that apply to all persons in the power of a party to an armed conflict.

**7.3 Internment of prisoners of war in international armed conflict** summarizes the detailed legal regime applicable to the internment of POWs – a concept that only exists in international armed conflict and is largely governed by the Third Geneva Convention.

**7.4 Internment of civilians and other protected persons in international armed conflict** discusses the detailed legal regime applicable to the internment of civilians and other persons protected by the Fourth Geneva Convention, whether in the territory of a party to conflict or in occupied territory.

**7.5 Procedural principles and safeguards of internment/administrative detention (all armed conflicts)** addresses the procedural principles and safeguards that apply, as a matter of law and/or recommended ICRC policy, to the internment/administrative detention of both fighting forces and civilians in non-international armed conflict. They may also serve as a guiding framework where the law of international armed conflict is insufficiently elaborated (e.g. the administrative detention of civilians who are not explicitly protected by the Fourth Geneva Convention).

**7.6 Retention of medical personnel** discusses the special rules applicable to the retention of medical personnel in all armed conflicts.

**7.7 Retention of religious personnel** discusses the special rules applicable to the retention of religious personnel in all armed conflicts. Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## **7.1 Introduction and road map**

This Section is intended to serve as a road map to this Chapter, and is designed to help the reader to determine which Sections apply to the internment or detention of particular categories of persons in particular circumstances.

Internment or administrative detention is defined as the deprivation of liberty of a person that has been initiated/ordered by the executive branch – not the judiciary – without criminal charges being brought against the internee/administrative detainee. These two terms (internment and administrative detention) are used interchangeably in this text.

The law applicable to administrative detention and internment in armed conflict hinges in part on whether the armed conflict is classified as international or non-international in nature. For a discussion of the difference between international and non-international armed conflict, see Section 2.3.

The law of international armed conflict sets out detailed rules concerning the reasons for internment, procedural guarantees, and conditions of internment for prisoners of war. It contains similarly detailed rules for civilians and other protected persons in the territory of a party to the conflict, and in occupied territory.

In contrast, apart from provisions requiring humane treatment, the law of non-international armed conflict does not contain specific rules concerning the reasons for and procedural guarantees governing internment/administrative detention. The ICRC's institutional position outlined in Section 7.5 below, which is based on both law and policy, was developed primarily to address this gap.

## **7.1.1 International armed conflict**

### **7.1.1.1 Legal framework**

The law of international armed conflict regarding internment/administrative detention consists of the following provisions:

- the law concerning the internment of prisoners of war in the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949 (Third Geneva Convention), and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977 (Additional Protocol I);
- the law concerning the internment of civilians and other persons protected under the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Fourth Geneva Convention);
- in addition, certain fundamental protections which apply to all persons not entitled to more favourable treatment by another provision of the Geneva Conventions are set out in Article 75 of Additional Protocol I;
- certain rules of the customary law of armed conflict;
- finally, in some cases international human rights law complements or fills in the gaps in the law of armed conflict concerning internment and detention. These standards are discussed in Section 7.5 below.

### **7.1.1.2 Detainees in an international armed conflict: legal categories**

In an international armed conflict, it is important to know the legal category to which a detainee belongs. While the basic rules governing humane treatment are essentially the same, the status of a person will determine his specific rights in internment.

The analysis below begins with an outline of the criteria applicable to prisoners of war. If the criteria are met, then the rules for internment of prisoners of war come into play (Third Geneva Convention and Additional Protocol I). If they are not, then the next step is to determine whether that person is protected by the Fourth Geneva Convention – the question of “protection” is therefore the next level of analysis below. If so, then his treatment and possible internment are governed in detail by that Convention.

In cases where the State wishes to intern a person who does not come within the definition of a “protected person” under the Fourth Geneva Convention (e.g. one of its own nationals who presents a palpable security threat), the humane treatment provisions of Article 75 of Additional Protocol I and customary international humanitarian law (IHL) will give at least a minimum of protection, and that person’s internment/administrative detention should be guided by the principles and procedural safeguards set out below.

## Combatants and prisoners of war

### 7.1.1.3 Rule: combatants and prisoners of war

The basic rule is that combatants are members of the armed forces of a party to conflict who have the right to take a direct part in hostilities. When combatants fall into the hands of the enemy they become prisoners of war. A small category of specific individual non-combatants also benefit from POW status.

All the following categories of persons are prisoners of war once they fall into the power of enemy forces:

- members of the armed forces of a party to the conflict, including members of militias or volunteer corps forming part of such armed forces (this includes members of regular armed forces who profess allegiance to a government or authority not recognized by the detaining State);
- members of other militias or other volunteer corps that belong to a party to the conflict (i.e. the State is responsible for their actions under international law), provided that such groups:
  - are under responsible command,
  - have a fixed distinctive sign (or uniform) recognizable at a distance,
  - carry their arms openly, and
  - conduct their operations in accordance with the law of armed conflict;
- civilians who accompany the armed forces, provided that they are specifically authorized by the armed force they accompany;
- members of crews of merchant marine and civilian aircraft of a party to the conflict who do not benefit from more favourable treatment under international law; and
- participants in a *levée en masse* (uncommon, see definition in Chapter 3, L).

[GC I, 14 / GC II, 16 / GC III, 4, 21] [IAC]

### 7.1.1.4 Combatants: principle of distinction

Combatants are required to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.

A combatant should wear a uniform. As provided for in Additional Protocol I, there are nevertheless situations in armed conflicts where, owing to the nature of hostilities, a combatant cannot so distinguish himself. He retains his combatant status if in such situations he at least carries his arms openly:

- during each military engagement; and
- during such time as he is visible to the adversary while engaged in a military deployment preceding the launching of an attack in which he is to participate.

A combatant who fails to distinguish himself while he is engaged in an attack or in a military operation preparatory to an attack loses his combatant status if he is captured, which means he then does not have prisoner-of-war status.

However, he must be given protections equivalent in all respects to those provided to prisoners of war under the Third Geneva Convention. The practical consequence is that he has no “combatant privilege”, meaning that he can be tried under the domestic criminal law of the detaining State for having taken a direct part in hostilities. For example, if a member of the armed forces kills an enemy soldier while not distinguishing himself as described above, he could, on falling into enemy hands, be tried for murder.

[GC III, 4 / P I, 43 (1), 44 / 1 CILS, 106] [IAC]

#### **7.1.1.5 Legal status: cases of doubt**

Should there be any doubt as to whether a person having participated in hostilities is entitled to prisoner-of-war status, that person must be presumed to have prisoner-of-war status and treated accordingly until such time as his or her status is determined by a competent tribunal (see 7.3.3.3).

[GC III, 5, P I, 45] [IAC]

#### **7.1.1.6 Medical and religious personnel**

Although the medical and religious personnel belonging to the armed forces of a party to conflict are not to be considered as prisoners of war, they are nevertheless entitled, as a minimum, to the same level of protection. They are non-combatants and do not have the right to participate in hostilities. They must be allowed to continue to exercise their professional functions for the benefit of prisoners of war, preferably those of their own nationality. For further details, see Sections 7.6 and 7.7.

[GC III, 33 / P I, 43]

#### **7.1.1.7 Explicit exclusions: spies and mercenaries**

The following persons are explicitly excluded from prisoner-of-war status in the law of armed conflict:

- members of the armed forces of a party to conflict who fall into enemy hands while engaging in espionage (this does *not* apply to those captured while operating in uniform); and
- mercenaries (see definition in Chapter 3, M).

Like other non-POWs, their status and protection need to be determined, based on whether or not they are “protected” persons under the Fourth

Geneva Convention (see 7.1.1.8). In all cases they are entitled to the fundamental guarantees of treatment contained in Section 7.2.

[GC IV, 4, 5 / PI, 46, 47 / 1 CILS, 107, 108] [IAC]

## **Civilians and other persons protected under the Fourth Geneva Convention**

### **7.1.1.8 Definition: protected persons**

The primary goal of the Fourth Geneva Convention is to protect civilians during an international armed conflict. As set out in 12.1.2.3, that Convention provides for several cumulative levels of protection for civilians and other protected persons. It provides specific protections for the category of persons who have historically been most vulnerable to abuse, namely persons who are nationals of an opposing party (to the detaining State) and find themselves either in the detaining State's own territory, or in territory occupied by the detaining State.

The basic definition of protected persons under the Fourth Geneva Convention is the following: "protected persons" are those persons who find themselves in the hands of a party to the conflict of which they are not nationals.

The Fourth Convention excludes the nationals of some States from the category of protected persons, because presumably their State of origin can protect them by the ordinary diplomatic means that apply in peacetime and continue to apply during an armed conflict:

- First, in the territory of a party to the conflict, the category of protected persons excludes nationals of a co-belligerent (allied) or neutral State, as long as the State of nationality maintains normal diplomatic representation with the State in whose hands they are.
- Second, in occupied territory, the category of protected persons excludes only nationals of a co-belligerent (allied) State, provided that the State of nationality maintains normal diplomatic representation with the Occupying Power. The nationals of neutral States remain protected persons in occupied territory.

The category of persons explicitly protected by the Fourth Geneva Convention also excludes persons already protected by the First, Second and Third Geneva Conventions (wounded/sick/shipwrecked combatants and prisoners of war).

It is important to note that any persons who meet the above definition are "protected persons" within the meaning of the Fourth Geneva Convention. Accordingly, individuals who are labelled as "mercenaries", "spies", "terrorists" or otherwise who meet the requirements above are still entitled to protected

person status under the Fourth Geneva Convention, subject to the right of derogation discussed in the following paragraph. Those who do not meet the Convention's requirements for specific protection still benefit from the fundamental guarantees of treatment listed in Section 7.2. In any event, there are no persons who are left in a legal void.

Refugees and stateless persons are always specifically protected persons, because they are in the hands of a party to the conflict of which they are not nationals.

[GC IV, 4, 5, 44 / P I, 73 / ICRC Commentary, GC IV, 4]

#### **7.1.1.9 Derogations**

A party to the conflict may, in the following limited circumstances, derogate from some of the protections accorded to a protected person:

- in the territory of a party to the conflict, if that person is definitely suspected of or engaged in activities hostile to the security of the State, that person cannot claim any rights and privileges under the Fourth Geneva Convention which would be prejudicial to State security;
- in occupied territory, if an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, the person can be considered to have forfeited his rights of communication (to the outside world) under the Fourth Geneva Convention, where such forfeiture is required by absolute military necessity.

In all cases, such persons must be treated humanely and cannot be deprived of the right to a fair trial. In addition, at the earliest date consistent with the security of the Occupying Power, they must be granted the full rights and privileges of a protected person.

It must be noted that such persons are still entitled to the fundamental guarantees of humane treatment set out in Section 7.2.

[GC IV, 5 / P I, 75]

#### **7.1.1.10 Road map: detention in international armed conflict**

The following road map for international armed conflict lists and provides references to the relevant parts of this Chapter for each category of persons:

- Combatants (defined in 7.1.1.3):
  - Fundamental Guarantees (see Section 7.2)
  - Internment of Prisoners of War in International Armed Conflict (see Section 7.3)

- Civilians and other persons protected by the Fourth Geneva Convention (defined in 7.1.1.8):
  - Fundamental Guarantees (see Section 7.2)
 Plus, if detained for non-criminal reasons:
  - Internment of Civilians and Other Protected Persons in International Armed Conflict (see Section 7.4), including either Internment of Civilians and Other Protected Persons in the Territory of a Party to the Conflict (see 7.4.1), or Internment of Civilians and Other Protected Persons in Occupied Territory (see 7.4.2)
 For additional guidance, Procedural Principles and Safeguards of Internment/Administrative Detention (see Section 7.5)
- Medical and religious personnel:
  - Fundamental Guarantees (see Section 7.2)
 Plus, as relevant:
  - Retention of Medical Personnel (see Section 7.6), or
  - Retention of Religious Personnel (see Section 7.7)
- All other persons not entitled to more favourable treatment under the law of armed conflict, e.g. because they do not fulfil the nationality criterion for protected persons:
  - Fundamental Guarantees (see Section 7.2)
 Plus, if detained for non-criminal reasons:
  - Procedural Principles and Safeguards of Internment/Administrative Detention (see Section 7.5)

## 7.1.2 Non-international armed conflicts

### 7.1.2.1 Legal framework

In the ICRC's view, both treaty and customary law of non-international armed conflict contain an inherent power to intern, and may thus be said to provide a legal basis for internment in non-international armed conflict. However, the grounds and procedures for internment must be set out in domestic and/or international law in order to satisfy the principle of legality. In 2005, the ICRC issued institutional guidelines on the procedural principles and safeguards that should govern internment/administrative detention in all situations (except POW internment). See Section 7.5.

The law of non-international armed conflict contains some fundamental rules related to the humane treatment of persons, including those who are detained. These are set out in:

- Article 3 common to the four Geneva Conventions of 1949 ("common Article 3");
- Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977 (Additional Protocol II), (provided that the conditions for its application are met); and
- the customary law of non-international armed conflict.

These rules, set out in Section 7.2, are further complemented by international human rights law and national law. The main human rights treaty governing internment/administrative detention is the International Covenant on Civil and Political Rights (ICCPR) of 1996. However, regional human rights treaties may also apply. In addition, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (BPPPI) of 1988, which is a soft-law standard, also addresses internment and administrative detention. These standards are reflected in the ICRC's institutional position on internment/administrative detention (see Section 7.5).

There is no combatant or prisoner-of-war status in non-international armed conflicts. Therefore all persons, including persons performing a continuous combat function within an organized armed group, may be criminally prosecuted by the detaining State under its domestic law for the mere fact of having taken up arms, as well as for any war crimes committed (see Section 9.7).

#### **7.1.2.2 Detention for criminal proceedings related to the armed conflict (NIAC)**

If persons are detained in a non-international armed conflict for criminal proceedings related to the armed conflict, they are entitled to the fundamental protections set out in common Article 3, the customary law of armed conflict, and Additional Protocol II (where the conditions for its application are met). These protections are described in detail in Section 7.2.

In addition, human rights law complements the law of armed conflict.

[GC I-IV, 3 / P II, 4, 5, 7 / 1 CILS, 87-99, 103-105, 118-27]

#### **7.1.2.3 Detention for criminal proceedings unrelated to the armed conflict: applicable law**

If persons are detained for criminal proceedings not related to the armed conflict, national law and human rights law apply.

The international standards related to detention in situations other than armed conflicts are discussed in 14.2.4.

[GC I-IV, 3 / 1 CILS, 87-99, 103-105, 118-27]

#### **7.1.2.4 Road map: detention in non-international armed conflict**

The following road map for non-international armed conflict provides links to the relevant Sections below for each category of persons:

- All members of State armed forces, organized armed groups, civilians and other individuals:
  - Fundamental Guarantees (see Section 7.2)

Plus, if detained for non-criminal reasons:

- Procedural Principles and Safeguards of Internment/Administrative Detention (see Section 7.5)
  - Medical and religious personnel:
    - Fundamental Guarantees (see Section 7.2)
- Plus, as relevant:
- Retention of Medical Personnel (see Section 7.6), or
  - Retention of Religious Personnel (see Section 7.7)

## 7.2 Fundamental guarantees of treatment

This Section discusses the fundamental protections to which any person in the power of a party to an armed conflict for reasons related to the conflict is entitled. These rules and principles have their basis in the treaties governing international and non-international armed conflicts and in customary law.

In this Section non-international and international armed conflicts are dealt with together, because the fundamental protections and principles set out below apply to all persons in the hands of a party to an armed conflict, regardless of its legal classification. This includes, but is not limited to, civilians, combatants, spies, mercenaries, and members of organized armed groups.

References have been provided to the specific law of armed conflict treaty provisions and to the corresponding customary law rules that support each rule or principle.

The specific rules and judicial guarantees applicable to penal proceedings related to an armed conflict are addressed in detail in Section 9.7.

[P I, 75 / GC III, 99-108 / GC IV, 64-70, 71-76, 117-126]

### 7.2.1 Humane treatment

#### 7.2.1.1 Basic principle

Every person in the power of a party to conflict is entitled to humane treatment.

[H.IV.R, 4 / GC I, 3, 12 / GC II, 3, 12 / GC III, 3, 13 / GC IV, 3, 27 / P I, 75 / P II, 4 / 1 CILS, 87] [IAC/NIAC]

#### 7.2.1.2 Prohibition of violence against life, health

Violence against life, health, or the physical or mental wellbeing of persons is prohibited.

[GC I, 3, 12, 50 / GC II, 3, 12, 51 / GC III, 3, 13, 130 / GC IV, 3, 32, 147 / P I, 75 / P II, 4 / 1 CILS, 89 / ICC Stat., 8] [IAC/NIAC]

**7.2.1.3 Prohibition of murder**

The wilful killing of persons is prohibited.

[GC I, 3, 12, 50 / GC II, 3, 12, 51 / GC III, 3, 13, 130 / GC IV, 3, 32, 147 / P I, 75 / P II, 4 / 1 CILS, 89 / ICC Stat., 8] [IAC/NIAC]

**7.2.1.4 Prohibition of torture, cruel or inhuman treatment**

Torture, cruel or inhuman treatment, and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.

Torture includes acts which inflict physical or mental pain or suffering.

Torture is not defined in the treaties of the law of armed combat (LOAC). One internationally recognized definition of torture is that set out in the Convention against Torture (CAT):

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Note that while the CAT definition requires that the act of torture be carried out by a public official or other person acting in an official capacity, the concept of torture in the law of armed conflict is broader in scope and does not include this requirement.

While there is no legally binding definition of inhuman treatment, it is usually considered to mean the infliction of serious physical or mental pain or suffering. The difference between torture and inhuman treatment is that torture requires that there be a purpose (such as intimidation, coercion, punishment), whereas inhuman treatment does not.

[GC I, 3, 12, 50 / GC II, 3, 12, 51 / GC III, 3, 13, 17, 87, 89, 130 / GC IV, 3, 32, 147 / P I, 75 / P II, 4 / 1 CILS, 90 / ICC Stat., 8 / CAT, 1 / 1 CILS, pp. 317-19] [IAC/NIAC]

**7.2.1.5 Prohibition of corporal punishment**

Corporal punishment is prohibited.

[GC III, 87 / GC IV, 32 / P I, 75 / P II, 4 / 1 CILS, 91] [IAC/NIAC]

### 7.2.1.6 Prohibition of mutilation

Mutilation, medical or scientific experiments, or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards, are prohibited.

[GC I, 3, 12, 50 / GC II, 3, 12, 51 / GC III, 3, 13, 130 / GC IV, 3, 32, 147 / P I, 11, 75 / P II, 4 / 1 CILS, 92 / ICC Stat., 8] [IAC/NIAC]

### 7.2.1.7 Prohibition of rape and other forms of sexual violence

Rape and any other forms of sexual violence, such as forced prostitution, are prohibited.

[GC I, 3 / GC II, 3 / GC III, 3, 14 / GC IV, 3, 27 / P I, 75, 76, 77 / P II, 4 / 1 CILS, 93 / ICC Stat., 8] [IAC/NIAC]

### 7.2.1.8 Prohibition of slavery

Slavery and the slave trade in all their forms (including sexual slavery) are prohibited.

[P II, 4 / ICC Stat., 8 / 1 CILS, 94] [IAC/NIAC]

### 7.2.1.9 Prohibition of hostage-taking

Taking hostages is prohibited.

[GC I, 3 / GC II, 3 / GC III, 3 / GC IV, 3, 34, 147 / P I, 75 / P II, 4 / 1 CILS, 96 / ICC Stat., 8] [IAC/NIAC]

### 7.2.1.10 Prohibition of collective punishments

Collective punishments are prohibited.

According to the ICRC Commentary, collective punishments are “penalties of any kind inflicted on persons or entire groups of persons” for acts that they did not commit.

Moreover, the concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but also sanctions and harassment of any sort, including administrative sanctions, by police action or otherwise.

[H.IV.R, 50 / GC III, 26, 87 / GC IV, 33 / P I, 75 / P II, 4 / 1 CILS, 103 / ICRC Commentary, P I, 75 / ICRC Commentary, GC IV, 33] [IAC/NIAC]

### 7.2.1.11 Prohibition of human shields

The use of human shields is prohibited. This includes using persons in the power of a party to a conflict as human shields.

[GC III, 23 / GC IV, 28 / P I, 51 / 1 CILS, 97 / ICC Stat., 8] [IAC/NIAC]

## 7.2.2 Non-discrimination

### 7.2.2.1 Non-discrimination: rule

Adverse distinction, i.e. unfavourable discriminatory treatment based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria, is prohibited.

[GC I, 3, 12 / GC II, 3, 12, 30 / GC III, 3, 16 / GC IV, 3, 13, 15, 27 / P I, Preamble, 9, 10, 69, 70, 73, 75 / P II, 2, 4, 7, 18 / 1 CILS, 88, 110] [IAC/NIAC]

### 7.2.2.2 Religion

The convictions and religious practices of persons must be respected.

[H.IV.R, 46 / GC III, 34, 72, 120 / GC IV, 24, 27, 38, 93 / P I, 75 / P II, 4 / 1 CILS, 104] [IAC/NIAC]

### 7.2.2.3 Women

The specific protection, health and assistance needs of women affected by armed conflict must be respected. The specific application of this fundamental rule is set out in many provisions of the Geneva Conventions, but is not limited to those provisions alone (see, for example, international human rights law).

[GC I, 12 / GC II, 12 / GC III, 14, 25, 29, 97, 108 / GC IV, 14, 16, 17, 21-23, 27, 38, 50, 76, 85, 89, 91, 97, 119, 124, 127, 132 / P I, 75, 76 / P II, 4, 5, 6 / 1 CILS, 93, 134] [IAC/NIAC]

### 7.2.2.4 Children

Children must be the object of special respect and must be protected against any form of indecent assault. They must be provided with the care and aid they require, whether because of their age or for any other reason. The specific application of this fundamental rule is set out in many provisions of the Geneva Conventions, but is not limited to those provisions alone (see e.g. international human rights law).

[GC IV, 14, 17, 23, 38, 50, 82, 94, 132 / P I, 70, 77, 78 / P II, 4, 6 / 1 CILS, 135] [IAC/NIAC]

### 7.2.2.5 Elderly, disabled and infirm

The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection.

[GC III, 16, 30, 44-45, 49, 110 / GC IV, 14, 16, 17, 21, 22, 27, 85, 119, 127 / 1 CILS, 138] [IAC/NIAC]

## 7.2.3 Deprivation of liberty

### 7.2.3.1 Prohibition of arbitrary deprivation of liberty

Arbitrary deprivation of liberty is prohibited.

This means that there must be a legal basis for the detention in the national law of the State and/or in the law of armed conflict, and that the deprivation of liberty of the particular person in the particular case must be based on grounds and carried out in accordance with procedures laid down in law.

[GC I, 3, 28, 30, 32 / GC II, 3, 36, 37 / GC III, 3, 21, 90, 95, 103, 109, 118 / GC IV, 3, 41, 43, 78, 147 / 1 CILS, 99 / ICC Stat., 8 / ICCPR, 9 / 1 CILS, pp. 344-52] [IAC/NIAC]

### 7.2.3.2 Prohibition of enforced disappearance

Enforced disappearance is prohibited.

Enforced disappearance is not defined in LOAC treaties, but has been defined in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) as:

“the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

The ICPPED entered into force on 23 December 2010.

[1 CILS, 98 / ICPPED, 2] [IAC/NIAC]

### 7.2.3.3 Provision of necessities

All persons deprived of liberty must be provided with adequate food, water, clothing, shelter and medical attention.

[GC III, 25-32, 125 / GC IV, 76, 85, 87, 89-92, 142 / P II, 5 / 1 CILS, 118] [IAC/NIAC]

**7.2.3.4 Women**

Women must be housed in separate quarters from men, except where families are housed as family units, and must be under the immediate supervision of women.

[GC III, 25, 29, 97, 108 / GC IV, 76, 82, 85, 124 / P I, 75 / P II, 5 / 1 CILS, 119]  
[IAC/NIAC]

**7.2.3.5 Children**

Children must be housed in separate quarters from adults, except where families are housed as family units.

[GC IV, 82 / P I, 77 / 1 CILS, 120 / ICCPR, 10 / CRC, 37] [IAC/NIAC]

**7.2.3.6 Health and safety**

Persons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene.

[GC III, 22, 23 / GC IV, 83, 85 / P II, 5 / 1 CILS, 121] [IAC/NIAC]

**7.2.3.7 Pillage**

The pillage of the personal belongings of persons deprived of their liberty is prohibited.

[GC III, 18 / GC IV, 33, 97 / P II, 4 / 1 CILS, 122] [IAC/NIAC]

**7.2.3.8 Correspondence**

Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities.

[GC III, 5, 70, 71 / GC IV, 106, 107 / P II, 5 / 1 CILS, 125] [IAC/NIAC]

**7.2.3.9 Religious convictions**

The personal convictions and religious practices of persons deprived of liberty must be respected.

[GC III, 34, 35 / GC IV, 76, 86, 93 / P I, 75 / P II, 4, 5 / 1 CILS, 127] [IAC/NIAC]

**7.2.3.10 Judicial guarantees**

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict without a trial. The proceedings must be conducted by a regularly constituted court respecting the generally recognized principles of judicial procedure.

Judicial guarantees are discussed in detail in Section 9.7.

[GC I-IV, 3 / P I, 75 / P II, 6 / 1 CILS, 100] [IAC/NIAC]

## **7.2.4 Right to medical care**

### **7.2.4.1 Fundamental principles**

The wounded and sick in the power of a party to the conflict, including those who are interned/detained, must be collected and cared for by the armed forces. They must receive to the fullest extent practicable, and with the least possible delay, the medical care and attention required by their state of health.

There must be no distinction among the wounded and sick founded on any grounds other than medical ones. In other words, it is permitted to prioritize treatment for a medical reason, but it is prohibited to prioritize treatment based on race, sex, nationality, religion, political opinions, etc.

The wounded, sick and shipwrecked must be treated humanely, and protected in particular against ill-treatment and pillage of their personal property.

[GC I, 3, 12, 15 / GC II, 3, 12, 18 / GC III, 3, 15, 30, 31 / GC IV, 3, 16, 81, 85, 91, 92 / P I, 10, 11 / P II, 5, 7, 8 / 1 CILS, 109, 110, 111, 118 / BPPDI, 24, 26] [IAC/NIAC]

### **7.2.4.2 Wounded and sick in detention**

All persons deprived of their liberty have the right to the medical care and attention required by their condition. This right is inherent in the right to humane treatment.

[GC III, 3, 30, 31 / GC IV, 3, 76, 81, 85, 91, 92 / P II, 5, 7 / BPPDI, 24, 26 / 1 CILS, 118] [IAC/NIAC]

## **7.3 Internment of prisoners of war in international armed conflict**

This Section discusses the treatment of prisoners of war in an international armed conflict. The main law of armed conflict treaty governing the treatment of prisoners of war is the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949 (Third Geneva Convention).

### **7.3.1 Treatment: principles and rights**

#### **7.3.1.1 Basis for internment: POWs**

Prisoners of war may be interned.

[GC III, 21]

Prisoners of war are not “prisoners” in the traditional sense of being persons who have been found guilty of a crime. On the contrary, members of the armed forces of a party to an international armed conflict are granted “combatant privilege” – that is, they have the right to take direct part in hostilities against the opposing party's armed forces. They therefore cannot be punished for their mere participation in hostilities, but may be interned by the opposing party in order to prevent them from re-engaging in combat until the cessation of active hostilities. If they committed war crimes prior to their capture, or if they commit disciplinary offences during internment, they can be tried and punished for such offences. However, the conditions of internment for prisoners of war reflect the fact that, as a starting point, their mere participation in lawful hostilities against enemy armed forces is permissible and not subject to punishment.

[GC III, 21 / P I, 43, 44]

#### **7.3.1.2 Humane treatment**

Prisoners of war must be treated humanely at all times.

Prisoners of war are in the hands of the Detaining Power, and not of the individuals or military units who have captured them. The Detaining Power is responsible for the treatment given to them wherever they are, whether interned in camps or not.

[GC III, 12, 13]

#### **7.3.1.3 Protection against acts of violence**

Prisoners of war must be protected at all times, particularly against acts of violence or intimidation and against insults and public curiosity.

[GC III, 13]

#### **7.3.1.4 Respect**

Prisoners of war are entitled to respect for their persons and their honour.

[GC III, 14]

#### **7.3.1.5 No adverse distinction**

All prisoners of war must be treated alike, without any adverse distinction based on race, sex, nationality, religious belief or political opinion, or any other distinction founded on similar criteria.

[GC III, 16]

However, under the provisions of the Third Geneva Convention, some prisoners of war must be accorded privileged treatment appropriate to their state of health, rank, sex, age and professional qualification.

[GC III, 25, 29, 30, 39, 44, 45, 49, 55, 60, 88, 89, 97, 98, 108-110, 114,]

#### **7.3.1.6 Women**

Women must be treated with all the regard due to their sex and must in all cases benefit from treatment as favourable as that granted to men.

Women must be protected in particular against rape, forced prostitution and any other form of indecent assault.

[GC III, 3, 14, 16, 25, 29, 88, 97, 108]

#### **7.3.1.7 Children**

Children must be the object of special respect and must be protected against any form of indecent assault. They must be provided with the care and aid they require, whether because of their age or for any other reason.

[P I, 77]

#### **7.3.1.8 Maintenance**

The Detaining Power must provide, free of charge, for the maintenance of prisoners of war and for the medical attention required by their state of health.

[GC III, 15]

#### **7.3.1.9 No renunciation of rights**

Prisoners of war may not renounce their rights under the law of armed conflict in any circumstances.

[GC III, 7]

#### **7.3.1.10 Full civil capacity**

Prisoners of war retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise of the rights such capacity confers, except insofar as the captivity requires.

[GC III, 14]

### 7.3.2 Beginning of captivity

#### 7.3.2.1 Persons who are *hors de combat*

A fundamental rule of the law of armed conflict is that persons who are *hors de combat* must not be attacked and must be treated humanely.

[GC I, 3, 12 / GC II, 3, 12 / GC III, 3, 13 / GC IV, 3, 16 / P I, 10, 41, 42 / P II, 4, 7 / 1 CILS, 47, 87]

A person is *hors de combat* if:

- he is in the power of an adverse party,
- he clearly expresses an intention to surrender, or
- he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself,

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

[GI-IV, 3 / P I, 41 / 1 CILS, 47]

A person is protected from the instant he is *hors de combat*, i.e. even before being captured.

#### 7.3.2.2 Surrender: rule

An intention to surrender must be clearly expressed (e.g. raising arms, throwing away one's weapons, bearing a white flag, etc).

According to the ICRC Commentary, "in land warfare surrender is not bound by strict formalities." It is enough that the person indicates the intention to surrender in a clear manner. In addition, a person who is surrendering must not engage in any further hostile acts and must not attempt to escape.

[P I, 41 / 1 CILS, 47 / ICRC Commentary, P I, 41] [IAC/NIAC]

#### 7.3.2.3 Surrender: parachutist in distress

In all armed conflicts, it is prohibited to attack a person parachuting from an aircraft in distress, as he is *hors de combat*.

Such a person must be given an opportunity to surrender upon landing, unless it is apparent that he is engaging in a hostile act.

[P I, 42 / 1 CILS, 48] [IAC/NIAC]

#### 7.3.2.4 Capture: definition

Capture means to fall, with or without surrendering, into the power of the enemy/adverse party.

[GC III, 4 / P I, 41, 44 / ICRC Commentary, P I, 41] [IAC]

#### 7.3.2.5 Capture: rule

Combatants who are captured are prisoners of war and must not be attacked.

Prisoner-of-war status and treatment start at the moment of capture.

Prisoners of war must be spared and treated humanely at all times.

[GC III, 4, 5, 13 / P I, 44] [IAC]

#### 7.3.2.6 Capture: release when safe and humane evacuation is not possible

When the capturing unit is unable to meet the required conditions for evacuation of prisoners of war, which include a humane and safe evacuation, then the unit must release them and take all feasible precautions for their safety (e.g. providing water, food, means of signalling or providing information on their location).

For details on the required conditions of evacuation, see Chapter 10.

[P I, 41] [IAC]

#### 7.3.2.7 Capture: search

Captured combatants may be disarmed and searched.

Disarming includes the search for and the taking away of equipment and documents of military value (e.g. ammunition, maps, orders, telecommunication material and codes). Such material becomes war booty.

The following objects must remain with captured prisoners of war:

- documents for personal identification (e.g. identity card, identity disc);
- personal effects (e.g. watches, spectacles, water-bottles), eating utensils;
- objects for personal protection (e.g. ballistic vest, helmet, gas mask, medication against combat toxics); and
- articles of personal or sentimental value (e.g. photographs of relatives, prayer books).

[GC III, 18 / ICRC Commentary, GC III, 18] [IAC]

**7.3.2.8 Safety, protection, care**

While awaiting evacuation, captured combatants must:

- not be unnecessarily exposed to combat danger;
- not be compelled to engage in activities that are military in character or purpose;
- be protected against acts of violence, insults, intimidation and public curiosity; and
- be given the necessary care (e.g. first aid, additional or new clothing) and sufficient food and drink.

[GC III, 13, 15, 19, 20, 50] [IAC]

**7.3.2.9 Evacuation: temporary retention**

Only those persons who, owing to wounds or illness, would run a greater risk being evacuated than remaining where they are, may be temporarily kept back in a dangerous area.

[GC III, 19] [IAC]

**7.3.3 Arrival in camp****7.3.3.1 Identification**

If the prisoner of war's identity has not already been established during evacuation, it must be established shortly after arrival in the camp.

[GC III, 17 / ICRC Commentary, GC III, 17]

**7.3.3.2 Prisoners list**

A list of prisoners must be made without delay, if this was not already done during evacuation.

[GC III, 20]

**7.3.3.3 Doubtful status**

If doubt exists as to whether a captured person is entitled to prisoner-of-war status, he continues to benefit from the protection of prisoner-of-war status until his status has been determined by a competent tribunal. The competent tribunal may be an administrative tribunal or body constituted, for example, by a panel of officers, taking into account the necessity to render a decision at field level.

If a captured person is not held as a prisoner of war and is to be tried for an offence arising out of the hostilities, he has the right to assert his entitlement to prisoner-of-war status before a judicial tribunal.

[GC III, 5 / P I, 45]

#### 7.3.3.4 Mailing of capture card

Within one week of arrival in any camp (or upon transfer to another camp or hospital) prisoners of war must be allowed to write capture cards, namely:

- one directly to their family; and
- one directly to the ICRC's Central Tracing Agency.

The capture cards must provide information on their capture, address and state of health. They must be forwarded as rapidly as possible. It must be stressed that this rule applies to any camp, including transit camps.

[GC III, 70, 123, Annex IV, B]

### 7.3.4 Internment camps, location, and quarters

#### 7.3.4.1 Prisoner-of-war camps

Internment should take place, as a rule, in prisoner-of-war camps. Except in particular cases which are justified by the interests of the prisoners themselves, prisoners of war must not be interned in penitentiaries.

[GC III, 22]

#### 7.3.4.2 Camps: not in combat areas

Prisoners of war must be held in camps situated far enough from the combat zone for them to be out of danger. The presence of prisoners of war may not be used to render certain points or areas immune from military operations.

[GC III, 19, 23]

#### 7.3.4.3 Camps: health and hygiene

Prisoners of war interned in unhealthy areas, or where the climate is harmful to them, must be moved as soon as possible to a more favourable climate.

Prisoner-of-war camps must provide every guarantee of hygiene and health.

[GC III, 22, 29]

#### 7.3.4.4 Camps: on land

Prisoner-of-war camps must be located on land.

[GC III, 22]

#### 7.3.4.5 Camps: shelters

Prisoner-of-war camps must include shelters against aerial bombardment and other hazards of war, to the same extent as provided for the local civilian population.

[GC III, 23]

**7.3.4.6 Camps: fences and guards**

Prisoner-of-war camps may be fenced in and guarded.

[GC III, 21]

**7.3.4.7 Camps: information on location**

Detaining Powers must give the parties concerned (belligerents, and neutrals as far as appropriate), all useful information regarding the geographical location of prisoner-of-war camps, through the intermediary of the ICRC.

[GC III, 23]

**7.3.4.8 Camps: marking**

Whenever military considerations permit, prisoner-of-war camps must be marked by the letters PW or PG, placed so as to be clearly visible in daytime from the air. PW means Prisoner of War; PG means *Prisonnier de Guerre* (French) or *Prisionero de Guerra* (Spanish).

The powers concerned may, however, agree upon any other system of marking. Only prisoner-of-war camps can be marked as such.

[GC III, 23]

**7.3.4.9 Transit camps**

Transit or screening camps of a permanent kind must provide the same facilities, and the prisoners there must have the same treatment, as in regular camps.

[GC III, 24]

**7.3.4.10 Quarters: rule**

The quarters of prisoner-of-war camps must be as favourable as those for the armed forces of the Detaining Power which are located in the same area.

The conditions must make allowance for the habits and customs of the prisoners of war and must in no case be prejudicial to their health.

[GC III, 25]

**7.3.4.11 Quarters: according to nationality**

Prisoners of war must be assembled in quarters according to their nationality, language and customs. Prisoners of war who served in the same armed forces must not be separated, except with their consent.

[GC III, 22]

#### **7.3.4.12 Quarters: women**

Women's quarters must be separated from men's quarters. They must be under the immediate supervision of women.

[GC III, 25]

#### **7.3.4.13 Quarters: children**

Children's quarters must be separated from adults' quarters, except where families are accommodated as family units.

[P I, 77]

#### **7.3.4.14 Quarters: close confinement**

Close confinement is prohibited, except:

- when provided for by the provisions relative to penal and disciplinary sanctions; or
- when necessary for the health of the prisoners of war, and then only during the circumstances which make such confinement necessary.

[GC III, 21, 87, 89, 90, 95, 98, 103, 108]

### **7.3.5 Health**

#### **7.3.5.1 Food and clothing**

Daily food and clothing must be sufficient to keep prisoners of war in good health (e.g. in quantity and quality, adapted to climate).

Account must be taken of the habitual diet of the prisoners.

[GC III, 26, 27]

#### **7.3.5.2 Toilets**

Prisoners of war must at all times have the use of hygienic toilets. In any camps in which women prisoners of war are accommodated, separate toilets must be provided for them.

[GC III, 29]

#### **7.3.5.3 Medical service**

Every prisoner-of-war camp must have an adequate infirmary where prisoners of war are able to obtain the medical attention they require. Isolation wards must, if necessary, be set aside for cases of contagious or mental disease.

Prisoners of war suffering from serious diseases, or whose condition necessitates special treatment, surgical operations or hospital care, must be

transferred and admitted to a military or civilian medical unit where such treatment can be given.

Special facilities must be provided for the care of the disabled and for their rehabilitation, pending repatriation.

Medical inspections of prisoners of war must be held at least once a month. They must include the checking of the weight of each prisoner of war.

The purpose of these medical inspections must be, in particular, to supervise the general state of health, nutrition and cleanliness of prisoners of war and to detect contagious diseases. For this purpose, the most efficient methods available must be employed.

[GC III, 30, 31]

#### **7.3.5.4 Physical exercise, recreation**

Prisoners of war must be given the opportunity to take physical exercise and to practise intellectual, educational, sporting and recreational activities.

The Detaining Power must provide adequate premises and the necessary equipment.

[GC III, 38]

### **7.3.6 Religious observance**

#### **7.3.6.1 Religious services**

Adequate premises must be provided for religious services. Prisoners of war must be allowed to practise their religion.

This includes attending a service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Prisoners of war must be allowed to receive by post or by any other means individual parcels or collective shipments containing religious articles (books, devotional articles, etc.).

Religious assistance may be given by: a) captured and retained enemy military religious personnel; b) prisoners of war who are ministers of religion, without having been military religious personnel in their own armed forces; or c) qualified ministers or laymen appointed at the request of the prisoners of war and approved by the Detaining Power.

[GC III, 34-37, 72]

## 7.3.7 Financial matters and work

### 7.3.7.1 Financial resources

The Detaining Power must grant all prisoners of war a monthly advance of pay and keep an account for each prisoner of war.

[GC III, 58, 60, 61, 64-66]

### 7.3.7.2 Work: rule

Prisoners of war may be assigned to work as follows:

- they must be physically fit;
- non-commissioned officers can only be required to do supervisory work; and
- officers may not be compelled to work.

[GC III, 49]

### 7.3.7.3 Work: nature of

The following rules apply to work by prisoners of war.

- A fair working rate must be paid.
- The work must not have a military character or purpose.

Examples of permissible work include: work connected with camp administration or maintenance, agriculture, food industry, public works and building operations which have no military character or purpose, commercial business, and arts and crafts.

- Prisoners of war must receive training and be provided with the means of protection suitable to the work they do.
- Working conditions must not be inferior to those of the nationals of the Detaining Power. The Detaining Power must ensure that national legislation concerning the protection of labour and regulations for the safety of workers are applied.
- Unless he is a volunteer, no prisoner of war may be employed on work which is of an unhealthy or dangerous nature. The removal of mines, booby-traps and other devices shall in particular be considered as dangerous labour.
- No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces.

[GC III, 50, 51, 52, 62]

### **7.3.8 Law and order**

#### **7.3.8.1 Camp commander**

A prisoner-of-war camp must be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power. This officer must have in his possession a copy of the Third Geneva Convention and its Annexes.

The officer must ensure that its provisions are known to the camp staff and is responsible, under the direction of his government, for its application.

[GC III, 39]

#### **7.3.8.2 Law of armed conflict texts**

In every prisoner-of-war camp the text of the Third Geneva Convention and its Annexes must be posted in the prisoners' own language in places where all may read them. Copies must be supplied on request to the prisoners who do not have access to the posted copy.

Regulations, orders, notices and publications relating to the conduct of prisoners of war must be issued to them in a language they understand and must be posted in places where all may read them, and copies must also be handed to the prisoners' representative.

[GC III, 41]

#### **7.3.8.3 Use of weapons**

The use of weapons against prisoners of war, especially against those who are attempting to escape, constitutes an extreme measure which must always be preceded by warnings appropriate to the circumstances.

[GC III, 42]

#### **7.3.8.4 Requests concerning conditions of captivity**

Prisoners of war have the right to make known to the military authorities in whose power they are their requests regarding the conditions of captivity to which they are subjected.

[GC III, 78]

#### **7.3.8.5 Prisoners' representatives**

Prisoners of war may freely elect prisoners' representatives.

Where there are officers, the senior officer shall act as the prisoners' representative.

Prisoner-of-war representatives are entrusted with representing fellow prisoners before military authorities and external bodies (e.g. the International Committee of the Red Cross, or any other organization which may assist them).

[GC III, 79-81]

### **7.3.9 Disciplinary sanctions**

#### **7.3.9.1 Applicable law**

Prisoners of war are subject to the laws, regulations and orders in force for the armed forces of the Detaining Power. The Detaining Power is justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders.

However, punishments contrary to the provisions of the Third Geneva Convention, such as collective punishment for individual acts, imprisonment in premises without daylight, corporal punishment or any form of torture or cruelty are prohibited.

The following paragraphs address disciplinary punishments for prisoners of war. For a discussion of judicial proceedings against prisoners of war, see 9.7.2.

[GC III, 82, 87]

#### **7.3.9.2 Competent authority**

The camp commander has the authority to impose disciplinary sanctions for violations by prisoners of war of disciplinary rules. That authority may be delegated to a deputy or other officer. In no circumstances may that authority be delegated to a prisoner of war.

[GC III, 96]

#### **7.3.9.3 Procedure**

The accused prisoner of war is entitled to information regarding the alleged offence, must be given the opportunity to defend himself, and has the right to call witnesses and the right to an interpreter. A record of all disciplinary punishments must be maintained and be open to inspection, for example by the ICRC.

[GC III, 96]

#### **7.3.9.4 Permitted disciplinary punishments**

The following disciplinary punishments may be applied to prisoners of war:

- a fine which must not exceed 50% of the advances of pay and working pay during a period of not more than thirty days;

- discontinuance of privileges (but only those granted over and above the treatment provided for by the Third Geneva Convention);
- fatigue duties not exceeding two hours daily (not applicable to officers); or
- confinement.

[GC III, 60, 62, 89 / ICRC Commentary, GC III, 89]

### 7.3.9.5 Disciplinary punishments: limitations

Disciplinary punishments:

- must never be inhuman, brutal or dangerous to the health of prisoners of war;
- must be limited to 30 days; and
- must not be more severe than the disciplinary punishments applied to members of the Detaining Power's armed forces of equivalent rank.

A prisoner of war may not be transferred to a prison or penitentiary for a disciplinary punishment.

A prisoner of war undergoing disciplinary punishment must:

- continue to receive the same benefits as other prisoners of war except insofar as they are rendered inapplicable by the mere fact of confinement, including ICRC visits (without restriction);
- be allowed to exercise at least 2 hours per day in the open air;
- receive the same medical inspections as other prisoners of war; and
- be allowed to read and write, and to receive and send letters.

[GC III, 89, 90, 98]

### 7.3.9.6 Escape, attempted escape

It is justified to use force to prevent a POW from escaping. Nevertheless, the use of force against a person who is attempting to escape "is only lawful to the extent the circumstances require."

The use of force against a prisoner of war who is attempting to escape is an extreme measure and must always be preceded by warnings appropriate to the circumstances. It is only lawful to kill a person who is attempting to escape "if there is no other way to prevent escape in the circumstances."

A prisoner of war who is recaptured during an attempt to escape must receive only disciplinary punishment, even if it is a repeated offence. A prisoner who makes good his escape and is subsequently captured cannot be punished for that act.

[ICRC Commentary, P I, 41 / GC III, 42, 91, 92 / P I, 41] [IAC]

### **7.3.10 Contact with the outside world**

#### **7.3.10.1 Correspondence, relief supplies**

Prisoners of war must be allowed to:

- send and receive letters and cards; and
- receive individual parcels or collective shipments.

The censoring of correspondence and the examination of consignments for prisoners of war must be done as quickly as possible and without exposing the goods to deterioration.

[GC III, 71-73, 76]

#### **7.3.10.2 Legal documents**

The preparation, transmission and execution of legal documents must be facilitated (e.g. powers of attorney, wills). In particular, prisoners of war must be allowed to consult a lawyer (another prisoner of war or a national of the Detaining Power).

[GC III, 77 / ICRC Commentary, GC III, 77]

#### **7.3.10.3 International Committee of the Red Cross**

Representatives of the International Committee of the Red Cross must:

- have access to all places and premises where prisoners of war are;
- be allowed to visit prisoners of war being transferred;
- be allowed to interview prisoners of war without witnesses, either personally or through an interpreter;
- have full liberty to select the time they wish to visit; in this respect it must be stressed that the duration and frequency of these visits must not be restricted, except for reasons of imperative military necessity, and then only as an exceptional and temporary measure; and
- receive notification of arrests, transfers and releases.

[GC III, 123, 126 / P I, 81]

#### **7.3.10.4 Liaison with external bodies**

The prisoner-of-war camp administration must ensure the necessary liaison with external bodies (e.g. National Information Bureau, Graves Registration Service, International Committee of the Red Cross).

[GC III, 8, 9, 120-124]

### 7.3.10.5 Reports

The National Information Bureau (see Chapter 3, N) must be sent:

- a list of prisoners and other initial recorded data on the identity of captured persons (e.g. capture card, reports on state of health);
- information on all transfers, releases, repatriations, escapes, recaptures, admissions to hospital and deaths; and
- information at least once a week on prisoners of war who are seriously sick or seriously wounded.

The Bureau must immediately forward such information by the most rapid means to the Powers concerned, through the ICRC and the Central Tracing Agency.

[GC I, 16 / GC II, 19 / GC III, 94, 120, 122]

## 7.3.11 Transfer, release, and repatriation

### 7.3.11.1 Transfer to another party to the conflict

Prisoners of war may only be transferred by the Detaining Power to a power which is a party to the Third Geneva Convention, and only after the Detaining Power has satisfied itself of the willingness and ability of such transferee power to apply the Convention.

If nevertheless that power fails to carry out the provisions of the Convention in any important respect, the transferring power must take effective measures to correct the situation or must request the return of the prisoners of war.

[GC III, 12]

### 7.3.11.2 Transfer to a neutral State

Parties to the conflict and neutral parties must endeavour to make arrangements for the internment in neutral States of seriously wounded or sick prisoners of war and of those who have recovered but whose mental or physical fitness is permanently gravely diminished, as well as those who have undergone a long period of captivity.

[GC III, 109-111, Annex I (model agreement)]

### 7.3.11.3 End of captivity: direct repatriation during hostilities

Parties to a conflict must return to their State of origin prisoners of war who are seriously wounded or sick, after having cared for them until they are fit to travel (e.g. the incurably wounded and sick, or prisoners whose mental or physical fitness has been gravely and permanently diminished).

However, no such prisoner of war may be repatriated against his will during hostilities. The belligerent parties may, in addition, conclude agreements for

the direct repatriation of able-bodied prisoners of war who have undergone a long period of captivity.

POWs repatriated during hostilities are prohibited from subsequently re-enlisting in active military service.

[GC III, 109, 110, 117, Annex I (model agreement)]

#### **7.3.11.4 Mixed Medical Commissions**

The parties to a conflict must establish Mixed Medical Commissions to examine sick and wounded prisoners of war and make the appropriate decisions regarding direct repatriation. However, prisoners of war who, in the opinion of the Detaining Power, are manifestly seriously injured or seriously sick, may be directly repatriated without having to be examined by a Mixed Medical Commission.

[GC III, 112, 113, Annex II]

#### **7.3.11.5 End of captivity: successful escape**

An escape is considered successful when a prisoner of war:

- has joined his own armed forces or allied forces;
- has left the territory that is under the control of the Detaining Power or of its allies; or
- has joined a ship flying the flag of his own party or of an allied party.

Prisoners of war who have made good their escape and who are recaptured shall not be liable to any punishment in respect of their previous escape.

[GC III, 91]

#### **7.3.11.6 End of captivity: at the end of hostilities**

Prisoners of war must be released and repatriated without delay after the cessation of active hostilities.

Prisoners of war cannot be forcibly repatriated if they fear persecution or other violations of fundamental rights in their home country. If they refuse repatriation and are released, they lose their POW status and the protections it confers, and if kept in prison they become civilian internees.

Prisoners of war against whom criminal proceedings are pending may be detained until the end of such proceedings, and if necessary until the end of the completion of a prison sentence. The same applies to prisoners of war already convicted of a criminal offence before the end of the conflict.

Prisoners of war who are retained against their will continue to have the benefit of prisoner-of-war status and all the protections of that status until they are released or repatriated.

[GC III, 5, 118, 119 / GC IV 6 (4) / P I, 85 / ICRC Commentary, GC III, 118 / 1 CILS, 128]

### **7.3.12 Deaths**

#### **7.3.12.1 Wills**

Wills of prisoners of war must be drawn up so as to satisfy the conditions of validity required by the legislation of their State of origin. At the request of the prisoner of war, and, in all cases, after death, the wills must be transmitted without delay to the Central Tracing Agency of the ICRC (see Chapter 3, C).

[GC III, 120]

#### **7.3.12.2 Medical examination**

A medical examination must precede the burial or cremation of a deceased prisoner of war, with a view to confirming the death and enabling a report to be made and, where necessary, establishing their identity.

[GC III, 120]

#### **7.3.12.3 Burial**

The burial must be carried out honourably and, if possible, according to the rites of the religion to which the dead person belonged.

[GC III, 120]

#### **7.3.12.4 Graves**

The graves must be respected, properly maintained and marked so as to be found at any time. Wherever possible, dead persons of the same nationality must be buried in the same place.

[GC III, 120]

#### **7.3.12.5 Cremation**

Cremation must only take place:

- for imperative reasons of hygiene;
- on account of the religion of the deceased; or
- in accordance with the deceased's express wish to this effect.

The ashes must be forwarded to and kept by the Graves Registration Service (see Chapter 3, G) until proper disposal thereof in accordance with the wishes of the home country.

[GC III, 120]

#### **7.3.12.6 Death certificates**

Death certificates or lists (certified by a responsible officer) of all persons who died as prisoners of war must be forwarded as rapidly as possible to the National Information Bureau (see Chapter 3, N).

[GC III, 120, Annex IV, D]

#### **7.3.12.7 Personal effects**

One half of the double identity disc, documents of importance to the next of kin, money, and articles of an intrinsic or sentimental value must be sent in sealed packets to the National Information Bureau.

[GC I, 16 / GC II, 19 / GC III, 122]

#### **7.3.12.8 Official inquiries**

Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war or any other person, as well as any death the cause of which is unknown, must be immediately followed by an official inquiry by the Detaining Power. A communication must be sent immediately to the Protecting Power or to the ICRC. If the inquiry indicates the guilt of one or more persons, the Detaining Power must take all measures for the prosecution of the person(s) responsible.

[GC III, 121]

#### **7.3.12.9 Reports**

All particulars of burials, graves, cremations and any subsequent transfer of mortal remains must be recorded with the Graves Registration Service (see Chapter 3, G).

[GC III, 120]

### **7.4 Internment of civilians and other protected persons in international armed conflict**

This Section addresses the rules governing the internment of civilians and other persons protected by the Fourth Geneva Convention during international armed conflict. As set out in 7.1.1.8, this Convention provides specific protections for the category of persons who have historically been most

vulnerable to abuse, namely nationals of a party to conflict who are in enemy or enemy-occupied territory.

These rules should be read in conjunction with Section 7.2, and additional guidance is provided in Section 7.5.

Subsection 7.4.1 sets out the specific rules for the internment of civilians and other protected persons who are aliens in an opposing party's own territory.

Subsection 7.4.2 sets out the specific rules for the internment of civilians and other protected persons in territory occupied by an opposing party.

### **7.4.1 Internment of civilians and other protected persons in the territory of a party to the conflict (IAC)**

#### **7.4.1.1 Basis for internment/administrative detention**

The legal basis for the internment of protected persons in a party to the conflict's own territory is the Fourth Geneva Convention. It stipulates that protected persons may be interned or placed in assigned residence only when absolutely necessary for the security of the Detaining Power.

[GC IV, 41, 42]

#### **7.4.1.2 Detention of protected persons related to criminal proceedings (in the opposing party's own territory)**

In addition to internment, protected persons in the territory of a party to the conflict may be confined pending penal proceedings or while serving a sentence involving the deprivation of liberty.

An example of this would be a protected person who is serving a sentence for robbery at the outbreak of the armed conflict.

The normal domestic legislation regarding aliens in time of peace applies to such protected persons. International human rights law also applies.

[GC IV, 38]

#### **7.4.1.3 Decisions: reconsideration**

With regard to procedural rights, the Fourth Geneva Convention states that a protected person who is interned or placed in assigned residence has the right to have the internment or placement in assigned residence reconsidered as soon as possible by an appropriate court or administrative board.

In addition, the court or administrative board must reconsider the case at least twice a year with a view to favourably amending the initial decision if circumstances permit.

[GC IV, 43]

#### **7.4.1.4 Release as soon as possible**

Persons interned for reasons related to an armed conflict must be released with the minimum delay possible, and in any event as soon as the circumstances justifying the interment have ceased to exist.

[GC IV, 132]

#### **7.4.1.5 Retention of civilian internees after the armed conflict for criminal proceedings**

Civilian internment must cease as soon as possible after the close of hostilities, if not before.

However, a party to an armed conflict may continue to detain those civilian internees against whom criminal proceedings (other than disciplinary proceedings) are pending, until the close of such proceedings, or until they have served their sentences. A party may also continue to detain internees previously sentenced for crimes until the end of their sentences.

Protected persons who are detained continue to be entitled to all the protections accorded to them by the Fourth Geneva Convention until their final release, repatriation or re-establishment.

[GC IV, 6, 133]

#### **7.4.1.6 Return to last place of residence, repatriation**

The parties to the conflict must endeavour to ensure the return of all internees to their last place of residence, or to facilitate their repatriation. However, in accordance with the principle of *non-refoulement* (no forcible return), they cannot be sent to any country, including their last place of residence, where they face persecution, the risk of serious human rights violations, or the risk of being transferred afterwards to a State that may violate those rights.

For specific provisions on the responsibility for costs of repatriation, consult the reference below.

[GC IV, 134, 135]

**7.4.1.7 Internment: State responsibility**

A State party to an armed conflict is responsible for the treatment by its agents of the protected persons in its power, regardless of any individual criminal responsibility that may be incurred.

[GC IV, 29]

**7.4.1.8 Analogy with prisoners of war**

In general, the rules concerning the treatment of civilian internees and conditions in places of internment are similar to those for prisoners of war (Section 9.3). For details, see Articles 79-135 of the Fourth Geneva Convention. However, there are some important differences, several of which are indicated in the following paragraphs.

[GC IV, 79-135]

**7.4.1.9 Detention separate from prisoners of war**

Civilian internees should not be held together with prisoners of war or with persons deprived of their liberty for other reasons.

[GC IV, 84]

**7.4.1.10 Care of dependents while interned**

The Detaining Power must provide for the support of internees' dependents if the dependents are without adequate means of support or unable to make a living.

[GC IV, 81]

**7.4.1.11 Children and families**

Members of the same family and parents and children must be housed together in the same place of internment. Internees may request that their children who are left without parental care be interned with them. Wherever possible, interned members of the same family must be housed in the same premises and given separate accommodation from other internees.

Education must be provided for interned children or they must be allowed to attend school outside the place of internment.

[GC IV, 82, 94]

#### **7.4.1.12 Prohibition of compulsory work**

Civilian internees must not be forced to work.

[GC IV, 95]

#### **7.4.1.13 Marking of internment camps**

Internment camps must, whenever military considerations permit, be marked by the letters "IC", placed so as to be clearly visible from the air in daytime. Only civilian internee camps may be marked as such.

The parties concerned may, however, agree upon any other system of marking.

[GC IV, 83]

### **7.4.2 Internment of civilians and other protected persons in occupied territory (IAC)**

This subsection addresses the rules for the internment of protected persons in occupied territory. The other rules related to occupation are discussed in Chapter 12.

#### **7.4.2.1 Basis for internment/administrative detention**

The legal basis for internment of protected persons in occupied territory is the Fourth Geneva Convention. It stipulates that protected persons may be interned or placed in assigned residence only if it is necessary for imperative reasons of security.

[GC IV, 78]

#### **7.4.2.2 Detention of protected persons in occupied territory pending criminal prosecution or trial**

The laws of occupation permit the detention, pending trial or in execution of a sentence, of protected persons in occupied territory who are accused of violating penal legislation enacted by the Occupying Power. For details of such penal provisions, see 12.2.1.

[GC IV, 76, 69]

#### **7.4.2.3 Decisions: reconsideration**

The Fourth Geneva Convention states that decisions regarding assigned residence or internment must be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of this Convention.

In particular, persons assigned to residence or interned by decision of the Occupying Power must be permitted to appeal against the decision and to have it reconsidered as soon as possible by an appropriate court or administrative board.

The decisions are subject to appeal and must be periodically reviewed by such a court or board, if possible every six months.

[GC IV, 78]

#### **7.4.2.4 Analogy with prisoners of war; same conditions as for civilian internees in the belligerent party's own territory**

The rules for the treatment of civilian internees in occupied territory are identical to those set out above (see 7.4.1) for foreign nationals interned in a party to the conflict's own territory, and thus likewise largely similar to those for prisoners of war (see Section 7.3).

[GC IV, 79-135]

### **7.5 Procedural principles and safeguards of internment/administrative detention (all armed conflicts)**

As seen above, the law of international armed conflict sets out rules concerning the reasons for internment, procedural guarantees and conditions of internment for civilians and other protected persons in the territory of a party to a conflict and in occupied territory. In contrast, apart from provisions requiring humane treatment, the law of non-international armed conflict does not contain similarly specific rules for internment/administrative detention. The ICRC's institutional position outlined below, which is based on both law and policy, was developed primarily with a view to addressing this gap.

Subsections 7.5.1 and 7.5.2 respectively set out the general principles and procedural safeguards for internment/administrative detention during an armed conflict, regardless of its legal classification. They are thus complementary to the Fourth Geneva Convention's provisions on internment, which are discussed in Section 7.4 above.

["International humanitarian law and the challenges of contemporary armed conflict", official working document of the 30th International Conference of the Red Cross and Red Crescent, Geneva, 26 to 30 November 2007, Annex I: Jelena Pejic, "Procedural safeguards for internment/administrative detention in armed conflict and other situations of violence". (RC Annex)]

## 7.5.1 General principles

### 7.5.1.1 Exceptional measure

Internment/administrative detention is an exceptional measure.

Internment/administrative detention is a severe measure of control that may only be taken when a person's activity is deemed to represent a serious threat to the security of the detaining authority.

[RC Annex, pp. 380-81 / GC IV, 42, 78] [IAC/NIAC]

### 7.5.1.2 Principle of legality

Internment/administrative detention must conform to the principle of legality.

The principle of legality means that a person may only be interned or administratively detained on grounds and according to the procedures set out in national and/or international law.

[RC Annex, p. 383 / GC IV, 41-43, 78, 79 / ICCPR, 4, 9] [IAC/NIAC]

### 7.5.1.3 Case-by-case basis

Internment/administrative detention can only be ordered on an individual case-by-case basis.

The internment of an entire population, group or class of persons without an individual decision would violate the prohibition on collective punishment which applies in both international and non-international armed conflicts.

[RC Annex, pp. 381-82 / GC IV, 33, 78 / P I, 75 / P II, 4 / 1 CILS, 103] [IAC/NIAC]

### 7.5.1.4 Non-discrimination

Decisions on internment/administrative detention must not be made on a discriminatory basis.

The principle of non-discrimination is a fundamental principle of both the law of armed conflict and human rights law.

[RC Annex, pp. 381-82 / GC I, 3 / GC II, 3 / GC IV, 3, 13, 27 / P I, Preamble, 75 / P II, 2, 4 / 1 CILS, 88 / ICCPR, 2] [IAC/NIAC]

### 7.5.1.5 Duration

Internment/administrative detention must cease as soon as the reasons for it no longer exist.

Internment must cease as soon as the individual in question no longer poses a serious threat to the security of the detaining authority. The longer internment lasts, the greater the onus on a detaining authority to prove that the reasons for it remain valid.

[RC Annex, pp. 382-83 / GC IV, 132 / P I, 75 / ICCPR, 9] [IAC/NIAC]

## **7.5.2 Procedural safeguards**

### **7.5.2.1 Right to information about reasons for internment/detention**

Every person who is interned/administratively detained "must be informed promptly, in a language he or she understands", of the reasons for the internment/detention.

The right to information is crucial, as it enables the person involved to challenge the lawfulness of his or her detention.

[RC Annex, p. 384 / P I, 75 / ICCPR, 9 / BPPDI, 10, 11, 12, 14] [IAC/NIAC]

### **7.5.2.2 Right to be registered and held in a recognized place of detention**

Every person who is interned/administratively detained has a right to be registered and held in an officially recognized place of internment/administrative detention.

The law of international armed conflict contains numerous provisions and extensive requirements concerning the registration of persons interned, notification to their country's authorities and to their families, and ICRC visits to places of detention.

Human rights law and soft-law standards contain similar provisions which are applicable in a non-international armed conflict.

[RC Annex, pp. 384-85 / GC IV, 106, 107, 136, 137, 138, 143 / BPPDI, 12, 16] [IAC/NIAC]

### **7.5.2.3 Foreign nationals**

The national authorities of a foreign national who is interned/administratively detained must be informed of the internment/detention, unless the person concerned has expressed a wish to the contrary.

Diplomatic or consular authorities must be allowed to communicate with and visit persons who are interned or administratively detained.

[RC Annex, p. 385 / Vienna Convention on Consular Relations, 36 / GC IV, 136-141] [IAC/NIAC]

#### **7.5.2.4 Right to challenge lawfulness of detention**

Every person who is interned/administratively detained has the right to challenge, with the least possible delay, the lawfulness of his or her detention.

The purpose of a challenge to lawfulness of detention is to enable a competent body to determine whether a person has been interned/administratively detained for valid reasons, and to order release if that was not the case.

[RC Annex, pp. 385-86 / GC IV, 43, 78 / ICCPR, 9 / BPPDI, 32 / Human Rights Committee, General Comment 29, para. 16] [IAC/NIAC]

#### **7.5.2.5 Review by an independent and impartial body**

The lawfulness of internment/administrative detention must be reviewed by an independent and impartial body.

This body must have the authority to render a final decision and, where required by that decision, to order the release of the internee/detainee.

In an international armed conflict, a court or an administrative board may conduct the review. In a non-international armed conflict, the competent body will be determined by reference to national and/or international law.

If a person is kept in internment/administrative detention after a final release order has been issued, such detention may be considered arbitrary.

[RC Annex, pp. 386-87 / GC IV, 43, 78 / ICRC Commentary, GC IV, 78 / ICCPR, 9] [IAC/NIAC]

#### **7.5.2.6 Right to periodic review**

A person interned/administratively detained has the right to periodic review of the lawfulness of continued detention.

The purpose of a periodic review is to determine whether the detainee continues to pose a serious threat to the security of the detaining power, and to order release if that is not the case.

In an international armed conflict, the review must take place at least every six months. In a non-international armed conflict, national law and/or international law will govern the periodicity of review.

[RC Annex, pp. 388-89 / GC IV, 43, 78 / BPPDI, 32] [IAC/NIAC]

**7.5.2.7 Legal assistance**

An internee/administrative detainee should be allowed to have legal assistance.

While this principle is not explicitly set out in either the law of armed conflict or human rights treaty law, it is provided for in soft law (the BPPDI). There may also be provisions related to the right to counsel in the national law of the detaining authority.

[RC Annex, p. 388 / BPPDI, 17, 18] [IAC/NIAC]

**7.5.2.8 Attendance by counsel and internee/administrative detainee at review proceedings**

An internee/administrative detainee and his or her legal representative should be permitted to attend the proceedings in person.

This includes the initial review of the detention and subsequent periodic reviews.

[RC Annex, p. 389] [IAC/NIAC]

**7.5.2.9 Correspondence, family visits**

Any person interned/administratively detained must be permitted to correspond with and be visited by members of his or her family.

[RC Annex, pp. 389-90 / GC IV, 106, 107, 116 / P II, 5 / BPPDI, 19 / 1 CILS, 125, 126] [IAC]

The preservation of family contacts is one of the main aims of the law of armed conflict. It is subject to only very few exceptions (in international armed conflict, see Article 5 of the Fourth Geneva Convention and Article 45(3) of Additional Protocol I). Human rights treaty law is less specific, but jurisprudence and soft law have also determined that family contacts must be preserved, subject to reasonable limitations.

[GC IV, 5 / ICRC Commentary, GC IV, 5] [IAC]

**7.5.2.10 Medical care**

Every person who is interned/administratively detained has the right to the medical care and attention required by his or her condition.

This rule is relevant here because the state of a person's health is obviously a prerequisite for his or her ability to claim most of the procedural rights listed above.

[RC Annex, p. 390 / GC IV, 3, 81, 91, 92 / P II, 5 / BPPDI, 24, 26 / 1 CILS, 118]  
[IAC/NIAC]

#### **7.5.2.11 Right to make submissions concerning treatment to detaining authorities**

Every person who is interned/administratively detained must be allowed to submit requests or complaints to the detaining authorities relating to his or her treatment and conditions of detention.

[RC Annex, p. 391 / GC IV, 101 / BPPDI, 33] [IAC/NIAC]

#### **7.5.2.12 ICRC access**

In an international armed conflict, the detaining authority must permit ICRC visits to all persons interned or detained in relation to the armed conflict.

The ICRC must have access to all premises occupied by protected persons and must have full liberty to select the places it wishes to visit.

The ICRC must be permitted to interview all protected persons without witnesses, either with or without an interpreter.

The frequency and length of visits must not be restricted.

The visits must not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

In a non-international conflict the ICRC may offer its services and conclude agreements with the detaining authority on visits to persons deprived of their liberty in relation to the armed conflict.

[RC Annex, p. 391 / GC IV, 3, 143 / Statutes of the International Red Cross and Red Crescent Movement, 5 / 1 CILS, 124]

### **7.6 Retention of medical personnel (all armed conflicts)**

In international armed conflicts the rule is that medical personnel are not prisoners of war and must be repatriated as soon as possible, unless they are needed to care for the wounded, sick or shipwrecked. There are no similar rules concerning the retention of medical personnel in non-international armed conflicts. Such personnel are entitled to the same fundamental protections as any other person in the power of a party to the conflict.

## **7.6.1 Armed conflicts**

### **7.6.1.1 Basic principle**

Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. This protection also applies to civilian medical personnel.

They lose their protection only if they commit, outside their humanitarian duties, acts harmful to the enemy.

[GC I, 24-26 / GC II, 36 / GC IV, 20 / P I, 15 / 1 CILS, 25 / P II, 9] [IAC/NIAC]

### **7.6.1.2 Continuation of medical duties [IAC]**

Retained medical personnel must continue to carry out, in accordance with their professional ethics, their medical duties on behalf of prisoners of war, preferably those of the armed forces to which they belong, as long as the capturing force does not itself ensure the necessary care of the wounded and sick in its hands.

They must be authorized to make periodic visits to prisoners of war in labour units or hospitals outside the camps.

They must not be required to perform any work other than their medical duties.

[GC I, 28 / GC II, 37 / GC III, 33] [IAC]

### **7.6.1.3 Continued performance of medical duties [NIAC]**

In a non-international armed conflict governed by Additional Protocol II, medical personnel exclusively assigned to medical duties must be granted all available help for the continued performance of their medical duties.

[P II, 9] [NIAC]

All available help must be given to civilian medical personnel in an area where civilian medical services are disrupted because of combat activity.

[P I, 15] [IAC]

### **7.6.1.4 No punishment for performing medical duties**

Medical personnel must not be punished for performing their medical duties or compelled to perform acts contrary to medical ethics. This rule also applies to civilian medical personnel.

[1 CILS, 26 / P I, 16 / P II, 10] [IAC/NIAC]

### **7.6.1.5 Evacuation and repatriation of medical personnel.**

For the rules concerning evacuation of medical personnel, see Section 10.3.

## **7.6.2 Specific rules in international armed conflicts**

### **7.6.2.6 Legal status**

Captured enemy military medical personnel exclusively assigned to medical duties are not prisoners of war.

Nevertheless, they must at least benefit from all provisions of the 1949 Geneva Convention relative to the Treatment of Prisoners of War.

[GC I, 28 / GC III, 33] [IAC]

### **7.6.2.7 Auxiliary medical personnel**

Captured enemy auxiliary military medical personnel are prisoners of war and may be retained, but must be employed in their medical duties insofar as the need arises.

[GC I, 25, 29] [IAC]

### **7.6.2.8 Hospital ships**

Medical personnel of hospital ships and their crews may not be captured during the time they are serving on these ships.

This rule applies whether or not there are wounded, sick or shipwrecked on board.

[GC II, 36] [IAC]

### **7.6.2.9 Retention of enemy medical personnel**

Captured enemy medical personnel are not prisoners of war and must be repatriated.

They may be retained only insofar as the state of health and number of prisoners of war require. Pending repatriation, they must at least benefit from all the provisions related to prisoners of war.

The parties to the conflict must make arrangements for relieving, where possible, retained medical personnel.

The selection of enemy military medical personnel for repatriation must be made irrespective of any consideration of race, religion or political opinion,

but preferably according to the chronological order of their capture and their state of health.

[GC I, 24, 26, 28, 30, 31, 32, 36, 37]

## **7.7 Retention of religious personnel (all armed conflicts)**

The basic rule in all armed conflicts is that religious personnel, assigned exclusively to religious duties, whether military or civilian, must be respected and protected in all circumstances.

They lose their protection only if they commit, outside their humanitarian duties, acts harmful to the enemy.

[GC I, 24 / GC II, 36 / P I, 15 / P II, 9 / 1 CILS, 27] [IAC/NIAC]

### **7.7.0.2 Hospital ships**

Religious personnel of hospital ships may not be captured during the time they are serving on these ships.

This rule applies whether or not there are wounded, sick or shipwrecked on board.

[GC II, 36] [IAC/NIAC]

### **7.7.0.3 Evacuation, repatriation and retention**

For the rules concerning evacuation of religious personnel, see 10.3.4.

### **7.7.0.4 Legal status**

Captured enemy religious personnel are not prisoners of war and must be repatriated. They may be retained only if the spiritual needs and number of prisoners of war so require. Pending repatriation, they must at least benefit from all the provisions related to prisoners of war.

Captured religious personnel must be free to continue their duties, as long as the capturing force cannot itself ensure that the necessary spiritual assistance is provided.

[GC I, 28 / GC II, 37] [IAC]

The provisions on repatriation and retention of captured enemy medical personnel also apply to enemy religious personnel.

[GC I, 28, 30, 31 / GC II, 37 / GC III, 33/ P I, 15] [IAC]

In non-international armed conflict, there is no similar rule concerning the retention of religious personnel. Such personnel are entitled to the same fundamental protections as any other person in the power of a party to the conflict.



# CHAPTER 8

# COMMAND RESPONSIBILITY

## 8 COMMAND RESPONSIBILITY

This Chapter deals with a commander's responsibility to ensure respect for the law of armed conflict by those under his command.

**8.1 Overall command responsibility** provides an overview of every commander's responsibility to ensure that his subordinates respect the law of armed conflict.

**8.2 Checklist: command responsibility** sets out the major law of armed conflict and human rights elements to be taken into account – as relevant – by commanders during the planning, execution and aftermath of military operations.

**8.3 Command responsibility for integrating the law** elaborates upon the need to ensure that relevant international law forms an integral part of military planning and operations.

**8.4 Cooperation with civilian authorities** discusses cooperation between military commanders and civilian authorities in order to address matters that affect civilians, the civilian population and civilian objects.

**8.5 Tactical situation and military necessity** addresses two areas where the law of armed conflict explicitly calls upon commanders to make legally important decisions based on their judgement of the situation on the ground: evaluations of the tactical situation, and evaluations of military necessity.

**8.6 Decision making and orders** describes the military decision-making process including the time factor, the commander's estimate, his decision, the orders issued to his subordinates, and cooperation with civilian authorities.

**8.7 Control of execution** outlines the measures a commander must take to ensure the proper execution of his orders, and the adjustments he must factor into their execution.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## 8.1 Overall command responsibility

This Section concerns the responsibility of commanders at every level to ensure that their subordinates respect the law of armed conflict.

The concept of command responsibility exists in both international and non-international armed conflict. That responsibility in an international armed conflict is set out explicitly in Additional Protocol I. The concept of responsible command also appears in Additional Protocol II. For example, one of the criteria for the application of Additional Protocol II is that the organized armed group must be under responsible command. Furthermore, international criminal tribunals have recognized the responsibility of commanders in non-international armed conflicts. This is now deemed to be part of customary international law.

Therefore, the duty of commanders to ensure that their subordinates respect the law of armed conflict applies in all armed conflicts, and this Section accordingly applies to both international and non-international armed conflicts.

The concept of the responsibility of commanders in operations that take place in situations other than armed conflict is also implicit, and in some cases explicit, in international human rights law.

[P I, 86 / P II, 1 / ICC Stat., 28 / 1 CILS, 153 / 1 CILS, p. 560 / ICCPR, 2 / BPUFF, 6, 7, 11, 19-21] [IAC/NIAC/SOTAC]

### 8.1.0.1 Definition

The term "commander" means military superiors, whether officially appointed or effectively acting as commanders, who are responsible for the conduct of their subordinates. It includes the entire range of commanders, from high-level strategic leaders down to those non-commissioned members of the armed forces with only a few subordinates under their command.

[P I, 86, 87 / ICRC Commentary, P I, 87]

### 8.1.0.2 Rule

Respect for the law of armed conflict depends on order and discipline as well as training.

As with order and discipline, the law of armed conflict must be respected and enforced in all circumstances.

[GC I, 1 / GC II, 1 / GC III, 1 / GC IV, 1 / P I, 87]

**8.1.0.3 Mission**

When a commander is assigned a mission, he must ensure that the mission is carried out in a way that is consistent with the law of armed conflict.

[H IV, Preamble, 1 / P I, 1, 80, 87]

**8.1.0.4 Control**

A commander must ensure that his subordinates respect the law of armed conflict.

There is no member of the armed forces exercising command who is not obliged to ensure the proper application of the law of armed conflict.

[ICRC Commentary, P I, 87]

**8.1.0.5 Prevention**

A commander must ensure that:

- his subordinates are aware of their obligations under the law of armed conflict;
- he takes general measures to prevent violations of the law of armed conflict; and
- if he is aware that troops under his command or control are going to commit a breach of the law of armed conflict, he takes specific action to prevent such a violation.

Subordinates need not understand all aspects of the law of armed conflict. Rather, their knowledge should as a minimum be commensurate with their responsibilities and functions.

Over and above training in the law, general measures to prevent violations include integrating the law into operational doctrine, education and field training, and giving orders that ensure compliance with the law. For detailed coverage of this topic see Chapter 1.

[P I, 87]

**8.1.0.6 Guidance to subordinates**

Appropriate mission-specific guidance (e.g. training, standard operating procedures, rules of engagement) must be given to subordinates:

- to ensure uniform, legally compliant action and behaviour; and
- to prepare subordinate commanders (particularly those with independent missions) to take the legal measures required by the situation.

[P I, 87]

### 8.1.0.7 Violations of the law

A commander must ensure that in the event of a breach of the law of armed conflict by a subordinate he:

- takes the steps necessary to suppress the violation;
- reports the matter up his chain of command; and
- imposes an appropriate disciplinary sanction or, if warranted by the seriousness of the offence, initiates penal action through the relevant channels.

Discipline and military justice are discussed in detail in Chapter 9.

[P I, 43, 87]

### 8.1.0.8 Command responsibility: failure to prevent

A commander is criminally responsible for war crimes committed by his subordinates if:

- he knew or had reason to know that his subordinates were about to commit or were committing war crimes; and
- he failed to take all necessary and reasonable measures in his power to stop or prevent their commission, or to submit the matter to the competent authorities for investigation or prosecution.

This is known as the rule of “command responsibility”, which applies to breaches of the law of armed conflict committed by subordinates over whom the commander exercises effective command and control.

[P I, 87 / 1 CILS, 153 / ICTY Stat., 7 / ICTR Stat., 6 / SCSL Stat., 6 / 1 CILS, p. 562]

For more details on the criminal responsibility of commanders, see Section 9.5.

## 8.2 Checklist: command responsibility for military operations

Command responsibility spans the entire spectrum of the law of armed conflict and international human rights law, and applies during both peacetime and armed conflict. Accordingly, in summarizing a commander’s duties and obligations the following checklist draws upon much of this Handbook, including the general provisions of this Chapter.

This checklist sets out the major law of armed conflict and human rights elements to be taken into account – as relevant – by commanders during the planning, execution and aftermath of military operations. It is divided into three parts: all operations; operations in armed conflict; and operations in situations other than armed conflict.

## All operations

- Prevention of violations. A commander must ensure, both in peacetime and during armed conflict, that:
  - his subordinates are aware of their obligations under the law of armed conflict (see Chapters 4 – 7 and 10) and international human rights law (see esp. Chapter 14); and
  - the necessary measures are taken to prevent violations of the law, including integrating relevant provisions into operational practice (see Chapter 1).
  
- Decision making and orders (see Section 8.6). The operational planning process and both written and oral orders, including standing orders, standard operating procedures and rules of engagement, must take into account the applicable law of armed conflict and human rights law.
  
- Control of execution (see Section 8.7). Once operational orders are being executed, a commander is obliged to control their execution and, in accordance with the changing situation in the field, ensure that the law continues to be respected.
  
- Discipline and military justice (see Chapter 9). A commander must ensure that for every breach of the law he:
  - takes the steps necessary to suppress the violation;
  - reports the matter up his chain of command; and
  - imposes an appropriate disciplinary sanction or, if warranted by the seriousness of the offence, initiates penal action through the relevant channels.

## Operations in armed conflict

- Targeting: distinction, proportionality, precaution. A commander must ensure that his subordinates abide by the legal framework governing the targeting of both persons and objects (see Chapter 5), including the principles of distinction, proportionality and precaution.
  
- Precaution in the conduct of operations:
  - In addition to precautions taken in targeting, a commander must exercise constant care in the conduct of every military operation to spare civilians, the civilian population and civilian objects.
  - A commander must take all feasible precautions to protect any civilians and civilian objects under his control against the effects of attacks (see Sections 4.3 and 4.4).

- **Limitation.** A commander must confirm that both the means and methods of combat to be chosen are permitted under the law of armed conflict:
  - the choice and use of weapons is discussed in Sections 6.1 – 8.
  - the choice and use of methods of attack is discussed in Section 6.9.
  
- **Treatment of detainees.** A commander is responsible for the treatment of any detainees captured during armed conflict, as set out in Chapter 7.
  
- **Logistics.** A commander must ensure that any logistics and movements he commands within the context of an armed conflict abide by the law, as discussed in Chapter 10.
  
- **General obligations related to combat.** A commander is responsible for the series of obligations related to combat (as relevant) contained in Chapter 4, including:
  - search for and the collection of victims of combat (see Section 4.1);
  - passage of humanitarian relief (see Section 4.2);
  - precautions against the effects of attacks (see Section 4.3);
  - non-hostile contacts with other parties to the armed conflict (see Section 4.4);
  - respect for and protection of civil defence (see Section 4.5);
  - use of distinctive signs and signals (see Section 4.6);
  - respect for medical work (see Section 4.7).
  
- **Cooperation with civilian authorities.** To reduce the risk to civilians and civilian objects from military operations or a military presence, commanders should seek close cooperation with civilian authorities, when compatible with the tactical situation (see Section 8.4).
  
- **Contextual legal obligations.** In addition to the obligations mentioned above, a commander is responsible for complying with the law that applies to the situation in which he finds himself, which might include:
  - the law of occupation (see Chapter 12);
  - the law of neutrality (see Chapter 13);
  - combat obligations in peace support operations (see Chapter 15).
  
- **Tactical situation.** In situations where the law only permits a particular action in the case of a particular tactical situation, a commander must evaluate whether his proposed action meets this requirement (see Section 8.5).
  
- **Military necessity.** In situations where the law only permits a particular action in the case of a particular level of military necessity, a commander must evaluate whether his proposed action meets this threshold (see Section 8.5).

### Operations in situations other than armed conflict

- Non-combat obligations. In situations other than armed conflict, a commander must abide by the legal framework governing (as relevant):
  - law enforcement operations (see Chapter 14);
  - non-combat obligations in peace support operations (see Chapter 15).

## 8.3 Command responsibility for integrating the law

This Section elaborates upon the need to ensure that the obligation to respect the law of armed conflict and international human rights law forms an integral part of military planning and operations.

### 8.3.0.1 Elements of integration

The behaviour of armed forces during operations is shaped by four main factors:

- doctrine;
- education;
- field training and equipment; and
- sanctions (including both discipline and military justice).

In order for operations to be conducted in compliance with the law, the law must become an integral part of all four elements. This is what the ICRC calls the process of "integration".

### 8.3.0.2 Preventing breaches of the law

Military commanders bear the responsibility for integrating the law as part of their duty to "prevent and, where necessary, to suppress and report to competent authorities breaches of [the law of armed conflict]". Although final responsibility for preventing such breaches lies with the political and strategic military levels (and they have certain fundamental duties in this regard – see 11.1.1.7), in practice the operational and tactical military commanders must fulfil these obligations on the ground and must therefore be fully aware of them.

[P I, 87]

For a full description of the fundamentally important process of legal integration, which translates legal norms into practice on the ground, see Chapter 1.

## 8.4 Cooperation with civilian authorities

This Section addresses cooperation between military commanders and civilian authorities in order to deal with matters that impact civilians, the civilian population, and civilian objects.

Since this Section deals with the protection of civilians and civilian objects, which is fundamental to the law of armed conflict in both international and non-international armed conflict, it applies to both types of conflict.

#### **8.4.0.1 Rule**

To reduce the risk to civilians and civilian objects from military operations or a military presence, commanders should seek close cooperation with civilian authorities, when compatible with the tactical situation.

Cooperation with civilian authorities should ideally take place within the framework of the civil-military cooperation (CIMIC) doctrine, and establish uniform principles for cooperation between commanders and civilian authorities and, more broadly, with civil society (e.g. intergovernmental organizations [UN and regional organizations], the ICRC, non-governmental organizations [NGOs], media and private companies operating in vital economical sectors).

[P I, 58 / 1 CILS, 22-24]

#### **8.4.0.2 Purpose**

The purpose of cooperation with civilian authorities is to assist civilian authorities to take all necessary measures and precautions to protect civilian persons and objects under their control.

For example, precautionary measures can be taken by or in cooperation with civilian authorities such as preparing for the removal or evacuation of civilians from the vicinity of military objectives, preparing shelters and warning signals, or marking specifically protected objects with distinctive signs.

[P I, 58 / 1 CILS, 22-24]

For more information concerning the removal or evacuation of the civilian population from the vicinity of military objectives, see Section 4.3. For a discussion of the marking of specifically protected objects, see Section 4.6.

#### **8.4.0.3 Cooperation between military and civilian medical services**

Where both civilian and military medical services are active, the respective responsibilities of each service as well as guidelines for their cooperation should be established by military and civilian authorities.

For example, cooperation should be organized between civilian and military medical services with regard to:

- the use of distinctive signs and signals;

- the use of small defensive weapons by medical personnel;
- military duties in the event of armed conflict (e.g. tending to prisoners of war); and
- joint medical logistics.

Further, a formal command structure should be established in:

- medical units where both military and civilian personnel are jointly engaged;
- military medical units reinforced by civilian personnel or means; and
- civilian medical units reinforced by military personnel or means.

[GC IV, 18-23 / P I, 12, 13, 18, 87 / P II, 12]

For more details on the use of distinctive signs and signals, see Section 4.6.

For details on the use of weapons by the civilian medical service, see 10.2.1.8.

For more details on the specific rules concerning supply, transport, and unloading areas, see Section 10.1.

#### **8.4.0.4 Civil defence**

In accordance with national arrangements for civil defence, cooperation between armed forces and civil defence organizations may be necessary.

Key issues will include:

- general instructions on cooperation (competence for deciding on cooperation in general or in a particular situation, subordination);
- assignment of military units for civil defence tasks;
- instructions for the use of distinctive signs and signals; and
- instructions on the permitted use of weapons.

[P I, 62, 63, 65, 67] [IAC]

#### **8.4.0.5 Cultural property**

Cooperation between the military and civilian authorities responsible for safeguarding cultural property is critical to ensure that cultural property is protected and does not lose its immunity from protection during an armed conflict.

During peacetime States should establish a specialist service or designate personnel within the armed forces (e.g. CIMIC officers) to cooperate with these civilian authorities.

For example, civilian and military authorities may need to cooperate to:

- mark cultural property with the distinctive emblem;

- transport cultural property to safety during an armed conflict; or
- remove cultural property from the vicinity of military objectives or provide adequate *in situ* protection.

[H.CP, 3, 4, 6, 7, 9, 10 / H.CPP.II 8-14]

For a full discussion of defensive measures for cultural property, see 4.3.3.

For a discussion of cooperation with national authorities for cultural property in occupied territory, see 12.4.0.9.

#### **8.4.0.6 Works and installations containing dangerous forces**

Cooperation with civilian authorities responsible for works and installations containing dangerous forces (e.g., dams, dykes or nuclear power plants) may be necessary to reduce civilian exposure to danger in the event of an armed conflict.

For example, preparatory measures may need to be taken by civilian authorities or in cooperation with civilian authorities such as: preparing for the removal of civilians, creating warning systems, lowering the level of water retained by dams and dykes, and powering-down nuclear power plants.

Similar measures may be necessary for other installations containing dangerous forces such as chemical plants or oil refineries.

[P I, 56 / P II, 15 / 1 CILS, 42]

#### **8.4.0.7 Cooperation with civilian law enforcement authorities**

Cooperation between the military police (or military holders of law enforcement functions) and civilian law enforcement authorities should be organized.

The relevant military and civilian authorities must determine the coordination and subordination details.

For a discussion of the participation by armed forces in law enforcement operations, refer to Chapter 14.

### **8.5 Tactical situation and military necessity**

This Section addresses two areas where the law of armed conflict explicitly calls upon commanders to make legally important decisions based on their judgement of the situation on the ground: evaluations of the tactical situation, and evaluations of military necessity.

### **8.5.1 Tactical situation**

Certain provisions of the law of armed conflict contain a duty to act or refrain from action which is conditional on the tactical situation on the ground. In such cases the tactical situation becomes a factor for the commander to consider in deciding whether and to what extent to apply a particular rule. Because such rules exist in both international and non-international armed conflicts, the concepts below apply in all armed conflicts.

#### **8.5.1.1 Rule**

The tactical situation comprises all circumstances on the ground at the time, including humanitarian and military considerations.

#### **8.5.1.2 Humanitarian considerations**

Humanitarian considerations relate to the dangers a military action could or does pose for civilian persons and objects (e.g. presence of combatants or military means in or near a populated area with or without shelters), as well as for *hors de combat* fighting forces.

#### **8.5.1.3 Military considerations**

Military considerations are derived from the assigned mission and relate to one's own and enemy action and situation (e.g. attack or defence, combat means and tactics used).

#### **8.5.1.4 Subordination to the tactical situation: rule and examples**

Certain rules of the law of armed conflict provide that the mandatory performance of particular actions or activities is conditional upon the current tactical situation. Some of these rules only require action when or as soon as the tactical situation permits. Others require certain actions unless their performance is made impossible by the tactical situation.

The following are some examples of rules that are conditional upon the tactical situation:

- provision of effective advance warnings before attacking a military objective (rule applicable unless the tactical situation does not permit) (see 5.2.0.5);
- the search for and collection of victims in combat area (must be done as soon as the tactical situation permits) (see Section 4.1); and
- movement of different categories of transport (i.e. civilian, medical, military) through separate routes (unless the tactical situation does not permit) (see 10.1.2.1).

### **8.5.2 Military necessity**

This subsection discusses the concept of military necessity; it also discusses those provisions of the law of armed conflict that contain a general rule but

explicitly permit a waiver or derogation from that rule in the case of military necessity.

### 8.5.2.1 Definition

“Military necessity” is a fundamental principle of the law of armed conflict. It permits measures that are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by the law of armed conflict.

In the case of an armed conflict the only legitimate military purpose is to weaken the military power of the opposing parties to the conflict.

[St. Petersburg Decl. / ICRC Commentary, P I, 35]

### 8.5.2.2 Restrictions

The rules of the law of armed conflict strike a balance between the requirements of military necessity and those of humanity.

Thus, the concept of military necessity is already built into the rules of the law of armed conflict.

As a result, a commander must not invoke military necessity as a reason for not complying with a particular rule *unless* there is an explicit waiver or derogation for military necessity in that rule. Military necessity does not trump or pre-empt the law of armed conflict.

[ICRC Commentary, P I, 35]

### 8.5.2.3 Imperative military necessity: rule

Some law of armed conflict rules provide that taking a particular action is permitted in cases of imperative military necessity. These rules contain a general prohibition, and then permit a derogation from that prohibition in case of imperative military necessity.

In such cases, the existence or non-existence of imperative military necessity must obviously be a factor in decision making.

### 8.5.2.4 Imperative military necessity: examples

The following are examples of specific rules where an action is conditional on imperative military necessity.

- It is prohibited to destroy objects indispensable to the survival of the civilian population. However, in one’s own territory, as a defensive measure against invasion, a derogation may be made for “imperative military necessity” (see 5.4.4.2).

- ICRC visits to protected persons must not be prohibited except for “reasons of imperative military necessity” and then only as a temporary measure (see 7.5.2.12).
- Civil defence organizations and personnel must be permitted to perform their duties except in cases of “imperative military necessity” (see 4.5.0.4).
- An area in occupied territory may only be evacuated for “imperative military reasons” (or “for the security of the population”) (see 12.3.3.3).
- States must refrain from using cultural property for purposes likely to expose it to destruction or damage in the event of armed conflict, but may waive this obligation in cases where “military necessity imperatively requires such a waiver” (see 4.3.3.2).

[GC I, 33 / GC IV, 49, 143 / P I, 54, 62 / H.CP, 4 / H.CP.P.II, 6]

## **8.6 Decision making and orders**

The commander is responsible for ensuring that his decisions and the actions of his subordinates comply with the law of armed conflict in all armed conflicts. To that effect, this Section outlines the process of decision making, and is applicable to all armed conflicts.

### **8.6.1 Time factor**

#### **8.6.1.1 Rule**

Time can be decisive with regard to effective compliance with the law of armed conflict.

[P I, 57 / 1 CILS, 15, 18, 19]

#### **8.6.1.2 Time available: pre-planned operation**

When preparing operations, every care must be taken to include law of armed conflict considerations in the planning cycle.

For example, when planning an air strike on a command post situated in the immediate vicinity of a civilian government building, whose destruction is unavoidable, the attack should be carried out at a time when the civilian building is usually empty (e.g. at night). This would be consistent with the requirement that a commander must take all feasible precautions in his choice of means and methods of attack in order to avoid, or in any event minimize, incidental loss to civilians, civilian populations and civilian objects.

[P I, 57 / 1 CILS, 15-21]

#### **8.6.1.3 No time available: improvised action**

When forces are thrown into action without much preparation, the immediate tactical needs take priority.

A commander must nevertheless respect the law of armed conflict. He must still take all measures required by the law of armed conflict that the tactical situation permits (e.g. last-minute adjustments to reduce civilian casualties and damage).

[P I, 57 / 1 CILS, 19]

## **8.6.2 Estimate (appreciation process)**

### **8.6.2.1 Rule**

As part of the operational planning process during or in anticipation of an armed conflict, a commander will normally prepare an estimate (based on his appreciation of the facts reasonably available to him at the relevant time) to determine his potential options. The estimate process must allow for the considerations and precautions required by the law of armed conflict, and must be modified accordingly.

### **8.6.2.2 Possible options: enemy**

The enemy's situation and options should be evaluated with regard to both military and civilian consequences (e.g. location of forces, civilian environment, possible movements and combat actions and their consequences for civilian areas).

### **8.6.2.3 Possible options: own and enemy**

The enemy's situation and options for action should be compared with one's own options for action, including feasible alternatives for both sides (e.g. possible and/or actual military necessity, possible and/or necessary precautions).

### **8.6.2.4 Possible options: subordinates**

The possible options for subordinates must be evaluated. If a mission envisaged for a subordinate includes too many legal constraints, the mission should be modified.

### **8.6.2.5 Assessment**

Based on his estimate, the commander must make a final balanced judgement taking into account the law of armed conflict (see checklist in Section 8.2).

## **8.6.3 Orders to subordinates**

### **8.6.3.1 Rule**

During an armed conflict, subordinates must only be given orders, standard operating procedures and rules of engagement which can be carried out in accordance with the law of armed conflict.

**8.6.3.2 Particulars**

Orders to subordinates must contain the particulars necessary to ensure respect for the law of armed conflict.

**8.6.4 Cooperation with civilian authorities****8.6.4.1 Rule**

Where relevant, orders given to subordinates should regulate their cooperation with civilian authorities (e.g. at corresponding levels of military command and civilian authorities).

**8.6.4.2 Civil-military cooperation (CIMIC)**

A commander's orders should state the appropriate behaviour and actions expected of his subordinates towards civilian authorities and the civilian population.

**8.6.4.3 Information to civilian authorities**

If the tactical situation permits, a commander must warn civilian authorities of impending attacks against military objectives and the possible risks for civilian persons and objects.

[P I, 57, 58]

**8.6.4.4 Behaviour expected of civilians**

The information commanders provide to civilians often consists of warnings suggesting that particular action be taken or avoided by civilians (e.g. to seek shelter or to stay away from certain areas or routes to be used by the armed forces).

[P I, 57, 58]

**8.4.5 Duty to disobey unlawful order****8.6.5.1 Duty to disobey**

Every subordinate has a duty to disobey an order and refuse to undertake a mission which is manifestly unlawful.

Any order to commit a war crime is considered to be manifestly unlawful.

[1 CILS, 154 / ICC Stat., 33]

**8.7 Control of execution**

This Section describes measures to be taken by a commander to ensure the appropriate execution of his orders by subordinates, including necessary adjustments. As discussed above, command responsibility is a concept which

applies in both international and non-international armed conflicts; thus, the concepts in this Section apply to both.

### **8.7.1 Control principles**

#### **8.7.1.1 Rule**

The exercise of control is the last step in the exercise of command.

Its purpose is to ensure that subordinates execute their orders according to the commander's intent.

[P I, 87]

#### **8.7.1.2 Order and discipline in general**

Control helps to ensure order and discipline.

It enables a commander to intervene when necessary to adjust or correct a situation with appropriate measures.

[P I, 43, 87]

#### **8.7.1.3 Respect for the law of armed conflict: general**

Through control the commander fulfils his obligation to ensure that his subordinates adhere to their own duty to apply and respect the law of armed conflict.

[P I, 87]

#### **8.7.1.4 Respect for the law of armed conflict: specific**

Particular control measures with law of armed conflict implications include:

- the use of intelligence to ensure legally compliant action;
- precautionary measures relating to civilian persons and objects;
- respect for the rules governing the conduct of hostilities;
- appropriate reporting of incidents and significant events (e.g. breaches of the law of armed conflict by a party's own forces and/or by the adversary's); and
- cooperation with civilian authorities.

### **8.7.2 Adjustments during execution**

#### **8.7.2.1 Rule**

A commander may be required to make adjustments to the plan of an ongoing operation if an unforeseen situation develops or new information becomes available. He should make any adjustments necessary –when practically and tactically possible– and always in light of the requirements of the law of armed conflict.

For example, just as a fire position may be improved during an operation, the location of objectives and the axes of attack may need to be modified if, for example, a medical unit or civilians are discovered in an area where none were previously anticipated.

[P I, 57 / 1 CILS, 19]

### **8.7.2.2 Pre-planned operations**

Preconceived operational plans should be modified as and when required by the tactical situation. For example, a commander can change the attack direction, select an alternative route for approach, or delay the commencement of the action.

[P I, 57]

### **8.7.2.3 Ongoing operations**

An ongoing operation must be cancelled, suspended or modified if it becomes apparent that:

- the target is not a military objective or is subject to special protection (principle of distinction); or
- the attack may be expected to cause incidental loss of civilian life, injury to civilians, and/or damage to civilian objects which would be excessive in relation to the direct military advantage anticipated (principle of proportionality).

On the principle of proportionality, see Chapter 5.

[P I, 57 / H.C.P.II, 7 / 1 CILS, 19]

# **CHAPTER 9**

# **PENAL MATTERS AND**

# **ENFORCEMENT MECHANISMS**

## 9 PENAL MATTERS AND ENFORCEMENT MECHANISMS

This Chapter addresses the enforcement of the law of armed conflict, including the prosecution of war crimes.

**9.1 Legal obligations of States pursuant to the law of armed conflict** addresses a State's responsibility to respect and ensure respect for the law of armed conflict. This includes enacting legislative measures and adopting preventive measures. This Section also addresses a State's responsibility for breaches of the law of armed conflict, including the rules on conducting inquiries.

**9.2 National enforcement mechanisms** discusses a State's obligation to investigate serious violations of the law of armed conflict and to discipline or prosecute perpetrators.

**9.3 International enforcement mechanisms** relates to the exercise of jurisdiction over international crimes, including serious violations of the law of armed conflict (war crimes), by international criminal courts and tribunals, and in particular the International Criminal Court (ICC).

**9.4 Legal obligations of individual members of the armed forces and other persons** discusses the obligation of individuals to respect the law of armed conflict and outlines individual criminal liability.

**9.5 Responsibility and accountability of commanders for war crimes** examines the various forms their responsibility for such crimes can take.

**9.6 War crimes and other international crimes** gives an overview of war crimes and other international crimes, including crimes against humanity and genocide.

**9.7 Judicial guarantees** sets out the judicial guarantees for the fair trial of persons for offences related to an armed conflict, and of persons in the control of a party to the conflict.

**9.8 State and individual responsibility for violations of human rights during law enforcement operations** specifies the respective obligations of States and individuals, and the rights of persons affected during such operations.

**9.9 State and individual responsibility during peace support operations** (PSOs) describes the application of the rules discussed in this chapter to PSOs.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## **9.1 Legal obligations of States pursuant to the law of armed conflict**

This Section addresses a State's responsibility to respect and ensure respect for the law of armed conflict (see 9.1.1), which includes enacting legislative measures (see 9.1.2), and the State's responsibility for serious violations of the law of armed conflict (see 9.1.3). It also addresses the rules on inquiries and investigations (see 9.1.4). The State's responsibility to prosecute and punish serious violations of the law of armed conflict is discussed separately below in Section 9.2.

The duty to respect and ensure respect for the law of armed conflict applies in all armed conflicts and, where applicable, during times of peace. Therefore, unless otherwise specified, the remarks made in this Section apply to all armed conflicts and, where applicable, in peacetime.

### **9.1.1 Duty to respect and ensure respect for the law of armed conflict**

#### **9.1.1.1 Treaty obligations: rule**

Every State is bound by the law of armed conflict treaties to which it has adhered, and by any treaty or treaty provision it has agreed to apply.

#### **9.1.1.2 Treaty obligations: duty to respect and to ensure respect**

The States party to law of armed conflict treaties undertake to respect the law of armed conflict and to ensure respect for it in all circumstances.

The duty to respect and ensure respect for the law of armed conflict is customary international law and applies in both international and non-international armed conflicts.

[GC I-IV, 1 / H.CP, 4 / P I, 1 / 1 CILS, 139 / *Military & Paramilitary Activities in & against Nicaragua (Nicaragua v. U.S.)*, *Merits*, I.C.J. Rpts. 1986, at paras 220, 255 (I.C.J. 1986)]

#### **9.1.1.3 Duty to respect: applies to all**

The duty to respect the law of armed conflict includes the duty to comply with the specific rules of that law.

The law of armed conflict must be respected by governments and by military and civilian authorities as well as by the members of the armed forces, civilians and armed groups.

[GC I-IV, 1 / H.CP, 4 / P I, 1 / 1 CILS, 139]

**9.1.1.4 Duty to respect: no reciprocity**

Every party to a conflict undertakes to respect the law of armed conflict in each armed conflict vis-à-vis other parties to the same treaty. If one party violates the law of armed conflict, another party may not terminate or suspend its application of that law as a result of the other party's violation.

[GC I-IV, 1 / 1 CILS, 140 / VCLT, 60 / ICRC Commentary, P 1]

**9.1.1.5 Duty to respect: unconditional compliance**

States must act in accordance with the law of armed conflict at all times when they are engaged in an armed conflict, regardless of whether the resort to force is justified or not. See 2.2.1.4 for a discussion of this notion.

**9.1.1.6 Duty to ensure respect**

The term "to ensure respect" means that there is a broader obligation not only for the State itself to refrain from violating the law of armed conflict, but also for it to ensure the compliance of entities or persons under its control, and to take measures under international law to stop violations of the law by other States.

[GC I-IV, 1 / Case Concerning Military & Paramilitary Activities in & against Nicaragua (Nicaragua v. U.S.A.), Merits, I.C.J. Rpts. 1986, at 115, 216, 255, 256 (I.C.J. 1986)]

**9.1.2 Legislative measures****9.1.2.1 National implementing legislation**

When a new law of armed conflict treaty is ratified or acceded to, a State must enact such national implementing legislation as is required by the treaty.

[GC I, 48, 49 / GC II, 49, 50 / GC III, 128, 129 / GC IV, 145, 146 / P I, 84, 85 / H.C.P, 26, 28]

**9.1.2.2 Legislation: penal sanctions for grave breaches**

The four Geneva Conventions and Additional Protocol I each oblige States party to them to enact legislation providing for penal sanctions for individuals who commit or order others to commit grave breaches of the Conventions and Protocol.

The concept of grave breaches is only applicable in international armed conflicts.

[GC I, 49 / GC II, 50 / GC III, 129 / GC IV, 146 / P I, 85] [IAC only]

### 9.1.2.3 Other law of armed conflict treaties

Other law of armed conflict treaties also oblige States party to them to enact legislation providing for penal sanctions for violations of certain treaty provisions.

The following are some examples of such treaties:

- Convention for the Protection of Cultural Property in the Event of an Armed Conflict, 14 May 1954 (H.CP);
- Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999 (H.CP.P.II);
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 January 1993 (CWC);
- Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW.P.II.Amend.);
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997 (AP Mine Ban Conv.).

These treaties apply in international and non-international armed conflicts alike.

[CWC, 7 / AP Mine Ban Conv., 9 / GC III, 128, 129 / H.CP 28 / H.CPP.II, 15 / CCW.P.II. Amend., 14]

## 9.1.3 State responsibility for violations of the law of armed conflict

### 9.1.3.1 Rule

A party to conflict which has violated the law of armed conflict shall, if the case demands, be liable to pay compensation.

This obligation of the said party is independent of any individual criminal responsibility incurred by the perpetrator of the violation.

[P I, 91 / H.IV, 3 / 1 CILS, 150 / H.CPP.II, 38]

### 9.1.3.2 State responsibility for acts attributable to the State

The State is responsible for all acts committed by persons whose acts are attributable to it. This includes:

- acts by its organs, including members of the armed forces, members of the government, other civilian authorities, police forces;

- acts by persons or entities it empowers to exercise elements of governmental authority;
- acts by persons or groups acting in fact on its instructions or under its direction or control; and
- acts committed by private persons or groups which it acknowledges and adopts as its own conduct.

[P I, 91 / H.IV, 3 / 1 CILS, 149]

### **9.1.3.3 State responsibility for treatment of persons deprived of liberty**

In an international armed conflict, the Detaining Power is responsible for the treatment given to prisoners of war wherever they are, whether in internment camps or not. A prisoner of war is considered to be in the hands of the Detaining Power, and not of the individuals or military units who have captured him (see Section 7.3).

[H.IV.R, 4 / GC III, 12] [IAC only]

A party which holds persons protected under the Fourth Geneva Convention in custody (see 7.4.1) is responsible for the treatment of such persons by its agents.

[GC IV, 29 and 148] [IAC only]

## **9.1.4 Inquiries and investigations**

The Geneva Conventions include provisions related to inquiries into alleged violations of the law of armed conflict, and Additional Protocol I establishes a procedure for investigations by an International Fact-Finding Commission. The inquiry provisions apply in international armed conflicts, although parties to a non-international armed conflict are free to agree to an inquiry procedure amongst themselves.

### **9.1.4.1 Inquiry procedure**

At the request of a party to the conflict an inquiry must be instituted, in a manner to be decided between the interested parties, concerning any alleged breach of the law of armed conflict.

If no agreement is reached on the procedure for the inquiry, the parties should agree on an arbitrator who will decide upon the procedure to be followed.

Once a violation of the law of armed conflict has been established, the parties to the conflict must put an end to it and must repress it as soon as possible.

[GC I, 52/ GC II, 53 / GC III, 132 / GC IV, 149] [IAC]

### 9.1.4.2 International Fact-Finding Commission

Pursuant to Additional Protocol I, an International Fact-Finding Commission has been established to inquire into allegations of grave breaches and serious violations of the Geneva Conventions and to facilitate, through its good offices, the restoration of an attitude of respect for the law of armed conflict.

States party to those treaties may make a declaration that they accept the competence of the International Fact-Finding Commission in relation to any other State that likewise accepts its competence, or they may agree to do so *ad hoc* (in an individual case).

[P I, 90] [IAC only]

## 9.2 National enforcement mechanisms

This Section covers enforcement of the law of armed conflict at the national level, including penal and disciplinary measures. Enforcement of the law of armed conflict is part of a State's duty to respect and ensure respect for that body of law, which applies in all armed conflicts. Therefore, unless otherwise specified, the remarks made in subsection 9.2.1 apply in all armed conflicts.

### 9.2.1 Penal and disciplinary measures

#### 9.2.1.1 Rule

Respect for the law of armed conflict is a matter of order and discipline.

Like order and discipline, the law of armed conflict must be respected and enforced in all circumstances.

[GC I, 1 / GC II, 1 / GC III, 1 / GC IV, 1 / H.CP, 2 / P I, 1 / 1 CILS, 139]

#### 9.2.1.2 Internal disciplinary system

State armed forces must be subject to an internal disciplinary system which enforces compliance with the law of armed conflict.

[P I, 43] [IAC]

#### 9.2.1.3 Disciplinary sanctions or penal prosecutions

States must ensure that breaches of the law of armed conflict are subject to disciplinary or penal sanctions.

[GC I, 49 / GC II, 50 / GC III, 129 / GC IV, 146 / P I, 85, 86, 87 / H.CP, 28 / 1 CILS, 157]

## 9.2.2 Exercise of national jurisdiction over war crimes and other international crimes

### 9.2.2.1 Exercise of criminal jurisdiction

It is the duty of every State to exercise its criminal jurisdiction over persons responsible for war crimes and other international crimes.

[ICC Stat., Preamble / 1 CILS, 158]

### 9.2.2.2 Obligation to prosecute: grave breaches of the Geneva Conventions

States must search for persons suspected or accused of having committed or having ordered the commission of grave breaches of the Geneva Conventions, and must bring these persons before their own courts.

A State may also extradite such persons to another State, in accordance with its national laws concerning extradition, provided that the requesting State has made out a *prima facie* case.

[GC I, 49 / GC II, 50 / GC III, 129 / GC IV, 146 / P I, 85]

### 9.2.2.3 Obligation to prosecute: other law of armed conflict treaties

Other law of armed conflict treaties also contain an explicit duty for States party to them to prosecute persons accused of violations of the treaty, including the H.CP, H.CP.P.II, AP Mine Ban Conv., and CCW P.III.

[H.CP, 28 / H.CP.P.II, 15, 17 / AP Mine Ban Conv., 9 / CCW.P.III, 14 / CWC, 7]

### 9.2.2.4 Universal jurisdiction: grave breaches of the Geneva Conventions

A State's duty to prosecute persons alleged to have committed grave breaches of the Geneva Conventions extends to persons found on its territory who:

- committed the acts outside the territory of the State, or
- are not nationals of the State.

When a State exercises criminal jurisdiction over such a person within its custody, it is referred to as "universal jurisdiction."

[GC I, 49 / GC II, 50 / GC III, 129 / GC IV, 146 / P I, 85] [IAC only]

### 9.2.2.5 Universal jurisdiction: other law of armed conflict treaties

Some of the other law of armed conflict treaties also contain universal jurisdiction provisions requiring States party to them to prosecute persons

found on their territory or subject to their control for violations of the law of armed conflict stipulated in those treaties.

[H.C.P.P.II, 16, 17 / AP Mine Ban Conv., 9 / H.C.P, 28 (arguably) / CCW.P.II.Amend.,14]

### **9.2.2.6 Duty to investigate and prosecute: customary international law**

States must investigate and, where appropriate, prosecute all alleged war crimes over which they have jurisdiction. This must include any war crimes perpetrated by their nationals or armed forces, as well as those committed by non-nationals on their territory.

These obligations apply to war crimes committed in all conflicts, not only to grave breaches of the Geneva Conventions in international conflicts.

[1 CILS, 158]

## **9.2.3 Mutual assistance**

### **9.2.3.1 Rule**

States, including parties to an armed conflict and neutrals, must give each other the greatest measure of assistance in penal proceedings for war crimes. Such assistance may include investigations, exchanging information and documents, prosecution and extradition.

[P I, 88, 89 / H.C.P.P.II, 19 / 1 CILS, 161 / ICRC Commentary, P I, 88]

## **9.2.4 Amnesties**

### **9.2.4.1 Amnesties: as broad as possible**

The law of non-international armed conflict stipulates that at the end of hostilities the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of liberty for reasons related to the armed conflict.

This rule does not apply to persons suspected of, accused of, or sentenced for war crimes, crimes against humanity, or genocide.

[P II, 6/ 1 CILS, 159] [NIAC only]

## **9.3 International enforcement mechanisms**

This Section outlines the exercise of jurisdiction over international crimes, including war crimes, by international and other tribunals, and in particular the International Criminal Court (ICC). The ICC and other tribunals have been granted jurisdiction over international crimes in both international and non-international armed conflicts. Therefore, unless otherwise specified in a particular rule, this Section applies to all armed conflicts.

### **9.3.1 International jurisdiction over war crimes and other international crimes**

#### **9.3.1.1 International and other tribunals**

At the international level, war crimes and other international crimes may be tried by:

- the International Criminal Court (ICC); or
- any other tribunal given jurisdiction to prosecute international crimes, including war crimes, committed in a specific armed conflict or situation – some examples of tribunals which have jurisdiction to prosecute international crimes committed in a specific armed conflict or situation include the:
  - International Criminal Tribunal for the former Yugoslavia (ICTY);
  - International Criminal Tribunal for Rwanda (ICTR);
  - Special Court for Sierra Leone (SCSL); and
  - Special Tribunal for Lebanon (STL).

### **9.3.2 The International Criminal Court**

#### **9.3.2.1 Jurisdiction**

The Statute of the International Criminal Court (ICC) grants the Court jurisdiction over war crimes committed during international and non-international armed conflicts, as well as crimes against humanity and genocide.

Note that the ICC will also have jurisdiction over the crime of aggression once an amendment to the Rome Statute of the ICC comes into effect (not before 2017).

[ICC Stat., 5, 11-14]

#### **9.3.2.2 Referral of particular crimes to the ICC**

The ICC may exercise its jurisdiction over a particular crime if the case has been referred to the Court by:

- a State party to the ICC Statute;
- the Prosecutor of the ICC; or
- the UN Security Council acting under Chapter VII of the Charter of the United Nations.

[ICC Stat., 13-15]

#### **9.3.2.3 Preconditions to the exercise of jurisdiction**

The International Criminal Court may only exercise its jurisdiction if one or more of the following States have accepted the jurisdiction of the Court:

- the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- the State of which the person accused of the crime is a national.

The above preconditions do not apply in cases referred to the ICC by the UN Security Council.

[ICC Stat., 12]

#### **9.3.2.4 Admissibility**

States maintain primary responsibility for prosecuting war crimes, crimes against humanity and genocide. The jurisdiction of the International Criminal Court is complementary to that of States. The Court may not assert its jurisdiction where:

- a State with jurisdiction over the case is investigating or prosecuting the case, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- the person has already been tried for the conduct which is the subject of the complaint; or
- the case is not of sufficient gravity to justify further action by the ICC.

[ICC Stat., 17, 18, 19]

### **9.3.3 State cooperation with the International Criminal Court and other international criminal courts and tribunals**

#### **9.3.3.1 Cooperation**

States must cooperate in good faith with international criminal courts and tribunals, according to their treaty obligations and/or in conformity with relevant UN Security Council resolutions.

[UN Charter, Chap. VII / ICTY Stat., 29 / ICTR Stat., 28 / ICC Stat., 86-102]

## **9.4 Legal obligations of individual members of the armed forces and other persons**

This Section discusses the obligation of individuals to respect the law of armed conflict and individual criminal liability, and applies in both international and non-international armed conflicts.

## **9.4.1 General legal obligations of individual members of the armed forces**

### **9.4.1.1 Rule**

The obligation to respect the law of armed conflict applies to members of the armed forces and to all other persons, whether military or civilian.

### **9.4.1.2 Duty to disobey**

Individual members of the armed forces have a duty to disobey a manifestly unlawful order or to refuse to undertake a mission which is manifestly unlawful.

[1 CILS, 154 / ICC Stat., 33]

### **9.4.1.3 Manifestly unlawful order**

Any order to commit a war crime is considered to be manifestly unlawful.

## **9.4.2 Criminal responsibility and accountability of individual members of the armed forces and other persons**

### **9.4.2.1 Liability for war crimes**

War crimes can be committed by members of the armed forces, by members of armed groups or by civilians, and by nationals of belligerent or neutral States.

War crimes can take place on national territory or abroad, and during an international or non-international armed conflict.

### **9.4.2.2 Individual criminal responsibility**

Individuals are responsible for the war crimes they commit.

[GC I, 49 / GC II, 50 / GC III, 129 / GC IV, 146 / PI, 85 / H.CP, 28 / CCW.P.II.Amend., 14 / AP Mine Ban Conv., 9 / ICC Stat., 25 / H.CP.P.II, 15 / 1 CILS, 151]

### **9.4.2.3 No time limits for prosecution of war crimes**

Statutes of limitation do not apply to war crimes.

[1 CILS, 160 / ICC Stat., 29 / Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, U.N. Doc. A/7218 (1968), *entered into force* Nov. 11, 1970]

### **9.4.2.4 Official capacity of the perpetrator**

The official capacity or position of the perpetrator of international crimes does not exempt him from criminal liability under the statutes of international criminal courts and tribunals, including the ICC.

[ICC Stat., 27 / SCSL Stat., 6 / ICTR Stat., 6 / ICTY Stat., 7]

## 9.5 Responsibility and accountability of commanders for war crimes

This Section addresses the individual responsibility of commanders for war crimes. War crimes may be committed in both international and non-international armed conflicts. The following remarks therefore apply in all armed conflicts.

For a discussion of the other responsibilities of commanders, refer to Chapter 8 of this Handbook.

### 9.5.0.1 Definition of commander

The term "commander" means military superiors, whether officially appointed or effectively acting as commanders, who are responsible for the conduct of their subordinates. It includes the entire range of commanders, from high-level strategic leaders down to non-commissioned officers with only a few subordinates under their command.

[P I, 86, 87 / ICRC Commentary, P I, 87]

### 9.5.0.2 Modes of liability

The different forms of criminal responsibility entailing punishment are known as "modes of liability".

The following paragraphs describe some modes of liability for commanders which are explicitly set out in the law of armed conflict or in the statutes of international criminal courts and tribunals.

NB: Readers of this Handbook are cautioned to consult their legal advisers concerning the specific modes of liability used in their national criminal system and/or system of military justice.

### 9.5.0.3 Modes of liability: perpetration

A commander is individually responsible for a war crime when he perpetrates the act himself.

For example, if a commander murders a person who is *hors de combat*, then he would be individually criminally responsible for that murder.

A commander is also responsible when he jointly commits a crime with another person.

[ICC Stat., 25]

#### **9.5.0.4 Modes of liability: unlawful orders issued by commanders**

Commanders are criminally responsible for breaches of the law of armed conflict committed pursuant to their orders.

The four Geneva Conventions explicitly state that commanders are criminally liable for any grave breaches committed pursuant to their orders. In addition, the statutes of the international criminal courts and tribunals provide for criminal responsibility for commanders who order war crimes to be committed.

[GC I, 49 / GC II, 50 / GC III, 129 / GC IV, 146 / HC P, 28 / 1 CILS, 152 / ICC Stat., 25 / ICTY Stat., 7 / ICTR Stat., 6 / SCSL Stat., 6]

#### **9.5.0.5 Modes of liability: planning**

The statutes of the international criminal courts and tribunals also provide for criminal liability for planning war crimes. Thus, when a military operation results in the commission of war crimes, the military commander who planned the operation may be held criminally responsible for planning, while the subordinates who carried out the operation would be criminally responsible as direct perpetrators of the war crimes.

[ICTY Stat., 7 / ICTR Stat., 6 / SCSL Stat., 6]

#### **9.5.0.6 Other modes of liability: soliciting, inducing, instigating, aiding and abetting**

The statutes of the international criminal courts and tribunals also provide for other modes of liability such as soliciting, inducing, instigating or aiding and abetting in the commission of a war crime.

[ICC Stat., 25 / ICTY Stat., 7 / ICTR Stat., 6 / SCSL Stat., 6]

#### **9.5.0.7 Command responsibility: failure to prevent, punish or report**

A commander is criminally responsible for war crimes committed by his subordinates if he:

- knew or had reason to know that his subordinates were about to commit or were committing such crimes; and
- failed to take all necessary and reasonable measures in his power to stop or prevent their commission, or to submit the matter to the competent authorities for investigation or prosecution.

This is known as “command responsibility”, and is applicable when the crimes in question are committed by subordinates over whom the commander exercises effective command and control.

For a detailed discussion of command responsibility, see Chapter 8.

[P I, 87 / 1 CILS, 153 / ICC Stat., 28 / ICTY Stat., 7 / ICTR Stat., 6 / SCSL Stat., 6]

## **9.6 War crimes and other international crimes**

This Section gives an overview of war crimes and other international crimes, including crimes against humanity and genocide (see 9.6.1), and the possible grounds for excluding criminal liability for these international crimes in the ICC (see 9.6.2).

### **9.6.1 International crimes**

This subsection sets out the basic definitions of war crimes, crimes against humanity and genocide.

It does not list the elements of each and every crime, and should be viewed as illustrative only of international crimes.

#### **9.6.1.1 Categories of international crimes**

During an armed conflict several categories of international crimes can be committed, including war crimes, crimes against humanity and genocide.

War crimes can only be committed in the context of an armed conflict, whereas crimes against humanity and genocide can be committed both within and outside an armed conflict.

[ICC Stat., 6, 7, and 8]

#### **9.6.1.2 War crimes: general definition**

War crimes are serious violations of the law of armed conflict. War crimes can be committed during an international armed conflict or a non-international armed conflict.

War crimes do not include crimes committed in situations other than an armed conflict.

[1 CILS, 156 / ICC Stat., 8]

#### **9.6.1.3 War crimes: international armed conflicts**

War crimes in an international armed conflict include:

- grave breaches of the Geneva Conventions of 12 August 1949;
- grave breaches of Additional Protocol I to the Geneva Conventions; and
- other serious violations of the laws and customs of war applicable in an international armed conflict, e.g. employing poisonous or asphyxiating gases.

#### 9.6.1.4 War crimes: non-international armed conflicts

War crimes in a non-international armed conflict include:

- serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949; and
- other serious violations of the laws and customs of war applicable in armed conflicts not of an international character.

#### 9.6.1.5 War crimes: grave breaches of the Geneva Conventions (IAC)

Grave breaches of the Geneva Conventions of 12 August 1949 include any of the following acts against persons or property protected by the Conventions:

- wilful killing;
- torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering, or serious injury to body or health;
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement of a protected person (as defined in the Fourth Geneva Convention); and
- taking hostages.

[GC I, 50 / GC II, 52 / GC III, 130 / GC IV, 147]

#### 9.6.1.6 War crimes: grave breaches of Additional Protocol I (IAC)

Additional Protocol I extends the grave breaches in the four Conventions to additional categories of victims.

Acts which constitute grave breaches of the Geneva Conventions of 1949 also constitute grave breaches of Additional Protocol I if they are committed against categories of persons protected by that Protocol, including: refugees, combatants, persons not held as prisoners of war who are to be tried for an offence arising out of the hostilities, civilian medical and religious personnel, medical units and medical transports.

Further grave breaches set out by Protocol I are as set out below.

- Wilfully seriously endangering the physical health or mental integrity of any person by subjecting the person to:
  - any medical procedure;
  - physical mutilations;
  - medical or scientific experiments; or
  - removal of tissue or organs for transplantation;
 when not indicated by the state of health of the person concerned or consistent with generally accepted medical standards.

- The following acts when committed wilfully and causing death or serious injury to body or health:
  - making the civilian population or individual civilians the object of attack;
  - launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
  - launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
  - making non-defended localities and demilitarized zones the object of attack;
  - making a person the object of attack in the knowledge that he is *hors de combat*;
  - the perfidious use of the distinctive emblem of the red cross, red crescent, or red crystal, or of other protective signs recognized by the law of armed conflict; and
  - depriving a person protected by Additional Protocol I of the right to a fair and regular trial.
- The following, when committed wilfully and in violation of the law of armed conflict:
  - the transfer by an Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
  - unjustifiable delay in the repatriation of prisoners of war or civilians;
  - practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; and
  - making clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given, the object of attack, causing as a result extensive destruction thereof. This provision applies where there is no evidence that the adverse party is using such objects in support of the military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives.

[P I, 11, 85]

#### **9.6.1.7 War crimes: other serious violations of the laws and customs of war (IAC)**

The following acts are listed in Article 8 of the Statute of the International Criminal Court as serious violations of the laws and customs of war (besides the grave breaches listed above), which constitute war crimes in an international armed conflict:

- intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- killing or wounding a combatant who, having laid down his arms or no longer having a means of defence, has surrendered at discretion;
- making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- killing or wounding treacherously individuals belonging to the hostile nation or army;
- declaring that no quarter will be given;
- destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

- pillaging a town or place, even when taken by assault;
- employing poison or poisoned weapons;
- employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate;
- committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions; and
- conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

[ICC Stat., 8]

#### **9.6.1.8 War crimes: serious violations of common Article 3 (NIAC)**

The ICC Statute defines serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 as any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

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

[GC I, 3 / GC II, 3 / GC III, 3 / GC IV, 3 / ICC Stat., 8]

### 9.6.1.9 War crimes: other serious violations of the laws and customs of war (NIAC)

The following acts are listed in Article 8 of the ICC Statute as serious violations of the laws and customs of war (besides violations of Article 3 common to the four Geneva Conventions, listed above), which constitute war crimes in a non-international armed conflict:

- intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- pillaging a town or place, even when taken by assault;
- committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;
- conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- killing or wounding treacherously a combatant adversary;
- declaring that no quarter will be given;
- subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; and
- destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

[ICC Stat., 8]

### 9.6.1.10 Crimes against humanity, definition (IAC/NIAC)

Article 7 of the ICC Statute defines crimes against humanity as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- murder;
- extermination;
- enslavement;
- deportation or forcible transfer of population;
- imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- torture;
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- enforced disappearance of persons;
- the crime of apartheid; and
- other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

[ICC Stat., 7]

#### **9.6.1.11 Crime against humanity: not only in armed conflict**

A crime against humanity can be committed outside the context of an armed conflict.

#### **9.6.1.12 Genocide (IAC/NIAC)**

Article 6 of the ICC Statute defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.

[ICC Stat., 6 / CCG, 2]

#### **9.6.1.13 Genocide: not only in armed conflict**

The crime of genocide can be committed outside the context of an armed conflict.

### **9.6.2 Grounds for excluding criminal responsibility, ICC**

This subsection discusses the grounds for excluding criminal responsibility in the ICC. These rules apply to any case over which the ICC has jurisdiction.

The grounds for excluding liability available in the ICC are illustrative of the types of defences that are available in international criminal courts and tribunals. Readers of this Handbook are advised to consult their legal advisers concerning the grounds for excluding liability for war crimes that are available in their national systems.

#### **9.6.2.1 Defences: grounds for excluding criminal responsibility**

Subject to the fulfilment of specific legal requirements, a person accused of having committed a war crime or other international crime cannot be held criminally responsible if, at the time the crime is committed:

- the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct;
- the person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct (unless the person has become voluntarily intoxicated and knew or disregarded the risk associated with intoxication);
- the person acts reasonably in self-defence or to defend another person or, in the case of war crimes, property which is essential for his or her own survival or that of another person or for accomplishing a military mission, against an imminent and unlawful use of force, and does so in a manner proportionate to the degree of danger to himself or herself or the other person or property protected (the fact that the person was involved in a defensive operation shall not in itself constitute a ground for excluding criminal responsibility); and
- the person is acting under duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against him, her or another person, and acts necessarily and reasonably in the circumstances, provided that he or she does not intend to cause a greater harm than the one sought to be avoided.

[ICC Stat., 31]

#### **9.6.2.2 Mistake of law**

Ignorance of the law is no excuse. It does not exempt the perpetrator of a crime from criminal responsibility.

[ICC Stat., 32]

#### **9.6.2.3 Mistake of fact**

The fact that a crime was committed as a result of a mistake of fact only excludes the criminal responsibility of the perpetrator if the mistake negated the mental element (*mens rea*) of the crime.

[ICC Stat., 32]

#### 9.6.2.4 Superior orders

The fact that a crime was committed pursuant to an order issued by a government or a superior – military or civilian – does not relieve the perpetrator of criminal responsibility unless:

- the perpetrator was under a legal obligation to obey the order;
- the perpetrator did not know that the order was unlawful; and
- the order was not manifestly unlawful.

[ICC Stat., 33 / 1 CILS, 155]

### 9.7 Judicial guarantees

This Section outlines judicial guarantees for the fair trial of persons for offences related to an armed conflict, and of persons in the control of a party to the conflict.

The law of armed conflict provides fundamental judicial guarantees for all persons who are tried for an offence related to the armed conflict (see 9.7.1). In addition, the law of international armed conflict sets out detailed rules for the trial of prisoners of war (see 9.7.2) and of persons protected under the Fourth Geneva Convention (see 9.7.3).

The statutes of the international criminal tribunals also provide judicial guarantees for the accused which are not discussed in this Handbook. The following are references to the specific provisions in those statutes.

[ICC Stat., 66, 67 / ICTY Stat., 21 / ICTR Stat., 20].

#### 9.7.1 Fundamental judicial guarantees

##### 9.7.1.1 Fundamental guarantees

Every person who is tried for an offence related to an armed conflict has a right to fundamental judicial guarantees.

[P I, 75 / P II, 6 / 1 CILS, 100-103] [IAC/NIAC]

##### 9.7.1.2 Regular judicial procedure

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict without a fair trial.

The judicial proceedings must be conducted by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

- the principle of legality (trial according to the law in force at the time when the offence was committed, no retroactive law, no heavier penalties than the one applicable at the time the offence was committed);

- no prosecution or punishment more than once for the same act or on the same charge (*ne bis in idem*);
- the principle of individual penal responsibility;
- presumption of innocence until proven guilty;
- right to be informed without delay of the particulars of the offence alleged;
- right to trial in the presence of the accused;
- right of the accused to examine the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as those brought against him;
- no compulsion of the accused to testify against himself or to confess guilt;
- right to public announcement of judgment; and
- right to information on the right of appeal and other remedies and their time limits.

[P I, 75 / P II, 6 / 1 CILS, 100-102] [IAC/NIAC]

For further guidance on the right to a fair trial in the customary law of armed conflict, see the commentary on Rule 100, "Fair Trial Guarantees", in the ICRC's *Customary International Humanitarian Law* study, vol. 1.

[1 CILS, 100]

### 9.7.1.3 Non-international armed conflict

In a non-international armed conflict it is absolutely prohibited to pass sentences and carry out executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are generally recognized as indispensable.

[GC I, 3 / GC II, 3 / GC III, 3 / GC IV, 3] (NIAC)

These judicial guarantees for persons charged with conflict-related offences have been further spelt out and expanded by Additional Protocol II governing non-international armed conflicts.

[P II, 6]

### 9.7.1.4 Death penalty

The death penalty as such is not prohibited by the law of armed conflict. However, many States have entered into international agreements and/or enacted national legislation prohibiting the death penalty both in peacetime and during an armed conflict.

In addition, the law of armed conflict provides that the pronouncement of the death penalty on pregnant women or mothers who have dependent infants,

for an offence related to the armed conflict, should be avoided. The death penalty for those offences must in no case be carried out on such women.

The death penalty for an offence related to the armed conflict must not be carried out on persons who were not at least eighteen years old at the time the offence was committed.

[GC IV, 68 / P I, 76, 77 / P II, 6] [IAC/NIAC]

## **9.7.2 Prosecution of prisoners of war (IAC)**

### **9.7.2.1 Applicable laws: same as for armed forces of the Detaining Power**

A prisoner of war is subject to the laws, regulations and orders in force for the armed forces of the Detaining Power and may only be punished on that ground.

No proceedings or punishments contrary to the law of armed conflict are allowed.

[GC III, 82]

### **9.7.2.2 Choice between penal proceedings and disciplinary sanctions**

If any law, regulation or order of the Detaining Power declares acts committed by a prisoner of war to be punishable, but the same act would not be punishable if committed by a member of the armed forces of the Detaining Power, only a disciplinary punishment may be applied.

In choosing between judicial or disciplinary proceedings, the Detaining Power must ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures.

[GC III, 82, 83]

### **9.7.2.3 Confinement pending trial**

A prisoner of war awaiting trial must not be confined unless:

- a member of the armed forces of the Detaining Power would be confined if accused of the same offence; or
- it is essential to do so in the interests of national security.

In no circumstance may the confinement exceed three months. A prisoner of war undergoing confinement while awaiting trial is entitled to the same treatment and protections as a prisoner of war undergoing confinement as a disciplinary sanction.

[GC III, 97, 98, 103]

#### **9.7.2.4 Judicial proceedings: no trial for acts not forbidden by a law in force at the time of commission**

A prisoner of war may not be tried or sentenced for an act that was not forbidden by a law of the Detaining Power or an international law in force at the time the act was committed.

[GC III, 99]

#### **9.7.2.5 Judicial proceedings: coerced confessions prohibited**

It is prohibited to exert moral or physical coercion on a prisoner of war in order to extract an admission of guilt of the act of which he is accused.

[GC III, 99]

#### **9.7.2.6 Judicial proceedings: communication of charges**

The prisoner of war has a right to receive, in a language he understands and in good time before the opening of the trial, the particulars of the charge or charges upon which he is to be brought before court and tried, as well as the documents generally provided to an individual accused of a crime under the laws in force for the armed forces of the Detaining Power.

[GC III, 105]

#### **9.7.2.7 Judicial proceedings: right to and means of defence**

A prisoner of war must not be convicted without the assistance of a qualified advocate or counsel, or without an opportunity to present his defence.

The accused is entitled to assistance by one of his fellow prisoners, or to defence by a qualified lawyer or counsel of his own choice. He has the right to call witnesses. He has the right to a competent interpreter. He must be advised of these rights by the Detaining Power in due time before his trial.

If the prisoner of war does not choose an advocate or counsel, the Protecting Power (see definition in Chapter 3, P) must find him one, and must have at least one week at its disposal for that purpose. Failing a choice by the Protecting Power, the Detaining Power must appoint a competent advocate or counsel to defend him.

The advocate or counsel must have a period of at least two weeks before the opening of the trial, as well as the necessary facilities, to prepare the defence of the accused.

The prisoner of war has the right to meet with his advocate or counsel in private.

The advocate or counsel has the right to confer with witnesses, including other prisoners of war, in order to prepare the defence of the accused.

[GC III, 99, 105]

#### 9.7.2.8 Judicial proceedings: role of the Protecting Power

The Detaining Power must notify the Protecting Power (see definition in Chapter 3, P) at least three weeks before the trial opens of all particulars about the accused, the place of internment or confinement, the specification of the charges, the designation of the court, and the date of the opening of the trial. The prisoner's representative must be given the same information.

Evidence that the Protecting Power, the prisoner and the prisoner's representative have received such notification must be presented at the opening of the trial, and if it is not, then the trial must be adjourned.

Representatives of the Protecting Power have the right to attend the trial unless, exceptionally, the trial is held *in camera* in the interest of State security.

Every judgment and sentence pronounced must immediately be reported to the Protecting Power along with an indication of whether there is a right to appeal. This information must also be sent to the prisoner of war if the sentence was not pronounced in his presence.

If the prisoner of war exercises or waives his right to appeal, this must also be reported to the Protecting Power.

In practice, the Protecting Powers system has not been used in recent years. Instead, the ICRC has come to be recognized as a substitute for the Protecting Power.

[GC III, 104, 105, 107]

#### 9.7.2.9 Judicial proceedings: additional procedural requirements

The following procedural requirements must be respected:

- trial of prisoners of war by a military court, unless existing laws expressly permit the trial of armed forces of the Detaining Power by civilian courts;
- trial by a court offering the essential guarantees of independence and impartiality as generally recognized;
- rapid judicial investigations; and
- not more than one punishment for the same act or the same charge.

[GC III, 84, 86, 103, 105]

**9.7.2.10 Judicial proceedings: appeal**

Every prisoner of war has, in the same manner as the members of the armed forces of the Detaining Power, the right to appeal or petition against any sentence pronounced upon him. He must be informed of his right to appeal or petition and of the time limits within which to do so.

[GC III, 106]

**9.7.2.11 Penalties: same penalties, courts and procedures as for armed forces of Detaining Power**

A prisoner of war may only be validly sentenced if the sentence is pronounced by the same courts and according to the same procedure as for members of the armed forces of the Detaining Power.

A prisoner of war may only be sentenced to the same penalties as those applicable to members of the armed forces of the Detaining Power who have committed the same acts.

[GC III, 87, 102]

**9.7.2.12 Penalties: no duty of allegiance**

When fixing a penalty, the courts or authorities of the Detaining Power must take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance.

The courts or authorities of the Detaining Power are at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and are therefore not bound to apply any minimum penalty prescribed by law.

[GC III, 87]

**9.7.2.13 Penalties: no deprivation of rank**

No prisoner of war may be deprived of his rank by the Detaining Power, or prevented from wearing his badges.

[GC III, 87]

**9.7.2.14 Penalties: death penalty**

Prisoners of war and the Protecting Power must be informed, as soon as possible, of any offences punishable by the death sentence under the laws of the Detaining Power.

The death sentence must not be executed before expiration of a period of at least six months from the date of receipt by the Protecting Power of the final judgment confirming the death sentence.

A death penalty may not be pronounced unless the attention of the court has been called to the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance.

[GC III, 100, 101]

#### **9.7.2.15 Penalties: execution of penalties**

Sentences pronounced on prisoners of war after a conviction has become enforceable must be served in the same establishments and under the same conditions as by members of the armed forces of the Detaining Power.

In all cases, prisoners of war sentenced to deprivation of liberty:

- must be treated humanely and must not be subjected to torture or cruelty, including corporal punishment or imprisonment in premises without daylight;
- have the right to receive and dispatch correspondence and to receive at least one relief parcel per month;
- have the right to take regular exercise in the open air;
- have the right to receive the medical care required by their state of health and the spiritual assistance they may desire;
- are entitled to receive visits by representatives and delegates of the ICRC; and
- have the right to address complaints and requests regarding their conditions of detention:
  - to the military authorities in whose power they are; or
  - to the representatives of the ICRC.

In addition, it must be noted that women prisoners of war are to be confined in separate quarters and must be placed under the direct supervision of women. They may only be searched by women.

[GC III, 78, 87, 88, 108, 126]

#### **9.7.2.16 POWs convicted for crimes committed prior to capture**

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture retain, even if convicted, the benefits of the Third Geneva Convention.

[GC III, 85]

### 9.7.2.17 Treatment after serving sentence

Prisoners of war who have served judicial sentences may not be treated differently from other prisoners of war.

[GC III, 88]

## 9.7.3 Prosecution of civilians (IAC)

This subsection discusses the detailed rules concerning the criminal prosecution of civilians and other persons protected by the Fourth Geneva Convention who are interned either in occupied territory or in the territory of a party to an international armed conflict.

For a discussion of the definition of “protected person” under the Fourth Convention, and the substantive rules concerning when and under what conditions civilians who qualify as “protected persons” may be detained or interned, refer to Section 7.4.

### 9.7.3.1 Applicable law: civilian internees

The territory’s penal laws in force for aliens during peacetime continue to apply, as a general rule, to civilian internees. For offences committed during internment, the laws in force in the territory in which they are interned apply.

[GC IV, 117]

If the act for which a civilian internee is to be punished is not punishable if committed by a person who is not interned, then only a disciplinary sanction may be applied.

[GC IV, 117-126]

### 9.7.3.2 Applicable law: protected persons in occupied territory

The penal laws of the occupied territory remain in force during occupation, except for those laws repealed by the Occupying Power for reasons of security or because they are an obstacle to the application of the Geneva Conventions.

During an occupation, the courts of the occupied territory continue to operate and hold trials for penal offences under the laws of the occupied territory, provided that justice is effectively administered, and that the operation of the occupied territory’s courts does not present a threat to the security of the Occupying Power or an obstacle to the application of the Geneva Conventions. Thus, persons accused of violating the penal laws of the occupied territory should be tried by the occupied territory’s courts, provided they are in operation.

In addition, as set out in more detail in Section 12.2, the Occupying Power may enact new penal laws to maintain orderly government, to fulfil its obligations under the Geneva Conventions, and to ensure the security of its armed forces and its administration (including personnel and objects).

In case of a breach of the new penal provisions promulgated by the Occupying Power, the properly constituted, non-political, military courts of the Occupying Power may try the accused.

These courts must sit in the occupied territory. Courts of appeal should, preferably, also sit in the occupied territory.

[GC IV, 64, 66]

### **9.7.3.3 Occupied territory: non-retroactivity of the new laws enacted by the Occupying Power**

The military courts of the Occupying Power must not apply the laws of the Occupying Power retroactively. In other words, they may only apply the laws that were in effect at the time the act was committed.

Furthermore, they must take into consideration the fact that the accused is not a national of the Occupying Power.

[GC IV, 65, 67].

### **9.7.3.4 Limitations on arrest, prosecution and conviction by the Occupying Power**

Protected persons must not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation or during a temporary interruption thereof, except for war crimes.

Nationals of the Occupying Power who have sought refuge in the territory of the occupied State before the outbreak of hostilities cannot be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

[GC IV, 70]

### 9.7.3.5 Judicial proceedings: penal procedures

The same penal procedures apply to:

- trials of protected persons by an Occupying Power; and
- trials of civilian internees by a Detaining Power.

[GC IV, 71-76, 126]

### 9.7.3.6 Judicial guarantees

The following judicial guarantees apply to protected persons accused of crimes by an Occupying Power or by a Detaining Power:

- the right to be informed in a language they understand of the particulars of the charges against them;
- a trial as soon as possible;
- the right to present a defence, including the right to present evidence and call witnesses;
- the right to counsel or an advocate of their choice, including the right to receive visits from that person, and:
  - if the accused does not make a choice, the Protecting Power may provide counsel or an advocate,
  - when the accused is facing a serious charge, the Detaining/Occupying Power must, subject to the consent of the accused, provide counsel or an advocate if the Protecting Power is unable to do so;
- the right to an interpreter and the right to object to the interpreter at any time and to request a replacement;
- a regular trial before a competent court; and
- the right to appeal and to be informed of this right and any time limits.

[GC IV, 71, 72, 73]

### 9.7.3.7 Judicial proceedings: role of the Protecting Power

The Protecting Power (see definition in Chapter 3, P) must be notified, not later than three weeks before the trial, of all criminal proceedings instituted against a civilian internee/protected person in occupied territory involving the death penalty or imprisonment of two years or more. The notice must include a description of the accused, place of residence or detention, specification of the charge(s) with mention of the penal provisions under which they are brought, designation of the court which will hear the case, and time and place of the first hearing.

If evidence is not introduced at the beginning of the trial that such notice was provided, then the trial must not proceed.

Representatives of the Protecting Power have the right to attend the trial, unless the hearing is, as an exceptional measure, to be held *in camera* in the interests of the security of the Detaining Power.

The Protecting Power must be notified of all sentences involving the death penalty or imprisonment of more than two years. The appeal period may not begin to run until notification of the judgment has been received by the Protecting Power.

[GC IV, 71, 74]

#### **9.7.3.8 Death penalty: procedure**

A person sentenced to death has the right to petition for a pardon and a reprieve.

A death sentence must not be carried out for at least six months after the Protecting Power receives notification of the final judgment confirming the sentence or of the denial of a pardon or reprieve.

[GC IV, 75]

#### **9.7.3.9 Death penalty: limitations**

The courts of an Occupying Power may only impose the death penalty on protected persons in cases of espionage or serious acts of sabotage against the military installations of the Occupying Power, or for intentional offences that caused the death of more than one person, and only if such offences were punishable by a death sentence under the law of the occupied territory before the occupation.

Furthermore, the death penalty may only be imposed if the court has been reminded that the accused is not a national of the Occupying Power and owes no allegiance to it.

The death penalty may not be imposed on protected persons who were under 18 at the time of the offence.

[GC IV, 68]

#### **9.7.3.10 Treatment while serving sentence**

Protected persons/civilian internees who are convicted must serve their sentences in the territory in which they have been found guilty. They must if possible be separated from other detainees. They must be treated humanely. They must be provided with conditions of food and hygiene sufficient to keep them in good health and at least as good as those in other prisons in the territory. They have the right to receive the medical attention required by their state of health, spiritual assistance, and visits by the ICRC and their close relatives.

Women must be held in separate quarters from men and must be under the immediate supervision of women. They may only be searched by women.

Imprisonment in premises without daylight, and all forms of cruelty, are forbidden.

[GC IV, 76, 118].

## **9.8 State and individual responsibility for violations of human rights during law enforcement operations**

This Section describes the responsibilities of States and individuals for violations of human rights during law enforcement operations.

### **9.8.1 Applicable law**

#### **9.8.1.1 Rule**

Law enforcement operations, i.e. situations other than armed conflict (as defined in 14.1.1.2), are governed by domestic law and human rights law.

However, it must be noted that situations other than armed conflict, e.g. a riot control operation carried out by armed forces, can occur on the territory of a State in which an armed conflict is taking place; and in such cases certain provisions of the law of armed conflict are potentially applicable, such as those relating to the internment of civilians who represent a security threat to a party to the conflict (see Chapter 7).

#### **9.8.1.2 Treaties and soft-law standards**

The following deals with the national enforcement of human rights obligations in law enforcement operations.

The main human rights treaty addressed is the International Covenant on Civil and Political Rights (ICCPR).

The main soft-law standards addressed are the:

- United Nations Code of Conduct for Law Enforcement Officials, 1979 (CCLEO); and
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

Certain regional human rights treaties contain provisions similar to those in the ICCPR. Readers of this Handbook are urged to consult their legal advisers concerning additional human rights treaties to which their State may be a party.

## **9.8.2 Obligations and responsibilities of States**

### **9.8.2.1 Maintenance of law and order: rule**

The maintenance of law and order is the responsibility of civilian authorities and the task of the police and/or paramilitary troops dedicated to this purpose.

However, armed forces may be required to assist the civilian authorities in the maintenance of law and order, especially in situations of internal tensions, violence or disturbances (see 14.1.1.1).

### **9.8.2.2 Duty to respect and ensure respect for human rights**

States have a duty to respect human rights and to ensure respect for them for all individuals under their jurisdiction and on their territory.

The UN Human Rights Committee has explained that the duty to ensure respect for human rights includes, among other things, the duty to take administrative, legislative, judicial and other measures (including providing education and training). In the case of armed forces engaged in law enforcement operations, this includes the duty to create rules and regulations on the use of force.

[ICCPR, 2 / Human Rights Committee, General Comment 31, CCPR/C/21/Rev.1/Add.13]

### **9.8.2.3 Rules and regulations on the use of force**

Governments and commanders of armed forces involved in law enforcement operations are responsible for the adoption and implementation of rules and regulations on the use of force against persons by members of the armed forces tasked with law enforcement duties.

These rules and regulations must comply in every respect with human rights law requirements and domestic law provisions on the use of force.

[BPUFF, 1]

For a detailed discussion of the substantive rules on the use of force and firearms in law enforcement operations, see 14.2.1.

### **9.8.2.4 Right to a remedy**

The ICCPR stipulates the obligation of States to ensure that every person whose human rights are violated has an effective remedy.

The right to an effective remedy includes the right to have the remedy determined by competent judicial, administrative or legislative authorities.

Furthermore, the State must also ensure that the competent authorities enforce such remedies when granted.

[ICCPR, 2]

The UN Human Rights Committee has clarified that the right to a remedy in the ICCPR also includes a duty on the part of the State to investigate violations of human rights, and where warranted, to criminally prosecute those who committed the violation.

[Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13]

#### **9.8.2.5 Reporting and review procedures**

The BPUFF provides guidance to States in fulfilling their obligation to respect and ensure respect for human rights.

First, it states that governments and armed forces must establish effective reporting and review procedures for all incidents where:

- death or injury is caused through use of force and firearms by members of the armed forces tasked with law enforcement duties; or
- such members of the armed forces use firearms in the performance of their duty.

For incidents reported pursuant to these principles, governments and law enforcement agencies must ensure that an effective review process is available, and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances.

In cases of death and serious injury or other grave consequences, a detailed report must be sent promptly to the competent authorities responsible for administrative review and judicial control.

[BPUFF, 6, 11, 22]

#### **9.8.2.6 Misuse of force and firearms**

Governments must ensure that arbitrary or abusive use of force and firearms by members of the armed forces tasked with law enforcement duties is punished as a criminal offence under their law.

Exceptional circumstances such as internal instability or public emergency may not be invoked to justify any departure from these basic principles.

[BPUFF, 7, 8]

For the substantive rules governing the use of force and firearms in law enforcement operations, refer to 14.2.1.

#### **9.8.2.7 Access to judicial review: persons affected by the use of force**

Persons affected by the use of force and firearms, their legal representatives, and in the event of the death of such persons, their relatives, must have access to a judicial review of the incident.

[BPUFF, 23]

#### **9.8.2.8 Access to judicial review: persons deprived of liberty**

The ICCPR stipulates that:

Anyone deprived of liberty through arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention, and order release if the detention is not lawful.

The ICCPR further stipulates that anyone who has been the victim of unlawful arrest or detention must have an enforceable right to compensation.

[ICCPR, 9]

For the substantive rules concerning arrest and detention in law enforcement operations, refer to 14.2.3 and 14.2.4.

### **9.8.3 Obligations and responsibilities of individuals**

#### **9.8.3.1 Rule**

When engaged in law enforcement operations, members of the armed forces are subject to the same fundamental rules and obligations as civilian officials and organizations tasked with such duties.

[CCLEO, 1, commentary]

#### **9.8.3.2 Respect for human rights**

Officials and organizations tasked with the maintenance of law and order are required to promote, protect and respect the human rights of all people without any adverse distinction while performing their duty.

[CCLEO, 2]

#### **9.8.3.3 Command responsibility**

Commanders must be held responsible if they knew, or should have known, that subordinates under their command are resorting, or have resorted, to

the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

[BPUFF, 24]

#### **9.8.3.4 Unlawful orders**

Commanders who give unlawful orders concerning the use of force and firearms must be held responsible under domestic law.

[BPUFF, 26]

#### **9.8.3.5 Obedience to superior orders is no defence**

A law enforcement official may not rely on the defence of superior orders if he used force or firearms in a manner that resulted in death or serious injury; he knew or should have known that the order was manifestly unlawful; and he had a reasonable opportunity to refuse to follow the order.

[BPUFF, 26]

## **9.9 State and individual responsibility during peace support operations (PSOs)**

This Section describes the application of the rules discussed in this Chapter of the Handbook to peace support operations (PSOs). The subject of PSOs, including the applicability of the law of armed conflict and human rights law, is discussed in detail in Chapter 15.

### **9.9.0.1 PSO: definition**

Peace support operations encompass all multifunctional operations conducted impartially, normally by States or by international or regional organizations such as the United Nations (UN), the European Union (EU), the African Union (AU), or the North Atlantic Treaty Organization (NATO), involving military forces and diplomatic and humanitarian agencies, and designed to achieve a long-term political settlement or other specified objective.

### **9.9.0.2 Legal framework in a PSO**

The legal framework for a PSO may include:

- the law of armed conflict;
- human rights law;
- the domestic law of the troop contributing State;
- the domestic law of the State where the PSO occurs;
- the mandate for the PSO; and
- one or more status of forces agreements.

For a description of each element, refer to Chapter 15.

### 9.9.0.3 Domestic law of the host nation & status of forces agreements

Most status of forces agreements (and the UN Model Status of Forces Agreement for Peace-Keeping Operations) provide that the individual members of armed forces deployed in a PSO are immune from prosecution in the host State and are under the exclusive jurisdiction of the troop contributing State for criminal offences committed during the PSO. Troop contributing States are obliged to investigate and discipline or prosecute, as warranted, members of their armed forces for violations of the law of armed conflict. With regard to troops under UN command and control, this requirement is set out in the UNSG Bulletin.

[UN Model Status of Forces Agreement for Peace-Keeping Operations, paras. 47-48 / Secretary General's Bulletin, Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, 6 August 1999, 4 / P I, 87 / 1 CILS, 158]



# CHAPTER 10

# LOGISTICS

## 10 LOGISTICS

This Chapter addresses the law of armed conflict implications for logistics during an armed conflict, including transport, evacuation, supplies to the armed forces, and logistics bases.

As discussed elsewhere in this Handbook, the principles of distinction, proportionality and precaution underlie much of the law of armed conflict relating to the conduct of hostilities. In the case of logistics, precautions against the effects of attacks take on particular importance. These are discussed as a separate subject in Section 4.3. Put simply, the parties to an armed conflict must take all feasible precautions to protect the civilian population and civilian objects from the effects of enemy attacks. These precautions are of particular relevance when commanders make decisions concerning transport, evacuation, supply, and the operation of logistics bases.

Another basic concept of the law of armed conflict, relevant to the Sections on evacuation and transport of persons, is that persons in the power of a party to a conflict are entitled to certain minimum standards of treatment. The standards required in actual detention and internment are further elaborated in Chapter 7.

**10.1 Transport management** addresses responsibility for transport, separate and joint military/medical/civilian transport, the transport of cultural property, and cooperation with civilian authorities.

**10.2 Medical transport** addresses the basic principles of medical transport, including the use of the distinctive emblem.

**10.3 Evacuation: captured persons and objects, and the dead** sets out the various measures required.

**10.4 Supplies** deals with the supply of military and medical items to armed forces.

**10.5 Logistics bases** addresses logistic principles, military supply and maintenance bases and military medical service bases.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## 10.1 Transport management

This Section addresses responsibility for transport, separate and joint military/medical/civilian transport, the transport of cultural property, and cooperation with civilian authorities.

### 10.1.1 Responsibility for military transport

#### 10.1.1.1 Definition

In this Handbook, "military transport" refers to the movements of military personnel and objects.

#### 10.1.1.2 General transport policy

Operational commanders should establish a general policy for military transport.

That policy should determine the various supply and evacuation channels, the use of means of transport and the responsibility for control of transport.

Each commander should establish the additional details appropriate to his sphere of responsibility (e.g. for unloading areas, for transports passing through his area of responsibility, etc.).

### 10.1.2 Separate military, medical and civilian transport routes

#### 10.1.2.1 Transport routes: rule

Commanders should, when the strategic and tactical situation permits, establish separate routes for military, medical, and civilian transport.

The reason for this recommendation is that, under the law of armed conflict, certain categories of persons and objects are protected from attack, whereas other categories constitute military objectives. For example, civilians who are not taking direct part in hostilities, persons who are *hors de combat* and specifically protected personnel must not be attacked.

Furthermore, pursuant to the principle of precaution, the parties to an armed conflict must take every feasible precaution to protect civilians and civilian objects from the effects of an attack, and remove individual civilians, the civilian population, and civilian objects from the vicinity of military objectives – which include military transports and military objects being transported.

In order to comply with these obligations, the best practice is therefore to establish separate routes or schedules for movements of the different categories of persons and objects – military, medical, and civilian.

[GC III, 23 / GC IV, 28 / P I, 12, 51, 58 / 1 CILS, 22, 24, 97] [IAC/NIAC (1 CILS, 24 is IAC / arguably NIAC)]

### 10.1.2.2 Non-medical military transports

Non-medical military vehicles, weapons and objects are military objectives by nature under the law of armed conflict. Subject to the principles of distinction, proportionality and precaution, these objects may be attacked by the opposing party.

Other objects which by their nature, location, purpose or use make an effective contribution to military action, and whose destruction, capture or neutralization offers a definite military advantage in the circumstances ruling at the time, are also military objectives. For example, a normal "civilian" automobile carrying military troops becomes a military objective.

For a discussion of the concept of military objective, see Chapter 5.

[P I, 48, 52 / 1 CILS, 1, 7, 8] [IAC/NIAC]

### 10.1.2.3 Civilian transports

Civilian objects, i.e. vehicles and other objects that are not defined by the law of armed conflict as military objectives, cannot be the object of a direct attack.

Civilians who do not directly participate in hostilities are also protected from direct attack.

For more details on civilian objects, see Chapter 5.

[P I, 48, 50, 51, 52 / P II, 13, / CCW.P.II.Amend., 3 / CCW.P.III, 2 / 1 CILS, 6, 7, 10] [IAC/NIAC]

### 10.1.2.4 Medical transports

The transport of medical personnel, medical objects and the wounded, sick and shipwrecked by medical vehicles must be given the protection granted by the law of armed conflict (see also Chapter 5).

[GC I, 12,19, 20, 24-25, 35-37/ GC II, 12, 22-27, 36, 37, 39, 40 / GC IV, 16, 18, 20-22 / P I, 9, 10,12,15, 21-24 / P II, 7, 9,11 / 1 CILS, 25, 28-30] [IAC/NIAC]

## 10.1.3 Joint military, medical and/or civilian transport routes

### 10.1.3.1 Transport routes and movement channels

Where common routes are used for military, medical and civilian transports, the commanders in charge must schedule and space out traffic so as to avoid intermingling and confusion between them.

### 10.1.3.2 Multi-modal transport

When successive different means of transport are used to carry the same persons and objects (e.g. first by truck, then by ship, and then by aircraft), the relevant commanders should give practical instructions for the transfer between modes of transport (e.g. instructions for the manning of transports by non-medical military, medical or civilian personnel, use of distinctive emblems and/or signals).

### 10.1.3.3 Transit points

Transit points and unloading areas should be assigned. The simultaneous presence of military transports and non-military and/or civilian transports should be avoided or kept short. Within a large transit centre, specific separate locations should be assigned to military, medical, and civilian personnel and transports.

## 10.1.4 Transport of cultural property

Cultural property is protected by international law, and each party to an armed conflict has obligations to respect and protect it. For the definitions and categories of cultural property, see Chapter 3, C and 5.4.6. This chapter outlines the immunity granted to moveable cultural property being transported and the procedures to obtain it.

The following obligations apply to States party to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (H.CP) and/or its Protocol II (H.CP.P.II).

### 10.1.4.1 Introduction

With regard to the transport of cultural property, the H.CP provides for two categories:

- transport under special protection; and
- transport in urgent cases.

### 10.1.4.2 Transport under special protection: procedure

To arrange for the transfer of cultural property as transport under special protection, a party must make a request to the Commissioner-General for Cultural Property at UNESCO in accordance with the conditions set out in the Regulations appended to the H.CP.

Transport under special protection must take place in vehicles exclusively engaged in the transfer of cultural property, displaying the distinctive emblem of cultural property (see 5.4.6.10), and under international supervision.

[H.CP 12]

#### 10.1.4.3 Transport under special protection: immunity

Cultural property being transported under special protection is immune from:

- seizure, capture, appropriation as booty, and
- attack.

This immunity extends to the means of transport itself, provided that it is exclusively engaged in the transfer of such cultural property. The means of transport and the cultural property may be searched.

[H.CP, 12, 14] [IAC/NIAC]

#### 10.1.4.4 Transport in urgent cases: procedure

In some cases there is not enough time to follow the procedure to obtain immunity as transport under special protection.

When the transfer of cultural property is urgently required for its safety and there is not sufficient time to make a formal request as outlined in 10.1.4.2, the party may transport the cultural property under the distinctive emblem of cultural property without doing so.

As far as possible, the party should notify the adverse party of the transfer.

The transferring party may *not* affix the distinctive emblem of cultural property to the means of transport if:

- the party has already sought and been refused immunity for the transfer as transport under special protection; or
- the means of transport is conveying the cultural property to the territory of another State.

[H.CP, 12, 13] [IAC/NIAC]

#### 10.1.4.5 Transport in urgent cases: protection

Cultural property being transported as a matter of urgency is immune from seizure or capture and confiscation as booty. This immunity extends to the means of transport that is exclusively engaged in the transport of such cultural property. The means of transport and the cultural property may be searched.

Parties to the H.CP must, as far as possible, take the necessary precautions to avoid attacks on transports displaying the emblem and transporting cultural property in urgent cases.

[H.CP 13, 14] [IAC/NIAC]

#### **10.1.4.6 Removal of cultural property as a precautionary measure**

Parties to the H.CPP.II must, to the maximum extent feasible, remove moveable cultural property from the vicinity of military objectives or provide for adequate protection on the spot.

A party removing such cultural property as a precautionary measure should follow one of the procedures set out above.

[H.CPP.II, 8] [IAC/NIAC]

### **10.1.5 Cooperation with civilian authorities**

#### **10.1.5.1 Rule**

The holder of general command responsibility should establish instructions for cooperation with and support to civilian authorities concerning transport.

#### **10.1.5.2 Priorities**

Joint instructions should determine transport priorities, including the emergency evacuation of civilians, to be executed as soon as the tactical situation permits.

#### **10.1.5.3 Emergency transport**

Locally competent commanders should offer emergency transport as required when the tactical situation permits. Priorities should be established in direct cooperation with the civilian authorities concerned.

#### **10.1.5.4 Communication**

Channels of communication should be established to avoid misunderstanding and confusion between military and civilian personnel, transports and locations (e.g. subordination, cooperation, mixed military and/or civilian manning of transports, camouflage requirements).

### **10.2 Medical transport**

This Section covers basic principles of medical transport, including the use of the distinctive emblem (see 10.2.1), and the specific rules for transport by land (see 10.2.2), sea (see 10.2.3) and air (see 10.2.4).

It should be noted that the definitions of medical transportation and of the types of medical transports used in this Handbook are those found in the law of international armed conflict.

## 10.2.1 Medical transport: principles

### 10.2.1.1 Definition: medical transportation

"Medical transportation" means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical and religious personnel, or medical material.

[P I, 8]

### 10.2.1.2 Definition: medical transports

"Medical transports" are any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a party to the conflict.

[P I, 8]

### 10.2.1.3 Protection

Medical transports must be respected and protected and must not be attacked.

[GC I, 35, 36 / GC IV, 21, 22 / P I, 21-24 / P II, 11 / 1 CILS, 29] [IAC/NIAC]

### 10.2.1.4 Separation from military objectives

Wherever possible, medical traffic should be kept a safe distance away from military objectives.

This recommendation stems from the rule in the law of international armed conflict that whenever possible, medical units must be located in such a way that attacks on military objectives do not endanger the safety of the medical unit.

However, because medical transports are entitled to protection from attacks in *all* armed conflicts, commanders should ensure that medical transports are kept a sufficient distance away from military objectives in a non-international armed conflict as well.

[P I, 12] [IAC]

### 10.2.1.5 Distinctive emblem: rule

The distinctive emblem of the medical service consists of a red cross on a white ground, a red crescent on a white ground or a red crystal on a white ground.

The distinctive emblem must be as large and visible as the tactical situation permits (e.g. illuminated at night, infrared visibility).

The specific rules on the use of the distinctive emblem are set out in the relevant parts of this Handbook concerning each category of medical transport and in Section 4.6.

[GC I, 38-44 / GC II, 41-45 / P I, 18, Annex I, Chapter II / P II, 12 / P III, 1, 2, 4, 5]  
[IAC/NIAC]

#### **10.2.1.6 Distinctive emblem: medical personnel**

Medical personnel and medical transports must display the distinctive emblem.

[GC I, 40, 41 / GC II, 42 / P I, 15, 18 / P II, 12] [IAC/NIAC]

#### **10.2.1.7 Identification**

The use of distinctive emblems and signals should be controlled by the military authority.

Such use should be adapted to the tactical situation (e.g. use of emblems where transfers from one means of transport to another take place; use of signals restricted to specific areas and/or periods of time, etc.).

[GC I, 38-44 / GC II, 41-45 / P I, 18, Annex I / P II, 12] [IAC/NIAC]

#### **10.2.1.8 Use of weapons by medical personnel and escorts during transport**

Commanders should regulate the use of weapons by medical personnel and combatants accompanying or escorting medical transports.

Medical personnel may only be armed with light weapons, i.e. small arms (usually a pistol) for self-defence or the defence of the wounded and sick in their charge.

Medical personnel may also be protected by an escort or by sentries. The use of weapons by escorts or sentries should be adapted to the tactical situation (e.g. special instructions should be issued for combatants accompanying or escorting medical transports that restrict the use of weapons to the same functions permitted for armed medical personnel).

[GC I, 22 / GC II, 35 / P I, 13, 28 / 1 CILS, 25 / 1 CILS, pp. 85-86] [IAC/NIAC]

**10.2.1.9 Transfer points**

Where the wounded, sick or shipwrecked are to be transferred from/to sea, air or land transports, responsibility should be clearly established for such transfer points and for the use of distinctive emblems, distinctive signals and radio communication.

**10.2.2 Medical vehicles: medical transport on land****10.2.2.1 Definition**

“Medical vehicles” means medical transports by land.

[P I, 8] [IAC]

**10.2.2.2 Protection**

Medical vehicles and units must be respected and protected. They must be marked with the distinctive emblem, with the consent of the competent authorities. In exceptional circumstances, the marking is not required (e.g. when it could help the enemy to locate military units in the proximity of the medical units).

[GC I, 35, 42 / P I, 18, 21 / P II, 11, 12 / 1 CILS, 29] [IAC/NIAC]

**10.2.2.3 Combat vehicles**

When combat vehicles are used as medical vehicles (e.g. wheeled or tracked armoured personnel carriers), particular emphasis should be placed on marking them as medical vehicles in order to avoid confusion with similar vehicles used for combat operations. For example, an armoured personnel carrier should have its cannon or machine gun removed, and the distinctive emblem affixed.

[GC I, 39 / P I, 18 / P II, 12] [IAC/NIAC]

**10.2.3 Medical transports by water**

This subsection addresses the specific rules to be applied to medical transports by water. Like all medical transports, those designed for use on water are subject to the general principles for medical transport in 10.2.1, which apply in all armed conflicts.

**All armed conflicts****10.2.3.1 Protection: medical transport by water**

Medical ships and craft must be respected and protected.

In a non-international armed conflict, medical transports by water should be marked with the distinctive emblem. In an international armed conflict there are specific rules on the marking of ships, which are discussed below.

[GC II, 22, 24, 25, 26, 27 / P I, 8, 22 / P II, 11, 12 / 1 CILS, 29] [IAC/NIAC]

## Specific rules in international armed conflicts

### 10.2.3.2 Definition

Medical ships and craft include any medical transports by water, such as hospital ships, coastal rescue craft, and their lifeboats and small craft.

[GC II, 22, 24, 25, 26, 27 / P I, 8, 22] [IAC]

### 10.2.3.3 Medical ships and craft: notifications

The names and descriptions of hospital ships and coastal rescue craft must be notified to the belligerent parties at least ten days before their use.

The notification must at least include registered gross tonnage, the length from bow to stern, and the number of masts and funnels. It may also include any other information that would facilitate identification.

This provision also applies where these hospital ships and coastal rescue craft carry civilian wounded, sick and shipwrecked.

It should be noted that small craft used for coastal rescue operations are protected even if the notification has not been made.

[GC II, 22, 24, 25, 26, 27 / P I, 22 / ICRC Commentary, GC II, 22] [IAC]

### 10.2.3.4 Military measures against hospital ships and coastal rescue craft

The belligerent parties have the right to control and search all hospital ships and coastal rescue craft.

They may refuse assistance from these vessels, order them off, make them steer a certain course, put a commissioner temporarily on board, control the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the situation so requires.

This provision also applies where these hospital ships and coastal rescue craft carry civilian wounded, sick and shipwrecked.

[GC II, 31 / P I, 22] [IAC]

### 10.2.3.5 Medical ships and craft: use of the distinctive emblem

Medical ships and craft must be distinctively marked.

All exterior surfaces of hospital ships must be white. One or more dark red crosses must be painted and displayed on each side of the hull and on the

horizontal surfaces. The distinctive emblems must be as large as possible, and placed so as to afford the greatest possible visibility.

Lifeboats, coastal lifeboats, and all small craft used by the medical service must be painted white with dark red crosses, prominently displayed.

At night and in case of reduced visibility, medical ships may take steps to render their distinctive emblems sufficiently apparent (lighting, etc.).

Ships must hoist a white flag with a red cross and their national flag (and ships of neutral States must also hoist the flag of the party to the conflict whose direction they have accepted).

[GC II, 43 / P I, 18, 22, 23] [IAC]

#### **10.2.3.6 Other medical ships and craft: protection and notifications**

Other medical ships and craft, whether at sea or in other waters, must be respected and protected in the same way as mobile medical units.

Such vessels must be marked with the distinctive emblem.

A belligerent party may notify an enemy party in advance of sailing of the name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons, and may provide any other information which would facilitate identification. The enemy party must acknowledge receipt of such information.

[P I, 23] [IAC]

#### **10.2.3.7 Military measures against other medical ships**

Any warship on the surface able to immediately enforce its command may order the medical ships and craft referred to in 10.2.3.6 to stop, order them off, or make them take a certain course, and they must obey every such command.

Such ships and craft may not in any other way be diverted from their medical mission as long as they are needed for the wounded, sick and shipwrecked on board.

[P I, 23] [IAC]

#### **10.2.3.8 *Ad hoc* transport of medical equipment**

The parties to an international armed conflict may charter ships for the *ad hoc* conveyance of medical equipment exclusively intended for the

treatment of wounded and sick members of armed forces or for the prevention of disease. The particulars regarding their voyage must be notified to the enemy power and approved by the latter.

The enemy power retains the right to board such ships, but not to capture them or seize the equipment carried.

Such ships do not have the status of medical ships and cannot be marked with the distinctive emblem or use the distinctive signals of the medical service.

[GC II, 38, 43] [IAC]

### **10.2.4 Medical aircraft**

This chapter addresses the specific rules to be applied to medical transports by air. Like all medical transports, those by air are subject to the general principles for medical transport in 10.2.1.

#### **All armed conflicts**

##### **10.2.4.1 Definition**

“Medical aircraft” means any medical transports by air.

[P I, 8]

##### **10.2.4.2 Rule**

Medical aircraft must be respected and protected. They must be marked with the distinctive emblem.

[GC I, 36 / P I, 24 / P II, 11, 12 / 1 CILS, 29] [IAC/NIAC]

#### **Specific rules in international armed conflicts**

##### **10.2.4.3 General rule: restrictions on overflight**

The use of medical aircraft is subject to restrictions regarding overflight of:

- areas physically controlled by enemy armed forces;
- contact zones; and
- areas controlled by neutral parties.

[GC I, 36 / P I, 24-30] [IAC]

##### **10.2.4.4 Notifications and agreements: areas not controlled by the adversary**

For flights over areas not physically controlled by enemy armed forces, an agreement with the adversary is not required.

For greater safety, however, a notification to the adversary is recommended, in particular for flights within the range of enemy anti-aircraft weapons.

[P I, 25] [IAC]

#### **10.2.4.5 Notifications and agreements: contact and similar zones**

For flights over contact and similar zones, an agreement with the adversary is recommended for the safety of the aircraft, because it is the only way protection for medical aircraft can be ensured.

In the absence of such an agreement, medical aircraft operate at their own risk, but they must nevertheless be respected after they have been recognized as such.

“Contact zone” means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

[P I, 26] [IAC]

#### **10.2.4.6 Notifications and agreements: areas controlled by the adversary**

For flights over areas physically controlled by the adversary, a medical aircraft continues to be protected provided that an advance agreement to such flights has been obtained from the adversary.

If a medical aircraft overflies such an area without, or contrary to, an agreement (for example due to navigational error or inclement weather), it must make every effort to identify itself.

As soon as such a medical aircraft has been recognized by the enemy armed forces, they must make all reasonable efforts to order the aircraft to land or to alight on water, as appropriate, or to take other measures to safeguard their own interests. In either case, the aircraft must be given time to comply before being attacked.

[P I, 27] [IAC]

#### **10.2.4.7 Notifications and agreements: contents**

The notifications and agreements referred to in 10.2.4.4 to 10.2.4.6 must state the proposed number of medical aircraft, their flight plans and means of identification.

A party which receives such a notification must immediately acknowledge receipt thereof and must as rapidly as possible agree, deny, or suggest reasonable alternative proposals to the request.

The parties must ensure that the military units concerned are rapidly informed of any such notifications and agreements.

[P I, 29] [IAC]

#### **10.2.4.8 Restrictions on medical aircraft**

There are several restrictions on the use of medical aircraft:

- Medical aircraft must not be used to attempt to acquire a military advantage over the adversary.
- Medical aircraft must not be used in an attempt to render military objectives immune from an attack.
- While overflying areas physically controlled by the adversary or contact zones, medical aircraft must not, except by prior agreement with the adversary, be used to search for the wounded and shipwrecked.
- Medical aircraft must not be used to collect or transmit intelligence data and must not carry any equipment intended for such purposes.
- Medical aircraft must not carry any armaments except small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as the medical personnel on board may need to defend themselves and the wounded, sick and shipwrecked in their care.
- Medical aircraft must not carry persons or cargo other than the wounded, sick, shipwrecked, medical and religious personnel, and medical equipment and supplies.

[P I, 28] [IAC]

#### **10.2.4.9 Inspection**

Medical aircraft flying over areas physically controlled by the adversary, or over areas where control is not clearly established, may be ordered to land or, if feasible, to alight on water for inspection.

Medical aircraft must obey any such order.

[P I, 27, 30] [IAC]

#### **10.2.4.10 Seizure**

A medical aircraft that is inspected may be seized, if the inspection establishes that:

- it is not a medical aircraft;

- it has been used in violation of the restrictions on medical aircraft listed in 10.2.4.8; or
- it has flown without or in breach of prior agreement where such agreement is required.

If the seized aircraft is in fact a permanent medical aircraft, it must be used as a medical aircraft until the end of the conflict. If it is not a permanent medical aircraft, then the seizing party may assign it to non-medical uses, provided any emblems are removed.

If the inspection establishes that the aircraft is in fact a medical aircraft, that it has not been used in violation of the restrictions in 10.2.4.8, and that it has not been flown in breach of a prior agreement where such agreement is required, the aircraft must be authorized to continue its flight without delay.

[P I, 30 / ICRC Commentary, P I, 30] [IAC]

#### **10.2.4.11 Overflight of areas controlled by neutral States**

Medical aircraft must not fly over or land in territory controlled by a neutral State (i.e. a State not party to the conflict) without prior agreement. Such aircraft must obey any summons to land or to alight on water.

If a medical aircraft flies over such territory without prior agreement, it must make every effort to identify itself. As soon as such a medical aircraft has been recognized, the neutral State must make all reasonable efforts to order the aircraft to land or to alight on water, as appropriate, or to take other measures to safeguard its own interests. In either case, the aircraft must be given time to comply before being attacked.

Once a medical aircraft lands or alights on water, it may be inspected by the neutral State to determine whether it is in fact a medical aircraft. If it is, it must be allowed to continue its flight, although the neutral State must first detain those of its occupants for whom the law of armed conflict requires internment, in accordance with the provisions in Chapter 13 and Chapter 7.

If the aircraft is not a medical aircraft, it must be seized by the neutral State. The neutral State must detain those of its occupants for whom the law of armed conflict requires internment, in accordance with the provisions in Chapter 13 and Chapter 7.

[H.V, 14 / GC I, 37 / GC II, 40 / P I, 31 / ICRC Commentary, P I, 31] [IAC]

## **10.3 Evacuation: captured persons and objects, and the dead**

This Section discusses the evacuation of captured persons. For the initial measures to be taken with regard to captured persons, see 7.3.2.

### **10.3.1 Evacuation: wounded, sick, shipwrecked**

#### **All armed conflicts**

##### **10.3.1.1 Rule**

Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction.

[GC I, 15 / GC II, 18 / GC III, 19 / P I, 10 / P II, 8 / 1 CILS, 109] [IAC/NIAC]

##### **10.3.1.2 Medical treatment**

During evacuation, the wounded and sick must be treated humanely and must be given, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.

[GC I, 3, 12 / GC II, 3, 12 / GC III, 3 / GC IV, 3, 16 / P I, 10 / P II, 4, 7 / 1 CILS, 110, 111] [IAC/NIAC]

#### **International armed conflicts**

##### **10.3.1.3 Wounded, sick and shipwrecked combatants**

Captured wounded, sick and shipwrecked combatants have prisoner-of-war status and must, during their evacuation, be given the treatment to which prisoners of war are entitled.

[GC I, 14 / GC II, 16] [IAC]

##### **10.3.1.4 Reports**

Data to facilitate the identification of wounded and sick must be recorded, if feasible before evacuation (e.g. personal data, particulars concerning wounds or illness), if not already done beforehand.

Such data must be forwarded through the appropriate channel to the National Information Bureau.

[GC I, 16 / GC II, 19] [IAC]

### **10.3.2 Evacuation: the dead**

#### **All armed conflicts**

##### **10.3.2.1 General rule**

Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to evacuate the dead.

[GC I, 15 / GC II, 18 / GC IV, 16 / P II, 8 / 1 CILS, 112] [IAC/NIAC]

##### **10.3.2.2 Prohibition of looting**

Each party must take all possible measures to prevent looting of the dead. Mutilation of dead bodies is prohibited.

[GC I, 15 / GC II, 18 / GC IV, 16 / P I, 34 / P II, 8 / 1 CILS, 113] [IAC/NIAC]

#### **International armed conflicts**

##### **10.3.2.3 Ashes**

Ashes must be forwarded through the appropriate channel to the Graves Registration Service (see Chapter 3, G), which must keep them until receiving instructions from the home country of the deceased for their disposal.

[GC I, 17] [IAC]

##### **10.3.2.4 Means of identification**

Means of identification taken from the dead or found elsewhere (e.g. identity card, identity disc) must be sent through the appropriate channel to the National Information Bureau.

It should be stressed that one half of a double identity disc, or the identity disc itself if it is a single identity disc, should remain on the body. If the body is buried at sea, then one half of a double identity disc should remain on the body, but a single identity disc must be forwarded to the National Information Bureau.

[GC I, 16 / GC II, 19] [IAC]

##### **10.3.2.5 Personal effects**

Personal effects of the dead must be sent through the appropriate channel to the National Information Bureau (see Chapter 3, N).

[GC I, 16 / GC II, 19] [IAC]

### **10.3.2.6 Reports: rule**

The certificates of death must be forwarded through the appropriate channel to the National Information Bureau.

[GC I, 16 / GC II, 19] [IAC]

### **10.3.2.7 Reports: particulars on burial**

The particulars on burials, graves and cremation must be forwarded through the appropriate channel to the Graves Registration Service.

[GC I, 17] [IAC]

## **10.3.3 Evacuation: enemy military medical personnel**

### **International armed conflicts**

#### **10.3.3.1 Rule**

Permanent enemy military medical personnel are not prisoners of war, but must receive at least the same benefits and protection. Evacuation of permanent enemy military medical personnel must take place as soon as their services are no longer necessary for the wounded, sick and shipwrecked.

Such personnel must be evacuated through the same channel as the military wounded, sick and shipwrecked.

[GC I, 24, 26, 28 / GC II, 37 / GC III, 19, 33 / ICRC Commentary, GC III, 33] [IAC]

#### **10.3.3.2 Medical activities**

During evacuation, enemy military medical personnel may be called upon to perform their medical activities, so long as needed to care for the wounded and sick.

[H.IV.R, 23 / GC I, 28 / GC II, 37] [IAC]

#### **10.3.3.3 Temporary medical personnel**

Temporary enemy military medical personnel are prisoners of war. They may therefore be evacuated through the same channels and are entitled to the same conditions of evacuation as other prisoners of war.

[GC I, 29] [IAC]

### **10.3.4 Evacuation: enemy military religious personnel**

#### **International armed conflicts**

##### **10.3.4.1 Rule**

The evacuation of enemy military religious personnel must take place as soon as they are no longer necessary for spiritual assistance.

[GC I, 28 / GC II, 37] [IAC]

##### **10.3.4.2 Analogy with military medical personnel**

The provisions for the evacuation of enemy military medical personnel apply to the evacuation of enemy military religious personnel.

[GC I, 28 / GC II, 37] [IAC]

### **10.3.5 Evacuation: prisoners of war (IAC)**

##### **10.3.5.1 Rule**

Prisoners of war must be evacuated out of combat areas as soon as possible after their capture.

Prisoners of war must not be exposed unnecessarily to danger while awaiting evacuation from a fighting zone.

[GC III, 19] [IAC]

##### **10.3.5.2 Conditions of evacuation: rule**

The evacuation of prisoners of war must be carried out humanely and in conditions similar to those guaranteed for the forces of the detaining power.

[GC III, 20] [IAC]

##### **10.3.5.3 Temporary retention**

Only those prisoners of war who, owing to wounds or illness, would run greater risks by being transported, may be temporarily held back during an evacuation.

[GC III, 19] [IAC]

##### **10.3.5.4 Conditions of evacuation: safety**

All suitable precautions must be taken to ensure the safety of prisoners of war during evacuation.

[GC III, 20] [IAC]

#### 10.3.5.5 Conditions of evacuation: protection

Prisoners of war must be protected during evacuation, particularly against acts of violence or intimidation and against insults and public curiosity.

[GC III, 13] [IAC]

#### 10.3.5.6 Conditions of evacuation: care

During evacuation prisoners of war must be supplied with sufficient food and clean drinking water, and the necessary clothing and medical attention.

[GC III, 20] [IAC]

#### 10.3.5.7 Conditions of evacuation: transit camps

If, during evacuation, prisoners of war must pass through transit camps, their stay in such camps should be as brief as possible.

The treatment of prisoners of war in transit camps must be the same as in regular camps.

[GC III, 20, 24] [IAC]

#### 10.3.5.8 Questioning and physical treatment

Prisoners of war may be questioned during evacuation. However, a prisoner of war is only bound to reveal his identity data, namely:

- surname and first name(s);
- rank;
- date of birth; and
- army, regimental, personal or serial number or, failing this, equivalent information.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind. Nevertheless, there is no rule restricting the non-coercive questioning of prisoners of war, which should be carried out by trained intelligence or military police investigators.

The questioning of prisoners of war must be carried out in a language they understand.

[GC III, 17] [IAC]

**10.3.5.9 Establishment of identity: rule**

As soon as the tactical situation permits, the identity of prisoners of war must be established.

[GC III, 17 / ICRC Commentary, GC III, 17] [IAC]

**10.3.5.10 Establishment of identity: difficulties**

Prisoners who, owing to their physical or mental condition, are unable to state their identity must be handed over to the medical service.

[GC III, 17] [IAC]

**10.3.5.11 Establishment of identity: refusal**

A prisoner of war who wilfully refuses to give the information he is bound to supply may render himself liable to a restriction of the privileges accorded to his rank or status, but the remainder of the protections in the Third Geneva Convention remain applicable.

[GC III, 17] [IAC]

**10.3.5.12 Prisoner lists**

As soon as the tactical situation permits, a list of captured combatants must be drawn up and forwarded through the appropriate channel to the National Information Bureau (see Chapter 3, N).

[GC III, 20, 122] [IAC]

**10.3.5.13 Doubtful status**

In case of doubt as to the legal status of persons who have taken direct part in hostilities, those claiming prisoner-of-war status must be treated as such until a competent tribunal determines their status. They must accordingly receive the same treatment as prisoners of war while awaiting evacuation and must be evacuated under the same conditions as prisoners of war.

[GC III, 5 / P I, 45-47] [IAC]

**10.3.5.14 Release when safe and humane evacuation is impossible**

When the capturing unit is unable to meet the required conditions for the evacuation of prisoners of war, which include their safety and humane treatment, then the unit must release them and take all feasible precautions for their safety (e.g. providing water, food, means of signalling).

[P I, 41] [IAC]

## **10.3.6 Evacuation: enemy military objects**

### **All armed conflicts**

#### **10.3.6.1 War booty**

War booty should be transported through the logistics channel.

Military equipment (e.g. weapons, ammunition) seized from captured persons becomes war booty and thus passes into the logistics channel.

[GC III, 18 / ICRC Commentary, GC III, 18 / 1 CILS, 49] [IAC]

Before using captured weapons and/or ammunition, the capturing party must make sure that the use of such weapons and/or ammunition is not prohibited by any rule of the law of armed conflict applicable to it. For the rules on weapons, see Chapter 6.

### **International armed conflicts**

#### **10.3.6.2 Mobile medical material**

Mobile medical material of the enemy armed forces should be removed through the same channel as the wounded, sick and shipwrecked. It must not be intentionally destroyed, but must be reserved for the care of the wounded and sick.

[GC I, 33] [IAC]

#### **10.3.6.3 Medical transports**

Enemy military medical transports which remain assigned to medical work must be used within the medical evacuation channel.

If enemy military medical transports are no longer used for medical purposes, they are war booty and should be evacuated through the logistics channel.

For the specific rules on seizure and use of medical aircraft, see 10.2.4.10.

[GC I, 35 / GC III, 18 / P I, 23, 30 / ICRC Commentary, GC I, 35] [IAC]

## **10.4 Supplies**

### **10.4.1 Supply principles**

#### **10.4.1.1 Rule**

Many of the items supplied to the armed forces constitute military objectives. See the definition of military objectives in 5.4.1.2.

The status of the items is independent from the status of the personnel and/or transports used to convey them.

[P I, 52/ 1 CILS, 8] [IAC/NIAC]

#### 10.4.1.2 Direct procurement

Items for military use or consumption obtained through direct procurement (e.g. purchase, requisition), which by their nature are not military objectives, may become military objectives when they pass into military hands – i.e. when they meet the definition of military objectives in 5.4.1.2.

#### 10.4.1.3 Civilian transport of military items

Items being transported that meet the definition of military objectives in 5.4.1.2 may be targeted by enemy armed forces. The fact that they are transported by a civilian or in a civilian transport does not render them immune from attack.

A civilian transporting military items must not *himself* be targeted unless he is deemed to be directly participating in hostilities (DPH).

In general, when a civilian transports military items from a port or factory to a military supply and service area, the act of doing so is not deemed to be DPH. In such a case, before a direct attack against the means of transport is launched, the incidental death or injury of the civilian transporter would have to be taken into account in the proportionality assessment. This means that, although the civilian must not be the target of an attack, he is exposed to a real risk of incidental injury or death while transporting the military items because they themselves can be attacked.

When a civilian transports military items directly to a specific military operation, the act of doing so is deemed to be DPH. The civilian himself then becomes a military objective, and may thus be directly targeted.

[P I, 51, 52 / P II, 13 / 1 CILS, 6, 14 / DPH Study, pp. 16, 55, 56] [IAC/NIAC]

#### 10.4.1.4 Unloading

The transfer of equipment or supplies from civilian personnel and/or transports to military personnel and/or transports and vice-versa should take place rapidly and at an appropriate distance from civilian objects and military objectives (e.g. in a special unloading area).

[P I, 58 / 1 CILS, 22, 24] [IAC/NIAC (1 CILS, 24 is arguably NIAC)].

#### 10.4.1.5 Supply routes

Military supply routes and transports should, to the maximum extent feasible, avoid proximity to civilian persons and objects that would expose them to the effects of combat action. This recommendation is based on the rule stipulating that parties to a conflict must endeavour to remove the civilian population, individual civilians and civilian objects from the vicinity of military objectives and to take the necessary precautions to protect them from the dangers resulting from military operations.

If the tactical situation does not permit such a spatial separation (e.g. because there is only one road in a mountainous area), movements of military supply transports should, if at all possible, take place at different times than those of civilian transports (temporal separation).

[P I, 58 / ICRC Commentary, P I, 58 / 1 CILS, 22, 24] [IAC/NIAC (1 CILS, 24 is arguably NIAC)]

#### 10.4.2 Medical supplies

##### 10.4.2.1 Rule

Military medical supplies should, as a general rule, pass through the medical supply channel and be moved by military medical personnel and transports.

### 10.5 Logistics bases

This Section outlines logistic principles, military supply and maintenance bases, and military medical service bases.

#### 10.5.1 Logistic principles (all armed conflicts)

##### 10.5.1.1 Definition

In this Handbook, "logistics bases" are:

- military supply and maintenance bases; and
- military medical service bases.

##### 10.5.1.2 General policy for locating bases

The operational commander should establish a policy for the choice of locations for logistics bases, including forward and/or intermediate bases.

The logistics bases should be so situated as to meet, in particular, the requirements of:

- a safe distance between military objectives and medical or civilian objects; and
- a safe distance between military objectives and concentrations of civilians.

[P I, 58 / H.CP.P.II, 8 / 1 CILS, 22, 23, 24] [IAC/NIAC (1 CILS, 23, 24 are arguably NIAC)]

### 10.5.1.3 Supervision and coordination

The operational commander must organize:

- the retention, repatriation and exchange of medical and religious personnel (see Sections 7.6 and 7.7);
- the treatment and conditions of confinement for internees and detainees, prisoners of war (see Chapter 7);
- supplies for internees, detainees and prisoners of war (e.g. food, clothing, medical material, religious objects) (see Section 10.4 and Chapter 7);
- the end of captivity of prisoners of war and other detainees and internees (e.g. transfer to a neutral State, repatriation of the most seriously wounded and sick) (see Chapter 7); and
- the use or assignment of captured objects (e.g. war booty, captured medical material) (see Section 10.3).

### 10.5.1.4 Access to bases

The clear distinction between military objectives and medical and civilian objects must be respected. Access to logistics bases should therefore be restricted to duly authorized persons.

[P I, 58 / 1 CILS, 22, 24] [IAC/NIAC (1 CILS, 24 is arguably NIAC)]

### 10.5.1.5 Transport between logistics bases

The transport management provisions (see Section 10.1) also apply to movements:

- between logistics bases; and
- between logistics bases and comparable civilian bases or locations.

### 10.5.1.6 Supplies for logistics bases

The supply provisions, including in particular those relating to direct procurement from civilian sources (see Section 10.4), also apply to supplies for logistics bases.

### 10.5.1.7 Captured persons and objects in forward logistics bases

The provisions on the treatment of captured enemy military personnel and objects in rear areas (see Chapter 7 and Section 10.3) also apply in forward or intermediate logistics bases and comparable locations.

[GC I, 3 / GC II, 3 / GC III, 3, 20, 24 / GC IV, 3 / P II, 4, 5, 6, 7] [IAC/NIAC]

### 10.5.1.8 Captured persons and objects: moving between logistics bases

The provisions on evacuation of captured enemy military personnel and objects in rear areas also apply to movements of such persons from one logistics base or location to another (see Section 10.3).

[GC III, 19, 20] [IAC]

### 10.5.1.9 Medical service: possible systems

There are essentially three possible medical service systems in rear areas, each of them consistent with the law of armed conflict:

- separate military and civilian medical bases and services;
- cooperation between military and civilian medical services whereby each accepts the other's wounded and sick; or
- partially or completely joint military and civilian medical bases and services.

### 10.5.1.10 Medical service: joint military and civilian

Where military and civilian medical services cooperate or are jointly run, every rear area commander should ensure:

- clear command organization;
- precise instructions to medical personnel moving between or acting in both military and civilian medical bases or locations; and
- full application of the law of armed conflict provisions regarding military and civilian medical services as well as military and civilian wounded and sick (e.g. wounded prisoners of war in civilian hospitals).

### 10.5.1.11 Religious activities

In all armed conflicts the convictions and religious practices of persons, including in particular persons whose liberty has been restricted, must be respected.

[P II, 4, 5 / 1 CILS, 104, 127] [IAC/NIAC]

This general rule is specified in greater detail in the law of international armed conflict.

Thus, the detaining party must allow and facilitate religious activities as granted by the law of armed conflict to prisoners of war:

- by allowing captured enemy military religious personnel or other qualified persons to perform their spiritual functions;
- by allowing the exercise of religious observance and providing adequate premises; and

- by supplying or at least permitting the supply of religious objects (e.g. books, devotional articles of their faith).

[GC III, 33-37, 72, 125] [IAC]

#### **10.5.1.12 Communications, administrative channels**

The operational commander must establish and ensure the functioning of communications and administrative channels relevant under the law of armed conflict between:

- logistics bases and national authorities (e.g. National Information Bureau, Graves Registration Service); and
- logistics bases and international authorities and bodies (e.g. The ICRC, and its Central Tracing Agency).

[H.IV.R, 14, 16 / GC I, 8, 16, 17 / GC II, 8, 19, 20 / GC III, 8, 23, 56, 60, 62, 63, 65, 66, 68, 69, 71, 72, 74, 75, 77, 96, 100, 104, 105, 107, 120, 122-125 / GC IV, 8, 25, 43, 45, 49, 50, 71, 72, 74, 75, 83, 92, 96, 104, 105, 106, 108, 110, 111, 113, 123, 129, 130, 131, 136-141 / P I, 33, 34, 45, 78] [IAC]

#### **10.5.1.13 The ICRC and other humanitarian organizations**

Parties to an international armed conflict must grant the ICRC all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Geneva Conventions and Additional Protocol I, in order to ensure protection and assistance to the victims of conflicts.

The ICRC may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the parties to the conflict.

National Red Cross and Red Crescent organizations must be granted the facilities and assistance necessary for carrying out their humanitarian activities in favour of the victims of the conflict in accordance with the law of armed conflict. Other humanitarian organizations authorized by the parties to the conflict must, as far as possible, be granted similar facilities.

In a non-international armed conflict, the ICRC may offer its services to the parties to the conflict with a view to carrying out its humanitarian functions in order to protect and assist the victims of conflict.

[GC I, 3, 8, 16, 23 / GC II, 3, 8, 9 / GC III, 3, 8, 12, 23, 56, 58, 60, 62, 63, 65, 66, 68, 69, 71, 72, 73, 75, 77, 78, 79, 81, 96, 100, 101, 104, 105, 107, 120, 121, 122, 123, 125, 126, / GC IV, 3, 9, 23, 24, 30, 35, 39, 42, 43, 45, 49, 52, 55, 59, 60, 61, 71, 72, 74, 75, 76, 83, 96, 98, 101, 102, 104, 105, 108, 109, 111, 113, 123, 129, 131, 137, 140, 142, 143, 145 / P I, 11, 17, 33, 45, 81, 60, 70, 78, 81 / P II, 18 / 1 CILS, 31, 32, 124] [IAC/NIAC]

## **10.5.2 Military supply and maintenance bases**

### **10.5.2.1 Rule**

Military supply and maintenance bases where goods (other than medical and religious items) are produced, transformed, packaged or stored for use or consumption by armed forces normally constitute military objectives as defined in 5.4.1.2. If so, they may be directly attacked by opposing forces.

[P I, 52 / 1 CILS, 8] [IAC/NIAC]

### **10.5.2.2 Civilian personnel at military supply and maintenance bases**

The presence of civilian personnel does not render a military objective immune from attack. Thus, civilian personnel who are assigned to work at a military supply or maintenance base are at risk of incidental injury or death. However, an enemy who attacks such a military objective must take the presence of civilian personnel into account in a proportionality assessment before the attack.

Civilian personnel who work at the base must not be made the object of attacks unless they are directly participating in hostilities (DPH). One way in which the activities of civilian personnel at a supply or maintenance base might qualify as DPH would be if they engage in a preparatory measure for the execution of a specific attack. Examples of such preparatory measures include loading bombs into an airplane for a specific attack, the transport and positioning of weapons for a specific operation, training personnel for a specific attack, etc.

To reduce the risk of incidental injury or death, civilian personnel should stay a sufficient distance away from the supply or maintenance base when off duty.

For a detailed discussion of direct participation in hostilities, see Chapter 5.

[P I, 51, 52, 57 / P II, 13 / 1 CILS, 6, 14 / DPH Study pp. 65, 66] [IAC/NIAC]

### **10.5.2.3 Civilian use of military supply and maintenance bases**

When civilians are granted access to a military supply or maintenance base, they are at risk of incidental injury or death because such a base is normally a military objective as defined in 5.4.1.2.

[P I, 52, 1 CILS, 8] [IAC/NIAC]

### **10.5.2.4 Unloading areas**

Areas and locations where items are to be unloaded or transferred from/to military and civilian transports should be clearly designated. The simultaneous

presence of military and civilian personnel and transports should be reduced to a minimum.

### **10.5.3 Military medical service bases**

#### **All armed conflicts**

##### **10.5.3.1 Rule**

Military hospitals and other rear area military medical units (e.g. medical stores or supply and maintenance bases) should be situated so that attacks on military objectives will not endanger their safety.

Arguably, since medical units are protected in international armed conflicts, this rule should be followed in a non-international armed conflict as well.

[GC I, 19, / P I, 12] [IAC]

##### **10.5.3.2 Use of the distinctive emblem**

Military hospitals and military medical units should be marked with the distinctive emblem of the red cross, red crescent or red crystal. Even if they are not marked, they must still be respected and protected, but are more likely to be accidentally targeted.

The distinctive emblem must be as large and visible as the tactical situation permits.

[GC I, 42 / P I, 18, Annex I / P II, 12] [IAC/NIAC]

##### **10.5.3.3 Military hospitals: treatment of wounded and sick**

Military hospitals receiving wounded and sick must in all cases ensure the minimum standards for humane treatment (see Section 7.2), in addition to the particular treatment required by their status under the law of armed conflict, e.g. as prisoners or war (see Section 7.1). They must also provide all wounded and sick with the medical care and attention required by their condition, without adverse distinction (see Section 4.1).

#### **International armed conflicts**

##### **10.5.3.4 Notification of emplacement**

The location of rear area fixed medical units and hospital zones should be notified to the enemy party, if doing so is likely to ensure that these units and zones are granted the protection to which they are entitled.

[GC I, 23, Annex I, 7 (draft agreement) / GC IV, 14 / P I, 12] [IAC]

#### **10.5.3.5 Guards**

When a combat unit (e.g. infantry platoon) is assigned to guard duty of a military medical service base, precise instructions must be given to that unit in order to avoid it being confused with units carrying out a tactical mission.

[GC I, 22] [IAC]

#### **10.5.3.6 Combatant proximity**

The siting of combatants in close proximity to military medical service facilities, personnel and transports should be avoided as far as possible.

[P I, 12] [IAC]

#### **10.5.3.7 Prisoners of war in military hospitals: safety**

Military hospitals that receive prisoners of war must meet the same minimum requirements with regard to location and safety as prisoner-of-war camps.

[GC III, 12-16, 22-23] [IAC]



# PART III



# CHAPTER 11

# STRATEGIC CONTROL

# OF ARMED CONFLICT

# 11 STRATEGIC CONTROL OF ARMED CONFLICT

This Chapter deals with measures to be taken before, during and after an armed conflict in order to ensure compliance with the law of armed conflict.

**11.1 Peacetime measures to be taken by States** describes the preparatory legislative, executive and administrative measures to be taken during peacetime to ensure compliance with the law in the event of an armed conflict.

**11.2 Control measures during an armed conflict** describes the strategic, executive and administrative measures to be taken during an armed conflict, including medical care, the role of intermediaries and civilian affairs.

**11.3 Measures after an armed conflict** addresses measures to be taken once hostilities have ended.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## 11.1 Peacetime measures to be taken by States

This Section describes the legislative, executive and administrative measures to be taken during peacetime to ensure compliance with the law in the event of an armed conflict.

The measures to be taken by a State party to a given treaty of the law of armed conflict include:

- incorporating the relevant parts of the treaty into national legislation in accordance with the rules of its constitution;
- introducing procedures at the administrative level to implement the duties set out in the treaty;
- designating or establishing organizations to carry out certain duties set out in the treaty;
- ensuring the dissemination of the law of armed conflict and its integration into military practice; and
- preparing documents or means of identification referred to in the law of armed conflict.

[ICRC Commentary, P I, 80]

## **11.1.1 Integration of the law of armed conflict into legislation and military documents**

### **11.1.1.1 National legislation**

When a new law of armed conflict treaty is ratified or acceded to, a State must enact national implementing legislation to ensure compliance with the treaty obligations.

The legislation should ensure that:

- adequate funding is approved to implement the new treaty; and
- adequate procedures are established to monitor the implementation of the new treaty (e.g. the provision of regular information to parliament).

### **11.1.1.2 Legislation, penal sanctions**

Many law of armed conflict treaties oblige States Parties to enact legislation providing for penal sanctions for individuals who commit or order the commission of certain violations of the treaties. In the case of the Geneva Conventions and Additional Protocol I, such legislation is required for grave breaches thereof. For more information, refer to Chapter 9.

[GC I, 49 / GC II, 50 / GC III, 129 / GC IV, 146 / P I, 85 / CWC, 7 / Mine Ban Conv., 9 / H.CP, 28 / H.CP.II, 15 / CCW.P.II.Amend., 14]

### **11.1.1.3 Protecting the red cross, red crescent and red crystal emblems**

Adequate legislation must be enacted concerning the use and protection of the red cross, red crescent and red crystal emblems.

Such legislation must in particular regulate the protective and the indicative use of the emblems, lay down measures to control their use, and provide for penal sanctions for their misuse.

[GC I, 53, 54 / GC II, 43, 44, 45 / P I, 18, 38 / P II, 12 / P III, 6]

### **11.1.1.4 Protection of other distinctive emblems**

Appropriate legislation must be enacted concerning the use and protection of other distinctive emblems, such as the international distinctive sign of civil defence or the distinctive emblem of cultural property.

[H.CP, 6, 16, 17 / P I, 56, 66]

### **11.1.1.5 Translations**

A State must send official translations of law of armed conflict treaties, plus copies of any national laws or regulations adopted, to the relevant treaty depositary.

Examples of depositaries include:

- Geneva Conventions and Additional Protocols: Swiss Federal Council;
- Hague Conventions of 1907: Netherlands government;
- Second Protocol to the Hague Convention of 1954 (1999): Director-General of UNESCO; and
- 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects: Secretary-General of the United Nations.

[GC I, 48 / GC II, 49 / GC III, 128 / GC IV, 145 / H.CP, 26 / P I, 80, 84 / ICRC Commentary, P I, 80]

#### **11.1.1.6 Instructions**

Instructions and orders must be given to the armed forces to ensure respect for the law of armed conflict.

[P I, 80]

#### **11.1.1.7 Integration into military doctrine, education, field training and discipline**

The behaviour of armed forces during operations is shaped by four main factors:

- doctrine,
- education,
- field training and equipment, and
- sanctions (including both discipline and military justice).

In order for operations to be conducted in compliance with the law, the law must become an integral part of all four elements.

Military commanders bear the responsibility for integrating the law of armed conflict into military practice as part of their duty to prevent and, where necessary, to suppress and report breaches of that law to competent authorities. Commanders at the strategic level are ultimately responsible for ensuring that integration takes place within their forces in order to ensure that the State meets its international legal obligations. They should therefore create any necessary administrative structures and task appropriate subordinate commanders to carry out the process of legal integration.

[P I, 87]

For a full description of this fundamentally important process, which translates legal norms into practice on the ground, see Chapter 1.

## 11.1.2 Executive and administrative measures

### 11.1.2.1 Rule

All States must take preparatory executive and administrative measures in times of peace in order to fulfil their obligations under the law of armed conflict.

Preparatory measures aim to:

- make the law of armed conflict known to the armed forces, the civilian authorities and the civilian population;
- ensure the application of the law of armed conflict in the event of an armed conflict; and
- ensure that any new weapon brought into use conforms with the law of armed conflict.

[GC I, 45, 47 / GC II, 46, 48 / GC III, 127 / GC IV, 144 / H.CP, 3, 7, 25 / P I, 80, 83, 84 / H.CP, 3, 7 / H.CP.II.Amend., 5, 30 / CCW, 15 / CCW.P.II.Amend, 14 / CCW.P.V, 11 / 1 CILS, 141, 142, 143] [IAC/NIAC]

### 11.1.2.2 Qualified personnel

Qualified personnel should be trained to facilitate the application of the law of armed conflict.

[P I, 6]

### 11.1.2.3 Legal advisers in armed forces

Legal advisers must be available at the appropriate level to advise the military at all times on the application of the law of armed conflict and on the instruction to be given to armed forces.

[P I, 82, 1 CILS, 141]

## 11.1.3 Establishment/designation of organizations

### 11.1.3.1 Introduction

Law of armed conflict treaties often require States to set up various entities/ organizations at the outbreak of hostilities to perform certain mandatory tasks during and after the armed conflict.

In order to be prepared to meet these obligations, a State should take contingency measures in peacetime, such as designating existing organizations or establishing new ones to carry out those particular duties in the event of an armed conflict.

### 11.1.3.2 National Information Bureau

Each State must have a National Information Bureau to receive and transmit information related to prisoners of war and protected civilians in its power. Accordingly, steps should be taken in peacetime to ensure that such a body is established and sufficiently prepared for this task in the event of an armed conflict.

Close cooperation with the ICRC's Central Tracing Agency is recommended for the purpose of establishing a National Information Bureau.

[GC III, 122 / GC IV, 136] [IAC]

### 11.1.3.3 Mixed Medical Commissions

Within each State, a Mixed Medical Commission must be established at the outbreak of hostilities.

Steps should be taken in advance, in peacetime, to ensure that a Mixed Medical Commission can be quickly organized at the outbreak of hostilities (e.g. by creating a list of qualified medical practitioners prepared to serve on it if needed).

[GC III, 112, Annex II]

### 11.1.3.4 Graves Registration Service

In each State, a Graves Registration Service must be prepared to record particulars of burials and gravesites and to keep ashes.

Such a service can be combined with the National Information Bureau.

[GC I, 17 / GC III, 120] [IAC]

### 11.1.3.5 National Red Cross or Red Crescent Society

The precise role and range of activities of the National Red Cross or Red Crescent Society or of other aid societies in the event of armed conflict must be established beforehand (e.g. medical support, use of distinctive signs, relief).

[GC I, 26, 44 / GC II, 24, 25 / GC IV, 30, 63 / P I, 6]

## 11.1.4 Preparatory measures for persons and objects

The law of armed conflict provides certain persons and objects with protection from attack. In order to ensure that all parties to an armed conflict are able to spare such persons and objects from attack in the event of an armed conflict, certain preparatory measures should be taken in peacetime.

#### 11.1.4.1 Specifically protected persons and objects in general

Criteria must be established and responsibilities assigned for designating and marking specifically protected persons and objects with distinctive signs, and for the use of distinctive signals.

For details on which persons and objects are specifically protected, refer to Sections 5.3 and 5.4.

[GC I, 38-44 / GC II, 41-45 / P I, 18, 22, 23, 56, 66, Annex I / P II, 12 / P III]

#### 11.1.4.2 Cultural property

States party to the treaties concerning cultural property undertake to take preparatory measures, in peacetime, for the safeguarding of cultural property in the event of an armed conflict. These measures include compiling inventories of cultural property, preparing for its removal, marking cultural property with its distinctive emblem, and designating national authorities responsible for safeguarding cultural property.

[H.CP, 3, 6, 16, 17 / H.CP.II, 5] [IAC/NIAC]

In addition, States should take the requisite steps to have eligible cultural property placed under:

- enhanced protection, by inclusion in the List of Cultural Property under Enhanced Protection maintained by the Committee for the Protection of Cultural Property in the Event of Armed Conflict; or
- special protection, by inclusion in the International Register of Cultural Property under Special Protection maintained by the Director-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO).

[H.CP, 8 / H.CPR, 12, 13 / H.CP.II, 11] [IAC/NIAC]

#### 11.1.4.3 Defensive precautionary measures

During an international armed conflict, the parties to the armed conflict have a duty to ensure that civilians and civilian objects are as far away as possible from military objectives. For example, parties to an international armed conflict must, to the maximum extent feasible:

- avoid locating military objectives within or near densely populated areas; and
- remove civilians and civilian objects from places where the risk of attack is greatest, i.e. from the vicinity of military objectives.

In order to be able to comply with these obligations in the event of an armed conflict, States should take preparatory measures in peacetime, such as:

- preparing and publishing plans to evacuate and temporarily relocate civilians away from military objectives, such as fixed military facilities that are likely to be targeted during an armed conflict;
- considering moving or closing fixed military facilities surrounded by a concentration of civilians; or
- when determining where to locate buildings or objects that may become military objectives, choosing locations outside densely populated areas, if feasible.

[P I, 58 / 1 CILS, 23, 24] [IAC/ NIAC]

### **11.1.5 Preparation of documents**

#### **11.1.5.1 Administrative documents**

Several provisions of the law of armed conflict treaties refer to the use of particular forms and administrative documents (e.g. capture cards, internment cards, notification of death forms, repatriation certificates and correspondence cards). These documents should be prepared in advance.

[GC I, Annex II / GC III, Annex IV, A-E / GC IV, Annex III / H.C.P.R, Annex / P I, Annex I, II] [IAC]

#### **11.1.5.2 Identity documents, discs, armllets**

Many provisions of the Geneva Conventions refer to the use of certain means of identification such as identity cards, identity discs and armllets. These items should be prepared and issued to relevant personnel in peacetime.

For example, members of the armed forces should be provided with identity cards and identity discs to ensure their successful identification if they are captured or killed following the outbreak of hostilities.

Military medical and religious personnel should also be provided with identity cards, identity discs, and water-resistant armllets bearing their distinctive emblems, issued and stamped by the military authority.

Other types of personnel to be provided with identity cards include:

- permanent or temporary civilian medical or religious personnel;
- civil defence personnel;
- journalists on dangerous professional missions; and
- personnel engaged in the protection of cultural property (for States party to the H.C.P).

For the technical specifications for such identity cards, discs and armbands, see the references below.

[GC I, 16, 17, 40, 41, Annex 2 / GC II, 19, 20, 42, Annex II / GC III, 17, Annex IV, A / P I, 18, 66, Annex I, Annex II / H.CP, 17, H.CP.R, 21] [IAC, except for cultural property personnel, to whom the same rules apply in both IAC and NIAC]

### 11.1.5.3 Texts of relevant law of armed conflict treaties

Certain texts of law of armed conflict treaties must be posted in places of detention/internment in the event of an armed conflict. These texts should be prepared in the appropriate languages and made available, in particular:

- for prisoner-of-war camps: the 1949 Geneva Convention Relative to the Treatment of Prisoners of War;
- for civilian internee camps: the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

[GC III, 41 / GC IV, 99] [IAC]

## 11.2 Control measures during an armed conflict

This Section discusses executive and administrative measures during an armed conflict, principles for medical care, the role of intermediaries, and civilian affairs.

### 11.2.1 Executive and administrative control measures

#### 11.2.1.1 Rule

Executive and administrative control measures during armed conflict should aim to:

- confirm and develop measures already taken in peacetime to ensure compliance with the law of armed conflict; and
- implement any additional measures necessary to ensure the full application of the law of armed conflict.

[GC I, 45, 47 / GC II, 46, 48 / GC III, 127 / GC IV, 144 / H.CP, 3, 7, 25 / P I, 80, 83] [IAC]

#### 11.2.1.2 Special agreements

In order to comply with the requirements of the law of armed conflict, it may be necessary for a State to secure the cooperation of other parties by means of a special agreement.

The Geneva Conventions and Additional Protocol I contain numerous provisions related to special agreements between parties to an international armed conflict, including, but not limited to:

- the establishment of hospital or safety zones, neutralized zones, and demilitarized zones;

- agreed markings or signs for particular objects beyond those already set out in the Conventions and Additional Protocol I;
- repatriation of protected persons as defined in the Fourth Geneva Convention, civilian internees, or retained medical personnel;
- direct repatriation or accommodation in a neutral country of prisoners of war;
- teams to search for, identify and recover the dead and for the facilitation of access to gravesites and the return of remains and personal effects of the deceased;
- provision of parcels and collective shipments to civilian internees and prisoners of war;
- overflights of aircraft;
- additional protections beyond those already required in Additional Protocol I for works and installations containing dangerous forces; and
- inquiry procedures concerning violations of the law of armed conflict.

Whenever possible, special agreements must be concluded at the appropriate level between the parties or with neutral States, as required.

[GC I, 6, 10, 15, 23, 28, 31, 36, 37, 52 / GC II, 6, 10, 18, 31, 38-40, 44, 43, 53 / GC III, 6, 10, 23, 28, 33, 60, 65-67, 72, 73, 75, 109, 110, 118 / GC IV, 7, 11, 14, 15, 17, 36, 83, 108, 109, 132, 133, 149 / P I, 26-29, 33, 34, 56, 66, 59, 60] [IAC]

### **11.2.1.3 Local arrangements for the removal of wounded, sick and other protected persons, humanitarian assistance for besieged areas**

Local arrangements and/or an armistice or suspension of fire must be concluded for the search, removal, exchange and evacuation of the wounded, sick and shipwrecked, whenever circumstances permit.

Local arrangements may also be concluded for the removal of the wounded, sick, shipwrecked, infirm, the elderly, children and maternity cases from a besieged or encircled area, and for the passage of medical and/or religious personnel and their equipment on their way to such areas.

[GC I, 15 / GC II, 18 / GC IV, 17] [IAC]

### **11.2.1.4 Notifications**

The Geneva Conventions and Additional Protocol I contain numerous provisions requiring or recommending that parties to an armed conflict notify each other (either directly or through an intermediary such as the ICRC, and where appropriate in advance) of the following:

- official translations of law of armed conflict texts/ treaties as well as relevant national laws and regulations adopted, if not already communicated in peacetime;

- the incorporation of any law enforcement or paramilitary forces into the armed forces;
- the names and descriptions of and other particulars concerning medical ships;
- the location of fixed medical units;
- the geographical location of prisoner-of-war and civilian internee camps;
- the overflight of medical aircraft over areas not controlled by an adverse party;
- the names of societies authorized to render assistance to the regular medical services of armed forces;
- titles and ranks of all persons entitled to the status of prisoner of war, in order to ensure equality of treatment between prisoners of equivalent rank;
- various notifications related to POWs' accounts;
- the escape and/or recapture of POWs; and
- requirements of the legislation of the State of origin concerning the validity of wills of prisoners of war.

For the procedures or requirements relating to such notifications and communications, refer to the specific treaty provisions below.

[GC I, 26, 48 / GC II, 22-25, 38, 43, 49 / GC III, 21, 23, 43, 63, 65, 94, 128 / GC IV, 83, 145 / P I, 12, 23, 25-29, 43, 84] [IAC]

#### 11.2.1.5 Administrative channels

Appropriate administrative channels must be established for the transmission of communications and documents:

- between national military and civilian authorities (e.g. for communications between prisoner-of-war camps and the National Information Bureau);
- between national (military or civilian) authorities and the ICRC, neutral States or other intermediaries (e.g. for communications between the National Information Bureau and the Central Tracing Agency); and
- to transmit letters, documents and relief shipments to and from prisoner-of-war or internment camps.

[H.IV.R, 14, 16 / GC I, 8, 16, 17 / GC II, 8, 19, 20 / GC III, 8, 23, 56, 60, 62, 63, 65, 66, 68, 69, 71, 72, 74, 75, 77, 100, 104, 105, 107, 120, 121-125 / GC IV, 8, 25, 43, 45, 49, 50, 71, 72, 74, 75, 83, 91, 96, 104, 105, 106, 107, 108, 109, 110, 111, 113, 123, 129, 130, 131, 136-141 / P I, 33, 34, 45, 78] [IAC]

#### 11.2.1.6 Administrative documents

According to the circumstances, existing administrative documents should be adapted and new ones drafted. For instance:

- translation of documents into other languages;

- forms for medical records (e.g. of blood or skin donations, of medical procedures concerning prisoners of war);
- documents for new situations (e.g. instructions to military and civilian authorities in a specific area).

### 11.2.1.7 Disciplinary or penal sanctions

Parties to an armed conflict must ensure that breaches of the law of armed conflict are subject to disciplinary or penal sanctions.

They must give each other mutual assistance and cooperate in the repression of grave breaches and other serious violations of the law of armed conflict.

For more information on penal sanctions, see Chapter 9.

[GC I, 49 / GC II, 50 / GC III, 129 / GC IV, 146 / P I, 85, 86, 87, 88, 89 / H.CP, 28 / H.CP.II, 15, 17, 19 / AP Mine Ban Conv., 9 / CCW.P.III, 14 / CWC, 7 / 1 CILS, 157, 161]

## 11.2.2 Action by intermediaries

### International armed conflict

#### 11.2.2.1 Role of intermediaries

Armed conflict may disrupt the peacetime relations between States (e.g. by severing diplomatic relations, closing borders, interrupting transport links and telecommunications). Some of the resulting gaps can be bridged by the intervention of intermediaries.

#### 11.2.2.2 Designation of a Protecting Power

Under the law of armed conflict, each party to an international armed conflict must designate a Protecting Power at the outbreak of hostilities.

A Protecting Power is a neutral State or other State not party to the conflict, which has been designated by a party to the conflict and accepted by the adverse party and has agreed to carry out the functions assigned to a Protecting Power under the law of armed conflict.

The main duty of Protecting Powers is to safeguard the interests of the parties to the conflict they represent.

[GC I, 8 / GC II, 8 / GC III, 8 / GC IV, 9 / P I, 2, 5 / H.CP, 21 / H.CPR, 2-10 / H.CP.II, 34]

#### 11.2.2.3 Substitute for the Protecting Power

If a Protecting Power has not been designated or accepted from the beginning of an armed conflict, the International Committee of the Red Cross or any other impartial humanitarian organization can offer its good offices to the parties to the conflict for this purpose.

In the absence of an agreement on a Protecting Power, the ICRC or any other impartial humanitarian organization should be designated as a substitute.

In practice, the Protecting Powers system has not been used in recent years. Instead, the ICRC has come to be recognized as a substitute for the Protecting Power.

Although this does not mean that other entities cannot assume the role of Protecting Power in the future, throughout this Handbook the term “ICRC” has been substituted where a provision of the law of armed conflict refers to the “Protecting Power”.

[GC I, 10 / GC II, 10 / GC III, 10 / GC IV, 11 / P I, 5]

#### 11.2.2.4 ICRC: main tasks as substitute for the Protecting Power

In its role as substitute for the Protecting Power, the ICRC’s tasks include:

- acting as an intermediary between the enemy powers (e.g. transmission of information, documents, declarations, notifications);
- visiting and monitoring prisoner-of-war and civilian internee camps as well as any place where protected civilians are held (i.e. to verify the living conditions, supplies and health and to ensure free communication with the exterior by mail);
- monitoring and, if necessary, taking appropriate action in the case of:
  - internment of protected persons;
  - penal prosecutions of prisoners of war and foreign civilians;
- verifying the food supply and medical care in occupied territory; and
- making enquiries with regard to violations of the protection of cultural objects.

[GC I, 11, 16, 23, 48 / GC II, 11, 19, 49 / GC III, 11, 23, 56, 58, 62, 63, 65, 66, 68-81, 96, 100, 101, 104, 105, 107, 120-122, 126 / GC IV, 12, 23, 24, 30, 35, 39, 42, 43, 45, 49, 52, 55, 60, 61, 71, 72, 74-76, 96, 98, 101-105, 109, 111, 123, 129, 143 / H CP, 21 / P I, 5, 11, 33, 45, 60, 69, 70, 84 / H.C.P.P.II, 34, 35] [IAC]

#### 11.2.2.5 ICRC: mandate

The International Committee of the Red Cross is mandated by the law of armed conflict (apart from its role as a substitute for the Protecting Powers):

- to provide the victims of armed conflict with protection and assistance (e.g. through visits to prisoners of war and civilian internees);
- to assist States in implementing and disseminating the law of armed conflict (e.g. by publishing and distributing the present Handbook);
- to promote and prepare the development of the law of armed conflict; and
- to direct and coordinate the international relief activities conducted by the Red Cross and Red Crescent Movement in situations of armed conflict.

In addition to the ICRC's specific mandate in international and non-international armed conflict, as set out in the law of armed conflict, its right of humanitarian initiative allows it to offer its services to States in other situations of violence.

[GC I, 3, 9, 10, 11, 23 / GC II, 3, 9, 10, 11 / GC III, 3, 9, 10, 11, 56, 72, 73, 75, 123, 125, 126, Annex II, 2, 3, 5, 8, 11, Annex III, 9 / GC IV, 3, 10, 11, 12, 14, 30, 59, 61, 76, 96, 108, 109, 111, 140, 142, 143, Annex II, 8 / P I, 5, 6, 33, 81, 97, 98] [IAC, except GC I-IV, 3 which is NIAC]

#### **11.2.2.6 ICRC: use of distinctive emblems**

The International Committee of the Red Cross may use the distinctive emblem of the red cross on a white ground for itself and for the personnel, establishments and transports under its control.

In exceptional circumstances and to facilitate its work, it may also use the distinctive emblem established by Additional Protocol III to the Geneva Conventions (the red crystal).

[GC I, 44 / P III, 4] [IAC]

#### **11.2.2.7 Central Tracing Agency**

The Central Tracing Agency at the headquarters of the International Committee of the Red Cross will collect all the information it obtains (through official or private channels) concerning prisoners of war, civilians (particularly internees) and missing persons.

The Agency will transmit this information rapidly to the person's State of origin.

The States concerned must give the Agency all the necessary assistance for such transmissions.

[GC III, 123 / GC IV, 140 / P I, 33] [IAC]

#### **11.2.2.8 International Fact-Finding Commission**

The International Fact-Finding Commission is competent to:

- enquire into any facts alleged to be a grave breach or other serious violation of the Geneva Conventions or of Additional Protocol I thereto; and
- to facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and Protocol I.

The Commission is an investigative body and not a judicial body or a court.

The International Fact-Finding Commission consists of 15 members acting in a personal capacity and elected by those States that have recognized the competence of the Commission.

[P I, 90] [IAC/NIAC]

#### **11.2.2.9 United Nations Educational, Scientific and Cultural Organization (UNESCO)**

The United Nations Educational, Scientific and Cultural Organization assists the parties to conflicts in ensuring the protection of cultural property.

A Commissioner-General for Cultural Property must be appointed to each party to a conflict.

[H.CP, 23, 26 / H.C.P.R, 1-10 / H.CP.P.II, 30, 31, 33]

#### **11.2.2.10 Committee for the Protection of Cultural Property in the Event of Armed Conflict**

The Committee for the Protection of Cultural Property in the Event of Armed Conflict has the following key functions (among others):

- to adopt guidelines for the implementation of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict;
- to grant, suspend or cancel enhanced protection for cultural property;
- to establish, maintain and promote the list of cultural property under enhanced protection; and
- to monitor the application of the provisions on enhanced protection for cultural property

[H.CP.P.II, 24-32]

#### **11.2.2.11 International Committee of the Blue Shield (ICBS)**

The mission of the International Committee of the Blue Shield (ICBS) is to work for the protection of the world's cultural heritage by coordinating preparations to meet and respond to emergency situations.

The ICBS is in particular tasked to advise the Committee for the Protection of Cultural Property in the Event of Armed Conflict.

The ICBS consists of representatives from five non-governmental organizations:

- the International Council on Archives,
- the International Council of Museums,
- the International Council on Monuments and Sites,
- the International Federation of Library Associations and Institutions, and
- the Co-ordinating Council of Audiovisual Archives Associations.

[H CP P.II, 11, 27]

### 11.2.2.12 Neutral States

For the role of neutral States during an armed conflict, see Chapter 13.

## Non-international armed conflict

### 11.2.2.13 Intermediaries in non-international armed conflicts

In a non-international armed conflict particular services may be offered to parties:

- by an impartial humanitarian body, such as the International Committee of the Red Cross and its Central Tracing Agency; and
- by the United Nations Educational, Scientific and Cultural Organization, with regard to cultural property.

[GC I, 3 / GC II, 3 / GC III, 3 / GC IV, 3 / H.CP, 19 / P II, 18] [NIAC]

## 11.2.3 Civilian affairs

### 11.2.3.1 Rule

Civilian affairs should be ruled by policies and procedures established in peacetime.

### 11.2.3.2 Command responsibility

Every commander should establish the necessary requirements and issue corresponding instructions or orders (insofar as not already stated by his superiors or the law) for:

- cooperation with civilian authorities; and
- action and behaviour towards the civilian population and civilian objects, insofar as militarily relevant.

### 11.2.3.3 Preparatory measures

Emphasis should be placed on cooperation in times of peace, in order to achieve correct behaviour and action in times of armed conflict.

In accordance with national military and civilian administrative organization, corresponding lines of communication between military commands and civilian authorities should be determined at the appropriate level.

### 11.2.3.4 Advice to civilian authorities

Cooperation should consist first and foremost of providing advice to civilian authorities to avoid misunderstandings (e.g. information on what the strategic or tactical situation could or would permit, practical possibilities to respect specifically protected objects, probable withdrawal of immunity of cultural objects, suggested behaviour of the civilian population in specific areas and circumstances).

### 11.2.3.5 Specifically protected persons and objects

Cooperation with regard to specifically protected persons and objects should consist of preparatory measures to ensure that they are duly respected and spared from the effects of hostilities (e.g. review of means of identification, possible military support for removal of the wounded and sick out of hospital, evacuation of transportable cultural objects, advice for cooperation in case of emergency).

### 11.2.3.6 Protected zones

To create protected zones (e.g. hospital and safety zones, centres containing monuments, demilitarized zones, non-defended localities) cooperation with the adverse party with or without an intermediary should aim at:

- establishing a common understanding as a basis for further discussion;
- defining and agreeing on the significance, contents and perimeter of the zone; and
- ultimately establishing a written agreement.

### 11.2.3.7 Relief supplies to the civilian population

For military support of relief supplies to the civilian population, commanders must be prepared to cooperate with the civilian authorities when the tactical situation permits.

## 11.3 Measures after an armed conflict

This Section addresses measures to be taken once the armed conflict has ended, including the repatriation and release of persons, the return of objects, and measures to deal with missing and dead persons.

It does not address the measures armed forces must take with regard to marking and clearing of mines and explosive remnants of war, which are discussed in detail in Chapter 6 (Section 6.9, 6.4.3.5 and 6.4.6.1).

### 11.3.1 Repatriation and release of persons and return of objects

The following specific rules apply in an international armed conflict.

#### 11.3.1.1 Repatriation of prisoners of war

Prisoners of war must be released and repatriated without delay after the cessation of active hostilities. However, prisoners of war cannot be forcibly repatriated if they fear persecution in their home country.

Unjustifiable delay in the release and repatriation of prisoners of war constitutes a grave breach of Additional Protocol I.

In the absence of stipulations agreed between the belligerent parties, the Detaining Power must itself establish and execute without delay a plan of repatriation.

Prisoners of war continue to benefit from prisoner-of-war status and all the protections of that status until they are released or repatriated (see Section 7.3).

[GC III, 5, 118, 119 / P I, 85 / ICRC Commentary, GC III, 118] [IAC]

#### **11.3.1.2 Release of civilian internees**

The internment of civilian persons must cease, at the latest, as soon as possible after the end of active hostilities.

Unjustifiable delay in the release and repatriation of civilian internees constitutes a grave breach of Additional Protocol I.

Protected persons whose release or repatriation takes place after the end of active hostilities continue to benefit from the protections of the law of armed conflict until they are released or repatriated (see Section 7.4).

[G GC IV, 6, 46, 133, 147 / P I, 85] [IAC]

#### **11.3.1.3 Return to last place of residence, repatriation**

The parties to a conflict must endeavour to ensure the return of all internees to their last place of residence, or to facilitate repatriation.

[GC IV, 134, 135] [IAC]

#### **11.3.1.4 Exception: criminal proceedings, punishment**

Persons against whom criminal proceedings for serious offences are pending may be detained until the end of such proceedings and, if necessary, until the completion of the sentence. The same applies to persons already convicted for a serious offence.

Belligerent parties must communicate to each other the names of any persons who are being detained until the end of proceedings or until the sentence has been completed.

[GC III, 119 / GC IV, 133] [IAC]

#### **11.3.1.5 Cultural property**

Cultural property transferred during an armed conflict from occupied territory into the territory of another State must be returned to the party in whose territory it was previously situated.

[H.C.P.I., 1-4] [IAC]

### 11.3.1.6 Return of objects used by military forces

Objects used or taken by military personnel for combat purposes must be returned to their owners or brought back to their previous location.

This applies in particular to items that were requisitioned during an occupation for the needs of the army of occupation or the administration of the occupied territory.

[GC IV, 55, 57 / H.IV.R., 52, 53, 54] [IAC]

## 11.3.2 Missing and dead persons

### 11.3.2.1 Missing persons

Each belligerent party must search for the persons who have been reported missing by an enemy party, and must transmit all relevant information concerning these persons in order to facilitate the search.

Requests for information and replies thereto must be transmitted either directly between the former parties to the conflict or via the ICRC and its Central Tracing Agency. When such information is transmitted directly, the former party to the conflict must also transmit the information to the Central Tracing Agency.

[GC III, 119 / GC IV, 133 / P I, 33]

### 11.3.2.2 Dead persons

The former parties to the conflict must endeavour to agree on arrangements to search for, identify and recover the dead from battlefields, if possible with the participation of representatives of the adverse party.

[P I, 33]

### 11.3.2.3 Gravesites

Gravesites must be respected and maintained, wherever located.

The former parties to the conflict and the State in which the graves are located must endeavour to reach agreements on access to the graves by family members and representatives of the Graves Registration Service; on the maintenance of the graves; and to facilitate the return of mortal remains, ashes and personal objects to the country of origin or next of kin, upon request.

[GC I, 17 / GC II, 20 / GC III, 120 / GC IV, 130 / P I, 34]



# CHAPTER 12

# OCCUPATION

## 12 OCCUPATION

Chapter 12 deals with the legal regime regulating the occupation of foreign territory. Occupation is a form of international armed conflict. Resort to military force between States may lead to occupation, but occupation may also constitute a state of war between two or more States in and of itself, even when it meets with no armed resistance and is neither preceded nor followed by hostilities.

A State that establishes effective control over the territory of an enemy State (i.e. the Occupying Power) is bound by all the relevant provisions of the law governing international armed conflict.

This Chapter only applies to international armed conflicts because there is no legal concept of occupation in a non-international armed conflict.

**12.1 Occupation: fundamentals** explains the nature of occupation, introduces the general legal framework for occupation, and specifies when application of the law of occupation begins and ends.

**12.2 Administration of occupied territory** explains the Occupying Power's obligations concerning its administration of the occupied territory. These include maintaining law and order, enacting legislation, and compliance with the rules applicable in the event of hostilities.

**12.3 Civilians in occupied territory** sets out the rules for the treatment in occupied territory of all civilians, and of those civilians who are specifically protected by the Fourth Geneva Convention.

**12.4 Protection of property in occupied territory** sets out the rules concerning the use, seizure, requisition, destruction and theft of property in occupied territory.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## 12.1 Occupation: fundamentals

### 12.1.1 Nature of occupation

#### 12.1.1.1 Principle of occupation law

The basic premise of the law of occupation is that occupation does not affect sovereignty. *De facto* control over the territory is lost, but the legal title over the territory remains with the sovereign State. In line with this idea, the aim of occupation law is to preserve the administrative rights of the ousted government and to maintain as normal a life as possible for the occupied population. Consequently, occupation has a provisional character and the rights and duties of the Occupying Power are transitory.

The Occupying Power is obliged by the law of armed conflict to administer the territory for the benefit of the local population, ensuring public order and safety, while preserving its own security. The Occupying Power may not exercise its authority to further its own interests – except military and security interests – or those of its own inhabitants. Moreover, it may not use the occupied territory's assets for the benefit of its own population or economy.

#### 12.1.1.2 Legal status of occupied territory

Neither the occupation of a territory nor the application of the law of armed conflict changes the legal status of the occupied territory.

In particular, the sovereignty over the occupied territory does not pass to the Occupying Power.

Annexation of occupied territory is prohibited and is void under international law.

[GC IV, 47 / P I, 4 / ICRC Commentary, GC IV, 47]

### 12.1.2 Legal framework during occupation

#### 12.1.2.1 Treaties governing occupation

The following law of armed conflict treaties contain specific rules applicable during an occupation (the law of occupation):

- Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 (H.IV), and the Regulations respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Regulations, or H.IV.R);
- Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Fourth Geneva Convention, or GC IV);
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977 (Additional Protocol I, or P I); and
- Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954 (H. CP).

### 12.1.2.2 Checklist: legal framework during occupation

The law of armed conflict imposes certain obligations on an Occupying Power in respect of its conduct in occupied territory.

- First, the Occupying Power must administer the occupied territory in accordance with the rules specific to the law of occupation set out in Section 12.2. These obligations are contained in the Hague Regulations of 1907, the Fourth Geneva Convention of 1949 and Additional Protocol I of 1977. It is extensively recognized that most of these norms are an expression of customary international law. In particular, the Occupying Power must:
  - Restore and ensure, to the extent possible, public order and safety in the occupied territory.
  - Respect the existing laws and institutions of the occupied territory. It is however authorized to make changes where necessary to ensure its own security and to fulfil its duties under the law of occupation, in particular the obligation to restore and maintain public order and safety and to ensure orderly government.
  - Ensure that the basic needs of the population of the occupied territory are met. The Occupying Power must also ensure the provision of all supplies essential to the survival of the civilian population of the occupied territory.
  
- Second, the Occupying Power must treat civilians in the occupied territory in accordance with the rules set out in Section 12.3. For the most part these obligations are contained in the Fourth Geneva Convention, although Additional Protocol I imposes further obligations.
  
- Third, limitations are placed on the Occupying Power with regard to private and State property in the occupied territory, as set out in Section 12.4. These rules are contained in the Fourth Geneva Convention, the Hague Regulations and Additional Protocol I.

[H.IV.R. 42-56 / GC I-III, 1, 2 / GC IV, 1, 2, 4-6, 13-26, 27-34, 47-78, 79-141 / P I, 14, 63]

### 12.1.2.3 Layers of protection for civilians and other persons in occupied territory

The law of armed conflict provides several cumulative layers of protection for civilians and other protected persons in a party to the conflict's own territory, during invasion before effective control is established, and in occupied territory. These protections are largely set out in the Fourth Geneva Convention, and are supplemented by Additional Protocol I.

The first layer of protection of the Fourth Convention applies to the whole population of the countries in conflict, i.e. of the entire territory of all parties to the conflict, including occupied territory [GC IV, 13-26]. These very general provisions, which deal primarily with the protection of medical and humanitarian activities, are discussed below in 12.3.1.

The second, additional layer of protection applies to "protected persons" under the Fourth Geneva Convention, i.e. foreign nationals (with certain exceptions). These persons require specific forms of protection, since they are in the hands of a foreign government with interests at least potentially adverse to those of their own government. Some of these specific protections apply to all protected persons [GC IV, 27-34, 136-143], while others apply solely in a warring party's own territory [GC IV, 35-46] or solely in occupied territory [GC IV, 47-78]. The definition of protected persons is set out in 12.1.2.4. The provisions of the law applicable to all protected persons, in addition to those specific to occupied territory, are assembled in 12.3.2 and 12.3.3.

A third additional layer of protection applies to protected persons who are interned either in a warring party's own territory or in occupied territory [GC IV, 71-76, 79-135]. For these protections, see Section 7.4.

Furthermore, persons in the power of a party to the conflict who do not benefit from more favourable treatment under the provisions in the Geneva Conventions or Additional Protocol I are entitled to certain fundamental guarantees of treatment [P I, 75]. This includes civilians who are not entitled to "protected person" status. These fundamental guarantees are likewise discussed in Section 7.2.

[GC IV, 4 / P I, 75]

#### **12.1.2.4 Definition: protected persons**

The basic definition of "protected persons" under the Fourth Geneva Convention is the following: "protected persons are those persons who find themselves in the hands of a party to the conflict of which they are not nationals."

The Fourth Convention excludes the nationals of some States from the category of protected persons, because presumably their state of origin can protect them by the ordinary diplomatic means that apply in times of peace and continue to apply during an armed conflict:

- First, in the territory of a party to the conflict, the category of protected persons excludes nationals of a co-belligerent (allied) or neutral State, as

long as the State of nationality maintains normal diplomatic representation with the State in whose hands they are.

- Second, in occupied territory, the category of protected persons excludes only nationals of a co-belligerent (allied) State, provided that the State of nationality maintains normal diplomatic representation with the Occupying Power. The nationals of neutral States remain protected persons in occupied territory.

The category of persons explicitly protected by the Fourth Geneva Convention also excludes persons already protected by the First, Second and Third Geneva Conventions (wounded/sick/shipwrecked combatants and prisoners of war).

It is important to note that persons who meet the above definition are "protected persons" within the meaning of the Fourth Geneva Convention. Accordingly, individuals who are labelled as "mercenaries", "spies", "terrorists" or otherwise who meet the requirements above are still entitled to protected person status under the Fourth Geneva Convention, subject to the right of derogation discussed in 12.3.2.16. Those who do not meet the Convention's requirements for specific protection still benefit from the fundamental guarantees of treatment listed in Section 7.2. In any event, there are no persons who are left in a legal void.

[GC IV, 4, 5, 44 / P I, 73 / ICRC Commentary, GC IV, 4]

### **12.1.3 Beginning and end of application of the law of occupation**

#### **12.1.3.1 Definition of occupation**

"A territory is considered to be occupied when it is actually placed under the authority of the foreign armed forces.

The occupation extends only to the territory where such authority has been established and can be exercised."

A State's territory may therefore be partially occupied, in which case the laws and obligations of occupation apply only in the territory that is actually occupied.

[H.IV.R, 42]

#### **12.1.3.2 Beginning of application of the law of armed conflict**

Once a State effectively controls a foreign territory or a part thereof, the law of armed conflict specific to occupation comes into effect (whether or not

LOAC was already in effect due to the existence of an international armed conflict).

[GC I-IV, 2 / P I, 1, 3]

### 12.1.3.3 Resistance to occupation not required

A territory is considered to be occupied even if the occupation meets with no armed resistance.

[GC I-IV, 2]

### 12.1.3.4 Invasion phase

An armed force that is advancing into the territory of an enemy State is bound by the laws of armed conflict related to combat operations (see Chapters 4, 5, 6 and 10) as well as the rules applicable to the treatment of persons who find themselves in its hands (see Chapter 7) and the provisions applicable to all protected persons. [GC IV, 27-34]

There is some disagreement as to the exact moment when the additional rules of the law of occupation come into effect during the invasion phase.

One view is that the occupation, and the specific legal regime of occupation, starts only once the territory is in actual fact under the control of the armed forces of the Occupying Power. [H.IV.R, 42]

The other view, represented in the ICRC Commentary, is that "the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 [...] The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the [Fourth] Geneva Convention." In other words, "There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation."

[H.IV.R, 42 / GC IV, 6 / ICRC Commentary, GC IV, 6]

### 12.1.3.5 End of occupation and end of application of the law of occupation

Occupation ends when the Occupying Power loses effective control of the territory in question. This may occur as a result of withdrawal, a peace agreement, the resumption of hostilities which challenge the effective control of the occupier, handover to the local government or a Security Council Resolution. The end of occupation ends the applicability of the law of occupation.

Where occupation continues, the full application of the law of occupation ceases one year after the general close of military operations. When the occupation continues beyond that time period, the Occupying Power must continue to apply the rules relating to the following:

- the fundamental guarantees of treatment to which protected persons are entitled [GC IV, 27, 29-34, 47] (see 12.3.2);
- the prohibition on renunciation of rights and on deprivation of rights by agreement or change in the law [GC IV, 8, 47] (see 12.3.2.2 and 12.3.2.3);
- transfers, deportations and evacuations [GC IV, 49] (see 12.3.3);
- work [GC IV, 51, 52] (see 12.3.2.10 – 12.3.2.12);
- the prohibition on the destruction of property [GC IV, 53] (see 12.4.0.1);
- humanitarian relief [GC IV, 59, 61, 62] (see 12.2.4.3);
- the activities of the ICRC [GC IV, 9-12, 59, 61, 63, 143] (see 12.3.2.15); and
- penal affairs, enactment of new laws and application of laws of the occupied territory [GC IV, 64-77] (see 12.2.1).

In addition, the Occupying Power must apply all the relevant provisions of the Fourth Geneva Convention to protected persons until they are released from internment/administrative detention, repatriated or re-established.

[GC IV, 6]

For States party to Additional Protocol I, the full law of occupation applies until the termination of the occupation. In addition, the Occupying Power must apply all the relevant rules of the Fourth Geneva Convention and Additional Protocol I to protected persons until such time as they are released, repatriated or re-established.

[P I, 3]

## **12.2 Administration of occupied territory**

This Section explains the Occupying Power's obligations with regard to administration of the occupied territory. Subsection 12.2.1 discusses the obligation to restore and ensure public order and safety, and law enforcement. Subsection 12.2.2 explains the rules on legislation, the Occupying Power's application of the laws of the occupied territory and adoption of new laws, and penal matters. Subsection 12.2.3 addresses taxes, and 12.2.4 discusses the obligations of the Occupying Power with regard to the health and nutrition of the population, including humanitarian relief and interaction with civil defence organizations and National Red Cross and Red Crescent Societies.

## **12.2.1 Administration and law enforcement**

### **12.2.1.1 Introduction**

During an occupation, the authority of the legitimate power passes into the hands of the Occupying Power and the latter assumes responsibility for the administration of the occupied territory. Nonetheless, the law of occupation allows for a sharing of authority in the occupied territory between the Occupying Power and local authorities, provided the former retains overall and ultimate authority over the occupied territory.

The Occupying Power, however, is not the sovereign of the occupied State, but the temporary “*de facto* administrator” of the occupied territory.

As a result there are restrictions on the measures the Occupying Power may take in its administration of the occupied territory, which are set out in the following paragraphs.

[H.IV.R, 43 / GC IV, 47 / ICRC Commentary, GC IV, 47]

### **12.2.1.2 Duty to restore and ensure public order and safety**

The Occupying Power must take all measures in its power to restore and ensure, as far as possible, public order and safety within the occupied territory. This provision consists of two distinct components. First, it entails the establishment of security and safety for the civilian population. Second, it entails the restoration of public order in the broader sense of re-establishing public welfare and social functions, including measures aimed at stabilizing social and economic life for the occupied population.

This provision imposes an obligation of means, not of result, and the Occupying Power must adjust its conduct as far as feasible.

[H.IV.R, 43]

### **12.2.1.3 Law enforcement or conduct of hostilities in occupied territory**

During an occupation, the situation in the occupied territory is variable. It may change from more or less peaceful coexistence to a situation with increasing acts of violence and combat operations. It should therefore be borne in mind that the international rules which govern a particular situation during the occupation period depend on the circumstances prevailing at the time.

The maintenance of public order and safety is one of the basic responsibilities of law enforcement. The Occupying Power is thus ultimately responsible for law enforcement in the occupied territory. When force and firearms are used

in an occupied territory for the purposes of law enforcement (other than the conduct of hostilities), then the rules applicable to the use of force in law enforcement operations must be applied (see Chapter 14).

When the Occupying Power engages in the conduct of hostilities against enemy armed forces, the relevant law of armed conflict applies (see Chapters 4, 5, 6 and 10). Such hostilities do not displace the law of occupation, which continues to apply. It should be noted that effective control is not necessarily lost as a result of hostilities taking place within the occupied territory.

[GC I-IV, 2 / P I, 1, 3]

#### **12.2.1.4 Police**

The police of the occupied territory cannot be required to:

- assist in the execution of orders designed to employ the population for military purposes or for the promotion of military operations;
- take part in military operations; or
- carry out any order contrary to their duty to respect human rights and the law of armed conflict.

[GC IV, 51, 54]

#### **12.2.1.5 Resistance movements**

Inhabitants of occupied territory may organize themselves into resistance movements.

The Occupying Power's rights and obligations in terms of responding to the actions of members of a resistance movement depend on the classification of the members of such a movement.

If members of resistance movements qualify as combatants, then they are entitled to participate in hostilities and the Occupying Power may target them in combat operations, in accordance with the rules set out in Chapter 5. If they fall into the hands of the Occupying Power, they are entitled to prisoner-of-war status (see Chapter 7).

For members of a resistance movement to qualify as combatants, they must:

- "belong" to a party to the conflict (normally they will be formally recognized as such by the government that has undergone foreign occupation);
- be commanded by a person responsible for his subordinates;
- wear a fixed distinctive sign or uniform recognizable at a distance;
- carry arms openly; and
- conduct operations in accordance with the laws and customs of war.

Conversely, if members of a resistance movement do not meet these conditions, they must be treated as civilians. Civilians who directly participate in hostilities lose their protection from attack for the duration of each specific act of direct participation (see 5.3.1.5 for a discussion of this concept). Furthermore, civilians who directly participate in hostilities are not entitled to prisoner-of-war status. They may be interned or administratively detained for imperative reasons of security, in accordance with the provisions for internment/detention set out in Sections 7.4 and 7.5.

Civilians who indirectly participate in hostilities may not be targeted, but may potentially be interned or administratively detained for imperative reasons of security (see Sections 7.4 and 7.5), or may be punished on the basis of penal legislation enacted by the Occupying Power.

[GC III, 4 / GC IV, 4, 5, 64-73 / P I, 43, 44]

### 12.2.1.6 Espionage

The general rule is that a combatant captured while engaging in espionage is not entitled to prisoner-of-war status.

This rule is modified in occupied territory as follows:

- A member of the armed forces who is a resident of occupied territory, and is caught while gathering information of military value on behalf of the party to the conflict on which he depends, will not be considered to be engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. He will not lose his right to prisoner-of-war status unless he is captured while actually engaging in espionage.
- A member of the armed forces who is not a resident of the occupied territory and who has engaged in espionage in that territory does not lose his right to prisoner-of-war status unless he is captured before he rejoins the armed forces to which he belongs.

[P I, 46]

## 12.2.2 Legislation by the occupying power

### 12.2.2.1 Laws of the occupied territory

The Occupying Power must respect the laws in force in the territory before the occupation. Accordingly, local laws cannot be suspended, modified or replaced by the Occupying Power's own legislation. However, there are certain exceptions to this rule applicable to penal law as well as other local laws of the occupied territory.

- When the necessity arises, the Occupying Power can suspend, modify or enact law, namely in the following circumstances:
  - the need to remove a direct threat to the security of the Occupying Power, including the members and property of the occupying forces and administration;
  - the need to ensure consistency with and fulfil the obligations of the Geneva Conventions; and
  - the need to maintain orderly government. This requirement includes the duty to maintain public order and civil life (see 12.2.1.2). Although this exception does not specifically grant the authority to repeal laws, new law will repeal the older law automatically.
- The need to repeal laws violating international law standards or to ensure human rights (e.g. discriminatory laws inconsistent with the law of armed conflict and/or human rights law).
- When the United Nations Security Council authorizes derogations from or changes to such laws in a resolution.

The displaced sovereign power is allowed to continue to legislate for the occupied territory but the Occupying Power is not bound to respect that law. The Occupying Power may only legislate for the time of the occupation.

[H.R.IV 43 /ICRC Commentary, GC IV, 64 / UN Charter, 103]

#### **12.2.2.2 New penal provisions: application**

Any legislation enacted by the Occupying Power must not come into force before it has been published, meaning printed in full in the local language and brought to the knowledge of the inhabitants. The effect of penal provisions must not be retroactive.

[GC IV, 65]

#### **12.2.2.3 Public officials, judges**

In general, the Occupying Power must allow public officials and judges of the occupied territory to carry out their functions without interference. Accordingly, the Occupying Power may not alter the status of public officials or judges.

This prohibition does not affect the right of the Occupying Power to remove public officials from their posts. It may enact its own legislation for this purpose.

The Occupying Power may not apply sanctions or take any measures of coercion or discrimination against public officials or judges, should they abstain from fulfilling their functions for reasons of conscience.

[GC IV, 51, 54, 64]

#### **12.2.2.4 Competent courts**

For violations of the laws of the occupied territory in force before the occupation, the courts of the occupied territory must continue to operate, unless those courts present an obstacle to the application of the Fourth Geneva Convention or do not provide for the effective administration of justice.

[GC IV, 64]

For violations of the new penal provisions promulgated by the Occupying Power, the properly constituted, non-political, military courts of the Occupying Power may try the accused.

These courts must sit in the occupied territory. Courts of appeal should preferably also sit in the occupied territory.

The judicial guarantees to which protected persons are entitled during penal prosecution are set out in Section 9.7.

[GC IV, 66]

### **12.2.3 Taxes and contributions**

#### **12.2.3.1 Taxes**

The Occupying Power may collect the taxes imposed for the benefit of the State by the ousted government, as far as possible in accordance with the rules of assessment and incidence in force. They must be used to defray the expenses of the administration of the occupied territory as the legitimate government would have done. This relates only to existing, governmental taxes; local taxes cannot be levied by the occupier.

[H.IV.R, 48]

#### **12.2.3.2 Money contributions additional to taxes**

In addition to the ordinary taxes, the Occupying Power may levy new taxes in the form of other "money contributions" in occupied territory, replacing or additional to existing taxes. These in turn may only be used for the needs of the occupation forces or of the administration of the occupied territory; they cannot be requested for extraneous purposes.

Such money contributions must be limited to those which the economy of the occupied territory can bear. Accordingly, contributions demanded must be balanced against the resources available.

Such contributions must be collected under a written order, in accordance with the rules of assessment and taxes already in force, and under the responsibility of the commander-in-chief. A receipt must be provided.

[H.I.V.R, 49, 51 / International Military Tribunal (Nuremberg), Trial of the Major War Criminals, 22, 411, at 481-2]

## **12.2.4 Basic needs of the population of the occupied territory, humanitarian activities and civil defence**

### **12.2.4.1 Basic needs of the population**

To the fullest extent of the means available to it, the Occupying Power must ensure the food and medical supplies of the population of the occupied territory. If the resources of the occupied territory are inadequate, it should import necessary foodstuffs, medical stores and other articles. This is an obligation of means.

[GC IV, 55, P I, 54]

In armed conflicts governed by Additional Protocol I, the Occupying Power must also ensure the provision of clothing, bedding, means of shelter, objects necessary for religious worship, and other supplies essential for the survival of the population. This obligation is unconditional.

[P I, 69]

Starvation of civilians as a method of warfare is prohibited. It is therefore forbidden to destroy, remove or render useless objects indispensable for the survival of the population, e.g. foodstuffs, crops and livestock.

[P I, 54]

### **12.2.4.2 Medical services**

To the fullest extent of the means available to it, the Occupying Power must ensure and maintain (with the cooperation of the authorities in the occupied territory) medical and hospital services, public health and hygiene in the occupied territory.

Medical personnel must be allowed to carry out their duties.

Furthermore, the Occupying Power must import necessary medical supplies, such as medicines and vaccines, when the resources of the occupied territory are inadequate.

[GC IV, 55, 56]

### 12.2.4.3 Humanitarian relief

If the whole or part of the population of an occupied territory is inadequately supplied with food, medical supplies and clothing, the Occupying Power must permit humanitarian relief operations, and must facilitate them by all the means at its disposal. This obligation is unconditional.

In armed conflicts governed by Additional Protocol I, the Occupying Power must also accept relief consignments of bedding, means of shelter, objects necessary for religious worship, and other supplies essential for the survival of the population.

Humanitarian relief operations can be carried out by other States or by impartial humanitarian organizations such as the ICRC.

Relief consignments must be exempt from taxes, charges or customs duties, unless such charges are in the interest of the economy of the occupied territory.

The distribution of the relief can be carried out under the supervision of the ICRC.

Relief consignments must not be diverted except in cases of urgent necessity for the benefit of the population of the occupied territory, and only with the permission of the ICRC. Under no circumstances may the Occupying Power divert humanitarian relief intended for the population of the occupied territory to its own population, its armed forces or its administrative personnel.

Relief consignments do not relieve the Occupying Power of its responsibilities towards the civilian population of the occupied territory, as the primary responsibility to ensure that the civilian population is adequately supplied remains with the Occupying Power.

Relief personnel may form part of the relief operation, subject to the approval of the party in whose territory they will carry out their duties. They must be respected and protected, and only in cases of military necessity may their activities be limited or restricted.

[GC IV, 59, 60, 61 / P I, 69, 71]

### 12.2.4.4 ICRC, National Red Cross or Red Crescent Societies, other relief societies and organizations

Subject to temporary and exceptional measures imposed for urgent reasons of security, the Occupying Power must permit the National Red Cross or Red Crescent Society and other duly authorized humanitarian organizations to continue their humanitarian activities.

The Occupying Power may not demand any changes in the personnel or structure of these aid agencies which would prejudice their humanitarian activities.

The same principles also apply to the activities and personnel of organizations of a non-military character, which already exist or which may be established for the purpose of ensuring the living conditions of the civilian population by maintaining the essential public utility services, distributing relief and organizing rescues.

The Occupying Power must also grant the ICRC all facilities within its power to carry out its humanitarian functions set out in the Geneva Conventions and Additional Protocol I to ensure the protection of and assistance to the victims of the armed conflict.

[GC IV, 63 / P I, 81]

#### 12.2.4.5 Civil defence

Civil defence organizations must receive from the authorities the facilities necessary for the performance of their tasks. "Facilities" means on the one hand authorization of access to places where the tasks must be performed and allowing personnel assigned to civil defence to carry out their activities, and on the other hand authorizing and even assisting civil defence organizations in procuring the material necessary for such tasks, i.e. the equipment, supplies and means of transport.

The Occupying Power must not compel the personnel of civil defence organizations to perform activities which would interfere with the proper performance of these tasks, must not change the structure or personnel of civil defence organizations, and must not give priority to the nationals or interests of the Occupying Power.

The Occupying Power is restricted in its right to requisition or divert resources of civil defence organizations. In particular:

- the Occupying Power must neither divert nor requisition buildings or material belonging to or used by civil defence organizations, if to do so would be harmful to the civilian population; and may only requisition or divert those resources if, and for so long as, they are needed to meet other needs of the civilian population; and
- the Occupying Power must never divert or requisition shelters provided for the use of the civilian population, or needed by that population.

For a more detailed discussion on the protection granted to civil defence organizations, see Chapter 5.

[P I, 63, 65]

## **12.3 Civilians in occupied territory**

This Section sets out the rules for the treatment in occupied territory of all civilians (see 12.3.1) and of protected persons (see 12.3.2). It also summarizes the rules related to the movement of persons into and out of occupied territory (see 12.3.3).

### **12.3.1 All persons in occupied territory**

#### **12.3.1.1 Rule**

The law of armed conflict provides certain protections for all persons who are in occupied territory, including those who do not qualify as specifically "protected persons" under the Fourth Geneva Convention.

In addition, all persons in the hands of a party to an armed conflict are entitled to certain fundamental guarantees (see Section 7.2).

[GC IV, 3, 4, 13-26 / P I, 75]

#### **12.3.1.2 Allegiance**

The inhabitants of the occupied territory have no duty of allegiance to the Occupying Power.

The Occupying Power must not compel the inhabitants of occupied territory to swear allegiance to it.

[H.IV.R, 45]

#### **12.3.1.3 Humane treatment**

Every person in the hands of the Occupying Power must be humanely treated, and must be protected against all acts of violence and threats thereof, rape, indecent assault, enforced prostitution, torture, murder, corporal punishment, and mutilation.

They must be treated in all circumstances with respect for their persons, their honour, and their religious convictions.

In addition, collective punishments, pillage and the taking of hostages are prohibited.

In this respect, see also Section 7.2.

[P I, 75 / H.IV.R., 46, 47, 50]

#### **12.3.1.4 Coercion**

The Occupying Power must not force inhabitants of the occupied territory to provide information about the armed forces and the defence systems of the ousted government.

[H.IV.R, 44]

#### **12.3.1.5 Religion**

The religious convictions and practices of all persons must be respected.

[H.IV.R, 46 / P I, 75 / 1 CILS, 104]

#### **12.3.1.6 Children**

Children under 15 who are orphaned or separated from their families must not be left to their own resources, and their maintenance, schooling, and the exercise of their religion must be facilitated in all circumstances.

[GC IV, 24]

#### **12.3.1.7 Family news**

All persons must be permitted to send news of a strictly personal nature to their families and to receive such news from them, wherever their families may be.

The parties to the conflict must facilitate enquiries made by members of families dispersed by armed conflict with the object of renewing contact and of meeting, if possible.

[GC IV, 25, 26]

#### **12.3.1.8 Wounded and dead**

Each party to the conflict must facilitate steps taken to search for those killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

[GC IV, 16]

### **12.3.1.9 Agreements to remove the wounded, sick, and others**

The parties to the conflict must endeavour to conclude agreements to remove from besieged or encircled areas the wounded, sick, infirm, elderly, children and pregnant women, and to allow the passage of medical and religious personnel and medical equipment.

The provisions related to the passage of humanitarian assistance in occupied territory are discussed in 12.2.4.3.

[GC IV, 17]

### **12.3.1.10 Agreements concerning hospital, safety and neutralized zones**

At the outbreak of a conflict (or even in times of peace), States may establish hospital, safety and neutralized zones in their territory, and may conclude agreements on mutual recognition of these zones.

[GC IV, 14, 15]

## **12.3.2 Protected persons in occupied territory**

### **12.3.2.1 Rule: protected persons**

The law of armed conflict provides certain additional protections for civilians in occupied territory who qualify as protected persons under the Fourth Geneva Convention.

For the definition of “protected person”, see 12.1.2.4 above.

[GC IV, 4]

### **12.3.2.2 No renunciation of rights**

Protected persons may not renounce their rights under the law of armed conflict in any circumstances.

[GC IV, 8]

### **12.3.2.3 Prohibition on depriving protected persons of their rights**

Protected persons in occupied territory cannot be deprived of their rights under the law of occupation by changes made to the institutions or government, by any agreement concluded between the authorities of the occupied territories and the Occupying Power, or by annexation. This provision is intended as a safeguard against exclusion of the rights of certain parts of the population.

[GC IV, 47]

**12.3.2.4 Responsibility**

The Occupying Power is responsible for the treatment of protected persons under its control regardless of any individual responsibility which may be incurred.

[GC IV, 29]

**12.3.2.5 Humane treatment**

Protected persons must be humanely treated, and must be protected against all acts of violence and threats thereof, rape, indecent assault, enforced prostitution, torture, murder, extermination, corporal punishment, mutilation, medical or scientific experiment, and any other measures of brutality whether applied by civilian or military agents, and against all insults and public curiosity.

They must be treated in all circumstances with respect for their persons, their honour, their family rights, and their religious convictions, manners and customs.

In addition, reprisals, collective punishments, all measures of intimidation, the taking of hostages and pillage are prohibited.

Lastly, the fundamental protections for all persons discussed in Section 7.2 apply.

[GC IV, 27, 32-34]

**12.3.2.6 Prohibition of physical or mental coercion**

The Occupying Power must not exercise any physical or mental coercion against protected persons.

[GC IV, 31, 32]

**12.3.2.7 Religion**

The religious convictions and practices of all persons must be respected.

In particular, the Occupying Power must permit ministers of religion to give spiritual assistance to the members of their religious communities. It must also accept consignments of books and articles required for religious needs and facilitate their distribution in occupied territory.

[GC IV, 27, 58]

### 12.3.2.8 Children

The Occupying Power must, in cooperation with the local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

Should the local institutions be inadequate for this purpose, the Occupying Power must make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

The Occupying Power may not, in any case, change the personal status of children, nor enlist them in its armed forces.

The Occupying Power must take all necessary steps to facilitate the identification of children and the registration of their parentage.

[GC IV, 50]

### 12.3.2.9 Prohibition of enlistment

The Occupying Power must not compel protected persons to serve in its armed or auxiliary forces.

No pressure or propaganda which aims at securing voluntary enlistment is permitted.

[GC IV, 51, 147]

### 12.3.2.10 Work: basic rules

The Occupying Power is restricted in its right to require the civilian population to carry out work.

In particular, the Occupying Power may not compel protected persons to work, unless such a measure is necessary for:

- the needs of the army of occupation;
- public utility services (e.g. water, gas and electricity services, postal and telecommunication services, fire fighting); or
- the feeding, sheltering, clothing, transportation or health of the population of the occupied country.

If the Occupying Power does compel a protected person to work, it must do so in accordance with the following provisions.

[GC IV, 51]

**12.3.2.11 Work: no participation in military operations**

Protected persons may not be compelled to undertake any work which would oblige them to take part in military operations.

[GC IV, 51]

**12.3.2.12 Work: conditions**

Authorized work must meet the following conditions:

- it may only be carried out in the occupied territory;
- persons under eighteen years of age may not be compelled to work;
- every person compelled to work must, as far as possible, be kept in his usual place of employment; and
- the labour legislation in force in the occupied territory must remain applicable (e.g. laws on wages, hours of labour, safety measures, training, compensation for occupational accidents and diseases).

[GC IV, 51]

**12.3.2.13 Security measures against protected persons**

Protected persons may be interned or placed in assigned residence only if it is necessary for imperative reasons of security.

For a full discussion of the internment/administrative detention of protected persons in occupied territory, see Section 7.4.

[GC IV, 78]

Control and security measures may be taken with regard to protected persons, as a necessary result of the armed conflict. These can include e.g. a curfew, restrictions of movement or a ban on carrying arms. The Occupying Power has broad discretion in the choice of such measures, but it may not diminish the fundamental rights of the persons concerned. For example, all medical services need to remain operational and enjoy freedom of movement.

[GC IV, 27, 41 / ICRC Commentary, GC IV, 27]

**12.3.2.14 Penal matters**

For a discussion of the judicial guarantees to which protected persons are entitled if tried by the Occupying Power for penal offences, see Section 9.7.

**12.3.2.15 The ICRC's right of access**

Representatives of the ICRC must be given access to all places in occupied territory where protected persons are, including all places of internment, detention and work.

They must be permitted to interview protected persons without witnesses and with the help of interpreters, if necessary. The duration and frequency of visits must not be limited. The ICRC representatives must have full liberty to select the places they wish to visit.

ICRC visits must not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

[GC IV, 143]

#### **12.3.2.16 Derogations**

A party to the conflict may derogate from some of the protections accorded to protected persons (i.e. limit their rights) in the following limited circumstances.

In occupied territory a protected person who is being detained as a spy or saboteur, or under definite suspicion of activity hostile to the security of the Occupying Power, can be considered to have forfeited his rights of communication (to the outside world), as stipulated in the Fourth Geneva Convention, where such forfeiture is required by absolute military necessity.

In all cases, such persons must be treated with humanity and cannot be deprived of the right to a fair trial. In addition, at the earliest date consistent with the security of the Occupying Power, they must be granted the full rights and privileges of a protected person.

It must be noted that such persons remain entitled to the fundamental protections set out in Additional Protocol I, 75, which are detailed in Section 7.2.

[GC IV, 5 / P I, 75]

### **12.3.3 Movements of civilians in or out of occupied territory**

#### **12.3.3.1 Right of aliens to leave the territory**

Protected persons who are not nationals of the State whose territory is occupied must be permitted to leave that territory, unless their departure is contrary to the national interests of the Occupying Power.

There must be a regularly established procedure to decide on applications to depart; decisions must be taken as quickly as possible, and negative decisions must be reconsidered as soon as possible by a court or administrative board designated by the Occupying Power for that purpose.

[GC IV, 48, 35]

### 12.3.3.2 Prohibition of deportation from or into occupied territory

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited regardless of their motive.

Furthermore, the Occupying Power must not deport or transfer parts of its own civilian population into the territory it occupies.

Nevertheless, a limited evacuation may be allowed, but only in accordance with the provisions regarding evacuation in the following paragraph.

[GC IV, 49 / 1 CILS, 129, 130]

### 12.3.3.3 Evacuation

The Occupying Power may totally or partially evacuate an area of the occupied territory if the security of the population or imperative military reasons so demand.

Such evacuations must not involve the displacement of protected persons outside the occupied territory, except when it is impossible to avoid such displacement.

During an evacuation the Occupying Power must ensure, to the greatest extent practicable, that:

- proper accommodation is provided to receive the protected persons being evacuated;
- evacuation is effected in satisfactory conditions of hygiene, health, safety and nutrition; and
- members of the same family are not separated.

[GC IV, 49]

### 12.3.3.4 Evacuation: mandatory end

Evacuated persons must be transferred back to their homes as soon as hostilities in the area in question have ceased.

[GC IV, 49 / 1 CILS, 132]

## 12.4 Protection of property

This Section sets out the rules concerning the use, seizure, requisition, destruction and theft of private and State property in occupied territory.

#### 12.4.0.1 Property: basic rules

The destruction of private or public property by the Occupying Power in occupied territory is prohibited, except where it is rendered absolutely necessary by military operations.

Theft and looting of property are strictly forbidden.

The use, requisition or seizure of property is restricted as set out below.

[H.IV.R, 46, 47 / GC IV, 33, 53, 147]

#### 12.4.0.2 Prohibition of confiscation of private property

Private property must be respected and may not be confiscated.

“Confiscation” means taking private property without adequately compensating the owner.

Reprisals against the property of protected persons in an occupied territory are forbidden.

[H.IV.R, 46, GC IV, 33]

#### 12.4.0.3 Requisition of private property

The Occupying Power may requisition private property and services, subject to the following restrictions:

- the requisitions must be dictated by the needs of the occupying armed forces (e.g. quartering of troops, accommodation of wounded and sick);
- the requisitioning must not oblige the inhabitants of the occupied territory to take part in military operations against their own country;
- the requisitions must be in proportion to the resources of the country;
- the Occupying Power must make arrangements to ensure that fair value is paid for any requisitioned goods. Contributions in kind must, as far as possible, be paid for in cash; if not, a receipt must be given and the payment of the amount due must be made as soon as possible; and
- the requisitions may only be made on the authority of the commander in the locality occupied.

With regard to private immovable property the requirements are less clear, but temporary possession by the Occupying Power has been accepted in cases of military necessity (e.g. needs related to quartering, observation or accommodation of the wounded and sick), provided that:

- it is for a fixed time;

- the owner is paid compensation for the use; and
- any damage is compensated.

[H.IV.R, 52 / GC IV, 55]

#### **12.4.0.4 Requisition of food and medical supplies**

Foodstuffs and medical supplies (whether private or public) may only be requisitioned:

- for use by the occupation forces and administrative personnel; and
- only if the needs of the population of the occupied territory have been taken into account.

[GC IV, 55]

#### **12.4.0.5 Requisition of civilian hospitals**

The Occupying Power may only requisition civilian hospitals on a temporary basis, and then only if:

- they are urgently needed for the care of military wounded and sick; and
- suitable arrangements are made in due time for the care and treatment of the hospital's patients and for the needs of the civilian population for hospital accommodation.

The material and stores of civilian hospitals may not be requisitioned so long as they are necessary for the needs of the civilian population.

[GC IV, 57]

#### **12.4.0.6 Property of municipalities and of institutions dedicated to religion, charity, education, the arts or sciences**

The property of municipalities and that of institutions dedicated to religion, charity, education, the arts and sciences, even when State property, must be treated as private property.

The seizure of, destruction of, or wilful damage to institutions of this character, historic monuments or works of art and science is forbidden, and should be made the object of legal proceedings. This prohibition is absolute and makes no exception for military necessity. See also the rules governing cultural property in 12.4.0.9.

[H.IV.R, 56]

#### **12.4.0.7 Use of immovable State property**

Immovable State property is defined as public buildings, real estate, forests and agricultural estates.

In general, the Occupying Power may use immovable State property but must administer it in accordance with the rules of usufruct. Under these rules, the Occupying Power enjoys the right of temporary possession of the property, and may use it, but must not destroy, waste, neglect, abusively exploit or encroach on the capital of such property.

Excluded from this right of requisition are buildings belonging to or used by the civil defence organizations and civilian medical units.

[H.IV.R, 55, P I, 14, 63]

#### **12.4.0.8 Seizure of immovable State property**

The Occupying Power may seize the following categories of movable State property:

- cash, funds and realizable securities;
- arms depots;
- stores and supplies;
- means of transport; and
- other movable State property which can be used for military operations.

In addition, the Occupying Power may seize any movable state and private property used for:

- telecommunications;
- munitions; and
- the transport of goods and people.

Such property must be restored and compensation fixed when peace is made.

[H.IV.R, 53]

#### **12.4.0.9 Cultural property, private and public**

The Occupying Power must prohibit and prevent:

- any illicit export, other removal (e.g. pillage by criminals) or transfer of ownership of cultural property;
- any archaeological excavation, except where this is strictly required to safeguard, record or preserve cultural property (such excavation must be carried out in cooperation with the competent national authorities of the occupied territory, unless the circumstances do not permit); and
- any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.

The Occupying Power must support the competent authorities of the occupied territory in safeguarding and preserving its cultural property.

When the competent authorities of the occupied territory are unable to take measures to preserve cultural property damaged by military operations, the Occupying Power must, in close cooperation with these authorities, take the essential preservation measures.

[H.CP, 5 / H.CP.P.II, 9]

# CHAPTER 13

# NEUTRALITY

## 13 NEUTRALITY

This Chapter deals with the law of neutrality applicable during international armed conflict, including the responsibilities of belligerent parties and neutral States.

**13.1 Introduction and definitions** outlines the law of neutrality and provides for the definitions of terms used in this Chapter.

**13.2 General responsibilities of belligerent parties and neutral States** sets out the duty of belligerent parties and neutral States to respect the law of neutrality.

**13.3 Warships** discusses the rules applicable to belligerent warships in neutral waters, including the restrictions that must or may be placed on them by neutral States.

**13.4 Medical transports** addresses the rules for medical transports of belligerent parties that pass through neutral territory, and for neutral ships which respond to appeals from belligerent parties to take the wounded, sick, shipwrecked and dead on board.

**13.5 Treatment of persons** discusses the internment of members of belligerent armed forces on neutral territory, the admission of civilians into neutral territory, and the status of nationals of neutral States in the territory of a belligerent party and in occupied territory.

**13.6 Implementation of neutrality** describes the measures to be applied by neutral States and belligerent parties respectively to ensure appropriate action and behaviour by the relevant bodies and persons concerned.

**13.7 Military operations in neutral space** describes the legal framework governing such operations.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

## 13.1 Introduction and definitions

### 13.1.0.1 Law of neutrality

The law of neutrality is the body of public international law regulating the coexistence of States that are parties to a particular international armed conflict and States that are not. It does not apply to non-international armed conflict.

The law of neutrality lays down the rights and duties of neutral States and belligerent parties.

The overriding principle of the law of neutrality is that because a neutral State is not a party to a given conflict, its territory and nationals are inviolable so long as the neutral State maintains its neutrality and refrains from participating in the hostilities.

On land, the law of neutrality applies most obviously between neutral States and neighbouring belligerent parties.

At sea and in the air, the law of neutrality regulates the conduct of ships and aircraft of the belligerent parties and those of neutral States.

### 13.1.0.2 Legal framework

The main treaties addressing the law of neutrality are:

- 1907 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land [H.V];
- 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War [H.XIII]; as well as
- certain provisions in the four 1949 Geneva Conventions [GC I - IV] and in their Additional Protocol of 1977 [P I].

Reference is also made below, where relevant, to provisions of the 1994 United Nations Convention on the Law of the Sea [UNCLOS].

Certain provisions of the law of neutrality are also found in customary international humanitarian law [CILS].

### 13.1.0.3 Definition: neutral State

A “neutral State” is a State that is not a party to a particular armed conflict.

A State may, but need not, make a formal declaration of neutrality.

### 13.1.0.4 Definition: neutral space

“Neutral space” is defined in this Handbook as a neutral State’s:

- land territory;
- internal waters;

- territorial sea; and
- national airspace.

[UNCLOS, 2, 3-16, 46-48]

#### 13.1.0.5 Definition: neutral person

A “neutral person” is a national of a neutral State.

A neutral person loses his or her neutral status if:

- he or she commits a hostile act against a belligerent party; or
- he or she commits an act in favour of a belligerent party.

[H.V, 16-18]

#### 13.1.0.6 Definition: belligerent party

For the purposes of this Chapter, a “belligerent party” is a party to the international armed conflict in question.

## 13.2 General responsibilities of belligerent parties and neutral States

This Section sets out the responsibility of belligerent parties and neutral States to respect the law of neutrality.

### 13.2.0.1 Prohibition of violation of neutrality by belligerent parties

The basic rule is that the territory of a neutral State is inviolable.

This means that a belligerent party must not conduct hostilities in a neutral State or take any action that would violate its neutrality.

In particular, a belligerent party must not:

- conduct hostilities within, through or from neutral space, either against belligerent parties or against neutral States;
- use neutral space as a base for military operations, including intelligence operations;
- erect telecommunications equipment to be used for military purposes within neutral space, or use any pre-existing equipment of this kind for purely military purposes;
- move its armed forces or convoys of war munitions or supplies through the land territory of a neutral State;
- overfly neutral national airspace;
- capture persons or objects located in neutral space (including ships and aircraft);
- recruit combatants in neutral space; or
- use the flags or military emblems, insignia or uniforms of neutral States.

For the rules related to belligerent warships in neutral waters, ports and roadsteads, refer to Section 13.3 below.

[H.V, 1-4 / H.XIII, 1, 2, 5, 17, 18 / 1 CILS, 63 / HPCR Manual on International Law applicable to Air and Missile Warfare, 166-75]

### 13.2.0.2 Neutral States: general obligations

The basic rule is that a neutral State must abstain from participating in the armed conflict.

A neutral State must not support, directly or indirectly, the war effort and/or the armed forces of belligerent parties (e.g. by providing militarily relevant intelligence, delivering State-owned military or militarily relevant material, allowing belligerent parties to use neutral air bases for refuelling, or allowing belligerent parties to use its ports as a base for naval operations).

A neutral State:

- must treat all belligerent parties impartially;
- must ensure respect for its neutrality by prohibiting belligerents from taking action in its territory that violates its neutrality, using the means at its disposal; for example, a neutral State must not allow belligerents to move troops or convoys of war munitions or supplies through its land territory or to erect telecommunications equipment there.
- must not supply warships, ammunition or war material to a belligerent party; and
- must oppose any violation of its neutrality, if necessary by the use of force. The fact that a neutral State resists, even by force, an attempt to violate its neutrality cannot be regarded as a hostile act. It must however respect the limits which international law imposes on the use of force.

A neutral State is not responsible for any of its nationals who cross its borders individually to serve in the armed forces of a belligerent party. Thus the fact that the neutral State failed to prevent this will not be regarded as a violation of its neutrality. On the other hand, a neutral State must apply impartially any regulations it enacts with regard to the movements of such persons, in order to comply with the rule that a neutral State must treat all belligerent parties equally.

[H.V, 5-10 / H.XIII, Preamble, 6, 25, 26]

### 13.2.0.3 Export and transit of military material

A neutral State may, but is not required to, prohibit or restrict:

- the export of military and military-relevant material to a belligerent party; and

- the use by or for a belligerent party of telecommunications equipment owned by the neutral State, private companies, or individuals.

A neutral State that applies such restrictive measures does not violate its neutrality insofar as the measures are applied impartially to all belligerent parties.

[H.V, 7-9 / H.XIII, Preamble, 7]

#### **13.2.0.4 Non-belligerent action in favour of belligerent parties**

A neutral State may carry out or facilitate certain non-belligerent actions for the belligerent parties and their nationals without violating its neutrality.

Examples of permissible non-belligerent actions are:

- providing medical assistance for humanitarian purposes;
- allowing the wounded and sick of belligerent parties to pass through its territory;
- allowing its civil defence organizations to perform civil defence tasks;
- acting as Protecting Power under the Geneva Conventions;
- allowing minimal repair of warships in a neutral port;
- interning belligerent armed forces; and
- organizing relief operations in favour of the civilian population of belligerent parties.

[GC I, 8, 10, 27, 43 / GC II, 8, 10, 11, 15, 17, 21, 25, 40, 43 / GC III, 4, 8, 10, 11, 109-17 / GC IV, 9, 11, 12, 15, 24, 36, 61, 132 / P I, 2, 9, 64 / H.V, 11, 12, 13, 14 / H.XIII, 17 / H.CP, 22 / H.CPR, 9 / H.CP.II, 34]

#### **13.2.0.5 Primacy of the United Nations Charter**

Members of the United Nations (UN) are required to give the UN every assistance in any action it takes.

In the event of a conflict between the law of neutrality and a UN Security Council resolution enacted pursuant to the Security Council's Chapter VII powers, the latter prevails.

In particular, a neutral State is bound to participate in the enforcement of UN economic sanctions and to refrain from providing assistance to any State against which the United Nations is taking preventive or enforcement action.

Furthermore, a neutral State may participate in military action mandated by the Security Council, and must not hamper the application of measures based on Chapter VII.

[UN Charter, 2, 25, 39-51, 48, 49, 103]

### 13.3 Warships

This Section discusses the rules applicable to belligerent warships in neutral space, including the restrictions that must or may be placed on them by neutral States.

#### 13.3.1 Restrictions on belligerent warships in the territorial sea of neutral States

##### 13.3.1.1 Innocent passage of a belligerent party

Neutrality is not violated by the innocent passage of a warship of a belligerent party through a neutral coastal State's territorial sea.

Passage is innocent so long as it is not prejudicial to the peace, good order or security of the neutral State.

The following activities are considered to be prejudicial to the peace, good order or security of the coastal State:

- any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- any exercise or practice with weapons of any kind;
- any act aimed at collecting information prejudicial to the defence or security of the coastal State;
- the launching, landing or taking on board of any aircraft or any military device;
- the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- any act of wilful and serious pollution contrary to the United Nations Convention on the Law of the Sea (UNCLOS);
- any fishing activities;
- the carrying out of research or survey activities;
- any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; and
- any other activity not having a direct bearing on passage.

For example, a belligerent party may use neutral waters as a transit route from the high seas to port or to internal waters and vice versa.

[UNCLOS, 17-26, 52 / H.XIII, 10]

### 13.3.1.2 Prohibition of hostile acts while in neutral waters

Belligerent warships must not commit any hostile act, or capture or search other vessels, in the territorial sea of a neutral State; such acts constitute a violation of neutrality.

[H.XIII, 2]

## 13.3.2 Regulation of access to territorial sea, ports, roadsteads

### 13.3.2.1 Rule

A neutral State may restrict or regulate access to its ports, roadsteads or territorial sea, but it must apply such restrictions impartially to all belligerent parties.

However, a neutral State may refuse entry to a belligerent ship which has failed to comply with its rules, or has violated the neutral State's neutrality.

[H.XIII, 9 / UNCLOS, 21, 22, 24]

### 13.3.2.2 Restriction of access to territorial sea

A neutral State may take the necessary steps to prevent the passage of belligerent warships that is not innocent through its territorial sea.

Furthermore, a neutral State may temporarily suspend innocent passage of all ships in its territorial sea, including belligerent ships, if the suspension is essential for its own security and if such closure has been published.

[UNCLOS, 25]

## 13.3.3 Belligerent warships in neutral ports and roadsteads

### 13.3.3.1 Regulations: duration of stay, supplies

The general rule is that belligerent warships must not remain in neutral ports and roadsteads for more than 24 hours, except on account of damage or the weather.

When a neutral State learns of the outbreak of hostilities, it must order all belligerent warships in its ports to depart within 24 hours.

A neutral State must not allow more than three belligerent warships in one of its ports or roadsteads at any given time, unless it enacts special legislation to the contrary. When warships belonging to two opposing belligerent parties are both in the same port or roadstead, there must be at least a 24-hour gap between the departure of the first ship and the departure of the second ship.

A neutral State may, after prior notification, detain a belligerent warship (and its officers and crew) that refuses to leave a port where it is not entitled to remain.

[H.XIII, 12, 13, 14, 15, 16, 24]

While in neutral ports belligerent ships may:

- take on fresh provisions up to peacetime standards;
- carry out repairs necessary to become seaworthy, as determined by the authorities of the neutral State (such repairs may not add to their combat capability); and
- ship sufficient fuel to return to their home country (but may only do so once every three months in any port in a particular neutral State).

While in neutral ports or the territorial waters of a neutral State, belligerent warships must not:

- replenish or increase their supplies of war materials or armaments; or
- complete their crews.

[H.XIII, 12-20]

### **13.3.3.2 Obligations of neutral States regarding warships**

A neutral State must employ the means at its disposal to:

- prevent the fitting-out or rearming of warships within its territory which it has reason to believe are to be used by a belligerent party against a State with which the neutral State is at peace; and
- prevent the departure from its jurisdiction of any vessels intended to cruise or engage in hostile operations which have been adapted entirely or partly within its jurisdiction for use in war.

[H.XIII, 8]

## **13.4 Medical transports**

This Section sets out the rules for medical transports of belligerent parties that pass through neutral space, and for neutral ships which respond to appeals from belligerent parties to take the wounded, sick, shipwrecked and dead on board.

### **13.4.0.1 Medical transports**

Neutral states may authorize the passage through their territory of belligerent medical transports, on condition that the transport carries neither combatants nor military material.

The neutral State must take the necessary security and control measures to ensure that this condition is met. In particular, the neutral State must ensure that there are no active military personnel or military material in the transport.

If wounded and sick military personnel of one belligerent party are brought into neutral territory by another belligerent party, then the neutral State must intern them until the end of the conflict.

[H.V, 14]

#### **13.4.0.2 Medical ships and craft of a neutral State**

Medical ships and craft made available to a belligerent party by a neutral State, private individuals, the National Red Cross or Red Crescent Societies or other recognized aid societies of a neutral State are entitled to the same protection as medical ships of belligerent parties and therefore must not be the object of attack, unless the conditions for protection are breached.

Such ships must provide relief and assistance to the wounded, sick and shipwrecked without distinction based on nationality.

[GC II, 25, 31, 30, 34, 35 / P I, 22, 23 / H.XIII, 14]

#### **13.4.0.3 Medical ships and craft of a belligerent party**

Medical ships and craft of belligerent parties in neutral waters and ports are not subject to the restrictions imposed upon warships in neutral waters and ports (see Section 13.3).

[GC II, 32]

#### **13.4.0.4 Medical aircraft**

Medical aircraft must not fly over or land in territory controlled by a neutral State without prior agreement.

A neutral State may place restrictions on the overflight or landing of medical aircraft in its territory, provided that such restrictions are applied impartially to all belligerent parties.

All medical aircraft flying over neutral space must obey any summons to land or to alight on water.

If a medical aircraft flies over neutral territory without prior agreement, it must make every effort to identify itself. As soon as such a medical aircraft has been recognized, the neutral State must make all reasonable efforts to order the aircraft to land or to alight on water, as appropriate, or to take other measures

to safeguard its own interests. In either case, the aircraft must be given time to comply before being attacked.

Once a medical aircraft lands or alights on water, the neutral State may inspect it to determine if it is in fact a medical aircraft.

If the aircraft is a medical aircraft, it must be allowed to continue its flight, although persons on board who are subject to detention under the law of armed conflict, i.e. wounded, and sick members of a belligerent party's armed forces, must be interned until the end of the armed conflict.

According to the ICRC Commentary, civilian wounded and sick on board the medical aircraft should be able to choose whether they continue the flight or disembark, because the law on neutrality does not regulate their situation. If they disembark, the neutral State must treat them humanely and provide medical care, but is not under any obligation to detain them.

If the aircraft is not a medical aircraft it must be seized, and persons who are subject to detention under the law of armed conflict (i.e. wounded and sick members of the armed forces of a belligerent party) must be interned until the end of the hostilities.

[H.V, 14 / GC I, 37 / GC II, 40 / P I, 31 / ICRC Commentary, P I, 31] [IAC]

#### **13.4.0.5 Neutral ships that answer the call to take wounded, sick, shipwrecked and dead on board**

The belligerent parties may ask neutral ships to take the wounded, sick or shipwrecked on board or to collect the dead.

Neutral ships that respond to such an appeal are protected and must not be attacked. They must not be captured for doing so, although in the absence of an agreement to the contrary they may be captured for any violation of neutrality they may have committed.

[GC II, 21]

#### **13.4.0.6 Military wounded, sick and shipwrecked persons in the hands of a neutral State**

Military wounded, sick or shipwrecked who are:

- taken on board a neutral warship or aircraft;
- disembarked on neutral territory from a medical aircraft, a warship or a medical ship with the consent of the neutral State; or
- who have otherwise ended up in the hands of a neutral State (e.g. taken on board a private neutral vessel);

must be interned by the neutral State until the end of the hostilities.

The neutral State must provide for their medical care.

The costs of treatment and internment will be borne by the State on whom the wounded, sick or shipwrecked person depends.

[H.V, 12, 14 / GC I, 4, 37 / GC II, 5, 15-17, 21, 40 / P I, 19]

### **13.5 Treatment of persons**

This Section discusses the internment of members of belligerent armed forces on neutral territory, the admission of civilians into neutral space, and the status of nationals of neutral States in the territory of a belligerent party and in occupied territory.

#### **13.5.1 Admission of members of the armed forces and civilians into neutral territory**

##### **13.5.1.1 Rule: belligerent armed forces admitted onto, or captured in, neutral territory**

A neutral State may admit units and members of the armed forces of belligerent parties onto its territory, but it must intern them, at a distance from the theatre of war (as far as possible), until the end of the hostilities.

Members of the armed forces of the belligerent parties who have been captured on neutral territory must also be interned until the end of hostilities.

[H.V, 11, 12]

##### **13.5.1.2 Treatment of military internees in a neutral State**

Members of the armed forces of a belligerent party, as well as any persons who would be entitled to prisoner-of-war status if they were in the hands of a belligerent party, should be treated as prisoners of war, which means they are entitled to treatment at least equal to the treatment to which prisoners of war in the hands of a belligerent party are entitled.

At the end of the hostilities the expense of internment must be made good to the neutral State (see Section 7.3).

[H.V, 11, 12 / GC III, 4]

##### **13.5.1.3 Escaped prisoners of war**

Escaped prisoners of war who are admitted onto neutral territory must be left at liberty.

If the neutral State tolerates their stay on its territory, it can assign them a place of residence.

Prisoners of war in the hands of units of a belligerent's armed forces which are themselves admitted into neutral territory must be treated in the same way as escaped prisoners of war.

[H.V, 13]

#### **13.5.1.4 Transfer of prisoners of war to a neutral State**

The belligerent parties may reach agreements with a neutral State for the transfer of prisoners of war for internment in that State (the parties are particularly encouraged to reach such agreements with regard to the seriously wounded and sick, as well as prisoners who have undergone a long period of captivity).

Prisoners of war transferred to a neutral State must be interned in the territory of the neutral State until the end of the hostilities.

However, the neutral State may repatriate such prisoners of war if their state of health so requires, in which case they must no longer be assigned to active military service.

[GC III, 109-111, 114, 115, 116, 117]

#### **13.5.1.5 Responsibility of a belligerent party concerning the transfer of prisoners of war**

Prisoners of war may only be transferred to a neutral State if the belligerent party in whose hands they are satisfies itself that the neutral State is willing and able to apply the Geneva Conventions in their respect (in other words, to grant the prisoners of war at least the treatment they are entitled to when in the hands of a belligerent party). They must not be transferred to a State where they objectively fear persecution or other violations of fundamental rights.

If after the transfer the belligerent party learns that the neutral State has failed to carry out the provisions of the Geneva Conventions in any important respect, it must take effective measures to correct the situation, even to the point of requesting the return of the prisoners of war.

The neutral State receiving the prisoners of war must comply with such requests.

[GC III, 4, 12]

**13.5.1.6 National Information Bureau**

A neutral State which has received prisoners of war on its territory must set up a National Information Bureau to record information relating to them.

[GC III, 122]

**13.5.1.7 Wounded, sick, shipwrecked and dead**

A neutral State must apply by analogy the relevant provisions of the law of armed conflict to the wounded, sick, shipwrecked and dead of a belligerent party in its hands (see Sections 4.1, 10.3 and 7.3).

[H.V, 15 / GC I, 4 / GC II, 5 / P I, 19]

**13.5.1.8 Military medical or religious personnel**

A neutral State should apply by analogy the rules concerning military medical and religious personnel. As an exception to this, according to the ICRC Commentary such persons must be repatriated if they wish, and cannot be compelled to remain for the purpose of caring for wounded and sick members of belligerent armed forces who are interned in a neutral State (see Sections 7.6 and 7.7).

[ICRC Commentary, P I, 31 / GC I, 4 / GC II, 5 / P I, 19]

**13.5.1.9 Admission of civilians**

Neutral States and belligerent parties should endeavour to reach agreements for the accommodation on neutral territory of protected persons under the Fourth Geneva Convention, in particular pregnant women, mothers with infants, young children, wounded and sick, and civilian internees who have been detained for a long time.

Neutral States may also host children who are orphaned or separated from their families as a result of the armed conflict.

[GC IV, 24, 36, 132]

**13.5.1.10 Responsibility of a belligerent party concerning the transfer of protected persons**

Protected persons may only be transferred to a neutral State by a belligerent party if that party satisfies itself that the neutral State is willing and able to apply the Geneva Conventions in their respect (in other words, to grant the protected persons at least the treatment they are entitled to when in the hands of a belligerent party).

Protected persons must not be transferred to a State where they objectively fear persecution or other violations of fundamental rights.

If after the transfer the belligerent party learns that the neutral State has failed to carry out the provisions of the Geneva Conventions in any important respect, it must take effective measures to correct the situation, even to the point of requesting the return of the protected persons.

The neutral State receiving the protected persons must comply with such requests.

[GC IV, 45]

#### **13.5.1.11 Internment of civilians**

The law of neutrality does not require a neutral State to intern civilian nationals of a belligerent State.

If the neutral State wishes to detain such persons, it must do so under the ordinary rules that apply in peacetime to the detention of foreign nationals on its territory. For the international standards that apply to the arrest and detention of civilians in situations other than armed conflict, see 14.2.4.

[ICRC Commentary, P I, 19 / ICCPR, 9]

### **13.5.2 Nationals of neutral States in the hands of a belligerent party**

#### **13.5.2.1 Nationals of neutral States who join the armed forces of a belligerent party**

Nationals of neutral States who join the armed forces of a belligerent party are subject to the same rules as other members of the belligerent party's armed forces when they fall into the hands of the enemy. In other words, they are prisoners of war (see 7.1.1.3 and Section 7.3).

[H.V, 17 / GC III, IV]

#### **13.5.2.2 Nationals of neutral States in a belligerent's territory or in occupied territory**

The law of armed conflict provides several cumulative layers of protection for civilians (including nationals of neutral States) who find themselves in the territory of a belligerent party or in occupied territory. These protections are set out in the Fourth Geneva Convention.

The first layer of protection applies to the "whole population of the countries in conflict" (including civilian nationals of neutral States) both in the belligerents' own territory and in occupied territory (see Section 7.2).

[GC IV, 13-26]

The second layer of protection applies only to persons who qualify as protected persons. In the territory of a belligerent party, nationals of a neutral State are not protected persons so long as the neutral State still has normal diplomatic representation with the belligerent party. In occupied territory, nationals of a neutral State are protected persons.

A third layer of protection applies to protected persons who are interned either in a belligerent's own territory or in occupied territory (see Section 7.4).

[GC IV, 71-76, 79-135].

In addition, persons in the power of a party to the conflict who do not benefit from more favourable treatment under the provisions in the Geneva Conventions or Additional Protocol I are entitled to certain fundamental guarantees. This includes nationals of neutral States who are not entitled to protected person status. These fundamental guarantees are discussed in Section 7.2.

## **13.6 Implementation of neutrality**

This Section outlines the measures to be applied by neutral States and belligerent parties respectively to ensure appropriate action and behaviour by the bodies and persons concerned.

### **13.6.1 Principles**

#### **13.6.1.1 Rule**

To be fully effective, the law of neutrality must be implemented both by the belligerent parties and by neutral States through appropriate rules and regulations (e.g. detailed rules of engagement (RoE)).

[H.XIII, Preamble]

#### **13.6.1.2 Need for neutrality policies**

Neutral States and belligerent parties should all have neutrality policies to ensure unity of action and behaviour within the State by all bodies and armed forces concerned.

Control measures should be adapted to the specific situation and should vary according to the evolution of the conflict.

### **13.6.2 Implementation by the neutral State**

#### **13.6.2.1 Neutrality policy**

The neutral State's neutrality policy must ensure that both the armed forces and civilian authorities respect the law of neutrality in order to maintain the State's neutral status.

### 13.6.2.2 Declaration of neutrality

A State is not required to make a formal declaration of neutrality in order to have the status of “neutral State”, but a formal declaration can publicize the State’s neutrality.

### 13.6.2.3 Access to neutral space

The neutrality policy should include provisions regulating access to the land territory, territorial waters and national airspace of the neutral State.

The neutral State should provide the belligerent parties with appropriate information, such as the boundaries of the neutral space and the conditions for access.

### 13.6.2.4 Specific instructions

The armed forces in the neutral State need to understand when the law of neutrality applies, because the rules of neutrality differ from those that apply in peacetime.

Commanders in neutral States must provide specific instructions, orders and/or rules of engagement to armed forces under their command who may come into contact with belligerent parties or their ships or aircraft, such as border area commands, coastal commands, and commands in charge of surveillance of the territorial waters.

### 13.6.2.5 Flexible use of military means

A neutrality policy should provide for a flexible military response which can be adapted, depending on the situation. For example, isolated and accidental violations of neutral space may warrant an individual warning or demonstration of force; whereas repeated and more significant violations of neutral space may warrant a general warning and an escalating use of force.

### 13.6.2.6 Hot pursuit into neutral territory

It is generally accepted that if belligerent forces enter neutral territory and the neutral authority is unable or unwilling to expel or intern them, the adverse party has the right of hot pursuit and is entitled to follow and attack them there. It may even seek compensation from the neutral State for this breach of neutrality. The mere presence of belligerent forces does not justify hot pursuit; there must be some failure by the neutral State to uphold its neutrality.

### **13.6.3 Implementation by belligerent parties**

#### **13.6.3.1 Neutrality policy**

The neutrality policy of a belligerent party must ensure that its armed forces respect neutral space and, in particular, that its armed forces do not enter neutral space except in circumstances permitted under the law of neutrality (e.g. innocent passage through the territorial sea of a neutral State).

#### **13.6.3.2 Instructions, orders**

Commanders must give specific instructions and orders to armed forces operating in the vicinity of neutral space to avoid a violation thereof. This includes instructions and orders prohibiting entry into neutral space and prescribing the course of action to be taken when neutral space is entered by accident.

## **13.7 Protecting neutrality: combat operations in neutral space**

### **13.7.0.1 Rule**

Every military operation by belligerent armed forces in neutral space (whether intentional or accidental) is a violation of the law of neutrality.

To avoid an escalation of the violation and subsequent countermeasures, it is in the interest of neutral States and belligerent parties to keep military operations in neutral space under strict control.

[H.V, 1 / H.XIII, 1, 25]

### **13.7.0.2 Applicable law**

The use of military force by a neutral State to defend its neutrality from being violated by belligerent armed forces cannot be regarded as a hostile act, i.e. it does not constitute a violation of neutrality by the neutral State. In other words, combat operations between belligerent armed forces and neutral armed forces acting in protection of their neutrality are not part of the pre-existing armed conflict between the belligerent parties, but give rise to a separate armed conflict between the neutral State and the belligerent party violating its neutrality. As a result, the relations between the defending neutral State and the belligerent party are fully governed by the law of armed conflict, including the use of means and methods of warfare, and the protection of the wounded, sick and shipwrecked, civilians, and other specifically protected persons.

[H.V, 15 / GC I, 4 / GC II, 5 / GC III, 4 / P I, 19]

### 13.7.0.3 Neutral State's duty to react

A neutral State must prevent violations of its neutrality by the belligerent parties. Military operations by a neutral State against the armed forces of a belligerent party are compatible with the law of neutrality when no other means can terminate the violation of neutral space by the belligerent party.

Measures taken by the neutral State in resistance to the violation of neutrality must not be regarded as hostile acts.

[H.V, 5, 10 / H.XIII, 25, 26]



# CHAPTER 14

# LAW ENFORCEMENT

# OPERATIONS

## 14 LAW ENFORCEMENT OPERATIONS

The enforcement of law and order normally falls within the purview of civilian authorities. Nevertheless, armed forces may be called upon to engage in law enforcement operations in peacetime, in situations of internal disturbances and tensions, and even on the territory of an ongoing armed conflict or military occupation.

This Chapter discusses the rules and principles that apply when armed forces participate in such operations.

**14.1 General legal framework** sets out definitions, the legal framework applicable to armed forces engaged in law enforcement operations, and the general responsibility to respect human rights during law enforcement operations.

**14.2 Law enforcement operations** summarizes the rules for core policing tasks when carried out by armed forces, including the use of force and firearms, crowd control, arrest and detention.

**14.3 States of emergency** deals with derogations from and restrictions on human rights during states of emergency.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

### 14.1 General legal framework

#### 14.1.1 Introduction and definitions

##### 14.1.1.1 General considerations

The primary responsibility for enforcing domestic criminal and public order law rests with civilian police and/or paramilitary forces that are specifically organized, trained and equipped for these functions.

Examples of paramilitary troops with law enforcement responsibility are the French *Gendarmerie*, the Italian *Carabinieri*, and the Spanish *Guardia Civil*.

In contrast, armed forces are typically organized, trained and equipped to defend national territory against external threats and to engage in non-international armed conflicts. These tasks are normally predicated upon a different mindset, in which the objective is to destroy the fighting capacity of an enemy force. In order to accomplish that objective, military forces generally employ different, more robust equipment and tactics than their civilian and paramilitary counterparts. Accordingly, as a general rule, armed forces are not used to carry out the traditional functions associated with the maintenance of domestic law and order.

Nevertheless, armed forces are sometimes called upon to assist civilian authorities in carrying out law enforcement tasks when the latter's capacity is or is likely to be exceeded. This may occur in peacetime, during internal disturbances and tensions, and even on territory engaged in armed conflict or under military occupation. Typical law enforcement tasks carried out by armed forces include:

- guard duties;
- cordon and search;
- arrest and detention;
- road blocks;
- securing routes;
- crowd or riot control; and
- enforcing curfews.

When armed forces are deployed in such situations they normally play a reinforcement role and are subordinated to the civilian authorities. This relationship is in many cases embodied in the constitution of the State.

#### **14.1.1.2 Definition: situations other than armed conflict**

This Handbook uses the term "situations other than armed conflict" (SOTAC) or "other situations of violence" to describe situations of internal violence that do not reach the threshold for application of the law of armed conflict (see Chapters 2, 4, 5 and 6).

However, it must be noted that situations other than armed conflict, e.g. a riot control operation carried out by armed forces, can occur on the territory of a State in which an armed conflict is taking place; and that in such cases certain provisions of the law of armed conflict are potentially applicable, such as those relating to the internment of civilians who represent a security threat to a party to the conflict (see Chapter 7).

#### **14.1.1.3 Definition: assemblies and demonstrations**

The terms "assemblies and demonstrations" are used in this Handbook to denote the phenomenon of people taking to the streets to express their opinion publicly.

#### **14.1.1.4 Definition: internal disturbances and tensions**

In this Handbook, "internal disturbances" means acts of public disorder accompanied by acts of violence.

"Internal tensions" refers to situations where there is no violence, but where a State may resort to such practices as the mass arrest of opponents or the suspension of certain human rights, with the intention of preventing the situation from degenerating.

**14.1.1.5 Definition: state of emergency**

In this Handbook, the term “state of emergency” refers to a situation in which a State follows the procedures of its domestic law to declare a state of emergency.

**14.1.1.6 Definition: law enforcement**

Law enforcement encompasses the following basic responsibilities:

- maintaining or restoring public order and security;
- preventing, detecting and investigating crime; and
- aiding and assisting populations affected by emergencies of all kinds.

During an armed conflict, although a military force's engagement in the conduct of hostilities can be construed as a form of law enforcement insofar as it is ultimately aimed at restoring public order and security, for the purposes of this Handbook the term "law enforcement" is limited to activities that do not form part of the conduct of hostilities.

**14.1.1.7 Definition: law enforcement operation**

In this Handbook a “law enforcement operation” is an operation involving activities encompassed by the definition of law enforcement.

**14.1.1.8 Definition: law enforcement official**

This Handbook adopts the definition of “law enforcement official” used in the 1979 Code of Conduct for Law Enforcement Officials (CCLEO) and the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (BPUFF):

“All officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.”

In other words, the term “law enforcement officials” includes members of armed forces when they are engaged in law enforcement operations.

[CCLEO, commentary, 1 / BPUFF, note 1]

**14.1.2 Legal framework****14.1.2.1 General rule**

When armed forces are used in law enforcement operations, they are required to comply with the same legal obligations that are imposed on traditional law enforcement authorities.

[CCLEO, commentary, 1]

### 14.1.2.2 Legal framework

The legal framework for law enforcement operations includes:

- domestic law of the State (see 14.1.2.5)
- human rights law (see 14.1.2.6), including soft law (see 14.1.2.7)
  - Check for derogations (see 14.1.2.8)
- in the case of armed conflict, the law of armed conflict provisions governing situations other than the conduct of hostilities (e.g. the law of belligerent occupation; the standards of treatment applicable to persons deprived of their liberty) (see 14.1.2.3 and 14.1.2.4).

### 14.1.2.3 Law enforcement and the law of armed conflict

Law enforcement operations are normally conducted during peacetime. However, it must be borne in mind that such operations can also take place within a State that faces an armed conflict or occupation.

In a State where there is an armed conflict, the question of whether to apply the legal framework governing law enforcement or the legal framework governing the conduct of hostilities is determined by the nature and circumstances of the operation, and not by whether the operation is carried out by the armed forces or by the civilian police.

If the operation forms part of the conduct of hostilities on behalf of a party to an armed conflict, then the rules of the law of armed conflict governing the conduct of hostilities apply.

If the operation is not part of the conduct of hostilities, the legal framework for law enforcement operations applies, which includes not only domestic and human rights law, but also the rules of the law of armed conflict governing situations other than the conduct of hostilities.

For example, in the context of an armed conflict, if a military unit is called upon to maintain law and order during a peaceful civilian demonstration in the city centre, then the applicable legal rules are those for law enforcement officials during assemblies and demonstrations (see 14.2.2). If the demonstration turns violent and it is necessary to arrest a participant, then the applicable legal rules are those for arrest (see 14.2.3). However, a person arrested for reasons related to the ongoing armed conflict will be protected not only by domestic and human rights law, but also by the rules of the law of armed conflict governing the treatment and conditions of detention of detainees (see Chapter 7).

If the next day the same military unit is called upon to protect the same city centre during an armed attack by members of an organized armed group, then the applicable legal framework is the law of armed conflict governing

the conduct of hostilities (see Chapters 4, 5 and 6). If a member of the organized armed group is captured and detained, the rules for detention in an armed conflict apply (see Chapter 7).

#### **14.1.2.4 The law of occupation and law enforcement operations**

During a military occupation, the Occupying Power has the duty to restore and ensure public order and safety as far as possible while respecting, unless absolutely prevented, the law in force in the country. Accordingly, law enforcement operations frequently fall within the responsibilities of the occupying armed forces. In such cases the armed forces are governed by domestic law, applicable human rights law and, where relevant, specific provisions of the law of armed conflict, as explained above. For more details concerning the law of occupation, see Chapter 12.

[H IV R, 43 / GC IV, Part III, Section III] [IAC]

#### **14.1.2.5 Domestic law**

The domestic law of the State related to the maintenance of law and order applies to armed forces engaging in law enforcement operations.

Domestic law on law enforcement must be consistent with the human rights treaty obligations of the State concerned, customary human rights law and the law of armed conflict.

#### **14.1.2.6 Human rights treaties**

The following universal human rights treaties contain core human rights that may apply to armed forces engaged in a law enforcement operation:

- 1966 International Covenant on Civil and Political Rights [ICCPR];
- 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT]; and
- 1989 Convention on the Rights of the Child [CRC].

In addition, States may be party to regional human rights treaties, such as the African Charter on Human and People's Rights, the American Convention on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, which then also apply to their armed forces engaged in law enforcement operations.

#### **14.1.2.7 Soft-law standards**

"Soft-law" standards are non-binding standards that often provide guidance on how binding rules should be implemented.

The following internationally recognized soft-law standards are relevant to law enforcement operations:

- Standard Minimum Rules for the Treatment of Prisoners (1955) [SMRTP];
- Code of Conduct for Law Enforcement Officials (1979) [CCLEO];
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) [BPPPI];
- Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989) [PPIEASE];
- Basic Principles for the Treatment of Prisoners (1990) [BPTP];
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) [BPUFF] (often the most relevant for armed forces); and
- Bangkok Rules for the Treatment of Female Prisoners (2010) [BRTFP].

#### **14.1.2.8 Derogations and restrictions**

In some cases during an armed conflict or other situations of violence the State may exercise a limitation clause in a human rights treaty provision, or proclaim a state of emergency and derogate from (temporarily suspend) human rights treaties (see 2.4.2).

For a discussion of states of emergency, see Section 1.3.

### **14.1.3 Human rights law**

#### **14.1.3.1 Protection and respect for human rights**

Law enforcement officials and organizations are required to protect and respect the human rights of all people, without any adverse distinction, while performing their duties.

[ICCPR, 2 / ICESCR, 2 / CRC, 2 / CCLEO, 2, 8 / BPUFF, preamble]

#### **14.1.3.2 Training, equipment and command**

Respect for human rights by officials and organizations tasked with law enforcement depends on:

- knowledge, training and application of the correct legal standards;
- appropriate command and control mechanisms; and
- possession of adequate equipment for law enforcement operations.

Therefore, unless it is practically impossible, military units used in law enforcement operations should be trained and equipped for such operations and their staff should be fully acquainted with the legal framework governing such operations.

Education and training of law enforcement officials are crucial for the acquisition of the knowledge, attitudes, skills and behaviour necessary to respect and protect human rights.

[ICCPR, 2 / Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13 / BPUFF, 18, 19, 20 / SMRTP, 47 / PPIEASE, 3]

Command and control mechanisms must be applied in law enforcement operations. The soft-law standards for law enforcement stress the need for reporting, review or inquiry procedures for unlawful acts by law enforcement officials; the need to hold law enforcement officials criminally responsible for violations of the law on the use of force and firearms; and the need to hold commanders responsible for unlawful acts of their subordinates when they ordered, or knew or should have known of the unlawful conduct.

[ICCPR, 2 / BPUFF, 6, 7, 22-26 / PPIEASE, 2, 9, 18, 19 / CCLEO, 8 / BPPDI, 34]

Law enforcement officials must be provided with equipment designed for the specific needs of law enforcement tasks, such as:

- various types of weapons and ammunition that allow for a differentiated use of force and firearms;
- non-lethal incapacitating weapons; and
- self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

[BPUFF, 2]

#### **14.1.4 The law of armed conflict**

##### **14.1.4.1 Application of the law of armed conflict**

In addition to their human rights law obligations, military forces carrying out law enforcement duties during an armed conflict are bound by relevant law of armed conflict provisions unrelated to the conduct of hostilities.

For example, during an international armed conflict the treatment of civilians who fall into the hands of the armed forces is governed by the Fourth Geneva Convention (see Chapter 7); the treatment of civilians in occupied territory (e.g. the obligation to maintain law and order or the prohibition of collective punishment) is governed by the law of occupation (see Chapter 12); and the handling of a riot at a POW camp would be governed by the Third Geneva Convention (see Chapter 7). Please consult the relevant Chapters of this Handbook in these particular situations.

During a non-international armed conflict, although there are fewer law of armed conflict provisions specifically governing law enforcement, certain provisions directly apply. For example, the detention/internment of civilians and members of armed groups for reasons related to the conflict is governed by Article 3 common to the Geneva Conventions and by customary law, including the prohibition on deportation of the civilian population contained in customary law (see Chapter 7).

#### **14.1.4.2 Law of armed conflict and human rights law: relationship**

In an armed conflict, the law of armed conflict and human rights law apply side by side and are cumulative and complementary.

Thus, according to the situation, human rights law can be:

- exclusively applicable (peacetime, internal tensions or disturbances, certain peace support operations); or
- applicable at the same time as the law of armed conflict, in a cumulative or complementary manner (non-international or international armed conflicts, certain peace support operations).

[P I, 72 / P II, Preamble]

## **14.2 Law enforcement operations**

This Section summarizes the rules for core policing tasks when carried out by armed forces (to whom the definition of "law enforcement officials" then also applies), including the use of force and firearms, crowd control, arrest and detention.

### **14.2.1 Use of force and firearms**

#### **14.2.1.1 Introduction**

The right to life is a non-derogable human right:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

[ICCPR, 4, 6 / UDHR, 3]

The CCLEO and BPUFF offer guidance on the use of force and firearms which is consistent with human rights obligations concerning the right to life.

[CCLEO, 2 / CCLEO, commentary, 2 / BPUFF, preamble, 1]

### 14.2.1.2 Rules and regulations on the use of force

States and law enforcement agencies (including armed forces and military commanders when engaged in law enforcement) must adopt and implement rules and regulations on the use of force by law enforcement officials.

[BPUFF, preamble, 1, 11 / CCLEO, 2]

### 14.2.1.3 Essential principles on the use of force and firearms

The principles governing the use of force in law enforcement operations, and those governing the conduct of hostilities, are very different. In addition, the meaning of some of the principles, specifically "necessity" and "proportionality", is different in law enforcement and in the conduct of hostilities. For a discussion of these principles with regard to the conduct of hostilities, see Chapter 5.

The essential principles for the use of force in the law enforcement context are the following.

- Legality: the use of force must have a sufficient legal basis in domestic law.
- Necessity: law enforcement officials may resort to the use of force only to the extent necessary to achieve a legitimate objective and only when all less harmful means have failed or remain without reasonable promise of success.
- Precaution: law enforcement officials must exercise restraint in the use of force, minimize damage and injury, and respect and preserve human life. Further precautions must be taken before using firearms (see 14.2.1.5).
- Proportionality: the harm likely to result from the use of force and firearms to any person or object must always be in proportion to the seriousness of the offence and the legitimate objective to be achieved.

[BPUFF 2, 3, 4, 5, 9, 10, 11]

### 14.2.1.4 Standards for the use of force

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty (necessity/proportionality). [CCLEO, 3]

- Law enforcement officials may resort to force only when it is unavoidable (necessity):
  - law enforcement officials must, as far as possible, apply non-violent means before resorting to the use of force or firearms;
  - law enforcement officials may use force and firearms only if other means remain ineffective or do not offer any promise of achieving the intended result (necessity).
- When law enforcement officials use force or firearms, they must exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved (precaution/proportionality).

- Law enforcement officials must minimize damage and injury, and respect and preserve human life (precaution).

[BPUFF, 4, 5]

#### 14.2.1.5 Standards for the use of firearms

The use of firearms to achieve a legitimate law enforcement objective is viewed as an extreme measure. As a result, the use of firearms is further restricted.

- Law enforcement officials may only use firearms against persons:
  - in self-defence or defence of others against the imminent threat of death or serious injury;
  - to prevent the perpetration of a particularly serious crime involving grave threat to life; or
  - to arrest, or to prevent the escape of, a person presenting such a danger and resisting their authority;

And only when less extreme means are insufficient to achieve these objectives.

- The intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.
- Before using a firearm, law enforcement officials must take the following precautions:
  - identify themselves as law enforcement officials; and
  - give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless:
    - to do so would unduly place the law enforcement officials at risk;
    - would create a risk of death or serious harm to other persons; or
    - would be clearly inappropriate or pointless in the circumstances of the incident.

[CCLEO, 3 / BPUFF, 9, 10, 11]

#### 14.2.1.6 Medical assistance

If the use of force by law enforcement officials causes an injury, they must ensure that medical assistance is rendered to any injured or affected person without delay.

Relatives and/or close friends of the injured or affected person must be notified at the earliest possible moment.

[BPUFF, 5 / CCLEO, 6]

#### 14.2.1.7 Reporting and review procedures

Governments and armed forces must establish “effective reporting and review procedures” for all incidents where:

- death or injury is caused through use of force and firearms by members of the armed forces tasked with law enforcement duties; or
- members of the armed forces used firearms in the performance of their duties.

Independent administrative or prosecutorial authorities must be permitted to exercise jurisdiction over such incidents.

Persons (and, in the event of death, their relatives) who have been affected by the use of force and firearms must be given access to the independent review process.

[BPUFF, 6, 11, 22, 23]

#### 14.2.1.8 Misuse of force and firearms

Governments must ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

[BPUFF, 7]

#### 14.2.1.9 Equipment and weapons

States and law enforcement agencies should develop and equip their law enforcement officials with a wide range of weapons and ammunition to allow for a graduated response in the use of force and firearms and to ensure that the appropriate means is available for use in different situations.

In addition, law enforcement officials should be issued protective equipment (e.g. protective armour, helmets, specially equipped vehicles) in order to reduce the need to use weapons of any kind.

Most weapons used by the armed forces (e.g. light or heavy machine guns, fragmentation grenades, bayonets, etc.) are not suitable for law enforcement operations, and will lead to the use of force beyond what is necessary to achieve a legitimate objective associated with law enforcement operations.

In general, only aimed single shots from small arms (e.g. pistols, rifles) are potentially compatible with human rights requirements, and only when used in accordance with the principles on the use of firearms (see 14.2.1.5).

Finally, it should be noted that certain *means* of force prohibited by the law of armed conflict in the conduct of hostilities are potentially available in law enforcement operations.

Prominent examples include:

- bullets which expand or flatten easily in the human body (e.g. hollow-tipped 9 mm rounds); and
- the use of riot control agents such as CS gas.

Similarly, certain coercive or deceptive *methods* prohibited by the law of armed conflict in the conduct of hostilities are potentially allowed in law enforcement operations. For example, in law enforcement there is no prohibition of perfidy. Accordingly, law enforcement officials are entitled to carry out undercover operations in which their identity is concealed.

[BPUFF, 2, 3]

#### **14.2.1.10 Training**

Members of armed forces who will be used in law enforcement operations should be given instruction in ethics, human rights and alternatives to the use of force and firearms (including methods of negotiation, persuasion and mediation), as well as training in technical means, with a view to limiting the use of force and firearms.

Members of armed forces should only be authorized to carry firearms in a law enforcement operation if they have received special training in their use.

[BPUFF, 19, 20]

### **14.2.1 Crowd control**

#### **14.2.2.1 Freedom of peaceful assembly**

The right to peaceful assembly, the right to hold opinions without interference, and the right to freedom of association are fundamental human rights.

[UDHR, 18, 19, 20 / ICCPR, 19, 21, 22 / BPUFF, 12]

#### **14.2.2.2 Restrictions on the right of peaceful assembly**

The right to peaceful assembly can be restricted when the restrictions:

- are applied in conformity with the law (i.e. domestic law);
- are necessary for:
  - national security;
  - public safety;
  - public order;

- public health or morals; or
- for the protection of the rights and freedoms of others; and
- are proportionate to the interest sought to be protected.

[ICCPR, 21 / Human Rights Committee, General Comment 27, UN Doc. CCPR/C/21/Rev.1/Add.9]

#### **14.2.2.3 Equipment, training and exercise of command for crowd control**

Effective crowd control requires knowledge, skill and thorough preparation, as well as clear command and control mechanisms.

Like other law enforcement operations, only law enforcement officials with appropriate training, equipment and orders should be assigned to a crowd control operation.

Law enforcement officials engaged in crowd control should be:

- equipped with adequate protective equipment (e.g. personal protective gear, protected vehicles), non-lethal means (e.g. batons, water canons, rubber bullets, tear gas), and communications equipment;
- trained in crowd control tactics and the use of protective equipment and non-lethal means; and
- deployed in sufficient numbers in relation to the assembled crowd.

[BPUFF, 2, 19, 20]

#### **14.2.2.4 Standard operating procedures**

Standard operating procedures for crowd control must be compatible with international standards, and should be included in training manuals in plain language that is easily understandable, and transformed into rules of engagement.

[BPUFF, 1]

#### **14.2.2.5 Non-violent means**

Law enforcement officials involved in crowd control operations must, as far as possible, apply non-violent means before resorting to force.

[BPUFF, 4, 12]

#### **14.2.2.6 Use of force: non-violent assemblies**

In dispersing unlawful but non-violent assemblies, law enforcement officials must avoid the use of force or, where that is not practicable, must use the minimum force necessary.

[BPUFF, 4, 13]

#### **14.2.2.7 Use of force: violent assemblies**

In dispersing violent assemblies, law enforcement officials engaged in crowd control may use firearms *only*:

- when less dangerous means (e.g. water canons, tear gas) are not practicable;
- only to the minimum extent necessary; and
- under the general conditions concerning the use of firearms (see 14.2.1.5).

If firearms are used, the rules on reporting and review of the use of firearms must be applied (see 14.2.1.7).

It must be stressed that indiscriminate firing into a violent crowd is never an acceptable tactic for dispersing a crowd. Where the use of firearms is strictly unavoidable to control a violent crowd (see 14.2.1.5), they should be used in such a way as to minimize injury and damage and to respect and preserve human life.

[BPUFF, 4, 5, 6, 9, 14]

#### **14.2.2.8 Arrests and detention**

Any person who is arrested or detained during a crowd control operation must be treated humanely and is entitled to the protections set out below.

#### **14.2.2.9 Medical care**

All necessary measures must be taken to provide medical treatment to anyone who is wounded during a crowd control operation, and to identify any dead and ensure that they are treated with respect.

[BPUFF, 5 / CCLEO, 6]

### **14.2.3 Arrest**

This subsection deals with arrests by members of armed forces during law enforcement operations. As a matter of policy, armed forces should turn over persons they have arrested to civilian authorities as soon as possible. Nevertheless, as long as they have control over such persons they must conform to the rules in this chapter.

In cases of arrest and detention during armed conflict, particular provisions of the law of armed conflict may apply. For example, in an international armed conflict the treatment and possible internment of civilian nationals of an opposing party is governed by the Fourth Geneva Convention. In such cases, consult Chapter 7.

**14.2.3.1 Arrest**

Arrest means the act of apprehending a person for the alleged commission of an offence or by the action of an authority.

[BPPDI, Terms]

**14.2.3.2 Right to liberty and security of person**

Everyone has the right to liberty and security of person.

Even though it may be necessary to arrest or detain a person as part of a law enforcement operation, the power to arrest and detain is not unlimited.

In particular, no person may be subjected to arbitrary arrest or arbitrary detention.

[UDHR, 3, 9 / ICCPR, 9 / CRC, 37 / BPPDI, 2]

**14.2.3.3 Reasons and conditions for arrest**

An arrest must be lawful. This means that there must be a legal basis for the arrest in domestic law, and that the arrest must be carried out in the manner specified in the law and by officials authorized for that purpose.

The following are examples of grounds for arrest/detention that are commonly authorized under domestic law:

- conviction for a crime by a competent court;
- non-compliance with a lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- a judicial warrant of arrest for the purpose of bringing the person before the competent legal authority on reasonable suspicion of having committed an offence;
- to prevent a person from committing an offence;
- to prevent unauthorized entry into the country or with a view to deporting or extraditing the person;
- to prevent the spread of infectious diseases; and
- exceptionally, internment for security reasons. During armed conflict, such internment may be governed by the law of armed conflict. See Chapter 7 for details.

[UDHR, 9 / ICCPR, 9 / CRC, 37 / BPPDI, 1, 2 / ECHR, 5]

**14.2.3.4 Humane treatment**

All persons deprived for any reason of their liberty must be treated with humanity and with respect for their inherent dignity.

It is absolutely prohibited to subject a person under arrest to torture or to cruel, inhuman or degrading treatment or punishment.

[UDHR, 5 / ICCPR, 7, 10 / CAT, 2 / CRC, 37 / BPPDI, 1, 6]

#### **14.2.3.5 Medical care**

Medical care must be provided at the earliest possible moment to any person who is injured in the course of an arrest.

[CCCLEO, 6 / BPPDI, 24 / BPUFF, 5]

#### **14.2.3.6 Information: for the arrested person**

Anyone who is arrested must be informed, at the time of arrest, of the reasons for his arrest and must be promptly informed of any charges against him.

A person under arrest must be informed of his rights and how to avail himself of those rights.

He must be given this information in a language he understands and be provided with an interpreter free of charge for use in connection with any legal proceedings concerning his detention.

[ICCPR, 9 / CRC, 40 / BPPDI, 10, 13, 14]

#### **14.2.3.7 Right to counsel**

A detained person must be allowed to communicate with, consult and be visited by his counsel.

This right must not be restricted "save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order". Communication with counsel must not, in any circumstances, be suspended for more than a few days.

[BPPDI, 15, 17, 18]

#### **14.2.3.8 Information: for third person(s)**

Every person under arrest has the right to notify his family, or other appropriate person(s) of his choosing, of his arrest.

This notification must be made or permitted without delay, although a reasonable delay may, as an exception, be permitted if the exceptional needs of the investigation so require. Such a delay must not last longer than a few days.

A person transferred from one place of detention to another is entitled to notify, or have the authorities notify, members of his family or other appropriate persons of the transfer and of the new place of detention.

[BPPDI, 15, 16 / PPIEASE, 6]

#### **14.2.3.9 Place of detention and records**

It is important for the protection of the rights of persons who have been arrested that their whereabouts are known.

A person under arrest may therefore only be taken to an officially recognized place of detention.

[PPIEASE, 6 / Human Rights Committee, General Comment No. 20, UN Doc. HRI/GEN/1/Rev.7]

#### **14.2.3.10 Records**

At the time of the arrest, a record must be made of:

- the reasons for the arrest;
- the time of the arrest and the taking of the arrested person to a place of custody, as well as that of the person's first appearance before a judicial or other authority;
- the identity of the law enforcement officials concerned; and
- precise information concerning the place of custody.

[BPPDI, 12 / PPIEASE, 6]

#### **14.2.3.11 Mandatory appearance before a judge (criminal charges)**

Every person arrested or detained on a criminal charge must be brought promptly before a judge or other officer authorized by law to exercise judicial power. The judge or officer must have the authority to order release.

[ICCPR, 9]

#### **14.2.3.12 Judicial review of lawfulness of detention (all detained persons)**

Every person deprived of liberty by arrest or detention has the right to proceedings before a court, in which the court decides without delay on the lawfulness of the detention and has the authority to order the person's release if the detention is not lawful (right to *habeas corpus*).

[ICCPR, 9 / CRC, 40 / BPPDI, 32]

#### 14.2.3.13 Compensation for unlawful arrest or detention

Anyone who has been the victim of unlawful arrest or detention has an enforceable right to compensation.

[ICCPR, 9]

#### 14.2.3.14 Presumption of innocence

The presumption of innocence applies to all persons arrested on a criminal charge and must be reflected in their treatment.

[UDHR, 11 / ICCPR, 14 / CRC, 40 / BPPDI, 36]

#### 14.2.3.15 Women

Women who are arrested have the same rights as men who are arrested, and are entitled to the same protections.

In addition, women benefit from a series of specific protections relevant to their gender. These include the following:

- all physical searches of their person or clothing must be carried out by female staff;
- women under arrest or in detention must be kept in separate quarters from men; and
- women under arrest or in detention must be attended and supervised only by female officers.

Detailed instructions for the treatment of detained women are contained in the Bangkok Rules for the Treatment of Female Prisoners.

[ICCPR, 2, 26 / BPPDI, 5 / SMRTP, 8, 53 / BRTFP]

During armed conflict, the international human rights law outlined above is complemented and supplemented by specific provisions of the law of armed conflict. For further guidance on the treatment of women in detention, see Chapter 7.

[GC I, 12 / GC II, 12 / GC III, 14, 25, 29, 97, 108 / GC IV, 14, 16, 17, 21-23, 27, 38, 50, 76, 85, 89, 91, 97, 119, 124, 127, 132 / P I, 75, 76 / P II, 4, 5, 6 / I CILS, 93, 134] [IAC/NIAC]

#### 14.2.3.16 Children

Children are defined in the Convention on the Rights of the Child as human beings below the age of eighteen years unless, under applicable domestic law, the age of majority is attained earlier.

Children under arrest have all the same rights as adults but enjoy additional protections:

- a child should only be arrested as a measure of last resort;
- a child must be separated from adults unless it is considered in the best interest of the child not to do so;
- a child must be brought before a judge as speedily as possible;
- a child must be permitted to maintain contact with his family unless exceptional circumstances prevail;
- the competent authorities must notify the child's parents or guardians promptly of the arrest, and of the place where the child is held; furthermore, the authorities must also notify them of any transfers to another place of detention;
- parents or guardians should be informed of the charges against the child and permitted to attend the required judicial proceedings, unless it is not in the best interests of the child.

As far as possible, law enforcement officials dealing with children should receive special instruction and training.

[ICCPR, 10 / CRC, 37, 40 / BPPDI, 16 / SMRTP, 8, 47]

During armed conflict, the human rights law outlined above is complemented and supplemented by specific provisions of the law of armed conflict. See Chapter 7 for further details.

[GC IV, 14, 17, 23, 38, 50, 82, 94, 132 / P I, 70, 77, 78/ P II, 4, 6 / 1 CILS, 135]  
[IAC/NIAC]

#### **14.2.3.17 Foreigners and refugees**

Foreigners must be informed of their right to communicate with a consular post or the diplomatic mission of their State of nationality.

Refugees must be informed of their right to communicate with a representative of the competent international organization if they are under the protection of such an organization.

[BPPDI, 16 / SMRTP, 38]

In situations of international armed conflict, civilian nationals in the hands of enemy armed forces are also specifically protected by the Fourth Geneva Convention. During non-international armed conflict, civilians benefit from the protection of Article 3 common to the Geneva Conventions, Additional

Protocol II (where applicable) and customary international law. For more details, see Chapter 7.

[GC IV, 4 / GC I, 3 / GC II, 3 / GC III, 3 / GC IV, 3, 4 / P II Part II / CIHL, 87-105, 118-128] [IAC]

#### 14.2.3.18 Checklist of obligations linked to arrest

Law enforcement officials carrying out an arrest have the following obligations.

- Give reasons for the arrest at the time of the arrest.
- Inform the arrested person promptly:
  - of any charge against him; and
  - of his rights and how to avail himself of those rights.
- Duly record for each arrested person:
  - the identity of such person;
  - the reason for his arrest;
  - the time of the arrest;
  - the time of the arrested person's transfer to a place of custody;
  - precise information concerning the place of custody;
  - the time of the person's first appearance before a judicial or other authority; and
  - the identity of the members of the armed forces concerned.
- Communicate these records to the arrested person or to his legal counsel in the form prescribed by law.
- Bring the person promptly before a court to determine whether continued detention is lawful and to order that person's release if it is not.
- Promptly inform the arrested person of his right to legal counsel and, as soon as possible, to allow adequate opportunity for effective communication between them.
- Refrain from any act of torture or cruel, inhuman or degrading treatment or punishment during and after arrest.
- Ensure that the arrested person is further afforded the rights to which he is entitled as a detained person (see below).
- Observe fully the rules for the protection of women and children.

[UDHR, 5, 9, 10, 11 / ICCPR, 7, 9, 10 / CRC, 37, 40 / BPPDI, 2, 4, 6, 10-18, 32 / PPIEASE, 6 / SMRTP, 8, 53]

#### 14.2.4 Detention

This chapter addresses the standards that apply to detention in law enforcement operations unrelated to an armed conflict.

In cases of law enforcement where persons are detained in relation to an ongoing armed conflict, see Chapter 7.

##### 14.2.4.1 No arbitrary detention

No person may be subjected to arbitrary detention.

This means that there must be legal grounds for the detention in domestic law, and that the detention must be carried out in accordance with the procedures set out in that law.

[UDHR, 3, 9 / ICCPR, 9 / CRC, 37 / BPPPD, 2]

##### 14.2.4.2 Humane treatment

All persons deprived, for any reason, of their liberty must be treated with humanity and with respect for their inherent dignity.

[ICCPR, 10 / BPPPD, 1]

Only the imposition of measures which are “strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of good order in the place of detention” is permitted.

[BPPPD, 36]

Detained persons must in particular have:

- adequate sanitation and hygiene facilities;
- adequate light, heating, ventilation, floor space;
- clean and decent clothing suitable for the climate;
- medical care;
- daily exercise in the open air;
- food and drinking water in sufficient quality and quantity; and
- accommodation, in particular sleeping accommodation, compatible with human dignity.

[ICCPR, 10 / CRC, 37 / SMRTP, 9-26 / BPPPD, 24]

##### 14.2.4.3 Prohibition of torture

It is absolutely prohibited to subject a person in detention to torture or other cruel, inhuman or degrading treatment or punishment.

No exceptional circumstances whatsoever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

[UDHR, 5 / ICCPR, 7 / CAT, 2 / BPPDI, 6 / CCCLEO, 5]

#### **14.2.4.4 Use of force against detained persons**

The use of force against detained persons must be limited to cases where it is strictly necessary for the maintenance of security and order within the institution or when personal safety is threatened.

Force may only be used when less extreme means are insufficient to achieve a lawful objective.

The use of force must be limited to the amount strictly necessary to achieve the objective.

Any use of force which causes injury or death must be immediately reported to the superior of the law enforcement official involved.

[CCLEO, 3 / BPUFF, 4, 5, 6, 15-17, 22 / SMRTP, 54]

#### **14.2.4.5 Use of firearms**

Firearms may only be used against detained persons:

- in self-defence or in the defence of others against the immediate threat of death or serious injury; or
- when strictly necessary to prevent the escape of a person who presents a danger of committing a crime involving a grave threat to life.

[CCLEO, 3 / BPUFF, 4, 5, 6, 15-17, 22 / SMRTP, 54]

#### **14.2.4.6 Presumption of innocence, and interrogation during detention**

Persons detained on a criminal charge must be presumed innocent until proved otherwise in a court of law.

They have the right not to be compelled to testify or to confess guilt.

Detained persons under interrogation may not be subjected to violence, threats, or methods of interrogation which impair their capacity of decision or their judgement.

[UDHR, 11 / ICCPR, 14 / CRC, 40 / BPPDI, 21, 36]

**14.2.4.7 Information on interrogations**

The following information on interrogations must be recorded and made available to the detained person (or to his counsel if provided by law):

- duration of any interrogation;
- intervals between interrogation sessions; and
- the identity of the interrogators.

[BPPPD], 23]

**14.2.4.8 Medical care**

Medical care and treatment must be provided whenever necessary, free of charge, to every detained person.

A proper medical examination must be offered to every detained person as promptly as possible after his admission to the place of detention.

The fact that the detained person underwent a medical examination, the name of the physician and the results of such an examination should be duly recorded.

[BPPPD], 24, 26 / CCLEO, 6]

**14.2.4.9 Right to counsel**

Every detained person is entitled to communicate with, consult with, and be visited by his legal counsel.

The right to communicate and consult with legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order. Communication with counsel must not, in any circumstances, be suspended for more than a few days.

Persons to be tried for a criminal offence and all detained persons have a right to legal counsel.

[ICCPR, 14 / BPPPD], 15, 17, 18]

**14.2.4.10 Contact with the outside world**

Every person in detention has the right to communicate with and maintain contact with his family and/or chosen persons. This may be subject to reasonable restrictions specified by law, but may only be restricted to the extent reasonably necessary.

[SMRTP, 37 / BPPPD], 19 / CRC, 37]

#### **14.2.4.11 Visits by independent observers**

Places of detention should be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention.

Each detained person has the right to communicate freely and confidentially with such persons who visit the place of detention.

[BPPDI, 29 / PPIEASE, 7]

#### **14.2.4.12 The ICRC's right of initiative**

The International Committee of the Red Cross has an internationally recognized right of initiative to offer its services to visit persons in detention during situations other than armed conflict.

The fact that the ICRC offers its services in such situations cannot be considered to constitute interference in the internal affairs of the State concerned.

This right of initiative is stated in the Statutes of the International Red Cross and Red Crescent Movement.

[ICRC Statutes, 5]

#### **14.2.4.13 Judicial review of the lawfulness of detention (all detained persons)**

Every person deprived of liberty has the right to proceedings before a court in which the court decides without delay on the lawfulness of the detention and has the authority to order the person's release if the detention is not lawful (right to *habeas corpus*).

[ICCPR, 9 / BPPDI, 32 / CRC, 37]

#### **14.2.4.14 Requirement to be brought before a judge (criminal charges)**

Every person arrested or detained on a criminal charge must be brought promptly before a judge or other officer authorized by law to exercise judicial power.

[ICCPR, 9]

#### **14.2.4.15 Right to trial within reasonable time**

Every person detained on a criminal charge is entitled to trial within a reasonable time or to release pending trial.

The default rule is that persons awaiting trial will be released unless the State shows cause that they must be remanded in custody.

Release pending trial may be subject to guarantees to appear for trial or other judicial proceedings.

[ICCPR, 9 / BPPDI, 38, 39]

#### **14.2.4.16 Segregation of accused and convicted persons**

Persons held on remand (awaiting trial) must, save in exceptional circumstances, be segregated from convicted persons and must be subject to separate treatment appropriate to their status as unconvicted persons.

[ICCPR, 10 / BPPDI, 8 / SMRTP, 8, 84]

#### **14.2.4.17 Compensation for unlawful detention**

Anyone who has been the victim of unlawful detention has an enforceable right to compensation.

[ICCPR, 9]

#### **14.2.4.18 Women**

Women in detention have all the same rights as men in detention and are entitled to the same protections.

In addition, women benefit from a series of specific protections relevant to their gender. These include the following:

- all physical searches of their person or clothing must be carried out by female staff;
- women under arrest or in detention must be kept in separate quarters from men; and
- women under arrest or in detention must be attended and supervised only by female officers.

Detailed instructions for the treatment of detained women are contained in the Bangkok Rules for the Treatment of Female Prisoners.

[ICCPR, 2, 26 / BPPDI, 5 / SMRTP, 8, 53 / BRTPF]

During armed conflict, the international human rights law outlined above is complemented and supplemented by specific provisions of the law of armed conflict. For further guidance on treatment in detention, see Chapter 9.

[GC I, 12 / GC II, 12 / GC III, 14, 25, 29, 97, 108 / GC IV, 14, 16, 17, 21-23, 27, 38, 50, 76, 85, 89, 91, 97, 119, 124, 127, 132 / P I, 75, 76 / P II, 4, 5, 6 / 1 CILS, 93, 134] [IAC/NIAC]

#### **14.2.4.19 Children**

The pre-trial detention of children should be avoided.

Where unavoidable, the duration of detention should be kept to an absolute minimum and the highest priority must be accorded to processing such cases expeditiously.

Children must be detained separately from adults.

They must be detained in a manner that takes into account the special needs of persons of their age.

[ICCPR, 10 / CRC, 37, 40 / SMRTP, 8]

#### **14.2.4.20 Training and instruction**

In order to ensure compliance with legal obligations applicable in situations of detention, State officials responsible for persons in detention require special instruction and training to perform their duties properly.

[SMRTP, 47 / BPUFF, 18, 19, 20]

#### **14.2.4.21 Investigation of deaths and potential abuse**

When a detained person dies or disappears while in custody, an inquiry must be held by a judicial or other authority into the cause of death or disappearance.

[BPPPI, 34 / PPIEASE, 9-17]

### **14.3 States of emergency**

This Section deals with derogations from and restrictions on human rights during states of emergency.

#### **14.3.0.1 State of emergency: definition**

Internal disturbances and tensions may escalate to the point at which a government is no longer able to control the situation with the measures it normally has at its disposal. States of emergency are not necessarily limited to situations other than armed conflict, but can also be declared in, or as a result of, situations of armed conflict.

In such situations, the government may proclaim a state of emergency under the provisions set out in its national law, and may in certain circumstances exercise its right to derogate from certain human rights obligations. In situations of armed conflict, the law of armed conflict may provide further possibilities of derogating from human rights obligations. In no case, however, can the "core" human rights (see 14.3.0.3) be derogated from.

[ICCPR, 4]

#### **14.3.0.2 Derogations: definition and conditions**

A derogation is defined as an exemption from or relaxation of a rule or law.

Some human rights treaties permit States to derogate from treaty provisions when responding to emergency situations.

In order to derogate from a human right in the International Covenant on Civil and Political Rights (ICCPR) the following conditions must be met:

- there must be a public emergency which threatens the life of the nation;
- the State must officially proclaim that a public emergency exists, using the procedures in its national law or constitution for declaring a state of emergency;
- the derogation must be limited to the extent strictly required by the exigencies of the situation (strict necessity/proportionality);
- it must not be inconsistent with the State's other obligations under international law (including the law of armed conflict);
- it must not involve discrimination (on the ground of race, colour, sex, language, religion or social origin); and
- finally, international notification is required: the State must inform the other States party to the ICCPR, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and its reasons for doing so.

[ICCPR, 4 / Human Rights Committee, General Comment 29, UN Doc. CCPR/C/21/Rev.1/Add.11]

#### **14.3.0.3 Non-derogable rights**

Some rights may never be derogated from, even in a state of emergency or during an armed conflict.

The ICCPR explicitly states that the following rights are non-derogable:

- the right to life;
- the right to be free from torture and cruel, inhuman or degrading treatment;
- the right to be free from slavery, the slave trade and servitude;
- the prohibition of detention for debt;

- the prohibition on retroactivity in criminal law;
- the right to freedom of thought, conscience and religion; and
- the right to recognition as a person before the law.

In addition, the United Nations Human Rights Committee has issued a general comment in which it states its view that other rights are also non-derogable. In particular, the Human Rights Committee has stressed that the right to a fair trial and the right to a review of the lawfulness of detention (*habeas corpus*) are non-derogable.

[ICCPR, 4 / Human Rights Committee, General Comment 29, UN Doc. CCPR/C/21/Rev.1/Add.11]

#### **14.3.0.4 Limitations and restrictions on human rights**

Some human rights treaty provisions contain a limitation clause which allows for restriction of the particular right for reasons set out in the provision itself.

For example, a limitation clause might allow restriction of a right when necessary for reasons of national security, public health or public order.

Generally, a State may only restrict a right when to do so is necessary to achieve a purpose laid down in the limitation clause. In addition, the restriction “must be proportionate to the interest sought to be protected.”

The UN Human Rights Committee has expressed the view that it would be hard to justify a derogation from a provision of the ICCPR which contains a limitation clause, such as the right to freedom of assembly. States must therefore first attempt to exercise the limitation clauses already built into such provisions.

[Human Rights Committee, General Comment 27, UN Doc. CCPR/C/21/Rev.1/Add.9 / General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13 / Human Rights Committee, General Comment 29, UN Doc. CCPR/C/21/Rev.1/Add.11]

#### **14.3.0.5 Continued applicability of other human rights obligations**

Even if the State has made a valid derogation from or placed a lawful restriction on some human rights, its armed forces are still required to comply with the State’s other human rights obligations. In particular, the State’s national law and the international rules on the use of force and firearms continue to apply (see 14.2.1).

#### **14.3.0.6 Escalation into a non-international armed conflict**

Internal disturbances and tensions may, on certain occasions, escalate into a non-international armed conflict. See 2.3.3 for details of the threshold for application of the law of non-international armed conflict.



# CHAPTER 15

## PEACE SUPPORT OPERATIONS

## 15 PEACE SUPPORT OPERATIONS

This Chapter deals with the laws and rules applicable to peace support operations (PSOs).

**15.1 Definition: peace support operations** outlines the nature and purpose of PSOs.

**15.2 Legal framework** sets out the international legal framework applicable across the spectrum of PSOs.

**15.3 Responsibility of members of armed forces** sets out the obligation of troop contributing countries to investigate and discipline members of their armed forces for crimes committed during the PSO.

**15.4 Protection of members of armed forces** explains the rules that prohibit and penalize attacks on members of armed forces in a PSO, as well as the improper use of the United Nations insignia, emblems and uniforms.

Throughout this Chapter, the masculine gender should be understood to refer to both sexes, unless otherwise specified.

### 15.1 Definition: peace support operations

#### 15.1.0.1 Definition: peace support operations

Peace support operations encompass all multifunctional operations conducted impartially, normally by States or by international or regional organizations such as the United Nations (UN), the European Union (EU), the African Union (AU), or the North Atlantic Treaty Organization (NATO), involving military forces and diplomatic and humanitarian agencies, and designed to achieve a long-term political settlement or other specified objective.

### 15.2 Legal framework

This Section sets out the legal framework in a PSO. It begins by explaining the components of the legal framework (see 15.2.1); then discusses specific issues related to the application of the law of armed conflict (see 15.2.2); specific issues related to the application of human rights law (see 15.2.3); and the legal framework applicable in law enforcement operations during a PSO (see 15.2.4).

## 15.2.1 Components of the legal framework

### 15.2.1.1 Checklist: legal framework

The legal framework for a PSO may include:

- the law of armed conflict;
- human rights law;
- the domestic law of the troop contributing State;
- the domestic law of the State where the PSO occurs;
- the mandate for the PSO; and
- one or more Status of Forces Agreements (SOFAs).

### 15.2.1.2 Law of armed conflict

The law of armed conflict (LOAC) is a set of international treaty or customary rules which are intended to resolve matters of humanitarian concern arising directly from armed conflicts, whether international or non-international. For humanitarian reasons, those rules restrict the parties to a conflict in their choice and use of methods and means of warfare, and protect people and property affected or liable to be affected by the conflict.

The law of armed conflict is applicable during a PSO as soon and as long as the conditions for its applicability are fulfilled, i.e. whenever there is recourse to armed force between two or more States, or a protracted armed confrontation between government armed forces and one or more armed groups (or between such groups). In this case two situations can arise:

- PSO contingents are party to the conflict; or
- PSO contingents provide support to a party to the conflict.

### 15.2.1.3 Human rights law

Human rights law consists of a set of principles and rules whereby individuals or groups can expect certain standards of protection, conduct or benefits from State authorities, simply because they are human beings.

As a matter of principle, the UN and its subsidiary bodies are bound by the international rules necessary to fulfil the purposes of the UN as set out in the UN Charter. The promotion of respect for human rights and fundamental freedoms is one such purpose. Therefore all civilian and military bodies involved in a PSO under UN auspices must, as a matter of policy, respect and promote human rights.

Furthermore, troops operating in a PSO are bound by the international obligations of the State upon which they depend, including its human rights obligations. However, these troops as a rule operate outside the territory of their State, which means that the human rights obligations of their State have to be deemed to apply extraterritorially as well. This issue is still controversial; see 15.2.3.3 on the extraterritorial application of human rights.

[UN Charter, Preamble, 1, 55, 56]

For more information on human rights obligations, refer to Section 2.4.

#### **15.2.1.4 Domestic law of troop contributing countries**

In general, a troop contributing State must conduct its operations in accordance with its international and domestic legal obligations. This includes its treaty law obligations as well as the customary law of armed conflict and human rights. Armed forces are normally bound by the disciplinary and criminal law of their home State.

#### **15.2.1.5 Domestic law of the host State**

As a general rule the domestic law of the host State is applicable, provided that it conforms to international standards. However, the relationship between the host State's jurisdiction and that of the troop contributing States is generally regulated by an agreement known as a "Status of Forces Agreement" (SOFA).

A common issue addressed in a SOFA is which country may exercise criminal jurisdiction over personnel. Other provisions that may be found in a SOFA include, but are not limited to, defining the rights and obligations of military personnel engaged in each mission, including immunities and privileges, taxes and fees, carrying of weapons, and customs regulations.

#### **15.2.1.6 Mandate for a PSO**

The mandate for a PSO is usually contained in a UN Security Council resolution. In some cases, the mandate may be elaborated in a peace agreement signed by the parties to an armed conflict (e.g. the former Yugoslavia's General Framework Agreement for Peace (GFAP)), or be issued by a regional organization.

In practice, the mandate is applied through the PSO military commander's operational order and its annexed rules of engagement (RoE).

## 15.2.2 Application of the law of armed conflict

### 15.2.2.1 General rule

The ICRC's position is that the applicability of the law of armed conflict in a PSO must be determined solely on the basis of the facts on the ground, irrespective of the formal mandate assigned to the peace operations by the Security Council, and irrespective of the labels given to the parties potentially opposed to peacekeeping forces.

In addition, the applicability of the law of armed conflict does not depend on the legality of the use of force under international law. In other words, the rules governing the right to use force (*jus ad bellum*) and the rules governing the use of force (*jus in bello*) remain separate.

### 15.2.2.2 Threshold for application of law of armed conflict

The law of non-international armed conflict applies whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

The law of international armed conflict applies whenever there is resort to armed force between States or an occupation of territory. It applies regardless of whether the parties involved recognize that there is an armed conflict.

[*Tadic Appeals* 1995, para. 70 / GC I, 2, 3 / GC II, 2, 3 / GC III, 2, 3 / GC IV, 2, 3 / P I, 3 / P II, 1]

For a detailed discussion of the threshold for application of the law of armed conflict, refer to Section 2.3.

The criteria used to determine the existence of an armed conflict involving armed forces in a PSO do not differ from those used to determine the existence of other armed conflicts. If the armed forces of a PSO are involved in armed hostilities that reach the threshold of international or non-international armed conflict, LOAC will apply.

### 15.2.2.3 PSO under UN command and control: Secretary-General's Bulletin

On 6 August 1999, the Secretary-General of the UN issued a bulletin concerning the application of the law of armed conflict to armed forces operating under UN command and control: "Observance by United Nations Forces of International Humanitarian Law" (UNSG Bulletin 1999).

It should be emphasized that the UNSG Bulletin 1999 explicitly states that it is not a complete list of every principle of the law of armed conflict that applies

to troops deployed in a PSO. Furthermore, the UNSG Bulletin 1999 does not displace domestic laws that are binding on the troops deployed in a PSO.

[UNSG Bulletin 1999]

#### **15.2.2.4 Application of the law of occupation to a PSO**

The rights, obligations and protections derived from the law of occupation should be applied in situations where the conditions for their applicability are met, including PSOs.

Regardless of whether the law of occupation applies as a matter of law, in a situation in which the PSO forces are exercising significant administrative or legislative powers, or performing tasks ordinarily carried out by the host State government, then the law of occupation may provide some practical guidance.

For details on the law of occupation, see Chapter 12.

### **15.2.3 Application of human rights law**

#### **15.2.3.1 Main human rights treaties**

The following international human rights treaties contain core human rights which may be relevant in a PSO:

- Convention on the Prevention and Punishment of the Crime of Genocide (1948) [CCG];
- Universal Declaration of Human Rights (1948) [UDHR];
- Convention relating to the Status of Refugees (1951) [CRSR];
- International Convention on the Elimination of All Forms of Racial Discrimination (1966) [CERD];
- International Covenant on Civil and Political Rights (1966) [ICCPR];
- International Covenant on Economic, Social and Cultural Rights (1966) [CESCR];
- Convention on the Elimination of All Forms of Discrimination Against Women (1979) [CEDAW];
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) [CAT];
- Convention on the Rights of the Child (1989) [CRC];
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000) [CRC OPI]; and
- International Convention for the Protection of All Persons from Enforced Disappearance (2006) [IPPCED].

In addition, troop contributing States may be party to regional human rights treaties, such as the African Charter on Human and People's Rights, the American Convention on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, which also apply to their armed forces.

### 15.2.3.2 Soft-law standards

“Soft law” or non-binding standards may also apply in a PSO. Soft-law standards provide guidance on how binding rules should be implemented.

The following are key soft-law standards which may apply in a PSO:

- Standard Minimum Rules for the Treatment of Prisoners (1955) [SMRTP];
- Code of Conduct for Law Enforcement Officials (1979) [CCLEO];
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) [BPPDI];
- Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989) [PPIEASE];
- Basic Principles for the Treatment of Prisoners (1990) [BPTP];
- United Nations Standard Minimum Rules for Non-custodial Measures (1990) [UNSMRNM]; and
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) [BPUFF].

### 15.2.3.3 Extraterritorial application of human rights law

One issue in the context of a PSO is whether human rights law applies to the actions of armed forces (or other agents of the State) who are deployed outside the territory of their State.

Most human rights treaties contain a provision on the scope of application of the treaty. For example, the ICCPR specifies that each State Party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”.

[ICCPR, 2]

The UN Human Rights Committee has interpreted this wording to mean that the treaty covers persons “within the power or effective control” of the armed forces of a State operating outside the State’s territory. The International Court of Justice (ICJ) similarly decided that human rights conventions apply extraterritorially. Some States, however, take the position that human rights treaties do not apply to their armed forces or other personnel operating outside the territory of the State.

[Human Rights Committee, General Comment 31, ¶ 10, CCPR/C/21/Rev.1/Add.13 / *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 / *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005]

## **15.2.4 Law enforcement operations during a PSO**

### **15.2.4.1 Law enforcement during a PSO: general rule**

During a PSO armed forces may be tasked with maintaining law and order, particularly in the absence of a civilian authority.

Law enforcement encompasses the following basic responsibilities:

- maintaining public order and security;
- preventing and detecting crime; and
- providing assistance.

To accomplish their mission, law enforcement officials exercise the following basic powers: arrest, detention, search and seizure, and the use of force and firearms.

When these activities are conducted as part of the maintenance of law and order, and not as part of the conduct of hostilities in an armed conflict, then the applicable legal regime is that of a law enforcement operation.

In the context of a PSO, the legal framework of a law enforcement operation includes human rights law, the domestic law of the troop contributing State (if applicable), the domestic law of the host State as modified by the SOFA, and any additional standards or principles set out in the mandate for the PSO. In addition, when PSO forces effectively control a territory within the meaning of the law of armed conflict, the law of occupation will provide a legal framework of reference for law enforcement operations.

For an extensive discussion of the maintenance of law and order by armed forces, refer to Chapter 14. The law of occupation is set out in Chapter 12.

### **15.2.4.2 Arrest and detention**

Situations may arise in which armed forces operating in a PSO have to arrest and detain persons, either briefly before handing them over to civilian authorities, or for longer periods, especially in the absence of adequate structures due to the collapse of the host nation.

The legal status and treatment of detainees depend on the legal qualification of the situation, and the particulars of each individual case.

Also, detention is normally regulated by a status of forces agreement (SOFA). For armed forces under UN command and control, Section 8 of the UNSG Bulletin 1999 sets out specific principles on detention.

The United Nations has issued standard operating procedures for detention in peace operations. These prescribe rules for the treatment of detainees, based on international human rights law (IHRL), while emphasizing the

continued application of IHRL, humanitarian law and mission-specific rules such as those contained in a SOFA.

For a discussion of the rules on detention in law enforcement operations, see 14.2.4.

When coalition forces are involved in an armed conflict, arrest and detention are governed by the law of armed conflict. The status of detainees must be determined accordingly (see Chapter 7).

[UNSG Bulletin 1999, 8, UN DPKO Standard Operating Procedures on Detention in United Nations Peace Operations / Thomas Winkler, "The Copenhagen Process on the handling of detainees in international military operations", San Remo Round Table report 2009, p. 246]

### 15.2.4.3 Transfer of detainees

During multilateral military operations, detainees may be transferred between troop- or police-contributing countries and between those countries and the host nation. The starting point regarding transfer is the principle of *non-refoulement*: a person shall not be transferred from one State to another if that person will face persecution, the risk of serious human rights violations or the risk of being transferred afterwards to a State that may violate those rights. The transferring party, regardless of whether the person has expressed a specific fear, must assess this risk.

Furthermore, in the context of an international armed conflict, POWs and other protected persons cannot be transferred to a party that is unwilling or unable to apply the protection of the Geneva Conventions to them. Protected persons in occupied territory may not be transferred, unless for imperative military reasons.

[CAT, 3 / GC III, 12 / GC IV, 45, 49 / UN DPKO Standard Operating Procedures on Detention in United Nations Peace Operations]

### 15.2.4.4 Use of force

Depending on the situation, armed forces in a PSO may have to resort to using force and firearms.

If PSO armed forces are engaging in the conduct of hostilities in the context of an armed conflict, then the rules of the law of armed conflict apply. If they are using force during a law enforcement operation that does not form part of the conduct of hostilities, then the rules applicable to a law enforcement operation apply (even if an armed conflict is taking place on the territory of the same State).

For the use of force in law enforcement operations, see 14.2.1, and for the use of force in an armed conflict, see Chapters 4, 5 and 6.

#### **15.2.4.5 Which body of law applies?**

Depending on the nature of the mission, the legal framework in a PSO can be both dynamic and complex.

First, over time the legal framework that applies in a particular PSO may change. For example, as the situation unfolds a PSO may evolve into an armed conflict, resulting in the application of the law of armed conflict.

Second, different legal frameworks may apply to different troop contributing States or to the same State in different parts of the same PSO. For example, a troop contributing State might be assigned warfighting responsibilities in one location and law enforcement responsibilities in another.

It is therefore fundamentally important for the military commander to understand which bodies of law apply to which troops at which time.

The determination of which law applies also affects the planning and conduct of military operations, including the rules of engagement (RoE). The RoE will differ significantly, depending on whether the rules are based on the law applicable to law enforcement operations or on the law of armed conflict.

### **15.3 Responsibility of members of armed forces**

#### **15.3.1 Investigation, discipline, prosecution**

##### **15.3.1.1 Rule**

Most SOFAs (and the UN's Model Status of Forces Agreement for Peace-Keeping Operations) provide that the individual members of armed forces deployed in a PSO are immune from prosecution in the host State and are under the "exclusive jurisdiction" of the troop contributing State for criminal offences committed during the PSO.

Troop contributing States must investigate and discipline or prosecute, as warranted, members of their armed forces for violations of the law of armed conflict.

[Daphna Shrager, "The applicability of international humanitarian law to peace operations: From rejection to acceptance", San Remo Round Table report 2009, p. 96 / UNSG Bulletin 1999, 4 / P I, 87 / 1 CILS, 158] [IAC/NIAC]

## **15.3.2 Prohibition on sexual exploitation and abuse**

### **15.3.2.1 Introduction: zero tolerance**

The UN has a “policy of zero tolerance of sexual exploitation and abuse in United Nations peacekeeping operations” and the UN Secretary-General has issued a specific bulletin prohibiting sexual exploitation and abuse by forces under UN command and control.

[UNSCR 1820, para. 7 / UNSCR, 1888, para. 21 / UNSG Bulletin 2003, Sec. 2.2]

Furthermore, as set out in the following paragraphs, the law of armed conflict and human rights law prohibit sexual violence.

### **15.3.2.2 Law of armed conflict**

Rape and other forms of sexual violence, including enforced prostitution, are prohibited in all armed conflicts. Rape and other forms of sexual violence, including sexual slavery, also constitute war crimes.

[GC I, 3 / GC II, 3 / GC III, 3, 14 / GC IV, 3, 27 / P I, 75-76 / P II, 4 / 1 CILS, 93 / ICC Stat., 8] [IAC/NIAC]

### **15.3.2.3 Human rights law**

Gender-based violence is a form of gender discrimination and is prohibited by human rights law.

The UN Committee on the Elimination of All Forms of Discrimination against Women has defined gender-based violence as “violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”

[Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation 19, para. 6 / CEDAW, 1, 2].

### **15.3.2.4 UN Secretary-General’s Bulletin**

On 9 October 2003, the UN Secretary-General issued a bulletin, “Special Measures for Protection from Sexual Exploitation and Sexual Abuse”, which underscores that “United Nations forces conducting operations under United Nations command and control are prohibited from committing acts of sexual exploitation and sexual abuse.”

The bulletin defines “sexual exploitation” as “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.”

“Sexual abuse” is defined as “the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.”

It should be noted that the bulletin applies to all staff of the United Nations.

[UNSG Bulletin 2003, Sec.1, 2.2]

#### **15.3.2.5 Security Council Resolutions 1820 and 1888**

The UN Security Council has issued two resolutions (1820 and 1888) concerning sexual violence in armed conflicts, which both include provisions related to PSOs.

Of particular relevance here, Security Council Resolution 1888 urges troop contributing States to ensure full accountability in cases of sexual exploitation and abuse involving their personnel engaged in PSOs.

[UNSCR 1820 / UNSCR 1888, para. 21]

### **15.4 Protection of members of armed forces in a PSO**

#### **15.4.1 Prohibition on attacks**

##### **15.4.1.1 Prohibited: attacks on personnel and objects involved in a PSO**

It is prohibited to attack personnel and objects involved in a PSO as long as they are entitled to the protection given to civilians and civilian objects under the law of armed conflict.

[1 CILS, 33] [IAC/NIAC]

Accordingly, PSO personnel are protected from attack until such time as there is an armed conflict and either the State contributing the personnel, or the international organization under whose command and control the operation is carried out, is a party to that conflict. In such cases, members of the armed forces of the contributing State, and civilian personnel who are directly participating in hostilities, may constitute military objectives and may be attacked in accordance with the standard rules of the law of armed conflict.

[1 CILS I, p. 112]

##### **15.4.1.2 War crime: attacks on personnel and objects involved in a PSO**

It is a war crime to intentionally direct an attack against PSO personnel, installations, materials, units or vehicles, as long as they are entitled to the protections given to civilians or civilian objects under the law of armed conflict.

[ICC Stat., 8 / UN Convention on the Safety of United Nations and Associated Personnel, 1994] [IAC/NIAC]

## **15.4.2 Improper use of UN emblem and uniform**

### **15.4.2.1 Prohibited: unauthorized use of UN emblem and uniform**

It is prohibited to use the UN emblem and uniform without authorization from the UN.

[P I, 38/ 1 CILS, 60] [IAC/NIAC]

### **15.4.2.2 Prohibited: perfidy**

It is prohibited to kill, injure or capture an adversary by resort to perfidy in an international armed conflict. This includes feigning protected status by using the signs, emblems or uniforms of the UN.

[P I, 37] [IAC]

### **15.4.2.3 War crime: perfidious use of UN flag, insignia, uniforms**

It is a war crime to make improper use of the UN flag, military insignia or uniform in an international armed conflict, if the improper use results in death or serious personal injury.

[ICC Stat., 8] [IAC]



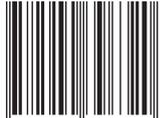
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