



## EXECUTIVE SERIES

### ADDP 06.4

# LAW OF ARMED CONFLICT

Australian Defence Doctrine Publication 06.4 is issued for use by the Australian Defence Force and is effective forthwith. This publication supersedes Australian Defence Force Publication 37—*Law of Armed Conflict*.

A.G. HOUSTON, AO, AFC  
Air Chief Marshal  
Chief of the Defence Force

Australian Defence Headquarters  
Canberra ACT 2600

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## FOREWORD

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2. ADDP 06.4—*Law of Armed Conflict* promulgates guidance to commanders for the planning and conduct of ADF operations in armed conflict and details responsibilities and obligations for ADF members.

3. The law of armed conflict (LOAC) is that part of international law which regulates the conduct of armed hostilities between states. LOAC encompasses all international law with respect to the conduct of armed conflict and its provisions are binding on Australia and individual members of the ADF.

4. It is essential that ADF commanders are aware of their legal duties and responsibilities under LOAC and that operational planning and the conduct of operations comply with LOAC.

5. The Vice Chief of the Defence Force is the publication sponsor and Commandant Australian Defence Force Warfare Centre (ADFWC) is responsible for its continued development, amendment and production. Further information on Joint Doctrine is promulgated in Defence Instructions (General) ADMIN 20–1—*Joint Operations Doctrine*.

6. Every opportunity should be taken by users of this publication to examine its contents, applicability and currency. If deficiencies or errors are found, amendment action should be taken. ADFWC welcomes any assistance, from whatever source, to improve this publication.



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## CHAPTER 1

# INTRODUCTION AND HISTORICAL BACKGROUND

### Executive summary

- Commanders have a legal obligation to prevent unnecessary injury and suffering during times of armed conflict.
- International and domestic laws have evolved to create laws which are binding on nations and individuals involved in armed conflict.

## INTRODUCTION

### General

**1.1** While it is the military objective of all commanders to win in battle, there must be limits to the means and methods that may be used. Commanders must be aware of their legal obligation to prevent unnecessary injury and suffering and to alleviate as much as possible the calamities of war.

**1.2** The law of armed conflict (LOAC) seeks to not only regulate the conduct of nations but also govern the behaviour and conduct of both combatants and non-combatants during times of armed conflict. The LOAC is synonymous with the term 'the Laws of War'.

### WAR CRIMES

*The Tokyo and the Nuremberg war crimes trials were manifestations of an intellectual and moral revolution which will have a profound and far-reaching influence upon the future of world society.*

**Tokyo Chief Prosecutor J.B. Keenan**

**1.3** The main purposes of the LOAC, which is part of international law, are to protect combatants and non-combatants from unnecessary suffering; to safeguard certain fundamental rights of persons who fall into the hands of an enemy, such as prisoners of war (PW), the sick and civilians; to maintain the distinction between combatants and non-combatants; and to facilitate the restoration of peace.

## Domestic law

**1.4** Domestic law encompasses all those internal laws that govern the behaviour of persons within a nation, and at times, of nationals abroad. In the case of Australia, these are the laws that are made by Australian legislatures applicable to Australian citizens and residents, to persons visiting Australia and in some cases to Australian nationals abroad. It is possible for Australian law to have extraterritorial operation. The *Defence Force Discipline Act 1982* (DFDA) is an example of a domestic law which binds Australian Service personnel abroad including those engaged in armed conflict under the Geneva Conventions and their Additional Protocols, and all members of the Australian Defence Force (ADF) serving within Australia. Furthermore, international law may become part of a nation's domestic law. This is evident in the Australian Parliament's incorporation of the 1949 Geneva Conventions and the 1977 Protocols Additional to the Geneva Conventions of 1949 (G. P. I and II) into domestic law.

## International law

**1.5** International law is concerned with the principles and rules of conduct which nations observe in their relationships with each other and which include:

- the rules of law relating to the functioning of international institutions or organisations, their relations with each other and their relations with states and individuals; and
- certain rules of law relating to individuals and non-state entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community.

**1.6** International law, then, is primarily concerned with the actions of states, though important aspects of it, including the LOAC, also govern the actions of individuals. In international law the term 'states' refers to nations which have been accepted as part of the international community and enjoy sovereignty. For simplicity the term 'nation' is used throughout this publication except in chapter 6—'Maritime operations and the law of armed conflict' where it is necessary to refer to 'archipelagic states'.

## Sources of international law

**1.7** There are four recognised sources of international law:

- international custom, as evidence of a general practice accepted as law;
- international conventions and treaties, whether general or particular, establishing rules expressly recognised by the contesting states;



- the general principles of law recognised by civilised nations; and
- judicial decisions of international and national judicial bodies and the influences of the writings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

**1.8** The most important sources of international law today are custom and treaties.

**1.9 Customary international law.** This encompasses those laws which represent the general and consistent practice among most nations with respect to a particular subject and are considered obligatory by nations. Custom becomes customary international law when, after a period of time, a practice is accepted by the international community as international law. Customary international law is the principal source of international law. All nations are bound by customary international law, although some nations refuse to recognise customary international law.

**1.10 Treaties.** Treaties are international agreements or commitments entered into by two or more nations. Agreements can be bilateral treaties, such as the Five Power Defence Arrangements, which comprise a number of bilateral treaties, or multilateral conventions such as the 1949 Geneva Conventions. Some treaties codify customary law while some broad multilateral treaties may eventually become customary international law which binds all nations regardless of whether they are party to the treaty or not.

### **Compliance with international law**

**1.11** While international law is often criticised because there is no central enforcement authority, breaches of international law can still have dire consequences. In the worst cases, armed conflict may result if two nations cannot resolve their differences through international law and diplomacy. International law covers the actions not only of nations but also of individuals. For example, this is seen in the jurisdiction of the International Criminal Court (ICC), discussed in chapter 13—'Compliance'. International law provides stability in international relations and an expectation that certain acts or omissions will result in predictable consequences. Failure to observe international law often involves political and economic costs.

### **Binding nature of the law of armed conflict**

**1.12** The LOAC, being part of international law, is binding on nations but it also regulates the conduct of individuals. The *Criminal Code Act 1995* (Criminal Code) makes the offences of genocide, crimes against humanity, and war crimes that are grave breaches of the Geneva Conventions and G.

P. I, as well as other serious violations of the LOAC, offences under Commonwealth law. A member of the ADF who is in breach of the LOAC would also be liable to be charged under the DFDA for corresponding service offences.

**1.13** A violation of the LOAC by the armed forces of a nation involves the international responsibility of that nation. A violation may also lead to the prosecution of the individuals concerned for war crimes. It follows that membership of the armed forces requires knowledge of the LOAC.

**1.14** Following World War II, the Allies tried a number of former German leaders and commanders for crimes committed during the war. The International Military Tribunal at Nuremberg rejected the assertion that the LOAC applies only to nations. Since that time, decisions in many war crimes trials have reinforced the principle of individual criminal responsibility of members of the armed forces or others who violate the LOAC. This principle has been confirmed in the statutes of the Yugoslavia and Rwanda War Crimes Tribunals and in the statute of the ICC.

## HISTORICAL BACKGROUND

**1.15** Human societies have always developed legal systems to govern their relations. This includes situations of conflict between groups. Early man and primitive societies had basic rules and ritualistic behaviour. As societies became more developed so did the rules. Agreements on the treatment of PW can be found in Egypt as far back as 1400 BC. There are also records of rules for humane treatment of non-combatants in some Indian states around 500 BC. A rudimentary form of international law was practised by Greek city states and the Romans. This included rules which regulated warfare. The rationale for these rules is the same today: to inflict unnecessary suffering can be counterproductive; for example, actions such as poisoning wells would have detrimental effects which may destroy the gains of victory.

**1.16** It is believed that the first systematic code of war was that of the Saracens, based on the Koran. During the sixteenth century, nation states emerged in Europe and a system of international law came into being. Part of this law was a code of chivalry; however, the desire for regulating war derived principally from national or personal interests rather than humanitarian concerns. For example, the conference called by Tsar Nicholas II in 1899 was motivated by the fact that Russia was falling behind in the nineteenth century arms race rather than by genuine humanitarian concerns. The modern LOAC originated from the customary practices adopted by those taking part in battles.

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## The modern law of armed conflict

**1.17** The origins of the modern LOAC can be traced to the battle of Solferino in 1859 in northern Italy. After witnessing the results of this battle a young Swiss merchant, Henri Dunant, wrote an influential book which described the carnage and the neglect of the wounded. The impact of this book and Dunant's subsequent efforts led to the formation of the Red Cross.

**1.18** In 1864, the Swiss Government, at the urging of the Red Cross, convened the first conference on International Humanitarian Law (IHL). At this conference the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was drawn up and signed by 16 nations. Subsequent conferences in 1906, 1929 and 1949 further developed and refined IHL. The latest development has been the Additional Protocols (G. P. I and G. P. II) which were adopted in 1977. Australia is a party to all of these conventions and protocols.

**1.19** Perhaps the most celebrated early attempt at codifying the customs and usages of war came with the American Civil War. In 1863, Dr Francis Lieber, an eminent lawyer, at the request of President Lincoln and in consultation with a board of officers, drew up a code of conduct titled 'Instructions for the Government of Armies of the United States in the Field'. This instruction established limits on a belligerent's means to wage war and identified military objectives as the only legitimate targets for deliberate attack.

**1.20** An early agreement dealing with the means and methods of war was the Declaration of St Petersburg in 1868 which prohibited the use of any projectile weighing less than 400 grams which was either explosive or charged with fulminating or inflammable substances. The principles stated in the preamble to the declaration are still relevant today:

*That the progress of civilisation should have the effect of alleviating as much as possible the calamities of war.*

*That the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy.*

*That for this purpose it is sufficient to disable the greatest possible number of men.*

*That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.*

*That the employment of such arms would, therefore be contrary to the laws of humanity.*

**International Military Commission,  
Declaration of St Petersburg,  
29 November 1868**

## Hague Law

**1.21** Hague Law is a term used to describe the set of international laws, which regulate the means and methods of warfare. It comprises a series of treaties which state what is, or is not legitimate in waging war. In 1899, Tsar Nicholas II of Russia in a note addressed to the diplomatic representatives at St Petersburg called for a conference with the purpose of seeking 'a real and lasting peace and above all, of limiting the progressive development of existing armaments'. While the conference failed in its main objective to limit armaments, it was partially successful. Three declarations were adopted, one prohibiting the discharge of projectiles from balloons, a second prohibiting the use of asphyxiating gases and a third prohibiting the use of expanding bullets. The most important achievement from this conference, however, was the Convention for the Pacific Settlement of International Disputes creating the Hague Permanent Court of Arbitration, and creating a list of judges from which the parties to a controversy might select the members of an arbitral tribunal for their particular case.

**1.22** Subsequent conventions include the Hague Convention of 1907, the 1923 draft Hague Rules for Aerial Warfare (never formally adopted), the Gas Protocol of 1925, 1954 Hague Cultural Property Convention, 1972 Biological Weapons Convention, 1980 Conventional Weapons Convention and the 1993 Chemical Weapons Convention. G. P. I and G. P. II are not confined to humanitarian issues; they also address issues which are traditionally regarded as Hague Law. Much of Hague Law is accepted as customary international law and directly affects the use of combat power.

## Geneva Law

**1.23** In 1864 at the invitation of the Swiss Government, a conference was held in Geneva which drew up 'the first Convention for the Amelioration of the Condition of the Wounded in Armies in the Field'. This convention was subsequently amended by the Geneva Conventions of 1906, 1929 and 1949, and by G. P. I. These agreements now constitute what is referred to as Geneva Law, which is fundamentally concerned with the relief of suffering of PW, the wounded and sick in the field, wounded, sick and shipwrecked mariners and civilians caught up in conflict.

**1.24** The LOAC thus developed along two separate streams, each named after the city where most of the relevant agreements were developed. Whereas Hague Law is concerned essentially with how operations are conducted, Geneva Law is concerned with the protection of persons not involved or no longer involved in the conflict. Generally speaking, Geneva Law has become a more developed and less contentious body of law than Hague Law. In recent years, particularly since the completion and introduction of G. P. I and G. P. II, there has been a merging of the two bodies of law. The Protocols, linked to the Geneva Conventions, deal not only with the protection of victims of war but also with the means and methods of warfare, which were traditionally the domain of Hague Law. G. P. I deals with international armed conflict while non-international armed conflict is further addressed by G. P. II.

## World War II

**1.25** Following World War II, tribunals were established at Nuremberg and Tokyo to try the major war criminals of the Axis powers. These tribunals were empowered to deal not only with war crimes but also with crimes against peace and crimes against humanity. The latter were defined by the tribunals, and identified as crimes under international law.

**HISTORICAL EXAMPLE—1946 MOROTAI TRIALS**

**Figure 1–1: Australian war crimes trial, 1945–1951**

Senior Japanese naval officers with their Australian defending officers, and a witness questioned through an interpreter, at their trial at Morotai in 1946.

Nearly 1000 Japanese nationals were tried for atrocities alleged to have been committed against Australian servicemen and women, against allied United Kingdom, Indian, Indonesian and Chinese servicemen, and Papua New Guinea, Chinese and European civilians, in flagrant breach of the LOAC (**source: Australian War Memorial OG3701**).

**Geneva Conventions 1949**

**1.26** Following the experiences in World War II, Geneva Law was revised in 1949 with four new conventions dealing with the protection of:

- the wounded and sick (replacing the conventions of 1864, 1906 and 1929);

- the wounded, sick and shipwrecked at sea (replacing Hague Convention X 1907);
- PW (replacing the convention of 1929); and
- civilians.

**1.27** All four Geneva Conventions apply:

- in any international armed conflict, whether war is declared or not, and even if one of the parties does not recognise the existence of a state of war; or
- if there is a partial or total occupation of another state's territory, even if the occupation has met with no armed resistance.

**1.28** The Geneva Conventions are of virtually universal application and certain provisions are generally considered to embody customary international law.

### **Cultural Property Convention 1954**

**1.29** In response to the destruction and looting of cultural property that had taken place during World War II, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was concluded in 1954 under the auspices of the United Nations (UN) Educational, Scientific and Cultural Organization. A second protocol to this convention was adopted in 1999.

**1.30** This convention places an obligation on defenders and attackers by requiring nations to refrain from uses of cultural property that would expose such property to danger in armed conflict and to refrain from acts of hostility against cultural property.

### **Biological Weapons Convention 1972**

**1.31** The Biological Weapons Convention 1972 prohibited State Parties from developing, producing, stockpiling or otherwise acquiring or retaining biological agents and toxins that could be used for other than protective or peaceful purposes. The Convention also prohibited any weapons, equipment or means of delivery designed to use the biologic agents or toxins for hostile purposes or in armed conflict.

### **Additional Protocols I and II 1977**

**1.32** A major development in the LOAC was the adoption in 1977 of two Protocols Additional to the Geneva Conventions of 1949. G. P. I deals with international armed conflicts and G. P. II deals with internal armed conflicts.

**1.33 International armed conflicts.** As well as codifying existing principles of customary law, G. P. I also includes new treaty provisions relating to international armed conflicts, some of which have since crystallised into customary international law. Among other things it sets out detailed rules on targeting and the means and methods of warfare and expands on the concept of grave breaches. It also extends the range of persons entitled to combatant status. The definition of international armed conflict is itself expanded to include certain conflicts fought by peoples 'in exercise of their right of self-determination'.

**1.34 Internal armed conflicts.** G. P. II develops and supplements the humanitarian protection provided by Common Article 3 to the Geneva Conventions of 1949 in the context of internal armed conflicts.

**1.35** International law has historically regulated relations between states. A state's internal affairs, including responsibility for the maintenance of law and order and the defence of territorial integrity against domestic insurgents, were largely regarded as within the exclusive jurisdiction of the state concerned. The notion of international law regulating a conflict occurring within a state was generally regarded as being at variance with this approach. However, it is possible for insurgents in an internal armed conflict to be recognised as belligerents and for the LOAC to apply.

**1.36** G. P. II does not apply to the internal use of force against criminal and terrorist activity unless the activity is of such a nature as to amount to armed conflict.

### **Conventional Weapons Convention 1980**

**1.37** The convention has five protocols dealing with:

- the prohibition of the use of weapons the primary effect of which is to injure by fragments which in the human body cannot be detected by X-rays;
- the regulation of mines, booby traps and similar devices;
- the prohibition of the use of incendiary weapons against a military objective located within civilian populated areas and the regulation of the use of other incendiary weapons;
- the prohibition of the use of laser weapons designed to cause permanent blindness; and
- the requirement for each party to an armed conflict to remove and to provide assistance for the removal of explosive remnants of war.



## **Chemical Weapons Convention 1993**

**1.38** This Convention introduces a complete ban on the development, production, stockpiling, retention, transfer or use of chemical weapons. Chemical weapons are those munitions and devices, specifically designed to cause death or harm through the toxic properties of chemicals contained within the weapon which are released as a result of the employment of such munitions and devices. The Convention also includes an undertaking from each signatory country to destroy chemical weapons it owns or possesses and further to destroy any chemical weapons production facilities it owns or possesses.

## **International criminal tribunals**

**1.39** International criminal tribunals were established by the UN Security Council:

- in 1993 to deal with grave breaches of the Geneva Conventions, war crimes, genocide and crimes against humanity committed in the former Yugoslavia since 1991; and
- in 1994 to deal with genocide, crimes against humanity and violations of Common Article 3 of the Geneva Conventions and of G. P. II committed in Rwanda or by Rwandans in neighbouring states in 1994.

## **Ottawa Convention 1997**

**1.40** The Ottawa Convention prohibits the use, development, production, acquisition, stockpiling, retention or transfer of anti-personnel mines and requires the destruction of stocks. It does however, permit the retention of limited stocks for training purposes.

**1.41** The Convention also prohibits the assistance, encouragement or inducement of anyone to engage in an activity prohibited under the Convention. Australia has interpreted 'assistance' to mean actual and direct physical participation in any activity prohibited by the Convention; 'encouragement' to mean the actual request for the commission of a prohibited activity; and 'inducement' as the active engagement in the offering of threats or incentives to obtain the commission of a prohibited activity.

## **International Criminal Court**

**1.42** In 1998 a conference was held in Rome to discuss international criminal law. On 18 July 1998, the conference adopted the 'Rome Statute' of the ICC. The Statute came into force on 01 July 2002. Australia ratified the Statute on the same date and introduced offences covered by the Statute into domestic law under the Commonwealth Criminal Code. The Statute entered

into force for Australia on 01 September 2002. The Court has jurisdiction over genocide, crimes against humanity and war crimes committed after the entry into force of the statute. The statute is discussed and explained in chapter 13.

## Naval warfare

**1.43** Prior to 1945 the conduct of naval warfare was relatively unlimited as to both goals and means. The Hague Conventions of 1899 and 1907 imposed some restrictions upon the methods of warfare employed, but the primary goal of belligerent naval operations was the total destruction of opposing naval units. If armed conflict should occur, traditional rules of naval warfare as modified by the UN Charter and other customary developments will continue to apply.

**1.44** In international conflicts since 1945, naval operations have reflected the limitations inherent in the international law concept of self-defence. The scale of operations and weaponry have normally been adjusted to meet the threat posed. There are still no specific modern conventions or protocols dealing with naval warfare. In most cases requiring the use of force by naval units since 1945, political and legal constraints have dictated a graduated escalation of force in response to threats.

**1.45** The 1982 United Nations Convention on Law of the Sea (UNCLOS) established a comprehensive legal order for the world's oceans. It clarified the regime of the territorial sea, set out navigation rights, recognised claims to exclusive economic zones and created legal provisions for mining the deep seabed as well as for the protection and preservation of the marine environment. Further, it recognised the jurisdictional claims of some coastal and island nations establishing the concept of the archipelagic state. The international legal regime established by UNCLOS has important implications for naval operations. A more detailed explanation of the law with respect to naval operations and the operation of UNCLOS is covered in chapter 6.

**1.46** Another international document of significance in the area of naval warfare is the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. It contains an extensive coverage of maritime issues directly connected with naval warfare. Although not a legally binding document, it represents a restatement of the law in part, and certain provisions of the manual are widely recognised as representing principles of customary international law. The manual was prepared during the period 1988–1994 by a group of legal and naval experts in a series of round table meetings convened by the International Institute of Humanitarian Law. The object of the manual is to provide a comprehensive statement of the international law applicable to armed conflict at sea.

## **Land warfare**

**1.47** The laws relating most specifically to land warfare are covered in chapter 7—‘Land operations and the law of armed conflict’.

## **Air warfare**

**1.48** Aerial bombardment has always been controversial. The first law which dealt with aerial bombardment, the Hague Peace Conference of 1899, simply prohibited the dropping of bombs from balloons. An attempt was made in 1923 to reach international consensus on aerial warfare, but the draft Hague Rules for Aerial Warfare were never formally adopted. During World War II, Royal Air Force Air Marshal Harris believed that in ‘the use of aircraft in war there is, it so happens, no international law at all’. In Vietnam, considerable restraint was placed on United States air power by political directives. Some reasons why these directives were so restrictive are a misunderstanding of the LOAC and a lack of authoritative and practical guidance.

**1.49** More recently, G. P. I and G. P. II particularly have provided guidance. This body of law was applied by air planners of the coalition forces during Operation DESERT STORM in 1991, later in Yugoslavia and Kosovo, and most recently in Iraq. One of the major successes of Operation DESERT STORM was the impressive result of the coalition air effort, conducted in accordance with the LOAC. The application of the LOAC to strike operations is critical because of the potential for these operations to cause heavy and widespread damage.

**1.50** A detailed explanation of the law with respect to air warfare is covered in chapter 8—‘Air operations and the law of armed conflict’.

# **ARMED CONFLICT**

## **International armed conflict**

**1.51** The term ‘international armed conflict’ refers to conflict between nations in which at least one party has resorted to the use of armed force to achieve its aim. It may also include conflict between a nation and an organised and disciplined force such as an armed resistance movement from another nation.

## **Non-international or internal armed conflict**

**1.52** Non-international or internal armed conflict is defined in G. P. II as conflict which takes place within the territory of a nation between its armed forces and dissident armed forces or other organised armed groups which,

under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations. The term does not apply to internal disturbances and tensions such as riots or isolated or sporadic acts of violence.

## **OPERATIONS LAW**

**1.53** Operations law is that domestic and international law associated with planning and execution of military operations in peacetime or during hostilities. It includes but is not limited to the LOAC, human rights law, Australian and foreign domestic law, air law, law of the sea, counter-terrorist activities, overseas procurement, discipline, pre-deployment preparation (wills, power of attorney, etc), deployment (contracts, etc), status of forces agreements, operations against hostile forces, aid to the civil power and civil-military matters (liaison, warning, coordination, etc).

## **ROLE OF THE UNITED NATIONS**

**1.54** In recent years, the increased role of the UN in world trouble spots has raised questions with respect to the application of the LOAC to UN forces operating under a UN mandate. The UN General Assembly has passed a resolution stipulating that principles of the LOAC apply to UN operations. The resolution has been restated in a bulletin issued by the Secretary General of the UN. Australian troops deployed on peace operations are required to observe the principles of the LOAC.

## CHAPTER 2

# PRINCIPLES OF THE LAW OF ARMED CONFLICT

### Executive summary

- The law of armed conflict (LOAC) is based on the three principles of military necessity, avoidance of unnecessary suffering and proportionality.
- Rules of engagement (ROE) provide authoritative guidance on the use of military force by the Australian Defence Force (ADF). They outline and emphasise the critical aspects of the laws of war relevant to a specific mission, and proscribe additional policy and command constraints on the use of military power.

## INTRODUCTION

**2.1** LOAC forms part of a larger body of international law. International law is made up of those principles and rules of conduct that govern states and which they commonly observe in their relations with each other. While the practical application of those principles and rules varies as they are tested against new (and often unforeseen) situations, and the detailed application of the rules is consequently continually evolving, the actual laws, in the majority of cases, are not disputed. LOAC was traditionally categorised as being either Hague Law or Geneva Law, the former relating to the actual means and methods of warfare while the latter related to humanitarian aspects of LOAC. Both these legal streams merged in Additional Protocols I and II; the Protocols have combined the Hague and Geneva Law.

**2.2** The development of LOAC has paralleled military capability developments. As more efficient means and methods of killing and destruction have been developed, LOAC has evolved to try and limit the suffering and damage caused by new weapons and consequent tactics developed to utilise them. The twentieth century, which has seen dramatic advance in weapons technology, has also seen the greatest development of LOAC. This development of LOAC has been influenced by the fact that at the beginning of the century approximately ten per cent of people killed in warfare were non-combatants, compared with 90 per cent in the late twentieth century.

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## BASIC PRINCIPLES OF THE LAW OF ARMED CONFLICT

**2.3** The basic principles underpinning LOAC are:

- military necessity,
- avoidance of unnecessary suffering, and
- proportionality.

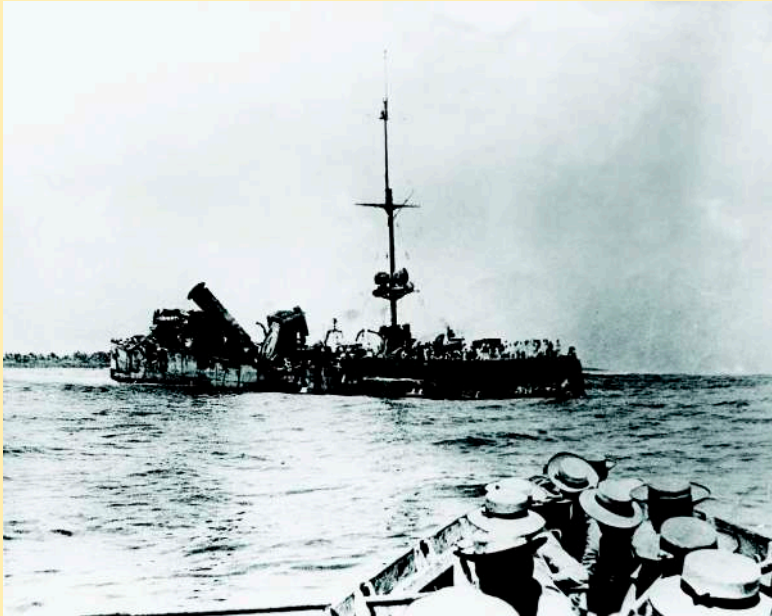
**2.4** Unnecessary suffering is often also referred to as the principle of humanity. Traditionally, chivalry has been included in the list of principles but this is now classified as an element of the principle of unnecessary suffering and is not treated as a separate topic.

**2.5** The three principles must be considered together in that no single principle can be considered in isolation from the other two. In other words, whilst military necessity may justify a particular action, the action may cause unnecessary suffering including civilian death, or damage may be totally disproportionate to the military advantage to be gained. If so, the action should not proceed because the military necessity is outweighed by proportionality and humanitarian considerations.

### **Military necessity**

**2.6** The principle of military necessity states that a combatant is justified in using those measures, not forbidden by international law, which are indispensable for securing complete submission of an enemy at the soonest moment. Military necessity requires combat forces to engage in only those acts necessary to accomplish a legitimate military objective. It permits the killing of enemy combatants and other persons whose death is unavoidable. It permits the destruction of property if that destruction is imperatively demanded by the necessities of war. Destruction of property as an end in itself is a violation of international law. There must be a reasonable connection between the destruction of property and the overcoming of enemy forces. The principle cannot be used to justify actions prohibited by law, as the means to achieve victory are not unlimited. This also reflects the principle of war of **economy of effort**.

### HISTORICAL EXAMPLE—DESTRUCTION VS OVERCOMING ENEMY FORCES



**Figure 2–1: Destruction of SMS EMDEN by HMAS SYDNEY**

Longer-range guns allowed HMAS SYDNEY to systematically demolish the German light cruiser SMS EMDEN. When EMDEN was run up on a reef to avoid capture, SYDNEY unleashed extra salvos. Although his ship had not struck its colours, the captain of EMDEN later accused the opposing captain of inflicting unnecessary casualties on a clearly defeated foe. SYDNEY's Captain maintained he was taking prudent self-protective action against an enemy which had not surrendered. The line was very fine. (source: Australian War Memorial G01442A)

## Unnecessary suffering

**2.7** The principle of avoiding unnecessary suffering forbids the use of means or methods of warfare which are calculated to cause suffering which is excessive in the circumstances. It has also been expressed as averting the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military objectives.

## Proportionality

**2.8** The principle of proportionality provides a link between the concepts of military necessity and unnecessary suffering. In simple terms, the principle generally relates to the reduction of incidental injuries caused by military operations and requires that the losses and damage resulting from military action should be proportionate (ie not be excessive) in relation to the anticipated military advantage. The proportionality principle, together with the unnecessary suffering principle, dictates that civilians should not be made the object of attack, and that while civilian casualties may be an inevitable consequence of an attack, every effort must be made to spare them, and other parties who are non-combatants, from becoming adversely affected.

### **HISTORICAL EXAMPLE—AVOIDING COLLATERAL DAMAGE, AFGHANISTAN 2002–2003**

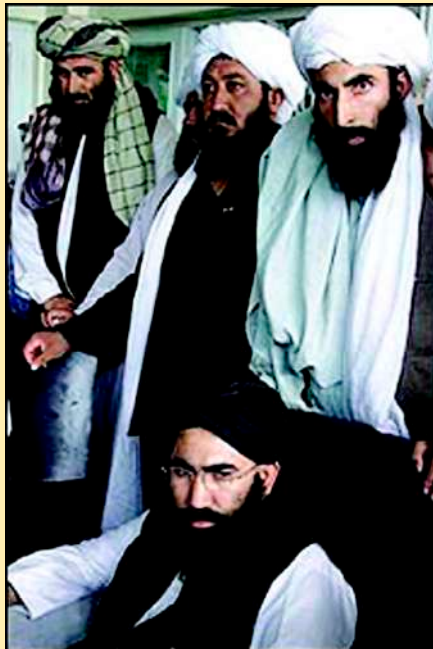
The campaign to remove the Taliban Government and forces from control of Afghanistan occurred at a point in weapons development when over half the air and ship-launched weapons available were precision-guided, surveillance and geopositioning. Coalition armed forces were alert to their responsibilities under the LOAC according to which their ROE were tailored. Yet the civilian casualty rate in Afghanistan was twice that of the bombardment of Serbia in the North Atlantic Treaty Organisation Kosovo operation, despite employing one third of the number of attack sorties and using half the number of weapons. Whilst both sets of figures are remarkably low by standards of previous wars, this raw comparison raises questions on proportionality. Principal factors were:

- **Density of the population and its location in relation to legitimate military targets.** Attacks in Kosovo-Serbia were related either to formed military units or to infrastructure facilities, as opposed to the fairly densely populated areas in which the Taliban made some of its stands.



**HISTORICAL EXAMPLE—(cont)**

- **A major focus in Afghanistan was the leadership.** This meant targeting residences and road convoys, with difficulties of identification and the consequent acceptance of non-combatant casualties as a necessary proportionate risk to achieve the military objective.
- **Unreliable intelligence.** Disinformation was provided by supposed allies anxious to settle scores or eliminate rivals.
- **Elusiveness of targets.** Instead of fixed facilities readily identifiable, the emphasis was on taking fleeting opportunities which might not recur.



**Figure 2–2: Taliban ambassador to Pakistan seated in front of Taliban Militia. The clothing worn by Taliban made it difficult to distinguish them from civilians**

### HISTORICAL EXAMPLE—(cont)

- **Distinction between civilians and combatants.** It was difficult to determine the difference between civilians and combatants as the Taliban did not wear conventional uniforms.

Other factors included the use of high proportion of area bombing, the extra crew fatigue from long carrier-borne turnarounds, and higher release heights of cluster munitions.

The analysis indicates that the raw comparison does not demonstrate either loss of intent to minimise collateral damage or deterioration in technique. Rather it hangs on different operational factors. The 700 000 deaths inflicted by the Soviet Union during their conflict with Afghanistan can be attributed to the type of weapons used, the intention of the Soviets and the fact that the conflict lasted for ten years. Proportionality considerations were observed by the Coalition, and by earlier standards of even the Gulf War, was remarkable for the minimised loss of life of protected persons in such a confused environment. (**source: various**)

**2.9** The principle of proportionality not only requires that an attacker must assess what feasible precautions must be taken to minimise incidental loss, but must also make a comparison between different methods or axes of attack so as to be able to choose the least destructive method or axis compatible with military success. When making that assessment the attacker should naturally take into account likely friendly casualties.

**2.10** Many authoritative writers on the laws of war have put forward the following three principles as encapsulating the concept of proportionality:

- Only that degree and kind of force, not otherwise prohibited by the LOAC, required for the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources may be applied.
- The employment of any kind or degree of force not required for the purpose of the partial or complete submission of the enemy with the minimum expenditure of time, life, and physical resources, is prohibited.
- Dishonourable (treacherous) means, dishonourable expedients, and dishonourable conduct during armed conflict are forbidden.

## **DISTINCTION**

**2.11** Although not a basic principle, distinction is said to be a related principle and seeks to ensure that only legitimate military objects are attacked. Distinction has two components. The first, relating to personnel, seeks to maintain the distinction between combatants and non-combatants or civilian and military personnel. The second component distinguishes between legitimate military targets and civilian objects. Military operations must only be conducted against military objectives, including combatants. Non-combatants and civilian objects are protected from attack, that is, they are not legitimate objects of attack. LOAC therefore requires that belligerents maintain the clear distinction between armed forces and civilians taking no direct part in hostilities; that is, between combatants and non-combatants, and between objects that might legitimately be attacked and those protected from attack.

## **RULES OF ENGAGEMENT AND LAW OF ARMED CONFLICT**

**2.12** ROE provide authoritative guidance on the use of military force by the ADF. ROE are meant to be a brief directive and summary which outline and emphasise the critical aspects of the laws of war relevant to a specific mission or operation rather than a restatement of the law generally. ROE will be issued by Chief of the Defence Force to Chief of Joint Operations (CJOPS). Australian joint force commanders will receive ROE from CJOPS. ROE will take into account legal considerations and so will comply with LOAC.

**2.13** ROE and their relationship with the law are rightly a matter of concern for planners and commanders. ROE do not form part of the law but it is important to clarify their relationship with the law. LOAC determines which actions are lawful and are therefore permissible. Government then places further limitations upon the ADF (for operational, political, diplomatic and legal reasons) and does so by the use of ROE. ROE do not override the inherent right of individual or self defence.

**2.14** ROE are of particular importance for multinational forces operating in the same theatre. It is important for agreement to be reached between the states on the interpretation to be given to the terms of the ROE to ensure they comply with the domestic law of each state and to avoid confusion and inconsistent application of the ROE during the operation.



## CHAPTER 3

# APPLICATION OF THE LAW OF ARMED CONFLICT

### Executive summary

- International agreements or customary international law bind all nations in the law of armed conflict (LOAC).
- The LOAC is binding on individuals and must be applied without discrimination irrespective of which country is the aggressor and without any adverse distinction founded on race, nationality, colour, political, philosophical or religious opinions, or other similar criteria.

### Parties to whom the law of armed conflict applies

**3.1** Nations are bound by the LOAC either by way of an international agreement or under customary international law. Where the LOAC is applicable in a particular conflict it is not only binding on nations but also on individuals, and in particular on the individual members of the armed forces of nations. The LOAC must be applied without discrimination irrespective of which country is the aggressor and without any adverse distinction founded on race, nationality, colour, political, philosophical or religious opinions, sex, language, birth, social standing, wealth or any other criteria.

### United Nations Charter

**3.2** The United Nations (UN) Charter requires all nations to settle their international disputes by peaceful means and to refrain from the threat or use of force against the territorial integrity or political independence of other nations. However, the UN Charter does permit nations to engage in armed conflict in the exercise of the right of individual or collective self-defence against aggression. An example of that right occurred with the initial international response to the armed invasion of Kuwait by Iraq where the UN affirmed 'the inherent right of collective self-defence, in response to the armed attack of Iraq against Kuwait'. In general, the LOAC applies to such conflicts.

### Resort to war

**3.3** A formal declaration of war is not an essential condition for the application of the LOAC. The LOAC applies to any armed conflict (whether there is a declared war or not) and whether or not a state of armed conflict is recognised by all parties to the conflict. The Geneva Conventions also apply to all cases of partial or total occupation of the territory of a party to the Convention, even if that occupation meets with no armed resistance.

## Definition of armed conflict

**3.4** Neither the Geneva Conventions nor Additional Protocols contain any definition of the term ‘armed conflict’ but the following may serve as guidance:

- ‘any difference arising between States [sic] and leading to the intervention of members of the armed forces is an armed conflict’<sup>1</sup>;
- ‘an armed conflict exists whenever there is a resort to armed force between States [sic] or protracted armed violence between governmental authorities and organised armed groups within a State [sic]’<sup>2</sup>.

**3.5** These definitions do not deal with the threshold for an armed conflict. Whether any particular fact situation meets the threshold so as to become an armed conflict will depend on all circumstances surrounding a particular event. For example, the replacing of border police with soldiers or an accidental border incursion by members of the armed forces would not, in itself, amount to an armed conflict. At the other extreme, a full-scale invasion would amount to an armed conflict.

## International armed conflict

**3.6** The LOAC applies to situations of international armed conflict—whether there is an attack or self-defence. What constitutes an attack or self-defence is a matter of fact. Once an attack or self-defence has been identified, the LOAC applies regardless of what political decisions may be made about the official recognition of a state of armed conflict.

**3.7** The operation of the LOAC gives inalienable legal rights to various categories of persons: eg wounded soldiers, civilian women and civil defence personnel. Those rights cannot be diminished or denied for political reasons. The duration and intensity of the conflict are not relevant to whether an armed conflict exists.

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1 Commentary on Common Article 2 of the Geneva Conventions.

2 Decision on the defence motion for interlocutory appeal on jurisdiction by Appeals Chamber in *The Prosecutor v Dusko Tadic* 02 October 1995 IT-94-1 AR72 (RP D6413–D6491).

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**Non-international armed conflict**

**3.8** A non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other; the parties to the conflict are not sovereign states, but the Government of a single state in conflict with one or more armed forces within its territory.

**3.9** The 1949 Geneva Conventions, by Common Article 3, make provision for the application of certain basic humanitarian safeguards during armed conflicts which are not of an international character and which occur in the territory of one of the parties to the Geneva Conventions.

**3.10** Additional Protocol II (G.P.II) develops and supplements Common Article 3 of the Geneva Conventions. Its provisions apply to all armed conflicts that are not covered by Article 1 of Additional Protocol I (G.P.I) and provide for humanitarian treatment in conflicts which take place solely within the territory of a party to the Protocol (an internal armed conflict), and in which its armed forces and dissident armed forces or other organised armed groups under responsible command are involved. The Protocol specifically provides that situations of internal disturbances and tensions such as riots and other isolated and sporadic acts of violence are not armed conflicts.

**Beginning and end of application**

**3.11** The point of commencement of armed conflict is often open to argument, eg there may be no formal declaration of war. Similarly, the precise point at which hostilities are terminated may also be unclear. Although the clearest way of indicating a formal end to hostilities may be by way of a peace treaty, the conclusion of a formal peace treaty may not occur. Armed conflicts may also conclude on the declaration of a general armistice.

### HISTORICAL EXAMPLE—BOUGAINVILLE 1998



**Figure 3–1: Unarmed peacekeeping by negotiation, Bougainville 1998**

The Australian-led multinational Peace Monitoring Group, with contingents from New Zealand, Fiji and Vanuatu, was designed to facilitate a peace earnestly desired, but still mired in long-held mutual animosity and suspicion, both within island factions and with the Papua New Guinea central Government.

A significant aspect of gaining agreement, by avoiding the appearance of an occupying force, was that the peacekeepers were unarmed, there by consent and under protection of the warring parties. The mission was completed successfully in 2003 after five years. (source: *Army Magazine* December 1998)

**3.12** Article 3 of G. P. I does essentially govern, however, when the provisions of the Geneva Conventions and Protocols apply. Article 3 provides that the Conventions and Protocols apply from the beginning of any situation referred to in Article 1 of G. P. I and cease on the general close of operations. The application of the Geneva Conventions and G. P. I will also cease, in the case of occupied territory, on the termination of the occupation, notwithstanding that military operations may have ceased at an earlier time. Persons who continue to remain in the power of an adversary until repatriation will continue to benefit from the relevant provisions of the Conventions and Protocols until their final release, repatriation or re-establishment.



## CHAPTER 4

# WEAPONS

### Executive summary

- Certain weapons are totally prohibited. The blanket prohibitions are based on concerns that the weapons in question are either indiscriminate in their effect or cause unnecessary suffering.
- Legal weapons are limited in the way in which they may be used. They cannot be used indiscriminately, against protected persons or places, or in a manner calculated to cause unnecessary suffering.

## INTRODUCTION

**4.1** Weapons, projectiles, materials and means of warfare which cause unnecessary injury or suffering are not permissible, that is, when the practical effect is to cause injury or suffering which is out of proportion to the military effectiveness of the weapon, projectile, material or means. Limitations on the use of weapons fall into two broad categories, namely:

- prohibited weapons, and
- the illegal use of lawful weapons.

**4.2** Defence Instructions (General) OPS 44–1—*Legal Review of New Weapons* requires legal review of all proposed new weapon acquisitions to determine whether their intended use is consistent with the Australian Government’s obligations under international law. While Australian Defence Force (ADF) members can be confident that their issued weapons do not violate the law of armed conflict (LOAC), care must be taken to ensure that they are used and employed in a manner that complies with the LOAC. Weapon use will be unlawful under the LOAC when it breaches the principle of proportionality by causing unnecessary injury or suffering.

**4.3** In a major or extended conflict, ADF members could be called upon to utilise captured enemy weapons. While the LOAC recognises that such weapons may be used (after enemy markings are removed and provided they do not cause unnecessary injury or suffering), prior command approval should normally be obtained if the captured weapon is not currently in the ADF inventory.

## PROHIBITED WEAPONS

### General

**4.4** Some weapons and weapons systems are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law, are justified on the grounds that the weapons in question are either indiscriminate in their effect or cause unnecessary suffering.

### HISTORICAL EXAMPLE—PROGRESSIVE WEAPONS RESTRICTION

Although the Hague Conventions of 1899 and 1907 proscribed the use of poisonous gases, when Germany initiated chemical warfare in April 1915, free-for-all use resulted in 1.3 million casualties. Similarly the use of flame warfare became a standard option. In 1922 the major powers signatory to the Washington Treaty joined in prohibiting chemical weapons, underpinned in part by the 1925 Geneva Protocol, which prohibited *first* use of chemical and bacteriological weapons, but not their development or production. Although there has been relatively restricted usage of such weapons—Italy in Ethiopia 1935–1936, Egypt in North Yemen 1963–1967 and Iran-Iraq 1983–1988, there was no use in World War II other than by Japan in China 1937–1945. The 1993 Chemical Weapons Convention (CWC) now totally prohibits their use.



**Figure 4–1: Disposal of chemical and biological weapons following the Gulf War 1991**

### HISTORICAL EXAMPLE—(cont)

Parallel strong pressure to limit all 'weapons of mass destruction' has resulted in bilateral moves to reduce arsenals of nuclear weapons by Russia and the United States of America, South African destruction of its nuclear weapons, and pressure on countries attempting to join the nuclear club to desist. This has not been effective with India-Pakistan, and other countries of dubious responsibility have also continued their attempts—Iraq, now forestalled, Iran and North Korea remain serious aspirants and threats. Biological weapons, prohibited under a 1972 convention, also remain an achievable goal for many third world countries, which either do not subscribe to the Protocol or are prepared to flout it. As with chemical weapons, these are in reach of countries with a modest industrial base. Other techniques which were standard up to the Vietnam War, such as incendiary, flame and fragmentary weapons, and blinding lasers, have been restricted by 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).

Anti-personnel mines were targeted for proscription in the 1990s. With over 100 million mines already laid, and an annual rate exceeding the recovery rate by a factor of more than 100, the need for action was clear. Now 147 countries, including Australia, subscribe to the 1997 Ottawa Convention. This Treaty proscribes the use of anti-personnel landmines as a method of warfare. The nations party to the Convention have also committed to an aggressive campaign to destroy existing minefields throughout the world. **(source: various)**

### Indiscriminate weapons

**4.5** It is prohibited to employ weapons which cannot be directed at a specific military objective or the effects of which cannot be limited as required by Additional Protocol I (G.P.I) and are therefore of a nature that they may strike military objectives and civilians or civilian objects without distinction or which may be expected to cause incidental loss to civilians or civilian objects which would be excessive in relation to the military advantage anticipated.

**4.6** G. P. I operates as an effective prohibition on the use of weapons that are so inaccurate that they cannot be directed at a military target. The Scud rockets used during the Gulf conflict of 1990–1991 are examples of weapons likely to be caught by this provision. Further clarification of what constitutes indiscriminate use or effect is covered in chapter 5—‘Targeting’.

### **Weapons calculated or modified to cause unnecessary suffering**

**4.7** Weapons such as irregularly shaped bullets, projectiles filled with broken glass, bullets which have been scored, have had their ends filed, have been altered or which have been smeared with any substance likely to exacerbate a trauma injury are prohibited. ‘Dum dum’ bullets (those with a hard envelope that does not entirely cover the core or which have been pierced with incisions or which have had their points filed off) come within this category of weapon.

### **Poison**

**4.8** Poison or poisoned weapons are illegal because of their potential to be indiscriminate. So, for example, the poisoning or contamination of any source of drinking water is prohibited and the illegality is not cured by posting a notice that the water has been so contaminated or poisoned.

### **Non-detectable fragments**

**4.9** Weapons which cause injury by the use of fragments that are undetectable by X-ray in the human body are prohibited.

### **Exploding small arms projectiles**

**4.10** Bullets or other projectiles weighing less than 400 grams which are either explosive or contain fulminating or inflammable substances (exploding small arms projectiles) are prohibited. It should be noted however, that tracer and incendiary ammunition are not prohibited.

### **Environment altering weapons**

**4.11** Environmental modification techniques having widespread, long lasting or severe effects are prohibited. An example of this is defoliant chemicals used by militaries to deprive the enemy of ground cover or kill food crops. The United States used Agent Orange during the Vietnam War for this purpose. These chemicals are not discriminating and are difficult to contain, often resulting in effects to water supplies and creation of toxins dangerous to humans. Further details are contained in chapter 5.

## **Laser weapons**

**4.12** Under the 1995 Protocol IV of the CCW (CCW P. IV), laser weapons are prohibited from use where they are specifically designed to cause permanent blindness. While CCW P. IV does not prohibit use of lasers for other purposes, precautions must be taken when using laser systems for other purposes in order to avoid causing permanent blindness.

## **Gas**

**4.13** Asphyxiating, poisonous or other gases are prohibited. Smoke grenades, smoke ammunition from indirect fire weapons and tank smoke ammunition, all primarily used to conceal position or movement or mask a target are not prohibited.

## **Bacteriological warfare**

**4.14** Bacteriological methods of warfare are prohibited.

## **Chemical weapons**

**4.15** Under the CWC, States Parties, including Australia, undertake:

*never under any circumstances:*

*to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;*

*to use chemical weapons;*

*to engage in any military preparations to use chemical weapons; and*

*to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under the convention.*

### **Article 1 of the Chemical Weapons Convention**

**4.16** The Convention contains a definition of chemical weapons as follows:

*'chemical weapons' means the following, together or separately:*

*toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;*

*munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in sub-paragraph (a), which would be released as a result of the employment of such munitions and devices; and*

*any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in sub-paragraph (b).*

#### **Article 2 Chemical Weapons Convention**

**4.17** Permitted uses of chemicals include industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; purposes directly related to protection against toxic chemicals and chemical weapons; military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; and law enforcement, including domestic riot control purposes.

**4.18** The CWC also requires States Parties to destroy existing chemical weapons and chemical weapons production facilities. It establishes an Organisation for the Prohibition of Chemical Weapons and contains very detailed provisions for verification, including short notice challenge inspections.

**4.19** The use of riot control agents, including tear gas and other gases which have debilitating but non-permanent effects as a means of warfare is prohibited under the CWC. This does not mean riot control agents cannot be used in times of conflict to maintain order, for example, in a prisoner of war camp, or to contain a riot by the civilian population. Legal advice should be sought on the occasions when their use is considered.

### **Biological weapons**

**4.20** Nations are prohibited from manufacturing, storing and using biological weapons. Both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion. Australia is a party to the international convention prohibiting the development, production and stockpiling of bacteriological (biological) and toxin weapons. As a party, Australia has

undertaken not to develop, produce, stockpile or otherwise acquire or retain biological agents or toxins that have no justification for prophylactic, protective or other peaceful purpose. Further, Australia has undertaken not to develop, produce, stockpile or otherwise acquire or retain weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

## **EXPLOSIVE REMNANTS OF WAR**

**4.21** In 2003 States Parties to the CCW negotiated a new protocol to deal with explosive remnants of war (ERW). After two years of discussions and negotiations by a group of governmental experts, the States Parties to the CCW, including Australia, adopted Protocol V (CCW P. V) on ERW in November 2003. It will enter into force once 20 States Parties have consented to be bound by the protocol.

### **Obligations imposed on States**

**4.22** The Protocol requires each party to an armed conflict to remove and to provide assistance for the removal of these weapons and to take other measures to reduce the threat to civilians. This is the first international agreement to require the parties to an armed conflict to clear all unexploded munitions that threaten civilians, peacekeepers and humanitarian workers once the fighting is over. What characterises CCW P. V is that it provides for both post-conflict remedial measures and preventive measures that aim, in so far as possible, to minimise future risks. Remedial measures mainly include the marking of ERW-affected areas as well as the clearance, removal or destruction of ERW. Although CCW P. V primarily applies to future cases, it also calls upon States Parties to cooperate in the clearance, removal or destruction of existing ERW.

### **Remedial and preventative measures**

**4.23** The Protocol addresses the post-conflict humanitarian problems caused by ERW, by proposing remedial measures of a generic nature, as well as generic preventive measures. It also addresses issues such as: clearance, removal and destruction of ERW, recording, retaining and transmission of information on the (potential) location of ERW, protection of civilians and humanitarian missions, and cooperation and assistance. Its technical annex also includes preventive measures aimed at minimising the occurrence of ERW. States Parties are encouraged to apply these measures when manufacturing, storing, and transferring munitions. As a preventive measure, States Parties have agreed to improve the reliability of munitions in order to minimise the occurrence of ERW.

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## LANDMINES

### Anti-personnel landmines

**4.24** Parties to the Ottawa Convention 1997, including Australia, accept a prohibition on the possession or use of anti-personnel landmines as well as assistance, encouragement or inducement to any other person to possess or use these mines. Members of the ADF will not, however, be guilty of an offence merely by reason of taking part in joint operations with forces of an ally not bound by the Ottawa Convention which deploy landmines.

### Anti-vehicle landmines

**4.25** The use of anti-vehicle landmines is permitted so long as:

- they are not designed to be detonated by mine detectors;
- any anti-handling device is deactivated when the mine deactivates;
- they are either cleared, removed, destroyed, or appropriately maintained after cessation of active hostilities.



## HISTORICAL EXAMPLE—ANTI-PERSONNEL MINEFIELDS



**Figure 4–2: Clearing the anti-personnel minefield, Nui Dat 1969**

In 1967, a barrier minefield of jumping anti-personnel mines, fitted with anti-lift devices, was laid south of the 1 Australian Task Force base, and expected to be protected by the Army Republic of Vietnam troops. This protection did not eventuate, so the minefield became both a lying-up haven at night for passing enemy, and as well a magazine from which to take mines which were used with great success in ambushing Australian forces. Several attempts to clear the minefield safely failed until a system of rollers towed by armoured personnel carriers, fast enough to out-run the hails of ball bearings which had defeated tank mine-clearers, enabled safe and rapid destruction of the mines. Australia now subscribes to the international ban on anti-personnel mines. **(source: Australian War Memorial BEL/69/0575VN)]**

**4.26 Restrictions on use.** The following rules apply to anti-vehicle mines:

- they may only be deployed against or to protect military objectives,
- they may not be directed against civilians,
- indiscriminate use is prohibited,

- feasible precautions must be taken to protect civilians from their effects,
- effective advance warning must be given of any deployment of mines that might affect the civilian population unless circumstances do not permit, and
- mines must not be of a nature to cause superfluous injury or unnecessary suffering.

**4.27 Civilian protection factors.** In considering the protection of the civilian population, regard should be had to the following factors, though these are not exclusive:

- the short and long-term effect of mines on the local civilian population;
- possible measures to protect civilians (for example fencing, signs, warning and monitoring);
- the availability and feasibility of using alternatives to mines; and
- the short and long-term military requirements for a minefield.

**4.28 Self-deactivation.** It is prohibited to use remotely delivered anti-vehicle mines 'unless, to the extent feasible, they are equipped with an effective self-destruction or self-neutralisation mechanism and have a back-up self-deactivation feature, which is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position'<sup>1</sup>.

**4.29 Recording.** The recording of information about minefields, mined areas and mines (as well as booby traps and other devices) is mandatory.

## LIMITATIONS ON LAWFUL WEAPONS

### General

**4.30** All legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used indiscriminately or in such a way as to cause unnecessary injury or suffering. Similarly, non-combatants and those who have not been or are no longer in the fight (sick and wounded, shipwrecked, medical personnel, chaplains and most civilians) must not be targeted.

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1 Article 6 of the CCW Protocol II as Amended.

## **Incendiary weapons**

**4.31** Incendiary weapons include any weapon or munition which is designed to set fire to objects or to cause burn injury to humans through the action of flame, heat or a combination of the two caused by a chemical reaction of a substance delivered on a target. They include flame throwers, shells, rockets, grenades, mines, bombs and other containers of incendiary materials.

**4.32** Incendiary weapons do not include munitions which have incidental incendiary effects such as illuminants, tracers, smoke or signalling devices; nor do they include 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 ammunition in which the incendiary effect is not specifically designed to cause burn injury to humans, but to be used against military objectives such as armoured vehicles, aircraft and installations and facilities.

**4.33** Specific rules prohibit the use of incendiary weapons:

- in all circumstances to attack the civilian population, individual citizens or civilian objects with incendiary weapons;
- in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons;
- to make any military objective located within a concentration of civilians the object of an attack by other than air delivered incendiary weapons, except where the military objective is clearly separated from the civilians and all feasible precautions are taken to minimise incidental loss of civilian life and damage to civilian objects (separation in this context can mean a barrier (such as an air raid shelter or a hill) or distance); and
- on forests or plant cover except when the forests or plant cover are either being used to cover, conceal or camouflage military objectives or are military objectives themselves (if it is necessary to use incendiaries on a forest to clear a field of fire or facilitate an advance or attack against an enemy, the forest has become a military objective and may legitimately be attacked).

## Sea mines

**4.34** There are very few restrictions on the use of sea mines. Sea mines must be able to self neutralise if control over them is lost. Their location must be recorded. They must not be laid in neutral waters and when first laid in the territorial waters of the nation laying them, there must be provision for free exit of neutral shipping located in ports of the nation laying the mines. More detailed discussion concerning sea mines is contained in chapter 6—'Maritime operations and the law of armed conflict'.

## Torpedoes

**4.35** International law prohibits the use of torpedoes that do not sink or otherwise become harmless when they have completed their run.

## Landmines, booby traps and other devices

**4.36** In addition to the specific prohibition on the use of anti-personnel mines, all feasible precautions must be taken to protect civilians from the effects of mines, booby traps and similar devices. They must not be directed at civilians nor may they be used indiscriminately. It is indiscriminate to place them so that they are not on or not directed at a military objective, to use a means of delivery which cannot be directed at a military target, or to place them so that they may be expected to cause excessive collateral damage, that is injury, loss or damage to civilians which is excessive in relation to the concrete and direct military advantage anticipated.

**4.37** Booby traps and similar devices must not be used in areas containing civilian concentrations if combat between ground forces is neither imminent nor actually taking place unless they are placed on, or in the vicinity, of an enemy military objective or there are protective measures for civilians such as warning signs, sentries, fences or other warnings to civilians.

**4.38** The location of all pre-planned minefields and areas in which there has been large scale and pre-planned use of booby traps must be recorded. A record should also be kept of all other minefields, mines and booby traps so that they may be disarmed when they are no longer required.

## Landmines

**4.39** Landmines other than anti-personnel mines, are defined as any munition on, under or near the ground or other surface area and designed to be detonated by the presence, proximity or contact of a vehicle and includes remotely delivered mines, that is, mines delivered by artillery, rocket, mortar or aircraft. Time delayed weapons are not landmines.

**4.40** Remotely delivered landmines can only be used within the area of a military objective if their location can be accurately recorded and they can be neutralised when they no longer serve the military purpose for which they were placed in position. Either each mine must have an effective self neutralising or destroying mechanism or a remotely controlled mechanism designed to render the mine harmless or destroy it. If circumstances permit, effective advance warning should be given where remotely delivered mines are likely to affect civilians.

### **Booby traps**

**4.41** Booby traps are objects that are designed to injure or kill and which explode when a person approaches or disturbs an apparently harmless object or performs an apparently safe act.

**4.42** Booby traps that appear to be apparently harmless portable objects which are specifically designed and constructed to contain explosive material are prohibited. In particular they should not be attached to or associated with:

- internationally recognised protective emblems;
- corpses, casualties or the sick;
- burial, cremation sites or graves;
- medical facilities, equipment, supplies or transportation;
- children's toys or objects designed for feeding, health, hygiene, clothing or education of children;
- food or drink;
- kitchen utensils or appliances (except those in military establishments, locations or supply depots);
- objects of a religious nature;
- historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- animals or their carcasses.

**4.43** Where booby traps are not prohibited, those that are used must not be designed to cause unnecessary injury or suffering.

## Other devices

**4.44** 'Other devices' are manually emplaced munitions and devices designed to kill, injure or damage and which are activated either remotely or by time delay. Restrictions on the use of these other devices are as for landmines and booby traps.

## Nuclear weapons

**4.45** The United Nations General Assembly has condemned nuclear weapons as illegal, although the international community itself is divided on this question. In 1996 the International Court of Justice handed down an advisory opinion on the legality of the threat or use of nuclear weapons determining that '...the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law'. The Court could not however, conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake.

**4.46** The commentary to G. P. I states that 'there is no doubt that during the four sessions of the Conference agreement was reached not to discuss nuclear weapons'. Nevertheless, general humanitarian law principles aimed at limiting unnecessary suffering and protecting the civilian population, as further clarified by G. P. I, must be considered in the employment of all weapons of war, including nuclear weapons. The International Court of Justice took the view that only in cases of extreme necessity, where the very survival of the nation is at stake, would the use of a nuclear weapon possibly be appropriate.

**4.47** In 1985 Australia ratified the Treaty of Rarotonga, which brought into effect the South Pacific Nuclear Free Zone. Pursuant to the terms of this Treaty, Australia has undertaken to prevent the stationing of any nuclear explosive device on Australian territory. The treaty preserves Australia's right to decide whether to allow visits by foreign aircraft or ships which might be either nuclear-powered or nuclear-armed.

## Rockets, missiles and bombardment

**4.48** The LOAC restrictions of proportionality and unnecessary suffering apply to all facets of aerial warfare. With the advent of modern technology many defence forces are now able to deliver weapons with much greater precision. However, nations are not obliged to use only precision munitions; attack by conventional, free-fall weapons or 'dumb' weapons is lawful provided that the overriding the LOAC principles of proportionality and unnecessary suffering and other applicable rules are not violated.

## CHAPTER 5

# TARGETING

### Executive summary

- Targeting must be based on the three principles of the law of armed conflict (LOAC). These are military necessity, avoidance of unnecessary suffering and proportionality.
- Commanders have duties to take care to spare civilians and civilian objects to the maximum extent possible in an armed conflict.

## INTRODUCTION

**5.1** The LOAC will affect military decisions concerning targeting. These may range from what weapons to use against an objective, to whether an object or person is a legitimate military target. Attacks can only be directed against military objectives and all reasonable precautions must be taken to avoid civilian deaths and damage to civilian objects. Due regard must be paid to the principle of proportionality and all feasible precautions must be taken to gather relevant intelligence and ensure attacks are directed against military objectives.

**5.2** This chapter will set out the legal rules applicable to all international armed conflict. Targeting in the three combat environments will be briefly outlined, but the specialised rules governing the conduct of combat on land, at sea and in the air are comprehensively covered in chapter 6—‘Maritime operations and the law of armed conflict’, chapter 7—‘Land operations and the law of armed conflict’ and chapter 8—‘Air operations and the law of armed conflict’ respectively. This chapter also should be considered with chapter 4—‘Weapons’ when making targeting decisions. For the purposes of this publication the following terms are defined:

- **Attacks.** Attacks are defined as acts of violence directed against an adversary. This includes both defensive and offensive operations.
- **Indiscriminate attacks.** Indiscriminate attacks are those:
  - which are not directed against a specific military objective;
  - involve use of a weapon that cannot be directed against a specific military objective; or
  - the effect of which cannot be limited, as required by the LOAC.

An example of an indiscriminate attack would be to bomb a city, town, village or area as though it were a single military objective when it contains a number of separate and distinct military objectives mixed in with a similar concentration of civilians and civilian objects. Similarly an indiscriminate attack is one which is expected to cause incidental loss, injury or collateral damage to civilians or civilian objects which is excessive in relation to the concrete and direct military advantage anticipated as a result of the attack.

- **Collateral damage and incidental injury.** Collateral damage and incidental injury are damage to civilian property and incidental death or injury to civilians respectively which arises out of any attack against a legitimate military objective.

### Targeting principles

**5.3** Targeting is premised on the basic principles set out in chapter 2—‘Principles of the law of armed conflict’. These principles lead to the following rules:

- the right to adopt means of defeating the enemy is not unlimited;
- attacks directed against the civilian population or civilian objects are prohibited; and
- distinction must be drawn between combatants and non-combatants, with every effort being made to avoid involving non-combatants in the conflict.

## APPLICATION OF LAW OF ARMED CONFLICT PRINCIPLES TO TARGETING

### Distinction

**5.4** The LOAC establishes a requirement to distinguish between combatants and civilians, and between military objectives and civilian objects. This requirement imposes obligations on all parties to a conflict to establish and maintain the distinction. Inherent in this requirement, and to make it effective, is the obligation not to use civilians to protect military objectives. Civilians may not be used as shields as the Iraqi President Saddam Hussein threatened to do on the eve of the Gulf War of 1991. Any party who uses civilians in this manner violates international law including its obligations to protect its own civilian population.



## **Military necessity**

**5.5** As detailed in chapter 2, military necessity is one of the fundamental LOAC principles. The four factors critical to adherence to the concept of military necessity are:

- combatants can only use such force as is necessary to achieve a military objective,
- the particular use of such force is not prohibited by the LOAC,
- the use of such force must result in the least expenditure of life and damage to property as is possible under the prevailing circumstances, and
- the force used is regulated by the user.

**5.6** These factors are relevant to targeting decisions particularly if collateral damage is a possibility. While Additional Protocol I (G. P. I) does not define military necessity it does make a number of implied concessions to the principle. Article 51(5) provides, in the context of civilian protection, that unlawful indiscriminate attacks include any:

*... which may be expected to cause incidental loss of civilian life which would be excessive in relation to the concrete and direct military advantage anticipated.*

**Article 51(5) of G. P. I**

**5.7** Despite the use of negative language, the implied concession to military necessity is the recognition that 'the concrete and direct military advantage' to be gained from some attacks might outweigh collateral damage which might otherwise be considered excessive. This is one of the most delicate military judgments demanded of commanders by international law.

## **Unnecessary suffering**

**5.8** Related to the principle of military necessity, and implicitly contained within it, is the principle of unnecessary suffering. This concept forbids any attack on an enemy, which inflicts unnecessary suffering, injury or destruction. The principles applicable are that:

- the force used must not exceed the minimum required to achieve the military objective;
- there must be a valid military objective;

- destruction as an end in itself is prohibited;
- any destruction of property must contribute to the defeat of the enemy; and
- wanton killing and wilful infliction of suffering, as revenge, are prohibited.

## Proportionality

**5.9** Proportionality requires a commander to weigh the military value arising from the success of the operation against the possible harmful effects to protected persons and objects. There must be an acceptable relationship between the legitimate destruction of military targets and the possibility of consequent collateral damage.

**5.10 Additional Protocol I and proportionality.** In relation to G. P. I, Australia has made a declaration to the effect that the Australian Government's understanding is that references to military advantage in Articles 51(5)(b) and 57 mean:

*the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack.*

**5.11** In addition, the declaration makes it clear that military advantage involves a number of considerations, including the security of attacking forces. The Australian Government's Declarations of Understanding also recognise that Australian Defence Force (ADF) commanders will, by necessity, have to reach decisions on the basis of their assessment of the information available to them at the relevant time. Australia's Declarations of Understanding to the Additional Protocols are in annex A.

## PERSONNEL

### Combatants

**5.12** For the LOAC purposes people are either combatants or non-combatants. Subject to the exceptions below, combatants are legitimate targets for attack whereas non-combatants are not. Combatants comprise all organised armed forces, groups and units (except medical service and religious personnel) which are under the command of a party to a conflict and are subject to an internal disciplinary system, which enforces compliance with the LOAC. Where persons are not members of armed forces, they must also have a fixed distinctive sign recognisable at a distance and carry arms openly.

**5.13 Enemy identification.** A member of the armed forces does not lose combatant status merely by operating covertly or as a guerrilla. That is, while combatants are normally expected to distinguish themselves from the civilian population by wearing a uniform, the LOAC recognises that they do not have to wear a uniform on operations to retain their status as combatants. This is conditional on combatants who cannot so distinguish themselves because of the nature of hostilities, openly carrying arms during:

- each military engagement, and
- at such times as they are visible to the adversary while engaged in a military deployment preceding the launching of an attack in which they are to participate.

**5.14 Levee en masse.** Where the inhabitants of a country or territory spontaneously ‘take up arms’ to resist an invader, the LOAC recognises them as combatants provided they do so when there has not been time to form themselves into units and they respect the LOAC. Individuals acting on their own are not entitled to combatant status nor the benefits or detriment flowing from that status.

**5.15 Saboteurs.** Targeting and the LOAC aspects with respect to saboteurs, spies and espionage are covered in paragraphs 7.18 to 7.26.

**5.16 Significance of combatant status.** The significance of combatant status is that, subject to the qualifications listed in paragraphs 5.17 to 5.24, combatants are liable to attack and, if captured, must be treated as prisoners of war (PW). Further, they receive immunity for their lawful warlike acts and must be repatriated at the end of a conflict.

**5.17 Terrorists.** Terrorists do not comply with the LOAC and are not accorded combatant status. They are not entitled to PW status. While they are entitled to minimum standards of humane treatment, they are fully accountable for actions and will face punishment for violations of international and domestic laws.

## **Non-combatants**

**5.18** Non-combatants may not be attacked, although the LOAC recognises that, in certain circumstances, unavoidable non-combatant casualties may occur during operations.

**5.19** PW, military personnel who are surrendering or attempting to surrender, and those who are wounded or sick must not be attacked. The basic principle is that any combatant who is hors de combat<sup>1</sup>, whether by choice or circumstance, is entitled to be treated as a PW provided they refrain from any further participation in hostilities.

## Prisoners of war

**5.20** Protected from the moment of their surrender or capture, PW must not be made the object of attack or reprisals. Similarly, PW camps and any transports used to convey PW are protected and may not be attacked. Military commanders should also ensure that PW are not located near military objectives and that they mark PW camps and transports with the protective distinctive emblem shown in annex A to chapter 9—‘Protected persons and objects’. Chapter 10—‘Prisoners of war and detained persons’ contains a full description of the responsibilities associated with the care of PW and detained persons.

**5.21 Civilians.** Civilians must be protected from the dangers of military operations. They must not be the object of attack nor of acts or threats of violence which are intended to create terror. They must not be subjected to indiscriminate attacks. Further treatment of civilians is covered in paragraphs 5.33 to 5.42.

**5.22 Refugees and displaced persons.** The situation of refugees and internally displaced persons in wars and civil wars raises significant legal issues encompassing elements of human rights and refugee law as well as the laws of war. Refugees and displaced persons are civilians and as such are protected persons and must be afforded corresponding protection.

**5.23 Medical personnel.** Included in the category of non-combatants are all medical personnel. They are protected so long as they do not participate in hostilities. The carriage of light individual weapons for self-defence or for defence of wounded or sick in their care is not considered participation. Medical personnel include persons on the permanent staff of medical establishments and any person temporarily assigned to medical duties such as soldiers who are carrying wounded from the battlefield. The underlying principle is that care of the wounded and sick (who are now non-combatants) is paramount and nothing should interfere with that care.

**5.24 Religious personnel.** Religious personnel, including military chaplains, are protected persons in the same way as are medical personnel. Religious personnel who participate directly in combat operations lose their protected status.

**5.25 Civil Defence personnel.** People assigned exclusively to civil defence tasks, administration and transport are protected persons.

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1 A person is hors de combat if they are ‘out of combat’. Paragraph 7.8 provides a full definition.

## MILITARY OBJECTIVES

**5.26** Only military objectives are legitimate objects of attack. During an armed conflict, and subject to the overriding considerations of proportionality and unnecessary suffering, the ADF may target any military objective.

**5.27** The term 'military objective' includes combatant members of the enemy armed forces and their military weapons, vehicles, equipment and installations. It may include other objects that have military value such as bridges, communications towers, electricity and refined oil production facilities. Objects are however, only military objectives if they come within the following definition:

'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'. (Article 52 (2) G. P. I)

**5.28** These criteria require commanders and others planning, deciding on or launching attacks to exercise their discretion. In doing so they must necessarily reach their decisions on the basis of their assessment of the information from all sources which is practicably available to them at the relevant time.

**5.29** The taxonomy of defining of military objectives contains a number of elements:

- The second part of the definition limits the first. Both parts must apply before an object can be considered a military objective.
- **Nature** refers to the type of object, for example, military transports, command and control centres or communications stations.
- **Location** includes areas which are militarily important because they must be captured or denied to the enemy or because the enemy must be made to retreat from them. An area of land can, thus, be a military objective.
- **Purpose** means the future intended use of an object while 'use' means its present function.
- The words **nature, location, purpose or use** seem at first sight to allow a wide discretion, but they are subject to the qualifications later in the definition of 'effective contribution to military action' and the offering of 'a definite military advantage'. There does not have to be geographical proximity between 'effective contribution' and 'military advantage'. That means that attacks on military supply dumps in the rear or diversionary attacks, away from the area of actual military

operations, can be launched.

- **Military action** means military action generally, not a limited or specific military operation.
- The words **in the circumstances ruling at the time** are important. If, for example, the enemy moved a divisional headquarters into a disused textile factory, an attack on that headquarters would be permissible (even though the factory might be destroyed in the process) because of the prevailing circumstances. Once the enemy moved their headquarters away, the circumstances would change again and the protection of the factory as a civilian object would be restored.
- **Definite** means a concrete and perceptible military advantage rather than a hypothetical and speculative one.
- The **military advantage** anticipated from an attack refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack. The advantage need not be immediate.

**5.30** The presence of non-combatants, including civilians, in or around a military objective does not change its nature as a military objective. Non-combatants in the vicinity of a military objective must share the danger to which the military objective is exposed. Attacks on military objectives that cause incidental loss or damage to civilians are not prohibited as long as the proportionality rule is complied with.

**5.31** Military objectives may include a very wide range of persons, locations and objects. Some examples are:

- military equipment, units and bases;
- power stations, industry and transport facilities which support military operations;
- facilities which support or enhance command and control, such as communications facilities;
- all persons taking a direct part in hostilities, whether military or civilian;
- civilian aircraft, vessels, vehicles and buildings which contain combatants, military equipment or supplies;
- transportation systems for military supplies, transportation centres where lines of communication converge, rail yards, industrial installations producing materiel for combat forces, fuel dumps and

- distribution centres supplying military users, industrial installations that repair and replenish lines of communication and other economic targets the destruction, capture or neutralisation of which offers a definite military advantage;
- economic targets that indirectly but effectively support operations are also military objectives if an attack will gain a definite military advantage;
  - areas of land which are of direct use to defending or attacking forces, eg land through which an adversary is likely to move its forces or which may be used as a forming up point preceding an attack; and
  - objects, normally dedicated to civilian purposes, but which are being used for military purposes, eg a school house or home which is being used temporarily as a battalion headquarters.

**5.32** In cases of doubt whether objects which are normally dedicated to civilian purposes, such as a church, are being used to make an effective contribution to military action, they are presumed to be civilian objects.

## CIVILIANS AND CIVILIAN OBJECTS

### Definitions

**5.33** Under G. P. I a civilian is 'any person who is not a member of the armed forces'. Similarly, the civilian population comprises all persons who are 'civilians'. In cases of doubt about civilian status, the benefit of the doubt must be given to the person concerned. A civilian has no general right to take part in hostilities.

**5.34** G. P. I defines 'civilian objects' as all objects which are not military objectives. In cases of doubt about whether an object, normally dedicated to civilian purposes, is being used to make an effective contribution to military action, the presumption is that it is a civilian object. For this purpose, 'use' does not necessarily mean occupation. For example, if enemy soldiers use a school building as shelter from attack by direct fire, then they are clearly gaining a military advantage from the school. This means the school becomes a military objective and can be attacked.

### Protection of civilians and civilian objects

**5.35** There is a fundamental rule that parties to a conflict must direct their operations only against military objectives. G. P. I expressly provides that the civilian population and civilian objects are to be protected against attack.

Acts or threats of violence primarily intended to spread terror among the civilian population are prohibited. Reprisal actions against civilians are also prohibited.

### HISTORICAL EXAMPLE—TERRORIST ATTACK IN BALI



**Figure 5–1: Result of the terrorist attack, Bali 2002**

The attack on the Sari nightclub with the clear intention of causing maximum civilian casualties was part of the unfolding attack of Jemaah Islamiah extremists on western interests. Attacking civilians demonstrates a flagrant disregard for the essential principle that civilians shall not be made the object of attack. The ability of civilised nations to respond to acts of terrorism represents one of the great challenges of our time. **(source: various)**

**5.36** Civilians are only protected as long as they refrain from taking a direct part in hostilities. Whether or not a civilian is involved in hostilities is a difficult question, which must be determined by the facts of each individual case. Civilians bearing arms and taking part in military operations are clearly taking part in hostilities; civilians working in a store on a military air base may not necessarily be taking such a direct part. However, stores depots, supply columns and military installations are clearly military objectives which may be attacked, regardless of the presence of civilian workers.



**5.37** Towns, villages, dwellings or buildings which are undefended are also protected from attack. Starvation of the civilian population as a method of warfare is forbidden. G. P. I expressly forbids attacks against objects that are indispensable to the survival of the civilian population. Examples given in the Protocol are: foodstuffs, agricultural areas, crops, livestock and drinking water installations. This prohibition relates to attacks made for the specific purpose of denying these items to the civilian population. Collateral damage to foodstuffs is not a violation of the rules as long as the intention was to gain a military advantage by attacking a military objective.

### **Collateral damage**

**5.38** Collateral damage may be the result of military attacks. This fact is recognised by the LOAC and, accordingly, it is not unlawful to cause such injury and damage. The principle of proportionality dictates that the results of such action must not be excessive in light of the military advantage anticipated from the attack.

**5.39** Commanders must take all practicable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to a minimum consistent with mission accomplishment. This is one of the most difficult decisions a commander will make and one of the most difficult to describe. The commander is required to make a reasonable and honest effort to minimise civilian injuries and damage after they have considered all the available information, and the requirement to complete the mission. Further guidance is set out in G. P. I and specialist legal advice may need to be sought when making targeting decisions which may cause collateral damage.

## **OBJECTS AFFORDED SPECIAL PROTECTION**

**5.40** Protected persons, objects and localities must not be attacked. Protected persons are those categories of persons classified as non-combatants described in paragraphs 5.18 to 5.25. Particular classes of protected objects are described below.

### **Medical units and facilities**

**5.41** Medical units, materials and means of transportation are protected. This applies to any form of medical transportation, whether by sea, land or air. Medical units include hospital ships. Medical materials are any equipment and supplies which are exclusively used for the benefit of the wounded and sick. Civilian medical facilities are entitled to the same protection as military medical units. Military commanders should ensure that medical units and facilities are situated such that they are not endangered by military attacks.

**5.42** The distinctive Red Cross, Red Crescent or Red Crystal<sup>2</sup> should be clearly displayed on all these facilities. If medical facilities are used for military purposes, inconsistent with their humanitarian purposes, the right to special protection is lost. Any medical facility is protected regardless of whether it is marked with a Red Cross, Red Crescent or Red Crystal. These distinctive protective symbols are shown in chapter 9, annex A. Chapter 10 has further guidance on medical units and their protection.

**5.43** Transports of wounded and sick or of medical equipment shall be respected and protected in the same way as mobile medical units. Should such transports or vehicles fall into the hands of the adverse party, they shall be subject to the laws of war, on condition that the party to the conflict who captures them shall in all cases ensure the care of the wounded and sick they contain.

**5.44** Medical aircraft, that is, aircraft exclusively employed for the removal of wounded and sick for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, at times and on routes specifically agreed upon between the belligerents concerned. These aircraft should bear clearly marked, distinctive emblems, together with their national colours on their upper and lower surfaces.

### **Religious, cultural and charitable buildings and objects**

**5.45** Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be attacked, provided they are not used for military purposes. It is the responsibility of the local population to ensure that such buildings are clearly marked with the distinctive emblem. These emblems are also shown in chapter 9, annex A.

**5.46** Cultural property is generally protected. This includes, but is not limited to, all buildings, locations, manuscripts, objects, works of art, archives, archaeological sites, historical documents and book collections which have any cultural significance. Also included in this category are places of worship which constitute the cultural or spiritual heritage of people.

**5.47** Religious objects, including articles of a religious character and objects or equipment used exclusively by military religious personnel.

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2 In 2005 a third additional protocol to the Geneva Conventions introduced the 'Red Crystal' as another protective symbol for the purposes of the Geneva Convention.

## Civil defence establishments

**5.48** Establishments and transport used exclusively for civil defence tasks, where organised and authorised by governmental authorities are also protected. Civil defence establishments should bear the distinctive international emblem which is shown in chapter 9, annex A. Chapter 10 has further guidance on the protection of civil defence personnel and facilities.

## Dams, dykes and nuclear power stations

**5.49** Dams, dykes and nuclear power stations may not be made the object of an attack if such attack may cause the release of dangerous forces and consequent severe losses amongst the civilian population. This is the position even if such installations are military objectives. Such objects should be identified using the distinctive emblems shown in chapter 9, annex A. Failure to display the emblem does not remove the protection afforded the installation. In exceptional circumstances, the protection ceases if the installation is used in 'regular, significant and direct support of military operations'. In any case, such an attack must be the only feasible way to stop the support, and any such attack would be approved at the highest command level.

## Environment

**5.50** Those responsible for planning and conducting military operations have a duty to ensure that the natural environment is protected. Specific rules are in effect which protect the environment. In addition, the environment remains under the protection and authority of customary international law, principles of humanity and dictates of public conscience. Some of the specific rules are shown below:

- The natural environment is not a legitimate object of attack. Destruction of the environment, not justified by military necessity, is punishable as a violation of international law.
- It is prohibited to employ methods or means of war which cause widespread, long term and severe damage to the environment or may be expected to cause such damage and prejudice the health or survival of the population.
- The general prohibition on destroying civilian objects, unless justified by military necessity, also protects the environment.
- Attacks on forests or other types of plant cover with incendiary weapons are prohibited, unless such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

- It is prohibited to use environmental modification techniques, ie any technique for changing, through deliberate manipulation of natural process, the dynamics, composition or structure of the earth; including its biota (plant or animal life), lithosphere, hydrosphere and atmosphere, or of outer space; having widespread, long lasting or severe effects as the means of destruction, damage or injury to an enemy.
- Attacks against the environment by way of reprisal are prohibited.
- In times of armed conflict, parties to the conflict shall facilitate and protect the work of impartial organisations contributing to the prevention of damage, or repair of damage to the environment (eg civil defence organisations). This shall be done by agreement between the parties to a conflict or with the permission of a party to a conflict. Any such work shall be done with due regard to the security interests of the party concerned.
- In the event of breaches to the rules protecting the environment, commanders are required to stop the violations, take action to prevent further breaches and report violations to higher authority so further action can be taken.

## OFFENSIVE SUPPORT AND STRIKE OPERATIONS

**5.51** Offensive support and strike operations include the use of naval gunfire support, fire support from any ground-based weapon system other than small arms and any air strike. In the Geneva Conventions and Protocols the use of these types of weapons and weapons systems is referred to as bombardment. Because of their potential to cause collateral damage, commanders should take particular care when carrying out offensive support or strike operations.

**5.52** In order to ensure that any combat action complies with the LOAC, there are a whole range of matters which must be considered in the targeting process but are also relevant to the planning of any type of military attack. These factors will influence the choice of axes, objects of attack, and the siting of defences, and include:

- clear identification of persons, objects or locations to be attacked to ensure as little risk as possible to protected persons, objects and locations, consistent with military advantage;
- a concrete and direct military advantage in any proposed course of action;
- the least possible collateral damage; and

- prohibitions on the use of weapons, projectiles or other means and methods of warfare that cause superfluous injury or unnecessary suffering.

### **Precautions in attack**

**5.53** Attacks must only be made against military objectives. All reasonable precautions must be taken to avoid injury, loss or damage to civilians and civilian objects and locations. It is therefore important to obtain accurate intelligence before mounting an attack. While the LOAC recognises that civilian casualties are unavoidable at times, a failure to take all reasonable precautions to minimise such damage may lead to a breach of those laws. The same principles apply to the risk of damage or injury to any other protected persons, places and objects.

**5.54** Accordingly, the best possible intelligence is required concerning:

- concentrations of civilians;
- civilians who may be in the vicinity of military objectives;
- the nature of built-up areas such as towns, communities, shelters, etc;
- the existence and nature of important civilian objects and specifically protected objects; and
- the environment.

**5.55** Civilians who are not directly involved in combat but are performing military tasks are not combatants. If they are killed or injured during an attack on a legitimate military objective there is no breach of the LOAC provided the death or injury is not disproportionate to the direct and concrete military advantage anticipated from the attack. The presence of civilians on or near the proposed military objective (either in a voluntary capacity or as a shield) is one of the factors that must be considered when planning an attack.

**5.56** When a planned attack is likely to affect the civilian population, those making the attack are required to give, if practicable, effective advance warning of the attack to the authorities or civilian population. This requirement must obviously be applied in a commonsense manner in light of all other factors. If the proposed action is likely to be seriously compromised by a warning then there is no requirement to provide any warning.

## **Axis of attack**

**5.57** Objects and axes of attack should be chosen to minimise collateral damage wherever possible. Where a similar military advantage may be gained by attacking any one of several military objectives, the attack should be made against the objective that is likely to cause the least collateral damage. The same principle applies to choosing axes of advance or attack where more than one practicable and reasonable axis is available.

## **Defensive locations**

**5.58** Defences and defensive positions should also be sited, if practicable, to avoid or minimise collateral damage. Ideally, all military objectives, including defensive positions, should be sited outside heavily populated areas. As in offensive operations, where a location or object may be equally successfully defended from any one of several defensive positions, the LOAC requires that the defence should be conducted from the position which would cause the least danger to civilians and civilian objects.

## **Terrorisation of civilian population**

**5.59** Offensive support or strike operations against the civilian population for the sole purpose of terrorising the civilian population is prohibited.

## **Non-lethal bombardment**

**5.60** The use of non-lethal technologies for bombardment is permitted if the technologies used and results expected comply with the general protection afforded the civilian population, non-combatants and civilian objects under the LOAC. In addition, they must accord with any other LOAC rules which may impact on the use of chemical or biological agents. In the past, a common and successful tactic has been the use of radio broadcasts and pamphlet drops for propaganda purposes as part of psychological operations. These are permitted.

# **DUTIES OF AUSTRALIAN DEFENCE FORCE COMMANDERS**

**5.61** One of the most significant consequences of G. P. I has been the emphasis placed on commanders to comply with the LOAC. The Protocol reminds commanders that, in the conduct of military operations, constant care must be taken to spare the civilian population and civilian objects to the maximum extent possible. This includes:

- removing civilians and civilian objects from the vicinity of military objectives;

- refraining from locating military objectives within or near densely-populated areas;
- taking precautions to protect civilians and civilian objects from the dangers of military operations;
- doing everything feasible to verify that objects being attacked are military objectives;
- taking all feasible precautions, in the choice of means and methods of attack, to minimise collateral damage; and
- refraining from launching any attack which may be expected to cause collateral injury, or collateral damage, which would be excessive in relation to the concrete and direct military advantage anticipated.

**5.62** While some of the above obligations rest primarily on civilian authorities, the commander's responsibility is to protect those civilians under their control, and those who may be affected by any attacks that they plan or carry out. As a part of a targeting process, a targeting directive will be issued for operations by the Chief of the Defence Force. The targeting directive will include a number of steps outlining the methodology of the LOAC underlying targeting decisions. These steps would include:

- locate and observe the potential target,
- assess the target as a valid military objective and otherwise unprotected by the LOAC,
- take all necessary means to minimise collateral damage,
- assess collateral damage as proportional,
- release weapon to achieve best possible chance of impacting the selected aim point commensurate with the tactical situation, and
- cancel or suspend the attack should it become apparent that the assessment made under dot points 2 and 4 are no longer valid.

**Annex:**

- A. Australia's Declarations of Understanding to the Additional Protocols





## **AUSTRALIA'S DECLARATIONS OF UNDERSTANDING TO THE ADDITIONAL PROTOCOLS**

1. In depositing its instrument of ratification for Protocol 1, Australia hereby makes declarations of understanding in relation to Articles 5, 44 and 51 to 58 inclusive of the said Protocol.

2. It is Australia's understanding that in relation to Article 5, with regard to the issue whether, and in what measure, Protecting Powers may have to exercise any functions within the combat zone (such as may be implied by provisions in Parts II and IV of the Protocol), the role of the Protecting Power will be of a like character to that specified in the First and Second Conventions and Part II of the Fourth Convention, which apply mainly to the battlefield and its immediate surroundings.

3. It is the understanding of Australia that in relation to Article 44, the situation described in the second sentence of paragraph 3 can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1. Australia will interpret the word 'deployment' in paragraph 3(b) of the Article as meaning any movement towards a place from which an attack is to be launched. It will interpret the words 'visible to the adversary' in the same paragraph as including visible with the aid of binoculars, or by infra-red or image intensification devices.

4. In relation to Articles 51 to 58 inclusive it is the understanding of Australia that military commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time.

5. In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the 'military advantage' are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term 'military advantage' involves a variety of considerations including the security of the attacking force. It is the further understanding of Australia that the term 'concrete and direct military advantage anticipated', used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.

6. It is the understanding of Australia that the first sentence of paragraph 2 of Article 52 is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective.



## CHAPTER 6

# MARITIME OPERATIONS AND THE LAW OF ARMED CONFLICT

### Executive summary

- Hostile actions by naval forces may be conducted in, on or over the territorial sea and internal waters, the land territories, the exclusive economic zone (EEZ), continental shelf and, where applicable, the archipelagic waters of belligerent states; on the high seas; and in the EEZ, contiguous zone and continental shelf of neutral states.
- Rights of passage and activities in various maritime zones vary depending on the type of passage, the nature of the vessel, and the status of the state, whether neutral or belligerent, controlling the water.
- All efforts must be made to search for and rescue the shipwrecked, wounded and sick.

## INTRODUCTION

**6.1** The purpose of this chapter is to state the legal rules governing the conduct of hostilities at sea. The parties to an armed conflict at sea are bound by the principles and rules of International Humanitarian Law (IHL), already expounded in chapter 2—‘Principles of the law of armed conflict’.

**6.2** The principles of necessity and proportionality apply equally to armed conflict at sea and require that the conduct of hostilities by a state should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict (LOAC), required to repel an armed attack against it and restore its security.

## DEFINITIONS

**6.3** For the LOAC purposes, the following definitions additional to those included in the glossary apply. The definitions are sourced from the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

### Archipelagic sea lanes passage

**6.4** An archipelagic state may designate archipelagic sea lanes suitable for continuous and expeditious transit by vessels and aircraft through and over the archipelago. Such sea lanes are defined by axis lines. Ships and

aircraft are not to deviate more than 25 nautical miles on either side of such axis lines, except in congested areas where this amount of sea room is not available, ships and aircraft must not navigate closer to the coast than 10 per cent of the distance between the nearest bordering islands. All vessels and aircraft may exercise the right of archipelagic sea lanes passage through these sea lanes. (The right of archipelagic sea lanes passage is the right to conduct continuous and expeditious transit of the archipelago in the normal mode of operation observing the same conditions applicable to transit passage through straits used for international navigation). Where an archipelagic state has not designated archipelagic sea lanes, the right of archipelagic sea lanes passage may be exercised through all routes normally used for international navigation. Archipelagic sea lanes passage may not be suspended or obstructed by the archipelagic state.

### **Archipelagic state**

**6.5** An archipelagic state is a nation consisting wholly of islands and which meets certain established criteria in UNCLOS.

### **Auxiliary vessel**

**6.6** An auxiliary vessel is a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a state and used for the time being on government non-commercial service.

### **High seas**

**6.7** High seas are those waters seaward of declared territorial waters and EEZ.

### **Innocent passage**

**6.8** All vessels may exercise the right of innocent passage in the territorial seas of foreign nations. The right of innocent passage entitles a vessel to traverse a foreign nation's territorial sea continuously and expeditiously without entering internal waters unless it is proceeding to or from internal waters. Submarines are to navigate on the surface and fly state flag. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Activities inconsistent with innocent passage include:

- the threat or use of force against the territorial integrity or political independence of the coastal state;
- any exercise or practice with weapons;
- intelligence collection activities;

- the carrying out of research or survey activities;
- the launching, landing or taking on board of military devices or aircraft;  
or
- any other activity not having a direct bearing on passage.

Innocent passage may be temporarily suspended by the coastal state in specified areas of the territorial sea if such suspension is essential for the protection of its security. Innocent passage does not apply to aircraft.

### **Innocent passage in archipelagic waters**

**6.9** Vessels transiting archipelagic waters outside archipelagic sea lanes or routes normally used for international navigation, as the case may be, have the right of innocent passage through these waters. This right of innocent passage may be temporarily suspended by the coastal state for reasons essential to the protection of its security, including weapons practice and military exercises. Such a temporary suspension must be published in 'Notices to Mariners'.

### **International waters**

**6.10** International waters include all areas of the ocean not subject to territorial sovereignty. All waters seawards of the territorial sea are international waters in which high seas freedoms of navigation and overflight apply. International waters thus include contiguous zones, EEZ and the high seas.

### **Vessel**

**6.11** Every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water.

### **Warship**

**6.12** A warship is a ship belonging to the armed forces of a state bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of that state and whose name appears in the appropriate Service list or its equivalent, and manned by a crew which is under armed forces discipline.

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## AREAS OF NAVAL OPERATIONS

### General area of naval operations

**6.13** Hostile actions by naval forces may be conducted in, on or over:

- the territorial sea and internal waters, the land territories, the EEZ, the continental shelf and, where applicable, the archipelagic waters of belligerent states;
- the high seas; and
- the EEZ, the contiguous zone and the continental shelf of neutral states (see chapter 11—‘Rights and duties of neutrals’).

**6.14** In carrying out operations, commanders should endeavour to avoid conducting hostile actions in marine areas containing:

- rare or fragile ecosystems; or
- the habitat of depleted, threatened or endangered species or other forms of marine life.

**6.15** In carrying out operations in areas where neutral states enjoy sovereign rights or jurisdiction, belligerents shall have due regard for the legitimate rights and duties of those neutral states (see chapter 11).

### Immediate area of naval operations

**6.16** Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. Neutral vessels and aircraft which fail to comply with a belligerent’s orders expose themselves to the risk of being fired upon or captured. This traditional belligerent right to control neutral vessels and aircraft in the immediate area or vicinity of naval operations should be distinguished from the concept of exclusion zones (EZ).

**6.17** Within the immediate area or vicinity of naval operations, a commanding officer of a belligerent warship may exercise control over the communications of any neutral merchant vessel or aircraft whose presence might otherwise endanger the success of the belligerent operation. Legitimate distress communications by neutral vessels and aircraft should be permitted if they do not prejudice the success of operations.

## PASSAGE RIGHTS DURING ARMED CONFLICT AT SEA

### Internal waters, territorial sea and archipelagic waters

**6.18** Neutral waters consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters of neutral states. Within and over neutral waters, including neutral waters comprising an international strait and waters in which the right of archipelagic sea lanes passage may be exercised, hostile actions by belligerent forces are forbidden. Hostile actions for this purpose include:

- attack on or capture of persons or objects located in, on or over neutral waters or territory;
- use as a base of operations, including attack on or capture of persons or objects located outside neutral waters, if the attack or seizure is conducted by belligerent forces located in, on or over neutral waters;
- laying of mines; and
- visit, search, diversion or capture.

These prohibitions on hostile actions by belligerent forces in neutral waters do not include the exercise of the right of unit self-defence when units are subjected to a hostile act or demonstration of hostile intent. In such circumstances proportionate use of force in self-defence may be exercised no matter where a unit finds itself.

**6.19** In addition, belligerent forces may not use neutral waters as a sanctuary.

**6.20** A neutral state may, without discrimination, place conditions on, restrict or prohibit the entrance to or passage through its internal waters, territorial waters and archipelagic waters outside archipelagic sea lanes by belligerent warships and auxiliary vessels. A neutral state may also, without jeopardising its neutrality, permit within its neutral waters:

- passage through its territorial sea and where applicable its archipelagic waters, by warships, auxiliary vessels and prizes of belligerent states;
- replenishment by a belligerent warship or auxiliary vessel of its food, water and fuel sufficient to reach a port in its own territory; and
- repairs of belligerent warships or auxiliary vessels found necessary by the neutral state to make them seaworthy but not to restore or increase their fighting strength.

**6.21** A belligerent warship or auxiliary vessel may not extend the duration of its passage through neutral waters, or its presence in those waters for replenishment or repair, for longer than 24 hours unless unavoidable on account of damage or weather.

### **International straits and archipelagic sea lanes**

**6.22** The rights of transit passage and archipelagic sea lanes passage applicable to international straits and archipelagic waters in peacetime continue to apply in time of armed conflict. Belligerent and neutral surface ships, submarines in normal mode and aircraft have the rights of transit passage and archipelagic sea lanes passage through, under and over all straits and archipelagic waters to which these rights apply. Neutral states may not suspend, hamper or otherwise impede the right of transit passage nor the right of archipelagic sea lanes passage.

**6.23** A belligerent in transit passage through, under or over a neutral international strait, or in archipelagic sea lanes passage through, under or over neutral archipelagic waters, is required to proceed without delay, to refrain from the threat or use of force against the territorial integrity or political independence of the neutral littoral or archipelagic state and otherwise to refrain from any hostile actions or other activities not incidental to their transit.

**6.24** Belligerents passing through, under or over neutral straits or archipelagic sea lanes are permitted to take defensive measures consistent with their security, including launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerents in transit or archipelagic sea lanes passage may not, however, conduct offensive operations against enemy forces, nor use such neutral waters as a place of sanctuary or base of operations.

**6.25** In time of armed conflict, belligerent and neutral surface ships and submarines also continue to have the right of non-suspendable innocent passage, ascribed to certain international straits by international law.

## **MEANS AND METHODS OF ARMED CONFLICT AT SEA**

**6.26** In conducting hostilities at sea, surface ships, submarines and aircraft are bound by the same principles and rules outlined in chapter 2. The use of weapons in armed conflict at sea must comply with the principles of necessity, unnecessary suffering and proportionality as well as the duty to avoid indiscriminate attacks and the taking of all reasonable precautions to avoid loss of civilian lives and damage to civilian objects. As with any armed conflict, the right of the parties to the conflict to choose the means or methods of warfare is not unlimited.



## Means of armed conflict at sea

**6.27 Mines.** Mines may only be used in armed conflict at sea for legitimate military purposes, including the denial of sea areas to the enemy. Mines may not be laid off coasts with the sole object of intercepting commercial shipping. The parties to the conflict shall not lay mines unless effective neutralisation occurs when they have become detached or control over them is otherwise lost. In the case of free floating mines, they should not be used unless they are directed against a military objective and they become harmless within an hour after loss of control over them.

**6.28** Belligerents are to record the locations where they have laid sea mines to ensure accurate notification of danger areas to shipping of other states and facilitate subsequent removal or deactivation. Mining of neutral waters by a belligerent should not occur. Mining operations in the internal waters, territorial sea or archipelagic waters of a belligerent state should provide, when the mining is first executed, for free exit of shipping of neutral states. Where mines are laid in international waters, belligerents should pay due regard to the legitimate uses of international waters by providing safe alternative routes for passage of neutral shipping. Likewise, transit passage through international straits and archipelagic sea lanes should not be impeded by belligerent minelaying unless safe and convenient alternative routes are provided.

**6.29** Following an armed conflict, parties to the conflict are obliged under international law to do their utmost to remove or render harmless the mines they have laid and to cooperate with other states and international organisations to remove sea mines and render them harmless.

**6.30 Torpedoes.** Torpedoes should only be employed in armed conflict at sea if they sink or otherwise become harmless when they have completed their run.

**6.31 Missiles and other projectiles.** These means of armed conflict at sea, including those with over the horizon capabilities, may be used in conformity with the principles of target discrimination contained in chapter 5—‘Targeting’.

## Methods of armed conflict at sea

**6.32 Exclusion zones.** Maritime exclusion zones (MEZ), variously referred to as defensive sea areas, total EZ, maritime control areas or operational zones, are areas of ocean space from which a belligerent declares some or all types of ships or aircraft to be excluded. MEZ must be distinguished from EEZ which bear no relationship to armed conflict at sea. An MEZ may be moving or stationary and is sometimes declared to include the airspace above

it. MEZ differ from the immediate area of naval operations because they normally encompass quite large water areas and are not confined to areas in the close vicinity of naval operations.

**6.33** There is no specific international law treaty provision referring to MEZ, however, their use has acquired a degree of validity under customary international law. The International Military Tribunal at Nuremberg held that establishment of EZ in which neutral merchant ships were subjected to a 'sink on sight' policy was illegal. However, the Tribunal implicitly accepted the legitimacy of an EZ in which belligerent merchant ships were subjected to a sink on sight policy where such ships were incorporated into the belligerent war effort.

**6.34** The establishment of an MEZ does not relieve the belligerent of its duties under IHL to avoid adversely affecting the legitimate uses of defined areas of ocean space. Where a belligerent establishes an MEZ the following conditions should apply:

- The extent, location and duration of the zone and the measures imposed should not exceed what is strictly required by military necessity and the principle of proportionality.
- Due regard must be given to the rights of neutral states in their exercise of the legitimate uses of the seas.
- The commencement, duration, location and extent of the zone, as well as the restrictions imposed, must be publicly declared and appropriately notified to other states.
- Necessary safe passage through the zone for neutral vessels and aircraft should be provided:
  - where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral state; or
  - in other cases where normal navigation routes are affected, except where military requirements do not permit.

**6.35 Ruses of war and perfidy in armed conflict at sea.** The basic definitions applicable to ruses of war and perfidy in armed conflict on land also apply to these methods of warfare at sea. However, there are some methods of lawful and unlawful deception peculiar to the naval environment. Warships and auxiliary vessels may fly a false flag up until the moment of launching an attack but are prohibited from launching an attack whilst flying a false flag, and at all times from actively simulating the status of:

- hospital ships, small coastal rescue craft or medical transports;

- vessels on humanitarian missions;
- passenger vessels carrying civilian passengers;
- vessels protected by the United Nations (UN) flag;
- vessels guaranteed safe conduct between the parties, including cartel vessels;
- vessels entitled to be identified by the emblem of the Red Cross, Red Crescent or Red Crystal; or
- vessels engaged in transporting cultural property under special protection.

**6.36** Perfidious acts also include the launching of an attack while feigning:

- exempt, civilian, neutral or protected UN status; or
- surrender or distress, eg by sending a distress signal or by the crew taking to life rafts.

## RESTRICTIONS ON TARGETING

**6.37** As outlined in chapter 5, the principle of distinction applies equally to armed conflict at sea. Attacks must be directed only at military objectives. In common with land warfare, maritime military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage. Merchant vessels and civil aircraft are civilian objects unless they are military objectives. Principles of neutrality are described in chapter 11.

**6.38 Enemy warships and military aircraft.** Enemy warships, auxiliary vessels and military aircraft are military objectives and may be attacked unless contained in the list of exempt categories of vessels and aircraft given below.

**6.39 Enemy merchant vessels.** Enemy merchant vessels may only be attacked if they meet the definition of military objective given above. The following activities may render enemy merchant vessels military objectives:

- engaging in belligerent acts on behalf of the enemy;
- acting as an auxiliary to an enemy's armed forces, eg carrying troops or replenishing warships;

- being incorporated into or assisting the enemy's intelligence gathering system;
- sailing under convoy of enemy warships or military aircraft;
- refusing an order to stop or actively resisting visit, search or capture;
- being armed to an extent that could inflict damage to a warship; and
- otherwise making an effective contribution to military action.

**6.40 Enemy civil aircraft.** Enemy civil aircraft may likewise only be attacked if they meet the definition of a military objective. The following activities may render enemy civil aircraft military objectives:

- engaging in acts of war on behalf of the enemy;
- acting as an auxiliary aircraft to an enemy's armed forces, eg transporting troops or military cargo or refuelling military aircraft;
- being incorporated into or assisting the enemy's intelligence gathering system;
- flying under the protection of accompanying enemy warships or military aircraft;
- being armed with air-to-air or air-to-surface weapons; or refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire control equipment that could reasonably be construed as part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent aircraft; or
- otherwise making an effective contribution to military action.

**6.41 Neutral merchant vessels.** Merchant vessels flying the flag of neutral states may not be attacked unless they:

- are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
- engage in belligerent acts on behalf of the enemy;
- act as auxiliaries to the enemy's armed forces;
- are incorporated into, or assist the enemy's intelligence gathering system;

- sail under convoy of enemy warships or military aircraft; or
- otherwise make an effective contribution to the enemy's military action, eg by carrying military material, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety.

**6.42** The mere fact that a neutral merchant vessel is armed provides no grounds for attacking it.

**6.43 Neutral civil aircraft.** Civil aircraft bearing the marks of neutral states may not be attacked unless they:

- are believed on reasonable grounds to be carrying contraband and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible;
- engage in belligerent acts on behalf of the enemy;
- act as auxiliaries to the enemy's armed forces;
- are incorporated into or assist the enemy's intelligence gathering system; or
- otherwise make an effective contribution to the enemy's military action.

**6.44 Classes of vessels exempt from attack.** The following classes of enemy vessels are exempt from attack:

- hospital ships;
- small craft used for coastal rescue operations and other medical transports;
- vessels granted safe conduct by agreement between the belligerent parties including:
  - cartel vessels, eg vessels designated for and engaged in the transport of prisoners of war (PW); and
  - vessels engaged in humanitarian missions including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
- vessels engaged in transporting cultural property under special protection;

- passenger vessels when engaged only in carrying civilian passengers;
- vessels charged with religious, non-military scientific or philanthropic missions (vessels collecting scientific data with likely military application are not protected);
- small coastal fishing vessels and small boats engaged in local coastal trade;
- vessels designed or adapted exclusively for responding to pollution incidents in the maritime environment;
- vessels which have surrendered; and
- life rafts and lifeboats.

**6.45** The above vessels are exempt from attack only if they:

- are innocently employed in their normal role,
- submit to identification and inspection when required, and
- do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

## MEASURES OF NAVAL WARFARE AGAINST TRADE

### Visit and search of merchant vessels

**6.46** In exercising their legal rights in international armed conflict at sea, belligerent warships and military aircraft have a right to visit and search merchant vessels outside neutral waters in order to determine their character (enemy or neutral), the nature of their cargo, their manner of employment and other facts which bear on their relationship to the armed conflict. Historically, visit and search was considered the only legally acceptable method for determining whether a merchant vessel was subject to capture. It is now recognised that changes in warfare may render this method either hazardous or impracticable in some circumstances.

**6.47 Procedures for visit and search.** In the absence of special instructions issued during a period of armed conflict, the following procedures should be adhered to:

- In general, a belligerent's right of visit and search should be exercised with tact and consideration.

- Before summoning a vessel to lie to, a warship's own flag should be hoisted. The summons should be made by firing a blank charge, international flag signal or other recognised means. The summoned vessel, if neutral, is bound to stop, lie to and display its colours; if an enemy, it may resist by force, but thereby assumes all risks of resulting damage. On the other hand, a neutral merchant vessel is obliged not to resist the belligerent's right of visit and search.
- If a summoned vessel takes flight, it may be pursued and brought to by forcible means.
- When a summoned vessel is brought to, a boat with at least one officer is to be sent to conduct the visit and search. Arming of the officers and the boat's crew is left to the discretion of the commanding officer of the visiting ship.
- If visit and search at sea of a neutral merchant vessel is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning vessel, or by another vessel, to the nearest place where search may be made.
- A boarding officer should first examine a ship's papers in order to determine its character, ports of departure and destination, nature of its cargo and employment, and other essential facts. Ship's papers generally found on board a merchant vessel include:
  - certificate of registry of nationality;
  - crew list;
  - passenger list;
  - log book;
  - bill of health;
  - clearance;
  - charter party, if chartered;
  - invoices or manifest of cargo;
  - bills of lading; and
  - a consular declaration certifying the innocence of the cargo may be included.

- Evidence furnished by papers against a vessel may be taken as conclusive:
  - Regularity of papers and evidence of innocence of cargo or destination furnished by papers are not necessarily conclusive, and if any doubt exists, the personnel of the vessel are to be questioned and a search made, if practical, of the ship or cargo. If search, under suspicious circumstances, does not satisfy a boarding officer, the vessel is to be captured and sent in for adjudication to the nearest port of the belligerent apprehending.
- Unless military security prohibits, the boarding officer must record in the log book the facts concerning the visit and search of the vessel, including the date and position. The entry in the log book should be authenticated by the signature and rank of the boarding officer. Neither the names of the visiting vessel nor the name and rank of the commanding officer are to be disclosed.

### **Exemptions from visit and search of merchant vessels**

**6.48** A neutral merchant vessel is exempt from the right of visit and search, if:

- it is bound for a neutral port;
- it is under the convoy of an accompanying neutral warship of the same nationality or a neutral warship of a state with which the flag state of the merchant vessel has concluded an agreement providing for such convoy;
- the flag state of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; and
- the commander of the neutral warship provides, if requested by the commander of an intercepting belligerent warship or military aircraft, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.

**6.49** In order to avoid the necessity of visit and search, belligerent states may establish reasonable measures for the inspection of cargo of neutral merchant vessels and certification that a vessel is not carrying contraband.



## Contraband

**6.50** Contraband consists of all goods which are destined for an enemy and which may be suspected to be of use in war. Contraband goods are divided into two categories; absolute and conditional. Absolute contraband consists of goods which are used primarily for war or goods whose very character makes them destined for use in war. Conditional contraband consists of goods which are equally suitable for use either for peaceful or warlike purposes. The distinction between absolute and conditional contraband is of declining importance, at least in major maritime conflicts, as there is a tendency to assume that all goods, which one party considers important enough to import during armed conflict must be of some value to its war effort.

**6.51** On the initiation of armed conflict, belligerents may declare contraband lists setting forth the classification of articles to be regarded as contraband, as well as the distinction to be made between goods considered as absolute contraband and those considered conditional. Goods consisting of absolute contraband are liable to capture if their destination is the territory belonging to or occupied by an enemy, or the armed forces of an enemy. It is immaterial whether the carriage of such goods is direct or involves trans-shipment or transport overland. In the case of absolute contraband, a destination of territory belonging to or occupied by an enemy or its armed forces, is presumed to exist when:

- the transporting vessel is to call at an enemy port before arriving at a neutral port for which the goods are documented;
- goods are documented to a neutral port serving as a port of transit to an enemy, even though the goods are consigned to a neutral; or
- goods are consigned 'to order' or to an unnamed consignee, but destined to a neutral state in the vicinity of enemy territory.

**6.52** Goods consisting of conditional contraband are liable to capture if destined for the use of an enemy government or its armed forces. It is immaterial whether the carriage of such goods is direct or involves trans-shipment or transport overland.

**6.53** Goods not on the belligerent's contraband lists are 'free goods', that are not subject to capture. As a minimum, 'free goods' shall include:

- religious objects;
- articles intended exclusively for treatment of the wounded and sick and prevention of disease (particulars concerning the carriage of such articles must be transmitted to the adverse party and approved by it);

- clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe that such goods will be diverted to other purposes, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes;
- items destined for PW, including individual parcels and collective relief shipments containing food, clothing, education, cultural and recreational articles;
- goods otherwise specifically exempted from capture by international treaty or by special arrangement between the belligerents; and
- other goods not susceptible for use in armed conflict.

### **Capture of enemy vessels and goods**

**6.54** Enemy vessels, whether merchant or otherwise, and goods on board such vessels may be captured outside neutral waters. Prior exercise of visit and search is not required. Categories of vessels exempt from capture correspond to those listed in paragraph 6.44. Capture of a merchant vessel is exercised by taking such vessel as a prize for adjudication. If military circumstances preclude taking such a vessel as a prize at sea, it may be diverted to an appropriate area or port in order to complete capture.

**6.55** A captured enemy merchant vessel may, as an exceptional measure, be destroyed when military circumstances preclude taking, or sending such a vessel for adjudication, as an enemy prize, only if the following conditions are met beforehand:

- the safety of passengers and crew is provided for (for this purpose, the ship's lifeboats are not regarded as a place of safety unless the safety of the passengers and crew is assured in the prevailing sea and weather conditions by the proximity of land or the presence of another vessel which is in a position to take them on board);
- documents and papers relating to the prize are safeguarded; and
- if feasible, personal effects of the passengers and crew are saved.

**6.56** The destruction of enemy passenger vessels carrying only civilian passengers is prohibited at sea. For the safety of the passengers, such vessels shall be diverted to an appropriate area or port in order to complete capture.

## Capture of neutral merchant vessels and goods

**6.57** Neutral merchant vessels are subject to capture outside neutral waters if they are engaged in any of the activities described in paragraph 6.41 or if it is determined, as a result of visit and search, or by other means, that they:

- are carrying contraband;
- are on a voyage especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy;
- are operating directly under enemy control, orders, charter, employment or direction;
- present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
- are violating regulations established by a belligerent within the immediate area of naval operations; or
- are breaching or attempting to breach a blockade.

Capture of a neutral merchant vessel is exercised by taking such vessel as a prize for adjudication. Goods on board neutral merchant vessels may only be captured if they are contraband (see paragraphs 6.50 to 6.53).

**6.58** A neutral vessel, which is captured in accordance with the criteria given above may, as an exceptional measure, be destroyed when military circumstances preclude taking or sending such a vessel for adjudication as an enemy prize only if the following conditions are met beforehand:

- the safety of passengers and crew is provided for (for this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured in the prevailing sea and weather conditions by the proximity of the land, or the presence of another vessel which is in a position to take them on board);
- documents and papers relating to the captured vessel are safeguarded; and
- if feasible, personal effects of the passengers and crew are saved.

**6.59** Every effort should be made to avoid destruction of a captured neutral vessel. Destruction shall not be ordered without there being entire satisfaction that the captured vessel can neither be sent into a belligerent port, nor diverted, nor properly released. The destruction of captured neutral

passenger vessels carrying civilian passengers is prohibited at sea. For the safety of the passengers, such vessels should be diverted to an appropriate port to complete the capture.

## **Blockade**

**6.60** A blockade is a belligerent operation intended to prevent vessels of all states from entering or leaving specified coastal areas which are under the sovereignty, occupation, or control of an enemy. Such areas may include ports, harbours, the entire coastline or part of it. A blockade is accomplished by establishing a cordon which separates the enemy from international waters and airspace. A blockade by sea may be extended to include the airspace above those portions of the high seas in which the blockading forces are operating.

### **HISTORICAL EXAMPLE—BLOCKADE, SOUTH ASIA, WORLD WAR I**

Part of Germany's plan for disruption of the British Empire in World War I was promotion of revolution in India. An Indian National Group was attached to the German General Staff in Berlin. The Group had ambitious plans for gun-running from San Francisco, the Netherlands East Indies (NEI) and Philippines to Bengal, and for releasing and arming of Indian convicts in penal settlements in the Andaman Islands to attack Rangoon. With agents throughout South-East Asia and 74 German merchant ships sheltering in neutral NEI, there was both the will and physical potential to cause serious disruption to British possessions and trade in South Asia.

Responding to an Admiralty request, the Royal Australian Navy (RAN) commissioned, armed and crewed the mothballed cruiser HMAS PSYCHE and survey vessel HMAS FANTOME in Sydney for protective duties in the Persian Gulf. The India-Burma plots caused their diversion on 04 September 1914 to join in a combined patrol in the Bay of Bengal, searching all vessels detected in the area and landing shore parties to search suspected landing areas.

Collapse of the plot in India by January 1915 shifted the centre of gravity of the blockade from British waters to the international and neutral waters east of Singapore, HMAS FANTOME moving to British Borneo, HMAS PSYCHE remaining in the Bay of Bengal.

### HISTORICAL EXAMPLE—(cont)

These patrols were 'very active and admirably carried out, and the Germans find grave difficulty in developing or carrying out any plans'. After a year of this grindingly tedious work, some were relieved by the new destroyers HUON, SWAN and TORRENS, with PARRAMATTA and YARRA remaining until 1917.

These blockaders also had ongoing political problems. The countries from which German agents operated were neutral—Siam, NEI, and America's colony the Philippines. The neutral waters surrounding these countries enabled suspect traffic, posing as merchantmen, to sail coastwise and claim sanctuary in the neutral ports. Inspection of vessels was also a problem, neutral captains objecting to search in international straits and claiming neutral waters in the Archipelago. This work, in a backwater of the war, demonstrated careful, restrained execution and strong self-discipline. **(source: Official History of Australia in the War of 1914–1918 volume 9)**

Meanwhile, the RAN destroyer flotilla completed operations in the capture of German New Guinea by the Australian Naval and Military Naval Force. HMA Ships PARRAMATTA, WARREGO, YARRA and UNA were diverted to Singapore, joined there by the light cruiser HMAS ENCOUNTER from Fiji. This force patrolled from Java to Siam, based variously at the British ports of Singapore, Sandakan and the French-owned Saigon.

**6.61** In order to be binding, a blockade must be established by a belligerent government. A blockade shall be declared and notified to all belligerents and neutral states. The declaration should include the date of commencement, duration, location, extent of the blockade and the period within which vessels of neutral states may leave the blockaded coastline. Notification of a blockade is an essential element in establishing whether a vessel or aircraft has breached a blockade.

**6.62** A blockade must be effective. Its effectiveness is a question of fact. As a guide, however, a blockade should be maintained by a force sufficient to render ingress and egress from the blockaded area dangerous. The force maintaining the blockade may be stationed at a distance determined by military requirements. A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare. A blockade must not bar access to or departure from neutral ports or coasts and must be applied equally to the vessels and aircraft of all states.

**6.63** Vessels and aircraft are liable to capture for breach of blockade. Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked. The liability of a blockade runner to capture begins with the commencement of its voyage or flight and terminates with the end of its journey.

**6.64** Neutral warships and neutral military aircraft have no positive right of entry to a blockaded area. However, they may be allowed to enter or leave a blockaded area as a matter of courtesy. Permission to visit a blockaded area is subject to any conditions, such as the length of stay, that the blockading force may deem necessary and expedient. Neutral vessels and aircraft in urgent distress may be permitted to enter and leave a blockaded area under conditions prescribed by the commander of the blockading force.

**6.65** The declaration or establishment of a blockade is prohibited if:

- it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
- the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

**6.66** If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

- the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
- the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organisation which offers guarantees of impartiality.

**6.67** The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.

## RESCUE AND CARE OF THE WOUNDED, SICK AND SHIPWRECKED IN ARMED CONFLICT AT SEA

**6.68 General rules.** All possible measures are to be taken to search for and collect the shipwrecked, wounded and sick in armed conflict at sea and ensure their adequate care in accordance with the provisions of the Second Geneva Convention (G. II) and Additional Protocol I. Rescued personnel shall be respected and protected. The parties to an armed conflict at sea may agree for humanitarian purposes to create a zone in a defined area of the sea in which only activities consistent with those humanitarian purposes are permitted.

**6.69 Protected persons.** Persons on board vessels and aircraft having fallen into the power of a belligerent or neutral shall be respected and protected. Members of the crews of hospital ships may not be captured during the time they are in the service of these vessels. Members of the crews of rescue craft may not be captured while engaging in rescue operations. Religious and medical personnel assigned to the spiritual and medical care of the wounded, sick and shipwrecked shall not be considered PW. They may however, be retained as long as their services are required for PW.

**6.70** Nationals of an enemy state, in the context of armed conflict at sea are entitled to PW status if they are:

- members of the enemy's armed forces;
- persons accompanying the enemy's armed forces;
- crew members of auxiliary vessels;
- crew members of enemy merchant vessels; or
- crew members of neutral merchant vessels that have taken a direct part in the hostilities on the side of the enemy or served as an auxiliary of the enemy.

**6.71** Nationals of a neutral state:

- who are passengers on board enemy or neutral vessels are to be released and may not be made PW unless they are members of the enemy's armed forces or have committed acts of hostility against the enemy;
- who are members of the crew of enemy warships or auxiliary vessels are entitled to PW status; and
- who are members of the crew of enemy or neutral merchant vessels are to be released and may not be made PW unless the vessel or the

crew member has personally committed an act of hostility against the captor.

**6.72 Medical transports.** In order to provide maximum protection for hospital ships from the moment of the outbreak of hostilities, states may beforehand give general notification of the characteristics of their hospital ships as specified in Article 22 of G. II. Hospital ships may be equipped with purely passive means of defence, such as chaff and flares. The presence of such equipment should be notified. In order to fulfil their humanitarian mission, hospital ships should be permitted to use cryptographic equipment provided such equipment is not used to transmit intelligence data nor in any other way to acquire military advantage.



## CHAPTER 7

# LAND OPERATIONS AND THE LAW OF ARMED CONFLICT

### Executive summary

- The law of armed conflict (LOAC) allows certain methods of combat to be used to engage the enemy such as surprise and camouflage. Other methods are prohibited such as perfidy and improper use of protected symbols.
- The three principles of military necessity, avoidance of unnecessary suffering and proportionality must be obeyed during land operations.

## INTRODUCTION

**7.1** The purpose of this chapter is to state the legal rules concerning the conduct of military operations on land. Reference should be made to chapter 2—‘Principles of the law of armed conflict’, where the basic principles of the LOAC are outlined. chapter 4—‘Weapons’, chapter 5—‘Targeting’, chapter 9—‘Protected persons and objects’ and chapter 10—‘Prisoners of war and detained persons’ contain specific guidance on those particular areas.

## METHODS OF COMBAT

### Stratagems and ruses

**7.2** Ruses of war and the employment of measures necessary for obtaining information about the enemy and the enemy country are permissible. Ruses of war are used to obtain an advantage by misleading the enemy. They are permissible provided they are free from any suspicion of treachery or perfidy. Legitimate ruses include surprises, ambushes, camouflage, decoys, mock operations and misinformation. Psychological operations are also permitted.

### Perfidy

**7.3 Perfidy is forbidden.** Acts which constitute perfidy are those inviting the confidence of an adversary, thus leading that adversary to believe that there is an entitlement, or an obligation, to accord protection provided under the LOAC, with an intent to betray that confidence. Acts which constitute perfidy include feigning of:

- an intent to negotiate under a flag of truce or surrender;
- an incapacitation by wounds or sickness;
- civilian or non-combatant status; and
- protected status by the use of protective symbols, signs, emblems or uniforms of the United Nations (UN) or of neutral or other states not involved in the conflict.

**7.4 Difference between perfidy and ruses.** It would be perfidious, for example, to falsely declare to the enemy that an armistice had been signed so as to gain the element of surprise for a subsequent attack. It would be lawful however, for a few soldiers to summon an enemy force to surrender on the false ground that it was surrounded, or to threaten bombardment when no guns were actually in place. To demand a cease-fire and then to break it by surprise, or to violate a safe conduct or any other agreement, in order to kill, wound or capture enemy troops would be perfidious. On the other hand, it has been considered a legitimate ruse to utilise an informal cease-fire for the purpose of collecting wounded and dead (which is sometimes arranged during a battle) to withdraw unseen by the enemy.

#### **Improper use of protective symbols and emblems**

**7.5** It is prohibited to improperly use the distinctive emblem of the Red Cross, Red Crescent or Red Crystal. Deliberate misuse of other protective symbols and emblems, signs and signals, including the flag of truce and the protective emblem of cultural property, is also prohibited. Use of the distinctive emblem of the UN is prohibited except as authorised by the UN.

**7.6** In armed conflict it is prohibited to use flags, military emblems, insignia or uniforms of neutral or other nations not party to the conflict. It is also prohibited to use the flags or military emblems, insignia or uniforms of the enemy while engaging in attacks or in order to shield, favour, protect or impede military operations. Enemy uniforms may otherwise be worn. Any soldier who is captured not wearing a military uniform risks being treated as a spy.

#### **Quarter must be granted**

**7.7** It is prohibited to order that no prisoners will be taken, threaten an enemy that such an order will be given or conduct hostilities on the basis that no prisoners will be taken. Ambiguous orders, such as, 'take that objective at any cost' should be avoided.

## Persons 'hors de combat'

**7.8** Those who do not participate in hostilities must not be the direct object of an attack. Soldiers who are 'out of combat' and civilians are to be treated in the same manner and cannot be made the object of attack. A person is *hors de combat* if that person:

- is under the control of an enemy;
- clearly expresses an intention to surrender; or
- has been rendered unconscious, or is otherwise incapacitated by wounds or sickness, and therefore incapable of defending himself.

Provided that person abstains from any hostile act and does not attempt to escape.

**7.9** Other persons who are not taking a direct part in hostilities are also considered to be out of combat. Those persons include medical personnel, chaplains and any person parachuting from an aircraft in distress.

## Starvation and devastation—scorched earth

**7.10** Starvation of civilians as a method of warfare is prohibited. Objects indispensable to the survival of the civilian population cannot be attacked, destroyed, removed or rendered useless for the specific purpose of denying them for their sustenance value to the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works. This includes starving civilians or causing them to move away.

**7.11** Foodstuffs and agricultural areas producing them, crops, livestock and supplies of drinking water intended for the sole use of the armed forces may be attacked and destroyed. Extreme care will need to be exercised when making some objectives a military target, eg drinking water installations, as such objects are likely not used solely for the benefit of armed forces.

**7.12** When objects are used for a purpose other than sustenance of members of the armed forces but such use is in direct support of military action, attack on such objects is lawful unless that action can be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

**7.13** It is permissible to destroy objects which are indispensable to the survival of the civilian population in the course of ordinary military operations only if it is militarily imperative to do so, for example, to destroy a wheat field to deny concealment to enemy forces, because this is a tactical measure and does not amount to a scorched earth policy.

## Protection of the environment

**7.14** Any method or means of warfare which is planned, or expected, to cause widespread, long-term and severe damage to the natural environment and thereby jeopardise the survival or seriously prejudice the health of the population is prohibited. In this context, 'long-term' means continuing for decades. Means or methods which are not expected to cause such damage are permitted even if damage results.

**7.15** Australia, as a signatory to the UN's Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification (ENMOD) Techniques has undertaken not to engage in any military or hostile use of ENMOD techniques which would have widespread, long lasting or severe effects as the means of destruction, damage or injury to any other state which is a party to the Convention.

**7.16** For the purposes of ENMOD, the terms 'widespread', 'long lasting', and 'severe' are interpreted as follows:

- 'widespread': encompassing an area on the scale of several hundred square kilometres;
- 'long lasting': lasting for a period of months, or approximately a season; and
- 'severe': involving serious or significant disruption or harm to human life, natural economic resources or other assets.

**7.17** ENMOD techniques are defined by ENMOD as any technique for changing, through deliberate manipulation of natural processes, the dynamics, composition or structure of the earth, including:

- animal and plant life (forbidding long-term defoliation and the like);
- the earth's crust (forbidding artificial earthquakes);
- the earth's water surface; and
- the gaseous envelope surrounding the earth.

## Espionage and sabotage

**7.18** International law recognises the right of belligerents to employ spies and other secret agents to obtain information about the enemy. Espionage is the clandestine collection of information behind enemy lines or in the area of operations with the intention of communicating that information to a hostile party to the conflict. A member of an armed force who is in territory controlled by an adverse party to a conflict gathering, or attempting to gather,

information is not considered as a spy if that person is wearing a military uniform. Any person captured while engaging in espionage is not entitled to the status of prisoner of war (PW) and is liable to be tried by the civil courts of the adversary.

**7.19** Sabotage is permitted if directed against a legitimate military objective. Saboteurs in uniform are combatants and entitled to PW status if captured. Civilian saboteurs or saboteurs not in uniform are not so protected. Generally speaking, saboteurs are persons operating behind the lines of the enemy to commit acts of destruction. If they are operating in civilian clothing they are liable to be treated as spies.

**7.20** Members of forces participating in acts of espionage or sabotage should wear uniform whenever possible while in enemy or enemy-occupied territory. Otherwise, they run the risk of being treated as spies if captured.

**7.21** Civilian residents of occupied territory who commit sabotage or espionage in that territory may be punished if captured. This does not apply to members of:

- national liberation movements engaged in a conflict seeking self-determination;
- resistance or properly organised guerrilla movements; and
- a *levee en masse* while acting in those capacities.

These people are to be treated as PW.

**7.22** A person engaged in gathering intelligence and captured in an aircraft or vessel while dressed in civilian clothes may only be charged with espionage if they are engaged in such activities. However, the crew of an aircraft carrying spies cannot be treated as spies in the absence of clear evidence that they are spying.

**7.23** Should combatants, including personnel from crashed aircraft, wear civilian clothing to facilitate escape, the burden of proving they are not spies is upon them. When the question arises as to whether a captive is to be treated as a PW, the person should be presumed to be a PW and given that status until the contrary is proved.

**7.24** Persons assisting the escape of saboteurs, spies, aircrew or escaped PW are liable to face trial in accordance with the national laws of the belligerent against whose interests they have been acting, or if within occupied territory, in accordance with the law of the occupying authority. They may be accused of espionage even though their acts do not technically fall within this definition and may jeopardise any civilian or other protected status they may have. Offenders are entitled to a proper trial.

## **Assassination**

**7.25** Assassination is the sudden or secret killing by treacherous means of an individual who is not a combatant, by premeditated assault, for political or religious reasons. Assassination is unlawful. In addition, it is prohibited to put a price on the head of an enemy individual. Any offer for an enemy 'dead or alive' is forbidden. If prior information of an intended assassination or other act of treachery should reach the party on whose behalf the act is to be committed, that party should endeavour to prevent its occurrence.

**7.26** The prohibition against assassination is not to be confused with attacks on individual members of the enemy's armed forces as those persons are combatants and are legitimate military targets.

## **Undefended localities**

**7.27** The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited. The reason for this rule is that there is no military need to attack a place that is not being defended. It can simply be occupied without resistance or bypassed. The concept of an undefended place does not apply to places in rear areas behind enemy lines. It applies only to places that are open to occupation by ground forces.

## **Non-defended locality**

**7.28** It is prohibited for parties to a conflict to attack, by any means whatsoever, non-defended localities.

**7.29** The parties to the conflict may declare as a non-defended locality any inhabited or uninhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse party. In order to be considered a non-defended locality, the following conditions must be fulfilled:

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

### HISTORICAL EXAMPLE—NON-DEFENDED LOCALITY, VIETNAM 1970



**Figure 7–1: Cordon and search of a village, South Vietnam 1970**

Villages suspected of harbouring enemy soldiers and equipment were surrounded, and then systematically searched, with interrogation of the inhabitants on enemy intelligence. This Montagnard village has been cordoned and searched by a mobile strike force battalion; the Australian Army Training Team Vietnam officer commanding the battalion and an interpreter are questioning the village headman.

As non-defended localities, no force was used against villages unless initiated from within it by enemy occupants. Civil and medical assistance was provided to the inhabitants. **(source: Australian War Memorial FAI/70/0590/VN)**

**7.30** The presence in this locality of protected persons and police forces retained for the sole purpose of maintaining law and order, does not change the character of a non-defended locality.

**7.31** The declaration of a non-defended locality must describe the geographical limits of the locality and be addressed to the relevant party to the conflict which must acknowledge its receipt and from that time treat the locality as a non-defended locality unless the conditions for establishment of the locality are not met. In that case, the locality continues to enjoy the protection provided by other provisions of Additional Protocol I and other rules of international law applicable in armed conflict.

**7.32** The parties to the conflict may also agree to grant the status of a non-defended locality to a particular area even if the conditions referred to in paragraph 7.29 are not fulfilled. Although there is no specific format or content for any such agreement, the principal points should be:

- the exact geographical limits of the area;
- the date and time of entry into force;
- the duration;
- the rules on marking the limits of the area and the type of marking to be used;
- persons or classes of persons authorised to enter the locality;
- if necessary, the methods of supervision; and
- the ultimate fate of the locality and the possible conditions under which the area may be occupied by enemy troops.

**7.33** Non-defended localities are to be signposted and although the status may be lost when the conditions upon which it was established are no longer being satisfied, the locality shall continue to enjoy any other protection afforded by the LOAC.

**7.34** Even though all the conditions are not met, the parties may agree between themselves to treat an area as a non-defended locality. The agreement should be in writing and should specify the exact geographical limits of the locality, the date and time of the entry into force of the agreement and its duration, rules on marking the locality and agreed signs, persons authorised to enter the locality, methods of supervision (if any), whether and under what conditions the locality may be occupied by enemy troops.

### **Siege warfare**

**7.35** Attack on towns, villages, habitations or buildings that are undefended is prohibited unless they have become military objectives.

**7.36** If the attack is likely to affect the civilian population, the commander of an attacking force shall give effective advance warning unless circumstances do not permit. If there are non-combatants in the locality, the anticipated collateral damage must not be excessive in relation to the concrete and direct military advantage expected to result from the bombardment. Buildings devoted to religion, art, science and charity, hospitals and places where the sick and wounded are collected, should not be made the specific subject of attack unless they are being used for military purposes, subject to



warning requirements. The besieged population should indicate by visible signs the buildings or places to be protected and should notify the attacking force of these signs.

**7.37** Diplomatic and consular personnel of a neutral nation should not be prevented from leaving a besieged place before hostilities commence. This privilege cannot be claimed while hostilities are in progress. Should they voluntarily decide to remain, they are subject to the same risks as other inhabitants.

**7.38** The commander of the besieging force has the right to forbid all communications and access outside the besieged place. The opposing parties are required to try and conclude local agreements for the removal from besieged or encircled areas of wounded, sick, infirm and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas. Similar considerations are made for the passage of consignments of medical and hospital stores and objects necessary for the religious worship of civilians and of essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity cases.

**7.39** The commander of a besieging force is not required to permit non-combatants to leave a besieged locality. A commander cannot direct fire at non-combatants who attempt to leave or enter a besieged place.

### **Demilitarised zone**

**7.40** Demilitarised zones are areas in which, by express agreement between the parties to the conflict, military operations are not conducted. The aim of these zones is common to that of non-defended localities. The differences between the two areas relate to how they are established and their situation. A non-defended locality may be created by unilateral declaration, whereas a demilitarised zone is created by express agreement between the parties. From the commander's point of view, protection granted to each zone is identical. Therefore, as long as sufficient notice is given of the zones and they are adequately marked, they are protected from attack.

### **Civil affairs**

**7.41** Commanders should give consideration to establishment of civil affairs units or teams to aid military operations by providing a means of communication between local authorities and military forces to assist in ensuring that planning and conduct of operations is in accordance with obligations under the LOAC. Areas in which civil affairs teams or units may support commanders include:

- assisting the commander in meeting legal and moral obligations to the civilian population (eg liaison, advice, coordination, warning);

- advising the commander on civil affairs aspects of current and proposed plans and operations;
- advising the commander on actions to minimise civilian interference with military operations; and
- identifying and coordinating acquisition of local resources.

### **Law of armed conflict profiles**

**7.42** The LOAC profiles should be prepared where possible for populated areas within an area of operations, to be included in the operational planning process. A LOAC profile format is in annex A.

## **PROPERTY ON THE BATTLEFIELD**

### **Destruction or seizure of civilian property**

**7.43 Public and private property.** The destruction or seizure of civilian property, whether it belongs to private individuals or the state, to other public authorities or to social or cooperative organisations is permitted if imperative for military purposes. Otherwise such action is forbidden.

**7.44 Municipal, religious, charitable and cultural property.** The property of municipalities and that of institutions dedicated to religion, charity, education, the arts and sciences is treated as private property and any seizure or destruction of that property is prohibited. If that property is located in any area that is subject to seizure or bombardment, then it must be secured against all avoidable damage and injury.

### **Booty**

**7.45** All enemy military equipment captured or found on a battlefield is known as booty and becomes the property of the capturing state. Booty includes all articles captured with PW and not included under the term 'personal effects'. Personal effects are considered to be those items listed in paragraph 10.35.

### **Pillage**

**7.46** Pillage, the violent acquisition of property for private purposes, is prohibited. In this regard the pillage of a town or place, even when taken by assault, is prohibited.

### **Annex:**

- A. Law of armed conflict profile format

# LAW OF ARMED CONFLICT PROFILE FORMAT

## LOAC PROFILE FOR OPERATIONS IN THE ..... AREA

1. Civilian population:
  - a. What is the populated area?
  - b. What are the concentration centres of the population and what are their geographic parameters?
  - c. What materials are used, in the majority of cases, for the construction of domestic dwellings?
  - d. What objects are indispensable to the civilian population and where are they?
  
2. Protected objects:
  - a. What is the location, size, and construction of any hospital, medical centre, medical storage facility, research or health facility in the populated area or vicinity?
  - b. What is the location and number of shrines, churches, religious objects or houses of worship?
  - c. What is the location of any civil defence facility?
  - d. What is the location and nature of the major:
    - (1) water supply systems including dams, reservoirs or dykes;
    - (2) power stations, both conventional and nuclear;
    - (3) transport systems, railheads, harbour facilities and airports;
    - (4) food distribution; and
    - (5) food production areas, for the civilian population?

3. Dangerous substances/hazards:
  - a. Are there any bulk handling or storage facilities for:
    - (1) petroleum or other inflammable substances,
    - (2) explosives,
    - (3) chemicals or other toxic substances, or
    - (4) radioactive materials,the release of which will endanger the civilian population?
  - b. Of the facilities mentioned above, which are located below ground level, at what depth, what is their construction and what would be the likely effects upon the civilian population should they be destroyed or damaged?
  - c. Should they be damaged or destroyed, would any dams, dykes, channels or other systems either carrying domestic water supplies or withholding the effects of the ocean be likely to cause serious or catastrophic damage to the civilian population?
  - d. Are there any other facilities, substances or materials not mentioned above which would cause irreparable consequences to the civilian population?
  - e. Are there any medical or research facilities in the area which are likely to hold dangerous viruses or bacteria, the escape of which is likely to significantly risk the civilian population?
4. LOAC guidance:
  - a. Care is required in the planning of operations to avoid or minimise the damage to protected objects or inflicting casualties on the civilian population.
  - b. The use of indirect fire or close air support should be avoided where the civilian population is concentrated.
  - c. Immunity is to be given to targets which, if damaged or destroyed, will pose major environmental hazards.
  - d. Damage from other dangerous substances stored in the vicinity of military objects should be limited to the immediate area so as to cause as few civilian casualties as possible and minimum damage to the environment.

- e. Commanders should be reminded that LOAC requires that if there is more than one military option open in achieving an objective, the option involving the least civilian casualties and collateral damage should be chosen.
- f. Commanders are prohibited from launching indiscriminate attacks.
- g. Further LOAC guidance is to be included depending on the nature of the operation.



## CHAPTER 8

# AIR OPERATIONS AND THE LAW OF ARMED CONFLICT

### Executive summary

- Airspace is divided into zones similar to maritime zones. Aircraft do not have a right of overflight through national airspace, particularly if it is the airspace of a neutral during armed conflict.
- The Convention on International Civil Aviation 1944 (Chicago Convention) and the International Civil Aviation Organisation (ICAO) rules do not bind military and state aircraft.

## INTRODUCTION

**8.1** An attempt was made in 1923 by some international jurists from a number of nations to reach international consensus on aerial warfare. These rules, which are referred to as the 1923 Draft Hague Rules for Aerial Warfare, were never formally adopted although some of the rules have now become part of customary international law. By the end of hostilities in 1945 there was little law of armed conflict (LOAC) relating specifically to the conduct of air warfare.

**8.2** Since 1944 international law has developed to encompass the regulations of international aviation through the Chicago Convention and the formation of the ICAO. In addition, Additional Protocol I (G. P. I) and Additional Protocol II have included specific provisions which deal with air warfare and aircraft operations. This chapter addresses these general issues as they apply to the conduct of Australian Defence Force (ADF) air operations. Reference should also be made to the Air Force publication Australian Air Publication (AAP) 1003—*Operational Law for RAAF Commanders*.

**8.3** Airspace has traditionally been classified either as national or international airspace. This division closely follows the maritime regime whereby oceans are regarded as national waters or international waters. Air law and the law of the sea are closely related and an understanding of each is critical when planning and conducting ADF operations. The LOAC considerations relating to maritime operations are covered in chapter 6—'Maritime operations and the law of armed conflict'.

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## CONTROL OF AIRSPACE

**8.4** International law recognises that the legal status of airspace is akin to that of a nation's territory, internal waters and territorial seas. Sovereignty extends to national airspace. The concept of territorial sovereignty includes the right to regulate, and if necessary prevent access, exit or transit of both personnel and aircraft, whether manned or not. This right in relation to civil aircraft has been modified by the provisions of the Chicago Convention.

### Airspace

**8.5 Lateral extent of airspace.** The Chicago Convention provides that every state has complete and exclusive sovereignty over the airspace above its territory. For the purposes of the convention the territory of a state shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such state. Despite the fact that this convention applies only to civil aircraft, this definition reflects accepted customary law regarding the lateral extent of airspace.

**8.6 Vertical extent of airspace.** While views differ as to the precise vertical and horizontal extent of airspace, for practical purposes, it can be said that the upper limit to a state's rights in airspace is above the highest altitude at which an aircraft can fly and below the lowest possible perigee of an earth satellite in orbit. The result is that anything in orbit or beyond can safely be regarded as in outer space.

**8.7 International airspace.** Aircraft have freedom of overflight over exclusive economic zones (EEZ) of other states and over other areas of the high seas. The airspace in question is often known as 'international airspace'. It is lawful for a military aircraft of one state to fly in international airspace adjacent to the national airspace of another state, for example, for the purpose of surveillance and observation of activities within that other state's national airspace or territory.

**8.8 Chicago Convention.** In accordance with the Chicago Convention the aircraft of one nation may not enter another nation's airspace without permission. The Chicago Convention is primarily concerned with the regulation of civil aviation. State aircraft are generally not subject to its provisions and do not enjoy its privileges. Some nations have, however, concluded bilateral agreements, which grant overflight rights to their respective state aircraft.

### Legal division of the oceans and airspace

**8.9** An understanding of the legal division of the oceans is necessary so that aircrew are aware of the rights of aircraft which transit above these ocean space divisions. The legal regimes of airspace and oceans directly affect



military operations because they determine the degree of control that a coastal nation may exercise over foreign aircraft and vessels within these zones. Details of the legal divisions of oceans are detailed in chapter 6, AAP 1003 and in the Royal Australian Navy Publication Australian Book of Reference 5179—*RAN Manual of International Law*.

## Outer space

**8.10** Outer space, while not having a clearly defined boundary, is still recognised as a zone to which particular legal obligations apply. All nations enjoy equal access to outer space and none may claim it as national airspace or for exclusive use.

## Status of military aircraft and personnel

**8.11** Military aircraft are classified as state aircraft under the terms of the Chicago Convention. This means that military aircraft are not subject to the provisions of the Chicago Convention and, therefore, the standards, practices and procedures of the ICAO do not apply. Likewise, military aircraft do not enjoy the overflight rights of civil aircraft accorded by the transit agreements negotiated under the Chicago Convention.

**8.12 Nationality and markings.** A nation's aircraft, like its ships, bear the nationality of the country in which they are registered. Civil aircraft must bear markings indicating their nationality. Military aircraft must bear markings indicating both nationality and military status.

**8.13 Immunity.** Military aircraft, similar to warships, have sovereign immunity from foreign laws in relation to search and inspection. This means that military aircraft should not be boarded, searched or inspected by foreign authorities without permission. Because military aircraft require diplomatic clearance to enter another nation's airspace, they may be required to submit to search as a condition of entry.

**8.14 Military contract aircraft.** Civilian aircraft that are contracted to support ADF operations are not normally regarded as state or military aircraft. If used exclusively by the ADF, civil aircraft could be designated as state aircraft and thus enjoy sovereign immunity, and not be subject to ICAO regulation. However, only military aircraft can exercise the combat rights of a belligerent. Examples of such rights include attacking military objectives and overflying enemy territory. Civilian owned and registered aircraft would enjoy the rights of a military aircraft if they carried the markings of a military aircraft, were manned by ADF personnel and were used for national tasks.

## Air navigation rights

**8.15 General principles.** Military and civil aircraft are free to operate in international airspace without interference. Civil aircraft are able to enter another nation's airspace without diplomatic clearance, if they have followed ICAO procedures. The Chicago Convention reaffirmed the principle that every nation has complete sovereignty over its national airspace. Crew of military aircraft must always seek permission to enter another nation's airspace. This may be a specific clearance or general permission granted by agreement. The clearance can be made conditional and any aircraft entering national airspace are subject to the agreed terms and conditions. Aircraft in distress are entitled to such measures of assistance as are necessary and practicable.

**8.16 Innocent passage.** Unlike warships, which have right of innocent passage in other nations' territorial seas, aircraft have no right of innocent passage through the airspace over those territorial seas.

**8.17 International straits passage.** International straits are those straits used for international maritime navigation. They are international waterways, including territorial waters, which join areas of the high seas or EEZ. All aircraft have the right to unimpeded transit passage through national airspace above international straits. Any transit must be continuous and expeditious though aircraft may conduct air-to-air refuelling. Aircraft must not threaten or use force against the aircraft of the nation, or nations, bordering the strait. In addition, all aircraft must monitor the internationally designated air-traffic control circuit or distress frequency while engaged in transit passage. This right of transit cannot be suspended in peacetime for any reason.

**8.18 Archipelagic sea lanes passage.** All aircraft and ships enjoy the right of archipelagic sea lanes passage in designated archipelagic sea lanes. The right of archipelagic sea lanes passage is the right to conduct expeditious and continuous transit in the normal mode of operation, observing the same conditions applicable to transit passage through international straits. This right of transit exists even if the nation has not declared such sea lanes. In common with vessels, aircraft can use all routes normally used for international navigation to transit the archipelago in the absence of designated archipelagic sea lanes.

**8.19 Innocent passage in archipelagic waters.** Unlike vessels, aircraft have no right of innocent passage over archipelagic waters outside archipelagic sea lanes.

## Navigation in international airspace

**8.20** International airspace is that airspace over the high seas, EEZ, contiguous zone and territory not subject to territorial sovereignty (eg the Arctic). International airspace is open to aircraft of all nations. Accordingly, military aircraft are free to operate in international airspace without interference from any other nation. While in international airspace, military aircraft are free to engage in normal flight operations, including weapons testing and firing, surveillance, intelligence gathering, and support of naval activities. All such operations must be conducted with due regard to the safety and rights of other aircraft and vessels.

**8.21 International Civil Aviation Organisation flight procedures.** ICAO flight procedures are established under the terms of the Chicago Convention. As military aircraft are generally not subject to this convention, they are not bound by ICAO regulations, other than the requirement to operate with due regard to the safety of civil aircraft. It is ADF practice to follow ICAO procedures, unless operational circumstances dictate otherwise. Operational circumstances which may not lend themselves to ICAO flight procedures include security contingencies and classified missions.

**8.22 Flight information regions.** Flight information regions (FIR) are defined areas within which flight information and alerting services are provided. FIR are established by ICAO for the safety of civil aviation and encompass both national and international airspace. As a matter of policy, ADF aircraft on routine missions follow ICAO procedures and utilise FIR services. Acceptance by a nation's government of responsibility for an FIR does not grant that government sovereignty over that international airspace. Furthermore military aircraft retain the right to transit international airspace without interference and are not required to use FIR services.

## Air defence identification zones

**8.23** An air defence identification zone (ADIZ) is a defined area within which civil aircraft are required to identify themselves. The asserted legal basis for such zones is the right of nations, under the Chicago Convention, to establish conditions and procedures for entry into their national airspace. These zones are established above the high seas adjacent to the coast, and over the territorial sea, land and territory. Declaration of an ADIZ does not constitute a claim of any sovereign rights. Australia, from time to time, has declared an ADIZ for military exercise purposes. Nations who have standing ADIZs include Indonesia (over Java), United States, Japan, Canada and France.

**8.24 Air defence identification zone procedures.** An aircraft approaching an ADIZ can be required to identify itself as a condition of entry to national airspace. ADIZ regulations generally require aircraft, bound for national airspace, to file flight plans and periodic position reports.

Failing voluntary identification, aircraft can expect to be identified by intercept aircraft. The declaration of an ADIZ does not confer on an intercepting pilot the right to engage an aircraft. Rules of engagement (ROE) will provide guidance on the circumstances in which an aircraft may be engaged. There is no right to require an aircraft to identify itself if it does not intend to enter national airspace. These procedures reflect the peacetime position. In the case of imminent or actual hostilities, a nation may take self-defence measures, which will affect overflight in international airspace.

**8.25 Promulgation of an air defence identification zone.** The activation of an ADIZ is effected by promulgation through military and civil agencies. In Australia, Air Services Australia, in concert with Headquarters Joint Operations Command, promulgates ADIZs by the issue of Notices to Airmen.

**8.26** In order to avoid exposing a medical aircraft to unnecessary harm, international law allows nations that operate medical or prisoner of war (PW) transport aircraft to enter into agreements with belligerents and neutrals to ensure safe passage of the aircraft over foreign territory.

### **Security zones**

**8.27** In the interests of safety, any nation may declare a temporary closure, or warning area, on and over the high seas to advise other nations of the conduct of hazardous activities. These warnings are cautionary, not mandatory. International law does not recognise the right of any nation to restrict the right of navigation of military aircraft in international airspace. Some nations have declared exclusion zones (EZ) in times of conflict, pursuant to the inherent right of self defence. The United Nations (UN) also sanctioned an air EZ over Bosnia following Security Council resolutions, in an effort to protect areas from attack.

**8.28 Claims of security zones.** Some nations have asserted claims that purport to restrict the activities of military aircraft and warships in so-called 'security zones' that extend beyond national airspace. These zones have no basis in international law except in times of conflict. Customary international law does not determine the extent of security zones, beyond having a requirement that they be reasonable in relation to the needs of national security.

### **Exclusion zones**

**8.29** In situations of international conflict and times of tension, a nation is entitled, under the UN Charter, to exercise measures of individual or collective self-defence against an imminent threat of armed attack or an actual armed attack. On many occasions this century, nations have declared an EZ in areas adjacent to national territory, invoking the principle of individual or collective self-defence.

**8.30** An EZ is an area declared by a nation, or military force, into which entry by designated forces is prohibited. An EZ may be stationary or moving. Neutral aircraft and ships should avoid such zones; those that enter navigate at their own risk. The use of EZ is expected to increase, as not only nations but also the UN, seek ways to localise conflicts. Because acceptability of the EZ will depend on factors unique to each situation, providing clear guidance on the legal acceptability of an EZ is difficult. In times of conflict a belligerent is not barred from using force outside the zone to eliminate enemy threats. Further guidance on the use of EZ can be obtained from Australian Defence Doctrine Publication 06.1—*Rules of Engagement* and ADF legal advisers.

### **Interception of aircraft**

**8.31** Where national airspace is violated by intrusion without permission it is considered that the following rules reflect current international law:

- Intruding aircraft must obey all reasonable orders to land at a determined place, to turn back or to fly on a prescribed course.
- In attempting to control the movement of an intruding aircraft an intercepting aircraft may not expose the intruder to unnecessary or unreasonable danger. The 'reasonableness' of the action must be determined by such factors as the character of the intruding aircraft, its probable motives for intrusion, the possibility of control without the use of force, the proximity of the aircraft to important installations and the frequency of previous intrusions.
- In peacetime, when there is no reason to believe the intrusion is hostile or harmful to the security or other appropriate interests of the nation, the intruder may not be attacked merely because it disobeys orders to land. On the other hand, if the intruder's intentions are unknown and cannot reasonably be ascertained, the intruder may, after disregarding appropriate warnings, be required to land. Article 3 of the Chicago Convention stipulates that 'contracting states' are to: 'refrain from the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of the aircraft must not be endangered'.

### **HISTORICAL EXAMPLE—INTERCEPTION OF AIRLINERS 1978, 1983**

Two South Korean airliners were shot down by Soviet warplanes within five years—in the first event a fortuitous minimum loss of life, in the second, total. The circumstances were as follows:

**Boeing 707 KAL Flight 902 on 20 April 1978:** Flying on the polar route from Amsterdam to Anchorage, the aircraft veered slowly to the right, apparently due to a miscoded magnetic correction, until it was over the Kola Peninsula. Here it was intercepted by a Soviet fighter who positioned itself on the right rather than on the left side as required by ICAO procedures. The airliner captain, in accordance with ICAO procedures, reduced speed, lowered his landing gear and flashed his lights as a demonstration of his willingness to obey the interceptor's instructions. The fighter pilot was ordered to attack, and after he protested the order, launched a missile, which blew off part of a wing and killed two passengers with the shrapnel. The pilot dived sharply through a cloud to gain breathable atmosphere, and in so doing evaded the fighter and Soviet radar, later landing safely on a frozen lake.



**Figure 8–1: Flight 902 landed safely on the ice**

**Boeing 747 KAL Flight 007 on 01 September 1983:** The flight from New York to Seoul via Anchorage began veering slowly to the north after leaving the latter, so that it passed over the Kamchatka restricted zone. Soviet fighter aircraft were scrambled, but it left their airspace over the Sea of Okhotsk and the fighters returned to base. Still veering off course, it passed into Soviet airspace again over Sakhalin and fighters again took off to intercept.

### HISTORICAL EXAMPLE—(cont)

The crew of the airliner was unaware of the presence of the interceptors and the interceptors were neither certain of the identity of the aircraft, nor did they comply with the ICAO challenging and warning conventions. The fighters were ordered to engage the airliner, with the result that it crashed with the loss of all 269 lives on board.

These were but two incidents of many in the Cold War stand-off, where both sides continuously flew intelligence missions at the fringes of each other's airspace.

There are many excuses, counter-claims and conspiracy theories that have arisen on the above incidents, however, the unavoidable facts are that:

- The ICAO has established procedures to protect civil air traffic passing by or through sensitive areas, including positive identification, interrogation, warning standards and procedures.
- The established ICAO procedures were not complied with in these cases, resulting in unnecessary loss of protected aircraft and lives. **(source: Oberg Uncovering Soviet Disasters)**

### Neutral airspace during armed conflict

**8.32** The national airspace of a neutral nation must be respected by belligerents. ADF aircraft should avoid overflying airspace of a neutral country without permission during times of armed conflict. However, archipelagic sea lanes and transit passage overflight are two exceptions. If a belligerent aircraft enters neutral airspace without permission the neutral nation is obliged to take appropriate action to expel it. If a neutral nation repeatedly fails to assert the territorial integrity of its airspace, a belligerent nation may be justified in taking appropriate action against another belligerent nation inside neutral airspace on the basis of self-defence.

**8.33** In times of armed conflict neutral nations may impose conditions and restrictions impartially on belligerent aircraft entering their national airspace. If a belligerent military aircraft enters neutral airspace without permission and must land in that territory (whether because of disability or at the direction of

the neutral nation), the aircraft and its crew will be interned by the neutral state until the cessation of hostilities and released in accordance with provisions similar to those for PW.

**8.34** ADF medical aircraft that are engaged solely in humanitarian functions must have prior approval to overfly or land in neutral territory. If permission is not obtained, the law is uncertain and the practice of nations varies. The most widely accepted view is that aircraft that violate neutral airspace may be asked to land by the nation in whose airspace they are flying. If their protected status is confirmed by subsequent search they are to be allowed to proceed. If a violation has occurred then aircraft and crews are to be held until the conclusion of hostilities.

## METHODS OF COMBAT

### Targeting

**8.35** An attack must be cancelled or suspended at any stage where it becomes apparent that the objective is not a military one, is subject to special protection, or the attack 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.

**8.36** The LOAC principles of proportionality, military necessity and unnecessary suffering determine which targets may be attacked by military aircraft. Target selection is based on current intelligence and information. However, aircrew have a special and personal responsibility, under the Additional Protocols, to ensure LOAC compliance if they acquire information that was not available at the planning stage. For example, aircrew may be ordered to bomb what the mission planner believes to be a command and control centre. If, in the course of the mission, the command and control centre is displaying an unbriefed symbol of protection, eg Red Cross symbol, then aircrew must refrain from completing their attack. The Red Cross symbol indicates the facility is a protected installation and is immune from attack unless intelligence, or higher authority, determines that the facility has lost its protected status because the emblem is being misused.

**8.37** As targeting decisions have the potential to lead to extensive collateral damage, air planners and commanders need to pay close attention to the LOAC considerations that will impact on their decisions. Guidance on targeting is provided in chapter 5—'Targeting'.



## Precision-guided weapons

**8.38** The existence of precision-guided weapons, such as GBU 10 and Harpoon missiles, in a military inventory does not mean that they must necessarily be used in preference to conventional weapons even though the latter may cause collateral damage. In many cases, conventional weapons may be used to bomb legitimate military targets without violating the LOAC requirements. It is a command decision as to which weapon to use. This decision will be guided by the basic principles of the LOAC: military necessity, avoidance of unnecessary suffering and proportionality.

## Quarter must be granted

**8.39** It is illegal to order that no prisoners will be taken, to make a threat that such an order might be given or to conduct hostilities on this basis.

**8.40** The LOAC forbids the killing or wounding of an enemy who, in good faith, surrenders or is otherwise *hors de combat* (out of combat). Surrenders in air combat are rarely offered. Nevertheless, actions or signals that suggest surrender should be respected. The surrendered aircraft should then be escorted to a suitable landing place.

**8.41** Although relatively rare, surrenders by defecting enemy aircrew of military aircraft do offer valuable intelligence and psychological opportunities, and should be encouraged.

**8.42** Disabled enemy aircraft in air combat are frequently pursued to destruction because of the difficulty of verifying their true status and inability to enforce surrender. Although disabled, the aircraft may or may not have lost its combat capability. Moreover, it may still represent a valuable military asset. If an aircraft in distress is clearly *hors de combat* from the information known to the attacking force at the time, then its destruction offers no military advantage, and the attack should be broken off to permit possible evacuation by crew or passengers. If the aircraft is a support or civil aircraft it is particularly important that this rule be observed.

**8.43** Aircraft may not open fire on any personnel who have indicated an intention to surrender. This applies to ships as well as land forces. Additionally, aircraft may not fire upon shipwrecked personnel, including those who may have parachuted into the sea or otherwise come from downed aircraft, so long as the personnel have not been picked up. These rules do not alter the fact that any attempt by the enemy to recover downed crew may be opposed.

## Propaganda

**8.44** The use of military aircraft for the purpose of disseminating propaganda from the air is well established in warfare. Dissemination of propaganda by military aircraft includes dropping of leaflets, air-to-ground broadcasts and the like.

**8.45** Propaganda for the purposes of inducing enemy combatants to rebel, desert, or surrender is not prohibited. Inducements may take the form of monetary rewards. Although the LOAC sanctions the use of military aircraft and aircrews to deliver propaganda, not all forms of propaganda are lawful. Propaganda that would incite illegal acts of warfare, as for example killing civilians, killing or wounding by treachery or the use of poison or poisonous weapons, is forbidden.

## RESTRICTIONS ON THE USE OF AERIAL WEAPONS

**8.46** The rules covering air-delivered incendiary weapons and air-delivered mines are outlined in chapter 4—'Weapons'.

## AIR-TO-AIR OPERATIONS

**8.47** Generally for air operations, the LOAC is the same as for the maritime and land environments.

**8.48** Enemy military aircraft may be attacked and destroyed in any airspace other than neutral airspace. Enemy military aircraft may be captured anywhere other than in neutral jurisdiction. Ownership of captured aircraft passes to the captor's government by virtue of the capture.

**8.49** A military aircraft is generally a legitimate target in armed conflict. There will be exceptions such as a medical aircraft or aircraft that have been granted specific protection by agreement between the parties concerning non-hostile uses such as negotiations to conclude hostilities, cease-fire, surrender, exchange of prisoners or the exchange of official communications. In all such circumstances, the agreement should include appropriate markings and other means of identification. In the absence of entitlement to protection, the status of personnel on board a military aircraft is irrelevant; their individual status is subsumed by the military character of the aircraft until such time as they leave it.

**8.50** All reasonable precautions should be taken during the conduct of military operations in the air to avoid loss of civilian lives and damage to civilian objects.

## **Parachutists and downed airmen**

**8.51** Aircrew descending by parachute from a disabled aircraft are immune from attack. If such personnel land in enemy territory they must be given an opportunity to surrender before being made the object of an attack, unless it is apparent that they are engaging in some hostile act.

**8.52** If personnel from a disabled aircraft do not surrender on being called upon to do so, they may be attacked in the same way as any other combatant. While they may be captured by non-combatants, they may not be subject to violent assault by them. This does not include such violence as may lawfully be used by a police officer or other non-combatant in effecting their capture.

**8.53** If the crew of a disabled aircraft lands by parachute in territory occupied by their own forces or under the control of their own national authority, they may be attacked in the same way as any other combatant, unless wounded, in which case they are protected. If in a raft or similar craft at sea after parachuting, they are to be treated as if shipwrecked and may not be attacked.

**8.54** Paratroopers and other airborne troops may be attacked, even during their descent. If the carrying aircraft has been disabled it may be difficult to distinguish between members of the crew abandoning such aircraft who are immune from attack, and the airborne troops who are not so protected.

## **Search and rescue operations**

**8.55** It is permitted to attack those who are not protected persons under the Conventions while they are attempting to rescue aircrew who have crashed. However, rescuers such as medical personnel attempting to rescue injured airmen are protected. In such cases, the airman and his rescuers are protected in accordance with the Geneva Conventions.

## **Civil aircraft and occupants**

**8.56** Civil aircraft in flight (including state aircraft, which are not military aircraft) should not be attacked. They are presumed to be carrying civilians who may not be made the object of direct attack. If there is doubt as to the status of a civil aircraft, it should be called upon to clarify that status. If it fails to do so, or is engaged in non-civil activities, such as ferrying troops, it may be attacked. Civil aircraft should avoid entering areas that have been declared conflict zones by the belligerents.

**HISTORICAL EXAMPLE—UNITED STATES SHIP VINCENNES**

**Figure 8–2: United States Ship VINCENNES which mistakenly shot down an Iranian airliner, Persian Gulf 1988**

On duty to protect tanker traffic in the Persian Gulf from Iranian interdiction, this leading-edge air defence cruiser mistook a climbing Iranian civil Airbus for an Iranian military F–14 apparently on a downward attack course. Several Iranian Revolutionary Guard vessels were simultaneously harassing the USS VINCENNES. The United States ROE were followed, and permission to engage the aircraft was sought and received from a superior headquarters. A series of ship crew errors aboard the cruiser, combined with the failure of the Airbus crew to respond to warnings, led to the airliner overflying the sea skirmish and being shot down, with the loss of all 290 lives aboard. (source: USN Image 165)

**8.57** Civil aircraft, which have been absorbed into a belligerent's air force and are being ferried from the manufacturer to a belligerent for this purpose, may be attacked.

**8.58** Civilian crew members of a military aircraft, together with those responsible for ferrying aircraft intended for military use, become PW if captured by the enemy.

**8.59** Civil aircraft on the ground may only be attacked in accordance with the normal rules relating to military objectives. However, since they may be used for transporting troops or supplies, their status will frequently depend

upon the prevailing military situation. In addition, airfields maybe subject to attack, and collateral damage to civil aircraft on the ground does not render the attack unlawful, provided that damage is not excessive in relation to the concrete and direct military advantage anticipated.

### **Medical aircraft**

**8.60** Medical aircraft, correctly identified and exclusively used as such, must not be attacked. Like other medical facilities, medical aircraft have special protected status. Medical aircraft must be clearly marked with the Red Cross, Red Crescent or Red Crystal and national emblem on their lower, upper and lateral surfaces. Medical aircraft are those aircraft assigned exclusively to medical transportation and under the control of a competent authority of a party to the conflict. Medical aircraft may fly over areas controlled by their own forces and over sea areas not controlled by the enemy.

**8.61** Flights over enemy controlled areas are forbidden without prior agreement. The parties to a conflict may agree to confer immunity from attack upon specific aircraft. Such aircraft remain protected only so long as they take no part in hostilities and rigorously respect the conditions laid down in the agreement.

**8.62** In the absence of any agreement, medical aircraft flying over the battle zone do so at their own risk.

**8.63** Regardless of any agreement, aircraft recognised as medical aircraft cannot be attacked, but may be ordered to land and be inspected. They can be attacked if they do not comply with such directions. Medical aircraft must not be used to gain any military advantage. G. P. I contains seven articles which outline the rules applicable to medical aircraft, and these should be considered by those ADF commanders involved in the use of medical aircraft during armed conflict.



## CHAPTER 9

# PROTECTED PERSONS AND OBJECTS

### Executive summary

- Civilians and other particular groups, objects, buildings and facilities are provided protection under the law of armed conflict (LOAC).
- The use of certain symbols assists in recognising protected persons and objects.

## INTRODUCTION

**9.1** The LOAC provides rules for both the conduct of hostilities and the protection of victims of hostilities. This chapter focuses on groups and objects, which have special protection under the LOAC, and is mainly concerned with the protection of non-combatants, and civilians and civilian objects. In modern times, the civilian population has become increasingly involved in hostilities as nations have waged ‘total war’.

**9.2** Apart from civilians, other particular groups, objects, buildings and facilities are given special protection. These include:

- medical personnel, equipment, transport and facilities;
- all religious personnel, including chaplains;
- sick, wounded and shipwrecked;
- civil defence personnel and facilities;
- installations containing dangerous forces;
- neutrals and neutral property;
- prisoners of war (PW), PW camps and internment camps;
- cultural, religious and historic buildings and items; and
- the environment.

## PROTECTED SYMBOLS

**9.3** In order for protected persons, transport, buildings and facilities to be identified, several internationally recognised symbols and markings are provided in international conventions. The main symbols and markings are explained in the following paragraphs and are illustrated in annex A. Use of the protected symbols is strongly recommended but not compulsory. Not displaying a symbol does not automatically leave a protected facility or person open to attack. If a belligerent has knowledge that a person or facility is protected under the Geneva Conventions, then the protected status of the facility or person must be respected. The practical problem is that it may be very difficult in combat for an attacker to identify and distinguish the unmarked protected person or facility.

**9.4** Protected symbols will be used by the Australian Defence Force (ADF) and the civilian population unless overriding military considerations dictate otherwise. To conceal a military deployment, a commander may choose not to display the Red Cross, Red Crescent or Red Crystal symbol on field ambulances or medical facilities which by necessity must be located close to a military objective such as a medical transit post adjacent to a military airfield.

### Red Cross, Red Crescent and Red Crystal

**9.5** A red cross on a white background is the internationally accepted symbol for protected medical and religious personnel, facilities, transports and activities. Moslem countries utilise a red crescent on a white background. In 2005 a third additional protocol to the Geneva Conventions introduced the Red Crystal (a hollow red diamond on a white background) as another protective symbol for the purposes of the Geneva Convention.



**HISTORICAL EXAMPLE—SINKING OF CENTAUR 1943**

**Figure 9–1: Her Majesty’s Australian Hospital Ship CENTAUR as she was marked when sunk, Moreton Island 1943**

A Japanese submarine off Moreton Island sank HMAHS CENTAUR at night, her lights brilliantly lit and Red Cross markings unmistakable. While there was suggestion that there were warlike stores aboard, these were confined to the lawful personal weapons of the drivers of the field ambulance embarked. The idea that Japanese intelligence was so acute in Australia as to detect and disseminate this in time is not credible, and was not claimed as a defence by the Japanese Government. This was a blatant disregard of a protected symbol. **(source: Australian War Memorial 302800)**

**9.6 Wearing of military uniform.** In addition to identity cards, medical and religious personnel, regardless of whether they are permanent or temporary, are to wear the distinctive emblem on both their headgear and clothing.

## Other protective symbols

**9.7** Other protective symbols include an oblique red band on a white background to designate hospital zones and safe havens for noncombatants. PW and PW camps are marked by the letters 'PW' or 'PG' (prisonnier de guerre) and civilian internment camps with the letters 'IC' (internment camp). A royal-blue diamond and royal-blue triangle on a white shield is used to designate cultural buildings, museums, historic monuments, and other cultural objects that are exempt from attack. In some countries, a red circle with triple red spheres in the circle, on a white background (the 'Roerich Pact' symbol) is also used for that purpose.

**9.8** Two new protective symbols were established by Additional Protocol I (G. P. I). They are for 'Works and Installations Containing Dangerous Forces', ie dams, dykes, and nuclear power plants, which are to be marked by three bright orange circles of equal size on the same axis; and for 'Civil Defence' facilities and personnel who are to be identified by an equilateral blue triangle on an orange background.

## Identity cards

**9.9** Identity cards are to be issued to both medical and religious personnel regardless of whether they are of permanent or temporary status. Under no circumstances are they to be deprived of this identification. Should circumstances prevent the issue of an identity card, a certificate may be issued temporarily until such time as a proper card can be issued. Identity cards are to:

- bear the distinctive emblem and be capable of being carried in a pocket;
- be as durable as practicable and be worded in the national or official language (it may carry an additional language);
- state the capacity of the holder and carry the name, date of birth, distinguishing features, identity number, photograph and signature or thumbprint of the holder; and
- bear the stamp and signature of the issuing authority, date of issue and expiry date of the card.

A model identity card for medical and religious personnel is in annex B.

## White flag

**9.10** International law recognises the white flag as symbolising a request to cease-fire, negotiate, or surrender. An adversary displaying a white flag should be permitted the opportunity to communicate a willingness to surrender, or to communicate a request for cease-fire or negotiation. The feigning of an intent to negotiate under a flag of truce or surrender is perfidious conduct.

## LOSS OF PROTECTED STATUS

**9.11** Protected personnel lose their protected status when:

- as medical, religious or shipwrecked personnel they engage in hostile acts, or attempt to shield military objectives from attack, other than circumstances in which:
  - they use arms in self-defence or for the defence of the wounded and sick;
  - they are used as guards, pickets and sentries for unit protection; and
  - small arms and ammunition taken from the wounded and sick are found within a medical unit;
- an otherwise protected person, in the territory of one of the belligerents is suspected of, or engaged in, activities hostile to the security of that state; and
- an otherwise protected person in an occupied territory is detained as a spy or saboteur.

## PROTECTION FOR CIVILIANS AGAINST THE EFFECTS OF HOSTILITIES

### Basic rule

**9.12** A basic rule of the LOAC expressed in G. P. I is that:

- 'In any armed conflict the right of the parties to the conflict to choose methods of or means of warfare is not unlimited'.

**9.13** The basic rule in respect of civilians which flows from this is that a distinction must be made between the civilian population and combatants, and between civilian objects and military objectives, in order that military operations will only be directed against military objectives.

## **Definition of civilian**

**9.14** G. P. I defines a civilian in a negative fashion, namely, any person not belonging to the armed forces. The definition covers civilians collectively as well, when they are referred to as the 'civilian population'. In cases of doubt about civilian status, the benefit of the doubt is given to the person concerned.

## **Journalists**

**9.15** Special provision is made for civilian journalists engaged in dangerous professional missions in areas of armed conflict. They are to be afforded the protection that normally applies to civilians. Granting of this protection is subject to the journalists not engaging in conduct that is inconsistent with their civilian status. Such journalists are normally issued with special identity cards. Protection does not extend to war correspondents who are members of the military forces of a nation. War correspondents are detained as PW upon capture whereas civilian journalists are deemed protected persons and would not normally be detained.

## **Civilian objects**

**9.16** Civilian property or objectives are defined as anything that are not military objectives.

## **Protection of civilians and civilian objects**

**9.17** Military operations may only be directed against military objectives and not against the civilian population and civilian objects. To give effect to this general protection the LOAC contains a number of specific prohibitions.

**9.18** It follows from the general rule that it is forbidden to attack the civilian population, individual civilians and civilian objects as a deliberate method of warfare. Furthermore, acts or threats of violence, the primary object of which is to spread terror among the civilian population are also prohibited. Objects, which are normally civilian objects, can become military objects due to the military situation, in the same way civilians who take part in the conflict become unlawful combatants and legitimate targets.

**9.19** The failure of one party to comply with the specific rules below concerning the protection of civilians does not release the other party from its duty to protect civilians.

**9.20** Refugees and internally displaced persons in war always raise issues involving elements of human rights and the laws of war. Refugees and those fleeing armed conflict are protected persons who must at all times be treated humanely and shall not be attacked or threatened with acts or threats of violence. Refugees are entitled to the same rights and privileges as other protected persons. They are entitled to respect for their person, honour, their family rights, their religious convictions and practices and their manners and customs. Women shall be especially protected against attack in particular against rape and any form of indecent assault. Furthermore, the party to the conflict in whose hands protected persons may be, shall be responsible for their treatment and for making available to such persons facilities to enable such persons to make contact with and application to international humanitarian organisations such as the International Committee of the Red Cross (ICRC).

#### **HISTORICAL EXAMPLE—REFUGEES PROBLEM, KAPYONG 1951**

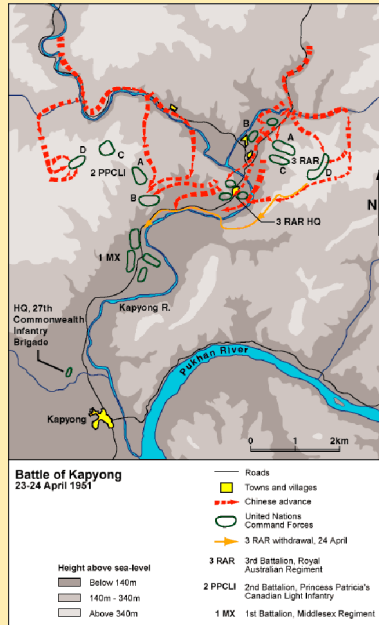
In response to the successful Chinese offensive down the main route to Seoul in April 1951, 27 Britcom Brigade was rushed into deployment near the village of Kapyong to stem the tide. 3 Royal Australian Regiment occupied the exposed forward right position covering the road south, taking up its positions by last light, at which stage the flow of rearward-moving Korean soldiers and transport had increased to a torrent, indicating that the lead Chinese division had broken through and could be expected on the heels of this influx.

Subsequently, this flow changed to mostly civilians, and it was expected that, as usual, Chinese soldiers would mix amongst them to infiltrate to the rear. As some shots were heard, the commander of A Company described it as:

*'It looked like the infiltration stage had been reached and I reckoned a few bursts of MMG (medium machine gun) fire would sort the situation out—the civilians scurrying off the road, leaving the Chinese to declare their hand. I requested permission to open fire but, in the absence of identified enemy, I was refused'.*

The battalion commander's refusal of this counter-infiltration measure in conformity with the rules of engagement did him no personal benefit. The infiltrators were in strength and shortly were attacking his headquarters and the mortar platoon which were located to the rear of the infantry companies, and they were fighting for survival. These enemy troops then further disrupted the other fire support units, denying their cover to the forward troops.

**HISTORICAL EXAMPLE—(cont)**



**Figure 9–2: A map of the Battle of Kapyong**

Such situations place commanders in a quandary. Refugees are classed as protected persons, and so should not be fired on. On the other hand, they provide an effective human shield and camouflage for belligerents to use to their distinct military advantage. The battalion commander correctly took responsibility for rejecting the suggestion of random firing when it was impossible to discriminate between fleeing civilians and oncoming troops. There are circumstances, however, when it is necessary to engage enemy forces using civilians as shields. In such circumstances, military forces must make every effort to minimise civilian casualties. (source: **Official History of Australia in the Korean War 1950–1953 volume 2, Anzac Day Magazine**)

**9.21 Reprisals.** A reprisal is an otherwise illegal act done in response to a prior illegal act by the enemy. A reprisal aims to counter unlawful acts of warfare and to force the enemy to comply with the LOAC. Reprisals are prohibited against civilians and civilian objects.

**9.22 Indiscriminate attacks.** An extension of the general rule for the protection given to civilians is that indiscriminate attacks, that is, attacks not directed at military targets but likely to strike at both military and civilian targets without distinction, are forbidden.

**9.23 Shielding military objectives.** The civilian population shall not be used to attempt to render military objectives immune from attack or to shield, favour or impede military operations.

**9.24 Other general prohibitions.** Other general prohibitions which provide for the protection of civilians or their property are as follows:

- It is prohibited to attack or bomb undefended towns, villages, dwellings or buildings. This prohibition does not apply where the undefended building or place becomes a military objective and its destruction is necessary. An example is a munitions factory or a railway yard used to support the enemy war effort.
- It is forbidden to destroy or requisition enemy property unless it is militarily necessary to do so. In the same manner pillage is also forbidden, even if the town or place concerned is taken by assault.
- Starvation of civilians cannot be used as a method of warfare.
- Enemy nationals cannot be compelled to take part in operations against their own country even if they were in your service before the outbreak of hostilities.

**9.25 Warning requirement.** Where a military objective is to be attacked and civilians may be in danger, there is a general requirement to warn them of the attack, unless circumstances do not permit. An example would be where surprise is essential to the mission. This rule specifically applies in cases of bombardment where civilians are likely to be endangered.

### **Relief operations for civilians**

**9.26** In addition to the special immunity granted to civilian and military medical services there are numerous civilian bodies which are given special protection. These include the ICRC, the Red Cross and Red Crescent Societies, personnel engaged in the protection of cultural property, personnel involved in relief operations and civil defence organisations.

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## SPECIALLY PROTECTED OBJECTS

### Cultural objects

**9.27** The LOAC provides for the specific protection of cultural objects and places of worship, which supplements the general protection given to civilian objects. Buildings dedicated to religion, science or charitable purposes, and historic monuments, are given immunity from attack as far as possible, so long as they are not being used for military purposes. Such places are to be marked with distinctive and visible signs, which must be notified to the other party.

### Cultural property

**9.28** Cultural property is also protected. Cultural property includes movable and immovable objects of great importance to the cultural heritage of people, whether their state is involved in the conflict or not, such as historical monuments, archaeological sites, books, manuscripts or scientific papers and the buildings or other places in which such objects are housed. Obligations are placed upon all parties to respect cultural property by not exposing it to destruction or damage in the event of armed conflict and by refraining from any act of hostility directed against such property. These obligations may be waived where military necessity requires such waiver, as in the case where the object is used for military purposes.

**9.29** Historic monuments, places of worship and works of art, which constitute the cultural and spiritual heritage of peoples, are protected from acts of hostility. These objects must not be used in support of any military effort or be the subject of reprisals.

### Objects indispensable to survival

**9.30** Protection is provided from certain types of attack upon civilian populations by providing special protection for certain types of objects. The first relates to objects indispensable to the survival of the civilian population.

**9.31** Starvation of civilians as a method of warfare is forbidden. G. P. I further prohibits the attacking, destruction, spoiling or removal of objects indispensable to the survival of the civilian population whatever the motive of such destruction. Examples of such objects include foodstuffs, agricultural areas producing foodstuffs, crops, livestock, drinking water installations and irrigation works.



**9.32 Loss of protection.** Objects indispensable to the survival of the civilian population are excluded from protection if:

- they are used solely for the sustenance of the armed forces;
- they are used in direct support of military action, but the civilian population may not be thus reduced to starvation or forced to move; or
- the military necessity for the defence of territory against invasion so requires.

**9.33** Details on the protection of objects is in chapter 7—‘Land operations and the law of armed conflict’.

### **Installations containing dangerous forces**

**9.34** The works or installations containing dangerous forces are specifically limited to dams, dykes and nuclear electrical generating stations. Even where these objects are military objectives, they shall not be attacked if such attack may cause the release of dangerous forces and consequently severe losses amongst the civilian population. The purpose of this rule against such attacks is to avoid excess damage or loss to the civilian population.

**9.35** Military objectives at or in the vicinity of an installation mentioned in paragraph 9.34 are also immune from attack if the attack might directly cause the release of dangerous forces from that installation in question and subsequent severe losses upon the civilian population.

**9.36** The release of the dangerous forces may have a consequent severe loss among the civilian population. This is an absolute standard rather than the relative one set by the rule of proportionality. If massive civilian losses are foreseeable, the attack would be prohibited regardless of the anticipated military advantage.

**9.37 Loss of protection.** In the case of a dyke or dam, the protection afforded ceases if three special conditions are evident. These are that:

- it is used for other than its normal function;
- it is used in regular, significant and direct support of military operations; and
- an attack is the only feasible way to terminate such support.

**9.38** In relation to nuclear electrical generating stations and other military objectives located in the vicinity, only the last two conditions in paragraph 9.37 apply.

**9.39 Defensive weapons.** Defensive weapons systems may be erected to protect works or installations from attack. These systems may only be used for the limited purpose for which they are intended. The erection of such defence facilities is not without danger and could lead to the work or installation losing its protection.

### **Protected zones and localities**

**9.40** The LOAC allows various zones to be set up for the protection of civilians from the effects of hostilities. They include hospital, safety, neutralised and demilitarised zones and non-defended localities.

**9.41 Hospital and safety zones.** Hospital and safety zones are established for the protection from the effects of war of the wounded, sick and aged persons, children under 15 years, expectant mothers and mothers of children under seven years. Such zones are:

- generally permanent in character;
- located outside the combat zone in either a state's own or occupied territory; and
- established in peacetime or during war by agreement between the parties. (Such agreement may be reached through the offices of any protecting power or the ICRC.)

**9.42 Neutralised zones.** Neutralised zones may be established in regions where fighting is taking place to shelter wounded and sick combatants or non-combatants and civilian persons who take no part in hostilities and who perform no work of a military character. The zones are set up by written agreement, which includes details of location, administration and duration of the neutralisation of the zone.

**9.43 Non-defended localities.** Generally non-defended localities are protected from attack. Further detail is covered in paragraphs 7.28 to 7.33.

**9.44 Demilitarised zones.** Generally, demilitarised zones are protected from attack. Further detail is covered in paragraph 7.39.

## GENERAL PROTECTION OF ALL PERSONS AFFECTED BY ARMED CONFLICT

### Basic standards of treatment

**9.45** All persons are to be treated humanely in all circumstances and without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status or on any other similar criteria. Their person, honour, convictions and religious practices must be respected. G. P. I provides 'fundamental guarantees' or basic human rights to all persons who find themselves under the control of one of the parties to an international armed conflict, and who do not benefit more favourably from other LOAC provisions. This would include a party's own nationals such as German Jews and dissidents who were brutally treated by the Nazis during World War II.

### Prohibited acts

**9.46** The following acts are prohibited at any time and in any place whatsoever:

- Violence to the life, health or physical or mental well-being of persons, in particular:
  - murder;
  - torture of all kinds, whether physical or mental;
  - corporal punishment; and
  - mutilation;
- outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
- the taking of hostages;
- collective punishments; and
- threats to commit any of the foregoing acts.

### Arrest, detention and internment

**9.47** Where a person is arrested, detained or interned for actions related to the armed conflict, they must be informed promptly in a language that they understand of the reason for these measures. Unless the arrest or detention is for penal offences, they must be released 'with the minimum delay possible

and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist'. Pending release, they retain the protection of G. P. I.

### **Protection of women**

**9.48** Women must be accorded 'special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault'.

**9.49** Women arrested, detained or interned for reasons connected with the armed conflict must be kept in separate quarters from men and under the immediate supervision of women. In cases where families are detained or interned, they should, whenever possible, be held in the same place and accommodated 'as family units'.

### **Protection and welfare of children**

**9.50** Children are to be respected and protected, especially against indecent assault. The care and aid needed by children must be provided. As is the case with women, children are granted special protection under the LOAC. Important rules are shown below:

- because of their age children should receive all the aid and care they require;
- children under 18 years of age should not take a direct part in hostilities<sup>1</sup>;
- in case of arrest, children should be kept in separate quarters from those of adults;
- the death penalty must not be executed on children who are under the age of 18 at the time the offence was committed; and
- children who are not nationals of the state may not be evacuated by that state to a foreign country unless the evacuation is temporary and accords to certain conditions set out in G. P. I.

**9.51 Recruitment.** There is a minimum voluntary recruitment age of 17 years, the exception being for entrants to military schools, apprentices and members of Service cadet schemes. All feasible measures are to be taken to ensure minors are not deployed to an area of operations.

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1 Note that G. P. I and the Convention on the Rights of the Child (CROC) stipulate 15 years of age. The 2000 Optional Protocol to the CROC on the involvement of children in armed conflict, and the preferred position of Australia, is 18 years of age.

**9.52 Arrest and detention.** If arrested, detained or interned for reasons connected with the armed conflict, children must be kept in quarters separate from adults unless they belong to an interned family unit.

### **Free passage of relief supplies**

**9.53** The free passage of medical and hospital stores, essential foodstuffs, clothing, bedding, means of shelter and articles necessary for religious worship, which are intended for civilians including those of an enemy, must be allowed.

## **RULES FOR THE TREATMENT OF PROTECTED PERSONS**

**9.54** The majority of the Fourth Geneva Convention (G. IV) deals with a specific group of civilians called 'protected persons'. The rules applicable to these persons are in addition to the general rules that apply to all civilians.

### **Protected persons**

**9.55** Protected persons are defined as: '... those persons who, at any given moment and in any manner whatsoever, find themselves, ... in the hands of a party to the conflict or occupying power of which they are not nationals'. The words, 'in the hands of', mean that the person concerned is in a territory which is under the control of that party. The most common groups within the definition are:

- enemy nationals who are in their own territory,
- the whole population of an occupied territory other than persons of the occupying power,
- persons considered as refugees or stateless persons under international law, and
- military and civilian medical personnel.

**9.56** Persons excluded from the definition of a protected person include:

- nationals of that party;
- nationals of neutral states who are present in the territory of a party to the conflict;
- nationals of states not parties to the conventions;
- persons protected by the other three Geneva Conventions, for example, crews of merchant ships if protected under one of the other Geneva Conventions;

- an otherwise protected person in the territory of one of the parties who is suspected of, or engaged in, activities hostile to the security of the state; and
- an otherwise protected person in an occupied territory who is detained as a spy or saboteur.

**9.57** The rights of a protected person cannot be renounced by them.

### **General treatment of protected persons in both their own territory and occupied territory**

**9.58 Basic rule.** The general rule for the treatment of protected persons is similar to that outlined in the previous section dealing with fundamental rights. An obligation is imposed on all parties to deal humanely with protected persons. The person, honour, family rights, religious convictions, manners and customs of protected persons shall be respected. Women are granted specific protection. Violence, torture, biological experiments, intimidation or coercion to obtain information, imposition of corporal or collective punishment, pillage and the taking of hostages are all forbidden.

### **Treatment of foreigners in a territory of a party to the conflict**

**9.59** Foreign inhabitants (aliens) who desire to leave the territory of one of the parties to the conflict are normally entitled to do so. Special rules apply to aliens who fall within the category of enemy aliens and thus the definition of a protected person under G. IV. Such persons will not be allowed to leave if their departure is contrary to the national interests of the state. Procedures exist for those who are not allowed to leave to appeal to an appropriate court or administrative board set up by the detaining power. For those that do leave, special procedures dictate the method of repatriation.

## **THE ENVIRONMENT**

### **Civil defence**

**9.60** The nature of modern warfare has the potential to cause significant losses, damage and suffering to the civilian population. Organised protection of the civilian population is commonly referred to as civil defence. The method and application of civil defence differs from country to country. Protection under G. P. I is based on the specific functions performed by the person or object, not the type of organisation to which the person or object belongs. The similarity of civilian civil defence organisations to military organisations, and indeed national compulsory service in them, shall not deprive them of protection.

**9.61** Australia's position is that ADF members will not be attached to civil defence organisations for the purposes of conducting civil defence tasks. ADF personnel may undertake military tasks in support of civil defence requests, but not under their command or control and not within the immediate vicinity of civil defence personnel. ADF members will not wear the civil defence emblem, nor will they receive the protection afforded to civil defence personnel.

## **Tasks**

**9.62** G. P. I describes civil defence for the LOAC purposes as 'the performance of some or all of the tasks intended to protect the civilian population against the dangers, and to help it recover from the immediate effects of hostilities or disasters, and to provide the conditions necessary for its survival'.

**9.63** There are 15 specific civil defence tasks, namely:

- warning;
- evacuation;
- management of shelters;
- management of blackout measures;
- rescue;
- medical services, including first aid and religious assistance;
- firefighting;
- 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 included above including but not limited to planning and organisation.

## General protection

**9.64 Scope of protection.** Civilian civil defence organisations and their personnel must be respected and protected under the same conditions and considerations as apply to civilians. The provisions also apply to civilians who, although not members of a civilian defence organisation, respond to a request from the appropriate authority and perform civil defence tasks under their control. Civil defence buildings, material and shelters have no greater protection from attack than any other prima facie civilian object. The purpose of granting civil defence organisations a special status is to ensure that the general protection given to them applies when they are performing their tasks, some of which could be mistaken for military tasks.

**9.65 Carriage of weapons.** Civilian civil defence personnel may carry light individual weapons for the purpose of self-defence, or maintaining order, without losing their protection. If operating where fighting is likely to take place, such weapons must be confined only to hand guns to assist in recognition. Australia's interim policy is that civilians will only perform civil defence tasks and they will not be armed while doing so.

## Identification

**9.66** The international distinctive symbol for civil defence is an equilateral blue triangle on an orange square background, and for distinctive purposes must be clearly visible. Civil defence personnel must also carry an identity card if they are in areas where fighting is taking place, or in occupied territories. A model identity card is in annex C.

## Australian civil defence organisations

**9.67** Australia does not have totally dedicated civil defence organisations. Emergency Management Australia (EMA) maintains a civil defence responsibility at the national level. EMA is a new division of the Attorney-General's Department. EMA's role includes: 'to promote and support the development of a core civil defence capability'. At the state level the civil defence function is handled by the various State and Territory Emergency Services.

# MEDICAL PERSONNEL, TRANSPORT AND FACILITIES

## Medical personnel

**9.68** Military and civilian medical personnel are protected persons. Similarly, civilian medical facilities, transports and supplies are not to be made the target of attack or unnecessarily destroyed.



**9.69** Military medical personnel, facilities and equipment are also entitled to general protection. However, they may lose this protection if they engage in acts harmful to the enemy. Before the protection of medical personnel and facilities is lost, a warning will normally be provided and reasonable time allowed to permit cessation of improper activities. In extreme cases, overriding military necessity may preclude such a warning. Protection will not be lost if medical members act in self-defence. Weapons may be carried.

**9.70** Captured military medical personnel are not PW and so they should be repatriated to their home country unless their medical services are required by PW. Similarly, civilian medical personnel should not be detained and must be permitted to continue to provide medical assistance.

**9.71** Medical personnel are those persons, military or civilian, assigned exclusively to medical tasks or to the administration of medical units or the operation or administration of medical transports. Such assignment may be permanent or temporary. In addition to doctors, dentists, nurses, medical orderlies and hospital administrators attached to the forces or military and civilian establishments, medical personnel include:

- personnel of national Red Cross and other voluntary aid societies recognised and authorised by a party to the conflict;
- medical personnel attached to civil defence units; and
- any persons made available for humanitarian purposes by a neutral state, a recognised and authorised aid society of such a state, or an impartial international humanitarian organisation.

**9.72** Medical personnel, military or civilian, cannot be compelled to give preferential treatment to any sick or wounded person, except on medical grounds, nor may they be compelled to carry out any act incompatible with their humanitarian mission or medical ethics. No person may be punished for carrying out medical activities in accordance with medical ethics, regardless of the nationality or status of the person treated.

**9.73** Medical personnel, whether belonging to the belligerents, relief societies or neutral powers, are generally required to wear on their left arm a water-resistant armband bearing the protective emblem, issued and stamped by the military authority to which they are attached. They are also required to carry an official identity card. Members of the military who are detailed to act as orderlies or stretcher bearers must also wear the armband when so employed.

**9.74** In the most extreme circumstances, for example where an enemy was unlawfully targeting medical personnel, a military commander may order military personnel to not wear their brassard. The military commander may order the medical personnel to reinstate the brassard without jeopardising their special protection.

### **Medical facilities and transports**

**9.75** As far as possible given the circumstances of a conflict, medical personnel, units and transports must be clearly marked with the Red Cross, Red Crescent or Red Crystal, each on a white background. Fixed or mobile units like hospitals or ambulances should fly a flag portraying this emblem and if the unit belongs to a neutral state, the national flag should be flown together with the flag of the belligerent to which they are attached.

**9.76** Military hospital ships, hospital ships used by national Red Cross Societies, recognised relief societies or private persons, whether belonging to or nationals of a party to the conflict or a neutral, and small craft employed by the state or officially recognised lifeboat institutions for coastal rescue work, must be painted white, with a large dark red cross on the sides and on horizontal surfaces so they may be visible from the sea and the air.

**9.77** Medical aircraft must be marked clearly with the protective emblem together with the national emblem on their lower, upper and lateral surfaces, as well as with any other emblems, which may be agreed upon by the parties to the conflict.

### **Medical facilities**

**9.78** Medical facilities on land, hospital ships and medical aircraft must be respected and protected at all times and must not be attacked. Their immunity ceases once they are used for purposes hostile to the adverse party and outside their humanitarian purpose.

**9.79** Medical units are establishments, whether military or civilian, organised for medical purposes, and may be fixed or mobile, permanent or temporary; medical transports are any means of transportation, military or civilian, permanent or temporary, assigned exclusively to medical transportation and under control of a competent authority of a party to the conflict; and the rights guaranteed by the LOAC apply equally to both temporary and permanent personnel, units and transports.

**9.80** The material of mobile medical units falling into enemy hands must be reserved for the care of wounded and sick. The buildings, materials and stores of fixed medical establishments are subject to the LOAC, but may not be diverted from their purpose as long as they are required for the care of the

wounded and sick. Commanders may use them in the event of urgent military necessity, as long as proper arrangements are made for the care of the wounded and sick nursed in them.

**9.81** The sick bay on a warship must, in case of a fight on board, be respected and protected as far as possible, but, provided proper care is taken of the wounded and sick therein, a captor may use the sick bay for other purposes in situations of military necessity.

**9.82** Hospital ships and other craft employed on medical duties are subject to control and search. They may be required to follow a particular course; their radios and other means of communication may be controlled; and if the gravity of the circumstance so requires, they may be detained for up to seven days. Neutral observers may also be put on board to ensure that the provisions of the LOAC are obeyed. Hospital ships found in a port at the time of its occupation by an adverse party must be allowed to leave.

### **Medical transport**

**9.83** Medical aircraft may fly over land physically controlled by their own or friendly forces, and over sea areas not under enemy control. However, it is advisable that the enemy be informed if such flights are likely to bring the aircraft within range of enemy surface-to-air weapon systems.

**9.84** In accordance with the LOAC, flight of such aircraft over enemy or enemy-occupied territory is forbidden without prior agreement. In the absence of such agreement, medical aircraft operating in parts of the zone controlled by friendly forces, and over areas the control of which is doubtful, do so at their own risk, but once they are recognised as medical aircraft they must be respected.

**9.85** Provided prior agreement has been obtained from the enemy, medical aircraft belonging to a combatant remain protected while flying over land or sea areas under the physical control of the enemy. If it deviates for any reason from the terms of such an agreement, the aircraft shall take immediate steps to identify itself. Upon being recognised as a medical aircraft, the adverse party may order it to land, or take such other steps to safeguard its own interests, and must allow time for compliance before attacking the aircraft.

**9.86** Known medical aircraft are entitled to protection when performing medical functions. The detailed rules to be applied may legitimately take into account the nature and flight characteristics of the particular medical aircraft, for example helicopters operating locally, or fixed wing aircraft in transit at higher altitudes. Medical aircraft must not be used in order to gain any military advantage and while carrying out flights in accordance with the two preceding paragraphs, shall not, without prior agreement, be used to search for the wounded, sick and shipwrecked.

**9.87** According to the LOAC medical aircraft are entitled to fly over neutral territory, land on it if necessary, or use it as a port of call. They are required to give notice of their passage and must land if ordered to do so. When flying on routes, at heights and times agreed between the parties to the conflict and the neutral concerned, they are immune from attack, but the neutral may place restrictions on flights over, or landing, on its territory. Unless otherwise agreed by the neutral and the parties to the conflict, the wounded and sick or shipwrecked who are disembarked shall be detained by the neutral and prevented from taking any further part in hostilities. If a medical aircraft is ordered by the enemy to land, it must obey such orders and permit inspection. Wounded and sick on board may only be removed if this is essential to enable the inspection to proceed, and only if such removal does not adversely affect their welfare. If the inspection of an aircraft, discloses that the aircraft is in fact a medical aircraft, has not violated any of the restrictions imposed upon the activities of such aircraft and is not in breach of any prior agreement, the aircraft and its occupants must be allowed to leave. If the aircraft does not satisfy these requirements it may be seized, but if it had been assigned as a permanent medical aircraft it may be used by the captor only for this purpose. If the aircraft makes an involuntary landing in enemy or enemy-occupied territory, the sick, wounded and shipwrecked as well as the crew become PW, but the medical personnel must be treated in the same way as other medical personnel falling into enemy hands.

### **Chaplains and religious personnel**

**9.88** Religious personnel are defined as those military or civilian personnel, who are exclusively engaged in their ministry and who are permanently or temporarily attached to one of the protagonists, their medical units or transports, or to civil defence. Religious personnel are to wear and display the same distinctive emblem as for medical personnel. Like medical personnel, chaplains may not be attacked but must be protected and respected. As with medical personnel, religious personnel do not become PW, but may be retained as required to attend to the spiritual welfare of PW. They must be repatriated as early as possible.

### **Wounded, sick and shipwrecked**

**9.89** Parties to the conflict may make special agreements relating to the sick, wounded and shipwrecked, other than those relating to PW generally, provided that such agreements do not adversely affect the position of such persons or medical personnel or chaplains as provided by the LOAC. It is not permissible for the persons protected by the LOAC to renounce any of their rights.

**9.90** Reprisals against the wounded, sick, shipwrecked and medical personnel, buildings and equipment are forbidden.

## Collection of wounded, sick and shipwrecked

**9.91** The parties to a conflict must take all possible measures to search for and collect the wounded, sick and shipwrecked, to protect them from pillage and ill-treatment, and to ensure their care. Parties must search for the dead and take measures to protect the bodies from being despoiled. Commanders may make agreements for the exchange, removal and transport of the wounded left on the field, besieged or encircled areas and to allow the passage of medical personnel and chaplains proceeding to any such area.

**9.92** While there is no absolute obligation to accept civilian wounded and sick, once civilian patients have been accepted, discrimination against them, on any grounds other than medical, is not permissible.

**9.93** Parties holding wounded, sick and shipwrecked personnel are obliged to record and forward the same details of identity and capture as in the case of any other PW and the rules with regard to burial at sea are adjusted to meet the requirements of the situation.

**9.94** All belligerent warships have the right to demand the handing over of wounded, sick and shipwrecked, whether they are being carried on hospital ships or any other vessels, except neutral warships, provided they are fit enough to be handed over and the warship involved has sufficient facilities for their proper care and treatment. If they have been taken on board a neutral warship or military aircraft, care should be taken that they take no further part in military operations. If they fall into enemy hands they become PW, but the captor may convey them to a port of its nationality, to a neutral port, or even to a port of the captive's own forces. In the latter case, such personnel must take no further part in the hostilities.

## Treatment of wounded, sick and shipwrecked

**9.95** Sick, wounded and shipwrecked combatants are to be protected and respected, treated humanely, and cared for by any detaining power without any adverse discrimination. Attempts upon their lives and violence against them are prohibited. They shall not be:

- murdered or subjected to biological experiments,
- left without proper medical care and attention, or
- exposed to conditions which might result in contagion or infection.

**9.96** G. P. I defines wounded, sick and shipwrecked, to include civilians, so that the provisions of the Protocol apply to civilians, although those of the Geneva Conventions do not.

**9.97** Priority in medical treatment can only be determined on the basis of medical need, although women are to be treated with all consideration due to their sex.

**9.98** A party to an armed conflict if compelled to abandon wounded and sick must, so far as military considerations permit, leave medical personnel and equipment to care for those left behind. The presence of such medical personnel does not, however, exempt the enemy from providing additional assistance that may be necessary.

## MISSING AND DEAD

### Search for missing and dead

**9.99** As soon as possible each party to an armed conflict must search for those reported missing by the enemy. Any requests and all information which may assist in tracing or identifying such persons shall be transmitted through the Protecting Power or the Central Tracing Agency of the ICRC or the national Red Cross societies.

### Missing persons

**9.100 General.** The request for information relating to either the missing or the dead must be humanitarian in nature and stem from the need for relatives to be notified of their whereabouts and subsequent repatriation, or re-internment. Should there be any controversy resulting from the request for information, the humanitarian needs and interests of the families concerned must prevail. The term generally accepted as common usage for missing combatants is 'missing-in-action'.

**9.101 The search.** As soon as circumstances permit, but at the latest once active hostilities have ceased, all protagonists to the conflict shall commence to search to the fullest extent possible for persons reported missing by one of the belligerents. The report of a missing person is to be notified by each belligerent's national bureau direct, or through a protecting power to the Central Tracing Agency of the ICRC.

**9.102 Particulars of missing persons.** In order to facilitate the search for missing combatants, protected persons, civilians and persons who would not receive more favourable considerations under either the Geneva Conventions or Additional Protocols, each of the protagonists shall:

- record the following information for each person detained, imprisoned or otherwise held in captivity for a period of two weeks, or who has died:
  - surname, all first names and nationality;

- place and date of birth;
  - location of last residence and any distinguishing features;
  - the first name of the father and the maiden name of the mother;
  - the circumstances of captivity or detainment, including the date and place of detainment;
  - the address to which correspondence may be sent to the captive or detainee; and
  - the name and address of the person to be informed.
- provide regular reports on the state of health of seriously ill or wounded persons held in captivity or detention who cannot be immediately repatriated because of their medical state.

### **The dead**

**9.103** The remains of the dead, regardless of whether they are combatants, non-combatants, protected persons or civilians are to be respected, in particular their honour, family rights, religious convictions and practices and manners and customs. At all times they shall be humanely treated and protected against pillage and despoilment. The minimum respect for the remains of the dead is a decent burial or cremation in accordance with their religious practices.

**9.104** The burial or cremation of the dead shall be carried out individually in accordance with the religious rites and practices of the deceased. In the case of burial the deceased shall be honourably interred, their graves respected and grouped by nationality. They are to be correctly marked to allow future exhumation. Bodies shall be buried with one half of a double identity disc placed in the mouth of the deceased. The other half is to be kept for records by Graves Registration. In the event of only one identity disc, that is to remain with the body.

**9.105** Bodies shall only be cremated for imperative reasons of hygiene and health, or for the requirements of the deceased. The ashes of the deceased shall be forwarded to Graves Registration and the ashes exchanged as soon as practicable following the conclusion of hostilities.

**9.106** As soon as is practical following the death of a combatant, a belligerent shall record the following information to aid identification. Such information is to be passed to the national bureau direct, or through a protecting power to the Central Tracing Agency of the ICRC as follows:

- nationality;

- regimental or serial number and rank;
- surname and all first names;
- date of birth, religion and any other particulars shown on the body's identity card or identity discs; and
- the date, cause and place of death and if the body is given a field burial, the exact location of the remains to enable future exhumation of the body, or remains if necessary.

**9.107 Prisoners of war.** The notification of the death of a PW is to be forwarded as soon as possible to the Central Tracing Agency along with the same information required immediately above. A death certificate is to accompany this notification along with a medical report establishing the cause of death.

**9.108 Internees.** The requirements for disposal of an internee is no different to the processes described above for combatants and PW. Notification of death is to be forwarded to the national bureau direct, or through a protecting power to the Central Tracing Agency of the ICRC.

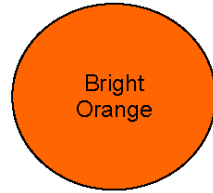
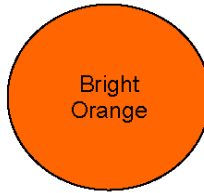
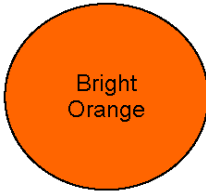
**9.109 Search teams.** All of the protagonists to a conflict shall attempt to agree to form special teams to undertake the search, identity and recovery of their dead from a belligerent's battlefield. This will include any arrangement for such teams to be accompanied by members of the belligerent force upon whose land they are searching. In the course of their duties search teams are deemed to be protected persons.

**Annexes:**

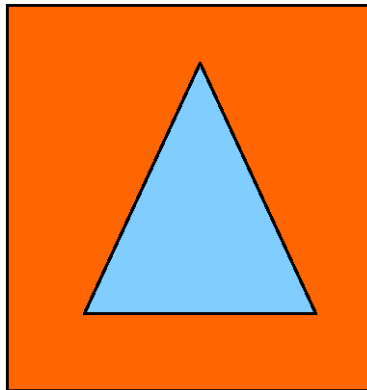
- A. Protective symbols
- B. Identity card for medical/religious personnel
- C. Identity card for civil defence personnel



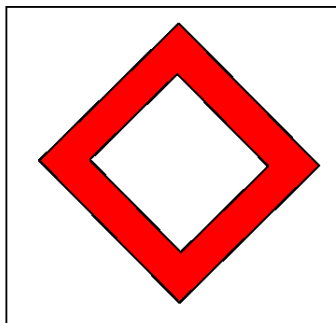
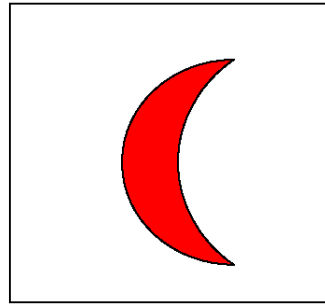
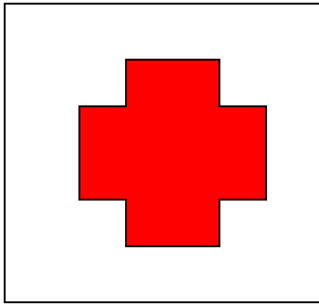
## PROTECTIVE SYMBOLS



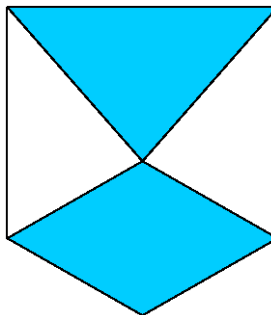
- 1. International special sign for works and installations containing dangerous forces.** Special sign for dams, dykes and nuclear power stations protected under Additional Protocol I (three bright orange circles of equal size on the same axis).



- 2. International sign for civil defence.** International distinctive sign for civil defence provided for in Additional Protocol I (equilateral blue triangle on an orange background).



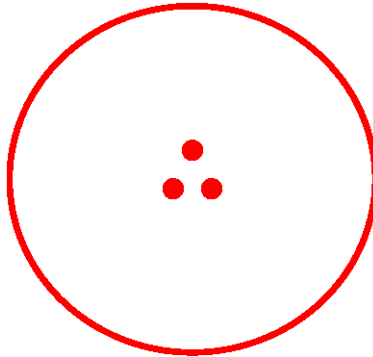
**3. Emblems for medical activities** (Red Crescent, Red Cross or Red Crystal<sup>1</sup> on a white background).



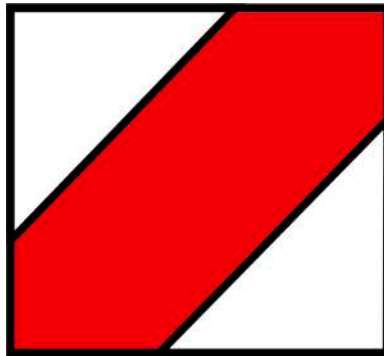
**4. Emblem for cultural property** under the 1954 Hague Convention (royal blue square and triangle on white square).

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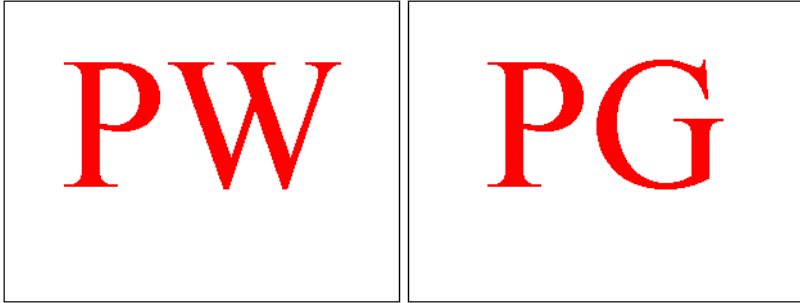
<sup>1</sup> In 2005 Additional Protocol III introduced the 'Red Crystal' as another protective symbol for the purposes of the Geneva Convention.



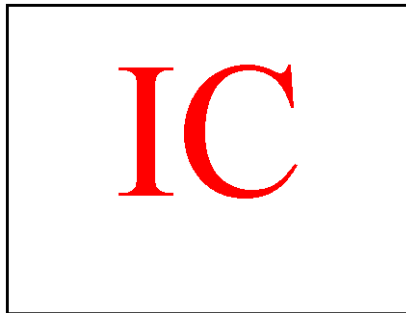
**5. Flag of the 'Roerich Pact' (1935).** To be used on historic monuments, museums, scientific, artistic, educational and cultural institutions, among Western Hemisphere States (red circle with triple red spheres in the circle, on white background).



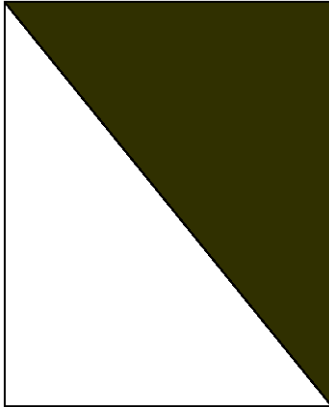
**6. Marking for hospital and safety zones for civilians and sick and wounded** (oblique red band on a white background).



7. **Markings for prisoner of war camps** (red letters on a white background).



8. **Markings for civilian internment camps** (red letters on a white background).



**9. The 1907 Hague sign.** The Convention on Naval Bombardment established this sign for sacred edifices; buildings used for artistic, scientific or charitable purposes; historic monuments and hospitals (rectangular panel divided diagonally into two triangular portions, the upper portion black, the lower white).



# IDENTITY CARD FOR MEDICAL/RELIGIOUS PERSONNEL

## FRONT



Space reserved for the name of the country and  
authority issuing this

### IDENTITY CARD

For PERMANENT/TEMPORARY civilian medical/  
religious personnel

Name.....  
.....

Date of Birth (or age).....

Identity No. (if any) .....

The holder of this card is protected by the Geneva  
Conventions of 12 August 1949 and by the Protocol  
Additional to the Geneva Conventions of 12 August  
1949, and relating to the Protection of Victims of  
International Armed Conflicts (Protocol I) in his capacity  
as .....

.....

Date of Issue..... No. of card .....

Signature of issuing authority

Date of Expiry .....



**REVERSE SIDE**

Height.....	Eyes.....	Hair.....
Other distinguishing marks or information: ..... ..... .....		
PHOTO OF HOLDER		
Stamp	Signature of holder or thumbprint or both	



# IDENTITY CARD FOR CIVIL DEFENCE PERSONNEL

## FRONT

	
Space reserved for the name of the country and authority issuing this	
<b>IDENTITY CARD</b>	
For civilian defence personnel	
Name..... .....	
Date of Birth (or age).....	
Identity No. (if any) .....	
The holder of this card is protected by the Geneva Conventions of 12 August 1949 and by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) in his capacity as .....	
.....	
Date of Issue..... No. of card .....	
Signature of issuing authority	
Date of Expiry .....	

**REVERSE SIDE**

Height.....	Eyes.....	Hair.....
Other distinguishing marks or information: ..... ..... .....		
PHOTO OF HOLDER		
Stamp	Signature of holder or thumbprint or both	

## CHAPTER 10

# PRISONERS OF WAR AND DETAINED PERSONS

### Executive summary

- Prisoners of war (PW) are victims of war and are not criminals. Accordingly they are entitled to proper treatment in accordance with the law of armed conflict (LOAC).

## INTRODUCTION

**10.1** The fundamental principle underlying the treatment of PW is that they are war victims, not criminals and are entitled to humane treatment throughout their captivity. Once combatants are captured they must not be attacked, but should be handed over without undue delay to PW processing authorities.

**10.2** The fundamental rules for the treatment of PW are:

- they must be treated humanely and honourably;
- any discrimination on the grounds of race, nationality, religious belief or political opinions is unlawful; and
- reprisals against them are prohibited.

### Action to be taken at the start of hostilities

**10.3** As soon as hostilities start each party involved should, where appropriate, take certain immediate steps for the benefit of PW. These include:

- appointing a protecting power, a neutral state whose duty it is to safeguard the interests of a belligerent and its nationals with regard to the enemy;
- setting up an official Information Bureau for the PW it holds; and
- issuing identity cards to all persons liable to become PW.

The following, although not mandatory, are desirable:

- notifying the enemy of the location and marking of PW camps and transports,
- notifying the enemy of arrangements made to enable PW to exercise their right of correspondence and to receive relief supplies and of any changes to those arrangements.

### **Prisoner of war status**

**10.4** Not all persons falling into the hands of a belligerent become PW or are entitled to PW status. Civilian nationals of an enemy, for example, when taken into custody do not fall into this category and if captured are entitled to treatment in accordance with the provisions of the Fourth Geneva Convention (G. IV), unless they have been taking part in hostilities when they may be liable to trial as unlawful combatants.

**10.5** In most cases, captured combatants are entitled to claim PW status. If any doubt arises about a captured person's status, PW status is to be granted until such time as a proper tribunal established under the Third Geneva Convention (G. III) can determine their status.

**10.6** The five categories of persons who may be entitled to claim PW status are:

- members of the armed forces of a party to the conflict (other than medical personnel and chaplains);
- members of militias, volunteer corps or organised resistance groups, belonging to a party to the conflict and operating in or outside their own territory provided that:
  - they are commanded by a person responsible for them as subordinates;
  - they have a fixed, distinctive sign recognisable at a distance;
  - they carry their arms openly; and
  - they conduct their operations in accordance with the LOAC;

- those who accompany the armed forces without actually being members thereof (for example, civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces which they accompany): an identity card is required to be provided to those persons to ensure PW status is given (a model identity card is in annex A);
- members of crews, including masters, pilots and apprentices, of the merchant marine and the crew of civil aircraft of the parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law; and
- *levee en masse*, ie 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 regular armed units, provided they carry arms openly and comply with the LOAC.

**10.7 Prisoner of war at sea.** Persons on board vessels and aircraft that have fallen into the power of a belligerent or neutral shall be respected and protected while at sea and thereafter until their status is determined. Persons so detained are entitled to PW status and may be made PW if they are:

- members of the enemy's armed forces;
- persons accompanying the enemy's armed forces, who have received authorisation from the armed forces they accompany;
- crew members of auxiliary vessels or auxiliary aircraft;
- crew members of enemy merchant vessels or civil aircraft who do not benefit from more favourable treatment under international law; or
- crew members of neutral merchant vessels or civil aircraft that have taken a direct part in the hostilities on the side of the enemy or served as an auxiliary for the enemy.

**10.8 Status of captured medical and religious personnel.** Medical personnel and chaplains who fall into enemy hands do not become PW but, until they are returned, are to be treated in accordance with the provisions of the G. III. They must be treated as PW and be provided with all necessary medical facilities to care for their own PW. PW who are medically qualified but not attached to the medical branch of their own forces may be required by the detaining power to exercise their medical functions on behalf of PW. Although prisoners, they are to be treated as other medical personnel and are exempt from any other work.

**10.9 The wounded and sick.** Wounded and sick combatants who are captured are PW, but are evacuated initially through medical channels. Until fully recovered they have the additional protection of the First Geneva Convention and Additional Protocol I (G. P. I).

**10.10 Mercenaries.** Mercenaries are not entitled to be PW, although their captors may afford them the protection of such status. Even if not treated as PW, captured mercenaries remain entitled to fundamental guarantees provided by G. P. I.

**10.11 Deserters and defectors.** Deserters in the military law sense become PW if they are captured. PW who defect during captivity retain their status and cannot be deprived of it.

**10.12 Civilians.** Civilians authorised to accompany the armed forces become PW on capture. Other civilians, including officials who are not considered part of the armed forces, are not PW, but have the protection of G. IV. If captured, they may for security reasons be interned or placed in an assigned residence.

**10.13 Diplomatic staff.** Accredited diplomatic staff must be given the opportunity to leave the receiving state on the outbreak of hostilities. Where necessary, they must be assisted with their transport requirements.

**10.14 Journalists.** Apart from war correspondents accredited to the armed forces, who have PW status on capture, journalists engaged in professional missions in areas of armed conflict are entitled to the protection afforded to civilians. A special identity card certifying status as a journalist may be issued by the state of which the individual is a national, or in which they reside or where his employer is located.

### **Determination of status**

**10.15 Presumption of prisoner of war status.** There is a presumption in favour of entitlement to PW status if:

- the person concerned claims, or appears to be entitled to, that status; or
- the party to the conflict to which they belong claims that status on their behalf by notification to either the detaining power or the protecting power.

In view of the difficulties of distinguishing combatants from non-combatants, it may not be easy to decide whether to give PW status to a person who has taken part in hostilities and has subsequently been captured, so the law makes this presumption in favour of PW status.

**10.16 Cases of doubt.** In cases of doubt as to entitlement, the person concerned continues to have the protection of G. III and G. P. I until his status has been determined by a competent tribunal.

**10.17 Claiming prisoner of war status.** Where a person in the power of an adverse party is not held as a PW and is to be tried by that party for an offence arising out of the hostilities, they have the right to claim PW status and to have that question adjudicated by a judicial tribunal. Whenever procedurally possible, this adjudication shall occur before the trial for the offence. Representatives of the protecting power are entitled to attend the adjudication proceedings unless, exceptionally, in the interests of state security, they are to be held in camera in which event the protecting power is to be advised accordingly by the detaining power.

**10.18 Duration of prisoner of war status.** The protected status of a PW begins at the moment when they falls into the power of the adverse party and continues until their final release and repatriation. PW are not permitted to renounce 'in part or in entirety' their rights as PW.

The reason for this is that PW, like other victims of armed conflict, are in a poor position to bargain with their captors who might otherwise be tempted, for example, to persuade PW to 'volunteer' to enlist in the forces of the capturing power.

## PROTECTION OF PRISONERS OF WAR

**10.19** PW must be treated humanely at all times. It must be remembered that PW when captured are the responsibility of an enemy power and not the individuals or military units that have captured them. The detaining power has overall responsibility for treatment of PW.

### HISTORICAL EXAMPLE—SURVEILLANCE OF PRISONER OF WAR TREATMENT, SOUTH VIETNAM 1966–1972

By agreement with the host country, PW captured by Australian forces were passed to the armed forces of South Vietnam for custody. This transfer did not, however, under the Geneva Convention, diminish Australia's responsibility for their subsequent welfare. As detaining authority, Australia was still obligated to oversee that their ongoing treatment and welfare continued to be satisfactory under the Convention.

**HISTORICAL EXAMPLE—(cont)**

In consequence, a staff officer from Headquarters Australian Force Vietnam kept records of these PW and their location and, accompanied by an interpreter, visited the various PW camps each month to inspect their conditions, accept complaints and report on their overall treatment. Any problems with the Australian-detained prisoners were taken up with the Republic South Vietnam Government, rectification sought and this was rechecked on subsequent visits. Lurid stories by the media of bad treatment of prisoners by Republic South Vietnam authorities were not borne out by these inspections.

In this way, Australia met the wishes of the host country, saved itself of the responsibility, diversion of effort, and local and domestic problems, of holding prisoners in-theatre or at home, while still discharging its responsibilities properly under the Geneva Convention.

**10.20** No PW may be subjected to physical mutilation or to medical or scientific experiments of any kind. They must be protected at all times, particularly against acts of violence or intimidation and against insults and public curiosity.

**10.21** All PW shall be treated without distinction based on race, nationality, religious belief or political opinions or any other distinction subject to privileged treatment which may be given to them by reason of their rank and sex, state of health, age or professional qualifications.

**10.22** Female prisoners must be treated with due regard to their sex and must in no case be treated less favourably than male prisoners. Their sex must also be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities. They must also be specially protected against rape and other sexual assaults.



## Violations

**10.23 Killing prisoners of war is prohibited.** PW cannot be put to death for any reason including:

- because the captors are unable to provide the necessary facilities or personnel to restrict their movements;
- because they will have to be fed, thus reducing the supplies available to the captors; or
- because they may gain their liberty as a result of an early success by the forces to which they belong.

**10.24** Any unlawful act or omission by the detaining power causing death or seriously endangering the health of a PW in custody is prohibited.

## PRISONER OF WAR CAMPS

**10.25** Prisoners must be evacuated to camps away from any danger areas as soon as possible. The only exception allowed is in respect of those who, because of wounds or sickness, would run a greater risk by being moved. PW may not be exposed to unnecessary dangers during evacuation.

**10.26** PW camps must not be located near military objectives with the intention of securing exemption from attack for those objectives and must be provided with the same protective measures against aerial attack as the civilian population. Prisoners must be allowed to seek shelter as soon as possible after an alarm sounds. The location of PW camps shall be communicated to the enemy through the protecting power and whenever possible such camps should be clearly marked with the letters 'PW' or 'PG' visible from the air. These marks are protected and must not be used for any other purpose.

**10.27** Evacuations must be conducted in conditions similar to those for the forces of the detaining power during changes of station. During the evacuation, prisoners must be provided with adequate food, clothing and medical attention, and lists must be maintained of those affected.

**10.28** PW may only be interned on land and centres of internment must be established in healthy areas, with prisoners having facilities guaranteeing hygiene and health. They must not be detained in penitentiaries.

**10.29** While officers should be housed separately, PW should be in camps according to nationality, language and customs, but should not be separated from other PW belonging to the forces with which they were serving at the time of capture, other than with their own consent.

## RULES OF CAPTIVITY

**10.30** Upon capture, any urgent or necessary medical treatment should be provided. If medical personnel or facilities are scarce they should be applied according to strict medical triage. The most gravely wounded or sick are to be given priority, irrespective of whether they are PW or soldiers of the capturing force. Immediate shelter, clothing and accommodation are to be provided and evacuation to a PW camp should be undertaken as soon as possible.

### Identity cards

**10.31** Every PW and person required to be treated as a PW must be issued with a capture card showing surname, first names, rank, Service, regimental or personal number and date of birth. The identity card must be shown by the PW on demand, but cannot be taken away from the PW at any time. A model capture card is in annex B.

**10.32** Those captured who are entitled to PW status have that status from the moment of capture until their repatriation. They cannot, even of their own free will, surrender their rights of protection. Therefore, PW includes deserters and defectors.

### Interrogation

**10.33** When questioned, PW are bound only to give their surname, first names, rank, date of birth and Service number. Any information beyond those areas must be given voluntarily.

**10.34** No physical or mental torture, or any other form of coercion may be inflicted on PW to obtain information of any kind.

### Articles and equipment

**10.35** After capture combatants may be disarmed and they and their possessions may be searched for the purpose of collecting military intelligence. PW must be allowed to retain:

- all their personal property, except vehicles, arms, and other military equipment or documents;
- protective equipment, such as helmets or respirators;
- clothing or articles used for feeding, even though the property of the government of the PW;
- badges of nationality or rank and decorations; and
- articles of sentimental value.

**10.36** Money and articles of value may be taken from a PW only on the order of an officer. If this is necessary, then there must be a proper system of security and accountability established for that action, eg a receipt must be given. Any money or articles of value that are taken must be returned to the PW at the end of captivity.

### **Quarters, food and clothing**

**10.37 Housing.** PW must be housed under conditions as favourable as those applicable to members of the detaining power housed in the same area.

**10.38 Food.** Food must be sufficient to keep prisoners in good health and the customs and normal diet of PW must be taken into account, ie PW dietary practices and customs must be accommodated if possible.

**10.39 Clothing.** Clothing, underwear and footwear must be sufficient and take into account the climate of the region where the PW is detained.

### **Medical and hygiene**

**10.40** The detaining power is bound to take all sanitary measures to ensure cleanliness of and health within the camps and to prevent epidemics. Every PW camp must have an infirmary.

**10.41** Medical personnel of the PW are to be made available to attend to PW. Special facilities are to be made available for the care of the disabled, in particular the blind, and for the rehabilitation of those PW, pending repatriation. PW whose condition necessitates special treatment must be admitted to any civilian or military unit where such treatment can be given. PW cannot be prevented from seeking medical attention.

### **Religious, intellectual and physical activities**

**10.42** PW are completely free to exercise their religious duties and must be provided with adequate premises where religious services can be held. Chaplains retained by the enemy power are not PW and must be permitted to minister to PW.

**10.43** The detaining power must encourage intellectual, educational and recreational pursuits, sports and games and provide adequate premises and equipment for that purpose.

**Labour**

**10.44 Type of work.** Officers and persons of equivalent status cannot be compelled to work but must be found work if they request suitable work. Non-commissioned officers may only be required to do supervisory work but, as with officers, they may request to do suitable work, and if that request is made, that work must be found if possible.

**10.45 Permitted work.** G. III (Article 50) lists the work that PW can be compelled to do. No PW can be employed on labour which is of an unhealthy or dangerous nature, which contributes to the war effort or which would be looked upon as humiliating for a member of the detaining power's own forces.

**10.46 Conditions.** The conditions of any work performed are not to be inferior to those enjoyed by the nationals of the detaining power employed in similar work. The duration of daily labour of PW cannot be excessive and cannot exceed that permitted for civilian workers in the area who are nationals of the detaining power and who are employed on the same work.

**10.47 Wages.** PW shall be paid a fair working rate of pay by the detaining authorities.

### HISTORICAL EXAMPLE—ITALIAN PRISONER OF WAR CAMP 1944



**Figure 10–1: Italian prisoner of war camp, Australia 1944**

Transfer of German, Italian and Japanese PW to camps in Australia not only removed them from danger in operational areas, as is required by the Geneva Convention, but also facilitated their custody and maintenance.

Camp guards and administration were provided by Garrison Battalions drawn from men unfit for operational service. Where possible, prisoners were given paid employment in camp support and trades, while the more tractable ones were allocated to farmers for food production work. **(source: Australian War Memorial 062914)**

## **Prisoner representatives**

**10.48** In general, in all places where there are PW, there will be prisoners' representatives entrusted with representing PW before the military authorities, the protecting powers, the International Committee of the Red Cross and any other organisation which may assist them. In officer camps, the senior officer shall be recognised as the representative. In all other camps, election of representatives is to occur every six months.

## **DISCIPLINARY AND JUDICIAL SANCTIONS**

**10.49** PW are subject to the same laws, regulations and orders applicable to members of forces of the detaining power, and judicial or disciplinary action can be taken for any offence committed against those laws. Minor offences will result in disciplinary action. More serious offences may result in judicial (penal) action. Disciplinary action rather than judicial measures are to be adopted wherever possible.

**10.50** Acts by PW punishable by the laws of the detaining power, which are not punishable if committed by a member of the forces of the detaining power, can only result in disciplinary punishment.

**10.51** PW undergoing disciplinary or judicial action cannot be subject to any more severe punishment than that applicable to members of forces of the detaining power.

### **Disciplinary punishment**

**10.52** The types of disciplinary punishments available are set out in G. III. The duration of any punishment cannot exceed 30 days.

### **Judicial sanctions**

**10.53** PW must be tried by military courts unless the laws of the detaining power permit trial by civil courts for members of forces of the detaining power for similar offences.

**10.54** A number of procedural rules apply in respect of trial. They are as follows:

- investigations must be conducted as rapidly as possible;
- PW cannot be confined awaiting trial unless members of the detaining power can be confined in similar circumstances;

- notice of proceedings must be given to:
  - the accused notifying the particulars of the charges in good time before trial; and
  - the protecting power at least three weeks prior to trial; and
- PW are entitled to be represented by a qualified lawyer of their choice and assisted by another PW; where the PW does not elect to choose a lawyer, the protecting power must appoint a defence lawyer within one week of being notified of the proceedings.

**10.55 Consequences of escape.** PW who have made good their escape and who are recaptured shall not be liable to any punishment in respect of their escape. The escape of a PW shall be deemed to have succeeded when the escapee:

- has joined friendly or allied armed forces,
- has entered neutral territory or otherwise left the territory under control of the detaining power, or
- has joined a ship in the territorial waters of the detaining power which is not under the control of the detaining power.

**10.56** A PW who has been captured in an attempt to escape, even if a repeated attempt, shall be liable to camp disciplinary sanction for offences committed solely to facilitate the escape and which do not entail violence against life and limb (eg the use of false papers, wearing of civilian clothing, theft without intention of self-enrichment). Violent crimes, such as killing or wounding a guard, committed during an escape attempt can result in trial and punishment for the offence committed.

### **Repatriation**

**10.57** With the general exception of the categories mentioned below, PW are to be repatriated immediately to their own country at the conclusion of hostilities.

**10.58** Seriously wounded and sick PW must be repatriated as soon as they are fit to travel except that PW cannot be involuntarily repatriated during hostilities. The incurably wounded or sick, those who will not recover within one year, or those who are gravely and permanently disabled are to be repatriated direct to their own country. PW who may recover within a year and those whose mental or physical health may be seriously threatened by captivity, may be accommodated in a neutral country.

**10.59** Agreements may also be concluded between the parties to the conflict for the repatriation and internment in a neutral country of able-bodied PW who have undergone a long period of captivity.

### **Effect of repatriation**

**10.60** PW who are repatriated for medical reasons or for reasons of prolonged captivity are not permitted to rejoin the conflict. No such restrictions apply where PW are repatriated for any other reason.

### **Annexes:**

- A. Identity card for a person who accompanies the armed forces
- B. Capture card for prisoner of war



# IDENTITY CARD FOR A PERSON WHO ACCOMPANIES THE ARMED FORCES

## FRONT

Photograph of the bearer	(Name of the country and military authority issuing this card)
IDENTITY CARD	
FOR A PERSON WHO ACCOMPANIES THE ARMED FORCES	
Name..... First Names..... Date and Place of Birth..... Accompanies the Armed Forces as.....	
Date of issue .....	Signature of bearer .....

## REVERSE SIDE

Height .....	Weight .....	Eyes .....	Hair .....
Any other mark of identification	(Left forefinger)	Fingerprint (optional)	Blood Type ..... Religion
	(Right forefinger)	Notice This identity card is issued to persons who accompany the Armed Forces of ..... but are not part of them. The card must be carried at all times by the person to whom it is issued. If the bearer is taken prisoner, he shall at once hand the card to the detaining authority.	



# CAPTURE CARD FOR PRISONER OF WAR

## FRONT

<u>PRISONER OF WAR MAIL</u>		Postage free
CAPTURE CARD FOR PRISONER OF WAR		
<p style="text-align: center; margin: 0;"><b>IMPORTANT</b></p> <p>This card must be completed by each prisoner immediately after being taken prisoner and each time his address is changed (by reason of transfer to a hospital or to another camp). This card is distinct from the special card which each prisoner is allowed to send to his relatives.</p>	<p style="text-align: center; margin: 0;"><b>CENTRAL PRISONERS OF WAR AGENCY</b></p> <p style="text-align: center; margin: 0;">INTERNATIONAL COMMITTEE OF THE RED CROSS</p>  <p style="text-align: right; margin: 0;"><b>GENEVA</b> SWITZERLAND</p>	

## REVERSE SIDE

Write legibly and in Block letters	1. Power on which the prisoner depends .....
2. Name	3. First names (in full)
4. First name of father .....	
5. Date of birth.....6. Place of birth .....	
7. Rank.....	
8. Service number .....	
9. Address of next of kin .....	
*10. Taken prisoner on: (or) Coming from (Camp - No., hospital, etc) .....	
*11. (a) Good health - (b) Not wounded - (c) Recovered - (d) Convalescent - (e) Sick - (f) Slightly wounded - (g) Seriously wounded.	
12. My present address is: Prisoner No .....	
Name of camp .....	
13. Date .....14. Signature .....	
* Strike out what is not applicable - Do not add any remarks - See explanations overleaf.	



## CHAPTER 11

# RIGHTS AND DUTIES OF NEUTRALS

### Executive summary

- A nation may avoid being involved in armed conflict by maintaining a neutral status.
- A neutral nation is entitled to have its sovereignty and commercial activities respected by other nations involved in armed conflicts.

## INTRODUCTION

**11.1** The law of neutrality defines the relationship under international law between nations engaged in armed conflict (belligerents) and nations seeking to avoid direct involvement in the conflict (neutrals). The law of neutrality originally developed to localise armed conflict, to limit the conduct of war on both land and sea and to lessen the impact of conflict on international commerce.

**11.2** At the time the law of neutrality was developed, transition to armed conflict was relatively clear-cut and usually accompanied by a declaration of war. Since that time, several legal developments have occurred to change the environment in which the law of neutrality operates. First, nations no longer customarily declare 'war' before engaging in hostilities and there is therefore no formal delineation between war and peace. Secondly, the use of force by member nations, other than in individual or collective self-defence or pursuant to authorisation under Chapter VII of the United Nations (UN) Charter, is now outlawed under the Charter. Thirdly, collective security arrangements, either through the UN Charter or by way of regional security compacts mean that very few nations will be able to remain 'neutral' in the true sense in the event of armed conflict. Notwithstanding these uncertainties, the principles developed under the law of neutrality continue to play an important role in containing the spread of hostilities, in regulating the conduct of belligerents with respect to nations not participating in the conflict and in reducing the harmful effects of such hostilities on international commerce.

### Neutral status

**11.3** Under customary international law, all nations, in the absence of an international commitment to the contrary, have the right to refrain from participation in an armed conflict by adopting neutral status. There is no requirement in international law for a 'declaration of neutrality'. However, all nations which do not expressly declare the contrary, by word or action,

are neutral and the rights and duties of neutrality apply to them. Neutral status remains in effect unless and until the neutral nation abandons its neutral stance and enters into the conflict, or is itself the subject of an attack by a belligerent.

### **Primary rights and duties of neutral states**

**11.4** The law of armed conflict (LOAC) reciprocally imposes duties and confers rights upon neutral states and upon belligerents. The primary right of a neutral is that of inviolability, that is, the right to have its territorial sovereignty and its activities, such as international trade and commerce, respected and unaffected by armed conflict occurring between other nations. There is a corresponding right on the part of the neutral to preserve its neutrality by excluding armed forces of the belligerents from its territory. As a corollary, a neutral has a duty to abstain from taking part in the conflict and to remain impartial by according rights of passage or providing goods and services to belligerents on a non-discriminatory basis.

**11.5** A belligerent has a right to insist that a neutral not violate its duties of abstention and impartiality and has limited rights, mainly in respect to neutral shipping and commerce, to pursue its war aims by acts that would not be permitted in peacetime (further detail is covered in chapter 7—‘Land operations and the law of armed conflict’). Likewise, a belligerent has a duty to respect the territorial sovereignty of a neutral state and the immunity of its activities, such as international commerce.

### **Neutrality and the United Nations Charter**

**11.6** The UN Charter requires nations to settle their disputes peacefully and to refrain from the threat or use of force in international relations. In the event of a threat to or breach of international peace or security, the UN Security Council is empowered to take enforcement action, on behalf of all member nations, involving or not involving the use of force, to maintain or restore international peace. When called upon by the UN Security Council to do so, all member nations are required to provide assistance to the UN in any action it takes. A nation which provides elements of its armed forces to a UN force or lends other assistance in support of UN peace operations cannot assume neutral status. Should the UN Security Council determine not to institute an enforcement action or is unable to do so, due to the use of the veto by one of its members, member nations remain free to assume neutral status.

### **Neutrality and its relationship to regional and collective security arrangements**

**11.7** The obligation in the UN Charter for member nations to refrain from the threat or use of force is qualified by the right of individual or collective self-defence, which member nations may exercise until such time as the

Security Council has taken the measures necessary to restore international peace. This inherent right of self-defence may be exercised by individual nations or through regional or collective security arrangements. The possibility of maintaining neutral status under such arrangements depends upon the extent to which the parties to the arrangements are obligated to provide assistance in a regional action, or in the case of collective self-defence, to come to the aid of a victim of an armed attack.

## NEUTRAL TERRITORY

**11.8** As a general rule of international law, all acts of hostility in neutral territory, including neutral land, neutral waters and neutral airspace are prohibited. A neutral state has a duty to prevent the use of its territory as a sanctuary or a base of operations by the belligerent forces of any side. If the neutral state is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may resort to acts of hostility in neutral territory against enemy forces, including warships and military aircraft, making unlawful use of that territory. Belligerents are also authorised to act in self-defence when attacked or threatened with attack while in neutral territory or when attacked or threatened from neutral territory.

### Neutral land territory

**11.9 Belligerent forces.** Belligerents are prohibited from moving troops or war materials and supplies across neutral land territory. Belligerent troops that enter neutral land territory or who are on neutral land territory at the outset of an armed conflict must be disarmed and interned until the end of the armed conflict. Internees under these rules must be afforded treatment at least to the same standard as laid down in the Third Geneva Convention.

### HISTORICAL EXAMPLE—INVASION VIA NEUTRAL THAILAND 1941

The operation order issued by Commander-in-Chief Far East Air Chief Marshal Brooke-Popham's headquarters in January 1941 correctly predicted the Japanese invasion points nearly a year later. One area was at Singora and Patani, 150 kilometres (km) across the border in neutral Thailand, which posed the question of how to deal with this expected breach of neutral territory by the enemy, which could not be reciprocated until the enemy landing was made.

## HISTORICAL EXAMPLE—(cont)



**Figure 11–1: A map of the invasion through Thailand to Malaya**

With two enemy divisions expected to be sea-landed, and a third one to move overland, it was estimated that three brigade groups and six squadrons of aircraft would be necessary to forestall the landing.

As it would take some 36 hours after the go-ahead to position the ground force at Singora, Plan MATADOR would obviously fail to achieve its objective—by then the invasion force would be firmly lodged. However, the 11th Indian Division was readied for this operation and stood by pointlessly on a half-hour notice from 06 December 1941 until after the Japanese landing on 08 December, when the orders were belatedly changed to taking up defensive positions obstructing their advance into east Malaya.



**HISTORICAL EXAMPLE—(cont)**

But these positions were now outflanked by the simultaneous landing behind them at Kota Bahru.

The other plan to counter an expected enemy thrust into west Malaya was Krocok—a battalion group based at Kroh, transported by 2/3 Australian Reserve Motor Transport Company to block a pass at 'The Ledge', 50 km beyond the frontier. This force was fired on by Thai police on crossing the border late 08 December, and was stopped for the night. When Thai opposition ceased on the afternoon of the following day and the advance was resumed, the force ran into Japanese tanks and infantry 8 km short of its objective, which forestalled the mission, due to the delay caused by Thai resistance focused on the British force, but not the Japanese one. The Australian Transport Company eventually had to dismount and fight its way in to extract the surrounded force.

Military forces willing to violate neutral territory may gain a military advantage, though there is always a risk of bringing the neutral into a conflict where their territory is violated. Planners need to recognise the possibility of the misuse of neutral territory and develop a realistic counter strategy. **(source: Official History of Australia in the War 1939–1945 volume 1.4)**

**11.10 Sick, wounded and shipwrecked.** A neutral state may accept sick and wounded of a belligerent into its territory but must ensure that they are guarded and do not again take part in military operations. Neutral states are also required to cooperate with belligerents in the accommodation or internment of sick and wounded in neutral territory. Neutral states are required to apply, by analogy, the same standards to sick and wounded and shipwrecked received or interned in their territory as is required of belligerents.

**11.11 Medical aircraft and transports.** A neutral state may authorise passage through its territory of wounded and sick belonging to the armed forces of either side on condition that the vehicles transporting them carry neither combatants nor materials of war. If passage of sick and wounded is permitted, the neutral nation assumes responsibility for providing for their safety and control. If any sick or wounded are left in neutral territory, they must not be allowed to take any further part in the conflict. Medical aircraft are not permitted to fly over neutral land territory without prior permission except in cases of emergency. The neutral state may impose conditions on such flights

on a non-discriminatory basis. Where an aircraft is ordered to land it must be inspected to verify its status, with the minimum disruption to the sick and wounded and to the aircraft's flight.

**11.12 Prisoners of war.** Prisoners of war (PW) that have escaped their captors and made their way to neutral territory may be either repatriated or left at liberty in the neutral state, but must not be allowed to take part in belligerent activities while there. The neutral state may assign them a place of residence. Neutral states are obligated to seek agreement with detaining powers with a view to interning PW on neutral territory. A neutral state which has received PW on its territory must set up an Information Bureau with the same rights and entitlements to receive information as those established in belligerent territory.

**11.13 Medical personnel and chaplains.** Medical personnel and chaplains of the armed forces of a belligerent who are received into neutral territory may only be retained if necessary for the medical and spiritual care of interned members of the armed forces. They must otherwise be repatriated. They must be accorded the same standard of treatment as applies to other internees.

**11.14 War criminals.** Where an individual seeking asylum in a neutral state is alleged to have committed grave breaches of the LOAC, and a prima facie case can be established, the neutral state is obligated either to place the individual on trial or hand them over to another party to the Geneva Conventions for trial.

**11.15 Recruitment and neutral territory.** A neutral state must not permit a belligerent to establish recruiting depots within its territory, nor may it permit the organisation of groups intending to proceed to belligerent territory in order to enlist there. The neutral state is not under an obligation, however, to prevent isolated individuals or disorganised groups from crossing its frontiers in order to enlist in the forces of one of the belligerents; nor is it under an obligation to prevent its own nationals from enlisting in the forces of belligerents but any such restriction it does impose must be non-discriminatory between belligerents. Active members of the armed forces of a neutral state must not be permitted to enlist, or to continue serving on exchange or otherwise in the armed forces of a belligerent nation.

## NEUTRAL WATERS

**11.16** Neutral waters are the internal waters, territorial sea and archipelagic waters of a neutral. The peacetime rights and duties of a neutral in relation to neutral waters and other waters under its jurisdiction, such as the contiguous zone and the exclusive economic zone, and the peacetime rights and duties of belligerent vessels entering and transiting such waters continue to apply during armed conflict subject to certain modifications necessary to observe the laws of neutrality. Further detail is covered in chapter 6—‘Maritime operations and the law of armed conflict’.

**11.17** As a general rule, belligerent warships and auxiliary vessels must abstain from acts of hostility in neutral waters except those necessitated by self-defence or undertaken as a self-help enforcement action against enemy forces that are in violation of the neutral status of those neutral waters and where the neutral cannot, or will not, enforce its neutrality. Belligerents are prohibited from using neutral waters as a base of operations or as a sanctuary from their enemies.

### Neutral internal waters

**11.18** Neutral states may, on a non-discriminatory basis, close their internal waters, including their ports and roadsteads, to belligerents but they are not obliged to do so. Belligerent vessels retain a right of entry in distress whether caused by force majeure or damage resulting from enemy action. In the absence of special provisions to the contrary in the national law and regulations of the neutral, belligerent warships or auxiliary vessels are forbidden to remain in a neutral port or roadstead in excess of 24 hours. Belligerent warships may be permitted by a neutral to extend their stay in neutral ports and roadsteads on account of stress of weather or damage involving seaworthiness. It is the duty of the neutral to intern a belligerent warship, together with its officers and crew that will not or cannot depart a neutral port or roadstead where it is not entitled to remain.

**11.19** Unless the neutral has adopted laws or regulations to the contrary, no more than three warships of any one belligerent nation may be present in the same neutral port or roadstead at the same time. When warships of opposing belligerent nations are present in a neutral port or roadstead at the same time, not less than 24 hours must elapse between the departure of the respective enemy vessels. The order of departure is determined by the order of arrival unless an extension of stay has been granted to a particular vessel.

**11.20** Belligerent warships may carry out such repairs in neutral ports and roadsteads as are absolutely necessary to render them seaworthy. They may not add to or repair weapons systems or enhance any other aspect of their war-fighting capability.

**11.21** A prize (a captured neutral or enemy merchant ship; see chapter 6) may only be brought into a neutral port or roadstead because of unseaworthiness, stress of weather, or want of fuel or provisions and must leave as soon as such circumstances permit.

### **Neutral territorial waters**

**11.22** A neutral may, on a non-discriminatory basis, close its territorial waters, except in international straits and archipelagic sea lanes, to belligerent vessels. When properly notified of its closure, belligerents are obliged to refrain from entering a neutral territorial sea except to transit through international straits or archipelagic sea lanes or as necessitated by distress. A neutral may, however, allow the 'mere passage' of belligerent vessels, including warships and prizes, through its territorial waters. Such passage must be innocent in nature and, in the absence of specific national law or regulations of the neutral state to the contrary, must not exceed 24 hours in duration unless a longer time is unavoidable on account of damage or the stress of weather. This rule does not apply in neutral international straits and neutral waters in which the right of archipelagic sea lanes passage is exercised. Although the general practice has been to close neutral territorial waters to belligerent submarines, a neutral may elect to allow mere passage of submarines, either on the surface or submerged. Neutral nations customarily authorise passage of vessels carrying the wounded, sick and shipwrecked, whether or not those waters are otherwise closed to belligerent vessels.

### **Neutral international straits**

**11.23** Belligerent and neutral surface ships, submarines and aircraft have a right of transit passage through, under and over all straits used for international navigation. Neutral nations cannot suspend, hamper or otherwise impede this right of transit passage through international straits. Belligerent forces transiting through international straits overlapped by neutral waters must proceed without delay, must refrain from the threat or use of force against the neutral nation and must otherwise refrain from acts of hostility and activities not incident to their transit. Belligerent forces in transit may take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerent forces may not use neutral international straits as a place of sanctuary nor a base of operations, and belligerent warships may not exercise the right of visit and search or capture vessels in those waters.

**HISTORICAL EXAMPLE—AE2 IN THE DARDANELLES 1915**

**Figure 11–2: A painting of Australian E class submarine AE2 interdicting enemy shipping, Sea of Marmora 1915**

The Treaty of Paris ending the Crimean War prohibited warships from the Dardanelles while Turkey was at peace and merchant ships had the right to use the straits. From 15 August 1914, Turkey, under German direction, began breaches of freedom of passage, finally closing it on 27 September 1914 and so blocking the shipment of munitions to Russia, and Russian grain and oil to France and the United Kingdom. This led to an attempt to force the straits with warships, and the subsequent landing attempt at Gallipoli.

Australian submarine AE2 managed to penetrate the Dardanelles during the landings at Anzac and Helles, and harass Turkish shipping until forced to scuttle after mechanical problems. (source: Australian War Memorial ART 09016)

## Neutral archipelagic waters

**11.24** Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or base of operations. All belligerent ships or aircraft, including submarines, retain the right of unimpeded archipelagic sea lanes passage through, over and under neutral archipelagic sea lanes. Belligerent forces exercising the right of archipelagic sea lanes passage in neutral archipelagic waters may engage in those activities that are incidental to their normal mode of continuous and expeditious passage, and are consistent with their security. Belligerent warships on archipelagic sea lanes passage are not permitted to conduct visit and search or capture of vessels while in archipelagic waters.

**11.25** A neutral may close its archipelagic waters (other than archipelagic sea lanes whether designated or those routes normally used for international navigation) to the mere passage of belligerent ships but it is not obliged to do so. The neutral archipelagic nation has an affirmative duty to police its archipelagic waters to ensure that the inviolability of its neutral waters is respected. If a neutral is unable or unwilling to effectively detect or expel belligerent forces unlawfully present in its archipelagic waters, the opposing belligerent may undertake such self help enforcement actions as may be necessary to terminate the violation of its neutrality. Such actions may include surface, sub-surface and air penetration of archipelagic waters and airspace, and the use of proportional force as necessary.

**11.26** Neutral states have a duty to prevent violation of neutral airspace by belligerent aircraft, to compel offending aircraft to land and to intern both aircraft and crew. If a neutral state is unable or unwilling to prevent the unlawful entry or use of its airspace by belligerent aircraft, belligerent forces of the other side may undertake such self-help enforcement measures as the circumstances may require.

## NEUTRAL COMMERCE

**11.27** A principal purpose of the law of neutrality is the regulation of belligerent activities with respect to neutral commerce. Neutral commerce comprises all commerce between one neutral nation and another not involving materials of war or armaments destined for a belligerent nation and all commerce between a neutral nation and a belligerent that does not involve the carriage of contraband or otherwise sustain the belligerent's war-fighting capability. Neutral merchant vessels and non-public civil aircraft engaged in legitimate neutral commerce are subject to visit and search, but may not be captured or destroyed by belligerent forces. The conditions under which neutral vessels and aircraft may be visited and searched and subsequently

captured together with other measures of naval and air warfare which affect neutral commerce are dealt with extensively in chapter 6—'Maritime operations and the law of armed conflict'.

**11.28** The law of neutrality does not prohibit neutral nations from engaging in commerce with belligerent nations. However, a neutral state cannot supply materials of war or armaments to a belligerent without violating its neutral duties of abstention and impartiality and risking loss of its neutral status. Although a neutral state may forbid its citizens from carrying on non-neutral commerce with belligerent nations, it is not obliged to do so. In effect the law establishes a balance of interests that protects neutral commerce from unreasonable interference on the one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other.

## **NEUTRAL PERSONS AND PROPERTY**

### **Neutral nationals and property in belligerent territory**

**11.29** Neutrals who remain in the territory of a belligerent are only entitled to treatment as a protected person under the Fourth Geneva Convention if their country of nationality does not maintain normal diplomatic relations with the belligerent nation. The rules in relation to property outlined in the following paragraph apply in respect of belligerent territory.

**11.30** A neutral ship in the territorial or internal waters of a belligerent may be requisitioned by a belligerent in the case of public need or necessity justifying the seizure. The owner must be fully compensated for any damage caused by use or destruction of the ship. Only a ship and not its cargo may be seized in this manner.

### **Neutral nationals or property in a theatre of war**

**11.31** A belligerent is not responsible for accidental injury or damage to neutral national property occurring in a theatre of war; however, if a belligerent has requisitioned neutral property, the belligerent is liable to pay compensation.

### **Neutral nationals in occupied territory**

**11.32** Neutral nationals in occupied territories may leave the territory unless their departure is contrary to the interests of the occupying power.

## Loss of neutral status

**11.33** Neutral nationals lose neutral status if they commit hostile acts against a belligerent, or acts in favour of a belligerent, particularly by joining the armed forces of the belligerent.

## BREACH OF NEUTRALITY

**11.34** Failure by a neutral national to observe or prevent violation of their neutrality can take a number of forms, including:

- direct participation in the conflict,
- providing assistance to a belligerent by way of supply of munitions or organised bodies of men, or
- failure to prevent a belligerent using neutral territory or neutral waters for its war aims contrary to the law of neutrality.

**11.35** Where there are severe breaches of the rules of neutrality, for instance by the commission of an armed attack or by assistance in such an attack, it may justify a conclusion that the nation is no longer neutral. This may then give rise to a legitimate exercise of the right to self-defence by the belligerent which was the subject of such an attack.

**11.36** In instances short of this situation, particularly where the neutral has been unable to prevent its territory or waters being violated by a belligerent, the nation would not lose its neutral status. The principal remedy in this case would be for the belligerent nation to seek reparations as it would for any other international wrong. To respond to such violations by a declaration of war or by armed attack directed against the neutral is contrary to international law.



## CHAPTER 12

# OCCUPATION

### Executive summary

- Military occupation may take many forms. 'Belligerent occupation' occurs when one belligerent in an armed conflict is in control of some of the adversary's territory and is directly responsible for administering that territory.
- 'Belligerent occupation' is governed by the provisions of the Regulations Respecting the Laws and Customs of War on Land (H. IV. R) and the Fourth Geneva Convention (G. IV).

## INTRODUCTION

**12.1** Occupation is the military occupation of enemy territory in the course of, or following, an armed conflict under the Geneva Laws. Further guidance with respect to this subject is available from Australian Defence Force (ADF) legal officers.

**12.2** Military occupation may take many forms. This chapter deals with 'belligerent occupation'. This refers to the occupation of enemy territory, that is, when one belligerent in an armed conflict is in control of some of the adversary's territory and is directly responsible for administering that territory. 'Belligerent occupation' is governed by the provisions of the Regulations Respecting the H. IV. R and G. IV.

**12.3** This chapter does not cover situations where the military forces of one state are in the territory of another allied state in pursuance of a treaty or agreement between allies. In those cases, the matter is governed by the treaty or agreement. Nor does this chapter apply to cases of international administration of territory, for example by the United Nations or other international organisations, which will usually be governed by a complex of legal instruments establishing and regulating such administrations.

**12.4** Where the ADF is sent in to a collapsed state to restore law and order, it may not always be possible to conclude a civil affairs agreement with the authorities of the country concerned in advance so that there will be de facto military rule by the liberating power. The rules of international law applying to occupied territory should, so far as possible, be applied by analogy until an agreement is concluded.

## COMMENCEMENT AND TERMINATION OF BELLIGERENT OCCUPATION

### Commencement

**12.5** A territory is considered occupied when it is actually placed under the authority of the enemy armed forces. The occupation extends only to the territory where such authority has been established and can be exercised. The territory is considered occupied even if the occupation meets with no armed resistance.

**12.6** Small armed groups, including special forces units, which move on or withdraw after carrying out their mission, do not normally occupy territory since they are not present in an area for sufficient time to establish an administration. When hostilities continue in enemy territory, occupation only arises in areas coming under the control of the adverse party, even if that control is only temporary, provided that measures are taken to administer the areas in question.

#### MILITARY OCCUPATION OF JAPAN 1946–1951

Aims of the British Commonwealth Occupation Force in Japan:

*To maintain and enhance the prestige of the British Commonwealth of Nations by worthily representing it in the Occupation and,*

*To demonstrate to the Japanese the democratic way of life.*

**(source: Official History of Australia in the War of 1939–1945  
volume 1.7)**

**12.7** Occupation does not take effect merely because the main forces of the country have been defeated but depends on whether authority has actually been established and can be exercised over the civilian population. However, for occupation of an area it is not necessary to keep troops permanently stationed throughout that area. It is sufficient that the national forces have withdrawn, that the inhabitants have been disarmed, that measures have been taken to protect life and property and to secure order and that troops are available, if necessary to enforce authority in the area. The existence within an occupied area of a defended zone makes no difference so long as it is surrounded and effectively cut-off.

**12.8** Occupation does not cease where the forces of the occupying power continue their advance, leaving only a few troops behind, so long as they have disarmed the inhabitants and made arrangements for the administration of

the occupied area and so continue to exercise control over such territory. However, the authority of the occupying power should be represented by the presence of a commissioner or civil officials.

### **Termination**

**12.9** Occupation may be terminated in at least three ways, shown below:

- The occupying power may withdraw.
- The occupying power may be ejected either by the population of the territory or by the armed forces of the sovereign nation, or by the armed forces of their allies or by a combination of the above.
- The sovereign government of the occupied territory may be defeated and part or all of the occupied territory may be annexed by the occupying power or by some other power. A legally valid annexation cannot occur while allies of the defeated sovereign nation are still in the field against the occupying power.

**12.10** The general termination of hostilities does not automatically terminate occupation. Occupation does not terminate until a nation exercises sovereign authority over the area as part of its own territory.

## **GENERAL EFFECTS OF OCCUPATION**

### **Limits on legislative power of occupying power**

**12.11** The powers of an occupying power are of a provisional nature and it should only take measures which are necessary for the purposes of the war, the maintenance of order and safety and the proper administration of occupied territory. Generally speaking, the occupying power is not entitled to alter the existing form of government, to disregard the constitution and domestic laws of the occupied territory or to set aside the rights of the inhabitants.

### **Constitutional position**

**12.12** Sovereignty of an occupied territory does not pass to the occupying power. The occupying power may not change the constitution and domestic laws of the occupied territory nor set aside the rights of the inhabitants except to the extent permitted under the law of armed conflict (LOAC).

**12.13** The occupying power has a duty to maintain orderly government, public order and security and to meet the humanitarian needs of the population. While it is not open to the occupying power to reconstruct every aspect of the economic and social life, the occupying power may assist the population to work towards economic recovery.

**12.14** The occupying power should not alter fundamentally the existing body of law and the judicial structures and administration, and when considering how to work within these limitations, account must be taken of the state of existing laws, administration and judicial structures.

**12.15** If an aspect of administration is degraded to the point where it cannot function, then the occupying power may put in place an effective system. If aspects of existing laws are inconsistent with fundamental human rights, or not sufficient for the maintenance of public order, those laws may be altered.

**12.16** The occupying powers may issue new laws that are essential to meet their obligations to maintain orderly government, or to ensure security, and may also create courts to deal with such provisions.

### **Annexation prohibited**

**12.17** It is unlawful for an occupying power to annex occupied territory while hostilities continue. The right to annex territory once hostilities have ended is beyond the scope of this publication. The inhabitants of occupied territory are not subjects of the occupying power and the territory does not belong to the occupying power. Neither annexation nor agreements between the occupying power and authorities of the occupied territory have any effect on the rights of protected persons under the LOAC.

### **Maintenance of public order**

**12.18** Inhabitants of occupied territory cannot be compelled to swear allegiance to the hostile power. Notwithstanding this prohibition, the occupying power has a right to demand and enforce such measures of obedience from the population of the territory as are necessary for the security of its forces, the maintenance of order, and the proper administration of the country. The occupying power has an obligation to maintain public order.

## **ADMINISTRATION OF OCCUPIED TERRITORY**

**12.19** All functions of the legitimate government in the occupied territory cease when occupation commences. The occupying power may, however, allow civil servants and other officials of the local government to continue to

perform their routine duties. Where municipal officials are involved in particular, this course of action is usually in the best interests of the occupying power.

### **Officials, civil servants, police and judges**

**12.20** Officials of the occupied territory owe no duty of allegiance to the occupying power and may refuse to serve that power. If they have fled, the occupying power will have to form its own administration. Local authority officials who remain may be employed for this purpose.

**12.21 Duties of officials.** The occupying power may not alter the status of officials, nor apply any sanctions or take measures of coercion or discrimination against them if they decide to abstain on grounds of conscience from fulfilling their functions. A belligerent cannot compel officials to take part in military operations against their own country, even if they were in the belligerent's service before the commencement of the armed conflict.

### **Law applicable in occupied territory**

**12.22** The occupying power does not bring with it the ordinary laws and jurisdiction of its own country. Generally speaking, laws of the occupied country continue to be valid and the courts continue to sit. The courts usually continue to try all criminal charges against the inhabitants which are not of a military nature and do not affect the safety of the army of occupation. The courts should be suspended only if:

- judges abstain from fulfilling their functions,
- the courts are corrupt or unfairly constituted, or
- local judicial administration has collapsed.

**12.23** If the exigencies of war, the maintenance of order, or the welfare of the population so require, it is within the power of the occupying power to alter or suspend or repeal any existing laws, or to promulgate new laws in areas such as:

- legislation constituting a threat to its security, such as laws relating to recruitment and the bearing of arms;
- legislation dealing with the political process, such as laws regarding the rights of suffrage and of assembly; and
- legislation, the enforcement of which would be inconsistent with the duties of the occupying power, such as laws establishing racial discrimination.

**12.24** In occupied territory possessing an adequate legal system conforming with generally recognised principles of law, significant changes should be avoided. The occupying power may, however, issue regulations fixing prices and securing the equitable distribution of foodstuffs and other commodities.

**12.25** The occupying power may not declare that the rights of enemy subjects are abolished, suspended, inadmissible or unenforceable in a court of law in the occupied territory.

**12.26 Jurisdiction.** The courts of occupied territory retain jurisdiction to deal with any of the inhabitants' cases that are neither of a military nature, nor affect the safety of the occupying forces. Jurisdiction in the latter two cases is a matter for the authorities of the occupying power.

### **Occupying force exempt from local laws**

**12.27** Members of an occupying force are not subject to the jurisdiction of the local courts but their offences will be dealt with under the military law of their own armed forces. The occupying power will generally ensure that some system of law is available to handle legal problems arising between inhabitants of the occupied territory and members of the occupation forces.

### **Welfare measures**

**12.28** Foodstuffs and medical supplies in the occupied territory may only be requisitioned for use by the occupation forces and administration personnel so long as the requirements of the civilian population have been taken into account. If the local food and medical resources are inadequate for the purposes of the local population, the occupying power is, to the fullest means and extent available to it, under a duty to bring in such supplies as are necessary. Civilian hospitals may only be temporarily requisitioned, and only in the event of urgent necessity for the care of military wounded and sick, provided adequate arrangements are made for the care of the local population. The occupying power must also ensure the provision of clothing, bedding, means of shelter and other supplies essential to the survival of the civilian population together with those objects which are required for religious worship.

**12.29** The occupying power must take necessary steps to ensure that children under 15 years of age and who are separated from their families are not left to their own resources, and that proper steps are taken to maintain their education and religious welfare. They must also enable all persons in the occupied territory to exchange news of a personal nature with members of their families, whether the latter be in the occupied territory or elsewhere, and shall facilitate inquiries made by families which have been dispersed as a result of the conflict and shall encourage relief organisations seeking to assist in this task.

## Relief measures

**12.30** The occupying power is under an obligation to allow free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended for civilians in occupied territory, as well as of essential foodstuffs, clothing and medical supplies intended for children under 15 years of age, expectant mothers and maternity cases, although it may require that distribution of such supplies be under the supervision of the protecting power.

### HISTORICAL EXAMPLE—AUSTRALIAN OCCUPATION IN JAPAN 1946



**Figure 12–1: Japanese queue for food in the Australian Occupation Zone, Kure 1946**

Participation in the British Commonwealth Occupation Force (BCOF) marked the first time that Australians were involved in the military occupation of a sovereign nation, which it had defeated in war. The task of exercising military government over Japan was the responsibility of the United States forces. BCOF maintained military control and supervised the demilitarisation and disposal of Japan's war making capability.

The end of a prolonged war is rarely completed without some level of shortage or starvation facing civilians and demobilising servicemen. This was a problem Australia, as an occupying force, had to contend with. While the objective was to return the defeated country to self-sufficiency, either or both of the provision of emergency food relief, and relocation and controlled issue of existing stocks of basic food and water supplies, were necessary until normal production and distribution was restored. (source: **Australian War Memorial P01205.012**)

## Population movements into occupied territory prohibited

**12.31** The occupying power is forbidden to move parts of its own population into the occupied territory with the intention of changing the nature of the population or annexing or colonising the area.

### The economy

**12.32 Occupation costs.** The economy of an occupied country may only be required to bear the expense of the occupation and only to the extent that this can be reasonably expected of it.

**12.33 Taxation.** The occupying power may tax the inhabitants. If the occupying power collects taxes, duties and tolls which were payable in the occupied state, it is bound to apply them towards the cost of administering that territory to the extent that the legitimate government was so bound. As far as possible, it must do so in accordance with the existing tax laws but any additional taxes levied shall only be for the needs of the army or the administration of the territory. However, local rates may only be used for the purposes for which they were levied. If tax officials continue to work normally, taxes will be collected by them in the usual way. Otherwise, the occupying power may require each local authority to collect and pay a proportion of total revenue.

**12.34** Funds raised must not be used for the enrichment of the occupying power or its personnel, nor be used as a collective punishment.

**12.35** The occupying power may tax the inhabitants. Funds raised may only be applied to the needs of the occupying forces or to the administration of the territory and only in so far as those requirements are not met by existing taxation. Funds raised must not be used for the enrichment of the occupying power or its personnel, nor be used as a collective punishment.

## EFFECTS OF OCCUPATION ON THE POPULATION

### Rights of inhabitants of occupied territory

**12.36** The inhabitants are entitled to respect for their person, their honour, their family rights, their religious beliefs and practices, and their manners and customs. They must be humanely treated at all times and be especially safeguarded against all acts of violence or threats of violence and against insults and public curiosity. Women must be protected against any attack on their honour, in particular against rape, enforced prostitution or any other form of indecent assault. All protected persons must be treated with the same consideration, without any adverse distinction based, in particular, on race, religion or political opinion.



**12.37** Any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands is prohibited. That prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

### **Control of persons in occupied territory**

**12.38** Military authorities in occupied territories have the right to perform police functions and to protect their own security.

**12.39** Measures for the control of the population which are prohibited include:

- violence;
- physical or moral coercion, particularly to obtain information;
- brutality;
- reprisals or collective penalties; and
- deportations.

### **Compulsory labour**

**12.40** The occupying power may only compel persons over the age of 18 to work, and then only on the needs of the army of occupation, the public utility services, or for the feeding, clothing, sheltering, transportation or health of the population of the occupied territory. The population cannot be compelled to participate in any work which would involve participation in military operations, nor may they be compelled to employ forcible means to ensure the security of the installations where they are performing compulsory labour. No contract made with any worker by the occupying power can impair the right of the worker, even though they are performing compulsory labour, of access to the protecting power.

**12.41** The occupying power must not requisition labour to an extent that leads to the mobilisation of workers in any organisation of a military or semi-military nature. Nor may the occupying power use any measures to stimulate unemployment or restrict the opportunities for work open to the population of the occupied territory so as to induce them to work for the occupying power.

## ENEMY PROPERTY IN OCCUPIED AREA

### Destruction prohibited

**12.42** Any destruction of enemy property, whether it belongs to private individuals or the state, is prohibited unless the destruction is absolutely necessitated by military operations. Extensive destruction and appropriation not justified by military necessity and carried out unlawfully and want only is a grave breach of G. IV.

**12.43 Private property.** Private property must be respected. Requisitions must be proportionate to the resources of the occupied territory and limited to the needs of the occupying power. Seizure is limited to public property.

**12.44** Private property includes property, regardless of ownership, which is dedicated to religion, charity, education or to the arts or sciences.

**12.45** The requirement to respect private property is subject to conditions necessitated by armed conflict. For example, military operations inevitably cause damage to private property and occupying forces are entitled to requisition property for necessary military purposes. Nevertheless, the principle of respect is important. Plundering and looting is subversive of military discipline. Theft and robbery remain punishable crimes in peace and war. The soldier in an enemy country must observe the same respect for civilian property as they would at home.

**12.46 Public property.** Military land and buildings belonging to the state, such as supply depots, arsenals, dockyards and barracks, as well as airfields, ports, railways, canals, bridges, piers, and their associated installations, remain at the disposal of the occupying power until the end of the occupation. The occupying power is liable for any waste or destruction resulting from such use. Structures of this type may only be destroyed or damaged if military operations render this absolutely necessary.

### Pillage prohibited

**12.47** Pillage is prohibited. Pillage is the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually armed forces, for private purposes. A soldier may, under certain circumstances seize enemy property but once such property has been seized it belongs to the state. A military person is not allowed to become a thief or a bandit merely because of involvement in a war. The rule against pillage is directed against all private acts of lawlessness committed against enemy property.

## Confiscation

**12.48** Confiscation is the taking of enemy public movable property without the obligation to compensate the state to which it belongs. All enemy public movable property which may be useable for the operations of war may be confiscated. Private property may not be confiscated. Enemy public immovable property may be administered and used but it may not be confiscated.

## Seizure

**12.49** The seizure of private movable property is governed by H. IV. R Article 53. By this rule all appliances adapted for the transmission of news or for the transport of persons or goods by land, sea or air, except where naval law governs, stores of arms and in general every kind of war material, even if they belong to private individuals, may be seized, but they must be restored and the indemnity fixed when peace is made.

**12.50** These objects may be seized by, but they do not become the property of, the occupying power. The seizure operates merely as a transfer of the possession of the object to the occupying power while ownership remains with the private owner. In so far as the objects seized are capable of physical restoration, they must be restored at the conclusion of peace, and in so far as they have been consumed or have been destroyed or have perished, a cash indemnity must be paid when peace is made.

## Requisition

**12.51** Requisition may be made of all commodities necessary for maintenance of the occupying army such as: food and fuel supplies, liquor and tobacco, cloth for uniforms, leather for boots, and the like. The taking of such articles is forbidden unless they are actually required for the needs of the occupying forces. Goods or medical supplies available in the occupied territory are subject to requisition because they are needed for the forces of occupation and for administrative personnel. They may be requisitioned only after the requirements of the civilian population have been taken into account. In every case, the articles taken must be duly requisitioned, and be in proportion to the resources of the country.

**12.52** Articles requisitioned should be paid for in ready money, but if this is not possible a receipt must be given for them and payment of the amount due must be made as soon as possible. Articles properly requisitioned become the property of the occupying power and pass out of the ownership of their former owner.

**12.53** The prices to be paid for requisitioned supplies may be fixed by the commander of the occupying force. The prices of commodities on sale may also be regulated.

**12.54** The right to billet troops on the inhabitants follows from the rights to requisition.

## CHAPTER 13

# COMPLIANCE

### Executive summary

- All Australian Defence Force (ADF) members are responsible for complying with the law of armed conflict (LOAC) and are trained in its principles.
- Commanders have a responsibility for the actions of their personnel even in cases where they have not ordered certain actions.

**13.1** Australia has ratified many of the major international treaties governing armed conflict, such as The Hague Conventions, Geneva Conventions and the Additional Protocols. In addition, Australia is also bound by customary international law which has not been incorporated into treaties. For these reasons, Australia is responsible for ensuring that its military forces comply with the LOAC.

**13.2** All ADF members are responsible for ensuring that their conduct complies with LOAC. They are to be trained in its basic principles and avoid breaches of these laws.

### Unilateral compliance

**13.3** The ADF obligation to comply with LOAC is not conditional upon an enemy's compliance; unilateral compliance by the ADF is required. The limited specified exceptions, which are matters of national policy are beyond the scope of this publication but include the concept of reprisals and specific aspects of Additional Protocol I (G. P. I).

### Orders and instructions

**13.4** States are under a general obligation to issue orders and instructions requiring compliance with the LOAC and to take steps to see that those orders and instructions are observed. Whilst ignorance of the law is not generally accepted as a defence, the first step to enforcement of the LOAC is to ensure as wide a knowledge of its provisions as possible both within and outside the armed forces.

## Yamashita principles

**13.5** After World War II, Japanese General Yamashita was put on trial and subsequently executed for the widespread destruction, murder and rape, which occurred in Manila just prior to its liberation. Out of this case, principles were established for the standard of responsibility of commanders for LOAC violations. In particular, the concept of indirect responsibility was established. The principles of this doctrine are that the commander will be held responsible if the commander:

- knows subordinates are going to commit war crimes and does not prevent them,
- knows subordinates have committed war crimes and does not punish them,
- should know subordinates are going to commit war crimes and does not prevent them, or
- should know subordinates have committed war crimes and does not punish them.

### **HISTORICAL EXAMPLE—WAR CRIMES TRIALS 1945–1951**

At the conclusion of World War II, the United Nations (UN) Allies conducted a series of trials of those accused—under new, retrospective offences—of war crimes. As well as participating, where it had a material interest, in the trials conducted by the United Kingdom and United States of America, Australia determined to conduct its own trials of enemy nationals in its possession who were accused of atrocities against Australian servicemen, associated allies and civilians. By bilateral agreement with its Allies, responsibility for war crimes trials rested with the country which had custody both of the accused and of the necessary evidence to prosecute the alleged offences.

Under the specially-enacted *Australian War Crimes Act 1945*, a legal basis for the specific charges was provided, and as well the trials were authorised to be conducted by military courts in the area of the alleged crimes. By bilateral agreement with each ally, where a crime was alleged to have been committed against a national of one of those allies, wherever practicable a representative from that country was included in the court. The accused were provided with Australian legal officers, and Australian interpreters were used to avoid contamination of evidence or defence.

### **HISTORICAL EXAMPLE—(cont)**

These trials were based on the 1943–1945 investigations of Queensland Supreme Court Chief Justice Sir William Webb, commissioned by the Federal Government to take statements under oath from witnesses to atrocities in the Australian area of operations. Consequently 296 trials were conducted in six series at Morotai, Labuan, Wewak, Rabaul, Manus, Singapore, Hong Kong and Darwin, with 924 indicted, some jointly for the same crime. The outcome was conviction in 236 trials, no conviction in 60. Of the individuals charged, 148 were sentenced to death, 496 sentenced to imprisonment, and 280 found not guilty.

These and other post-war trials established the principles of individual and command responsibility for war crimes and greatly contributed to the development of the LOAC. (**source: Australian War Memorial files**)

## **Commander's responsibilities**

**13.6** Military commanders of all Services and at all levels bear responsibility for ensuring that forces under their control comply with LOAC. Specifically, a commander will be held accountable for ordering a subordinate to commit a war crime or for failing to intervene if the commander knows that a breach is occurring. A commander is also accountable if the commander fails to prevent a breach of the LOAC of which the commander should have known.

## **Individual responsibility**

**13.7** ADF members are open to prosecution for breaches of LOAC. Individual responsibility for compliance cannot be avoided and ignorance is not a justifiable excuse. ADF members will be held to account for any unlawful action that leads to a serious breach of LOAC. If such acts are committed, compliance with unlawful orders of a superior officer is not a justifiable excuse. If an order is ambiguous, clarification should be sought. If clarification is unavailable, any action taken must comply with LOAC.

## **Dissemination**

**13.8** In time of peace and war, states are required to disseminate the texts of the Geneva Conventions 1949 and the two Additional Protocols 1977 as widely as possible within their respective countries. This may facilitate the principles of the Conventions and Protocols becoming known to the entire population.

**13.9** The manner of dissemination is left to the states themselves and may be by means of orders, courses of instruction, commentaries or manuals. There is a specific requirement to instruct medical personnel, chaplains and those responsible for handling prisoners of war (PW) and the administration of protected persons. There is a general requirement to disseminate to the armed forces as a whole. Those civilians or military who have responsibility for applying the conventions or protocols must be fully acquainted with the texts.

### **Training**

**13.10** G. P. I also requires states to endeavour, with the assistance of their national Red Cross or Red Crescent societies, to train qualified persons 'to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers'. The parties are encouraged to send lists of such qualified persons to the International Committee of the Red Cross (ICRC).

### **Legal advisers**

**13.11** Legal advisers are required to be available, when necessary, to advise military commanders at the appropriate level on the application of the LOAC and also on the appropriate instruction to be given to members of the armed forces in this subject.

## **FACT FINDING**

### **Role of the United Nations**

**13.12** The UN, and in particular the Security Council, has taken a wide range of measures regarding the enforcement of the LOAC. These measures have included investigation of violations, urging parties to observe the law, authorising military action to prevent or respond to violations and the establishment of criminal tribunals.

**13.13** During the Cold War, with frequent uses of the veto by the two super-powers, the Security Council was not active in taking such measures, its power was rarely utilised and the principal role of the UN was in acting through the 'good offices' of the Secretary-General. Successive Secretaries-General intervened and mediated with varying degrees of success and whilst their primary role was conflict resolution, efforts were also made in 'humanitarian' missions such as those to secure the release of Western hostages in Lebanon during the Lebanese civil war. The Security Council itself has raised the issue of violations of 'International Humanitarian



Law (IHL)' in numerous conflicts, including the Iran-Iraq conflict 1980–1988, the Gulf conflict 1990–1991, the conflicts in former Yugoslavia 1991–1999 and the events in Rwanda in 1994.

### **Fact finding**

**13.14** G. P. I also provides for the establishment of a permanent International Fact Finding Commission. The International Humanitarian Fact Finding Commission came into existence in 1991 after twenty States Parties to the Protocol agreed to accept its competence. It is competent to enquire into an allegation that a grave breach or other serious violation of the conventions or protocol has occurred but only in regard to the conduct of a party that has accepted its competence whether permanently or ad hoc. With the consent of the parties concerned, the commission can also enquire into other violations of the LOAC and, in all cases, can offer its good offices to assist in helping to restore respect for the Conventions and Protocol.

## **INDEPENDENT SUPERVISION**

### **The protecting power**

**13.15** The parties to a conflict are under a duty at the beginning of the conflict or any occupation to appoint a protecting power. If no protecting power has been nominated or accepted, the ICRC or some other similar organisation is authorised to 'offer its good offices' to help the parties agree on the selection. If no agreement is possible, the ICRC or other organisation concerned may offer to act as a substitute. The parties to the conflict shall accept such an offer. Once protecting powers have been appointed, the parties must permit them to fulfil their role. This includes facilitating the activities of the representatives of the protective power, only restricting those activities exceptionally and temporarily for reasons of imperative military necessity.

**13.16** The specific duties of protecting powers are laid down in various articles of the Geneva Conventions and G. P. I. These are dealt with in detail in the relevant chapters of this manual. However, their general responsibilities may be summarised as follows:

- to safeguard the interests of the parties, applying the Conventions and Protocol with the cooperation of the parties and under the scrutiny of the other protecting powers;
- to lend their good offices with a view to settling disagreements between the parties to the conflict as to the application or interpretation of provisions of the Conventions and Protocols; and

- to visit PW and civilian internees, including the conducting of interviews personally or through an interpreter. It is for the protecting power to select the places for these visits. These may be prohibited only exceptionally and temporarily for reasons of imperative military necessity. If mutually agreed and necessary, compatriots of those interned may be permitted to participate in these visits.

## REPRISALS

### Nature of reprisals

**13.17** Reprisals are acts which would normally be illegal, resorted to after the adverse party has itself carried out illegal acts and refused to desist when called upon to do so and issued with a warning that such action would be taken if the prior illegal act is not terminated. They are not retaliatory acts or simple acts of vengeance. Reprisals are, however, an extreme measure of coercion. Nevertheless, in the circumstances of armed conflict, reprisals, or the threat of reprisals, may sometimes provide the only practical means of inducing the adverse party to desist from its unlawful conduct.

### Conditions for reprisal action

**13.18** In order to qualify as a legitimate reprisal, an act must comply with the following conditions when employed:

- It must be in response to serious and manifestly unlawful acts, committed by an adverse government, its military commanders or combatants for whom the adversary is responsible.
- It must be for the purpose of compelling the adversary to observe the LOAC. Reprisals serve as an ultimate legal sanction or law enforcement mechanism. Thus, if one party to an armed conflict breaches the law but then expresses regret, declares that it will not be repeated and takes measures to punish those immediately responsible, then any action taken by another party in response to the original unlawful act cannot be justified as a reprisal.
- Reasonable notice must be given that reprisals will be taken. What degree of notice is required will depend upon the particular circumstances of the case.
- The victim of a violation must first exhaust other reasonable means of securing compliance before reprisals can be justified.
- A reprisal must be directed only against the personnel or property of an adversary.

- A reprisal must be in proportion to the original violation. Whilst a reprisal need not conform in kind to the act complained of, it may not significantly exceed the adverse party's violation either in degree or effect. Effective but disproportionate acts cannot be justified as reprisals on the basis that only an excessive response will forestall further violations.
- It must be publicised. Since reprisals are undertaken to induce an adversary's compliance with the LOAC any action taken as a reprisal must be announced as such and publicised so that the adversary is aware of the reason for the otherwise unlawful act and of its own obligation to abide by the law.
- As reprisals entail state responsibility, they must be authorised at the highest level of government.
- Reprisal action may not be taken or continued after the enemy has ceased to commit the conduct complained of.

### **Unlawful reprisals**

**13.19** Reprisals are never lawful if directed against any of the following:

- the wounded, sick and shipwrecked, medical personnel and chaplains, medical units, establishments and transports;
- PW; or
- protected persons and their property.

**13.20** G. P. I extends the categories of persons and objects against whom reprisals are prohibited to:

- civilians and the civilian population;
- civilian objects;
- historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- objects indispensable to the survival of the civilian population such as foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works;
- the natural environment; and
- works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations.

## WAR CRIMES

### Introduction

**13.21** The principle of individual responsibility for violations of the LOAC is not a new concept. The Lieber Code during the American Civil War specifically imposed individual responsibility, whereas the Hague Conventions 1907 were silent on the point. This did not prevent the allied powers, at the end of World War I, seeking the trial 'before military tribunals [of] persons accused of having committed acts in violation of the laws and customs of war' under the Treaty of Versailles. Indeed Kaiser Wilhelm II of Germany was himself 'arraigned' under the same treaty.

**13.22** Following World War II, the Allies established the Nuremberg Tribunal to try war crimes, crimes against humanity and crimes against peace. War crimes were defined as:

- '... violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of PW or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity'.

**13.23** Although there is some overlap with war crimes, crimes against humanity and crimes against peace are not covered in this manual.

### Grave breaches and war crimes

**13.24** The Geneva Conventions introduced a new concept, that of 'grave breaches'. These are war crimes of such seriousness as to invoke universal jurisdiction. Universal jurisdiction entitles any nation to exercise jurisdiction over any perpetrator, regardless of their nationality or the place where the offence was committed. In the case of grave breaches, states are obliged to introduce legislation to this effect. G. P. I extended the definition of grave breaches. Other serious offences against 'the laws and customs of war' whether proscribed by treaty or by customary law remain war crimes and are punishable as such.

### Grave breaches

**13.25** Grave breaches under the Geneva Conventions consist of any of the following acts against persons or property protected under the provisions of the relevant Convention:

- 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 PW or other protected person to serve in the forces of a hostile power;
- wilfully depriving a PW or other protected person of the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement; and
- taking hostages.

**13.26** G. P. I extends the definition of grave breaches to include the following:

- any wilful and unjustified act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a party other than the one on which they depend;
- acts when committed wilfully, in violation of the relevant provisions of the protocol, 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 demilitarised zones the object of attack;
  - making a person the object of attack in the knowledge that they are hors de combat;

- the perfidious use of the distinctive emblem of the Red Cross, Red Crescent, Red Crystal and other Red Cross societies, or of other protective signs recognised by the Conventions or the Protocol; and
- acts, when committed wilfully and in violation of the Conventions or the Protocol:
  - the transfer by the occupying power of part 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 PW or civilians;
  - practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
  - making the clearly recognised 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 by special arrangement, the object of attack, causing as a result extensive destruction thereof, 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; or
  - depriving a protected person of the rights of fair and regular trial.

## War crimes

**13.27** Aside from grave breaches of the Conventions and Protocols, other serious violations of the LOAC constitute war crimes and are punishable as such. A distinction must be drawn between crimes established by treaty or convention and crimes under customary international law. Treaty crimes only bind parties to the treaty in question, whereas customary international law is binding generally on all states. Many treaty crimes are merely codifications of customary law and to that extent binding on all states, even those that are not parties.

**13.28** War crimes may be committed by nationals both of belligerent and of neutral states. A state may elect to deal with its own nationals under the appropriate municipal law for acts that amount to war crimes. Members of the ADF can be dealt with under the relevant provisions of Australian legislation for offences such as murder or manslaughter.

### **The Hague Regulations**

**13.29** Provisions of the Hague Regulations 1907 are now recognised as part of customary law. Those regulations provide that the following acts are 'especially forbidden':

- to employ poison or poisoned weapons;
- to kill or wound treacherously individuals belonging to the hostile nation or army;
- to kill or wound an enemy who, having laid down their arms, or having no longer means of defence, has surrendered at discretion;
- to declare that no quarter will be given;
- to employ arms, projectiles or material calculated to cause unnecessary suffering;
- to make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive emblems of the Geneva Convention;
- to destroy or seize the enemy's property, unless such destruction or seizure is imperatively demanded by the necessities of war;
- to declare abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; and
- to compel 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.

### **Customary law**

**13.30** Among other war crimes generally recognised as forming part of the customary LOAC are:

- mutilation or other maltreatment of dead bodies;
- looting;

- use of a privileged building for improper purposes;
- attacking a privileged or protected building;
- attacking a properly marked hospital ship or medical aircraft;
- firing on shipwrecked personnel; and
- using bacteriological methods of warfare.

**13.31** The Rome Statute of the International Criminal Court (ICC) contains a longer list of war crimes including offences committed in international and non-international armed conflict. Though it is not necessarily an exclusive list, it is indicative of current international thinking in this area.

### **International tribunals**

**13.32** Persons charged with the commission of war crimes may also be tried by international tribunals.

**13.33** The Nuremberg International Military Tribunal was established by agreement between the Allies to try the major war criminals of World War II. It followed the abortive attempts to bring war criminals to justice after World War I. The International Military Tribunal supplemented the military tribunals and national tribunals established by the authorities of the allied states. A further international military tribunal was established in Tokyo.

**13.34** The principles of international law recognised in the Nuremberg Charter and judgements were unanimously affirmed by the UN General Assembly in 1946. In 1948, the General Assembly requested the International Law Commission to study the desirability and feasibility of an ICC. This work led to a draft statute for such a court, but the project foundered at the time owing to the absence of an internationally accepted definition of the crime of 'aggression' and the onset of the Cold War.

### **The International Criminal Court**

**13.35** While there were ad hoc attempts to deal with serious violations of IHL, including the creation of the tribunals for the former Yugoslavia and Rwanda, fresh attempts were made to resurrect the idea of an ICC. The International Law Commission produced a draft statute which was considered by a diplomatic conference. This resulted in the Rome Statute, and provides for the establishment of such a court.

**13.36** The Statute came into force on 01 July 2002. Australia signed the Statute and introduced offences covered by the Statute into domestic law under the Commonwealth Criminal Code.



**13.37** The ICC has jurisdiction only where nations having jurisdiction themselves are 'unwilling or unable genuinely' to exercise that jurisdiction. In addition, before any Australian national is surrendered to the ICC, the Attorney-General must authorise the surrender of the person. The Court's jurisdiction is complementary to national jurisdictions and does not have primacy over them as in the case of the Yugoslav and Rwanda tribunals. Indeed, under the Statute, a state may exclude war crimes committed by its nationals or on its territory for a period of seven years after the entry into force of the statute for that state.

**13.38** The court will have jurisdiction over genocide, war crimes and crimes against humanity as defined in the statute. It will also have jurisdiction over the crime of aggression, although this cannot be exercised until a definition has been agreed and adopted by a formal review conference.

## **CRIMINAL RESPONSIBILITY**

### **Individual criminal responsibility**

**13.39** Individuals are responsible for the war crimes that they commit themselves or which they order or assist others to commit.

**HISTORICAL EXAMPLE—CRIMINAL RESPONSIBILITY**

**Figure 13–1: Breaker Morant—first Australian convicted as a war criminal**

**HISTORICAL EXAMPLE—(cont)**

Three Australians were tried and convicted on charges of shooting surrendered Boers in the South African war in 1901.

The accused claimed both provocation—the murder of their commander—and that they were under verbal orders to shoot the prisoners. Against a court martial recommendation for clemency, Lieutenants H.H. Morant and P.J. Handcock were executed, with life imprisonment for Lieutenant G.R. Witton. Morant's final plea on behalf of the others of his total responsibility, as he authorised the shootings as senior officer present, was disregarded.

This early example of individual responsibility for war crimes was clouded by the politics involved, but it established some important principles. It also provoked a prohibition on Australian servicemen being sentenced to death by non-Australian courts. (source: **Australia War Memorial A50311**)

**13.40** Article 7 of the Statute of the International Criminal Tribunal for the former Yugoslavia provides that 'a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime ... shall be individually responsible for the crime'.

**13.41** The Rome Statute of the ICC also confirms that an individual is responsible for a war crime if they:

- commit the crime themselves, on their own or jointly with others;
- order, solicit or induce a crime which is committed or attempted;
- aid, abet or otherwise assist in the commission of the crime, including providing the means for its commission; or
- contribute to the commission or attempted commission of the crime by a group of persons acting with a common purpose.

Such ancillary offences are also provided in Australian domestic law under the Commonwealth Criminal Code.

**13.42** The fact that a subordinate was ordered to do an act, or make an omission, which was illegal does not, of itself, absolve the subordinate from criminal responsibility.



## GLOSSARY

### **aircraft**

An aircraft is any machine that can derive support in the atmosphere from the reactions of the air; and includes any aeroplane, balloon, kite, airship, remotely piloted vehicles or glider, but not hovercrafts.

### **airspace**

Airspace is the zone next to the earth consisting of atmosphere capable of sustaining flight. While there is no general agreement, the boundary with outer space is somewhere between the outermost reach of airborne aircraft and the lower limit of spacecraft in orbit.

### **archipelagic waters**

Those waters enclosed by archipelagic baselines drawn in accordance with Article 47 of the United Nations Convention on the Law of the Sea (UNCLOS). The sovereignty of an archipelagic state extends to the waters enclosed by the baselines, regardless of their depth or distance from the coast, as well as the associated seabed, subsoil and airspace.

### **armed conflict**

Conflict between states in which at least one party has resorted to the use of armed force to achieve its aims. It may also embrace conflict between a state and organised, disciplined and uniformed groups within the state such as organised resistance movements.

### **attacks**

Acts of violence against the adversary, whether in offence or defence.

### **belligerent**

A state or other entity engaging in armed conflict, also combatants in some contexts.

### **civil aircraft**

Civil aircraft are any aircraft not classified as state aircraft under the Chicago Convention.

### **civil defence**

Mobilisation, organisation and direction of the civilian population, designed to minimise by passive measures the effects of enemy action against all aspects of civil life.

### **civil defence organisations**

Those establishments and other units which are organised or authorised by the competent authorities of a party to the conflict to perform any of the following tasks: warning, evacuation, management of shelters, management of blackout measures, rescue, medical services including first aid and religious assistance, firefighting, 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 including, but not limited to, planning and organisation, and which are assigned and devoted exclusively for such tasks.

### **collateral damage**

Incidental damage to persons, objects or locations arising out of combat action against a legitimate military objective.

### **combatants**

All organised armed forces, groups and units (except medical service and religious personnel) who are under the command of a party to a conflict and are subject to an internal disciplinary system.

### **contiguous zone**

In a zone beyond and adjacent to the territorial sea, described as the contiguous zone, the coastal state may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; and punish infringement of the above laws and regulations committed within its territory or territorial sea. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

### **cultural property**

Movable and immovable objects of sufficient artistic or religious importance to constitute the heritage of all people, including that which has been renovated or restored. Cultural property includes historical monuments, archaeological sites, books, manuscripts or scientific papers and the buildings or other places in which such objects are housed.

**exclusive economic zone (EEZ)**

An area beyond and adjacent to the territorial sea, subject to the specific legal regime established in Part V of UNCLOS, under which the rights and jurisdiction of the coastal state and the rights and freedoms of other states are governed by the relevant provisions. The EEZ shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

**explosive remnants of war (ERW)**

Unexploded ordnance and abandoned explosive ordnance.

**feasible precautions**

Precautions which are practicable or practically possible taking into account all circumstances ruling at the time including humanitarian and military considerations.

**innocent passage**

Innocent passage entitles a warship to traverse another state's territorial seas 'continuously and expeditiously'. Passage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal or island state.

**international straits**

Straits which are used for international navigation between one part of the high seas or an EEZ and another part of the high seas or EEZ. In these straits all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a state bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an EEZ of similar convenience.

**law of armed conflict (LOAC)**

The international law regulating the conduct of states and combatants engaged in armed hostilities. LOAC is often termed the 'law of war'.

**levee en masse**

Where the inhabitants of a country or territory spontaneously take up arms en masse to resist an invader, LOAC recognises them as combatants provided they do so when there has not been time to form themselves into organised units and they respect LOAC. Individuals acting on their own are not entitled to combatant status nor benefits or detriment flowing from that status.

### **medical personnel**

Medical personnel include persons on the permanent staff of medical establishments and any person temporarily assigned to medical duties, such as soldiers who are carrying wounded from the battlefield. The underlying principle is that care of the wounded and sick (who are now non-combatant) is paramount and nothing should interfere with that care. All medical personnel, whether civilian or military, enemy or friendly are included in the category of non-combatants so long as they do not participate in hostilities.

### **medical transports**

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.

### **medical units**

Establishments and other units, whether military or civilian, organised for medical purposes, namely the search for, collection, transportation, diagnosis or treatment including first aid treatment of the wounded, sick and shipwrecked or for the prevention of disease. The term includes hospitals and other similar units, blood transfusion centres, preventative medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary.

### **mercenary**

A mercenary is any person who:

- a. is specially recruited locally or abroad in order to fight in an armed conflict;
- b. takes part in hostilities;
- c. is motivated to take part in hostilities essentially for the desire for private gain and is 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;
- d. is neither a national of a party to the conflict nor a resident of the territory controlled by a party to the conflict;
- e. is not a member of the armed forces of a party to the conflict; and
- f. has not been sent by a state which is not party to the conflict on official duty as a member of its armed forces.

### **merchant ship**

A vessel engaged in mercantile trade except river craft, estuarial craft or craft which operate solely within harbour limits.



### **military aircraft**

Military aircraft are any aircraft belonging to the armed forces of a nation. They must bear external marks distinguishing nationality, be under command of an officer and be manned by a crew that is subject to armed forces discipline. All military aircraft are state aircraft.

### **military objectives**

Legitimate objects of attack comprise:

- a. all combatants who are not hors de combat;
- b. objects which, by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage. The presence of non-combatants in or around a military objective does not change its nature as a military objective.

### **national airspace and waters**

Areas subject to the territorial sovereignty of individual nations. National waters comprise all those waters landwards of the outer limit of a nation's territorial sea. All airspace above national waters, including internal waters, territorial sea and archipelagic waters and territory is national airspace.

### **outer space**

The zone beyond airspace.

### **protecting power**

The Geneva Conventions provide that the treatment of prisoners of war, interned civilians and inhabitants of occupied territory be monitored by a neutral nation known as a protecting power. As nations often disagree as to which nations are neutral or otherwise, the International Committee of the Red Cross has been authorised to perform some of the functions of the protecting power.

### **reprisal**

An act, otherwise unlawful under the international law regulating armed conflict, utilised for the purpose of coercing an adversary to stop violating the recognised rules of armed conflict.

### **roadstead**

Roadsteads are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly beyond the limits of the territorial sea, are included within the territorial sea. Roadsteads included within the territorial sea must be clearly marked on charts by the coastal or island nation.

### **rules of engagement (ROE)**

ROE are directions endorsed by Government and issued by commanders, which delineate the circumstances, and limitations within which military force may be applied to achieve military objectives. They do not inhibit or replace but are part of the command function. ROE may be framed to limit certain actions; alternatively, they may authorise actions to the full extent permissible under domestic and international law.

### **shipwrecked**

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. These persons, provided they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Geneva Conventions or Additional Protocols.

### **state aircraft**

Any aircraft used by a nation's military, police and customs services. The definition also includes any aircraft under the control of the national government and used for public service. Examples of this latter category are national very important person transports and aircraft on special missions.

### **targeting**

The process of identifying targets for possible engagement and determining the attack system to capture, destroy, degrade or neutralise them.

### **territorial sea**

An area of waters adjacent to a state over which it exercises sovereignty, subject to the right of innocent passage. Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines.

### **transit passage**

All vessels and aircraft have the right to unimpeded transit passage through and over straits used for international navigation. Transit passage must be continuous and expeditious and vessels and aircraft must not threaten or use force against nations bordering the strait. Transit passage is in the normal mode and includes activities such as fuel replenishment, submerged transit for submarines, organic flying operations and tactical manoeuvring.

### **United Nations Convention on the Law of the Sea (UNCLOS)**

Much of what is now internationally accepted as the law of the sea is contained in the Official Text of UNCLOS (with annexes and index) and the Final Act of the Third United Nations Conference on the Law of the Sea.

#### **wounded and sick**

Persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new born 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.



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## ACRONYMS AND ABBREVIATIONS

AAP	Australian Air Publication
ADF	Australian Defence Force
ADIZ	air defence identification zone
BCOF	British Commonwealth Occupation Force
CJOPS	Chief of Joint Operations
CROC	Convention on the Rights of the Child
DFDA	Defence Force Discipline Act
EEZ	exclusive economic zone
EMA	Emergency Management Australia
ENMOD	Environmental Modification
ERW	explosive remnant of war
EZ	exclusion zone
FIR	flight information region
IC	Internment Camp
ICAO	International Civil Aviation Organisation
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
km	kilometres
LOAC	law of armed conflict
MEZ	maritime exclusion zone
NEI	Netherlands East Indies
PG	prisonnier de guerre
PW	prisoner of war
RAN	Royal Australian Navy
ROE	rules of engagement
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea



## MAIN INTERNATIONAL TREATIES ON THE LAW OF ARMED CONFLICT

Below are the internationally recognised abbreviations which are used for these treaties (listed in chronological order).

- St Petersburg** Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight. St Petersburg, 29 November–11 December 1868.
- H. Decl** Declaration (IV, 3) Concerning Expanding Bullets. The Hague, 29 July 1899.
- H. III** Convention (III) Relative to the Opening of Hostilities. The Hague, 18 October 1907.
- H. IV** Convention (IV) Respecting the Laws and Customs of War on Land. The Hague, 18 October 1907.
- H. IV. R** Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
- H. V** Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907.
- H. VI** Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities. The Hague, 18 October 1907.
- H. VII** Convention (VII) Relating to the Conversion of Merchant Ships into Warships. The Hague, 18 October 1907.
- H. VIII** Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines. The Hague, 18 October 1907.
- H. IX** Convention (IX) Concerning Bombardment by Naval Forces in Time of War. The Hague, 18 October 1907.
- H. X** Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. The Hague, 18 October 1907.
- H. XI** Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War. The Hague, 18 October 1907.
- H. XIII** Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907.
- H. XIV** Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons. The Hague, 18 October 1907.

- London Decl** Declaration Concerning the Laws of Naval War. London, 26 February 1909 (not ratified by any signatory).
- Oxford** The Laws of Naval War Governing the Relations Between Belligerents. Manual adopted by the Institute of International Law (Oxford Manual of the Laws of Naval War). Oxford, 09 August 1913.
- H. AW** Rules of Air Warfare. Drafted by a Commission of Jurists at The Hague, December 1922–February 1923 (this was not adopted in a binding form).
- G. BC** Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925.
- Havana** Convention on Maritime Neutrality. Havana, 20 February 1928.
- Washington** Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact). Washington, 15 April 1935.
- London PV** Proces-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930. London, 06 November 1936.
- Chicago Convention** Convention on International Civil Aviation. Chicago, 1944.
- G. I** Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949 (First Geneva Convention).
- G. II** Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949 (Second Geneva Convention).
- G. III** Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 (Third Geneva Convention).
- G. IV** Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 (Fourth Geneva Convention).
- H. CP** Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954, with:
- H. CP. R** Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954.



<b>H. CP. P</b>	Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954.
<b>ENMOD</b>	Treaty 1977—United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, New York, 18 May 1977.
<b>G. P. I</b>	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. Geneva, 08 June 1977 (Additional Protocol I).
<b>G. P. II</b>	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts. Geneva, 08 June 1977 (Additional Protocol II).
<b>G. P. III</b>	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional distinctive Emblem (Additional Protocol III, 08 December 2005).
<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. Geneva, 10 October 1980.
<b>CCW. P. I</b>	Protocol on Non-detectable Fragments (Protocol I). Geneva, 10 October 1980.
<b>CCW. P. II</b>	Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II). Geneva, 10 October 1980.
<b>CCW. P. III</b>	Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva, 10 October 1980.
<b>CCW. P. IV</b>	Protocol on Blinding Laser Weapons (Protocol IV). Vienna, 13 October 1995.
<b>CCW. P. V</b>	Protocol on Explosive Remnants of War (Protocol V). Vienna, 28 November 2003.
<b>UNCLOS</b>	1982 United Nations Convention on the Law of the Sea.
<b>SPNFZ</b>	South Pacific Nuclear Free Zone. Raratonga, 1985.
<b>CROC</b>	Convention on the Rights of the Child. New York, 20 November 1989.

- CWC** Convention on the Prohibition of the Development, Production, Stockpiling and the Use of Chemical Weapons and on their Destruction.
- Ottawa Convention** Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.
- OP CROC** Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. New York, 25 May 2000.
- Rome Statute** Rome Statute of the International Criminal Court. Rome, 17 July 1998. (Entry into force on 01 July 2002).